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2001

## Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and their Governing Principles of Political Economy

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### Original Citation

Michael Henry Davis, Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and their Governing Principles of Political Economy 69 *University of Missouri at Kansas City Law Review* 733 (2001)

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Citation: 69 UMKC L. Rev. 733 2000-2001

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# LEGITIMACY, GLOBALLY: THE INCOHERENCE OF FREE TRADE PRACTICE, GLOBAL ECONOMICS AND THEIR GOVERNING PRINCIPLES OF POLITICAL ECONOMY

Michael H. Davis\* & Dana Neacsu\*\*

*"Money is a good soldier, sir, and will on"*<sup>1</sup>

*"Illegal is purely a matter of geography"*<sup>2</sup>

## INTRODUCTION

In this article, we observe the legalized character of the phenomenon popularly called "globalization." We first examine what it means to be a legalized phenomenon and observe that an important part of legalization is legitimation. In domestic legal regimes, legitimation is accomplished through the Rule of Law, which makes certain claims about the nature of the society of which the legal regime is a part. Simply stated, the Rule of Law claims that a legal system is legitimate if its rules are definite and predictable and are applied in a general, impartial, and non-retroactive manner.<sup>3</sup> In the international trading system of which globalization is the legalized regime, the legitimizing role is played by the so-called law of comparative advantage, developed originally by David Ricardo. Simply stated, the law of comparative advantage claims that all nations, not just the richest or most powerful, can profit from unhindered international trade, since each country can exploit and thus profit from its own particular advantages, even while it pays others for goods produced elsewhere.<sup>4</sup> This globalized legitimation, similar to domestic legitimation, makes certain claims about the nature of the system of which the globalized regime is a part. We then examine what particular features of globalization are supported by the law of comparative advantage, and we note how the legitimating role of that law conceals the true nature of those features. Finally, we observe that globalization and those features we have

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\* Professor of Law, Cleveland State University College of Law. This article was supported by a grant from the Cleveland-Marshall Fund. It was also supported by the extraordinary efforts of Marie Rehmar, reference law librarian at CSU, as well as the assistance of Kemal Becirspahic dit Becir of GERPISA at the Université d'Évry-Val d'Essonne, France.

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<sup>1</sup> WILLIAM SHAKESPEARE, *THE MERRY WIVES OF WINDSOR* act 2, sc. 2.

<sup>2</sup> *DEAR BRIGITTE* (Twentieth Century Fox 1965).

<sup>3</sup> See ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 234-409 (8th ed. 1927); ROBERTO M. UNGER, *LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY* 176-77 (1976), discussed *infra* nn. 33-34 and accompanying text.

<sup>4</sup> See DAVID RICARDO, *ON THE PRINCIPLES OF POLITICAL ECONOMY, AND TAXATION* 313 (Ronald M. Hartwell ed., Penguin Books 1971) (1819), discussed *infra* nn. 94-100 and 201, and accompanying text. Illustrating one of the central problems of the law of comparative advantage – its indefiniteness – some will take issue with this description since, as Ricardo formulated it using only two countries, it applied only bilaterally. Its modern articulation nonetheless insists, however inaccurately, that the law works in the multinational context.

examined produce, contrary to their express claims, disastrous global disparities in income and welfare. We conclude that it is the legitimizing functions of the law of comparative advantage that allows globalization to proceed in the manner it does while claiming to do quite the opposite. The legitimizing function of the global regime thus prevents a true understanding of globalization's nature.

The failure to understand the nature of globalization and, oddly, of globalization's opponents, is a serious and, moreover, astonishing, failure of public debate. Globalization is a political phenomenon whose strategy is to internationalize capitalism through a process of legalization. Globalization, thus seen as a legalized economic phenomenon can be understood as one in which formally rational propositions are first posited as natural, just, or even inevitable, apparently subject to a constraining rational limit (the law of comparative advantage) which is then used to discredit opposition as illegitimate and therefore somehow illicit. What globalization gains from this gambit is the legitimation of its underlying political and economic choices while foreclosing debate. But globalization's underlying assumptions when viewed in that sense become contestable, because they are unexamined, undebated, and undemocratic.<sup>5</sup> Globalization is Havel's Velvet Revolution<sup>6</sup> in reverse: it is brutally raw capitalism in a legal face.

Because globalization, when viewed objectively, is nothing less than capitalism writ large,<sup>7</sup> its opposition is unsurprisingly largely, though not exclusively, leftist and therefore legitimately Marxist in at least some sense.<sup>8</sup> As will be discussed later, one of the hegemonic and legitimating features of globalization is the exclusion of parts of the debate as unworthy, in fact foreclosing what might be the most meaningful parts of the debate as meaningless. Opponents are called, and often call themselves, anarchists; anarchism, of course, is by definition not legal tender in the debate of world governance, being its very antithesis.<sup>9</sup>

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<sup>5</sup> That the WTO and GATT are the products of raw force and, worse, simple concentrations of private wealth is abundantly clear when a prominent proponent of globalization reveals that U.S. companies (what he also called "certain economic interests . . . deeply concerned. . .") were instrumental in crafting GATT to their own advantage, even to the point of creating "deal breakers" at the final, Uruguay Rounds leading up to the creation of the WTO. The power and influence of those companies explains why that proponent could not freely explain the facts and could only cite unidentified "interviews" as support. JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT AND THE WTO* 135 n.12 (2000).

<sup>6</sup> BERNARD WHEATON & ZDENEK KAVAN, *THE VELVET REVOLUTION: CZECHOSLOVAKIA 1988-1991*, 39 (1992). The phrase "socialism with a human face" was coined during the so-called Prague Spring of 1968. *Id.* at 3-10. Under General Secretary Dubcek, the government announced the new policy. This liberalization program had a tragic end after the Warsaw Pact tanks crushed the Prague Spring when Dubcek was expelled and eventually exiled to a rural area, and a period of "normalization" re-embraced totalitarianism. *Id.* at 9-10.

<sup>7</sup> "The driving idea behind globalization is free-market capitalism. . . . Globalization means the spread of free-market capitalism to virtually every country in the world." THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 9 (Anchor Books 2000) (1999).

<sup>8</sup> This has not stopped the critics from trying to tar opponents of globalization with what they perceive to be the fatal label of Marxist, even while they adopt a coyly "objective" measure of progressive politics. See Raj Bhala, *Essay: Marxist Origins of the "Anti-Third World" Claim*, 24 *FORDHAM INT'L L.J.* 132, 135 (2000).

<sup>9</sup> One of the most astonishing apparent consequences of the so-called "fall" of communism is a kind of embarrassment at being openly Marxist. Thus not only do establishment observers fail to understand the opposition to globalization, viewing it as a disorganized mass of political misfits, but

One might conclude, as we and some others do, that it is globalization that is anarchistic but it is the rare observer who finds anarchism not in the opposition to globalization but in the very character of globalization itself.<sup>10</sup> The failure to accurately and prudently characterize the opponents of globalism is not unimportant, in our view; it is, instead, a direct and inevitable result of how all ideologies, including the ideology of globalization, end up devaluing their opposition. Thus it is not merely trivial name-calling that those who oppose globalization have been labeled, on the one hand, juvenile, and on the other, ancient.<sup>11</sup> It is the failure to understand the true nature of globalization, of its legitimacy,<sup>12</sup> and of those who oppose it, that is the subject of this article.

## I. THE NATURE OF A LEGAL REGIME AND THE LEGITIMIZING FUNCTION OF ITS UNDERLYING RULE OF LAW

To understand the strategy and tactics of globalization, it is essential to understand the nature of a legalized regime. This is because globalization is in large part a legalized phenomenon, and to understand legal phenomena, it is essential to understand the nature of law. It is almost tautological to say that law is

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those misinterpreted misfits themselves, perhaps only to avoid the Marxist label, style themselves otherwise. The most surprising of these is a self-styled so-called "anarchism" that has become nothing if not trendy in the new millennium. Joseph Kahn, *Anarchism, the Creed That Won't Stay Dead; The Spread of World Capitalism Resurrects a Long-Dormant Movement*, N.Y. TIMES, Aug. 5, 2000, at B9; Walter Goodman, *Anarchists of the World, Unite in Your Literary Roots!*, N.Y. TIMES, Aug. 3, 2000, at E2.

<sup>10</sup> "The erosion of the nation state means that governments are becoming more and more powerless. And weakened governments may spell the end of governance. Many applaud this erosion of governance – indeed, many see it as a main attraction of globalization. These are the true anarchists – perhaps more so than the masked youth that smashed windows at the WTO meeting of Seattle in 1999." Isabelle Grunberg, *Globalization, Governance and the Role of the United Nations in Economic and Social Affairs*, in GLOBALIZATION: THE UNITED NATIONS DEVELOPMENT DIALOGUE; FINANCE, TRADE, POVERTY, PEACE-BUILDING 2 (Isabelle Grunberg & Sarbuland Khan eds., 2000).

<sup>11</sup> Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 259 (2000). The article presents a grotesque caricature of globalization as an untarnished human good, and its opponents as "the ancients," committed to a Luddite-like campaign against modernity. It relies on a kind of *ad hominem* appeal to authority instead of rational argument, first asserting without more that "The GATT and WTO were established with the interests of developing countries in mind," then asking "If developing nations are so harmed by the WTO, why have the developing countries so vigorously supported the WTO and so eloquently objected to the protesters?" *Id.* at 275-76 (relying solely on the fact that Mexico's President Zedillo [whose "closest aide" had been protected thus far from drug corruption inquiries (see Tim Golden, *Mexico Clears a Top Official of Graft, but Doesn't Convince the U.S.*, N.Y. TIMES, June 2, 1999, at A13), and whose top generals and closest relatives were accused of drug-related graft by a lawyer who was slain shortly afterwards (see Sam Dillon, *Accuser of Top Generals Slain in Mexico*, N.Y. TIMES, Apr. 23, 1998, at A6)] had called the protests "globaphobia").

<sup>12</sup> We speak here of jurisprudential legitimacy, not the international law doctrine of governmental legitimacy which seeks to decide whether sovereign states possess sufficient legitimacy to merit recognition. Although the latter is not our topic, it is currently subject to interesting examination, coincidentally also because of the pressures of globalization. See James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 MICH. L. REV. 1996 (2000).

mere superstructure.<sup>13</sup> On the other hand, it is highly contestable, because within the claim that law is superstructure is the implication that law changes nothing and that to change the law changes nothing else. Indeed, as one interesting and relevant example, Western support of economic reform in Eastern Europe unaccompanied by any demand for democratic reforms reflects a paradoxical attachment by the Right to the superstructure argument (normally considered a Leftist hypothesis) as well, since it assumes that structural economic reform will automatically produce democratic legal change.<sup>14</sup> That is, it seems, an adoption of the Marxist view that social change cannot be effected (or at least not solely) through legal change but only through materially real economic change because law simply reflects the material conditions of a society. Without accepting this in its totality, it seems obvious that law is at least in part superstructural and superficial, and it becomes important to understand how law, to the extent it is merely superficial, still serves a purpose.

One reason many find it difficult to accept that legal change is not only superstructural but, in substance, merely cosmetic, is that it seems to defy common

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<sup>13</sup> Though the initial claim that law is superstructure seems clearly tautological, the political ramifications of the next inevitable claim are perhaps the most contestable and provocative ideas in political and legal theory. If the second claim is that only the non-superstructural elements of a society are causal factors, we arrive at some variety of materialism or economic determinism throwing all aspirations for political change through rational discourse and argument into the proverbial dustbin. Our hopes then lie only in violent revolt. If through despair, ethics, or higher insight we reject that conclusion, we throw our dreams onto the altar of human kindness and rationality. It is this debate between materialism and rationalism, or between intellectual argument and violent revolt that dominated what passed for political debate in the last century. The real question, of course, is not whether law is superstructure which, because it is tautological and definitional can raise no real problems, but whether as superstructure it can have any effect: in other words, does it matter. For lawyers and law students, who dedicate their professional lives to it, the possibility that what they do does not matter is inherently threatening. Even the most progressive legal movements devote an inordinate energy into rescuing the futility of what they do from the lurking meaninglessness of pure superstructure. It is therefore disappointing, though unsurprising, to find members of CLS, the most Left legal movement of our time, distorting Marxism sufficiently to assert that superstructure, and therefore law, can change society. See *infra* note 260. See E. Dana Neacsu, *CLS Stands for Critical Legal Studies, If Anyone Remembers*, 8 J.L. & POL'Y 415, 417, 429, 434 (2000).

<sup>14</sup> Ingeborg Maus, *Liberties and Popular Sovereignty: On Jürgen Habermas's Reconstruction of the System of Rights*, 17 CARDOZO L. REV. 825, 830 (1996).

From a Western point of view, the processes of transition in the East are judged by their success in introducing capitalism as quickly as possible, regardless of whether the prescribed pace of development is conducive to the evolution of democracy and the rule of law or not – as if to say that these structures will be automatic byproducts of the new economic “substructure.” Social scientists of many different camps follow a comparable logic. They are concerned with “real” social conditions and tacitly regard the law as a negligible quantity or simply as a “superstructure.”

*Id.* In a kind of semantic gymnastic double flip, Habermas seems to agree that formal, superstructural change cannot effect structural reform. “Habermas points out that in case of weakness of civil society, the development of such deficits is quite likely: the prospects of constitutional adjudication and the rule of law in general are, therefore, particularly dim in the postcommunist societies, notwithstanding the imitation of Western legal forms.” Andras Sajó, *Liberalism, Republicanism, and Constitutionalism: Constitutional Adjudication in Light of Discourse Theory*, 17 CARDOZO L. REV. 1193, 1203 n.28 (1996).

sense. What would explain the resources invested into legal change if it produced nothing of substance? What is the function of law? One can say that law functions by mediating between real social conditions and our perceptions of them, or, in Marxist terms, the means of production and the relations of production.<sup>15</sup> Another way of saying the same thing is to say that law legitimizes its unstated assumptions, or that it legitimizes the underlying economic system<sup>16</sup> (by legitimizing the unstated assumptions that make the economic system seem not only acceptable but necessary and inevitable). Mediation is, in that sense, legitimation. Law legitimizes what would otherwise be contested, and by asserting its supremacy and legitimacy, it removes political questions from debate.

Habermas, for instance, illuminates the problem by observing that Western constitutional democracies achieve harmony either by protecting minority rights or by appealing to the legitimacy of procedures that might necessarily invade them.<sup>17</sup> Constitutional democracies, he says, have a limited repertoire for regulating value conflicts that result from the unavoidable interactions between (the members of) coexisting forms of life that are “alien” to one another in an existentially dissonant way. In that context, he asserts, two means of normatively neutralizing differences deserve our attention above all: (i) the guarantee of an equal right of coexistence; and (ii) securing legitimation through apparently fair, formally rational, procedures.<sup>18</sup>

In a “formal democracy,” law’s essence is rules formulated through political and judicial processes, which almost by definition nurture the dominant needs

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<sup>15</sup> Marx stated that “juridical relations, like forms of state, are to be grasped neither through themselves nor through the so-called universal development of the human spirit, but rather are rooted in the material relations of life. . . .” KARL MARX & FRIEDRICH ENGELS, *WERKE* Vol. 13:8 (1969). Cf. V. I. LENIN, *SELECTED WORKS* Vol. I 328 (Foreign Languages Publishing House, Moscow, 1952).

<sup>16</sup> Scholars have observed a tight fit between an economic system and its characteristic legal system. “[C]apitalist societies are legal formations or configurations which are constituted by four basic modes of production of law.” Boaventura de Sousa Santos, *On Modes of Production of Law and Social Power*, 13 *INT’L J. SOC. L.* 299, 300 (1985) (cited in David M. Trubek et al., *Symposium: The Future of the Legal Profession: Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *CASE W. RES. L. REV.* 407, 413 n.5 (1994)).

<sup>17</sup> JÜRGEN HABERMAS, *LEGITIMATION CRISIS* 36-37 (Thomas McCarthy trans., 1975) (1973).

[T]hrough the universalistic value-systems of bourgeois ideology, civil rights – including the right to participate in political elections – have become established; and legitimation can be dissociated from the mechanism of elections only temporarily and under extraordinary conditions. This problem is resolved through a system of formal democracy. Genuine participation of citizens in the processes of political will-formation, . . . substantive democracy . . . would bring to consciousness the contradiction between administratively socialized production and the continued private appropriation and use of surplus value. In order to keep this contradiction from being thematized, then the administrative system must be sufficiently independent of legitimating will-formation.

*Id.* at 36.

<sup>18</sup> Jürgen Habermas, *Habermas on Law and Democracy: Critical Exchanges: Part II: Habermas Responds to His Critics: Reply to Symposium Participants*, Benjamin N. Cardozo School of Law, 17 *CARDOZO L. REV.* 1477, 1489 (1996).

and ideology of the public.<sup>19</sup> In effect, Habermas implied that human rights are a perverse legal construction.<sup>20</sup> What better way to legitimize the state than by conferring fundamental rights descending from some “natural law”? For advanced “formal democracies,” contractarian notions are at the heart of any theory of justice. They depart, however, from common ground, relying on a merely constructive consent or, in contract terms, agreement.<sup>21</sup> This is, of course, because they assert – at the most fundamental level, as a basic, and therefore uncontested, assumption – that all parties are autonomous and competent.

Max Weber<sup>22</sup> offered a conceptual framework for an analysis of the role of law in securing political legitimacy.<sup>23</sup> Weber’s concept of legal domination<sup>24</sup> explains the structures of authority in complex industrial societies, and by extension might help explain how imposed domination becomes globalized.<sup>25</sup> By

<sup>19</sup> See Benjamin I. Page & Robert Y. Shapiro, *Effects of Public Opinion on Policy*, 77 AM. POL. SCI. REV. 175 (1983); Gerald C. Wright, Jr. et al., *Public Opinion and Policy Liberalism in the American States*, 31 AM. J. POL. SCI. 980 (1987); THOMAS R. MARSHALL, PUBLIC OPINION AND THE SUPREME COURT (1989); LARRY D. BARNETT, LEGAL CONSTRUCT, SOCIAL CONCEPT: A MACROSCIOLOGICAL PERSPECTIVE ON LAW (1993).

<sup>20</sup> Habermas showed that through “the arrangement of formal democratic institutions and procedures” – therefore, including human rights constructions – the legitimation process that may take place elicits “diffuse mass loyalty” as it “avoids participation.” HABERMAS, *supra* note 17, at 36. We view such constructions, such as human rights, which legitimize in the name of universal values clearly limited individual powers, as being perverse legal constructions.

<sup>21</sup> “These laws draw their legitimacy from a legislative procedure based in turn on the principle of popular sovereignty.” JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 110 (William Rehg trans., 1996). Habermas frankly accepts the label of “proceduralist.” *Id.* at 489-90. Modern legitimacy, according to Habermas, derives from its processes. Maus, *supra* note 14, at 864 (quoting Jürgen Habermas, *Legitimitätsprobleme im Modernen Staat*, 7 POLITISCHE VIERTELJAHRESSCHRIFT, SONDERHEFT 39, 44 (1976) (“The procedures and preconditions for the process of legitimation are now the legitimating reasons on which the validity of legitimations are based”). To that extent, and certainly paradoxically so, he shares some of the same assumptions as John Hart Ely.

<sup>22</sup> Raymond Aron believes that Weber is “the greatest of German sociologists”; others have called him a “passionate . . . radical. . . .” Guenther Roth, *Political Critiques of Max Weber: Some Implications for Political Sociology*, 30 AM. SOC. REV., 213 (1965) (“Weber was a passionate advocate of political rationality and, literally, a ‘radical’ sociologist with a world-historical vision...”).

<sup>23</sup> This framework has been profoundly influential in the development of the sociology of law, and in modern political and legal theory. See, e.g., Roger Cotterell, *Legality and Political Legitimacy in the Sociology of Max Weber*, in LAW, STATE AND SOCIETY SERIES: LEGALITY, IDEOLOGY AND THE STATE 69-91 (David Sugarman ed., 1983).

<sup>24</sup> Of course, after Weber, many jurists explained the role of law as “some institution that can, in fact, secure the public interest.” David M. Trubek, *Balancing the Scales of Justice: Financing Public Interest Law in America: A Report by the Council for Public Interest Law*, 1977 WIS. L. REV. 303 (1977) (book review). On law as a modern substitute for sacred needs, see JAMES WILLARD HURST, THE GROWTH OF AMERICAN LAW: THE LAW MAKERS 439-46 (1950); ROBERTO MANGABEIRA UNGER, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976); David M. Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 L. & SOC’Y REV. 529 (1977).

<sup>25</sup> The concept of legitimation is unsettled. The strong Weberian sense claims people actually obey law because of its perceived legitimacy. Others question this, raising the seemingly obvious point that most people – and that is surely the portion that matters – obey for other reasons, such as rational choice and habit. Whether habit is just another word for legitimation in action hardly matters. See Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379

Weber's account, in the modern state political domination is legitimized through a system of formally rational legal rules which designate a power of command exercised in accordance with those very rules.<sup>26</sup> That is the account we use here, although we believe any of the various formulations work equally well for our purposes.

Another, perhaps more modern, variant of legitimation theory is that of the economist Thorstein Veblen, particularly apt here because of its claims as an economic model. Veblen, in *The Theory of the Leisure Class*, attacked the very basis of modern economic theory, asserting that consumption, and in the end all political economy, was not decided nor driven by individual utility maximization – as insisted by utilitarians since at least Adam Smith – but, instead, by social values.<sup>27</sup> Those values, said Veblen, were determined by the habits (but importantly, not necessarily by the intent or even individual choice) of the wealthy, the leisure class.<sup>28</sup> As one economist has put it, “[e]mulation of the leisure class’s consumption habits implicitly accepts their system of values, and hence the existing social order.”<sup>29</sup> The difference between Veblen’s conception and those of Rule of Law theorists, perhaps, is that the former is psychologically-based while the latter are cognitively-based.

We might wonder, however, even assuming the validity of legitimacy theory, whether it matters or not. In a sense, who cares? If democracy is important, however, and if open political debate is essential, then we should probably care a great deal. To have open political debate there must be some notion of what the arguments are, and what the alternatives are. And the one most troubling, though hardly uncontested, feature of legitimacy theory is that legitimation limits the political imagination. The extreme form of this is so-called “false consciousness,” whereby the dominated do not even understand that they are oppressed and somehow learn to love the hand that beats them. Such a theory condemns all chance for democracy, of course. But the far more moderate form of legitimacy theory does not require adoption of false consciousness. Under this form, it is not so much that legitimacy makes people think certain things as that it is an obstacle to the imagination. Even those who oppose Left politics recognize that

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(1983). Our point here is not that international trade law forces countries to obey it because of its purported legitimacy. It is more likely that Third World states act exactly as the critics of legitimacy say: they know the deck is stacked, have no respect for the game, but play to minimize their losses. The importance of legitimacy is not how nation-states act, but how populations react. In that sense, the soft critical sense of legitimacy is more important: it limits the imagination and deprives people from seeing alternatives. See Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 641 (David Kairys ed., 3d ed. 1998). If the demonstrators at Seattle were able to imagine the alternatives, all the rest who were not at Seattle most likely do not, and the media surely was unable to understand, even while they witnessed the demonstrations before them. See FRIEDMAN, *supra* note 7, at 364

<sup>26</sup> In Gramsci’s words: “the State through ‘law’ renders the ruling group ‘homogeneous,’ and tends to create a social conformance which is useful to the ruling group’s line of development. . . .” Antonio Gramsci, *Some Theoretical and Practical Aspects of ‘Economicism’*, in *THE GRAMSCI READER: SELECTED WRITINGS, 1916-1935*, 195 (N.Y.U. Press, David Forgasc ed., 2000) (1988).

<sup>27</sup> THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 126 (1908).

<sup>28</sup> *Id.*

<sup>29</sup> Charles M.C. Clark, *Thorstein Bunde Veblen: The Quintessential Dissenter*, in *ECONOMICS AND ITS DISCONTENTS* 278 (Richard P.F. Holt and Steven Pressman eds., 1998).

ideology, in this case of the free trade variety, can legitimate by “turning a deaf ear” to alternatives.

Ideological extremists turn a deaf ear to the cognitive dissonance of signals that contradict their analysis of reality. Their unquestioned faith that the ideology is leading in the right direction induces them to take risks dangerous to themselves and others. It is my view that free tradism has become such a classic extremist ideology just as, until recently, Marxism-Leninism was.<sup>30</sup>

It is not, by this view, what it makes people think but what it makes them not think.

In other words, one need not either embrace or reject Alan Hyde’s convincing critique of legitimacy theory, in which he questioned whether people actually obey, and thereby give legitimacy to, legal commands because of law’s character or because of its consequences or, even, merely out of habit,<sup>31</sup> to accept nevertheless that legitimacy works a profound limit upon political consciousness.

[T]he ‘critical’ American lawyers agree . . . that one must look closely at these belief systems, these deeply held assumptions about politics, economics, hierarchy, opportunity, individual merit, the proper role of government, the proper roles of men and women in the family, which are profoundly paralysis-inducing because they make it so hard for people (including the ruling groups themselves) even to *imagine* that life could be different and better.<sup>32</sup>

It is not, in other words, false consciousness that convinces the working class to obey the rules serving the ruling class. It is a limit upon consciousness in which all, rulers and ruled, share. “[A]n ideology can still be ‘hegemonic’ if its practical effect is to foreclose imagination of *alternative* orders.”<sup>33</sup>

Beneath doctrinal law (such as contract and tort, for instance) lurks the Rule of Law, upon which all of Western legal theory rests, and the principles of which are trumpeted as the basis of any modern legal system. The Rule of Law is generally defined as the basis of a legal system in which rules and their application are definite and predictable (specificity), general, impartial, and non-retroactive. Those five features avoid the abuse of discretion condemned by Dicey,<sup>34</sup> and ensure the uniformity and neutrality urged by Unger.<sup>35</sup> Despite the affection for which those of us trained in law feel for the Rule of Law, it has been

<sup>30</sup> Robert W. Benson, *Free Trade As an Extremist Ideology: The Case of NAFTA*, 17 PUGET SOUND L. REV. 555, 555 (1994).

<sup>31</sup> Hyde, *supra* note 25, at 382.

<sup>32</sup> Gordon, *supra* note 25, at 648.

<sup>33</sup> Gordon, *supra* note 25, at 648.

<sup>34</sup> He wrote that the Rule of Law is “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, . . . or even of wide discretionary authority on the part of government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished . . . for nothing else.” DICEY, *supra* note 3, at 198.

<sup>35</sup> “In the broadest sense, the rule of law is defined by the interrelated notions of neutrality, uniformity, and predictability. Governmental power must be exercised within the constraints of rules that apply to ample categories of persons and acts, and these rules, whatever they may be, must be uniformly applied.” UNGER, *supra* note 24, at 176-77.

criticized as culturally biased and exploitive.<sup>36</sup> Others seem to find in it something close to godliness.<sup>37</sup> The United States Agency for International Development actually has its own definition by which it rates the performance of others, mostly according to how well they protect our investments from expropriation.<sup>38</sup>

Thus, the notions of autonomy, individual competence and responsibility, as well as principles of neutrality, predictability, and resulting fairness, found, for instance, in contract and tort law, derive ultimately from this ideological source. It is probably impossible to exaggerate the importance of the Rule of Law as a legitimating force for the society which adopts it as its fundamental legal principle. The utility of the Rule of Law in legitimating those societies which purport to embrace it is that it not only justifies social institutions, but also stabilizes them. The very nature of a Rule of Law is to legitimize the society which it governs, and some have observed that the legitimizing function of a Rule of Law, and perhaps the existence of a Rule of Law itself, depends upon deep divisions between different classes or groups, divisions which become sanitized if not purged by that Rule of Law.<sup>39</sup> These possibilities nevertheless solve one, though only one, question: that of finding the most satisfactory way to produce consensus (only in the sense of the absence of an organized rejection of the status quo).<sup>40</sup>

Because globalization at least partially universalizes the legal superstructure, it too can only mediate existing forces with relations of production. At least one of its functions, and we would assert its chief and only meaningful function, therefore, is to remove its underlying assumptions – in this case, the choice of a

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<sup>36</sup> “What is evident from these principles is that the rule of law was defined more by what it opposed than what it created. Hardly surprising, it was a principle rooted in the politics of the day, both societal and professional.” Maxwell O. Chibundu, *Law in Development: On Tapping, Gourding and Serving Palm-Wine*, 29 CASE W. RES. J. INT’L L. 167, 237 (1997).

<sup>37</sup> “The Rule of Law is demonstrably in the interest of every modern nation. While avoidance of legal norms may seem expedient in the short run, it has insupportable costs in lost efficiency and legitimacy in the long run. Put crudely, the Rule of Law is in the enlightened self-interest of ruling elites everywhere.” John V. Orth, *Exporting the Rule of Law*, 24 N.C. J. INT’L L. & COM. REG. 71, 80 (1998).

<sup>38</sup> Jacques deLisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179, 185 (1999).

<sup>39</sup> David M. Trubek et al., *Symposium: The Future of the Legal Profession: Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 CASE W. RES. L. REV. 407, 421 (1994).

The idea of a “rule of law,” which asserts the existence of a normative order independent of social hierarchy, makes no sense either in the absence of major divisions or in circumstances where these divisions are stable and accepted by all. “Liberal” societies are made up of differentiated and stratified social groups and classes, but these divisions and hierarchical orderings cannot be fully justified by any shared social vision or widely accepted ideology. In such circumstances, the idea of a neutral sphere of law provides legitimation for what would otherwise be seen as the unjustifiable exercise of power by dominant groups in society.

*Id.*

<sup>40</sup> See HABERMAS, *supra* note 17, at 108. See also Colin Sumner, *Law, Legitimation and the Advanced Capitalist State: The Jurisprudence and Social Theory of Jürgen Habermas*, in LAW, STATE AND SOCIETY SERIES: LEGALITY, IDEOLOGY AND THE STATE 119, 133 (David Sugarman ed., 1983).

market economy over alternatives, free trade over regulation, privatization over social democracy – from political debate.

To the extent that the Rule of Law encourages a polity to believe there is no better, or no alternative, social structure, the goals of legitimation are accomplished. No monarch, aristocracy, and certainly no propaganda machine no matter how extensive, could accomplish that as effectively. The Rule of Law shows its role in the various doctrinal areas and applications, such as contract and tort. While laypersons do not know or appreciate the content of such doctrines, the Rule of Law, it seems, assures an otherwise uninformed polity that all is well.

As an application of the Rule of Law, contract law has importance as a legal doctrine but it also serves as a kind of benchmark in U.S. history. It was at the core of the American search for a new order, and it was at the center of American industrialization.<sup>41</sup> As a central tool of industrialization and as a derivative of the Rule of Law, it surely legitimized the massive social changes attendant to industrialization. Certainly tort law exercised a similar legitimating function.<sup>42</sup> Those same principles of contract law, however, may be treated as fundamental human rights (or, as Habermas perhaps unintentionally implies, perverse legal constructions<sup>43</sup>) with a certain utility to attract under-developed nations to the formal package that clothes “civilized nations.”

Contract can be constructed narrowly or broadly. In its narrow conception the aim of contract is the enforcement of agreements or promises. In the broad conception contract is the law governing the private transfer of property<sup>44</sup> and thus includes the very principle of transferability of property.<sup>45</sup> A part of this principle is the notion of good faith,<sup>46</sup> which is required not only during the enforcement of a contract, but also during the process of negotiation and formation.<sup>47</sup> This is a part of the principle of transferability of property which includes a prohibition against involuntary transfers of property.<sup>48</sup> That means that

<sup>41</sup> See LESTER G. LINDLEY, *CONTRACT, ECONOMIC CHANGE, AND THE SEARCH FOR ORDER IN INDUSTRIALIZING AMERICA* 281-95 (1993).

<sup>42</sup> Historians seem to agree, for instance, that *Brown v. Kendall* represented an effective subsidization of industrialization through tort law while, at the same time, pretending to treat all equally, pursuant to the Rule of Law. Elizabeth C. Price, *Toward a Unified Theory of Products Liability: Reviving the Causative Concept of Legal Fault*, 61 TENN. L. REV. 1277, 1289 (1994). But see Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 GA. L. REV. 925 (1981). A standard torts casebook quotes Winfield to the effect that “[e]arly railway trains, in particular, were notable neither for speed nor for safety. They killed any object from a Minister of State to a wandering cow, and this naturally reacted on the law.” Percy H. Winfield, *The History of Negligence in the Law of Torts*, 42 L. Q. REV. 184, 195 (1926). But although there are many cow cases in torts casebooks, there is nary a Minister of State to be found.

<sup>43</sup> See generally HABERMAS, *supra* note 17.

<sup>44</sup> Property includes services for purposes of our discussion.

<sup>45</sup> This is the meaning we use in this discussion.

<sup>46</sup> The principle of good faith implies that contract law should require conduct necessary for the minimal trust rational people need to interact with a reasonable prospect of mutual benefit. MICHAEL D. BAYLES, *PRINCIPLES OF LAW: A NORMATIVE ANALYSIS* 189 (1987).

<sup>47</sup> E. ALLEN FARNSWORTH, *FARNSWORTH ON CONTRACTS* § 3.26c (2d ed. 1998); ROBERT S. SUMMERS, *CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE* 99, 394 (2d ed. 1992); CURTIS R. REITZ, *CONTRACTS AS BASIC COMMERCIAL LAW* 66-68 (1975).

<sup>48</sup> See BAYLES, *supra* note 46, at 189. This includes transfers of services.

parties should have a reasonable opportunity to choose to contract. Without that, the contract is not voluntary, therefore lacking good faith.<sup>49</sup> Thus it legitimizes both the present distribution of resources as well as commerce in those same resources.

Another part of this principle is that one's commitments during negotiation and contract formation be sincere (the prohibition against misrepresentation).<sup>50</sup> And last but not least, the right of each party to an opportunity for reasonable choice means freedom from duress or undue influence. In this way a party has a reasonable and free choice. In general, only contracts freely entered into are enforceable.<sup>51</sup> Thus, contractual relations generally are legitimized as fair, free, and honest.

Commercial law should share all those legal principles, at least for the reason that "the diverse juridical phenomena are not isolated from one another; rather there are between them all manner of connections and they are linked with one another."<sup>52</sup> Thus, international trade law too should be legitimized by the same principles of freedom, good faith, and honesty. However, our point here is that globalization, dominated as it is by the law of comparative advantage more than by the Rule of Law, is legitimized at least as much by the former. This is because contract is not a product of globalization's structures (the WTO and GATT) but, as is true of private international law generally, it is a product of each member country's legal regime.

One of the characteristics of legitimating ideologies, at least if contract law, for instance, is an example, is that, as a mask for underlying powerful interests, frequent conflicts arise between the ideology and reality. In contract, for instance, the commitment to bargain, individual competence and equality often collide with the reality that one contracting party is not powerful enough to truly bargain, whose competence may be questionable, and whose equality is clearly just an unacceptable fiction.<sup>53</sup> At such times "exceptions" arise, whose status as

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<sup>49</sup> Alternatively, this might be understood simply as a part of the principle of fairness. For example, it may be applied to property law to achieve a fair distribution of social burdens. In this way equality of opportunity becomes recognized as one of the principles for the legal (fair) acquisition of property. Another example of fairness is rationalized intellectual property in general: materializing the creative efforts of diverse individuals. This is accomplished, in part, by the principle of first possession which recognizes a formal equality. In copyright, this is known as authorship; in patent law it is inventorship.

<sup>50</sup> BAYLES, *supra* note 46, at 189. The Restatement (Second) of Contracts § 161 (1979), treats certain failures to disclose information as misrepresentation.

<sup>51</sup> This contractual duty to ensure an opportunity for a reasonable choice, might also be presented under a general value or principle of freedom. Thus, we speak of the freedom to acquire property by possession or labor and similarly the freedom to dispose of property (which supports voluntary transfers and prohibits involuntary ones).

<sup>52</sup> Emile Durkheim & Paul Fauconnet, VI ANNEE SOCIOLOGIQUE 305 (1903). It is interesting that Durkheim was inclined to see law as derivative from and expressive of a society's morality. See Emile Durkheim, *De la Division du Travail Social* 22-24 (1893). Thus it might be argued that in the international community international law is an expression of that community's morality.

<sup>53</sup> See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 75 A.L.R.2d 1 (N.J. 1960). This landmark case, holding that unequal bargaining positions may invalidate contractual obligations is, by its exceptional status, intended to underline the supposedly nonexceptional presumption under contract law that most parties occupy equal positions of competence, autonomy, and individuality.

exceptions save the rule from reexamination, and whose exceptional status highlight the Rule of Law as governing, even if the exception might otherwise demonstrate the ideological bankruptcy of the rule itself.<sup>54</sup> As we shall see, just as domestic law is studded with “exceptions,” so too is WTO and GATT practice.<sup>55</sup>

It should come as no surprise then that one of the pillars of the legal system borrowed by globalization is the law of contract, without which, of course, international trade – the lifeblood of globalization and without doubt its *raison d’être* – would become impossible. If contract is important to globalization, it should not be surprising that it would be consistent with Maine’s observation about the nature of law.<sup>56</sup> Although contract is either derived from or applied according to the Rule of Law, it also routinely appears in the common jurisprudential theories offered to justify all those Rule of Law regimes which adopt contract doctrine, thereby serving double duty as its own justification. It is difficult to justify law without resort to contract.<sup>57</sup> The alternatives, some kind of resort to natural law, seem outdated, perhaps only out of favor, but surely no more illogical, in the end, than contractarian theories which have been labeled “though incorrect. . . also not entirely false.”<sup>58</sup> Contract’s principles of good faith and bargaining fail when developing nations have no ability to bargain with the First World. Contract legitimizes this kind of oppression by positing that all parties – in this case First and Third World nations – are autonomous, competent, and able to reach agreements that merit enforcement. Autonomy in terms of these countries and their bargaining power is clearly fictional. It is obviously through the use of such le-

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The social vacuity of this claim is evident when one considers whether this is actually true – something the normal experience of most readers immediately contradicts, of course – and, even if true, whether the palliative intent of *Henningsen* can possibly work, since in the vast majority of cases it is like a beacon to nowhere in that its holding is almost never applied (almost 90% of the more than 600 cases citing *Henningsen* either reject, distinguish, or criticize its holding; it is clearly then an almost entirely, and therefore insultingly, empty gesture that contract law can be humanized).

<sup>54</sup> See the doctrine of interference with contract in which the legal system wrestles with itself over its commitment to the concept of the efficient breach. *Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768 (Tex. App. – Houston [1st Dist.] 1987), *rev’d*, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987). See Clark A. Remington, *Intentional Interference with Contract and the Doctrine of Efficient Breach: Fine Tuning the Notion of the Contract Breacher as Wrongdoer*, 47 *BUFF. L. REV.* 645, 646 (1999).

<sup>55</sup> John H. Jackson describes a “series of exceptions” to GATT. See JACKSON *supra* note 5, at 38.

<sup>56</sup> “One of the most influential of modern saws is Maine’s famous dictum that the progress of law has been from status to contract.” MORRIS R. COHEN & FELIX S. COHEN, *READINGS IN JURISPRUDENCE AND LEGAL PHILOSOPHY* 125 (1951).

<sup>57</sup> The primacy of contract as a tool of legitimation predates Rousseau’s theory of the social contract, and reemerges after him in modern attempts to repair the obvious logical gaps in his theory, such as Rawls’ attempt to create a kind of social contract with blinders on. But the well-known alternatives to contractarian justificatory theories, such as natural law theories, tend to highlight the vulnerabilities of globalization the most stark of which is that international law is not law but sheer self-interest. The lack of consent of the governed is surely the first step in this argument.

<sup>58</sup> Habermas, *supra* note 18, at 1516.

gal fictions, however, that law is able to allow domination couched in the appearance of autonomy.<sup>59</sup>

Surely contract law and its underlying assumptions deriving from the Rule of Law stand as one of the primary legitimizing principles of Western legal systems. All of the themes – of autonomy, individual competence, individual responsibility, and equality – dictated by the Rule of Law upon which contract law depends, and by which the Rule of Law is both implemented and promoted, assert strong legitimizing statements about our society and its purported democracy. In this way, as both Habermas and Gramsci<sup>60</sup> imply, and as Gordon<sup>61</sup> notes, it becomes difficult for most and impossible for many even to imagine that an alternative social arrangement could deliver greater and truly substantive autonomy, competence, responsibility, and equality. The potential perversions of the underlying social assumptions of contract law – for instance those illustrated by *Lochner*<sup>62</sup> and its aftermath – become unimaginable.

*Lochner* serves as one demonstration of how contract law violates its underlying assumptions. Under strict rules of contract, the plaintiffs were right: there is no reason why parties might not agree to work a set number of hours per week, no matter how inhuman that might be. The Supreme Court, in reversing, essentially admitted that the issue was political not legal, because a decision in either direction essentially advanced a rival theory of political economy.<sup>63</sup> So,

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<sup>59</sup> It is no mere detail, therefore, that WTO is considering rules seeming to guarantee more “democracy” in its operations, but only after having already agreed on a free-trade regime premised upon the law of comparative advantage and opposed to interventionist measures. C. Christopher Parlin, *Review of the Dispute Settlement Understanding*, 31 L. POL’Y INT’L BUS. 565, 570 (2000).

<sup>60</sup> Gramsci, *supra* note 26, at 210.

The approach of the free trade movement is based on a theoretical error whose practical origin is not hard to identify: namely the distinction between political society and civil society, which is made into and presented as an organic one, whereas in fact it is merely methodological. Thus it is asserted that economic activity belongs to civil society, and that the state must not intervene to regulate it. But since in actual reality civil society and state are one and the same, it must be made clear that *laissez-faire* too is a form of state ‘regulation,’ introduced and maintained by legislative and coercive means. It is a deliberate policy, conscious of its own ends, and not the spontaneous, automatic expression of economic facts. Consequently, *laissez-faire* liberalism is a political programme, designed to change – in so far as it is victorious – a state’s ruling personnel, and to change the economic programme of the state itself – in other words the distribution of the national income.

*Id.*

<sup>61</sup> See Gordon, *supra* note 25, at 648-61.

<sup>62</sup> *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>63</sup> Its political nature is all too obvious, from Justice Peckham’s majority opinion in which he observes, “There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action,” *id.* at 57, to Justice Holmes’ characteristically more trenchant but unavailing complaint that “[t]his case is decided upon an economic theory which a large part of the country does not entertain. . . . The 14th Amendment does not enact Mr. Herbert Spencer’s Social Statics.” *Id.* at 75.

too, do *Menlove*,<sup>64</sup> *Brown v. Kendall*,<sup>65</sup> and the professional standard, rejected by *Helling v. Carey*,<sup>66</sup> illustrate that tort law similarly departs from its bedrock principles when the perceived need is great. *Menlove*, for instance, represents the failure of nerve that industrialization elicited from the tort system, when it rejected the principle that culpability was a matter of personal fault. The *Menlove* court declared subjective standards unworkable<sup>67</sup> in favor of a purely economic standard favorable to industry, despite the fact that the criminal law, to this day, routinely applies variably subjective standards. We shall see that just as domestic law violates the Rule of Law while trumpeting its virtues, so too does globalization violate the law of comparative advantage while boasting that doctrine's merits. In *Helling v. Carey*, the Washington Supreme Court basically told the dirty secret of one of tort law's sacred cows: that despite the notion that the same standard of care applies to all, irrespective of wealth or station, the professional standard enjoyed by those of wealth and high station routinely violates the principle that custom and practice do not immunize a defendant from liability.<sup>68</sup>

## II. THE NATURE OF A GLOBAL LEGAL REGIME AND THE LEGITIMIZING FUNCTION OF ITS UNDERLYING LAW OF COMPARATIVE ADVANTAGE

As we have noted earlier, in the modern state (and by extension in international multi-state organizations) political domination is legitimized through rules which designate a power of command exercised in accordance with those very

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<sup>64</sup> *Vaughan v. Menlove*, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (Comm. Pl. 1837). See Price, *supra* note 42, at 1289.

<sup>65</sup> *Brown v. Kendall*, 6 Cush. (60 Mass.) 292 (1850). It is generally agreed that prior to the time this case was decided, the prevailing standard of tort law was one of strict liability and that, because that standard was inconsistent with the dominant economic demand for concentration of capital, a system of so-called fault liability was impressed into use.

The definition of fault under common law trespass – synonymous with causation of harm – was believed to be simply too much for burgeoning industries to bear. Infant industries stridently argued that a lesser standard of liability was needed lest courts should discourage investment, research and development, and full employment. It just made economic sense, in a macro view, to limit industry liability to those situations where the plaintiff could prove some deviation from the behavior of the reasonable person. The quid pro quo was obvious: some innocent victims would go uncompensated so that the money could be invested in expansion of industry. Thus, with a subtle stroke of the judicial pen, the concept of legal fault was converted from one of causation of harm to one of failure to exercise reasonable care.

Price, *supra* note 42, at 1289. But see Rabin, *supra* note 42.

<sup>66</sup> *Helling v. Carey*, 519 P.2d 981, 983 (Wash. 1974) (en banc).

<sup>67</sup> Without mention of the fact that subjective standards are the modus operandi of the entire criminal law system, the *Menlove* court ridiculed them as threatening a legal system “variable as the length of the foot of each individual.” *Vaughan v. Menlove*, 3 Bing. (n.s.) 468, 475 (1837).

<sup>68</sup> “[A] strict adherence to the standard of professional custom in judging the reasonableness of a physician’s conduct renders the democratic principle meaningless.” Jay Alexander Gold, *Wiser Than the Laws?: The Legal Accountability of the Medical Profession*, 7 AM. J. L. & MED. 145, 179 (1981).

rules.<sup>69</sup> We have already noted how the Rule of Law sanitizes deep class divisions. But the lack of a true international legal regime might make one wonder whether the present international order can have obtained its legitimacy<sup>70</sup> by the mere existence of formally rational rules irrespective of their content, in the same way that occurs domestically, because the absence of a state – there being no real power of command – makes those rules suspect. In fact, however, whatever the doubts about legitimacy theory, it seems possible that legitimation has far more currency on the international than on the national level.<sup>71</sup> If that is true, a formally rational international free market bounded by complex rules runs little risk of being challenged, especially regarding such fundamental questions as its essential *raison d'être* or the identity of its principal beneficiaries.

We have already observed that one of the consequences of liberal legal legitimacy is that it asserts at a level immune from debate that all parties are autonomous and competent.<sup>72</sup> The benefits on the international level of such uncontested assumptions, if they are transported onto the international arena via globalization, obviously might be that they foreclose debate about whether some nations, for instance the First World, are more competent and autonomous than others in the Third World,<sup>73</sup> and whether international agreements should bind them or whether, because of the disparity of bargaining power, such agreements should be invalid. Or, in the sense that the law of comparative advantage assures that all will benefit, as we discuss below, legitimation seems to ensure that Third World countries will not demand special treatment.

International harmonization sponsors liberal capitalist legal forms based on the prototype of the “civil society”<sup>74</sup> – that pluralism “of a certain kind,” secular,

<sup>69</sup> See Gramsci, *supra* note 26.

<sup>70</sup> See THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONGST NATIONS* (1990).

<sup>71</sup> See Obiora Chinedu Okafor, *The Global Process of Legitimation and the Legitimacy of Global Governance*, 14 ARIZ. J. INT'L & COMP. L. 117, 128 (1997).

Why is it that, absent a recognized Sheriff with all the trappings of a domestic police force, nations by and large obey most of the rules of international law? Why is it that the thousands of ordinary rules of international law, such as those relating to trade, investment, immigration, refugees, the seas, shipping, air transport, diplomatic and sovereign immunity, and treaty-relations, are for the most part observed by states?

*Id.* at 127. We say it has “far more” currency because one would not normally anticipate any legitimation without a state.

<sup>72</sup> See *supra* notes 51-58 and accompanying text.

<sup>73</sup> We use “developing,” “undeveloped,” as well as “Third World” to designate the same portion of the world’s population, and use them interchangeably from time to time purely for variety, since there are so many poor people and nations that to use the same term consistently might lead to unmerited boredom unless it is true that the poor deserve to be poor just as the rich deserve to enjoy their wealth.

<sup>74</sup> In our opinion harmonization and its parent concept globalization, which are both American phenomena, see Robert Boyer, *La Globalisation: Mythes et Réalités*, in *MONDIALISATION OU RÉGIONALISATION? ACTES DU GERPISA* (1996), logically require a certain type of state based on “Americanization.” In Gramsci’s words:

Americanization requires a particular environment, a particular social structure (or at least a determined intention to create it) and a certain type of state. This state is the liberal state, not in the sense of free-trade liberalism or of effective

individualistic, built on capitalist economic relations; it is dedicated to science rather than superstition, and it originated in Western Europe upon the arrival of the Protestant Reformation. The prototype is thus not truly secular, and, in the Gramscian sense, only to a certain extent ethical.<sup>75</sup> (If it were, it might be more akin to the ideal of communism). The kind of modernity and progress that global harmonization can achieve is hardly different from the kind of civil society that “British colonialism” exported: capitalist relations wrapped in a formal secular pluralism.<sup>76</sup> The ideal of globalization is a kind of *aura mediocritas* – a supposed humanitarian middle way between the capitalist and Soviet excess.<sup>77</sup>

On the other hand, it is all too obvious that legal arguments about the character of international regimes are handicapped by the fact that there is no state. As a result, it is difficult to characterize them (although, as we discuss below, it is not essential to do so), including their newest manifestation, globalization and the WTO and GATT, as legal in the same sense as are domestic regimes, sponsored as they explicitly are by an authoritative and powerful state. But it is undeniable that globalization is an anxious, and perhaps even successful, suitor for legal status. The more pragmatic proponents of the WTO freely admit that its character is something short of a true legal regime, and though obviously preferring a “Rule of Law” or even merely a “rule-based system” settle willingly for some-

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political liberty, but in the more fundamental sense of free initiative and of economic individualism which, with its own means, on the level of ‘civil society,’ through historical development, itself arrives at a regime of industrial concentration and monopoly.”

Antonio Gramsci, *Financial Autarky of Industry*, in *THE GRAMSCI READER: SELECTED WRITINGS, 1916-1935*, 285 (N.Y.U. Press, David Forgasc ed., 2000) (1988).

<sup>75</sup> For Gramsci, “every state is ethical in as much as one of its most important functions is to raise the great mass of the population to a particular cultural and moral level, a level (or type) which corresponds to the needs of the productive forces of development, and hence to the interests of the ruling classes. The school as a positive educative function, and the courts as a repressive and negative educative function, are the most important state activities in this sense. . . .” Antonio Gramsci, *Ethical or Cultural State*, in *THE GRAMSCI READER: SELECTED WRITINGS, 1916-1935*, 258-59 (N.Y.U. Press, David Forgasc ed., 2000) (1988).

<sup>76</sup> It is also, interestingly, described by experts in the same eighteenth-century terms: “The Gramscian form of hegemony is, however, by no means absent from the international system. In the present sense consent is largely manufactured by gunboat diplomacy and economic inducement.” Okafor, *supra* note 71, at 128, n.72.

<sup>77</sup> *Aura mediocritas*, which may be equated with the “ideal middle way” means that globalization is being sold as the ideal middle way between the excesses of both the capitalism of sweatshops and the disillusion of the Soviet gulag. This middle way approach is very much a pragmatic postmodernist approach, which Gary Minda masterfully explains in the context of property and sovereignty. See Gary Minda, *The Dilemmas of Property and Sovereignty in the Postmodern Era: The Regulatory Takings Problem*, 62 U. COLO. L. REV. 599, 635 (1991).

For the postmodernist, the dilemmas of property and sovereignty cannot be solved through legal formulations based on the ideal of a rule of law alone. Instead of seeking to affirm either a property or community-like perspective in takings analysis, postmodernists seek a pragmatic ‘middle way’ that advocates the importance of giving consideration to both perspectives, as well other perspectives not embodied by such views.

*Id.*

thing that can be called “rule orientation.”<sup>78</sup> Thus, it would seem that, if globalization is not a truly legal order, it not only strives for that status but has succeeded in becoming, at least, something of a quasi-legal order. If legitimacy requires true legality, the most that we might claim for globalization – as a source for *legal* legitimacy only – is some kind of quasi-legitimacy. But it is unlikely that legitimacy operates in such a geometric and systematic fashion, and indeed, to the extent there are systems of a non-legal character which nonetheless seem to be able to confer legitimacy on their acts – such as organized religions – it does not seem fatal to our argument that globalization is not of the same legal order as the nation-state. There is no question, certainly, that it is of superstructural significance, whatever the label.

While the legal regime represented by international law is elusive in the case of globalization, this is characteristic of international law generally. So, from the perspective of legitimacy, international law suffers from some threshold doubts. “Due to their anational global character, all these legal regimes cannot be rooted in a national legal order. Ergo: no law.”<sup>79</sup> But this, of course, is an exaggeration. The attempt to justify globalization by its proponents, and the use of globalization to legitimize its own product is too strong to deny. One of the problems with applying the Rule of Law to international relations, trade or otherwise, is, of course, that there is no real “law” because there is no international government to issue that law. Nevertheless, there is a strong tendency for “legalism” in international trade law, and even a school of thought referred to as the “legalists.”<sup>80</sup> But whether it is possible or not, it is clear that proponents of globalization pretend and even advocate that globalization and, at its base the so-called law of comparative advantage, is a legalized phenomenon.<sup>81</sup> Even when

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<sup>78</sup> JACKSON, *supra* note 5, at 8.

The phrase ‘rule orientation’ is used . . . to contrast with phrases such as ‘rule of law’ and ‘rule-based system.’ Rule orientation implies a less rigid adherence to ‘rule’ and connotes some fluidity in rule approaches which seems to accord with reality. . . . For this purpose the procedure must be creditable, ‘legitimate,’ and reasonably efficient. . . .”

JACKSON, *supra* note 5, at 8. Later, however, Jackson revealingly contrasts rule-orientation not with the more legalistic Rule of Law, but with raw force, or “power-orientation.” JACKSON, *supra* note 5, at 121.

<sup>79</sup> Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 AM. J. COMP. L. 149, 157 (1997).

<sup>80</sup> “For the legalists, a central objective of the system is to enable private entrepreneurs to plan economic decisions and thereby maximize efficiency. To this end they need stability and predictability. The rules must be clear, and the best way to assure clarity is through a system of impartial adjudication that is routinely used by governments to develop a common law of trade.” Phillip R. Trimble, 1985 *Survey of Books Relating to the Law: V. Foreign, International and Comparative Law: International Trade and the “Rule of Law,”* 83 MICH. L. REV. 1016, 1017-18 (1985); see also G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 877-85 (1995).

<sup>81</sup> “Because free trade leads to the most (comparatively) efficient use of national resources, a majority of domestic economic interests and all transnational business enterprises are presumed to favor implementing the doctrine of comparative advantage as an international ‘rule of law.’” G. Richard Shell, *Participation of Nongovernmental Parties in the World Trade Organization: The*

globalization flouts its own principles, it does it through a legalized procedure.<sup>82</sup> Just as law domestically flies the banner of equality while marching to the order of disparity, GATT, for instance, was formed to assert a principle of non-discrimination while offering opportunities to dominate. But all the while, GATT and globalization depend upon the law of comparative advantage for their legitimacy. And we repeat that our argument is not that globalization is necessarily a legal phenomenon. To be legitimate, all that seems necessary are formally rational rules, something that the law of comparative advantage, applied through GATT and the WTO, readily supplies.

“International law,” is the sum of “public international law” – those rules established by international fora intended for state relations – and “private international law” – those domestic rules designed to solve conflicts between foreign parties.<sup>83</sup> Ironically, hardly a century ago the prevailing theme of international public law was a notion of international regulation,<sup>84</sup> and that its role derived from the need for harmonization among the “civilized nations.”<sup>85</sup> But if Kelsen was right in claiming that the legal order constitutes the state<sup>86</sup> and treating the “state” as a metaphor for a specific territorial and cultural entity with discrete interests, the interest represented by the present international legal order is surely elusive.

Nevertheless, globalism, as represented by WTO and GATT constitutes, if only formally, an agreement by its contracting States. Fictional or not, that agreement confers some apparent validity upon the Organization and its rules. The strength of such fictions seems at least as great in international arrangements as it is in domestic law.<sup>87</sup> In international law, legitimacy classically derives from

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*Trade Stakeholders Model and Participation by Nonstate Parties in the World Trade Organization*, 17 U. PA. J. INT'L ECON. L. 359, 367 (1996).

<sup>82</sup> “[S]ome perplexing questions of developing country trade are handled primarily by a ‘legalization’ of the currently tolerated noncompliance practices of those countries. . . .” JACKSON, *supra* note 5, at 41.

<sup>83</sup> For the classic definition of international law and the distinction between international public law and international private law, see PAUL GUGGENHEIM, *TRAITÉ DE DROIT INTERNATINAL PUBLIC*, i, (2d ed. 1967); GIORGIO BALLADORE PALLIERI, *DIRITTO INTERNAZIONALE PUBBLICO* (1952); WILHELM WENGLER, *VÖLKERRECHT* (1970); PHILIP C. JESSUP, *TRANSNATIONAL LAW* (1956); AHMET GÜNDÜZ OKÇÜN, *TRANSMUNICIPAL LAW* (1968); HENRI BATIFFOL & PAUL LAGARDE, *DROIT INTERNATIONAL PRIVÉ* (6th ed. 1981).

<sup>84</sup> In fact, purists will argue that international private law is by and large a collection of domestic laws and regulations.

<sup>85</sup> “The sources of that Law,” said Gray, “may be customs which prevail among civilized nations.” J. CHAPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (1st ed. 1921).

<sup>86</sup> HANS KELSEN, *REINE RECHTSLEHRE* 267 (1960).

<sup>87</sup> See Okafor, *supra* note 71, at 128:

To achieve universal adherence in a multi-cultural and diverse world, the law of nations must present itself as value-neutral, instead of value-laden. It must be designed to serve equitably the interests of all states. To accomplish this requires the denial of the duality of the international institutions and processes from which international law emerges and is applied. International law also must deny the domination and hegemony of certain groups within these institutions; the “manufacturing” of states’ consent to the rules and other outcomes that emerge from the said bodies.

the agreement of nation-states. Remarkably, an inescapably essential part of the process of globalization is the apparent usurpation of the nation state.<sup>88</sup> Nevertheless, within WTO, the contracting states have at least formally agreed to its rules and conditions, all or most of them bottomed on Ricardo's theory. In the WTO and GATT, legitimacy seems to derive from the tacit agreement, underlying virtually all, if not all, of the WTO and GATT rules, that the law of comparative advantage is valid.<sup>89</sup>

If anything, it is international public law that has generally qualified as a semi-legal system, international private law being relegated to an even lower tier on the hierarchy of legal orders. But the distinction between international private law and that of international public law is evolving, even mutating, as international private law has overtaken not only the scope of international public law, but has usurped the very basis of international public law: the nation state. As international private law has leapfrogged over the boundaries of the nation state, it has adopted and enacted new international rules which cross the boundaries of both public and private spheres.<sup>90</sup> The primary example of this, and the focus of this article, is globalization's prize: WTO and GATT, and, to repeat, whether or not there is agreement about its legal status is irrelevant here, for it is its attachment to an underlying "law," that of comparative advantage, which affords it the power to legitimize itself.

International trade law has become one of the newest branches of public international law.<sup>91</sup> This is because before World War II, international law, "being essentially political," was generally concerned with war and peace.<sup>92</sup> Trade was the province of each separate state, "and it involved international law and international organizations to only a small extent."<sup>93</sup> In this view, modern international trade law and globalization dates only from 1947 with the creation of GATT.<sup>94</sup>

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Okafor, *supra* note 71, at 128. Bourdieu terms globalization itself a "myth." PIERRE BOURDIEU, *ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET* 34-38 (1998).

<sup>88</sup> See Robert Boyer, *La Globalisation: Mythes et Réalités*, in *MONDIALISATION OU RÉGIONALISATION? ACTES DU GERPISA* (1996), in which he observes, "D'une part, les États-Nations et, par voie de conséquence, les gouvernements perdaient toute capacité à influencer les évolutions économiques domestiques, au point que les institutions centralisées héritées de l'après guerre devaient céder la place à la constitution d'entité régionales ou urbaines, point d'appui nécessaire du réseau tissé par les multinationales" ("Nation-States and, as a result, their governments, lost any ability to influence their domestic economic development, to the point that the centralized institutions inherited from the post-war period were forced to give way to the urban or regional arrangements demanded as a point of departure by the multinationals").

<sup>89</sup> There is general agreement that WTO and GATT rely entirely on the law of comparative advantage. See Shell, *supra* note 81 and accompanying text; Joel P. Trachtman, *Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis*, 34 COLUM. J. TRANSNAT'L L. 37, 98 (1995); Avi Gesser, *Canada's Environmental Choice Program: A Model for a "Trade-Friendly" Eco-Labeling Scheme*, 39 HARV. INT'L L.J. 501, 518 (1998).

<sup>90</sup> See Boyer, *supra* note 88.

<sup>91</sup> THIÉBAUT FLORY, *LE G.A.T.T. DROIT INTERNATIONAL ET COMMERCE MONDIAL* (1968).

<sup>92</sup> *Id.*

<sup>93</sup> Of course there was an international trade law before World War II, but it was conventional and bilateral. See HARRY C. HAWKINS, *COMMERCIAL TREATIES AND AGREEMENTS. PRINCIPLES AND PRACTICE* (1951).

<sup>94</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, TIAS No. 1700, 55 UNTS 188 [GATT].

GATT is a particular instance of the free trade obsession. David Ricardo's efforts to promote free trade, not only as an economist but perhaps more importantly as a member of the London stock exchange as well as of Parliament (which he became less than two years after his landmark work was published) via his law of comparative advantage was an historically undisguised effort to repeal England's Corn Laws.<sup>95</sup> In that sense, Ricardo's theory of free trade is like a flame to the moth of international commerce. GATT was a reaction to the protectionism of the inter-war period.<sup>96</sup> It is an "historic accident"<sup>97</sup> born in the failure of the Havana Charter, originally conceived to be a mere accord, simple in form and transitory in substance.<sup>98</sup> However, by mid-century, GATT had eventually emerged into the dominant instrument that was to change the international commercial environment from one of bilateral to that of multilateral agreements based on two derivations of Ricardo's law of comparative advantage. According to Ricardo's theory, all nations will benefit from free trade, and thus there is an underlying principle of equality that supports his law.<sup>99</sup> That notion of equality manifests itself in the two basic principles of GATT which are derived, at bot-

<sup>95</sup> "It is the worst species of taxation," said Ricardo of the Corn Laws. RICARDO, *supra* note 4, at 313. He "is . . . remembered by the historians because of his influence on the two most important economic policy decisions of the first half of the nineteenth century: the return to convertibility . . . and the gradual freeing of trade, culminating in the repeal of the Corn Laws in 1846." Ronald M. Hartwell, *Introduction to DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY, AND TAXATION 10* (Ronald M. Hartwell ed., Penguin Books 1971) (1819).

<sup>96</sup> The history of international trade is, in fact, an alternation of free trade (*libre-echange*) and protectionism. The first period, between the end of nineteenth century and the start of World War I was a peak of commercial liberalism, due to its monetary stability and free movement of capital. Some claim this was characterized by a complete absence of state interventionism and the pure consequence of market laws. The second period occurred between the two World Wars and was characterized by extreme nationalism, profound protectionism, and what might be termed a "tariff war." The third period follows World War II. Its announced principal goal was to restore the free trade from the first period, but through regulation by international treaty. This is of course GATT's inner contradiction: its aim is to restore a kind of historical, perhaps mythical, free market dating from before two massive World Wars through the intervention of international organization. See ROBERT SCHNERB, *LIBRE-ECHANGE ET PROTECTIONISME* (1963).

<sup>97</sup> GERARD CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY, THE GENERAL AGREEMENT ON TARIFFS AND TRADE, AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES* 31 (1965).

<sup>98</sup> In 1946 and 1947 the United States asked the Economic Council of the United Nations for a meeting of the dominant commercial states to establish the charter of an international commercial organization, where the "grands Etats commercants" – Benelux, Canada, China, the United States, France, India, the United Kingdom, and the USSR – were to divide up the post-war spoils. However, the United States refused to ratify the resulting charter. As a result, the interim instrument, what is now GATT, became, by default, the governing instrument of international trade. Despite its character to the contrary, due to its unintended but dominant influence it eventually became possible to characterize it is a treaty, an international organization and a quasi-court. See FLORY, *supra* note 91, at 6. For a view contrary to Flory's concerning GATT's true role, see DANIEL C. ESTY, *GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE* 215 (1994). Although GATT is formally a contract and not a treaty or international organization, its rules as applied through the 1947 Protocol of Provisional Application have binding treaty status. However, the 1969 Vienna Convention on the Law of Treaties makes no distinction between a contractual agreement such as GATT and other kinds of treaties. Thus it seems, under international law, GATT is a treaty.

<sup>99</sup> RICARDO, *supra* note 4.

tom, from the appealing notion, no matter how stilted, of equality. Those two principles are (1) non-discrimination, otherwise known as the “most-favored-nation” (MFN) principle, and (2) national treatment, under which goods of all origins are entitled to the same treatment as those of the host nation. In addition, the so-called “trade liberalization policies” which underlie GATT include tariff reduction generally and reduction of so-called nontariff barriers.<sup>100</sup>

Because the law of comparative advantage is the bedrock of globalization, just as the Rule of Law is the bedrock of western law, it is important to understand its context as well as its content. Comparative advantage was first formulated in its modern sense by David Ricardo, who advanced a theory which was an undisguised brief against the British tariff system including, especially, its Corn Laws.<sup>101</sup> His claim was surprising and counterintuitive at a time of uniformly high tariff barriers: that a nation need not be absolutely more efficient than another in order to benefit by trading with the other.<sup>102</sup> Even if the home country could produce everything more cheaply than the foreign, it is better to concentrate on those industries that yield the highest profit rate, exporting them and purchasing foreign goods even if at a somewhat higher price than they could be otherwise purchased at home.<sup>103</sup>

Two men can both make shoes and hats, and one is superior to the other in both employments; but in making hats, he can only exceed his competitor by one-fifth or 20 per cent, and in making shoes he can excel him by one-third or 33 per cent; – will it not be for the interest of both, that the superior man should employ himself exclusively in making shoes and the inferior man in making hats?<sup>104</sup>

Prior to Ricardo, mercantilist theory held that trade was a kind of zero-sum game in which the country with the greatest absolute advantage was able to profit at the expense of less advantaged ones.<sup>105</sup> Exports represented a net profit while imports were a failure and a net loss. Measures to increase exports were valuable while tariffs to prevent imports were desirable. Colonialism, with its readily controlled foreign markets, is one of the more egregious examples of mercantilism. But Ricardo thought that trade could benefit both partners. Absolute advantages were not necessary. Instead, all that is necessary is that, in the overall context of trade between two nations, each country can profit by trading with the other, even if one country could in theory produce all of the traded goods more efficiently. Though that one country might have absolute advantages, it behooves it to engage in those traded goods (or services, today) in which it has a comparatively greater advantage, and purchase the remaining goods from its partner(s), who profit by those exports and purchase goods (or services) from the

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<sup>100</sup> See JACKSON, *supra* note 5, at 419.

<sup>101</sup> See RICARDO, *supra* note 4.

<sup>102</sup> See RICARDO, *supra* note 4.

<sup>103</sup> See RICARDO, *supra* note 4.

<sup>104</sup> RICARDO, *supra* note 4, at 154 n.\*.

<sup>105</sup> See Jeffrey Simser, *GATS and Financial Services: Redefining Borders*, 3 *BUFF. J. INT’L L.* 33, 41 (1996).

first at a lower price than they could producing for themselves.<sup>106</sup> Thus, each country will invest in that over which it has a greater comparative, not absolute, advantage, making a greater profit from its partner(s) than if it supplied itself, with each country profiting to the extent of its comparative advantages.

Ricardo's theory was the product of a particular historical context, and aside from its qualities as a mere rationalization of a potentially more profitable system of international trade already visible on the economic horizon, it was limited even by its own terms by the constraints recognized by Ricardo himself. The reason comparative advantage works, he noted, was that national borders prevented capital and labor from freely moving to locations where advantages could be exploited more efficiently.<sup>107</sup> Due to the reluctance to leave one's home country, and the risk inherent in allowing one's money to the stewardship of foreign banking houses, each nation's economy was limited by its national borders. Comparative advantages, due at least partly (and perhaps exclusively) to that immobility could be exploited by international trade instead of international movements of capital and labor.<sup>108</sup>

But the "law" of comparative advantage was only theory, and there were theorists who advanced competing and contradictory theories. Comparative advantage was immediately rejected by a circle of politicians, economists, and theorists who favored protectionism. Unsurprisingly, many of these, like Alexander Hamilton who stands as an influential proponent of protectionism, were from developing countries for whom the law of comparative advantage was obviously an attempt to rationalize Britain's domination of world trade, as well as an attempt to argue against measures by other countries to compete successfully with the Empire.<sup>109</sup> Other prominent protectionists included Jean Baptist Colbert

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<sup>106</sup> Ricardo's theory was articulated in two famous paragraphs:

England may be so circumstanced, that to produce the cloth may require the labour of 100 men for one year; and if she attempted to make the wine, it might require the labour of 120 men for the same time. England would therefore find it her interest to import wine, and to purchase it by the exportation of cloth.

To produce the wine in Portugal, might require only the labour of 80 men for one year, and to produce the cloth in the same country, might require the labour of 90 men for the same time. It would therefore be advantageous for her to export wine in exchange for cloth. This exchange might even take place, notwithstanding that the commodity imported by Portugal could be produced there with less labour than in England. Though she could make the cloth with the labour of 90 men, she would import it from a country where it required the labour of 100 men to produce it, because it would be advantageous to her rather to employ her capital in the production of wine, for which she would obtain more cloth from England, than she could produce by diverting a portion of her capital from the cultivation of vines to the manufacture of cloth.

RICARDO, *supra* note 4, at 153-54.

<sup>107</sup> RICARDO, *supra* note 4, at 154.

<sup>108</sup> "Experience, however, shows, that the fancied or real insecurity of capital, when not under the immediate control of its owner, together with the natural disinclination which every man has to quit the country of his birth . . . checks the emigration of capital." RICARDO, *supra* note 4, at 155.

<sup>109</sup> Simser, *supra* note 105, at 40-48.

and Friedrich List. Protectionist theories remain a viable, though not often very visible, alternative to comparative advantage and its client, free trade.

By the twentieth century it was clear to many but, sadly not all, that comparative advantage did not provide a predictive rule but merely a justification for trade policies favoring dominant economies. Comparative advantage did not explain why even advanced economies frequently engaged in activities that might be more efficiently performed by others. The Heckscher-Ohlin theorem (also known as the factor endowment approach)<sup>110</sup> modernized the theory, explaining that in addition to simple comparative advantage, countries would exploit their most abundant resources even if it violates basic comparative advantage.<sup>111</sup> Thus countries with abundant capital will engage in capital-intensive industries and labor-rich countries will engage in labor-intensive activities. The resulting “Leontief Paradox” led to the modern variation of Ricardo’s law, that of the New International Trade Theory, or NITT. NITT acknowledges at least in part that comparative advantage can be created through various private and public efforts.<sup>112</sup> In a variation of that theory, the modern form of comparative advantage seems to lie in the fact that technology has become so profitable but of such wide breadth that it is possible to develop a specialty in one part of an industry and develop an advantage there.<sup>113</sup>

This variation of NITT is the so-called strategic advantage theory<sup>114</sup> under which governments target certain industries for development, developing a global or regional advantage. Critics argue that if all countries were to do this, it would lead to a kind of trade, or at least targeting, war.<sup>115</sup> But the strategy of “intraindustry trade,” whereby a country targets a particular niche is an attractive alternative to free trade that allows governments to manage an economy without being in stark violation of the law of comparative advantage. This assumes, of course, that such targeting will not precipitate the predicted trade war. That such a war is unlikely might be a reasonable assumption in technologies where a multiplicity of niches is available; in that event, a full battle over them might be beyond the capacity of any single country – or even against its own interests, if it can also develop a sufficient number and quality of niches. Ricardo himself, without necessarily anticipating developments in a globalized economy, nevertheless seemed to recognize similar economic limits within which world traders must operate:

If, in consequence of the price of foreign commodities being cheaper, a less portion of the annual produce of the land and labour of England is employed in the purchase of foreign commodities, more will remain for

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<sup>110</sup> EDWARD E. LEAMER, *THE HECKSCHER-OHLIN MODEL IN THEORY AND PRACTICE*: PRINCETON STUDIES IN INTERNATIONAL FINANCE (1995).

<sup>111</sup> Simser, *supra* note 105, at 40-48.

<sup>112</sup> Simser, *supra* note 105, at 40-48.

<sup>113</sup> “This specialisation of trade within an industry is what is known as intraindustry trade . . . where a high degree of specialisation occurs. . . . This corresponds to a . . . specialised version of . . . comparative advantage.” BRIAN McDONALD, *THE WORLD TRADING SYSTEM: THE URUGUAY ROUND AND BEYOND* 20 (1998).

<sup>114</sup> *See id.* at 20-22, 29-31.

<sup>115</sup> *See id.* at 29-31.

the purchase of other things. . . . At the same time that capital is liberated from the production of shoes, hats, &c. more must be employed in manufacturing those commodities with which foreign commodities are purchased; and consequently in all cases the demand for foreign and home commodities together, as far as regards value, is limited by the revenue and capital of the country. If one increases, the other must diminish.<sup>116</sup>

Thus at the start of the twenty-first century comparative advantage is hardly received wisdom any more.<sup>117</sup> It, like laissez-faire capitalism, has been roundly criticized and often rejected by modern economic theory, which recognizes that “economists have used . . . the term comparative advantage in different and often incompatible ways.”<sup>118</sup> Nevertheless, globalization embraces comparative advantage as a kind of gospel – in many ways similar to the way the Rule of Law is embraced by Western legal systems, despite its observed failures.<sup>119</sup>

As the Rule of Law is a pillar of domestic legal regimes (being the underlying justificatory source of legitimacy), Ricardo’s comparative advantage is the mainstay of globalization. And, deriving from the same economic base (that of capitalism), they share parallel trajectories. Thus, as contract law, via the Rule of Law, forbids state interference in the agreements of individuals, comparative advantage forbids state interference in international trade. Both are supported by utilitarian philosophies grounded, ultimately, in a mystical faith in an invisible hand<sup>120</sup> that always, or at least on the whole, does good. It is not called the dismal science for nothing, of course.

The old doctrine of free trade was based on David Ricardo’s nineteenth century theory of comparative advantage, whereby countries produced what they were best at producing, and by trading with others they were

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<sup>116</sup> RICARDO, *supra* note 4, at 148-49.

<sup>117</sup> See Simser, *supra* note 105, at 41-43.

<sup>118</sup> ANDREA MANESCHI, COMPARATIVE ADVANTAGE IN INTERNATIONAL TRADE 9 (1998).

<sup>119</sup> Far too many critics embrace a suffocating conventionality and treat the problem of globalization as one of mere implementation instead of a question of misplaced first principles. “Free trade creates wealth among nations. This proposition has been well established since at least the beginning of the nineteenth century, when David Ricardo first articulated the theory of comparative advantage,” commence Professors John O. McGinnis and Mark L. Movsesian, in *The World Trade Constitution*, 114 HARV. L. REV. 511, 521 (2000). They then suggest fine-tuning the WTO to avoid its capture and manipulation by special interests. *Id.* at 602-04. The utility of this kind of literature, understanding the WTO only from the conventional paradigm, is unpromising. While not descending to the level of the chest-thumping boosterism seen in the Tiefenbrun school of “GATT is Great,” see Tiefenbrun, *supra* note 11, it lamentably fails to appreciate that the WTO, while subject to the “covert protectionism” of certain nations not privy to dominant power alignments, is itself little more than protectionism dressed up in more acceptable attire. Apparently believing that the real danger of the WTO is its vulnerability to “protectionist interest groups,” it utterly fails to understand that the true nature of the WTO and globalization generally is nothing more than a dominant interest group set on feathering its own coffer. It is this myopic view, distorted by its own misconceptions, that serves as a barrier to understanding the nature of Third World claims of WTO oppression.

<sup>120</sup> “[Free trade theory] was closely linked to and based on the article of faith that the market’s and Adam Smith’s ‘hidden hand’ knew best.” McDONALD, *supra* note 113, at 18.

better off than if all countries sought to produce everything they needed. . . .

The main consequence of the theory was that it created a justification for free trade.<sup>121</sup>

Because, however, the “law” of comparative advantage is an integral part of economic liberalism, arguing that entrepreneurs should be free from government interference, comparative advantage is not a scientific rule but, instead, a rationalization designed to support a political goal. In other words, just as Ricardo formulated his law of comparative advantage to defeat the Corn Laws, the law does not “prove” the validity of free trade so much as to simply assert or circularly justify it. Under the theory of free trade (which is nothing but the flip side of comparative advantage), government intervention should be limited to instances of “market failure,” if that. Thus, GATT and WTO generally forbid all interventions except at specified exceptional moments. On the other hand, it should come as no surprise that intellectual property is characterized as the only conceivable remedy for the massive market failure purportedly caused by the so-called public goods problem and is not only authorized, but mandated on a global scale,<sup>122</sup> even though, of course, public goods become a problem and a sign of market “failure” only once one has already adopted the model of free trade.<sup>123</sup>

One of the basic political characteristics of the “law” of comparative advantage is that, as is true of all liberal economics, it concerns itself solely with increasing wealth as Wallerstein has noted,<sup>124</sup> and ignores any question about the distribution of that wealth.

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<sup>121</sup> *Id.*

<sup>122</sup> “There is also the public goods problem, where the market cannot adequately give incentive . . . because there is the opportunity for the whole public to use it . . . i.e. to ‘free ride.’ This is a subject, of course, that is very close to intellectual property questions.” JACKSON, *supra* note 5, at 450.

<sup>123</sup> This may not be immediately obvious. The solution to public goods is some form of cooperative social action, so that the cost of public goods like armies, police, or public roads, is shared by all. This is a “failure” only once one has adopted a social theory in which cooperative activity is itself deemed a failure. In a society in which cooperative social activity is the model, rather than the exception, the fact that all contribute is hardly a failure and might even be considered a virtue. Dagan and Heller, in a recent article, while urging a middle road (their “liberal commons” solution) between the two alternatives of regulation or privatization, thus observe that any resolution of the so-called tragedy of the commons is, in the end, a political one. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 *YALE L.J.* 549, 560-68 (2001).

<sup>124</sup> Wallerstein noted, with a certain evident amazement, that capitalism is distinctive not by its search for profit or surplus value, but by the use of the surplus value for the creation of still more surplus value, and that the accretion of such surplus eventually enriches the few who accumulate it at the expense of all the others. “The structure of the market ensures that those who do not accumulate capital (but merely consume surplus value) lose out economically over time to those who do accumulate capital.” IMMANUEL WALLERSTEIN, *THE CAPITALIST WORLD-ECONOMY* 285 (1979). He also insisted, this time no doubt amazing his readers, that despite globalization’s claims that the rising tide would raise all boats, not only is that false, but that as globalization enriches the few, the rest will become even more impoverished – not in a relative, but in an absolute sense. “Surely you can’t be serious; surely you mean relative immiseration,” Wallerstein imagines his reader asking, and answers: “The overwhelming proportion . . . are worse off than their ancestors five hundred years ago.” IMMANUEL WALLERSTEIN, *HISTORICAL CAPITALISM WITH CAPITALIST CIVILIZATION* 101 (1983).

Liberal economic theorists, particularly Adam Smith and David Ricardo, sought to demonstrate that free markets, unfettered by state regulation, would result in the greatest prosperity for all.

Liberal economics has thus been concerned more with the production of new wealth than with the distribution of existing wealth.<sup>125</sup>

Thus, even if comparative advantage were an objectively verifiable rule with predictive value, it could do no more than make some people or nations richer. Being non-distributive, comparative advantage would be valid, or at least consistent with its assumptions, even if it made rich countries richer while further impoverishing the Third World.<sup>126</sup> Comparative advantage is thus a political theory, not a scientific or economic one. It is fundamentally a political strategy reflecting a choice for minimal government,<sup>127</sup> a choice that is more legitimately made not by economists but by a polity. Just as the Rule of Law defers decisions to a non-democratic institution – the judiciary – the law of comparative advantage defers decisions to non-democratic trading blocs like the WTO.<sup>128</sup> Since Ricardo's theory is not the result of observation of data but is, instead, a purely theoretical exercise, its blind faith in the market is more fictional than factual.

Lawyers are so accustomed to legal fictions that they tend to accept them as a necessary basis of argument which, in the end, tend to factor out since they represent, at one level or another, shared understandings of common values nec-

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<sup>125</sup> Kenneth J. Vandeveld, *The Political Economy of a Bilateral Investment Treaty*, 92 AM. J. INT'L. L. 621, 623 (1998) (citations omitted). "Comparative advantage is measured in terms of the costs of production, with an indifference to how those costs are constituted. If a country can produce cheaper goods by using slave labor, the theory of comparative advantage simply tells us that free trade with a country that permits slave labor will be beneficial to both." Clyde Summers, *The Battle in Seattle: Free Trade, Labor Rights, and Societal Values*, 22 U. PA. J. INT'L ECON. L. 61, 86 (2001).

<sup>126</sup> See WALLERSTEIN, *THE CAPITALIST WORLD ECONOMY*, *supra* note 124, at 288. Wallerstein claims that globalization has visited greater absolute, not relative, poverty (or, as he terms it, "immiseration") upon the Third World. *Id.*

<sup>127</sup> "Economic liberals, however, do not in all cases favor foreign investment. State action to promote the establishment of foreign investment in a sector of the economy in which the state does not enjoy a comparative advantage, for example, is antithetical to liberal principles. The liberal doctrine in essence is that the state should permit the market to determine the direction of international investment flows." Vandeveld, *supra* note 125, at 624.

<sup>128</sup> "Global corporate accountability based on democratic values may be the fundamental element missing in the new global world order." Gary Minda, *Globalization of Culture*, 71 U. COLO. L. REV. 589, 632 (2000) (book review). Trubek et al. recount the history of the "democracy deficit" endemic to NAFTA and globalization generally. Trubek et al., *supra* note 39, at 472. Even the Director General of WTO has been unable to ignore the problem. "Some very heavy lifting and thinking is required that goes beyond the traditional banner slogans, car stickers, television sound bites and radio grabs. Healthy, democratic and accountable international agencies are now as important as democracy at home." Mike Moore, *In Praise of the Future*, Address to the International Union of Socialist Youth Festival (Malmo, Sweden July 26, 2000), available at [http://www.wto.org/english/news\\_e/spmm\\_e/spmm33\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm33_e.htm). "My study of international relations theory as a key to the jurisprudence of international trade reveals that free trade theory and the doctrine of comparative advantage are likely to loom large in the future development of the WTO system. In the absence of meaningful political institutions to complement the powerful new adjudicatory system of the WTO, therefore, the new mechanism may easily evolve into a forum that lacks democratic legitimacy and, ultimately, effectiveness." Shell, *supra* note 81, at 925-26.

essary to operate a legal system.<sup>129</sup> But economic fictions are something quite different, since they are completely hypothetical abstractions necessary not to operate any actual enterprise, but necessary only to justify the theory being advanced, and other theories building upon them. As Lon Fuller observed, “the purpose of any fiction is to reconcile a specific result with some premise or postulate.”<sup>130</sup> Comparative advantage is just such a theory resting upon another theory resting upon what is essentially an ontological vacuum.<sup>131</sup> For instance, comparative advantage relies more than anything upon the notion that one country can produce a good more cheaply than some other country. “The problem with this view is that, in the absence of trade impediments or transport costs, trade tends to equalize commodity prices in different countries.”<sup>132</sup> Without this bedrock assumption of different pricing, however, all argument about comparative advantage must come to a grinding halt. To maintain the theory in the face of such inconsistent experience, economists simply ignore reality and proceed to deal with “a fictitious state of the world in which countries are isolated from each other, or self-sufficient, or in a state of *autarky*.”<sup>133</sup> As Fuller observed, “the fiction is the cement that is always at hand to plaster together the weak spots in our intellectual structure.”<sup>134</sup> The autarkic state, however, is not an exceptional one, and not even a temporary suspension of disbelief, but a permanent postulate. Comparative advantage depends on the supposition of autarky, and it is a rare economic text which does not often refer to this state of autarky when the theory is jeopardized.<sup>135</sup>

But comparative advantage starts with even more handicaps. Ricardo premises comparative advantage on the so-called law of diminishing returns by which increasing productivity and concomitant population growth invariably leads to increasing prices due to the cultivation of increasingly unproductive land. (Ricardo’s entire theory was based on a substantially agricultural model,

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<sup>129</sup> LON FULLER, *LEGAL FICTIONS* 50 (1967).

<sup>130</sup> *Id.* at 51.

<sup>131</sup> This may not be immediately apparent. Comparative advantage theorizes that each country will profit in some relative sense. That profit depends upon a presumption that the market acts rationally, a presumption supported by the fiction of economic man. It cannot, however, demonstrate the theory is valid unless it posits a hypothetical which cannot ever exist (the autarkic state). This is almost exactly the situation Fuller described with respect to various rules that depend upon the presumption that everyone knows the law for their justification, even though in such cases that presumption is never expressly raised. “[T]he only recognition that the assumed principle finds is in the very fiction by which it is evaded!” *Id.* at 53, n.11.

<sup>132</sup> MANESCHI, *supra* note 118, at 133.

<sup>133</sup> MANESCHI, *supra* note 118, at 133 (emphasis in original).

<sup>134</sup> FULLER, *supra* note 129, at 52.

<sup>135</sup> There is a reason autarky is such an important concept to economists; its implications are the foundation upon which the entire theory rests. For instance, one scholar recognizes: “The law of comparative advantage is one of the most fundamental and widely accepted findings in the area of international trade economics,” and immediately adds this footnote: “Testing the theory empirically would require an analysis of relative prices under autarky, which are not available for countries engaged in international trade.” Stephen P. Sorensen, *Open Regionalism or Old-Fashioned Protectionism? A Look at the Performance of Mercosur’s Auto Industry*, 30 U. MIAMI INTER-AM. L. REV. 371, 379 (1999).

using corn as its basis of value and exchange – as well as its product).<sup>136</sup> Globalization, however, relies primarily upon high technology which is probably the best model for the law of increasing returns by which the marginal costs of production progressively decrease as productivity increases. Although Ricardo's theory has been modernized by later economists in an attempt to rescue it from obsolescence, the theory as it was originally propounded, and by which free trade has become legitimated, assumes a kind of low-tech modernity,<sup>137</sup> not the high tech one in which we live. Nevertheless, it is clear that Ricardo saw technology as a source of comparative advantage: "If, by the introduction of cheap foreign goods, I can save 20 per cent from my expenditure, the effect will be precisely the same as if machinery had lowered the expense of their production, but profits would not be raised."<sup>138</sup>

What Ricardo does not seem to have anticipated, however, as we will discuss later in this article, is that technology would become immobile, due to the theretofore unforeseen creation of extraterritorial intellectual property ("IP") laws, under what is called TRIPS.<sup>139</sup> During Ricardo's time and for many years before and after, foreign technology could be liberally imported, free of foreign patent claims. "British legal interpretation under the Statute of Monopolies had authorized patents of importation for almost one hundred years at the time the [United States] Constitution was drafted."<sup>140</sup>

Equally importantly, however, Ricardo admitted that comparative advantage works only when both labor and capital have no substantial mobility. "The

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<sup>136</sup> RICARDO, *supra* note 4, at 57-63. By using corn as his example, Ricardo also introduces a potentially fatal confusion because his measure of price is not only the very good produced but is also an inefficient means of savings.

<sup>137</sup> "The traditional view is that productivity at any given level of technology depends on the endowments of land, labor and capital. Because technology was assumed to be a constant, it was not treated as a factor of production. Modern economics, however, treats technology as a variable determining productivity, whether classified as a factor of production or not." Vandevelde, *supra* note 125, at 640 n.33. See PETER B. KENEN, *THE INTERNATIONAL ECONOMY* (3d ed. 1994).

<sup>138</sup> RICARDO, *supra* note 4, at 150.

<sup>139</sup> AGREEMENT ON TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS, ANNEX IC OF THE FINAL ACT OF THE 1986-1994 URUGUAY ROUND, available in Legal Texts – The WTO Agreements (visited Apr. 9, 2001) [http://www.wto.org/wto/english/docs\\_e/legal\\_e/final\\_e.htm](http://www.wto.org/wto/english/docs_e/legal_e/final_e.htm) (hereinafter "TRIPS"). In Ricardo's day, and in ours as well until about ten years ago, patent protection was exclusively intraterritorial. See, e.g., *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972). *Deepsouth* was substantially reversed statutorily in 1984. Patent Law Amendments Act of 1984, 35 U.S.C. § 271(f)(1-2) (1984). The notion that technology would be immobile was not only unknown, but also counter-intuitive because not only could patent law not prevent the introduction of technology, but, in fact, patents were the tool by which technology was imported into a country via the "importation patent," whereby a foreign technology could be coaxed into a country through the offer of exclusive rights to the technology. "The first [US] patent statutes were ambiguous in their wording and did not expressly preclude patents of importation which both France and Great Britain routinely granted." Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 J. MARSHALL L. REV. 269, 314 n.26 (1995). Hamilton thought importation patents "the most efficacious means of supporting manufactures through the transfer of foreign technology to the United States." Edward C. Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, 13 HARV. J.L. & TECH. 87, 109-110 (1999). Thus, TRIPS actually imposes the very opposite of that which Ricardo's theory, upon which TRIPS is premised, presupposes.

<sup>140</sup> Walterscheid, *Conforming the General Welfare Clause and the Intellectual Property Clause*, *supra* note 139, at 127 n.58 (1999).

difference . . . between a single country and many, is easily accounted for, by considering the difficulty with which capital moves from one country to another, to seek a more profitable employment, and the activity with which it invariably passes from one province to another in the same country."<sup>141</sup>

Economists generally agree that a major flaw in the application of Ricardo's law to modern globalization is that his law was based on national limits to both labor and capital mobility.

A primary objection to the doctrine of comparative advantage is that Ricardo certainly would have had in mind a world in which capital remained within national boundaries, rather than the current transglobal free flow of capital, guided only by considerations of greatest short-term profit. If serious flaws are established concerning the old doctrine of comparative advantage, at least policy makers, international lawyers and multinational corporations would be obliged to develop a more cogent explanation for pursuing an ever-increasing level of international trade.<sup>142</sup>

Comparative advantage only works in Ricardo's example because, as he expressly posits it, labor cannot move to Portugal as easily as it can move to Yorkshire, and capital is unacceptably expensive and risky when transferred to foreign lands where it cannot be watched and managed.<sup>143</sup>

But economists have long recognized that comparative advantage does not work – in the sense that it does not accurately describe – and certainly does not predict – how free trade actually operates. Comparative advantage is at best only interstitially valid and is replete with inconsistencies.<sup>144</sup> Many economists admit that comparative advantage is entirely arbitrary and is, instead of an economic law, merely a political choice or preference. “[C]omparative advantage is now . . . considered to be arbitrary and a product of corporate and state policies. As the concept of comparative advantage has lost status, the argument for free trade has necessarily lost some of its efficacy and has become less relevant. . . .”<sup>145</sup>

If that is so, of course, there is no need to fashion international trade relations according to its claims unless those claims are dictated by some other economic rule or perhaps only naked interest, such as simple profit. To the extent, that is, that the First World will profit and the Third will lose by imposing international structures parroting Ricardoesque economics, they will surely do so, and have done so with WTO. And it seems the Third World submits not only because of the simply overpowering economic might of the First, but also because of the influence of the law of comparative advantage in legitimating the mechanisms of globalization.

<sup>141</sup> RICARDO, *supra* note 4, at 154.

<sup>142</sup> Sara Dillon, *Trade and the Environment: A Challenge to the GATT/WTO Principle of “Ever-Freer” Trade*, 11 ST. JOHN'S J. L. COMM. 351, 380-81 (1996).

<sup>143</sup> RICARDO, *supra* note 4, at 154-55.

<sup>144</sup> “[T]he doctrine of free trade has come in for a certain amount of scrutiny and doubt and the problems . . . have tended to shake people's faith in free trade. . . . [D]evelopments in economic theory and trade policy have done nothing to allay these uncertainties. . . .” MCDONALD, *supra* note 113, at 17.

<sup>145</sup> ROBERT GILPIN, *THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS* 173-74 (1987).

Thus Ricardo's theory seems largely inapplicable to globalization where transnational capital is definably trustworthy, while cross-border immigration (as well as, now under TRIPS, technology) is made illegal. Globalization, depending upon a theory which assumes immobile capital and labor (and mobile technology), has made capital exportable while labor remains shackled (and Third World economies endure technological extortion). "[T]he more open trading system . . . has been largely brought about by the deregulation of capital movements. . . ."<sup>146</sup>

Globalization, in other words, justified only by a theory which pretends to achieve social betterment while actually favoring that which is mobile – capital – and disfavoring that which is immobile – labor – effectively advantages capital over labor.<sup>147</sup> It has not escaped notice, therefore, that one of globalism's "difficulties is the freedom of capital to go where it pleases."<sup>148</sup>

### III. PARTICULAR FEATURES OF GLOBALIZATION AND THE WTO THAT, SUPPORTED BY COMPARATIVE ADVANTAGE, LEGITIMIZE THE GLOBAL REGIME

#### A. Introduction

GATT, and now its umbrella organization, the WTO (spawned paradoxically by its own structural subsidiary),<sup>149</sup> assert two principles are paramount: MFN and national treatment. Although GATT was created simply to reduce and perhaps eliminate the tariffs (something of an irony because, as we show later, at least some of the WTO is now a mere subterfuge for the imposition of a newly legitimized form of tariff known as the CVD, or countervailing duty) that many believed led to the World Wars through resulting "trade wars," GATT has now become the template for globalization. The twin principles of MFN and national treatment derive directly from the law of comparative advantage<sup>150</sup> which rests, essentially upon a non-interventionist state.

<sup>146</sup> MCDONALD, *supra* note 113, at 9.

<sup>147</sup> Lucy Williams, in a different but related context (the domestic effects of U.S. globalization via NAFTA) implies that globalization actually depends on this disparate treatment of capital and labor. She examines social welfare policy and low-wage labor in the United States, urging consideration of "the connection between these two fields and the areas of immigration (mobility of humans) and globalization (mobility of capital)." She asks, "can an effective poverty policy ever be based on a protectionist position?" The answer, of course, depends upon whether the policy belongs to a rich or a poor country. See Lucy A. Williams, *Cross-Border Reflections on Poverty: Lessons From the United States and Mexico*, 5 HYBRID 33, 46 (2000).

<sup>148</sup> MCDONALD, *supra* note 113, at 15.

<sup>149</sup> The story of how the WTO was produced by its subsidiary, GATT, is told in Patrick M. Moore, *The Decisions Bridging the GATT 1947 and the WTO Agreement*, 90 AM. J. INT'L L. 317 (1996).

<sup>150</sup> "[F]ree trade theory and the doctrine of comparative advantage are likely to loom large in the future development of the WTO system." Shell, *supra* note 81, at 925.

MFN is consistent with the theory of comparative advantage: by ensuring that all foreign producers are subject to equal tariffs, at least among foreign producers the market is left undistorted by tariffs. Most importantly, MFN is a rule of non-discrimination, and is thus thought to promote order and peace. As

Another economic type argument for MFN links the MFN policy to a more general policy of freeing trade from as much government interference as possible. Since MFN has the effect of generalizing specific trade liberalizing practices, it is argued that more liberalization overall is obtained when MFN prevails than when it does not.<sup>151</sup>

MFN prevents a state from seeking preferred partners – in the name of protecting the non-preferred from being injured. It is very much like, however, Anatole France's dictum that "the law, in its majestic equality, forbids the rich as well as the poor from sleeping under bridges, begging in the streets, and stealing bread."<sup>152</sup> For it is only the poor countries that might want preferential treatment. To protect them (just as *Lochner* "protected" workers from losing their right to work from dawn to dusk, seven days a week<sup>153</sup>), WTO and GATT forbid favorable treatment to any one country or group of countries. This is not to say there are no exceptions. But a system is best understood – or at least introduced – by its rules, not its exceptions. The law of comparative advantage, of course, insists that everyone will be better off, mutually profiting from their mutually comparative advantages, in a system undistorted by government interventions in the form of, for example, preferred trading blocs or subsidized industries or exports.

It is not surprising, therefore, that a recurring feature of applying comparative advantage to globalization is that globalization and the multinationals conveniently depart from Ricardo's theory the moment the advantage is not in the home court.<sup>154</sup> Globalization insists that comparative advantage free trade theory

a rule of non-discrimination, MFN complements national treatment. While national treatment compares the treatment of foreign and domestic, MFN compares the treatment of foreign and other foreign.

Joel P. Trachtman, *Trade in Financial Services under GATS, NAFTA and the EC: A Regulatory Jurisdiction Analysis*, 34 COLUM. J. TRANSNAT'L L. 37, 98 (1995). "The national treatment and MFN principles are designed to level the playing field among the contracting parties to GATT in order to liberalize international trade and increase the 'comparative advantage' of each individual country. . . ." Avi Gesser, *Canada's Environmental Choice Program: A Model for a "Trade-Friendly" Eco-Labeling Scheme*, 39 HARV. INT'L L.J. 501, 518 (1998).

<sup>151</sup> JACKSON, *supra* note 5, at 60.

<sup>152</sup> "Ils y doivent travailler devant la majestueuse égalité des lois, qui interdit au riche comme au pauvre de coucher sous les ponts, de mendier dans les rues et de voler du pain." ANATOLE FRANCE, *THE RED LILY (LE LYS ROUGE)* 106 (Calmann-Levy 1961) (1894).

<sup>153</sup> *Lochner v. New York*, 198 U.S. 45 (1905). See *supra*, notes 62 & 63 and accompanying text.

<sup>154</sup> We do not mean to imply in any way that the problem with globalization and its embrace of the law of comparative advantage is that it allows powerful parties to circumvent the law when it is convenient for them to do so. Our main argument is that comparative advantage inherently favors the powerful, so that they do not need to greedily seek even more favor. The point here, however, is that in fact such greed frequently finds its satisfaction. One of the many ways powerful countries dodge comparative advantage when it does not favor them, however rarely, is through the use of CVDs or anti-dumping duties prior to any decision by the WTO that they are justified. "A country does not need GATT permission to impose such a duty." David W. Leebron, *An Overview of the Uruguay Round Results*, 34 COLUM. J. TRANSNAT'L L. 11, 18 (1995). See Stephen L. Kass and Jean M. McCarroll, *Having It All: Trade, Development, Environmental and Human Rights*, 223 N.Y. L.J. 3 (May 5, 2000) (noting "continuing resentment by WTO members at U.S. insistence on preserving its 'antidumping' legislation as a unilateral trade sanction"). On the other hand, sometimes powerful nations find themselves apparently hoist on the petard of their own WTO commitments – such as the recent decision by a WTO dispute resolution panel that an entire section of U.S.

apply to all national resources including, of course, those advantages in which the multinationals share: high technology production, computer program authorship, and intellectual property generally. When a country, however, enjoys a comparative advantage in something the First World does not – like cheap labor – the system becomes less free, or excuses<sup>155</sup> are raised that nevertheless exclude, in the end, the advantage of the undeveloped countries. Although it is difficult to imagine any First World country adopting free trade in labor (that is, open borders to labor), it seems clear that to the extent they do not, they are cheating in the most profoundly fundamental way. That is, the First World is happy to take the Third's capital, in the form of investments that appear crucial to the present stability of Western stock exchanges,<sup>156</sup> but it is wary of the Third World's labor, which is excluded by restrictive immigration policies (unless, of course, the immigrants are Cuban and their emigration can help sap the strength of one of the few remaining purportedly socialist nations<sup>157</sup>).

Globalization often promotes and advocates legal harmonization, a benign-sounding concept that, in reality, robs nations of the ability to choose legal regimes appropriate to their level of economic development. Harmonization is not, as one might naively suppose, the search for the most melodic or beautiful legal rules, but the assertion of First World rules to dominate the Second and Third. It is "harmonized" much as George Carlin's baseball is domesticated.<sup>158</sup> In the words of one commentator, for the international business community to supplant the traditional Leftist term "internationalization" with the current (and *au courant*) term "globalization" is, after all, to control and master its evolution.

If this term, supplied by the United States, has known such success, to the detriment of the idea of internationalization, it is without doubt because the analyses are a bit behind the reality. To name an unknown

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Copyright law (17 U.S.C. § 110(b)) is a TRIPS breach. Note, however (*see infra* text accompanying nn. 235-237), that we find reason to speculate that this decision was not truly unwelcome by U.S. industry and is merely a particularly sophisticated example of the "bootstrap" strategy observed by Keith Aoki and others. *See supra*, note 231. *See* The Report of the Panel on United States – Section 110(5) of the U.S. Copyright Act, WT/DS160/R (WTO 15 June 2000), available in Dispute Settlement: List of Panel and Appellate Body Reports (visited Apr. 13, 2000) [http://www.wto.org/wto/english/tratop\\_e/dispu\\_e/distab\\_e.htm](http://www.wto.org/wto/english/tratop_e/dispu_e/distab_e.htm).

<sup>155</sup> "The demand from many rich countries for the inclusion of a 'social clause' relating to labour standards in the WTO is mostly driven by protectionism and not by altruism. If indeed altruism was the driving force, there are other and more efficient ways than trade sanctions for the rich countries to help poor workers, including liberal immigration policies." T.N. Srinivasan, *The Case for Openness*, in *GLOBALIZATION: THE UNITED NATIONS DEVELOPMENT DIALOGUE; FINANCE, TRADE, POVERTY, PEACE-BUILDING 148* (Isabelle Grunberg & Sarbuland Khan eds., 2000).

<sup>156</sup> FRIEDMAN, *supra* note 7, at 115-16.

<sup>157</sup> Cuban Refugee Adjustment Act of 1966, 8 U.S.C. § 1255 (1994); *see also* Cuban Democracy Act of 1992, 22 U.S.C.S. §§ 6001-6010 (1994 & Supp. 1999).

<sup>158</sup> Carlin contrasts the imagery and language of baseball with that of North American football, noting among other things, the combative labels applied to football plays (players wear helmets, ask what down it is, suffer penalties, endure two minute warnings, and engage in aerial attacks to penetrate the opponent's defensive line) with the more domesticated patina of the baseball tradition (players wear caps, ask who is up, commit errors, enjoy seventh-inning stretches, and sacrifice in order to come home). CARLIN ON CAMPUS (1984).

phenomenon, though indeed improperly, is that not already to control and master it somewhat?<sup>159</sup>

The use of benign labels, or what one commentator calls “the more neutral sounding” labels employed by globalization,<sup>160</sup> is part of the strategy of legitimation that is central to globalization.

Starting with the principles of MFN and national treatment, GATT derives various rules purportedly designed to implement the underlying principle of equality. Among the rules are those that prohibit subsidies – although not all subsidies are treated similarly<sup>161</sup> (in the world of GATT equality, in other words, not everything is treated equally). Thus, even the hallowed principle of MFN is not sacred. It should not be surprising, then, that aside from the two major features we examine here – subsidies and IP law – generally speaking globalization, the WTO, and GATT, are simply studded with exceptions<sup>162</sup> while at the same time strictly dictating free trade as an unbreakable rule. And, in TRIPS, GATT insists that all countries treat so-called intellectual property essentially the same. Finally, one of the major changes in GATT, as it emerged from its last negotiation (the Uruguay Round) and converted itself into a part of the new WTO, was that formerly preferential provisions favoring the developing and developed world were scrapped. Instead of permanent preferences, the Third World received temporary aid, in the form of transition periods<sup>163</sup> – a maximum of ten

<sup>159</sup> Boyer, *supra* note 88 (“Si ce terme, venu des Etats-Unis, a connu un tel succès, au détriment de la notion de mondialisation, c’est sans doute que les analyses sont en retard sur la réalité. Nommer un phénomène inconnu, voire improprement, n’est-ce pas déjà le maîtriser un peu?”).

<sup>160</sup> Keith Aoki, *The Stakes of Intellectual Property Law*, in *THE POLITICS OF LAW* 271 (David Kairys ed., 3d ed. 1998). This is a particular application of the use of legal fictions, in the sense that it conceals either ignorance or a hidden agenda, in this case the latter.

<sup>161</sup> What is worse, nobody knows whether subsidies are good or bad for global welfare, Ricardo’s law notwithstanding (of course, much of the point of this article is that nobody knows whether Ricardo’s law is good for global welfare). “If government subsidization merely enables industries more quickly to gain the economies of scale that allow them to continue to produce at considerably lower prices (and not necessarily to capture monopoly rents) perhaps the whole world benefits from such targeting.” JACKSON, *supra* note 5, at 92.

<sup>162</sup> “For example, the GATT obligation of nondiscrimination – the most-favored-nation (MFN) principle – has been eroded by expansive use (or abuse) of a series of exceptions in the GATT.” JACKSON, *supra* note 5, at 38.

In one key area, agriculture, on which much of the world depends for its export potential, GATT contained almost no disciplines to counter the increased use of subsidies and the tight constraints on market access maintained by large parts of the industrial world. In another sector, textiles and clothing, which is usually the staple export of developing countries seeking to advance towards more sophisticated and higher value-added manufactures, one vast exception permitted the main industrial-country markets to block access at will. The Multifibre Arrangement (“MFA”) had been in place one way or another for some twenty years as a “temporary” cushion for European and American companies to adjust to the competition from low-cost producers elsewhere. Not only had it survived, it had been steadily reinforced.

Peter D. Sutherland, *Concluding the Uruguay Round – Creating the New Architecture of Trade for the Global Economy*, 24 *FORDHAM INT’L L.J.* 15, 18-19 (2000).

<sup>163</sup> “Developing” and “least developed” countries, for instance, had between five and ten years in which to fully comply with the TRIPS provisions. TRIPS Arts. 65 and 66. One of the major obsta-

years – at the end of which they were to emerge as trading equals of the First World. How this was supposed to happen in so short time while being, at the same time, handicapped by various obstacles (in, for instance, textiles and agriculture<sup>164</sup> – the kind of primary goods the Third World might use in order to reach competitive status – as well as the very development-halting nature of TRIPS) is simply inexplicable.

As stated above, two features of GATT and WTO illustrate the massive, even fraudulent, tilt in favor of the First World while, at the same time, mouthing the comparative advantage platitudes that give the appearance, and misleadingly insist, that all members of GATT receive equal treatment. The first of these features is the categorization of subsidies into permissible and impermissible groups.<sup>165</sup> The second feature advantaging the First World is GATT's adoption of the TRIPS Accord. Ricardo's entire law of comparative advantage depends upon advantages being potentially available to all. Although Ricardo arguably allows for creating what he referred to as "artificial" advantages through legal means, in his day technology was not a product that could be exclusively appropriated through legal means, thereby permanently creating or increasing one's comparative advantage. TRIPS, however, defines technology as so-called "intellectual property." In Ricardo's day, any country could adopt technology to increase its productive capacity.<sup>166</sup> By sanctioning legal monopolies over technology, TRIPS

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cles to China's entry to the WTO was whether it could enjoy the transition period offered to developing countries. "The United States does not want to give China an economic advantage by allowing it to enter the WTO as a developing country. To do so would allow Chinese companies to conform to less rigorous standards than American companies in similar areas, making it far more difficult for American businesses to succeed in China." Jeremy Brooks Rosen, *China, Emerging Economies, and the World Trade Order*, 46 DUKE L.J. 1519, 1536-37 (1997).

<sup>164</sup> "In addition, a substantial number of high tariffs and non-tariff barriers will remain in place even after the full implementation of the Uruguay Round, especially in areas of particular importance to DCs such as agricultural trade, textiles and clothing, footwear, and leather goods." Friedl Weiss, *From World Trade Law to World Competition Law*, 23 FORDHAM INT'L L.J. 250, 269-70 (2000). Admittedly, those high barriers are lower than they might have been had not the less-developed countries "compromised," by agreeing to inclusion of the TRIPS provisions but that was not a choice that even Hobson could have swallowed. In exchange for more preferential treatment on Old Economy goods – but still not equal, because the barriers remain high – whose value is fast disappearing, the less-developed countries accepted a new form of barriers on what has become the basis of the global New Economy. "Although many non-industrialized nations initially objected to the inclusion of IPRs as part of the comprehensive trade accord, they eventually accepted TRIPs in exchange for 'a global package deal' that included greater access to industrialized markets and new treaties on trade in agriculture and textiles." Laurence R. Helfer, *Adjudicating Copyright Claims Under the TRIPs Agreement: The Case for a European Human Rights Analogy*, 39 HARV. INT'L L.J. 357, 377 (1998).

<sup>165</sup> Actually, there are three, not two, groups, consisting of permissible, impermissible, and arguable subsidies. All that matters, however, is, first, that there are some subsidies which pass muster and others that do not and, second, that, so constructed, only the First World can afford to engage in the permissible subsidies. The important feature of so discriminatorily-constructed subsidies is that through them a country can manage to maintain and even increase its so-called comparative advantage.

<sup>166</sup> In fact, the earliest, so-called "importation" patents explicitly authorized the appropriation of foreign technology and were considered the means by which technological innovation was legitimately encouraged. Even our present patent law continues, if only vestigially, the distinction between domestic inventions which are patentable only if they are novel, and foreign inventions

has ensured that advantaged countries can exclude the Third World from the technology essential to develop their own advantages. Thus the circle is completed. As we show later, the incorporation of TRIPS into the WTO enlists Ricardo's theory into a strategy at odds with comparative advantage.

Parenthetically, a third feature, or perhaps an underlying common theme, is that while comparative advantage maintains that each country can profit by exploiting those advantages, it does so based on national barriers to both capital and labor. GATT encourages the free flow of capital – especially in its new emphasis on barrier-free services – while remaining silent or, alternatively, highly selective about obstacles to labor mobility.<sup>167</sup> To the extent some countries might have an advantage in labor while others have an advantage in capital, it all might even out because each country might be able to exploit such advantages. However, under WTO and GATT, barriers to capital have been abolished (or substantially minimized) while barriers to labor have not. Thus, rich countries can exploit poor countries' labor pools, but poor countries cannot exploit rich countries' capital pools,<sup>168</sup> because their workers are unable to travel freely to rich countries for employment. Further, and most importantly, Third World countries lose the capital necessary to exploit their own advantages when investments flow to more secure and profitable First World stock markets, real estate, and businesses.<sup>169</sup> Thus the Third World has become a source of cheap labor while the First World has secured its own capital.

## B. Subsidies

The subsidy scheme of GATT is, in its outlines, not difficult. Some subsidies, the “red light” sort, are prohibited; some, the “yellow light,” are, though undesirable, permitted, but they render the host country vulnerable to retaliatory countervailing duties (CVDs) by others; and some, the “green light,” are allowed. This very terminology was designed to promote an impression of intelligible simplicity, as well as a sort of metaphorical and familiar orderliness. The image of the traffic light supports the “red-light, yellow-light, green-light” system that GATT adopted. Stupefyingly childish, perhaps, in its over-simplicity, it conceals far more indirect and calculating attempts to prevent state intervention in the

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which can be patented with less regard to novelty. 35 U.S.C. § 102(a) (1994). See Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 J. MARSHALL L. REV. 269, 277-78 (1995).

<sup>167</sup> Thus, even where “free trade” in labor is adopted, it is expressly designed only to increase the comparative advantage already possessed by the developed countries, and decrease (via, for instance, the classic “brain drain” phenomenon) of the less developed. See Don Devoretz, *People Aspects of Technological Change: Immigration Issues, Labor Mobility, The Brain Drain, and R & D – A Canadian Perspective*, 25 CAN.-U.S. L.J. 67 (1999); William J. Benos, *The Movement of Professionals, Technicians, and Other Workers Across NAFTA Borders*, 8 U.S. MEXICO L.J. 25 (2000).

<sup>168</sup> “There is also no doubt that firms in developed countries export capital in increasing quantities . . .” MCDONALD, *supra* note 113, at 14.

<sup>169</sup> “Governments – be they led by Democrats or Republicans, Conservatives or Labourites, Gaullists or Socialists, Christian Democrats or Social Democrats – that deviate too far from the core rules will see their investors stampede away, interest rates rise and stock market valuations fall.” FRIEDMAN, *supra* note 7, at 106.

economies of the contracting states. For instance, though it is often agreed that countervailing duties – essentially tariffs – erected by importing countries (to supposedly “protect” them from subsidized exports from more interventionist countries) are economically harmful, globalization allows, if not encourages, this remedy to combat the use of subsidies.<sup>170</sup>

Red-light subsidies are export subsidies, and are absolutely prohibited, so in theory they do not raise the issue of CVDs.<sup>171</sup> Subsidies are of the permissible green-light variety if they are intended to support research (but only where an industrial or educational partner can support at least 25% of the costs, or 50% if it is non-industrial, “pre-competitive”), environmental goals, or limited regional development, applied strictly along geographic and demographic lines. All other subsidies are at least yellow-light and are actionable – meaning that although GATT exists to prohibit tariffs, a country facing another’s subsidized exports can retaliate by imposing tariffs, that is, CVDs can be imposed – if the importing country can show actual harm. The fact is that advanced countries routinely engage in subsidization of basic research and development, while, at the same time of course, this subsidization is far out of reach of developing countries.<sup>172</sup>

At the outset it should be noted that there is not even full agreement on the economic nature, nor the desirability or undesirability, of subsidies. To the extent that an export subsidy seems to distort the “free” market, such subsidies seem opposed to the principles underlying WTO and GATT. But that is a tautological claim, raising the very definition of a free market, because whether the freedom to subsidize is part of a free market is a question that is up for grabs.

Even trade that is unfair in the sense of dumping or subsidization is simply considered as a bonus to the consuming country and a negative action on the part of the exporting country. This approach is . . . close to the purest form of comparative advantage theory described [as “free trade at all costs”].<sup>173</sup>

While phrased in terms and images which are easily understandable and implicitly simple, the real impact of the traffic light system is, perhaps as a result, unsurprisingly veiled and cunning. If one remembers that GATT was created in order to do one thing, reduce tariffs, its present treatment of subsidies becomes almost comical. GATT’s treatment of subsidies is central to the understanding of how the law of comparative advantage actually discriminates against the powerless under the banner of equal treatment. In order to understand them however, it is also necessary to understand that GATT’s treatment of subsidies is wedded to its treatment of CVDs, because a CVD, technically an otherwise prohibited tariff,

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<sup>170</sup> “Subsidies generally are some of the most perplexing and complex of the trade policies. This . . . article deals . . . with the countervailing duty, which many economists dislike. Here the argument is made that the countervailing duties may have a constructive effect . . . to inhibit . . . subsidies....” JACKSON, *supra* note 5, at 56.

<sup>171</sup> See William K. Wilcox, *GATT-Based Protectionism and the Definition of a Subsidy*, 16 B.U. INT’L L.J. 129, 151-55 (1998).

<sup>172</sup> McDONALD, *supra* note 113, at 29. “These policies have always existed, even in the United States (NASA, DARPA and so on. . . .)” *Id.* at 31.

<sup>173</sup> McDONALD, *supra* note 113, at 23.

is allowed in response to all but so-called “green-light” subsidies. Thus, in a way, GATTs treatment of subsidies, under the banner of the law of comparative advantage and equality, can be viewed less as a limit on subsidies than as a license for CVDs, or a license to scrap the law of comparative advantage through the legalization of supposedly outlawed tariffs (CVDs, a form of tariff). The present traffic light rules, purportedly dictated by the principle of free trade, work a massive discrimination against the developing and least-developed world, and are a significant violation of the principles of WTO and GATT, just as the Rule of Law is so often honored only in its breach.<sup>174</sup>

This is because, except for the relatively cheap but prohibited red-light variety, only the First World can afford to operate the permissible green-light subsidies and it turns out that the permitted green-light variety are those that require the wealthy infrastructure possessed by First World countries. “With some exceptions, subsidies in developing countries tended not to be as large and their use as a tool of industrial policy was far less than in developed countries if only because they could afford them less.”<sup>175</sup>

It takes an economy rich with surplus government funds and wealthy private institutions such as profitable industry to subsidize the kind of non-competitive research (the only kind permitted) and find private partners (required for green-light status) flush enough to devote funds to activities that do not promise immediate returns. Although the First World, through GATT, forbids the Third World from protectionism, it is a sobering historical fact that “[m]ost Western economies grew to maturity behind a series of protectionist measures such as tariffs.”<sup>176</sup> Even today it is unsurprising, surely, to learn that “only large countries are able to use countervailing duties to create such an impact. Small countries will generally be unable to use countervailing duties to change foreign governmental activity. Thus, there is an important asymmetry. . . .”<sup>177</sup>

But under GATT, the developing and least-developed countries are not allowed the only protectionist measures they can afford – export subsidies – while the First World is licensed, under the doctrine of CVDs, to erect the tariffs GATT

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<sup>174</sup> The entire process of common law reconciliation involving the techniques of distinguishing and harmonizing otherwise inconsistent cases results from the fact that the Rule of Law does not truly dictate results. When legal theory collides with economic reality, principle yields to the expedience the Rule of Law theoretically forbids. Thus, the adoption of the objective reasonable person standard in *Menlove* was necessitated by the forces of industrialization, even though in theory liability had been premised on some notion of personal fault. Similarly, when the legal theory of freedom of contract captured by *Lochner* collided with the unacceptable social reality of massive inequalities, principle yielded to expediency. Trying to minimize, but nevertheless recognizing the damage (admitting, “the Court lost something”), the Court has since called this, in language bordering on the nonsensical, one of the cases “that have responded to national controversies and taken on the impress of the controversies addressed.” Their fault, said the Court, was that they “rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 861-862 (1992).

<sup>175</sup> MCDONALD, *supra* note 113, at 20.

<sup>176</sup> MCDONALD, *supra* note 113, at 53.

<sup>177</sup> JACKSON, *supra* note 5, at 91. “In fact, the WTO entrenches an asymmetrical, non-reciprocal trading system that benefits multi-national corporations (‘MNCs’) especially.” William A. Lovett, *The WTO: A Train Wreck in Progress?*, 24 *FORDHAM INT’L L.J.* 410, 411 (2000).

(and, sadly, Ricardo's theory) was intended to dismantle! One is tempted to imagine poor Ricardo crying out from the grave.

In a world divided economically between rich and poor and nevertheless tending towards regional cooperation, the principle of non-discrimination has become very difficult. The principle of nondiscrimination (embracing both MFN and national treatment as derivatives of the law of comparative advantage)<sup>178</sup> has become impracticable and almost impassable as a tool to be used in favor of each member state and not in favor of the most powerful. To be equitable, the abolition of all forms of protectionism requires relatively equal economic development. As an indirect way of discouraging subsidies, GATT allows for tariffs in the form of countervailing duties – that is, instead of the WTO directly sanctioning the subsidy, the same result is accomplished by allowing contracting states to engage in what is essentially a tariff – the one thing against which GATT was originally conceived to eliminate.

### C. TRIPS and Intellectual Property

Some of the most fundamental tenets of comparative advantage are at absolute odds with the way GATT, especially its intellectual property component, TRIPS, treats technology and innovation. Most profoundly of all – we cannot stress this enough – the unimagined idea that a technological advance in England would not be freely available in Portugal, for instance, is utterly inconsistent with Ricardo's theory. In that way TRIPS is fundamentally at odds with any intellectually honest version of comparative advantage. Under comparative advantage, very often technology is “assumed to be everywhere the same. . . .”<sup>179</sup> While the state of available technology may not be the same in all geographical areas, comparative advantage demands that access to technology be equal, because if that is not so the underlying principle of equality is fatally tilted. It is not surprising, then, that Ricardo recognized that technological discoveries could effect “reversals of comparative advantage,” as if England were “to discover a process for making wine, so that it should become her interest rather to grow it than import it.”<sup>180</sup> Attempts to explain the relation between technology and comparative advantage are difficult since Ricardo said comparative advantage can be created artificially apparently meaning in part, at least, social or technological conditions. And his theory certainly never contemplated the very notion of international IP rules that embrace, for instance, foreign patents with only the most limited ability to require their domestic working.<sup>181</sup> But modern artificial conditions, especially technological ones, are largely due to economies of scale. Economies of scale give some countries, especially first-comers, advantages which may be inconsistent with what Ricardo and his followers seem to presume are some sort of natu-

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<sup>178</sup> This most fundamental principle is also presented more simply as the Golden Rule, “to do unto others as you would have them do unto you.” Its two key components easily become: most favored nation status and national treatment. See ESTY, *supra* note 98, at 245.

<sup>179</sup> MANESCHI, *supra* note 118, at 23.

<sup>180</sup> RICARDO, *supra* note 4, at 156.

<sup>181</sup> By this we refer to the TRIPS provisions which eliminate the previously wide latitude countries enjoyed in requiring a foreign patent holder to either “work” the patent or suffer a compulsory license allowing a national to do so. TRIPS art. 31(a)-(l).

ral superiorities (natural in the minimal sense that they are not the product of tariffs or perhaps even subsidies). And economies of scale are

inconsistent with comparative advantage, since a country's production costs can be lower simply because it was the first to start producing a commodity. Its acquired expertise allows it to become the low-cost world producer even though other countries, with an earlier start, could have had lower production costs. Learning by doing may allow such countries to realize their potential comparative advantage in a line of production for which they are *suited*.<sup>182</sup>

Note, however, that intellectual property, if it does anything, gives an advantage not to those who are "suited" to a particular activity but merely to those who are first (unless one believes that a first-comer is by definition better-suited than competitors, an assertion inconsistent with claims of historians of science<sup>183</sup>); furthermore and most importantly, one may be first only because of the availability of capital – and this, of course, is supposed to, at minimum, be determined by national boundaries if comparative advantage is to work, not infinitely flexible as is true of the present system of global capital mobility. To the extent that wealth can accelerate – or subsidize in a deep cultural sense – technological innovation – and nobody denies the truth of this – then TRIPS, to the extent it forecloses Third World countries from free access, perpetuates the present disparity between the First and Third Worlds.<sup>184</sup> While TRIPS has adopted patents and copyrights under the banner of free trade and comparative advantage, it is no slight thing to understand how deeply inconsistent such IP monopolies are with their underlying international justification. This is not, then, merely a legal fic-

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<sup>182</sup> MANESCHI, *supra* note 118, at 24 (emphasis supplied). The notion that some peoples may be "suited" to some industries while others are "suited" to others is, obviously, the very bedrock of both comparative advantage and neo-colonial racism.

<sup>183</sup> See William F. Ogburn & Dorothy Thomas, *Are Inventions Inevitable? A Note on Social Evolution*, 37 POL. SCI. Q. 83 (1922), in which the authors list 148 inventions that were made by two or more persons almost simultaneously. They conclude "it is thought that the evidence presented of independent duplicate origins of inventions brings out forcibly the importance of the cultural factor in the production of inventions." *Id.* at 92. See also JAMES BURKE, CONNECTIONS (1978), which demonstrates that it is the material conditions of a society which lead to new technical innovations. Far from demonstrating greater competence or merit, first-comers who obtain patent rights by their celerity may use resulting patents simply to block others from competing. FREDERIC M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 451-52 (2d ed. 1980).

<sup>184</sup> "To many developing countries, an intellectual property protection mechanism translates into a blockade of the transfer of technology and an impediment to economic development." Evelyn Su, *The Winners and the Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries*, 23 Hous. J. INT'L L. 169, 205 (2000). There is a convincing body of literature that demonstrates that future technological development is a product of existing technological development, and not a product of legal doctrines like patent law that claim to spur innovation. See for instance, Mariko Sakakibara & Lee Branstetter, *Do Stronger Patents Induce More Innovation? Evidence from the 1988 Japanese Patent Law Reforms*, RAND J. ECON., Spring 2001, at 77, which found no relationship between greater patent protection and innovation; and James Bessen & Eric Maskin, *Sequential Innovation, Patents, and Imitation* (MIT Dept. of Economics, Working Paper No. 00-01, 2000), which observed that there seemed to be greater innovation in computer programs in the period before intellectual property protection was assured than after.

tion, but a legal fiction built upon a legal contradiction,<sup>185</sup> and since Ricardo did not intend that comparative advantage be a product of different legal regimes (in fact his program was aimed at leveling legal regimes at least insofar as they created barriers to trade), this is what Lon Fuller meant when he said that certain legal fictions

are often simplifactory falsifications of reality, exceedingly useful for some purposes, and highly dangerous when employed for ends not in the mind of the scientist who developed them. . . .

The fiction that man is an “economic animal” has great utility when one’s problem is to develop laws of economic behavior; taken as a foundation for ethics it would be disastrous.<sup>186</sup>

TRIPS also illustrates the poverty of Ricardoesque comparative advantages, to the extent they comprise to any extent the “artificial” conditions of which Ricardo wrote.<sup>187</sup> Tilted towards First World countries and their high-tech subsidies, but not towards the needs of the Third World like fair use,<sup>188</sup> export tariffs, and targeted subsidies, it is a trap for the Third World. Not only does the very essence of IP law pervert the basis of the legal regime of which it is a part, but as a strategic matter IP law assures that countries that are not yet at the level of producing IP products will never reach that point.<sup>189</sup> Thus, GATT and NAFTA assure perpetual domination, just as mercantilism and the British Empire assured that the “white man’s burden”<sup>190</sup> would be suffered, to their great profit, only by white men. Interestingly, while globalization is proceeding under the legitimating idealism of Ricardo’s law of comparative advantage, imperialism’s “burden”

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<sup>185</sup> The contradiction is this: WTO, through GATT, purports to prohibit various obstacles to free trade; patents and copyrights constitute exactly that obstacle. They are in one sense subsidies authorized by national patent offices, and, as such, express governmental interventions in the pricing of a product or service. In another sense they are tariffs, because they prohibit free trade in patented or copyrighted product especially as between nationals of countries none of which is the home country of the patent or copyright proprietor. Such nationals can only trade in the product by paying a bounty to the proprietor. In either sense, they are at least the kind of non-tariff barrier to whose elimination GATT is purportedly dedicated.

<sup>186</sup> FULLER, *supra* note 129, at 107.

<sup>187</sup> RICARDO, *supra* note 4, at 151.

<sup>188</sup> TRIPS provides expressly for fair use in trademark but not copyright. TRIPS Art. 17. Some commentators have urged a so far unrecognized fair use exception to patent law. Maureen A. O’Rourke, *Toward a Doctrine of Fair Use in Patent Law*, 100 COLUM. L. REV. 1177 (2000). Such a provision would be especially valuable to developing countries. However TRIPS makes this unlikely, in view of (1) its (circular) prohibition on anything that might interfere with the “normal exploitation” of intellectual property, TRIPS Art. 13, and (2) the application of that “normal exploitation” provision by a WTO panel to declare invalid a portion of U.S. copyright fair use. See The report of the Panel on United States – Section 110(5) of the US Copyright Act, WT/DS160/R (15 June 2000) World Trade Organization. Fears about the exercise of fair use by developing countries have been the source of serious publishing industry concern. Amy E. Simpson, *Copyright Law and Software Regulations in the People’s Republic of China: Have the Chinese Pirates Affected World Trade?*, 20 N.C.J. INT’L LAW & COM. REG. 575 (1995).

<sup>189</sup> See Fritz Machlup, *An Economic Review of the Patent System*, Study No. 15, Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 85th Cong. 2d Sess. 445 (1958).

<sup>190</sup> Rudyard Kipling, *The White Man’s Burden*, MCCLURE’S MAGAZINE, Feb. 1899, at 12.

similarly proceeded, not through naked claims of selfish interest but through the kind of legitimized “idealism” that Kipling’s famous poem implied.<sup>191</sup> “The reasons for . . . imperialist expansion are . . . complex. . . . But one aspect was the idealism of those who saw themselves as the custodians of a superior civilization....”<sup>192</sup>

Thus, the fact that, under TRIPS, all WTO members are now required to protect all fields of technology via patent law,<sup>193</sup> whether or not they have the infrastructure to compete within and afford the purchase of access to such areas of technology, directly violates the premise of the law of comparative advantage. For, under true comparative advantage, any country could freely exploit a technology that might provide it with such an advantage. That TRIPS similarly requires copyright protection for computer programs,<sup>194</sup> even though such a proposition was seriously disputed even in the United States until just a few years ago (and studies have shown that greater innovation – though not profits extracted from developing countries – was produced when there was no clear protection for such programs<sup>195</sup>), erects a similar trade barrier that is not within the premises of the law of comparative advantage. Similarly, and as only one more example,<sup>196</sup>

<sup>191</sup> See Steve Charnovitz, *Free Trade, Fair Trade, Green Trade: Defogging the Debate*, 27 CORNELL INT’L L.J. 459 (1994).

<sup>192</sup> Deepak Lal, *Trade Blocs and Multilateral Free Trade*, 31 J. COMMON MARKET STUD. 356 (1993). Indeed, Kipling’s poem exhorted Americans to “Fill full the mouth of Famine, and Bid the sickness cease,” in very much the same way the Tiefenbrun piece claims GATT was designed to serve undeveloped countries. See Tiefenbrun, *supra* note 11, at 262-63.

<sup>193</sup> “[P]atents shall be available for any inventions . . . in all fields of technology....” TRIPS Art. 27.

<sup>194</sup> TRIPS Art. 10.

<sup>195</sup> See Bessen & Maskin, *supra* note 184.

<sup>196</sup> To discuss all the other provisions of TRIPS which disadvantage less developed countries would demand an entirely separate article, but some of those other features include: first, the very notion that substantive intellectual property law may be dictated globally to nations of different levels of economic development (TRIPS art. 1, ¶ 1); the mandatory lifetime plus fifty year term for copyright protection (TRIPS art. 12), which is decades longer, on average, than was the law even in the United States less than thirty years ago; the vaguely worded and tautological blanket prohibition against “exceptions . . . which . . . conflict with a normal exploitation” of the patent or copyright (TRIPS arts. 13 & 30); the mandatory protection given to so-called “well-known” trademarks via Article 6bis of the Paris Convention (TRIPS art. 16 ¶ 2; the mandatory adoption of the trademark dilution doctrine, again via the Paris Convention (TRIPS art. 16 ¶ 3); the prohibition of trademark exceptions which violate the vaguely tautologically identified “legitimate” interests of the trademark claimant (TRIPS art. 17); the blanket prohibition of compulsory trademark licenses (TRIPS art. 21), a prohibition which might be applied to otherwise legitimate marketers of essential generic pharmaceuticals; the prohibition of exceptions to patent protection based on entire fields of technology, thus requiring countries to grant patents on pharmaceuticals, for instance, despite religious, ethical, or moral objections (TRIPS art. 27); the mandatory twenty year period of patent protection without respect to the field of technology (TRIPS art. 33); the extreme conditions placed on the ability of a country to grant compulsory licenses on patents (TRIPS art. 31); and the blanket and detailed requirements that member countries adopt expensive enforcement mechanisms without respect to their level of economic development or to whether they might have more pressing social or economic priorities than protecting the intellectual property claims of foreign nations. (TRIPS Part III, arts. 41-49). Robert Gutowski, explaining how Disney attempted to suppress a book using Donald Duck to satirize U.S. imperialism, neatly captures the problem: “But the question of whether the Chilean government should focus its limited resources on protecting Disney’s property interests is not easily answered.” Robert Gutowski, *The Marriage of Intellectual Property and International Trade in the TRIPS Agreement: Strange Bedfellows or a Match Made in Heaven?*, 47

that TRIPS forbids fair use of educational materials, *qua* educational materials *vel non*, locks less developed countries into their pauperized conditions (the key to which, of course, is the very surplus funds they do not have by which to purchase such programs at the supra-competitive price assured by copyrighted status).<sup>197</sup> Even if the other TRIPS obstacles to development did not exist, it will be impossible to attain and exercise any comparative advantage of their own.

WTO and GATT's treatment of so-called intellectual property is just as flawed, biased, and ideologically manipulative as are its subsidy provisions. Using the term "harmonization" in its most deceptive manner, the First World has succeeded in overturning two centuries of IP jurisprudence<sup>198</sup> as well as imposing the harshest possible economic restrictions upon the weakest economies on the globe. TRIPS claims to simply "harmonize" IP rules by imposing the same patent, trademark, and copyright, regimes upon the Third World as the First World enjoys. This is harmonization in the sense that the rules are the same for all – a central objective, naturally, of Ricardoesque free trade principles of comparative advantage. But because of its inconsistency with well-developed international rules of IP, as well as with the underlying premises of IP jurisprudence,<sup>199</sup> and also because of its inconsistency with the very premises of the law of comparative damage, and finally because of its trashing of the historical truths underlying the reasons for First World wealth,<sup>200</sup> this so-called harmonization is the most viciously unequal and unfair regime imposed by the WTO GATT entity.

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BUFF. L. REV. 713, 749 (1999). A helpful article is Keith Aoki, *Symposium: Sovereignty and the Globalization of Intellectual Property: Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection*, 6 IND. J. GLOBAL LEG. STUD. 11 (1998).

<sup>197</sup> See Surendra J. Patel, *What the Group of 77 Wanted at UNCTAD and Why*, in CURRENT INTERNATIONAL LEGAL ASPECTS OF LICENSING AND INTELLECTUAL PROPERTY 124 (1980).

<sup>198</sup> See *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518 (1972) in which the Court noted, "what is at stake here is the right of American companies to compete with an American patent holder in foreign markets. Our patent system makes no claim to extraterritorial effect; 'these acts of Congress do not, and were not intended to, operate beyond the limits of the United States,' and we correspondingly reject the claims of others to such control over our markets." *Id.* at 531 (citation omitted).

<sup>199</sup> The reason that intellectual property law has never been viewed as extraterritorial is that it has always been accepted that intellectual property law is a domestic regime designed to instrumentally achieve progress in technology and expressive knowledge. As a national instrument, its rationale is national development; there is nothing in the theory to justify subsidizing the development of other countries. Indeed, that would be a self-destructive notion.

<sup>200</sup> The U.S. was "the pirate of the nineteenth century." David Nimmer, *Time and Space*, 38 IDEA 501, 506 (1998). "During the nineteenth century, the United States was considered to be the 'Barbary Coast' of intellectual property." Aoki, *supra* note 196, at 24-25. While we aggressively demand that undeveloped countries adopt intellectual property laws which require them to devote their resources to paying tribute to foreign publishers, we ignore the historical truth that the United States practiced and even encouraged "piracy" in order to establish its publishing industry during the Nineteenth Century, avoiding exactly what we are demanding of others today. AUBERT J. CLARK, *THE MOVEMENT FOR INTERNATIONAL COPYRIGHT IN NINETEENTH CENTURY AMERICA* 243 (1960). "[T]he United States has traditionally taken a nationalistic stance toward the development of copyright law, ostensibly to encourage an American culture and its nascent publishing industry." Michael T. Crowley, *Raise The Yellow Submarine! Subafilms and Extraterritorial Application of the Copyright Act*, 48 FED. COMM. L.J. 133, 140 (1995).

#### IV. GLOBALIZATION'S IMPACT ON FIRST AND THIRD WORLD COUNTRIES, OR HOW GLOBALIZATION AND THE WTO'S RULES PRODUCE DISASTROUS GLOBAL DISPARITIES IN INCOME AND WELFARE

There is arguably a certain inconsistency between a supposedly democratically constructed organization purportedly devoted to ensuring the economic well-being of all its international members through the GATT provisions and the principle of a free market. This is further complicated by the concomitant right to development assistance for developing countries (a right, of course, that directly violates the underlying principle of the law of comparative advantage that forbids government interference in the market).<sup>201</sup> It is doubtful that GATT/WTO promoters believe this is their real responsibility because this could, in terms of Ricardo's theory, end in general poverty, or at least a depletion of the surplus profits which justify free trade.<sup>202</sup> The GATT/WTO structure of international trade is fundamentally premised upon principles of professed free trade based on Ricardo's theory of national comparative advantage<sup>203</sup> through which every state's interest is furthered.<sup>204</sup> As we have observed, the theory does not admit, however,

<sup>201</sup> On the right to development assistance, see KATARINA TOMASEVSKI, *DEVELOPMENT AID AND HUMAN RIGHTS: A STUDY FOR THE DANISH CENTER OF HUMAN RIGHTS* (1989). The author notes the Catch-22 situation created by donor countries, which refuse aid when the recipients do not ensure the right to adequate nutrition, education or work, when those governments claim to require the aid in order to implement those very human rights obligations. *Id.* at 8. Specific promises of development assistance can be found, for instance, in TRIPS article 67, "Technical Cooperation," where it is mandated that Members "shall" provide such assistance, including financial help.

<sup>202</sup> "The nature of the evil points out the remedy. By gradually contracting the sphere of the poor laws; by impressing on the poor the value of independence, by teaching them that they must look not to systematic or casual charity, but to their own exertions for support that prudence and forethought are neither unnecessary nor unprofitable virtues. . . ." RICARDO, *supra* note 4, at 127. Ricardo ends his analysis with the suggestion that poor laws should be revoked especially in times of prosperity because it would be more difficult in times of stagnation. Without such revocation, he asserted, "all classes should be infected with the plague of universal poverty." *Id.*

The theory of comparative advantage does suggest that not all transfers from developed to developing countries will constitute a zero-sum game. Nevertheless, there will almost certainly be a relative, if not absolute, decrease in the welfare of developed countries in order that the welfare of all states may increase. In such a scenario it is unlikely that national decision-makers will argue for policies resulting in decreases in national welfare, whether absolute or relative, by appealing to the welfare increases in poorer states and the resulting overall welfare increase.

Frank J. Garcia, *Trade and Inequality: Economic Justice and the Developing World*, 21 MICH. J. INT'L L. 975, 1005-06 (2000).

<sup>203</sup> For a definition of comparative advantage, see DICTIONARY OF DEVELOPMENT, THIRD WORLD ECONOMY, ENVIRONMENT, SOCIETY VOL. I, 251 (Brian W.W. Welsh & Pavel Butorin eds., 1990). Ricardo's theory derives from his devotion to a so-called free market "[E]very man is free to employ his capital where he pleases," he states, adding "he will naturally seek for it that employment which is most advantageous." See RICARDO, *supra* note 4, at 48. Therefore, "under a system of perfectly free commerce, each country naturally devotes its capital and labor to such employments as are most beneficial to each. This pursuit of individual advantage is admirably connected with the universal good of the whole." *Id.* at 81.

that this “furtherance” is very uneven, being especially disadvantageous for less developed countries whose trade, at best, is composed of the least profitable commodities like raw materials, textiles and/or agricultural goods.<sup>205</sup> Nevertheless, in a kind of international Lochnerianism, it is assumed that every country, rich or poor,<sup>206</sup> has the same opportunity to produce the much more profitable finished goods like aeronautics, pharmaceuticals, computers, and, generally, intellectual property of every sort. Indeed, it is not always clear, despite the obvious tilt of globalization in favor of the First World, that the developed countries themselves are ready for globalization when their own experts worry that “a precipitate move to free trade could . . . provoke the widespread collapse of domestic manufacturing. . . .”<sup>207</sup>

It should be clear now that the law of comparative advantage and free trade is a cruel, intellectually fraudulent, joke designed to handicap less developed countries. To the extent that free trade incorporates not only comparative advantage but part or all of the Rule of Law, the fraud is that much greater. Of course, international trade depends on not only comparative advantage but also on contract. Industrializing economies, both domestically and globally, inevitably produce large concentrations of economic power “that threaten contract’s social utility.”<sup>208</sup> The notion that contracts between First and Third World traders are somehow fair is supported, of course, by the legitimating function that contract law exercises, but it certainly only compounds the fraud of globalization. Thus, why a uniform market – including the global market – is so important for industrialized countries is not a difficult question. As Marx demonstrated, if profit (called by him surplus value) is created only in production (viz., in industrialized countries), it can be realized only in the market before it can be returned as capital. It is thus important for multinationals to aspire to a single market whose rules they know and with whose guaranteed returns they are familiar. And

<sup>204</sup> “The [GATT] overriding objective is to promote and secure a multilateral, free system of trade.” DICTIONARY OF DEVELOPMENT, *supra* note 203, at vol. II, 994.

<sup>205</sup> For countries in the vanguard of the world economy, the balance between knowledge and resources has “shifted so far toward the former that knowledge has become perhaps the most important factor determining the standard of living – more than land, than tools, than labor. Today’s most technologically advanced economies are truly knowledge-based.” World Bank, World Bank Development Report 1988/99: Knowledge for Development, p. 16, available at <http://www.worldbank.org/wdr/wdr98/contents.htm>. “The type of knowledge fostered by intellectual property protection has a particularly high capacity to improve products and processes, create new technology, and launch new industries.” Robert M. Sherwood, *Human Creativity for Economic Development: Patents Propel Technology*, 33 AKRON L. REV. 353, 357 (2000). In an unintentionally humorous excursion, Sherwood asserts that modern intellectual property laws are as advantageous to the poor as to the rich countries: “Someone will say, but these are poor countries. They can’t afford money for research,” he says, and attempts to rebut the obvious conclusion by noting the invention of a watermelon stand by a Latin American inventor as evidence, not that underdeveloped nations are limited to producing the least profitable technologies, but that Latin Americans, like everyone else, are capable of inventing – surely a point that should not be within the arena of dispute in the first place. *Id.*

<sup>206</sup> Much like Anatole France’s rich and poor whom the law equally forbids from sleeping under the bridge at night! See *supra* note 152.

<sup>207</sup> RONALD I. MACKINNON, THE ORDER OF ECONOMIC LIBERALIZATION: FINANCIAL CONTROL IN THE TRANSITION TO A MARKET ECONOMY 9 (2d ed. 1993).

<sup>208</sup> LINDLEY, *supra* note 41, at 293.

it is reasonable for their domestic governments to legitimize their activities with a global market economy. What can be easier to rationalize and accept than extending Adam Smith's doctrine of harmony of interests to the international level,<sup>209</sup> especially when combined with Ricardo's theory of "comparative advantage."

For a while, comparative advantage seemed to work with the newcomers from East Asia: Taiwan, South-Korea, Hong Kong and Singapore, for instance. But these countries were newly industrialized, financed by loans secured by their own governments. They eventually penetrated the global market because along with low prices, they offered high quality manufactured goods. But, most of all, they succeeded as "late industrializers" because their governments actively and very carefully provided disciplined subsidies to the eventually successful industries, showing that national industrial policies expertly managed by emerging economies are able to compete with the multinational corporations.<sup>210</sup> But of course the game was up when, at the first sign of financial difficulty, infinitely mobile capital was able to flee, leaving the "Asian Tigers" in the lurch.<sup>211</sup> The mobility of capital, in violation of the precepts of the law of comparative advantage, was the cause of both the "Tigers" ascendancy and their soberingly pitiful crash.<sup>212</sup> Though the crash suffered by the entire Pacific Rim told the lie of this billboard for the new global economy, even during its ascendancy, its success was limited. It was not the same for countries without industry (the African continent) or countries whose industry, one might say, exists no more (the Eastern European countries). These will benefit only from the export of their raw materials, assuming they have any, or agricultural or textile products. But the market demands, and offers meaningful profit, increasingly only for highly manufactured products and intangibles such as services, and "intellectual products," such as patented or copyrighted products. "Knowledge has become the key economic resource and the dominant, if not the only source of comparative advantage."<sup>213</sup> Most importantly, however, the Pacific Rim success cannot be repeated because GATT and WTO have outlawed the very subsidies that allowed their victory, and condemned the remaining undeveloped countries to the free-market where, bereft of the necessary subsidies and national industrial policies, they must surely

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<sup>209</sup> His idea was that there is a natural harmony of interests between men as men. See ANDREW WALTER, *WORLD POWER & WORLD MONEY: THE ROLE OF HEGEMONY AND INTERNATIONAL MONETARY ORDER* 9-14 (1991).

<sup>210</sup> Alice H. Amsden & Takashi Hikino, *The Bark Is Worse Than the Bite: New WTO Law and Late Industrialization*, 570 *ANNALS* 104 (July, 2000). The role of the state was often indirect, but it was effective. "According to many, the East Asian state did not pursue hands-off policies, as required by liberal theories, but instead led the process of growth, using a variety of instruments to cajole private actors." Tom Ginsburg, *Does Law Matter for Economic Development? Evidence From East Asia*, 34 *L. & SOC'Y REV.* 829, 836 (2000).

<sup>211</sup> See FRIEDMAN, *supra* note 7, at 161.

<sup>212</sup> See FRIEDMAN, *supra* note 7, at xii, 159-60, 184-89, 457.

<sup>213</sup> Peter F. Drucker, *The Age of Social Transformation*, *ATLANTIC MONTHLY*, Nov. 1994, at 53, 77. Nigel Thrift calls these "Drucker's famous words." Nigel Thrift, *State Sovereignty, Globalization and the Rise of Soft Capitalism*, in *DEMYSTIFYING GLOBALIZATION* 86 (Colin Hay & David Marsh eds., 2000). See also Peter F. Drucker, *The Coming of the New Organization*, *HARV. BUS. REV.*, Jan.-Feb. 1988, at 45-53.

starve. Finally, even if there were a ray of hope in agriculture or textiles, the rules of GATT that perpetuate the First World tilt in those sectors have extinguished it.<sup>214</sup>

Without too much exaggeration one might say that international trade has become an arrangement between industrialized countries to commonly share the international market (i.e., the Third World), with no fear of being accused of illegitimacy or imperialism, as Lenin complained in the years surrounding World War I.<sup>215</sup> It comes as no surprise then, surely, that the legal regime promoted by globalization, laissez-faire free-market capitalism, has inevitably increased international and intranational economic disparities. Globalization, exporting this crude legal system, exports more widely dispersed distribution of resources in client states, especially developing states. "As globalization has intensified, the gap between per capita incomes in rich and poor countries has widened,"<sup>216</sup> Bowman Cutter noted, because, obviously, globalization is proposed and pursued on behalf and for the benefit of the First World countries.<sup>217</sup> Commentators across the ideological spectrum have acknowledged that globalization is more or less responsible for the increasing gap between the haves and the have-nots at the national as well as the international level.<sup>218</sup> One of the biggest boosters of GATT and the WTO has claimed that, with respect to the Bretton Wood system and GATT, "[a]t least some of the credit for relative peace and economic growth of the past half-century goes to those institutions and their rules."<sup>219</sup> But if the past half-century has not been one of such relative peace, it would seem only fair then to credit the international trading system with creating the disparities of income that have nourished the conflicts that have killed however many people in the last half-century, however many less than in the previous demi-siecle, especially because the scales may well be tipped by globalization's tendency to starve rather than shoot its victims or, in any case, to indulge in the more quiet and less

<sup>214</sup> See *supra* note 164, citing Weiss, Helfer.

<sup>215</sup> V.I. LENIN, *IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM: A POPULAR OUTLINE* (Foreign Language Press, 1975) (available at <http://www.marxists.org/archive/lenin/works/1916/imp-hsc/index.htm>). One of Lenin's central points was that even critics of imperialism had too much at stake to identify it as an inevitable stage of capitalism and chose, instead, various "reform" critiques. "Instead of an analysis of imperialism and an exposure of the depths of its contradictions, we have nothing but a reformist 'pious wish' to wave them aside, to evade them." *Id.* at Ch. IX, ("Critique of Imperialism").

<sup>216</sup> W. Bowman Cutter et al., *New World, New Deal: A Democratic Approach to Globalization*, FOREIGN AFFAIRS, Mar.-Apr. 200, at 80, 93.

<sup>217</sup> Peter Evans, *Economic Governance Institutions in a Global Political Economy: Implications for Developing Countries*, UNCTAD X: HIGH-LEVEL ROUND TABLE ON TRADE AND DEVELOPMENT: DIRECTIONS FOR THE TWENTY-FIRST CENTURY 8, 13 (United Nations: Geneva 2000) (acknowledging the need to address the "growing First World/Third World disparities").

<sup>218</sup> Frances Stewart, *Income Distribution and Development*, UNCTAD X: HIGH-LEVEL ROUND TABLE ON TRADE AND DEVELOPMENT: DIRECTIONS FOR THE TWENTY-FIRST CENTURY 16-18 (United Nations: Geneva 2000) (acknowledging that "freer international trade" and globalization in general" are the first and sixth cause of "rising inequality"); Deepak Nayyar, *Globalization and Development Strategies*, UNCTAD X: HIGH-LEVEL ROUND TABLE ON TRADE AND DEVELOPMENT: DIRECTIONS FOR THE TWENTY-FIRST CENTURY (United Nations: Geneva, 2000) (acknowledging the devastating role of globalization for the developing countries).

<sup>219</sup> JACKSON, *supra* note 5, at 7.

flamboyant kinds of annihilations characterized by famines, epidemics, and plagues. By the same logic, it must be at least partly the fault of the international trading system that this storied economic growth has been so one-sided that a large part of perhaps half the world has felt compelled to kill, or starve others, to get its share.<sup>220</sup>

But it is in the somewhat dishonest way in which GATT serves the interests of the First World that is most shameful. If subsidies and CVDs form one of the most important and inconsistent internal exceptions to the GATT scheme, it is noteworthy that it is the United States that is the biggest culprit. The "United States has been the only major trading nation to use countervailing duties extensively."<sup>221</sup> Thus, not only is the system tilted, but it is applied in an even more unbalanced way.

In the face of this sorry record and threatening future, the WTO's own experts, who deny that WTO globalization benefits only a small number of rich countries, continue the comparative advantage mantra, repeating that the only way to obtain favorable results from international trade is to ensure that countries tend to specialize in the production of goods and thus tend to trade in areas in which they have a comparative advantage.<sup>222</sup> It seems clear that globalization, as contrived by the WTO, is meant to maintain the advantage of those countries who had obtained it by 1994, and make it impossible for the developing countries to obtain their own, as long as they are forbidden from any protectionist measures, and required to adopt unprotected policies.

GATT sired WTO when it became apparent that First World countries' demands embraced more than the relatively small-change trade issues governed by GATT. Today the WTO dictates the rules for world trade in almost all important areas, and allows little flexibility, "to countries that are latecomers to industrialization. In comparison, there was more room for maneuver in the erstwhile GATT, *inter alia*, because of special and differential treatment for developing countries."<sup>223</sup>

In addition, WTO, although it was supposed to ensure that violations of its rules were within the organization's purview, has not been able to ensure that

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<sup>220</sup> The most authoritative text shows deaths (civilian and military) due to hostilities through the end of World War II numbered approximately 83,000,000 while there were only 26,000,000 in the following half-century. *WORLD MILITARY AND SOCIAL EXPENDITURES* (Ruth Leger Sivard ed., 16th ed. 1996). However, the so-called Black Book of Communism which purports to account for the deaths caused by the so-called Communists of the twentieth century claims that 20,000,000 more deaths occurred in the ten years or so following the Russian Revolution, and another 60,000,000 after World War II, bringing the two totals to something like 103,000,000 during the first half-century and 86,000,000 during the second. *STEPHANE COURTOIS ET AL., THE BLACK BOOK OF COMMUNISM: CRIMES, TERROR, REPRESSION* 133 (1999). Since these figures do not include deaths other than those "war-related," it does not account for the famines, droughts, and premature deaths possibly due to effects of globalization itself. All in all, hardly a showcase century, with or without globalization.

<sup>221</sup> Alan O. Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 *COLUM. L. REV.* 199, 201 (1989).

<sup>222</sup> Patrick Low et al., *Does Globalization Cause a Higher Concentration of International Trade and Investment Flows?*, WTO Staff Working Paper ERAD-98-08, available at <http://www.wto.org/wto>.

<sup>223</sup> Nayyar, *supra* note 218, at 13.

unilateral sanctions, such as those of the United States pursuant to its trade laws have been repealed. "In the WTO . . . major trading countries resort to a unilateral exercise of power, ignoring the rules, because small countries do not have the economic strength, even if they have the legal right, to retaliate."<sup>224</sup>

International discrimination against developing countries is at least as prominent in IMF and the World Bank rules which threaten Third World countries with insolvency, bankruptcy, or worse, for failure to honor the punctilio of free trade. Their rules target only developing countries because First World countries do not borrow from multilateral financial institutions. The purpose of the IMF and World Bank is, stated baldly, "to increase the degree of openness . . . so that market forces can shape economic decisions, [and not each country's own interests]."<sup>225</sup>

For example, while the United States, the most prominent First World country at the moment, has benefited from globalization, in the 1990s its exports counting for about a third of its economic growth, in the former USSR, globalization caused a marring corruption, a "dramatic 1998 financial collapse," while globalization touted abstract advances in basic freedoms like "speech, travel, and religion," freedoms which, given to the starving, do not amount to much.<sup>226</sup> Thus globalization, and through it international legal harmonization seems to have induced a kind of vertical and horizontal class division.

First, through globalization, first-world countries have produced client states which effectively offer huge pools of both labor<sup>227</sup> and (impoverished) consumers under the domination of First World capital. Second, globalization requires harmonization of national legal systems to a common standard, through for instance GATT, WTO, or NAFTA. These international entities, as well as the World Bank and the IMF, will cause the legal systems of developing countries to be leveled with that of developed countries, despite the real disparities

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<sup>224</sup> Nayyar, *supra* note 218, at 12. "The most notorious example is section 301, under which the U.S. government makes unfair trade accusations on its own initiative or at the request of private U.S. groups. Section 301 is another U.S. invention, and until 1984 'was virtually unique in the world'; it 'is to many countries the classic symbol of American unilateralism.'" Ewell E. Murphy, Jr., *The Lessons of Seattle: Learning From the Failed Third World WTO Ministerial Conference*, 13 *TRANSNAT'L L.* 273, 278 (2000) (citations omitted).

<sup>225</sup> Nayyar, *supra* note 218, at 13.

One important function of the IMF, therefore, is to decide which nations "merit" success and which should be disciplined with economic austerity in the supposedly colorblind system of neoliberal law and economics. In this way, the IMF has helped enforce the Western backlash against the 1970's economic gains of the Third World. As with other politics of backlash closer to home, this backlash reflects a yearning for a merit that never was. The history of European exploitation of Latin America and other parts of the Third World gives proof to the lie that the privileged position of the privileged classes in the West has been properly earned and is justified by merit.

Timothy A. Canova, *Global Finance and the International Monetary Fund's Neoliberal Agenda: The Threat to the Employment, Ethnic Identity, and Cultural Pluralism of Latina/o Communities*, 33 *U.C. DAVIS L. REV.* 1547, 1557 (2000) (citations omitted).

<sup>226</sup> Cutter et al., *supra* note 216, at 85, 93.

<sup>227</sup> *Europe's Immigrants*, *ECONOMIST*, May 6, 2000, at 25 ("Foreigners are streaming into the EU in search of jobs. They are often vilified, but they are increasingly necessary").

between their economies and the different needs of their people. For example, as Peter Evans noted

[A]ll trading nations have an interest in the existence of some set of transparent rules which are considered legitimate by their trading partners. To this extent the WTO is a collective good. At the same time, no set of rules is neutral. Any actual set of rules represents a selection from the theoretical universe of possible rules, and the selection process will benefit some countries (and groups within nations) more than others. Since the economic power of the United States and the advanced industrial countries cannot help but be reflected in the process of negotiating the rules, it would be odd if the resulting set of rules did not differentially reflect the interests of these nations. The fact that the . . . priorities of the WTO regime focused on intellectual property rights and trade services – both issues which are primarily of interest to the United States and other advanced industrial countries – is consistent with this premise.<sup>228</sup>

Third, because globalization is mainly pursued through international institutions which follow the First World countries' interests, the rules they produce will lack the legitimation necessary for any Rule of Law to exist.

An immediate result of globalization will also be domestic transformations within the first-world countries, certainly producing there, as well, larger pools of more poorly paid and un- or under-employed workers. This is part of the "race to the bottom"<sup>229</sup> encouraged by globalization. Accordingly, the class divisions will be both international and domestic, or what we refer to as horizontal and vertical divisions of labor. The less-developed countries will serve as an underclass to the more-developed but, also, the latter will also be even more sharply defined by economic divisions.<sup>230</sup> That is, just as globalization will have a leveling effect on Third World Countries through the export from the First World of brutally untamed capitalism, a kind of dialectical response, in a pattern known as the bootstrap, whipsaw, or ratcheting effect, will appear in the First World, replicating events in the Third.

Keith Aoki notes that the whipsaw effect allows First World countries to continually ratchet up the stakes, thus maximizing what might have been minimal international requirements.

The pattern that has emerged is to whipsaw domestic and international protections against each other. The U.S. will first sign on to a multilateral treaty such as GATT, which provides for minimum standards of intellectual property protection. Next, there are moves to ratchet up domestic levels of protections, which in turn exert pressure on other treaty nations to increase protection likewise. The end result is that

<sup>228</sup> Evans, *supra* note 217, at 13.

<sup>229</sup> See Jeffrey L. Dunoff, *Understanding Asia's Economic and Environmental Crises*, 37 COLUM. J. TRANSNAT'L L. 263 (1999); Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1581 (2000).

<sup>230</sup> This is, of course, part of and a result of the "race to the bottom," which is how many victims and critics of globalization characterize it. Reuven S. Avi-Yonah, *Globalization, Tax Competition, and The Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573, 1581 (2000).

minimum standards of protection become driven by a maximalist agenda.<sup>231</sup>

But that is only one way by which the reimportation of normally Third World consequences to First World values back into their place of origin via the Third World can occur. In a kind of Catch-22, if the whipsaw effect doesn't work because Congress will not enact the legislation necessary to pressure Third World countries to comply, it is possible for multinationals to do an end run by first going to the international organizations where both transparency and democratic participation is limited enough to allow unilateral activity.<sup>232</sup> For example, the failure to enact a database protection law in the U.S. spurred its supporters to seek WTO enactment of a draft international treaty, which the supporters then used to convince Congress – unsuccessfully, for the time being – that it must enact the same provisions in the spirit of globalization.<sup>233</sup> Similarly, in a further “intentional” use of this process, the Bush *père* administration

used international trade negotiations to complete the deregulatory agenda of the Reagan administration. [T]hese secretive negotiations provided a low visibility arena for doing what could not be successfully carried out in the United States Congress. Thus, American negotiators pressed for provisions both in the GATT Uruguay Round and in NAFTA that would preempt local and state laws and limit federal authority to legislate in a number of areas deemed trade-related. In this manner, they sought to restrict the capability of states and provinces, and to a degree federal governments, to maintain existing protective laws.<sup>234</sup>

A more canny, even nuanced, form of the whipsaw effect may be reflected in the decision of a WTO dispute resolution panel that found section 110(b) of

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<sup>231</sup> Keith Aoki, *The Stakes of Intellectual Property Law*, in *THE POLITICS OF LAW* 271 (David Kairys ed., 3d ed. 1998).

<sup>232</sup> Some observers label the simple export of national values to the international arena as “Global localism,” while the re-absorption of global values back into the domestic arena is called “local Globalism:”

“Global localism” is “the process by which a given local phenomenon is successfully globalized” to gain acceptance throughout the world. Examples include the English language and U.S. software copyright laws, both of which have come to be widely used and accepted in many different and diverse nations. “Local globalism,” on the other hand, “consists of the specific impact of transnational practices and imperatives on local conditions by means of which the later are restructured, in order to respond to transnational imperatives. . . .

Trubek et al., *supra* note 39, at 412, n.3 (citations omitted).

<sup>233</sup> The story is told in Charles Brill, *Legal Protection of Collections of Facts*, 1998 *COMP. L. REV. & TECH. J.* 1, 40-46 (1998).

<sup>234</sup> Trubek et al., *supra* note 39, at 407, 461. It is important to avoid viewing this as somehow conspiratorial, the unlikelihood of which might convince potential critics that the phenomenon does not exist at all. “Whether or not these developments were part of an intentional deregulatory strategy, it is clear that they might easily have that effect.” *Id.* at 462. That the various consequences of globalization are or may be unintentional surely does not affect their importance. Legitimation theories, of course, could easily explain that process as one that is unconscious and “false,” but that would then make such unintended consequences even more serious.

the U.S. copyright statute to be in violation of TRIPS.<sup>235</sup> Section 110(b) elaborated long-standing U.S. copyright fair use to specify precise square footage and other details (like how many and what type of speakers and stereo equipment) that would allow retail establishments like bars and restaurants to play recorded music without infringing composers' copyrights. It was the result of fierce lobbying on the part of those retail enterprises, to which Congress acceded.<sup>236</sup> One might view the WTO decision as a classic example of submission by powerful interests to rules that otherwise advantage them. Alternatively, however, in an era of constantly increasing copyright protection to which section 110(b) stands in stark contrast, one might view Congressional passage of that section as simply an astute decision to give to small and unimportant private interests what the WTO was destined to return to the powerful multinational holders of copyright; if so, it is a far more sophisticated use of the "whipsaw" strategy (in another but almost identical situation, this has been called a "bait-and-switch" strategy)<sup>237</sup> than we might imagine, although it clearly shares much in common with the database protection tactics.

Similarly, although the less-developed countries will serve primarily as a consumer and labor pool to the First World, it is likely that they will also have, if not an owner class, their share of a managing class (if only middle-level) and therefore will be similarly divided along economic class lines.<sup>238</sup> These, of course, are the very conditions that produce both racial and gender discrimination in the First World and we are witnessing an increase in those phenomena as well.<sup>239</sup>

<sup>235</sup> The report of the Panel on United States – Section 110(5) of the U.S. Copyright Act, WT/DS160/R (WTO 15 June 2000).

<sup>236</sup> *Music Licensing and Small Business: Hearing Before the House Committee on Small Business*, 104-67 (1996). Apparently, the National Restaurant Association was the prime lobbyist. Noel L. Hillman, *Intractable Consent: A Legislative Solution to the Problem of the Aging Consent Decrees in United States v. ASCAP and United States v. BMI*, 8 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 733, 766 (1998). The Register of Copyrights voiced some objections to the bill as originally proposed. Statement of Marybeth Peters, Register of Copyrights, Before the House Subcommittee on Courts and Intellectual Property, 105th Cong., 1st Session (July 17, 1997), available at <http://lcweb.loc.gov/copyright/docs/regstat97.html>.

<sup>237</sup> "The Clinton administration might have used the WTO to pull a bait-and-switch on Kodak, taking up its cause but also sending it down to defeat in a forum it knew to be hostile. . . ." Paul B. Stephan, *Sheriff or Prisoner? The United States and the World Trade Organization*, 1 CHI. J. INT'L L. 49, 72 (2000).

<sup>238</sup> Evans, *supra* note 217, at 8.

<sup>238</sup> The importance and cardinal nature of economic class divisions seems so self-evident that it is a subject of popular discourse. See V. Chambers, *Which Counts More, Gender or Race? Two Novelists Meet in a Black-and-White Conversation: Bebe More Campbell and Joyce Carol Oates*, N.Y. TIMES MAGAZINE, Dec. 25, 1994, at 16-19. Even assuming some racial battles can be won, as long as economic class divisions exist, there seem to be a sufficient supply of replacement racial or ethnic minorities to fill the void. "I mean, you talk to old black Angelenos and they'll tell you that in the 40's and 50's, even the 60's, and 70's, you go down to the downtown hotels for a big dinner, everybody serving your table is going to be an older black man. Well, now they are Latino." *Id.*

<sup>239</sup> Gender, too, can yield more confusion than light when it is not clearly subordinated to economic class as the defining issue. See, e.g., BARNETT, *supra* note 19, at 47-68. Otherwise, measures such as gender-based minimum wages, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 398 (1937) ("what can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers?"), or gender-limited licensing, *Goesaert v. Cleary*, 335

The increased income disparities are of far more than merely academic concern. The sharp division along South v. North or First- and Third-world lines is of concern to international organizations, such as the UN, as well as ordinary citizens, such as the demonstrators in Seattle, Washington, and Prague. Recently, the UN's Committee for Development Policy produced its first report and noted that although

the results of the Uruguay Round of multilateral trade negotiations for the General Agreement on Tariffs and Trade (GATT) are expected to increase world income between 1995 and 2001 by an estimated \$212 billion to \$510 billion as a result of expanded trade and increased efficiency, . . . countries that account for 70 per cent of world populations receive only 10 percent. . . . The least developed countries, with 10 per cent of the world's people, have less than 2 per cent of world trade.<sup>240</sup>

Even more dramatically, the committee emphasized that the major effect of globalization in developing countries has been an

increased exposure of many workers, especially those with fewer skills, . . . to non-standard forms of work (temporary, part-time, home-based), [which] are associated with lower levels of social security coverage, and worse job security, working conditions and employment rights. [Additionally, women] have generally fewer skills and account for a much higher share of non-traditional workers; they are therefore even more vulnerable than men.<sup>241</sup>

It is understandably important to the Third World that the trading system be revamped and that they be free of the shibboleth of so-called free trade. Logically, among the demands of developing countries would be the full mobility of labor "to ensure that any agreement on the movement of natural persons is liberal. This is important because many developing countries have comparative advantage in labor intensive services, and some in skill intensive services such as computer software."<sup>242</sup>

But the very nature of globalization makes truly progressive change virtually impossible, bottomed as it is on a "law" of comparative advantage inherently biased against the Third World. Its extremist consequences sometimes border and at other times all but coincide with neo-colonialism and racism. "[M]ercantilists . . . spoke of a country's 'riches' as either 'natural' or 'artificial,' the former coming from the earth and the latter from 'manufactories.' . . . [E]ven a 'nationalist' economist like Friedrich List maintained that tropical countries have no 'vocation' for manufacturing."<sup>243</sup>

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U.S. 464 (1948) (bartender licenses, based on the public interest in women's moral health), to give two not-so-trivial examples, tend to distract needed attention from the more fundamental problem of the failure of the market with regard to labor generally.

<sup>240</sup> UNITED NATIONS DEPARTMENT OF ECONOMIC & SOCIAL AFFAIRS, VULNERABILITY AND POVERTY IN A GLOBAL ECONOMY: REPORT OF THE COMMITTEE FOR DEVELOPMENT POLICY ON THE FIRST SESSION 9-10 (1999) (hereinafter, "VULNERABILITY REPORT").

<sup>241</sup> *Id.* at 11.

<sup>242</sup> Srinivasan, *supra* note 155, at 148.

<sup>243</sup> MANESCHI, *supra* note 118, at 33.

To the extent that one can rely on inherent “vocations” for different economic activities, therefore, comparative advantage offers a convenient refuge either for racists and neo-colonialists on the one hand or for multinational corporations on the other. The First World, in other words, is unlikely to abandon its own advantages – chief among them, the claim that comparative advantage assures “free” trade for all. Poverty, under the law of comparative advantage, can then be attributed to a nation’s particular “vocation.”

In Seattle, students and steelworkers marched to protest the World Trade Organization. The United Nations acknowledged that the WTO meeting in Seattle “drowned out concerns” about the fact that

developing countries cannot pay off their debt because they cannot penetrate major export markets in industrial countries – in part because of the formidable walls of protection that remain. Rich countries continue to protect their farmers, for example, while developing countries are being asked to open up their own agricultural sectors – a measure that threatens to undermine their food security and spread poverty.<sup>244</sup>

In addition, the United Nations emphasized that “[w]hat the poor most need . . . is not resources for safety nets but resources to build their own organizational capacity.”<sup>245</sup>

As we have seen, the First World countries and their international organization which promote globalization do not want that. The nature of the WTO and the GATT rules on CVDs, IP, and domestic subsidies, ensure that developing countries cannot overcome the client stage, providing the more developed with a low-paid (and exogenous) work force<sup>246</sup> and a market to sell their products.

Recently, serious jurists, such as Justice Steven Breyer,<sup>247</sup> Shlomo Avineri,<sup>248</sup> and Charles Fried<sup>249</sup> have noted the particularly portentous conjunction of privatization with globalization, and how the resulting privatized globalization, affects “the ultimate shape of law,” meaning the legitimacy of all Western-based legal systems. Justice Breyer noted that within the European Community (“EC”), which may be described perhaps as an emerging supra-state, its highest legal authority, the European Court of Justice (ECJ) faces a potential crisis of legitimacy because it is made up of appointed, not elected members, whose decisions are final.<sup>250</sup>

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<sup>244</sup> OVERCOMING HUMAN POVERTY: UNDP POVERTY REPORT 2000 at 6, available at <http://www.undp.org/povertyreport> (hereinafter “UNDP REPORT”).

<sup>245</sup> *Id.* at 8.

<sup>246</sup> Roger Cohen, *Europe’s Migrant Fears Rend a Spanish Town*, N.Y. TIMES, May 8, 2000, at A1 (addressing the role of young working immigrants from poor countries in supporting the economies of more developed countries); Steven Erlanger, *Birthrate Dips in Ex-Communist Countries*, N.Y. TIMES, May 4, 2000, at A8 (explaining the role of immigrants from poorer countries to make up for the necessary loss of work force).

<sup>247</sup> Justice Stephen Breyer, *Changing Relationships Among European Constitutional Courts*, 21 CARDOZO L. REV. 1045 (2000).

<sup>248</sup> *Id.* at 1085.

<sup>249</sup> *Id.* at 1091.

<sup>250</sup> *Id.* at 1054 (“The EC’s member states have strong reasons to resist granting the Council or the Parliament added majoritarian lawmaking authority. But that very fact means that those same EC institutions find it difficult to enact legislation that would overturn an ECJ decision. In that sense,

What is equally or more lamentable is that even assuming globalization offered some sort of formal equity to all nations, we have already seen that getting one's share of that equity takes a certain amount of capital – whether economic, cultural or human – and most of this capital is effectively possessed by the First World with precious little, if at all, available to the Third. That the principles do not match the reality becomes poignantly clear when small countries lament that they cannot benefit from WTO's structures as developed countries can. For example, Renald Clerisme, Haiti's representative to the WTO, complained that small economies cannot afford to use the WTO's structures, such as the dispute settlement procedures, as often as larger countries due to a lack of resources, including the essential human resource of lawyers with international trade law training.<sup>251</sup> He also pointed out that this is a vicious circle because the size and the training of his country's staff depends on the trading opportunities Haiti obtains. Thus, without those opportunities Haiti “[would not] be able to afford to send a bigger, better-trained staff to Geneva [and] without a bigger staff, he [could not] see how trading opportunities [would] improve.”<sup>252</sup>

As we have noted, United States trade law expressly provides for sanctions against others, including the most desperately poor, even if they have complied in every respect with GATT or TRIPS.<sup>253</sup> For US trade officials, trade comes first and free trade perhaps second. They have already created a “war room” in Washington to ensure U.S. firms get their “fair” share of foreign sales. And they are not embarrassed to admit they are more interested in ensuring that their firms are “not going to lose, whatever it takes”<sup>254</sup> than in international legal

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the effort to limit the EC's authority and to maintain that of member states (often justified in terms of maintaining member state 'democracy') ironically provides greater authority to the least democratic EC institution – namely, the ECJ – to determine the ultimate shape of the law”).

<sup>251</sup> United Nations Foundation, UN Wire, June 27, 2000, available at <http://www.unfoundation.org/unwire/archives/UNWIRE000627.cfm>. The same sentiment was expressed by Professor Peter J. Spiro, who, discussing the renaissance of international law, observed that globalization presents “[i]n some respects a serious threat to justice, to individual liberty, and to world order.” Peter J. Spiro, *Globalization, International Law, and the Academy*, 32 N.Y.U. J. INT'L L. & POL. 567, 589 (2000).

<sup>252</sup> Naomi Koppel, *Small Fry Struggle to Keep Up With Big Fish at WTO*, THE NANTO TIMES, June 25, 2000, available at <http://www.nantotimes.com/global/story/0,1024,500220959-500315514-501764321-0,00.html>.

<sup>253</sup> This is because section 301 of the Trade Act of 1974 shamefully allows for sanctions against countries which in the unilateral view of the U.S. deny “provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights.” 19 U.S.C. § 2411(d)(3)(B)(i)(II) (1994 & Supp. 2000). See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 94 AM. J. INT'L L. 348, 376 (2000); A. Lynne Puckett & William L. Reynolds, *Current Development: Rules, Sanctions and Enforcement under Section 301: At Odds With the WTO?*, 90 AM. J. INT'L L. 675 (1996).

<sup>254</sup> Jeffrey E. Garten, *The New Trade Challenge: Is the U.S. Really Committed to Free Trade?: Even Economists Are Now Questioning the Very Concept of Free Trade*, THE FINANCIAL POST, Dec. 3, 1994, at 16. On the “war room,” see D.E. Sanger, *How Washington Inc. Makes a Sale*, N.Y. TIMES, Feb. 19, 1995, at C6.

principles.<sup>255</sup> The message is that "the U.S. likes rules-based free trade, as long as it works in its favor."<sup>256</sup>

## V. CONCLUSION

It would be overly ideological to claim that there is only one possible response to globalization, although there may be, as we believe, one most effective such response. The search for a "middle way," the classic response of liberal modernity, would seek to deny the truth of the observations we have made, and claim that each gambit can be parried by half measures. Such is the response of the United Nations, unsurprisingly dominated by the First World, through its spokesperson Kofi Annan, who, purporting to speak as a humanist, recently suggested that globalization demands moderation on the part of those who are both its sponsors and chief benefactors. After the protests in Seattle, seething with so-called "anarchists," Annan proposed a meeting of First World countries, and through that, some sort of sponsored response which, of course, can do nothing about the threat posed by First World interests.<sup>257</sup> Anarchism was, Lenin said, a "dilettante," and politically "infantile disorder," and "not infrequently a sort of

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<sup>255</sup> However, it might be argued that the very conception of legal principles has changed. If traditionally law is an affair of rules and the rules provide the language of legal discussion, in discussing a case, for example, the social structure of the case provides the grammar by which this language is expressed. See DONALD BLACK, *SOCIOLOGICAL JUSTICE* 19-46 (1989).

<sup>256</sup> Garten, *supra* note 254. During the Bush *père* administration, Washington slowly awakened to the reality that foreign governments were devoting far more resources to commercial competition abroad than the U.S. Today, the Commerce Department is the "most effective and proactive it has been in my business career," says the chairman of the Chrysler Corporation, which has worked for two years with American officials in a so far unsuccessful effort to gain China's approval to build minivans there. In 1992 Congress created the Trade Promotion Coordinating Committee without identifying or assigning it any clear charge. Now, however, the committee meets almost weekly, "constantly revising a list of major projects around the world that have caught the attention of corporate executives, ambassadors, the C.I.A., or other agencies, and assessing American chances to win the business." Sanger, *supra* note 254, at C6. Before any commentary it might be insightful to add a few words from ex-C.I.A. director R.J. Woolsey who states that "whether nations are skirting the rules of international trade by using their intelligence services for industrial espionage, or exerting pressure to win contracts for their firms at the expense of American business and American jobs . . . this does not mean [the C.I.A. is] in the business of spying for private firms. . . ." *Id.* Instead, he says, it means the C.I.A. brings these "corrupt foreign practices" to the attention of the White House and the State Department. The agency's "economic mission" is bound to become "a bigger issue in the coming years, as tension rises with allies who are also competitors for billions in contracts." *Id.* In Tokyo, for example, Japanese officials complained of the activities of the agency inside the American embassy. More recently, of course, the French asked five agents to leave the country for bribing French officials during the last round of GATT negotiations. Charles Pasqua, France's former Interior Minister, "certainly has plenty of reasons to be angry with Clinton's America. Since he entered the White House and adopted the growth of American penetration of foreign markets as a principal foreign policy goal, his foreign agents have heightened their activity." *France-Amerique*, L'EXPRESS, Mar. 2, 1995, at 39.

<sup>257</sup> Opening Statement to the High-Level Meeting on the Global Compact, Held on July 26, 2000, United Nations Headquarters, available at [http://www.un.org/partners/business/gcevent/press/opening\\_remarks.htm](http://www.un.org/partners/business/gcevent/press/opening_remarks.htm). See Kofi A. Annan, *Help the Third World Help Itself*, WALL ST. J., Nov. 29, 1999, at A28

punishment for the opportunist sins of the working-class movement.”<sup>258</sup> Annan’s endorsement of working class capitulation may well be exactly that kind of sin, in view of Lenin’s belief that anarchism

is a social phenomenon . . . characteristic of all capitalistic countries. The instability of such revolutionism, its barrenness, its liability to become swiftly transformed into submission, apathy, fantasy, and even a “frenzied” infatuation with one or another bourgeois “fad” – all this is a matter of common knowledge.

In fact the most terrible reality of the constricted range of alternatives that seem imaginable to virtually all factions – from the far Right to, terrifyingly, as far Left as we seem to extend in the U.S. – is that the only choices are those dictated by American liberalism. It is unsurprising that the establishment suggests business-as-usual as the best route to progress. It is worse than depressing when GATT and WTO are promoted by the establishment Left as a desirable goal.<sup>259</sup> Even worse, perhaps the worst imaginable, is when the self-identified radical, or at least critical, Left deconstruct Marxism to arrive at a desiccated version in which accommodation, and not rebellion, becomes the preferred, not just practical, alternative.<sup>260</sup>

In Washington in the Spring of 2000, students and activists protested the World Bank and International Monetary Fund.<sup>261</sup> The protesters demonstrated on behalf of U.S. workers<sup>262</sup> and on behalf of the developing countries.<sup>263</sup> However, as many noted, the alliances were ad-hoc and lacked any articulated ideological basis, which may have given them momentum but may also be a fatal weakness for any long-term movement. From that perspective, a leftist ideology may be what a rejuvenated labor movement needs. Opposition to globalization needs a

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<sup>258</sup> V.I. LENIN, “LEFT-WING” COMMUNISM, AN INFANTILE DISORDER (Foreign Languages Press, Peking 1970) (1965) (from V. I. LENIN, SELECTED WORKS Vol. II, Part 2 (Foreign Languages Publishing House, Moscow, 1952).

<sup>259</sup> “We on the Left have a lot to be proud of . . . So it is odd that some in the Left have sometimes opposed free trade.” Michael Moore, “In Praise of the Future,” International Union of Socialist Youth Festival (Malmo, Sweden July 26th 2000), *available at* [http://www.wto.org/english/news\\_e/spmm\\_e/spmm33\\_e.htm](http://www.wto.org/english/news_e/spmm_e/spmm33_e.htm). The jarring image of a self-identified Leftist such as the Director General of the WTO exhorting young socialists to embrace the WTO is softened, we suppose, when Left means Labour, probably in the British sense, and not Marxism, in the honest sense.

<sup>260</sup> This seems to be what Robert Gordon does when he urges his readers to convert “false consciousness” from a limit to a source of power, all the while urging what amounts to nothing more than the same legal reform responsible for the “false consciousness” in the first place. *See* Gordon, *supra* note 25.

<sup>261</sup> Fred O. Williams, *Students, Unions Unite to Fight Globalization: Will Alliance Last?*, BUFFALO NEWS, Apr. 23, 2000, at 11B.

<sup>262</sup> *Id.* (“Before NAFTA you had American and Canadian and Mexican workers, and they all didn’t have to compete against each other,” said Wilke, who is active in the Coalition for Economic Justice. Susan Wilke of North Tonawanda . . . lost her job in 1994 when auto-parts maker NETP Inc. moved its plant to Mexico. For years afterward, she worked a string of temporary jobs without benefits”).

<sup>263</sup> Martha McCluskey, *Seattle Protests Brought Together Some Unlikely Allies*, BUFFALO NEWS, Dec. 12, 1999, at 5H. “Thousands of demonstrators joined international church groups to form a massive human chain to dramatize their call for cancellation of the debt owed by poor nations to the International Monetary Fund, the World Bank and other foreign lenders”).

global ideology to counter that of globalization's crude economic strategy. But if globalization is nothing more, as we said at the start, than capitalism writ large, its most logical opposite seems obvious. If some form of Marxism is the appropriate ideology, it has been tarred, unfortunately, with the implicit criticism inherent to globalization's natural claim to legitimacy. And it is more than a daunting task to seek an alternative legal system based on Marxist principles especially since it is not clear that Marx did not offer an alternative to law rather than an alternative legal regime.<sup>264</sup> As one commentator has noted, "[a]lthough protests are useful, they will not themselves alter global capitalism. They are a strategy, a means of helping to shatter the wrongheaded consensus and open space for new thinking, but they are not a program for change."<sup>265</sup>

There seems an almost mysterious resentment among the Left towards Marxism. Some of this is due to the Bolshevik<sup>266</sup> or Maoist experiment, or to those who misunderstood it;<sup>267</sup> but much has been caused by left-oriented intellectuals who were all too eager to embrace and then to reject ideologies based on the whimsical radical fashions of the day, intellectuals like Foucault and his followers.<sup>268</sup> Of course, there are those who developed Marxism (such as Gramsci and Marcuse) and who made it transcend Foucault's famous words: "Marxism exists in nineteenth-century thought in the same way a fish exists in water; that is, it stops breathing anywhere else."<sup>269</sup> Surely, Marxism's truths should not be haunted by the failed Bolshevik experiment. That the current opposition to pri-

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<sup>264</sup> "[T]he opponent must propose either an alternative to law, as Marx did in his day, or an alternative concept of law." Habermas, *supra* note 18, at 1511.

<sup>265</sup> *A17 and Counting*, THE NATION, May 8, 2000, at 4.

<sup>266</sup> However, even if the Marxist-Leninist ideology represented a departure from Marxism, as a theory of democracy, it nevertheless showed that backward countries found welfare improvement not under capitalism (which has proved to be deadly for those countries which changed from state capitalism to individual capitalism) but under the previous regime. For a description of the so-called "socialist" regime and its counterpart, the capitalist regime, see Bernard Chavance, *The Historical Conflict of Socialism and Capitalism, and the Post-Socialist Transformation*, UNCTAD X: HIGH-LEVEL ROUND TABLE ON TRADE AND DEVELOPMENT: DIRECTIONS FOR THE TWENTY-FIRST CENTURY (United Nations: Geneva, 2000). See Wallerstein's claim that capitalism has brought about not relative, but absolute, immiseration, in *HISTORICAL CAPITALISM WITH CAPITALIST CIVILIZATION*, *supra* note 124, at 101.

<sup>267</sup> See, e.g., Bertrand Russell, *HISTORY OF WESTERN PHILOSOPHY, AND ITS CONNECTION WITH POLITICAL AND SOCIAL CIRCUMSTANCES FROM THE EARLIEST TIMES TO THE PRESENT DAY* 282-329 (1945). Critics delight in defining Marxism out of existence. For instance, "There was only one common thread connecting all of these [revolts against the Soviet system]: what began as a moderate change quickly transcended its original scope. There were two reasons for this. First, between 1968 and 1989, a great majority of opposition leaders had come, often painfully, to believe that socialism with a human face is a contradiction in terms and could not work. Ash gives an excellent account of that process in the last chapter of *The Magic Lantern*. [TIMOTHY GARTEN ASH, *THE MAGIC LANTERN: THE REVOLUTION OF '89 WITNESSED IN WARSAW, BUDAPEST, BERLIN, AND PRAGUE* (1990)]. Second, the actual force of appeal of communism turned out to be close to zero. When the Soviet might was removed from the picture in Eastern Europe, there was nothing left for the regimes to hold on to." Wiktor Osiatynski, *Revolutions in Eastern Europe*, 58 U. Chi. L. Rev. 823, 843-44 (1991).

<sup>268</sup> Foucault, who started out as an indefatigable Marxist, gradually tired or became simply bored with it, then embraced, in rapid succession, Nietzsche, Mao, and, finally, himself. See DIDIER ERIBON, *MICHEL FOUCAULT* 316 (Betsy Wing trans., Harvard U. Press 1991) (1989).

<sup>269</sup> *Id.* at 162.

vativized globalization<sup>270</sup> needs a unifying ideology<sup>271</sup> is obvious from the media response to the Seattle and Washington events, which failed to distinguish the positions of the Left and the developing countries from those of nativist xenophobes like Pat Buchanan. Certainly the demonstrators' opposition to privatized globalization and labor exploitation in sweatshops has nothing in common with that of Buchanan who urged a variant of American neo-isolationism. Of course, if all the demonstrators want is no more "chopsticks in any mall in the United States,"<sup>272</sup> then they need, of course, no particular unifying ideology. But if they seek to change international labor conditions, then they surely need an articulated ideology distinguishable from the raw nativism like that of Buchanan.

GATT has altered the nature of international law from the utopian vision of One World to that of One Economic Order. The goal of non-discrimination and its alter ego, harmonization, meant that disadvantaged countries would lose. The free-market commitment destroys their ability to palliate or soften the market's brutality. Ricardo's law of comparative advantage is upended when the very availability of information necessary to justify its theory of property, is turned into property itself, depriving the theory of its own justification. GATT, through TRIPS especially, guarantees that the haves remain the haves and dominate a permanent international underclass of have-nots.

The triumph of globalization is surely at least partly in its legitimation. Based on comparative advantage and committed to its offshoot, free trade, in its legitimation it forecloses from the political imagination any alternatives, and few valid opponents. Comparative advantage devalues protectionism as a reactionary, as opposed to a potentially progressive, economic strategy. The law of comparative advantage, in its very rule-based legalism, condemns other opponents, almost by definition, as lawless. It would seem then that the profound power of legitimation is that globalization successfully characterizes its opponents as either nativist protectionists or irrational anarchists. The truth of course is that globalization can be and certainly has been opposed in part by those on the right by appealing to a nationalistic nativism that condemns any efforts at One-Worldism. But more progressive opposition must be seen as legitimate, as a traditionally Left effort to protect the weak against the strong, and to oppose rules that owe their legitimacy only to the fact that they have been posited, without regard to whether they truly benefit a global citizenry. As we have shown, much of globalization relies on intellectual incoherence, and the cause of Internationalism (certainly not globalism as we know it) deserves something more than that.

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<sup>270</sup> Shlomo Avineri, *Constitutionalism, Privatization, and Globalization: Comment: Remarks on Michelman and Breyer*, 21 CARDOZO L. REV. 1085, 1085 (2000).

<sup>271</sup> Because such a unifying ideology must be practical as well as coherent, it can probably profit more from traditional Marxist analysis than from the kind of utopian postmodern mysticism of EMPIRE, which bases its romantic optimism on the formal argument that because globalization has united worldwide capital, it presents an equal opportunity to unify a global proletariat. It is exactly such formalism, responsible for globalization's rise, that we have tried to debunk in this article. Globalization (which, we must repeat, is not Internationalism), like the law, might forbid both the rich and poor from various things, but it surely does not give both equal opportunity to resist. See MICHAEL HARDT & ANTONIO NEGRI, EMPIRE, 43-44, 237, 396-400 (2000).

<sup>272</sup> Thomas L. Friedman, *America's Labor Pains*, N.Y. TIMES, May 9, 2000, at A25.