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INTERNATIONAL ACTIVITY AND DOMESTIC LAW

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INTRODUCTION

The first volume of the *Penn State Journal of Law & International Affairs* seems an appropriate place to think about the relationship between international law[1] and other forces relevant to multistate activity. This essay focuses on one such force—domestic law. First, I suggest that domestic law has an important and underappreciated role in regulating international activity. Second, I identify several types of scholarship that might be particularly suited to a journal of law and international affairs.

Broadly speaking, two types of law are relevant to international affairs. The first is international law, consisting of norms embodied in treaties, custom, general principles, and judicial decisions that purport to provide rules for state and individual

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[1] For two opposing views of the nature of international law, *compare* MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT 132 (2008) (suggesting that fundamental norms of international law are based in natural law theory), *with* JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW 10-17 (2005) (suggesting that many rules of international law are a result of the rational pursuit of state interests).

behavior that do not derive from the domestic law of an individual state. The second is domestic law, the positive law of individual states (including the laws of component states in federal systems).

Domestic law applied domestically can have significant international ramifications. Domestic laws affect the way states treat their own citizens and thus can implicate human rights commitments. States also apply domestic laws to foreign citizens, implicating both human rights commitments and rights of other states in traditional public international law. Furthermore, domestic laws apply, increasingly, to transactions and events that cannot be considered purely domestic.

In some transactions, relevant parties are nationals of different countries. In others, a party may be a resident of a country other than the country of his or her nationality. Or, relevant events may take place in more than one country, which may or may not be a country where any of the parties have ties of nationality or residence. Indeed, the relevant events can take place on the internet, and their physical location could be interpreted as anything between "nowhere" and "everywhere at once." The vast majority of these multinational transactions are governed by the domestic law of one or more of the various states relevant to the transaction.

Dramatic examples come from the multinational regulatory enforcement activities of the United States and the European Union,[2] as well as the emerging regulatory activities of China.

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[2] This is not to suggest that U.S. and E.U. approaches to extraterritorial regulation are identical or even similar. The two enforcement approaches are qualitatively different. The United States makes use of criminal penalties, private civil litigation, and prosecutorial discretion in ways that are rare or absent in the E.U. and its member states. *See* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775, 1788-1793 (2011) (describing differences between U.S. and European approaches to prosecuting white collar and corporate crime). The E.U. relies far less on regulatory enforcement, and more on the desire of multinational companies to provide products and services that can be sold in European markets. *See* Anu Bradford, *The Brussels Effect*, 107 NW. U. L. REV. (forthcoming 2012/2013) (July 1, 2012 draft on file with author) (describing a "Brussels effect" in product regulation similar to the "California effect" previously identified in U.S. environmental regulation).

In the United States, the largest antitrust fines are routinely in international cases,[3] with at least twenty fines over $100 million in the past fifteen years.[4] The largest, a $500 million fine in a vitamin case, is now over ten years old.[5] The U.S. Internal Revenue Service has brought UBS, a major Swiss bank, to its knees over assisting U.S. clients in tax evasion—the first major crack in the long history of Swiss bank secrecy.[6] In 2009, the U.S. Department of the Treasury's Office of Foreign Asset Control (OFAC) imposed a fine of $536 million U.S. dollars against another Swiss bank, Credit Suisse, for assisting clients in evading U.S. economic sanctions.[7] In the first eight months of 2012, OFAC collected over $600 million in penalties for violations of U.S. economic sanctions.[8] And enforcement of the

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[3] U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION, *Sherman Act Violations Yielding a Corporate Fine of $10 Million or More*, http://www.justice.gov/atr/public/criminal/sherman10.html (last visited Oct 24, 2012).

[4] *Id.*

[5] *Id.* On September 21, 2012 AU Optronics Corp. issued a press release indicating that a federal district court had imposed a fine of $500 million U.S. dollars in an antitrust case. Press Release, AU Optronics Corp (Sept. 21, 2012), http://auo.com/?sn=1214&lang=en-US (last visited Oct 24, 2012). This matches the largest previous fine (imposed in 1999 against F. Hoffmann-La Roche, Ltd.) in nominal terms. *See Sherman Act Violations Yielding a Corporate Fine of $10 Million or More*, *supra* note 3. The company has indicated it plans to appeal.

[6] U.S. INTERNAL REVENUE SERV., *Offshore Tax-Avoidance and IRS Compliance Efforts*, http://www.irs.gov/uac/Offshore-Tax-Avoidance-and-IRS-Compliance-Efforts (last updated Aug. 1, 2012).

[7] Settlement Agreement between the U.S. Department of Treasury's Office of Foreign Assets Control and Credit Suisse AG, Dec. 16, 2010, MUL-473-923, http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/12162009.pdf.

[8] *See* U.S. DEP'T OF THE TREASURY, Resource Center—2012 Enforcement Information, http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx (last updated Oct. 22, 2012, 11:06 AM). The vast majority of this total ($619 million) came from a single enforcement action against ING Bank N.V. *See* U.S. DEP'T OF THE TREASURY, ENFORCEMENT INFORMATION FOR JUNE 2012, http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06122012_ing.pdf (last visited Nov. 4, 2012). However, this is not out of step with other penalty totals in recent years. OFAC imposed penalties of over: $91 million in 2011, U.S. DEP'T OF THE TREASURY, Resource Center—2011 Enforcement Information, http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/2011.aspx (last updated Oct. 22, 2012, 11:06 AM); $200 million in 2010, U.S. DEP'T OF THE TREASURY, Resource Center—2010 Enforcement Information http://www.treasury.gov/

Foreign Corrupt Practices Act (FCPA) continues to be a priority for the U.S. government.[9]

In 2001, European antitrust regulators blocked the merger of the American companies General Electrical and Honeywell after the U.S. Department of Justice had approved the merger.[10] By 2008, the European Commission had fined a major U.S. software company, Microsoft, over €1.5 billion in several related antitrust proceedings.[11] In 2009, the European Commission imposed a €1.06 billion antitrust fine against U.S. computer-chip maker Intel.[12] Outside of antitrust, the size of the European market makes it possible for European regulations to dictate the composition, manufacturing process, or other requirements for many products and services that are sold

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resource-center/sanctions/CivPen/Pages/2010.aspx (last updated Aug. 25, 2012, 12:23 PM); and $772 million in 2009, U.S. DEP'T OF THE TREASURY, Resource Center—2009 Enforcement Information http://www. treasury.gov/resource-center/sanctions/CivPen/Pages/2009.aspx (last updated Aug. 25, 2012 12:23 PM).

[9] *See, e.g.*, *Walmart's Mexican Morass*, ECONOMIST, Apr. 28, 2012, at 82, http://www.economist.com/node/21553451.

[10] Philip Shishkin, *E.U. Members Endorse Move to Bar GE Deal,* WALL ST. J., June 26, 2001, at A3.

[11] *See* European Commission decision fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005)4420 final, 2009 O.J. (C 166) 08, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:166:0020:0023:EN:PDF (imposing fine of €899 million); European Commission decision fixing the definitive amount of the periodic penalty payment imposed on Microsoft Corporation by Decision C(2005)4220 final and amending that Decision as regards the amount of the periodic penalty payment Case COMP/C-3/37.792 Microsoft, July 12, 2006, http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_2186_8.pdf (imposing fine of €280.5 million); European Commission decision relating to a proceeding pursuant to Article 82 of the EC Treaty and Article 54 of the EEA Agreement against Microsoft Corporation, 2007 O.J. (L 32) 50, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:032:0024:0024:EN:PDF (imposing fine of €497,196,304).

[12] Summary of a European Commission decision relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/C-3/37.990 — Intel), 2009 O.J. (C 227) 07, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2009:227:0013:0017:EN:PDF.

worldwide.[13] These include cosmetics, processed foods, social networks, air conditioning units, and children's toys.[14]

China had no antitrust law before 2008, but it has already become a significant gatekeeper in the approval of mergers and acquisitions between multinational companies. By August 2012, China's Ministry of Commerce had imposed conditions on at least thirteen mergers,[15] including at least three mergers between non-Chinese companies that had been unconditionally approved by U.S. and European regulators.[16] This included conditions imposed on: U.S. hard-drive maker Seagate's acquisition of the hard drive division of South Korea's Samsung; U.S. automaker General Motor's acquisition of U.S. auto-parts-supplier Delphi; and U.S. internet-search provider Google's acquisition of U.S. cellphone manufacturer Motorola Mobility.[17]

These examples, of course, raise an important question: where does international law enter the picture?[18] In terms of

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[13] *See* Bradford, *supra* note 2.

[14] *Id.*

[15] *See, e.g.*, Announcement of Approval with Additional Restrictive Conditions of the Acquisition of Motorola Mobility by Google, No. 25 (promulgated by the Ministry of Commerce of the People's Republic of China, May 31, 2012) http://english.mofcom.gov.cn/aarticle/policyrelease/domesticpolicy/201206/20120608199125.html (China); Margaret Wang, *China's Current Approach to Vertical Arrangements Under the Anti-Monopoly Law,* COMPETITION POL'Y INT'L, May 16, 2012, https://www.competitionpolicyinternational.com/assets/Free/cpiasiawang.pdf.

[16] Davis Polk & Wardwell LLP, *China's Antitrust Regulator MOFCOM Approves Google's Acquisition of Motorola with Conditions*, Davis Polk Client NewsFlash (May 24, 2012), http://www.davispolk.com/files/Publication/31302b00-317b-48a4-b718-a753dfd28f23/Presentation/PublicationAttachment/d91771bc-ac0c-4140-8a80-a9b727e6a885/052412_antitrust.html. It has blocked only one proposed deal, Coca-Cola's unsuccessful attempt to acquire Huiyuan, a Chinese juice manufacturer. *Id.* Because this involved acquisition of a Chinese company, I do not include it in the above discussion of China's extraterritorial regulatory efforts.

[17] *Id.*

[18] International law is undoubtedly relevant to multistate activity. Whether its rules serve simply to coordinate behavior or exercise independent normative force, it is something which matters to states. Their official rhetoric relies heavily on the language of international law, GOLDSMITH & POSNER, *supra* note 1, at 168-170, and their resource allocation decisions indicate that they value

international law doctrine, it enters with the law of international prescriptive jurisdiction, the body of international law relating to when states can prescribe legal rules to affect conduct that is not purely domestic.[19] Treatises, casebooks, and law-reform efforts set out a group of categories that are said to justify such prescriptive jurisdiction.[20] Territory and nationality start the list as generally-accepted categories.[21] These are typically followed by effects-based jurisdiction, sometimes with the proviso that jurisdiction based on physical effects is more broadly accepted than jurisdiction based on economic effects.[22] After effects, passive-personality jurisdiction (based on harm to a state's nationals)[23] and protective jurisdiction (based on harm to a state's security interests)[24] round out the list of standard grounds. A principle of "reasonableness" is sometimes set out as a limit on activities otherwise falling within one or more categories.[25] Universal jurisdiction is included at the end of most lists, setting out the idea that for a very limited set of offenses (piracy is

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technical competence in international law analysis. Yet public international law—particularly in its formalistic sense—generates academic attention that may exceed this admitted substantive importance. It may be of great concern to lawyers in ministries of foreign affairs, non-governmental advocacy organizations, and international trade and arbitration practice groups. But to the vast majority of attorneys dealing with international issues, "international law" is not of primary concern. Domestic law has far more importance to the mundane, daily activities of international business—the movement of goods, money, persons, and technologies across international boundaries.

[19] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 401 (1987) (distinguishing between jurisdiction to prescribe, jurisdiction to adjudicate, and jurisdiction to enforce).

[20] *See, e.g.*, Harvard Research on International Law, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. SUPP. 435, 445 (1935). *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987).

[21] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1) (a)-(b) (1987) (territory); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(2) (1987) (nationality).

[22] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) (not distinguishing between physical and economic effects); *id.* cmt. d (discussing possible distinction between physical and economic effects).

[23] *Id.* at § 402, cmt. g (1987).

[24] *Id.* at § 402(3); *id.* cmt. f (1987).

[25] *Id.* at § 403 (1987).

usually listed as the paradigmatic example), any state may exercise jurisdiction.[26]

Yet, despite the technical names, it is not clear that these jurisdictional categories—even if applied strictly—would limit state behavior in typical enforcement actions. The number of situations in which states have an incentive to apply their law extraterritorially, but that do not fall into one of these categories (involving a national, an event on state territory, a physical or economic effect on state territory, harm to a national, or harm to the state's security interests), seems small. Accordingly, the public international law of prescriptive jurisdiction may serve more to enable than to constrain state action. To the extent "reasonableness" is an international-law requirement (a contested proposition),[27] it would appear to do more work than any of the jurisdictional categories themselves.

This apparent prevalence of domestic over international law in governing multinational activities makes it a subject worthy of sustained analysis. Academic writing certainly has addressed the extraterritorial application of domestic law. Some articles oppose extraterritorial application of the particular laws,[28] others favor of it,[29]

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[26] *Id.* at § 404 (1987).

[27] *See* Phillip R. Trimble, *The Supreme Court and International Law: The Demise of Restatement Section 403*, 89 AM. J. INT'L. L. 53, 54-55 (1995) (questioning the assertion that international law contains a "reasonableness" requirement); Jack L. Goldsmith, Book Review, *International Litigation and the Quest for Reasonableness: Essays in Private International Law*, 91 AM. J. INT'L L. 391, 392-93 (1997) (same).

[28] *See, e.g.*, Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 208 (1996) (questioning the value of extraterritorial application of U.S. securities law); Austen Parrish, *Reclaiming International Law from Extraterritoriality*, 93 MINN. L. REV. 815, 874 (2009) (arguing that extraterritorial application of domestic law erodes cooperation and is accordingly harmful to the international system).

[29] *See, e.g.*, Joel R. Paul, *The Transformation of International Comity*, 71 LAW & CONTEMP. PROBS. 19, 38 (2008) (arguing against comity-based deference to international markets); Anthony J. Colangelo, *Constitutional Limits on Extraterritorial Jurisdiction: Terrorism and the Intersection of National and International Law*, 48 HARV. INT'L L. J. 121, 124-25, 188 (2007) (arguing for new constitutional test that would permit expansive extraterritorial application of U.S. anti-terrorism laws).

and there are many positions in between.[30] Others articles focus on conflict-of-law[31] and statutory interpretation[32] theories. Some writing offers empirical analysis of how lower courts apply the vague standards that typically result (at least in the United States) from high-court decision-making.[33]

Yet the actual operation of domestic extraterritorial enforcement programs receives less attention than it deserves.[34]

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[30] *See, e.g.*, Larry Kramer, *Extraterritorial Application of American Law After the Insurance Antitrust Cases: A Reply to Professors Lowenfeld and Trimble*, 89 AM. J. INT'L L. 750, 758 (1995) (advocating that courts balance interests statute-by-statute rather than case-by-case in extraterritoriality cases); Kenneth W. Dam, *Extraterritoriality in an Age of Globalization: The* Hartford Fire *Case*, 1993 SUP. CT. REV. 289, 290 (1993) (criticizing the international economic policy implications of the U.S. Supreme Court's *Hartford Fire* decision).

[31] *See, e.g.*, William S. Dodge, *Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L L. J. 101, 104-05, 169 (1998) (advocating that courts should apply a unilateral, rather than a multilateral, conflict-of-laws theory when deciding extraterritoriality cases); Larry Kramer, *Vestiges of Beale: Extraterritorial Application of American Law*, 1991 SUP. CT. REV. 179, 207 (1991) (suggesting that the U.S. Supreme Court's *Aramco* decision was in many ways a return to Bealean territorial thinking).

[32] *See, e.g.,* William S. Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKELEY J. INT'L L. 85, 90-91 (1998) (arguing that the presumption against extraterritoriality should be treated as weak presumption, useful as a means of determining unexpressed congressional intent, rather than as a clear statement rule); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 1-2 (1992) (arguing that the presumption against extraterritoriality should be replaced with a presumption that Congress intends a statute to apply extraterritorially when extraterritorial application would be consistent with contemporary principles of international law).

[33] *See, e.g.*, Tonya L. Putnam, *Courts Without Borders: Domestic Sources of U.S. Extraterritoriality in the Regulatory Sphere*, 63 INT'L ORG. 459 (2009) (reporting results of empirical analysis of U.S. federal court decisions in extraterritoriality cases).

[34] An emerging body of work is beginning to address the Foreign Corrupt Practices Act. *See, e.g.*, Stephen J. Choi & Kevin E. Davis, *Foreign Affairs and the Enforcement of the Foreign Corrupt Practices Act*, N.Y.U. Pub. Law & Legal Theory Research Paper Series, Paper No. 12-35, 3-4, 38-40 (2012) (reporting results of empirical analysis of FCPA enforcement actions); Joseph W. Yockey, *FCPA Settlement, Internal Strife, and the Culture of Compliance*, 2012 WIS. L. REV. 689, 715-16 (2012) (suggesting that aspects of current FCPA enforcement policy may impede, rather than promote, a culture of corporate self-policing); Mike Koehler, *The Façade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 998-1001 (2010) (criticizing the use of out-of-court settlements to resolve most FCPA enforcement actions).

Fortunes of international companies are made and lost by domestic enforcement decisions, and senior executives increasingly find themselves facing long jail sentences for white collar crimes, perhaps even in a state that has never been their home.[35] Given these realities, there is room for additional attention to situations where the extraterritorial scope of a statute is not seriously contested.[36]

I. THREE IMPLICATIONS

The domestic source of many of the laws regulating international business has several ramifications for understanding the regulatory regime applicable to international activities. First, procedures for conducting domestic investigation and enforcement proceedings influence the degree to which domestic substantive law actually affects international activity. Second, the same activity will frequently be subject to the laws of multiple countries. Sometimes compliance with all applicable laws will be possible; at other times, compliance with one regulatory regime will necessarily entail at least technical violation of the laws of another regime. Third, the types of admissions and disclosures governments require to settle enforcement proceedings will influence the success rate of related civil claims.

A. Substance and Procedure

Legal historians have long observed that procedural rules influence the scope of substantive law.[37] Economic analysis has

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[35] *See* Scott D. Hammond, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Address at the 24th National Institute on White Collar Crime, (Feb. 25, 2010), http://www.justice.gov/atr/public/speeches/255515.htm (noting number of foreign defendants serving jail time for criminal violations of U.S. antitrust law).

[36] For a more detailed discussion of statutes with broadly accepted extraterritorial scope, see Adam I. Muchmore, *Jurisdictional Standards (and Rules)*, 46 VAND. J. TRANSNAT'L L. (forthcoming 2013).

[37] *See, e.g.*, F. W. MAITLAND, EQUITY—ALSO THE FORMS OF ACTION AT COMMON LAW—TWO COURSES OF LECTURES 295 (A. H. Chaytor and W. J. Whittaker ed. 1929) (quoting 1 HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CHIEFLY SELECTED FROM LECTURES DELIVERED AT OXFORD

described a similar phenomenon with respect to traditional crime: the actual rate of compliance with substantive law should be directly related to the likelihood that a violator will be caught and convicted—an outcome that depends, in part, on the types of investigative and trial procedure the law permits.[38]

In the United States, at least three aspects of government enforcement procedure heavily influence the scope of substantive law. First, the executive frequently enforces broad, open-textured (standard-like)[39] legal requirements.[40] Second, a large proportion of major government investigations are settled before trial (and sometimes outside of court).[41] Third, enforcement priorities change

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389 (1883)) (observing that procedural rules have exercised a profound influence on the development of English substantive law).

[38] *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176-78 (1968) (suggesting that criminal activity is a function of the likelihood of apprehension and severity of punishment). The likelihood that a violator will be caught and convicted is itself a function of criminal procedure rules governing investigation and trial.

[39] On the distinction between rules and standards and its influence on the effective content of substantive law, see Muchmore, *supra* note 36.

[40] *See, e.g.*, The Sherman Act, 15 U.S.C. § 1 (2012) (prohibiting "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations"); The Securities Exchange Act of 1934, 15 U.S.C. § 78j(b) (2012) (prohibiting "in connection with the purchase or sale of any security" the use of "any manipulative or deceptive device or contrivance").

[41] *See* Lars Noah, *Administrative Arms-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 Wis. L. Rev. 873, 891 (1997) ("As is true with civil lawsuits and criminal prosecutions, the vast majority of all administrative enforcement proceedings result in settlements."). *Cf. Bribery Abroad: A Tale of Two Laws*, ECONOMIST, Sept. 17, 2011, at 80, http://www.economist.com/node/21529103 (noting virtual absence of trials in FCPA enforcement actions against corporations); *Free Exchange: Fine and Punishment*, ECONOMIST, July 21, 2012, at 35, http://www.economist.com/node/21559315 (highlighting the frequency and magnitude of corporate settlements in the 2012 summer in both the U.S. and the U.K.); Milton Handler, *Antitrust: Myth and Reality in an Inflationary Era*, 50 N.Y.U. L. REV. 211, 240 n.149 (1977) (setting out statistics from the U.S. Department of Justice's Antitrust Division on cases settled by consent decree between 1962 and 1974). The second observation may explain part of the first, but that is beyond the scope of this essay. On the wide breadth of federal criminal law and its relation to government settlement power, *see* Samuel Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1662-63 (2007).

over time, with available resources, and according to the preferences of government officials.[42]

Accordingly, understanding what the law "is" in a particular area subject to regulation requires more than a simple reading of written laws and published court decisions. A party seeking to comply with the most restrictive possible reading of every government requirement would not only face severe competitive pressures, but would frequently be conforming its behavior to a standard beyond that intended[43] by the requirements' drafters.[44] Intelligent compliance requires an analysis of current and potential future government policies. Potential sources include speeches by government officials, formal policy statements, and perhaps most importantly, information about the factual background of prior enforcement actions and the terms on which those actions were resolved.[45]

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[42] According to press reports, the U.S. Department of Justice was pursuing only eight FCPA cases in 2001. *Schumpeter: The Corruption Eruption*, ECONOMIST, Apr. 29, 2010, at 87, http://www.economist.com/node/16005114. It was reportedly pursuing 150 as of April 2010. *Id.*

[43] For those who accept the distinction between rules and standards, this should hold regardless of one's view of the degree of intent that can be attributed to collective bodies such as legislatures and agencies. *Cf.* MAXELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE: CONCEPTS AND APPLICATIONS IN LAW 264-80 (2009) (describing several academic theories skeptical of the idea of legislative intent).

[44] Such a strict view would of course be open to individuals, but is at least arguably problematic for managers with a fiduciary obligation to maximize shareholder profits. *See* JAMES D. COX & THOMAS LEE HAZEN, TREATIES ON THE LAW OF CORPORATIONS § 10:1 (2011) (discussing fiduciary duty generally).

[45] The information available on prior enforcement actions varies substantially between regulatory areas and by type of settlement arranged. Substantial information is available on enforcement actions resulting in criminal plea agreements. *See, e.g.*, U.S. DEP'T OF JUSTICE, FRAUD SECTION, FCPA and Related Enforcement Actions, http://www.justice.gov/criminal/fraud/fcpa/cases/a.html (last visited Oct. 24, 2012) (listing docket numbers and including public court filings for over 200 FCPA enforcement actions dating back to 1977). Far less detailed information is available on enforcement proceedings resulting in a confidential settlement. For an example from the domestic biotechnology context, see U.S. DEP'T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERV., Biotechnology Regulatory Services, Noncompliance History, http://www.aphis.

B. Multiple Regulatory Regimes

The scope of the modern regulatory state means that most international actors will face legal requirements from two or more states. (While questions remain at the margins and as a matter of legal doctrine, it is largely settled that states can regulate some things outside of their physical territory—and, in fact, may need to do so in order to maintain basic territorial control.)[46]

Differences in legal requirements exist along a continuum. (See Figure 1.) At one end are differences in substantive policy. At the opposite end are differences in technical requirements.[47] Somewhere near the middle are the numerous procedural rules that implicate significant substantive concerns.

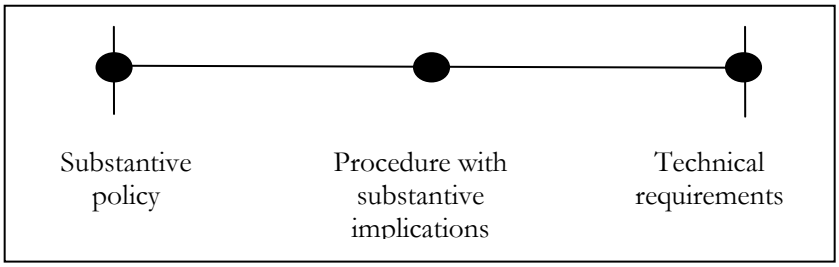

Figure 1.

An example of the first extreme, differences in substantive policy, is the content—or existence—of antitrust law. For over a century now, antitrust law has been a basic part of U.S. economic policy.[48] Other

usda.gov/biotechnology/compliance_history.shtml (last updated Aug. 4, 2011) (providing only short summaries of most enforcement actions).

[46] *Cf.* JACK GOLDSMITH & TIM WU, WHO CONTROLS THE INTERNET: ILLUSIONS OF A BORDERLESS WORLD, 155-156 (2006) (noting that states frequently seek to protect their citizens from foreign harms, and often do so by extraterritorial application of domestic law).

[47] There may of course be some borderline areas, but the basic distinction is useful for analytical purposes. *Cf.* Kenneth W. Dam, *Extraterritoriality and Conflicts of Jurisdiction*, 77 AM. SOC. INT'L L. PROC. 370, 373 (1983).

[48] Although still far less developed, it is possible that anti-bribery laws may be becoming a similarly constitutive aspect of U.S. foreign economic policy. Like antitrust law in the latter half of the last century, the United States still enforces laws against foreign bribery more aggressively than any other country. *See*

countries have adopted economic policies encouraging the development of national industrial leaders in ways that are fundamentally opposed to U.S. antitrust principles. Historically many European countries adopted this type of economic policy;[49] today China is perhaps the best example.[50]

Differences in substantive policy are difficult to resolve through technocratic negotiation, and decisions to pursue or drop major enforcement actions may involve the highest levels of government.[51] Differences in substantive policy also have been

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TRANSPARENCY INT'L, PROGRESS REPORT 2011: ENFORCEMENT OF THE OECD ANTI-BRIBERY CONVENTION 8-9 (2011), http://www.transparency.org/content/download/61106/978536 (showing Germany is the only country that is beginning to come close). However, there is increasing convergence between the United States and the Organization for Economic Cooperation and Development (OECD) countries in at least the formal prohibition on foreign bribery. *See* OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec, 17, 1997, T.I.A.S. No. 105-43, 37 I.L.M. 7, http://www.oecd.org/dataoecd/4/18/38028044.pdf; OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions: Ratification Status, Mar. 2009, http://www.oecd.org/dataoecd/59/13/40272933.pdf.

[49] *See* KINGMAN BREWSTER, JR., ANTITRUST AND AMERICAN BUSINESS ABROAD 40-42 (1958) (discussing differing policies toward cartels in several European countries); Dam, *supra* note 47, at 373-74 (discussing U.S. antitrust case involving watchmaking cartel established with the support of the Swiss government). On the strategic implications of the gradual (but far from complete) convergence between the E.U. and U.S. antitrust regimes, *see* Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L. J. 383, 405-410, 418 (2007).

[50] *See* Brief of Amicus Curiae the Ministry of Commerce of the People's Republic of China in Support of Defendants' Motion to Dismiss the Complaint at 3, In Re Vitamin C Antitrust Litig., 2011 U.S. Dist. LEXIS 5466 (E.D.N.Y Jan. 20, 2011) (No. 06-MD-1738).

[51] *See* Letter from Margaret Thatcher, Prime Minister of the United Kingdom, to Ronald Reagan, President of the United States (Mar. 29, 1983) (urging President Reagan to intervene personally to block a U.S. antitrust investigation involving U.K. companies in the civil aviation industry); Memo from Richard Burt to George Schultz, U.S. Secretary of State (undated memo in preparation for Dec. 22, 1984 visit of U.K. Prime Minister Margaret Thatcher to Washington, D.C.) (noting President Reagan's decision to direct the U.S. Department of Justice to close its antitrust investigation involving U.K. companies in the civil aviation industry); Memorandum of Conversation, Meeting between U.S. President Ronald

prominent in disputes over criminal penalties for insider trading (where the United States has criminalized actions that were only civil violations in some Asian countries)[52] and over the sale of Nazi memorabilia (where some European countries have prohibited actions that would be protected by the First Amendment in the United States).[53]

An example of the second extreme, differences in technical requirements, is a form that needs to be filed reporting certain information relating to a particular transaction. For example, a firm may need to file different disclosure documents in different jurisdictions. So long as one jurisdiction does not require withholding of information that another jurisdiction requires disclosed, the firm is able to comply with the technical requirements of more than one jurisdiction. Many differences in technical requirements lead to increased compliance costs but few substantive problems.

In between the two extremes are procedural rules with substantive implications. These rules, while phrased in terms of procedure, can create conflicting requirements or differing incentive structures that in effect alter the substantive requirements of a law.

Reagan and U.K. Prime Minister Margaret Thatcher (Dec. 28, 1984) (noting that Prime Minister Thatcher "expressed her immense gratitude for the President's courageous decision" to halt the antitrust investigation involving U.K. companies in the civil aviation industry, but indicating her displeasure at learning that the Reagan Administration did not plan to introduce legislation to remove the treble damages provision from U.S. antitrust law). These documents are available at the website of the Margaret Thatcher Foundation, http://www.margaretthatcher.org/. *See also* Dam, *supra* note 47, at 374.

[52] *See Insider Trading in Hong Kong: To the Dungeon*, ECONOMIST, Sept. 17, 2009, at 35 http://www.economist.com/node/14460534 ("[i]nsider trading was not even a criminal offense in Hong Kong until 2003"); Anthony Lin, *Letter From Asia: Landmark Decision Reached in First Hong Kong Insider Trading Trial*, AM LAW DAILY (Mar. 13, 2009), http://amlawdaily.typepad.com/amlawdaily/2009/03/hong-kongs-first-criminal-trial-for-insider-trading-has-resulted-in-the-conviction-of-a-former-investment-banker-and-fou.html (noting that before 2003, insider trading was only a civil offense in Hong Kong "and was rarely punished").

[53] *See, e.g.*, UEJF et Licra c/Yahoo! Inc., No. RG: 00/05308 (Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, Nov. 20, 2000) (Fr.), *English translation available at* http://www.juriscom.net/txt/jurisfr/cti/yauctions20000522.htm.

Examples include many of the procedural rules that have historically led to conflict between the United States and the European countries. On the U.S. side, these include: private-attorney-general provisions;[54] treble damages provisions;[55] and extensive mandatory discovery.[56] On the European side, they include blocking statutes[57] and banking secrecy laws.[58]

These regulatory conflicts often involve differences that are difficult to resolve through purely legal analysis. Whatever the role of power in public international law,[59] differences in substantive policy frequently involve situations where state power dictates the outcome of a dispute. Powerful countries can exercise more extraterritorial authority than weak countries.[60] Countries with assets relevant to

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[54] *See generally* Hannah Buxbaum, *The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation*, 26 YALE J. INT'L L. 219, 222-223 (2001) (describing private-attorney-general provisions).

[55] *See, e.g.*, 15 U.S.C. §15 (2006) (providing that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may sue to "recover threefold the damages by him sustained").

[56] *See* FED. R. CIV. P. 26(b)(1) (providing for discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense"); *see also* GARY B. BORN & PETER B. RUTLEDGE, INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS 941-62 (4th ed. 2007) (discussing disputes over U.S. discovery orders requiring production of materials located abroad).

[57] *See generally* BORN & RUTLEDGE, *supra* note 56, at 649-50 (describing blocking statutes).

[58] *See Don't Ask, Won't Tell: Amid a Global Squeeze on Tax Evasion, Switzerland is the Prime Target*, ECONOMIST, Feb. 11, 2012, at 46 ("Swiss law entrenched bank secrecy in 1934, making it a criminal offence to reveal a client's identity."), http://www.economist.com/node/21547229.

[59] *Compare* W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 105, 108, 110-111 (1981) (describing international lawmaking as a process of communication dependent in part on state power) *and* GOLDSMITH & POSNER, *supra* note 1, at 39-40 (describing customary international law as a product of state pursuit of rational self-interest) *with* Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisions in International Law*, 119 HARV. L. REV. 1404, 1415, 1440 (2006) (asserting that states have a "moral and legal obligation" to comply with international law) (reviewing GOLDSMITH & POSNER, *supra* note 1).

[60] Of course, weaker countries may choose to operate extraterritoriality in areas of high concern to them, but the costs they suffer will limit them in this area more than similar costs limit powerful countries. *See* Muchmore, *supra* note 36.

particular substantive areas can exercise more authority in those areas than similarly powerful countries without relevant assets.[61]

This is not to suggest that state power is the only determinant of extraterritorial scope. To the extent international law serves as a limit on state behavior, the international law of prescriptive jurisdiction may limit the scope of state extraterritoriality. Outside of legal requirements, the ability of private actors to relocate or influence domestic political processes (including both the scope of law and the exercise of enforcement discretion) can substantially limit what a country can do both inside and outside its territory.[62]

C. Admissions, Information Disclosure, and Civil Litigation

Many U.S. federal laws are enforced by both government action and private civil litigation.[63] This has two important consequences. First, the executive branch of government does not retain exclusive authority over whether to begin an extraterritorial enforcement action. Second, targets of government enforcement must consider the potential for follow-on civil litigation after a government enforcement proceeding is concluded.[64]

A substantial majority of major enforcement proceedings initiated by the U.S. government are resolved through settlement rather than trial.[65] These settlements fall into three primary categories: guilty pleas to criminal charges; civil or criminal settlements involving

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[61] Relevant assets would include financial centers (securities and banking regulation), large markets (antitrust and product safety regulation), and natural resources (regulation of those resources).

[62] *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES 15-20 (1970) (introducing concepts of economics-based "exit" and politics-based "voice" as two opposing ways of influencing the behavior of an organization).

[63] Two well-known examples are the Sherman Antitrust Act of 1890, 15 U.S.C. § 15, and the Securities and Exchange Act of 1934, 15 U.S.C. § 78j. On the relationship between government enforcement proceedings and private civil litigation, see Stephen Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 358, 372-74 (1984) (discussing "four determinants of the relative desirability of liability and regulation").

[64] Or follow-on government enforcement after a private civil proceeding.

[65] *See supra* note 41.

an admission of wrongdoing (including non-prosecution and deferred prosecution agreements); and settlements "neither admitting nor denying wrongdoing."[66]

The tendency of regulated parties to settle rather than force the government to try its case relates in part to the structure of U.S. evidence law. Under the Federal Rules of Evidence, either a judgment in response to a guilty plea or a settlement involving an admission of wrongdoing can have significant consequences in related civil litigation.[67] A judgment following a guilty plea is generally admissible "to prove any fact essential to the judgment."[68] A guilty plea is also perceived as causing substantial (and sometimes terminal) reputational consequences for firms, and presenting risks to the firm's operating licenses or ability to do business with the government.[69]

Even without a criminal guilty plea, a settlement involving an admission of wrongdoing can have tremendous consequences in civil litigation. The Federal Rules of Evidence provide that a party's prior statements are not hearsay (and thus may be admissible for the truth of the matter asserted) if the statement is one that "the party manifested that it adopted or believed to be true" —a criterion that an admission of wrongdoing in a settlement agreement is highly likely

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[66] For more extensive discussion of the use of non-prosecution agreements and deferred-prosecution agreements in settling FCPA actions, *see* Koehler, *supra* note 34, at 933-939.

[67] Preclusion law presents defendants in government enforcement proceedings with a similar problem. Under the doctrine of non-mutual offensive collateral estoppel, defendants face a significant risk in going to trial against the government. A loss in trial against a government agency can in some circumstances bar a defendant from re-litigating one or more issues in a related civil claim. *See* Lewis A. Grossman, *The Story of Parklane: The 'Litigation Crisis' and the Efficiency Imperative*, *in* CIVIL PROCEDURE STORIES 436-38 (Kevin M. Clermont ed., 2d ed. 2008) (noting the effect of non-mutual offensive issue preclusion on government settlement leverage in enforcement actions).

[68] FED. R. EVID. 803(22) (providing that judgments of previous convictions—including those that result from a guilty plea—are not excluded by the hearsay rule, even if the declarant is available. There is a requirement that the plea be to a crime "punishable by death or imprisonment in excess of one year.").

[69] *See* Buell, *supra* note 41, at 1664-1666 (discussing reputational consequences of indictment or conviction of corporations).

to satisfy.[70] Where a private right of action exists for the precise issue that is subject to government enforcement—such as a securities fraud action under SEC Rule 10b-(5)[71] —forcing a company to admit to wrongdoing could "remove . . . potentially all barriers to private liability, including trial risk for the plaintiff."[72]

These evidentiary rules give a government agency substantial power to influence the enforcement target's later exposure to related civil litigation. Consequently, the type of admission the government requires should affect the amount an enforcement target is willing to pay to settle the potential charges. All other things being equal, the government should be able to extract a larger payment by offering a settlement neither admitting nor denying wrongdoing.[73] This option will least impair the target's defense in follow-on litigation. The value of this option depends on how much the admission would increase the probability of the target's losing in such litigation, the amount of that loss, the effect on possible settlements with future litigants, and the expected effect on the company's good will.

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[70] FED. R. EVID. 801(d)(2)(B). They are accordingly admissible so long as they are relevant, FED. R. EVID. 402 (providing that evidence is admissible only if relevant), not unduly prejudicial, FED. R. EVID. 403 (providing that relevant evidence may be excluded "if its probative value is substantially outweighed" by its prejudicial effect), and not excluded by other evidentiary rules.

[71] 17 C.F.R. § 240.10b-5 (codification of SEC Rule 10b-(5)).

[72] Samuel W. Buell, *Potentially Perverse Effects of Corporate Civil Liability*, *in* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT 87, 100 (Anthony S. Barkow & Rachel E. Barkow eds., 2011); *see also id.* ("Class action plaintiffs could simply print a copy of the settlement documents in the SEC enforcement proceeding, take them to a judge and if necessary a jury, and offer them as admissions to support denial of a motion to dismiss or for summary judgment, or even to support a jury verdict.").

[73] This should be true regardless of the strength of the government's case at trial. At any probable government victory below 100% (at perhaps even then due to transaction costs), the target will be willing to pay some marginally lower amount for a settlement that increases exposure to civil litigation risk than a settlement that does not. A possible exception is a target that is effectively judgment proof for the amount of money at stake.

II. UNDERSTANDING DOMESTIC EXTRATERRITORIALITY

Having discussed the importance of domestic law for international activity, I suggest four methodological approaches that may be relevant for a journal focusing on the intersection between law and international affairs. These are grounded broadly in the law-and-economics tradition of legal scholarship.[74]

A. Law Outside the Courts

In studying purely domestic law, an important component of legal scholarship has sought to understand how both law and non-legal norms function outside of the context of court enforcement.[75] While a few scholars have moved in this direction in understanding public international law,[76] much international law scholarship continues to focus on enforcement of international law by domestic[77]

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[74] I do not mean to suggest economic analysis as the only relevant perspective. I do believe, however, that the application of domestic law to international activity presents numerous issues that can be usefully analyzed from an economic perspective. Other traditions likely to offer useful insights on the application of domestic law to international activity include comparative studies, historical studies, and perhaps anthropological studies.

[75] *See, e.g.*, ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 4 (1991) (presenting results of empirical study of informal dispute-settlement among neighbors, and noting that findings "add to a growing library of evidence that large segments of social life are located and shaped beyond the reach of law"); Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1724-25 (2000) (analyzing role of extralegal norms in the cotton industry); Lisa Bernstein, *Merchant Law in a Merchant Court*, 144 U. PA. L. REV. 1765, 1771-77 (1996) (analyzing role of extralegal norms in the grain and feed industries); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 115-17 (1992) (analyzing role of extralegal norms in the diamond industry).

[76] *See, e.g.*, GOLDSMITH & POSNER, *supra* note 1, at 26-35 (arguing that many phenomena typically described as customary international law can be explained through one of four models of states acting in their own self-interests); Bradford, *supra* note 49, at 438-39 (analyzing international antitrust negotiations and suggesting that existing incentive structures may lead rational states to choose informal cooperation over legally binding commitments).

[77] The literature on the enforcement of international law in domestic courts—particularly U.S. courts—is too numerous to cite. For two opposing views

and international courts.[78] This focus on courts has obscured the role of non-court enforcement as a major determinant of *ex ante* behavior. A deeper understanding of the dynamics of out-of-court regulatory enforcement could have significant explanatory power.[79]

B. Rational Choice Theory

By definition, extraterritorial application of domestic law involves at least two states—the law-applying state and the foreign state in which the law is applied.[80] The power of the two states may differ, but each state retains some ability to act unilaterally—both in the current situation and in future interactions.

Rational choice theory offers tools for analyzing such interactions. Whether through two-by-two games, extended form games, or complex multi-level models,[81] this theoretical approach should offer insight into many interactions between states. Under what circumstances can we expect aggressive enforcement by one state (of, say, anti-bribery laws) to encourage, rather than discourage, the other state from devoting additional resources to that issue?

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on the degree to which international law can serve as a rule of decision in U.S. courts, *compare* Curtis A. Bradley et al., Sosa, *Customary International Law, and the Continuing Relevance of* Erie, 120 HARV. L. REV. 869, 935-36 (2007) (arguing that the U.S. Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain* only provided for limited application of international law in U.S. courts); *with* Beth Stephens, Sosa, *The Federal Common Law and Customary International Law: Reaffirming the Federal Courts' Powers*, 101 AM. SOC'Y INT'L L. PROC. 269, 271 (2007) (arguing that the U.S. Supreme Court's 2004 decision in *Sosa v. Alvarez-Machain* provided for broad application of international law in U.S. courts).

[78] *See, e.g.*, Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 AM. J. INT'L L. 225, 225-230 (2012) (surveying existing literature on the effectiveness of international courts and proposing increased use of social-science-based research methodologies).

[79] The emerging FCPA literature has begun to scratch the surface with respect to out-of-court enforcement of U.S. anti-bribery law. *See* Koehler, *supra* note 34, at 907.

[80] This excludes, of course, situations where a state's law is applied on the high seas or in other areas not claimed by any state.

[81] *See generally* DOUGLAS BAIRD ET AL, GAME THEORY AND THE LAW 10-11, 50-52, 75-78 (1994); *see also* Rachel Brewster, *Rule-Based Dispute Resolution in International Trade Law*, 92 VA. L. REV. 253, 263-68 (2006) (modeling U.S. negotiations for rule-based WTO dispute resolution as a two-level game).

Under what circumstances can we expect a crackdown on one tax haven to reduce, rather than relocate, tax evasion? Under what circumstances will increased inspection of imports result in increased product safety, rather than a relaxation of safety standards in the exporting country? For these types of questions, an analysis of the appropriate domestic-law policy depends on an understanding of how foreign countries or their citizens will react.

C. Predictable Non-Rationality

Rational choice analysis is only one step toward a more complete understanding of domestic extraterritoriality. Behavioral psychology has demonstrated that individuals respond in non-rational but predictable ways to particular situations.[82] States are led by individuals, who respond to constituencies of other individuals. Applying cognitive psychology to leaders and constituencies should refine—and sometimes refute—rational-choice predictions about the consequences of particular policies.

D. Empirical Analysis

Congress frequently structures the extraterritorial scope of statutes as standards, rather than rules.[83] Often the relevant substantive law is also more standard-like than rule-like. This two-level standard makes predicting how the law will be applied—and thus, in a Holmesian sense, what the law is—difficult in borderline situations. One solution to this uncertainty is the practitioner's approach—a hunch based on years of experience (often including non-public knowledge) analyzing similar situations.[84] Another approach, more suited to the academic setting, is large-*n* and small-*n*

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[82] *See generally* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473-74 (1998) (proposing the use of behavioral economics as a supplement to traditional, rational-choice-based economic analysis of the law).

[83] *See* Muchmore, *supra* note 36.

[84] *Cf.* KARL N. LLEWELLYN, THE BRAMBLE BUSH: SOME LECTURES ON LAW AND ITS STUDY 99-100 (1930) (noting that experienced practitioners rely on educated "hunching" to predict case outcomes).

empirical analysis of publicly available data.[85] This could usefully test rational choice, behavioral, and anecdotal conclusions about the effective content of existing law.[86]

III. NATIONAL AND GLOBAL WELFARE

I wish to begin this section by clarifying two things I have not argued in this essay. First, I have not argued that international law is not "law," or that states should be able to act contrary to international law without risking negative consequences. My goal has simply been to highlight the continuing significance of domestic law to international activity, and to suggest some ways that this might be relevant to legal scholarship. Today, all mainstream views of international law see application of domestic law to multinational activity as permissible in at least some circumstances. The way states use whatever discretion they have should itself be of significant interest.

Second, I have not argued that legal scholarship should limit itself to issues that are of concern to the practicing lawyer. Many issues that arise in private practice are fact-specific and tied to the interests of individual parties. An academic article on these topics might save a practicing lawyer research time, or serve a role similar to an amicus brief for one side or the other. Although this may at times be useful, it is not generally the most productive aspect of the academic enterprise.

Instead, I intend to suggest that domestic-law enforcement decisions play a major role in international policy—and that these decisions may not have received the level of systematic attention they

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[85] *See, e.g.*, Putnam, *supra* note 33. *See generally* Ran Hirschl, *The Question of Case Selection in Comparative Law*, 53 AM. J. COMP. L. 125, 132 n.22 (2005) (explaining differences between "large-N" and "small-N" studies).

[86] For example, Oona Hathaway has done several large-*n* empirical studies of treaty compliance. *See* Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOLUTION 588, 613 (2007); Oona A. Hathaway, *Between Power and Principle: A Political Theory of International Law*, 72 U. CHI. L. REV. 469, 513-30 (2005); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE. L. J. 1935, 1938-39 (2002).

deserve. Moreover, there may be aspects of domestic-law international enforcement policy that lend themselves to such systematic analysis.

In particular, most national regulators are likely to face incentives (such as democratic elections) that encourage them to pursue national, rather than global, welfare. Moreover, many issues subject to extraterritorial regulation involve collective action problems.

The distinction between global and national welfare is implicated because many instances of the behaviors sought to be regulated by extraterritorial statutes involve costs outside of the state that has the most direct ability to control the behavior at issue. A cartel among Chinese exporters may increase welfare in China, but reduce welfare (in a greater amount) within other countries. In that case, the cartel is Kaldor-Hicks efficient[87] within China, but inefficient at the global level. By applying (or threatening) to apply their antitrust laws to the Chinese exporters, other countries may be able to alter the incentives of either the Chinese regulators or the companies of the cartel.

Collective action problems exist because enforcement activities are costly and high levels of regulation can reduce the competitiveness of national firms. Anti-bribery laws are an example. Prohibiting domestic firms from bribing foreign government officials is likely to reduce national welfare—at least in the short term—if other countries do not enforce similar prohibitions. This is the situation the United States faced after the passage of the FCPA in 1977.[88]

More broadly, regulatory enforcement actions can have distributional consequences favoring—or disfavoring—the economy of the state taking the enforcement action. Few regulatory

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[87] *See generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW § 1.2 (8th ed. 2011) (explaining Kaldor-Hicks efficiency).

[88] Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat 1495.

enforcement actions are likely to be Pareto superior,[89] even within an individual economy.[90] The target of the enforcement action will almost certainly be worse off. Enforcement decisions are more likely to increase net welfare[91] (with both winners and losers), although even Kaldor-Hicks efficiency hardly can be guaranteed—some enforcement actions may in fact reduce net welfare.

From a global-welfare perspective, Pareto superiority seems just as unlikely, but Kaldor-Hicks efficiency raises concerns beyond those present in purely domestic enforcement actions.[92] Actions that are Kaldor-Hicks efficient are welfare-enhancing within the relevant society, but make some parties worse off. Actions can be Kaldor-Hicks efficient on a global level but have those made better off concentrated in one country and those made worse off concentrated in others.

Of course, similar situations exist within any state that has political or geographical subdivisions. Still, at least as a matter of political theory, concerns with the distributional implications of Kaldor-Hicks efficiency are mitigated in democratic societies by political mechanisms. National regulators are selected by national political processes, and self-interested actions by state regulators are constrained by mechanisms such as the U.S. Constitution's Dormant Commerce Clause.[93]

At the present time, no similar global political process exists, and it does not seem likely that one will develop in the foreseeable future. Accordingly, countries will continue to exist in a system where they will be tempted to implement regulatory policies: (1) that are Kaldor-Hicks efficient from a national perspective, even if welfare-

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[89] *See generally* POSNER, *supra* note 87, § 1.2 (explaining Pareto superiority).

[90] *Id.* (questioning the possibility of Pareto superior changes in the real world); *see also* Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1216, 1229 (1991) (same).

[91] *See generally* ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 42, 47-48 (5th ed. 2008) (explaining basic concepts of welfare economics).

[92] *Cf.* Calabresi, *supra* note 90, at 1221-1227 (discussing distributional concerns associated with Kaldor-Hicks efficiency).

[93] *See* U.S. CONST. art. I, § 8, cl. 3; LEA BRILMAYER ET AL, CONFLICT OF LAWS: CASES AND MATERIALS 376 (6th ed. 2011).

reducing from a global perspective; and (2) that, even if coincidentally Kaldor-Hicks efficient from a global perspective, contain a concentration of winners within the regulating state and a concentration of losers in one or more other states.

In such a situation, an excessive focus either on the open-textured international law of jurisdiction to prescribe or on formalistic domestic-law theories is unlikely to provide a complete picture of the regulatory environment. These approaches can usefully be supplemented by analysis of non-court enforcement mechanisms; formal modeling and rational choice theory; incorporation of insights relating to predictable non-rationality; and empirical testing.

IV. CONCLUSION

I have sought to suggest several types of scholarship that could be particularly suited to a journal of law and international affairs. There are of course many others, some of which may involve "law" far less directly. However, regardless of the reader's views about the nature and effectiveness of international law, domestic law is even more relevant to the daily business of international life. The literature on domestic extraterritoriality has focused extensively on territorial scope in borderline situations;[94] those where extraterritoriality is already accepted may be a more fruitful subject for academic analysis.

Absent world government or hegemony, states must find a way to co-exist without a central enforcing authority. In such a situation, authority, status, and the distribution of resources are determined not only by strict rule-following, but also by actions that push, bend, and even violate existing rules. Powerful states use domestic law as a tool for these purposes, and back it with an enforcement apparatus that dwarfs that available for enforcement of international law. Yet, the ability of states—even powerful ones—to apply domestic law extraterritorially is limited.

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[94] *See supra* notes 28 to 34 and accompanying text.

These limits should be greatest when other states perceive the relevant domestic enforcement action as promoting national, rather than global, welfare. The limits should be lowest when other states perceive the relevant enforcement action as promoting global, rather than national, welfare. Other states may even wish to step aside when one state takes the cost of global-welfare-enhancing enforcement action on itself. Yet, this points to an inherent limit on global-welfare-enhancing enforcement actions—anytime such an action promotes global welfare, states have an incentive to free ride and hope that other would-be enforcers step up to the plate (and bear the relevant enforcement costs).

Viewing the state as a unitary actor[95] suggests that global-welfare-enhancing enforcement actions will primarily be taken when: (1) a state determines that its national welfare is benefitted in an amount that is greater than its enforcement costs; and (2) no other state has sufficient incentive (or ability) to undertake a similar enforcement action. Often, these conditions will not be satisfied for particular global-welfare-enhancing extraterritorial enforcement actions. All other things being equal, this possibility suggests that—from a global-welfare perspective—there is likely to be an undersupply of extraterritorial enforcement actions that are Kaldor-Hicks efficient on a global scale. This undersupply should be made more severe by opposition from states who would be losers, from the Kaldor-Hicks perspective, in the relevant global-welfare-enhancing enforcement action.

Similarly, states will often have an incentive to undertake enforcement actions that are welfare reducing on a global scale, but Kaldor-Hicks efficient for the enforcing state. However, other states—especially those whose welfare would be reduced—have an incentive to oppose these nationally-efficient-but-globally-inefficient

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[95] When the state is not viewed as a unitary actor, interest-group theory suggests that states will at times act in the interest of powerful groups rather than of the state as a whole. *See generally* STEARNS & ZYWICKI, *supra* note 43, at 42-92 (explaining interest group theory). The overall analysis should not change, but significant additional complexities would be introduced to account for the differential ability of particular groups to pressure states to undertake, or decline to undertake, individual enforcement actions.

enforcement actions. This opposition should reduce, but not necessarily eliminate, the likely oversupply of enforcement actions that are in national, but not global, interest.

This conflict between national and global interests suggests an additional perspective on Anne-Marie Slaughter's theory of "global governance" through networks of national government officials.[96] Critics of government-network theory have suggested that Slaughter's documentation of the many interactions between government officials fails to explain why such interaction would result in increased international cooperation.[97] One possibility is that government networks help to mediate this conflict between collective action problems and the differing incentives to pursue global and national welfare. To the extent that government officials (especially executive officials with similar portfolios of responsibility) share information, this could help states determine: (1) whether particular types of enforcement actions would be supported or opposed by other governments; (2) whether enforcement actions would be more, or less, costly for one state to undertake; (3) whether another government might be willing to take a contemplated enforcement action; and (4) whether undertaking a particular enforcement action would result in political capital that could be used to influence another state's future enforcement decision. Regardless of whether government networks eventually result in a reconceptualization of the nature of sovereignty,[98] they may already be playing a more limited role. These networks may be serving as a forum coordinating the interaction between collective action problems and the distinction between global and national welfare.

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[96] *See* ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 261 (2004).

[97] *See* ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM 41 (2009).

[98] *See* SLAUGHTER, *supra* note 96, at 266-71.