LEGITIMACY IN INTERNATIONAL DISPUTE RESOLUTION IN THE AGE OF ANTI-GLOBALIZATION, NATIONALISM, AND ISOLATIONISM: HOW GEOGRAPHICAL AND LEGAL CULTURAL DIVERSITY ON THE INTERNATIONAL BENCH CAN PROMOTE REGIONAL AND INTERNATIONAL COOPERATION

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I. INTRODUCTION

One of the most pressing health concerns across the globe is the impact of greenhouse emissions and climate change on public health.

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Low income and marginalized populations are among those most affected by toxic exposures and pollutants, and young children and developing fetuses are the most vulnerable—biologically and psychologically—to the adverse effects of fossil fuel combustion.[1] Some evidence indicates that air pollutants produced by these combustions can cause high infant mortality, low birth weight, allergies, asthma, neurodevelopmental disorders, and potential cancer.[2] Given the health impacts of global climate change on the most vulnerable among us, the need for international cooperation and agreement on limiting and regulating carbon emissions globally is dire.[3] Yet on June 1, 2017, President Trump announced that the United States would be withdrawing from the Paris Climate Accord because "the [Paris] agreement is a massive redistribution of United States wealth to other countries"[4] which "undermines the economy" and "weakens our sovereignty."[5] President Trump saw the withdrawal from the Paris Climate Accord as both "a reassertion of America's sovereignty" and a protection from "future intrusions on [that] sovereignty,"[6] and instead contended that strengthening political boundaries favored national economies.

The desire to withdraw from regional and international cooperation and refocus on national priorities appears to be widespread in recent times. For example, in an April 2016 survey, the Pew Research Center found that 57% of Americans wanted the United States to deal with its own problems while leaving other countries to take care of themselves to the best of their abilities.[7] Only 37% of Americans believe that the United States should help other countries with their problems, and 49% say that the United States involvement

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1 *Frederica P. Perera, Multiple Threats to Child Health from Fossil Fuel Combustion: Impacts of Air Pollution and Climate Change*, 125 ENVTL. HEALTH PERSP. 141, 142 (2017).

2 *Id.* at 142-43.

3 *Id.* at 145-46 (laying out the cost of not limiting or regulating greenhouse gasses and air pollution on governments and nation states).

4 Donald J. Trump, President of the United States, Statement on the Paris Climate Accord (June 1, 2017) (transcript available at https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/) (last accessed Aug. 21, 2019).

5 *Id.*

6 *Id.*

7 *Public Uncertain, Divided over America's Place in the World: Growing Support for Increased Defense Spending*, PEW RES. CTR. 3 (May 5, 2016), http://assets.pewresearch.org/wp-content/uploads/sites/5/2016/05/05-05-2016-Foreign-policy-APW-release.pdf.

with global economy is a bad thing because it lowers wages and costs jobs.[8] The general tendency against internationalism is not only startling as a demonstration of public attitude towards United States foreign policy, but also in representing a resurgent isolationist world-view that short-term self-interest and preservation are more important than long-term collaboration among nations towards mutually beneficial global goals.[9] The successful campaign that led to the Brexit referendum vote to leave the European Union also ran on a similar political desire to "take back" control of national, legal, and trade borders after more than four decades of United Kingdom membership in the European Union and its single market.[10]

Ideologies centering on nationalism and isolationism as political world-views assume that the global problems we see today can be contained within geographical, political, and physical boundaries. However, this assumption is deeply erroneous because specific issues affecting particular economic sectors within national economies are becoming increasingly global in nature.[11] For example, global health epidemics are neither limited by geography nor region and require international collaboration to overcome.[12] National policies based on autarky, nationalism, or isolationism do not protect other countries from the spillover effects of activities and decisions undertaken under the aegis of these policies. Economic policies supporting local manufacturers, for example, encourage home-grown production, build local economics, and increase jobs to benefit national economies. However, without international consensus based on shared global values to regulate the emission of greenhouse gasses, equivalent anti-pollution measures to safeguard the interests of global population will not be put in place by national governments to contain pollutants

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8 *Id.*

9 Bret Stephens, AMERICA IN RETREAT: THE NEW ISOLATIONISM AND THE COMING GLOBAL DISORDER 18-21 (Sentinel 2015).

10 Kenneth A. Armstrong, BREXIT TIME: LEAVING THE EU - WHY, HOW AND WHEN? 3 (Cambridge Univ. Press 2017).

11 Jagadeesh Gokhale, *Globalization: Curse or Cure?, Policies to Harness Global Economic Integration to Solve Our Economic Challenge*, CATO INSTITUTE POLICY ANALYSIS, No. 659 (2010).

12 Take, for example, the recent Ebola outbreak in 2014 starting with patient zero suspected to be from West Africa and infecting an American doctor, who worked for Doctors Without Borders, and healthcare workers, who treated him and an individual who travelled to Liberia and back to the United States. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, *Cases of Ebola Diagnosed in the United States,* https://www.cdc.gov/vhf/ebola/outbreaks/2014-west-africa/united-states-imported-case.html (last visited Mar. 31, 2018).

produced by these local economies. Governments may reduce the release of pollutants into the environment through regulatory action,[13] but given the difficulty of funding, producing, distributing, and employing technologies that reduce or eliminate the release of pollutants into the environment, it would be nearly impossible to physically contain the release of pollutants within any country's political and geographical borders so as not to affect the environment on a more global scale.[14] Today, the spillover effects and negative externalities of national economic activity on other countries and the environment is significant.[15] To ensure the preservation, protection, and health of the international community, governments will need to consider the impact of national economic policies on global welfare and surrender some degree of political autonomy to implement policies from the international community which may prioritize long-term global well-being over immediate national interests.[16]

Yet, nations do not always choose to cooperate and collaborate. Instead, nations tend to form alliances, engendering distrust among nation states as others are seen as the "enemy."[17] Coalitional biases divide the world we live into coalitions, alliances, and groups while separating ourselves from others whom we consider to hold different beliefs and ideas from us.[18] The bases for societal division into an "us" and "them" scenario vary. Age, sex, or any third variable category—

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[13] *See, e.g.*, *Pollution Prevention Law and Policies*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/p2/pollution-prevention-law-and-policies (last visited Oct. 18, 2019) (noting that regulations passed by Congress empower the Environmental Protection Agency to "reduc[e] or eliminat[e] waste at the source by modifying production processes, promoting the use of nontoxic or less toxic substances, implementing conservation techniques, and reusing materials rather than putting them into the waste stream.").

[14] *See* Richard Howard, *6 New Technologies Which Could Improve Urban Air Quality*, POL'Y EXCH. (May 5, 2016), https://policyexchange.org.uk/6-new-technologies-which-could-improve-urban-air-quality/.

[15] David M. Konisky & Neal D. Woods, *Exporting Air Pollution? Regulatory Enforcement and Environmental Free Riding in the United States*, 63 POL. RES. Q. 771 (2010).

[16] Alan O. Sykes, *The Inaugural Robert A. Kindler Professorship of Law Lecture: When is International Law Useful?*, 45 N.Y.U. J. INT'L L. & POL'Y 787, 797 (2013).

[17] Ronald J. Fisher, Herbert C. Kelman & Susan Allen Nan, *Conflict Analysis and Resolution*, *in* THE OXFORD HANDBOOK OF POLITICAL PSYCHOLOGY 494 (Leonie Huddy, David O. Sears & Jack S. Levy eds., 2013).

[18] Melissa M. McDonald, Carlos David Navarrete & Mark Van Vugt, *Evolution and the Psychology of Intergroup Conflict: The Male Warrior Hypothesis*, 367 PHIL. TRANSACTIONS ROYAL SOC'Y B: BIOLOGICAL SCI. 670 (2012) (describing intergroup conflict and hypothesizing male coalitional aggression as its source).

such as race, religion, ethnicity, clan, or other social factors—justify our division of society into groups with which we form alliances and groups of others whom we oppose.[19] Paradoxically, comradeship or fraternity among people with some commonality is what generates group loyalty, builds communities, and allows large scale societies, such as nations and international communities, to form.[20] But the forces of anti-globalization, nationalism, and populism based on these implicit biases against the "other" work, at best, to produce dissociations in the international community and, at worst, result in outright discrimination based on race, national origin, or geographical location. Academics such as Linda Hamilton Krieger pointed out that discriminatory practices in intergroup relations are seldom based on an outright intention to discriminate and differentiate with prejudicial intent, but instead are a result of our implicit, but entirely normal, inclination to think in terms of categories and to label others who do not fit into certain acceptable categories set by our minds as different and untrustworthy.[21] Other types of implicit biases, such as the endowment effect, status quo bias, and loss aversion,[22] contribute towards public sentiments of anti-globalization, nationalism, and isolationism.[23]

This paper argues that, by being aware of these implicit biases, the international legal system will able to address national practices that affect international well-being in a more effective manner. International law and dispute resolution mechanisms can do a lot to

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[19] FELICIA PRATTO & JIM SIDANIUS, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION (1999); Felicia Pratto, Jim Sidanius & Shana Levin, *Social Dominance Theory and the Dynamics of Intergroup Relations: Taking Stock and Looking Forward*, 17 EUR. REV. SOC. PSYCHOL. 271-320 (2006).

[20] *See generally* BENEDICT ANDERSON, IMAGINED COMMUNITIES (Verso 1991).

[21] Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995) (arguing that courts need to develop jurisprudence that also addresses discriminatory acts that result from cognitive biases and errors in judgment that are actually normal in human cognition and not just discrimination that is clearly motivated by prejudicial intent).

[22] Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, *in* CHOICES, VALUES, AND FRAMES 159-70 (Daniel Kahneman & Amos Tversky eds., 2000) [hereinafter Kahneman et al., *Anomalies in* CHOICES, VALUES, AND FRAMES].

[23] Eyal Zamir, *Loss Aversion and the Law*, 65 VAND. L. REV. 829 (2012) (discussing how notions of reference points and loss aversion shapes the law). *See also* Simon Kemp, *Psychology and Opposition to Free Trade*, 6 WORLD TRADE REV. 25, 35 (2007) (discussing loss aversion and its impact on international trade).

promote cooperation and build trust among nation-states by addressing and correcting implicit biases and cognitive errors that lead to global problems instead of believing that globalization and market forces are the primary contributors to these challenges. International legal systems can be the mechanism through which the international community creates conditions that facilitate international cooperation and collaboration. However, clear legal rules that set the framework for multinational and international cooperation may have to be introduced and implemented.[24] While international courts and tribunals can promote multilateral and international cooperation by acknowledging and speaking about implicit biases and cognitive errors, it is also important that they be perceived to be socially and normatively legitimate and effective.[25] Courts that interpret and apply international law must show their ability to address and correct implicit biases in nation-states that contribute towards anti-globalization, nationalism, and isolationism effectively. These institutions must be ultimately accountable to their larger regional and global community in order to establish legitimacy as international dispute-resolution bodies with jurisdiction over nation-states.

Part II of this paper shows how implicit cognitive biases and heuristics cause governments to espouse isolationist policies resulting in anti-globalization, nationalism, and populism. Systematic errors in judgment caused by natural human cognitive shortcuts and implicit biases make individuals—including those running national governments—believe, mistakenly, that global problems such as

[24] Besides law, social norms can also promote and encourage international cooperation.

[25] Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman & Geir Ulfstein, *Legitimacy and International Courts – A Framework*, *in* LEGITIMACY AND INTERNATIONAL COURTS 2 (Harlan Grant Cohen, Andreas Follesdal, Nienke Grossman & Geir Ulfstein eds., Cambridge Univ. Press 2018).

poverty,[26] economic disparity,[27] and environmental degradation[28] are exacerbated by globalization. The availability bias, affect heuristic, and endowment effect are implicit biases that specifically produce cognitive errors, making it difficult for governments to see that collaboration and cooperation towards a common international goal would be the most rational and productive course of action to resolve these challenges.

Part III of this paper identifies the role of international institutions in promoting cooperation. International legal systems bear the task of conveying to national governments and actors that the root cause for global problems lies less in market forces that are paving the way for a globalized economy and instead rests on the lack of cooperative and collaborative effort by national and regional governments to commit to mutually beneficial common goals for people in the international community who may be beyond their political reach.[29] As these errors in human cognition are prevalent in how we think, isolationist view points and national policies that are more insular in nature would tend to be the norm; thus, international law and international legal systems must take a more deliberative role in engaging multiple constituencies and stakeholders in coming up with just solutions; or, in the alternative, in otherwise proposing fair and transparent methods for arrival at just solutions to global problems.

Part IV of this paper shows that diversity in geography and in the legal culture of adjudicatory bodies increases their perceived legitimacy and persuasiveness and, in turn, promotes regional and international cooperation by creating an environment where nation states' implicit biases can be addressed and corrected through

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[26] Pranab Bardhan, *Does Globalization Help or Hurt the World's Poor?: Overview/Globalization and Poverty,* SCIENTIFIC AM. (Mar. 26, 2006), https://www.scientificamerican.com/article/does-globalization-help-o-2006-04/. *See also* Arie M. Kacowicz, *Globalization, Poverty, and the North-South Divide*, 9 INT'L STUD. REV. 565, 565-80 (2007) (discussing the link between globalization and poverty).

[27] Nahuel Berger, *Theorist Eric Maskin: Globalization Is Increasing Inequality*, WORLD BANK (June 23, 2014), http://www.worldbank.org/en/news/feature/2014/06/23/theorist-eric-maskin-globalization-is-increasing-inequality.

[28] Pankaj Ghemawat, *Globalization Plays a Bit Part in Environmental Issues*, HARV. BUS. REV. (May 25, 2012), https://hbr.org/2012/05/globalization-plays-a-bit-part.

[29] Stephen J. Kobrin, *MNCs, the Protest Movement, and the Future of Global Governance*, *in* LEVIATHANS: MULTINATIONAL CORPORATIONS AND THE NEW GLOBAL HISTORY 229 (Alfred D. Chandler Jr. & Bruce Mazlish eds., 2005).

decisions, adjudication, and rulemaking that promotes the common good. International courts and dispute resolution authorities have a large role to play in facilitating cooperation and collaboration among nation states, yet their success is highly dependent on how the international community views them. There will be a need to show that international legal systems are legitimate and their decisions highly persuasive. As international dispute resolution systems try to encourage cooperation by showing. that implicit biases in human cognition work to isolate nations and lessen the desire to collaborate, they will face increasing pressure to establish legitimacy in order to be effective. These international dispute resolution systems must be capable of managing and correcting implicit biases in nation states that contribute towards anti-globalization, nationalism, and isolationism. It is equally important that such international dispute resolution systems are observed to be capable of managing and correcting implicit biases by the international community to build legitimacy capital.[30] The more legitimacy capital that international legal systems and adjudicatory bodies have, the more persuasive they will become and the more influence they will impart on nation-states and their willingness to cooperate in the pursuit of goals for the greater good. Conversely, where there is a deficit in legitimacy—whether that deficit is real or perceived—the less persuasive and influential the international legal system and adjudicatory body becomes. However, increasing diversity in geographical and legal culture in adjudicatory bodies presents unique challenges of its own; one such challenge is that judges and adjudicators who are tasked with managing implicit biases in nation states to create a cooperative environment often carry with them their own implicit biases which may cloud their judgement. This paper proposes steps that judges and adjudicators can take to reduce the impact of cognitive errors and implicit biases in Part V.

II. COGNITIVE ERRORS THAT CAUSE ISOLATIONIST VIEWS

Proxies such as race, skin color, jersey color, accents, or other group-identifying factors are often used to separate ourselves from others and create social divisions because they are the simplest and easiest cues to help us determine whether another person belongs to a different group than we do. These proxies, or heuristics, that today produce anti-globalization and nationalist sentiments around the

[30] Cohen et al., *supra* note 25, at 5 (identifying "external legitimacy" as "the belief of outsiders, or constituencies beyond the institution itself.").

globe, may have evolved from cognitive mechanisms in our ancestors to help them quickly deal with conflicts when they ran into other social groups, to characterize and determine how to deal with other hominid species that they may have encountered in the wild, and to identify those who were kin to them.[31] The ability to make quick judgments about the "other" and the potential threat they posed ensured species survival.[32] However, heuristics and adaptive biases that we may have inherited through evolution to quickly identify groups to which we are loyal and those to which we are opposed may today cause us to by-pass more complex cognitive tasks of assessing probabilities and predicting values when making judgments about the best course of action. These heuristics, while "quite useful," can, as psychologists Amos Tversky and Daniel Kahneman point out, "lead to severe and systematic errors" in judgement.[33]

Cognitive errors occur because "people rely on a limited number of heuristics principles which reduce the complex tasks of assessing probabilities and predicting values to simpler judgmental operations."[34] These heuristics, while useful in helping the mind make quick intuitive judgments, are often based on data of limited validity, such as a generalized rule that comparable and familiar characteristics are representative of a different and separate class of subjects of similar characteristics (the "representativeness heuristic").[35] As an illustration, Tversky and Kahneman offer the following scenario: consider an individual, Steve, who is "very shy and withdrawn, invariably helpful, but with little interest in people, or in the world of reality. A meek and tidy soul, he has a need for order and structure, and a passion for detail."[36] When people were asked to assess the probability that Steve is engaged in a particular occupation (for example, as a farmer, salesman, airline pilot, librarian, or physician) from most to least likely, people ranked Steve as more likely to be a librarian than a farmer. The reason is because the probability that Steve would be a librarian is assessed by the degree to which his

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[31] Mark Schaller & Steven Neuberg, *Intergroup Prejudices and Intergroup Conflict*, *in* FOUNDATIONS OF EVOLUTIONARY PSYCHOLOGY 401-02 (Charles Crawford & Dennis Krebs eds., 2008).

[32] *Id.* at 403 (describing social categorization of people as "us" and "them" as effortless).

[33] AMOS TVERSKY & DANIEL KAHNEMAN, JUDGMENT UNDER UNCERTAINTY: HEURISTIC AND BIASES 3 (Daniel Kahneman et al. eds., 1982).

[34] *Id.*

[35] *Id.* at 4.

[36] *Id.*

characteristics and description matches the stereotype of a librarian.[37] However, the likelihood of Steve being a farmer is more likely because farmers make up a much larger portion of the population than librarians.[38] The probability that Steve might be a farmer is not taken into account in the reasonable estimate that Steve is a librarian rather than a farmer. The representative heuristic, for example, might cause a consumer to infer that a generic product will perform as well as a brand name product if its packaging is designed to resemble the brand name product.[39] But in reality, a product package characteristic has very little correlation to product performance.

Often, when people have to make judgements under conditions where the outcome is uncertain, that judgement often "rests on a limited number of simplifying heuristics rather than extensive algorithmic processing."[40] These heuristics facilitate intuitive judgements that are "categorically different in kind" than the models of clear unbounded rationality advanced by economists and philosophers and are "simple and efficient because they piggybacked on basic computations that the mind had evolved to make."[41] In his book, *Thinking Fast and Slow,* Kahneman termed these quick intuitive modes of thinking "System 1" and "System 2," System 1 "operating with systematically and quickly with little or no effect and no sense of voluntary control,"[42] in contrast with System 2, which is a slower, more deliberative, and exact mental process that "allocates attention to the effortful mental activities that demand it, including complex computation" and which is often "associated with the subjective experience of agency, choice, and concentration."[43] In assessing probabilities of uncertain events or estimating values of an uncertain quantity, the mind's intuitive System 1 usually works quickly through a limited number of heuristic principles to reduce the more complex cognitive tasks of System 2 to simpler thought processes which help

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[37] *Id.*

[38] *Id.*

[39] Frank R. Kardes et al., *Consumer Inference: A Review of Processes, Bases, and Judgment Contexts*, 14 J. CONSUMER PSYCHOL. 230, 237 (2004).

[40] THOMAS GILOVICH & DALE GRIFFIN, HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGEMENT 1 (Thomas Gilovich et al. eds., 2013).

[41] *Id.* at 3.

[42] DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20 (2011) [hereinafter KAHNEMAN, THINKING, FAST AND SLOW].

[43] *Id.* at 21.

the mind make quick judgments, but because of their dependency on data of limited validity, can lead to systematic errors.[44]

Unilateral decisions made by state actors in a globalized economy are often based on these heuristics that obscure the real issues that state actors must address for the international community to mutually benefit from national policies.[45] To bring common benefit to the international community, nation states must engage in more deliberate thinking and negotiations as they surrender some of their sovereignty over a particular matter and submit to an external source of authority.[46] However, international negotiations for mutual benefit or common good and the cooperative infrastructure that emerges as a result of these negotiations sometimes breaks down or fails because of errors in judgement caused by heuristics and biases.[47] Many environmental agreements to commit national governments to reduce greenhouse gases and manage climate change, for example, have been unsuccessful, despite scientific consensus and the costs of inaction[48] because each nation state's conception of fairness and equity differs from the next.[49] In the judgement of what would be a fair expectation in emissions reduction, state actors would be influenced by heuristics and biases that would sway their decision.[50] An appropriate yardstick to use in the emissions standards debate is the amount of emissions released per capita nationally,[51] and while the United States releases twice as much emissions per capita compared to China,[52] public opinion in Europe and the United States maintains that China needs to

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[44] *Id.* at 21-22.

[45] Kemp, *supra* note 23, at 30-33 (discussing the existence of bias in international trade policy making).

[46] JOSEPH F. MORRISSEY & JACK M. GRAVES, INTERNATIONAL SALES LAW AND ARBITRATION: PROBLEMS, CASES AND COMMENTARY 27 (2008).

[47] Russell Korobkin & Chris Guthrie, *Heuristics: Heuristics and Biases at the Bargaining Table*, 87 MARQ. L. REV. 795, 798-99 (2004) (discussing how some heuristics "prove to be poor substitute for more complex reasoning and result in negotiator decisions that fail to serve the negotiator's interest.").

[48] Emily O'Brien & Richard Gowan, *What Makes International Agreements Work: Defining Factors for Success*, N.Y.U. CTR. INT'L COOPERATION 10 (Sept. 2012), *available at* https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7839.pdf.

[49] *Id.* at 11.

[50] *Id.* (discussing how the international community believes that since China's absolute level of emissions ranks first among all countries, it should cut back on environmental emissions more quickly than others).

[51] *Id.*

[52] FRANCES BEINECKE, THE WORLD WE CREATE: A MESSAGE OF HOPE FOR A PLANET IN PERIL 106 (2014).

reduce emissions more quickly than other countries—including the United States—because China's absolute level of emissions is highest among all countries.[53] The availability bias, a result of the availability heuristic (defined as "the process of judging frequency 'by the ease with which instances come to mind'"[54]), is at play here. Other heuristics that cause errors in judgement in a globalized economy are the affect heuristic[55] and endowment effect,[56] which are discussed in turn.

A. The Availability Bias

The availability bias causes people to think that the easier an image or thing comes to mind (or becomes cognitively available), the more representative it is of the question at hand.[57] Thus, there is a tendency to believe that Hollywood divorces and political scandals are more frequent than for non-celebrities and non-politicians because divorces among Hollywood celebrities and sex scandals among politicians are reported more frequently by news and tabloids.[58] Or we believe that it is less safe to fly in airplanes after a horrific plane crash is reported because the reporting of a dramatic event temporarily

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[53] O'Brien & Gowan, *supra* note 48, at 11.

[54] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 129.

[55] The affect heuristic influences judgment and processing strategies by inducing certain decisions based on how one feels about (or is affected by) the issues involved. Evaluative judgments drawing from our feelings about the stimulus tend to be influenced by the affect heuristic. Norbert Schwartz, *Feelings as Information: Moods Influence Judgments and Processing Strategies*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 534, 536 (Thomas Gilovich et al. eds., 2002).

[56] The endowment effect relates closely to loss aversion, the tendency to prefer to avoid losses than acquire commensurate gains. Tversky and Kahneman explain: "An immediate consequence of loss aversion is that the loss of utility associated with giving up a valued good is greater than the utility gain associated with receiving it. Thaler [1980] labeled this discrepancy the endowment effect, because value appears to be change when a good is incorporated into one's endowment." Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, *in* CHOICES, VALUES, AND FRAMES 143, 145 (Daniel Kahneman & Amos Tversky eds. 2000).

[57] Amos Tversky & Daniel Kahneman, *Availability: A Heuristic or Judging Frequency and Probability*, *in* JUDGEMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163-65 (Daniel Kahneman, Paul Slovic & Amos Tversky eds., 1982).

[58] Norbert Schwartz & Leigh Ann Vaughn, *The Availability Heuristic Revisited: Ease of Recall and Content of Recall as Distinct Sources of Information*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 103 (Thomas Gilovich et al. eds., 2002).

increases the availability of its category in our mind.[59] The probability of an event happening is greatly exaggerated in our mind when it is easy to recall instances of the event occurring because of the availability bias. Conversely, hypothetical events that are not conjured up as easily in the mind are thought to be less probable,[60] such as when subjects to a psychological experiment who were asked to imagine vague symptoms of diseases—such as disorientation, a malfunctioning nervous system, and an inflamed liver[61]—judged themselves to be less likely to contract the disease than other groups who were asked to imagine more easily imaginable symptoms (such as low energy level, muscle aches, and frequent severe headaches).[62] When an availability bias is produced, the actual question of estimating the size of a category or the frequency of an event is substituted with the impression of how easily specific instances come to mind.[63] Those specific instances are reported as the answer to the question and are not valid responses because cognitive reliance on the availability heuristic obscures the real question and prevents deliberate analysis and search for the correct answer.[64]

Opposition to unbridled capitalism, multinational corporations ("MNCs"), and corporate interests prevailing over the wellbeing of society central to the anti-globalization movement may be exacerbated by the availability bias. The psychology of availability draws on well-reported instances where MNCs and unbridled corporate power have ignored social welfare and the interests and well-being of local communities to lead to an erroneous conclusion that deregulated markets and globalized trade per se are the causes of such problems of globalization as income inequality,[65] environmental decline,[66] and

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[59] *Id.*

[60] Sherman et al., *Imagining Can Heighten or Lower the Perceived Likelihood of Contracting a Disease: The Mediating Effect of Ease of Imagery*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 98 (Thomas Gilovich et al. eds., 2002).

[61] *Id.* at 99.

[62] *Id.* at 101.

[63] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 130.

[64] *Id.*

[65] Kacowicz, *supra* note 26, at 565-80.

[66] COREY L. LOFDAHL, ENVIRONMENTAL IMPACTS OF GLOBALIZATION AND TRADE: A SYSTEMS STUDY 2-3 (Mass. Institute of Technology ed., 2002).

cultural imperialism[67] and misappropriation of cultural heritage.[68] The fire that killed more than 101 factory workers at the Tarzeen Fashions factory in Bangladesh on November 24, 2012,[69] and the collapse of a building housing several clothing factories in Dhaka, Bangladesh, that killed 134 and injured more than 1,000 workers,[70] for instance, drew worldwide attention to the spillover effects or negative externalities that are produced and transferred to developing countries from globalized trade activities.[71] In both cases, the factories were producing garments for major American and European clothing brands.[72] Reports of child labor in cocoa farms in West Africa[73] and deforestation in the developing world[74] also draw attention to the spillover effects of globalized trade. The ease of recalling instances where globalized trade has had a negative effect on local economies, culture, and the environment contributes to the view that globalization as a whole is problematic and should be opposed.

However, many instances of global cooperation and aid are not as widely reported in the news and media as the failures of globalization, or worse still, fabricated stories disguised as news.[75] News, including stories liked, shared, and disseminated through social media in the digital age, tends to be a consistent update every few

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[67] John Carlos Rowe, *Culture, US Imperialism, and Globalization,* 16 AM. LITERARY HIST. 575 (2004).

[68] Daniel Wuger, *Prevention of Misappropriation of Intangible Cultural Heritage Through Intellectual Property Laws*, *in* POOR PEOPLE'S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 183-84 (J. Michael Finger & Philip Schuler eds., 2004).

[69] Vikas Bajaj, *Fatal Fire in Bangladesh Highlights the Dangers Facing Garment Workers,* N.Y. TIMES (Nov. 25, 2012), https://nyti.ms/2jO1M9c.

[70] Julfikar Ali Manik & Jim Yardley, *Building Collapse in Bangladesh Leaves Scores Dead*, N.Y. TIMES (Apr. 24, 2013), https://nyti.ms/XVXkDk.

[71] *Id. See also* Alexandra Rose Caleca, *The Effects of Globalization on Bangladesh's Ready-Made Garment Industry: The High Cost of Cheap Clothing,* 40 BROOK. J. INT'L L. 279 (2014).

[72] Manik & Yardley, *supra* note 70.

[73] Susan Ariel Aaronson, *Child Labor: The Cause Can Also be a Cure*, YALEGLOBAL ONLINE (Mar. 13, 2007), https://yaleglobal.yale.edu/content/child-labor-cause-can-also-be-cure.

[74] Nayan Chanda, *The Double Edge of Globalization,* YALEGLOBAL ONLINE (June 28, 2007), https://yaleglobal.yale.edu/content/double-edge-globalization.

[75] *See, e.g.*, Michael Barthel, Amy Mitchell & Jesse Holcomb, *Many Americans Believe Fake News Is Sowing Confusion*, PEW RESEARCH CTR. (Dec. 15, 2016), https://www.journalism.org/2016/12/15/many-americans-believe-fake-news-is-sowing-confusion/ (32% of adults in the United States say that they encounter fake political news online while nearly a quarter of Americans surveyed admit to sharing fake political news online).

minutes on events that are happening in real time with a high level of focus on the dramatic, upsetting, unsettling, and provocative. And bad events, like a plane crash or a factory burning down, happen very quickly with a lot of pain and emotional turmoil that tends to stay in a person's memory for an extended period of time. In contrast, good events such as the global aid that was given to Japan during the 2011 earthquake and tsunami by ninety-one countries around the globe, including Pakistan and Bolivia who were recovering from their own natural disasters,[76] tend to be quietly forgotten because these events engender "feel-good feelings" that are more ambiguous and difficult to pinpoint and less provocative or tangible. News reporting tilt towards the negative and generate more negative feelings than may be warranted by the global state of affairs. As Harvard cognitive scientist, experimental psychologist, and linguist Steven Pinker points out in an article:

> [i]t's easy to see how the Availability heuristic, stoked by the news policy "If it bleeds, it leads," could induce a sense of gloom about the state of the world. Media scholars who tally news stories of different kinds, or present editors with a menu of possible stories and see which they pick and how they display them, have confirmed that the gatekeepers prefer negative to positive coverage, holding the events constant.[77]

That in turn provides an easy formula for pessimists on the editorial page: make a list of all the worst things that are happening anywhere on the planet that week, and you have an impressive-sounding—but ultimately irrational—case that civilization has never faced greater peril.[78]

B. The Affect Heuristic

The affect heuristic creates errors in human judgement because of the role emotions play in navigating through uncertainty and risks.

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[76] Liz Ford & Claire Provost, *Japan Earthquake: Aid Flows in From Across the World,* THE GUARDIAN (Mar. 14, 2011, 9:03 AM), https://www.theguardian.com/global-development/2011/mar/14/japan-earthquake-tsunami-aid-relief-world.

[77] Steven Pinker, *The Media Exaggerates Negative News. This Distortion Has Consequences,* THE GUARDIAN (Feb. 17, 2018, 4:00 AM), https://www.theguardian.com/commentisfree/2018/feb/17/steven-pinker-media-negative-news.

[78] *Id.*

Human emotions attribute specific qualities of good and bad to stimuli we encounter. The human tendency to rely on these emotions, rather than cognitive functionality, in decision-making and judgments is called the affect heuristic.[79] The affect a particular outcome has on us and the emotions which that affect evokes will influence how we view external stimuli, such as the forces of globalization and its effect on global and local issues as we make determinations about whether to get involved with or stay away from global affairs.[80] Neurologist Antonio Damasio found that individuals who appear to be fully functional in the requisite attention, memory, linguistic skills, and analytical functions needed for day-to-day activity, may suffer from a latent kind of sociopathy if they are not able to feel emotions.[81] Damasio studied patients who suffered damage to the ventromedial frontal cortex of the brain—the part of the brain that controls emotional responses to stimuli—and discovered that these patients were unable to make rational decisions that were in their best interest, and their reasoning about their social surroundings were fundamentally flawed.[82] Damasio found that positive and negative feelings generated by "images, broadly construed to include sounds, smells, real or imagined visual impressions, ideas, and words" become "connected, by learning, to predicted future outcomes of certain scenarios," and a disconnect between these affective feelings and decision-making causes a person to make irrational decisions.[83] Negative feelings that are linked to an image of a future outcome sounds an alarm and, in contrast, positive feelings that are linked with an image of a future outcome creates incentives. Thus, feelings "increase the accuracy and efficiency of the decision process, and their absence degrades decision performance."[84]

Subsequent studies on the affect heuristic have shown that affect-laden imagery, whether positive or negative, can evoke such clear emotions that it is possible to predict, with some degree of certainty, how a person will make a decision depending on how good or bad he or she feels about the decision, such as whether to invest in a new

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[79] Paul Slovic et al., *The Affect Heuristic*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 397, 399 (Thomas Gilovich, Dale W. Griffin & Daniel Kahneman eds., 2002).

[80] *Id.* at 398.

[81] *Id.* at 399.

[82] *Id.* at 399.

[83] *Id.* at 399 (emphasis in original).

[84] *Id.* at 399.

company in the stock market or not.[85] With an understanding of the affect heuristic, it is also possible to predict an adolescent's decision about whether to take part in health-threatening behaviors, such as smoking, or health-enhancing behaviors, such as regular exercise.[86] Furthermore, a study on the affect heuristic showed that judgments of risk and benefit are negatively correlated—that for many hazards, the greater one perceives a benefit, the lower the perceived risk, and vice versa.[87] Since people base a lot of their judgement on what they think and *feel* about the risk and the potential outcome of the risk, when people like an activity they are more likely to judge the risks as low and the benefits as high; conversely, when people dislike an activity they are more likely to judge it as being high risk and yielding very little benefit.[88] This is so even if activity and its benefits are "distinct and qualitatively different from the risks."[89]

Because the affect heuristic creates cognitive errors that result in poorer judgments, both proponents and opponents of a globalized economy will perceive the benefits and risks from free trade, the international movement of goods, services, and people, and the blending of distinct cultures that characterize a globalized economy in a distorted way based on how they feel about the matter. Imagery of a child working in a cocoa plantation that produces cocoa, which is then exported to developed countries, will evoke negative feelings of injustice and immorality and cause people to believe that globalization as a whole is unjust and immoral and the sole cause of child labor in developing countries because of the feelings the image of child labor evokes.[90] These people oppose globalization, although there is a myriad of causes of child labor unrelated to the globalization of local markets.[91]

In another example, during the United Kingdom's 2016 referendum on whether to remain or to leave the European Union, the "Vote Leave" campaign hired buses to go around London claiming

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[85] Solvic et al., *supra* note 79, at 404.

[86] *Id.*

[87] *See id.* at 410.

[88] *See id.* at 410-11.

[89] *See id.* at 410.

[90] Aaronson, *supra* note 73.

[91] Madeleine Grey Bullard, *Child Labor Prohibitions are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer*, 24 HOUS. J. INT'L L. 139, 147-56 (2001) (laying out the different contributors to the problem of child labor, including globalization).

that the United Kingdom sends the European Union £350 million a week, which could be used to fund the National Health Service if the United Kingdom left the European Union.[92] That purported claim is staggering and is believed to have been influential in swinging the referendum vote in favor of leaving the European Union.[93] However, Britain contributed only £9.4 billion to the European Union in 2016, about £180 million a week.[94] Moreover, once rebates and credits that the United Kingdom receives in return from the European Union—such as a £5 billion rebate and £4.4 billion in public-sector credits such as payments via the European Regional Development Fund and the Agricultural Guarantee Fund as well as research grants to British universities—are taken into account, the country's net contribution averaged just £8.1 billion between 2012 and 2016.[95] Here, the negative feelings associated with spending that was diverted from national health services may have affected how people saw and thought about membership in the European Union and influenced their final decision on whether to stay in or leave the European Union during the referendum more than the actual monetary data presented, whereas a fact-based understanding or analysis would evoke less emotions or affective impressions that would sway judgment and decision-making in favor of leaving the European Union.[96] Attitudes and impressions about an issue sometimes matter more than the economic value of a decision.[97]

C. The Endowment Effect

The "endowment effect," a term coined by Richard Thaler, an economist at the University of Chicago, to describe a bias towards the status quo (or "status quo" bias),[98] occurs when people overvalue a good or entitlement that they currently possess far more than what it

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[92] Andrew Atkinson & Lucy Meakin, *U.K. Contribution to EU Was About Half What Brexit Supporters Claimed,* BLOOMBERG POLITICS (Oct. 31, 2017), https://www.bloomberg.com/news/articles/2017-10-31/u-k-contribution-to-eu-half-amount-claimed-by-brexit-campaign.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] Slovic et al., *supra* note 79, at 404.

[97] *See id.* at 415 (referring to literature suggesting that willingness to pay for a public good or the award of punitive damages in a personal injury lawsuit are "derived from attitudes based on emotion rather than indicators of economic value").

[98] Kahneman et al., *Anomalies in* CHOICES, VALUES, AND FRAMES, *supra* note 22, at 163.

is actually worth in the market and what they think it would be worth if it was not already in their possession.[99] The human mind works from a reference point or an internal repository of assets which splits the outcomes of actions or decisions into losses or gains.[100] A shift in this reference point would make a receipt of an asset a "gain" and, vice versa, the surrender of an asset a "loss." The endowment effect starts at the current wealth point, where assets are accounted for and owners of resources or things ascribe value to them.[101] When the endowment effect is at play, people value what they have, or their "endowment," much more than what it is actually worth and are not be willing to pay as much for the exact same resource or thing or the equivalent to acquire it.[102] From this point, "losses . . . are systematically valued far more than commensurate gains," and the "minimum compensation people demand to give up a good has been found to be several times larger than the maximum amount they are willing to pay for a commensurate entitlement."[103]

The endowment effect, and the observation that people would demand much more to give up an object or entitlement than they would be willing to pay to acquire the same object or entitlement, creates a gap between a person's buy and sell price with respect a specific good or resource. If the amount they are willing to accept ("WTA") in order to part with the thing or resource exceeds what others are willing to pay ("WTP") to acquire it, a situation arises where goods or resources will remain where it is, even when its current owner is not able to make the best use of said good or resource or even if someone else is able to make better use of the good or resource or put it to its most efficient and economic use.[104] The belief that a "bird in the hand is worth two in the bush" causes people to hold on to objects, rights, or entitlements, even when offered an amount that is more than

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[99] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 290.

[100] *Id.* at 293.

[101] *Id.* at 290-91.

[102] *Id.* at 293.

[103] Jack L. Knetsch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, *in* CHOICES, VALUES, AND FRAMES 171 (Kahneman et al. eds., 2000).

[104] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 295 (describing an experiment where students, who were given mugs at random to sell, and other students who were tasked with buying those mugs could not enter into exchange because "the average selling price was about double the average buying price, and the observed number of trades was less than half the number predicted by standard theory").

the lowest selling price.[105] People who own an object, right, or entitlement attribute more value to it than it actually is worth, but this attribution of higher worth has little to do with the inherent value of the object, right, or entitlement and rather has more to do with pain of giving up that object, right, or entitlement.[106]

The endowment effect is grounded in Kahneman and Tversky's "prospect theory," which posits that a person's willingness to sell or buy a good depends on the person's reference point.[107] If that person owns the good, he considers the *pain of giving it up*; yet if he does not own it, he considers the *pleasure of receiving it*.[108] The pain of giving something up—known as "loss aversion"[109]—is usually more than the pleasure of receiving it,[110] causing a disparity between the WTA and WTP amounts. One who does not have the object, right, or entitlement to begin with would not be willing to spend as much to acquire it because the disadvantage of parting with the money (or any other measurement of value such as political autonomy or national sovereignty) to acquire the object, right, or entitlement outweighs any benefit of acquiring them, exhibiting "the status quo bias."[111] The endowment effect plays out in reality by making people hold on to objects, rights, or entitlements because errors in our cognitive processes make us believe something we possess is actually more valuable than it actually is on the market.[112] In fact, the worth people erroneously place on an object, right, or entitlement bears little relation to its inherent value per se.[113]

Status quo bias and loss aversion represent anomalies to the economic assumption that human behavior can be best explained by

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[105] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 292-93.

[106] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 296 ("The high price that Sellers set reflects the reluctance to give up an object they already own, a reluctance that is seen in babies who hold on fiercely to a toy and show great agitation when it is taken away.").

[107] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 293.

[108] *Id.*

[109] *See id.* at 283-84.

[110] *See id.*

[111] Kahneman et al., *Anomalies in* CHOICES, VALUES, AND FRAMES, *supra* note 22, at 163 (describing an experiment by Samuelson and Zeckhauser in 1988 which demonstrated that "individuals have a strong tendency to remain at the status quo, because the disadvantages of leaving it loom larger than [the] advantages," terming this "the status quo bias").

[112] *Id.*

[113] *Id.* at 163 ("the main effect of endowment is not to enhance the appeal of the good one owns, only the pain of giving it up.").

rational choice theory, which assumes "that [economic] agents have stable, well defined preferences and [that they] make rational choices consistent with those preferences in markets that (eventually) clear."[114] When status quo bias and loss aversion are present, however, people overvalue their entitlements and are less likely to part with them even when the entitlement may not be as economically valuable to them as is would be to another person.[115] But the transfer of entitlement does not take place according to conventional economic understanding because of the disparity between WTP and WTA.[116]

In international negotiations with a view towards collaboration and cooperation for a common goal, loss aversions and status quo biases make it difficult for state actors to reach an agreement in an environment where resources are scarce because collaboration and cooperation towards a common-goal necessitates some surrender of an entitlement or expectation to the benefit of another nation state. The country that must give up the entitlement is going to place more value on the entitlement than countries who are "buying" it for the sake of collaboration. For example, the ongoing Brexit negotiations between the United Kingdom and the European Union illustrate the implications of the endowment effect, status quo bias, and loss aversion as the European Union holds on to its own rules regarding the single market and customs union, while the United Kingdom negotiates for the type of economic and political relationship that is most favorable to it.[117] From the United Kingdom's perspective, giving up sovereign control of national borders and the movement of

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[114] *Id.* at 159.

[115] *See* Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 J. ECON. PERSP. 193 (1991).

[116] In law, most entitlement to property is absolute and protected by injunctions against trespass and intrusions unless there exists justification for the right to be protected by the award of damages allowing the trespass and intrusion to continue for a "fee." The general assumption is that the person who values the entitlement more will eventually bargain for and acquire it and if there is no one in the market who values the entitlement more, the entitlement stays where it is. According to Ronald Coase, it does not matter how the law allocates the initial entitlement. In the absence of transaction costs, the entitlement will shift to the party who values it more. The endowment effect varies the application of the Coase theorem because entitlements tend to stay where they were initially placed because of the disparity between WTA and WTP. *See* Jeffrey J. Rachlinski & Forest Jourden, *Remedies and the Psychology of Ownership*, 51 VAND. L. REV. 1541 (1998).

[117] Simon Fraser, *The Real Brexit Challenges Facing the UK in 2018*, FIN. TIMES (Dec. 30, 2017), https://www.ft.com/content/b0d8039e-ec8b-11e7-b4d1-b2f78612cc4a.

peoples into the country, even if that means that the country can have access to the single market of the European Union, will trigger aversions to perceived losses.[118] Negotiations have not been easy and will not be easy moving forward due to the disparity in opinion among parties at the negotiation table about the value of a particular right or entitlement, especially when the entitlement does not have a dollar value but is valued with a more amorphous benchmark such as liberty, autonomy, and freedom. As Kahneman explains:

> Loss aversion creates an asymmetry that makes agreements difficult to reach. The concessions you make to me are my gains but they are your losses; they cause you much more pain than they give me pleasure. Inevitably, you will place a higher value on them than I do. The same is true, of course, of the very painful concessions you demand from me, which you do not appear to value sufficiently! Negotiations over a shrinking pie are especially difficult because they require an allocation of losses. People tend to be much more easygoing when they bargain over an expanding pie.[119]

III. THE ROLE OF LAW AND LEGAL INSTITUTIONS IN THE FACE OF ANTI-GLOBALIZATION, NATIONALISM, AND POPULISM

A greater awareness of how heuristics and biases cause errors in human judgment that lead to questionable choices and decisions help us see more clearly how the law and legal institutions can respond to the forces of anti-globalization, nationalism, and populism grow in today's economy and socio-political landscape. Concerns expressed by those opposed to a globalized economy are valid concerns, although whether the problems highlighted by these groups can be really attributed to globalization per se—and whether national sovereignty and autonomy should be returned to the nation state to address these problems—is highly debatable.[120] The role of law and legal institutions in this new environment—where globalization can represent economic progress, prosperity, and democracy, while simultaneously representing environmental degradation, exploitation of the developing world, and disregard for human life—should be a

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[118] *See* Delphine Strauss, *Brexit Explainer: What's at Stake for EU Single Market and Customs Union* FIN. TIMES (Oct. 9, 2018), https://www.ft.com/content/1688d0e4-15ef-11e6-b197-a4af20d5575e.

[119] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 304.

[120] *See* Rana Dasgupta, *The Demise of The Nation State,* THE GUARDIAN (Apr. 5, 2018), https://www.theguardian.com/news/2018/apr/05/demise-of-the-nation-state-rana-dasgupta.

moral arbiter of both viewpoints, finding just solutions, encouraging open collaboration among different stakeholders, and building trust.

International collaboration among countries on certain issues has reached great strides on some fronts. With the problem of child labor, for example, international collaboration has worked to significantly reduce the pervasiveness of child workers in many parts of the world, including sub-Saharan Africa and Asia.[121] Over the period of twelve years from 2000-2012, the global child labor figure had substantially declined by almost a third, and the number of children involved with hazardous work—which directly endangers child health, safety, and moral development—declined by half.[122] The International Labor Organization ("ILO") took the initiative in leading a collaboration among the international community to put an end to child labor through multilateral agreements that set minimum general labor standards, improved understanding of conditions that contribute to child labor, and in creating global strategies that place the primary responsibility of eliminating child labor on national governments.[123] These international strategies required national governments to work with international organizations, businesses, educational institutions, law enforcement, and child protection services in supporting roles.[124] The ILO and supporting organizations managed to gather international help in a relatively short time because they focused on a very specific issue—child labor—and a very specific goal—its elimination.[125]

The specificity in aim allowed the ILO to deal with the heuristics and biases that prevent international cooperation and overcome them. By raising funds, generating awareness, and having discussions about the issue at regional and international conferences, the ILO and its

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[121] Constance Thomas, *Addressing Child Labor in Agricultural Supply Chains Within the Global Fight Against Child Labor,* 21 U.C. DAVIS J. INT'L L. & POL'Y 131, 133 (2014).

[122] *Id.* at 133-34. The global fight against child labor is still ongoing and there is a long road ahead despite these statistics. Today, 152 million children around the world are working so that they and their families can survive, and 73 million of those children are engaged in hazardous jobs. *See* Tomoko Nishimoto, ILO Regional Director for Asia and the Pacific, *We Have Seven Years Left to Keep Our Commitment to the End of Child Labor*, Remarks to Malaysia's World Day against Child Labor 2018 (Sept. 13, 2018), https://www.ilo.org/asia/media-centre/statements-and-speeches/WCMS_644773/lang——en/index.htm.

[123] Thomas, *supra* note 121, at 136-38.

[124] *Id.* at 138-41.

[125] *Id.* at 141 ("The extensive amount of international and national discussions, projects, surveys and research have produced a wealth of knowledge and lessons learned in how to effectively tackle and eliminate child labor generally, and in specific settings.").

counterparts made governments aware of the problem. When the problem became "available" to their mind and captured their attention, the availability heuristic worked to make the problem more significant and requiring more immediate attention.[126] Furthermore, a strategy that places the primary responsibility on governments to eliminate child labor by calling on governments to "assess the impact of relevant policies on child labor, to put in place preventive and time bound measures, and to make adequate resources available to fight the worst forms of child labor" might provoke feelings of fear, inhumaneness, or carelessness, that would have an "effect" on national governments pushing them to make a change for the better.[127] Finally, the ILO-led initiative recognized the "fact that the needs of countries and regions differ and that there is no single policy that by itself will end the worst forms of child labor . . . emphasiz[ing] the importance of taking a strategic integrated approach to eradicate child labor."[128] By acknowledging the different needs of each country and focusing on the problem of child labor itself, the initiative effectively dealt with the endowment effect because a country is not made to give up an entitlement but rather to move towards solving an important global problem. The discrepancy between WTA and WTP does not exist here, as countries are not trading entitlements, creating "losses and gains," but are rather moving forward to reach a common goal of eliminating child labor. As the Hague Roadmap of 2010, which sets out this strategy, stresses:

> [T]he importance of moving forward simultaneously on all four of the following priority areas: 1) Ensuring enactment and enforcement of adequate laws and regulations; 2) Promoting decent employment of adults and young persons—including the protection of fundamental principles and rights at work, fair wages, and occupational safety and health; 3) Improving and extending social protection to guard against economic and social risks and lack of income; and 4) Providing

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[126] Before these efforts, "many governments denied they had a child labor problem or that child labor should even be a problem." Thomas, *supra* note 121, at 135. After these efforts, Ms. Thomas explained that "child labor is no longer considered to be an 'unmentionable' topic nor an acceptable practice in most parts of the world. Most national leaders, Ministers of Labor, government officials, trade unionists along with some business leaders and corporate executives now recognize that child labor exists in their countries or supply chains and that it must be addressed. Overall, there is greater public awareness which has led to 'the invisible' largely becoming visible." Thomas, *supra* note 121, at 136.

[127] Thomas, *supra* note 121, at 138.

[128] *See id.* at 138.

> accessible, affordable, quality education or skill training for all children.[129]

This approach was reaffirmed in the Brasilia Declaration of 2013[130] that was a result of the third Global Conference on Child Labor, gathered in Brasilia, Brazil, from October 8 to 10, 2013, where representatives of governments and employers' and workers' organizations, together with Non-Governmental Organizations ("NGOs"), other civil society actors as well as regional and international organizations, who participated in the Conference committed to "assess [the] remaining obstacles and to agree on measures to strengthen [their] actions to eliminate the worst forms of child labor by 2016, as well as to eradicate all forms of child labor."[131]

A. Distributive Justice

When dealing with global problems—such as poverty, access to education and healthcare, access to natural resources, and economic disparity—the law's normative role should be to work towards building a socially just form of resource allocation for its communities.[132] With countries around the globe in different economic, social, and political developmental stages, it is necessary for laws and legal institutions to find a way to distribute limited resources in a way that does not cause one party to be worse off after another party is given an additional benefit so that the endowment effect is not triggered. Laws, if necessary, should facilitate tradeoffs among multiple stakeholders until an economic equilibrium is achieved where no further changes in the global economy can be made to make one country better off without at the same time making another worse off. Pareto optimality may be used as a measure to successfully distribute entitlements and scarce resources in a global economy.[133] However, Pareto optimal distribution of resources and

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[129] *See id.* at 138.

[130] *See id.*

[131] INT'L LABOUR ORGANIZATION, *Third Global Conference on Child Labour—Brasilia Declaration* (Oct. 10, 2013), *available at* https://www.ilo.org/ipec/Informationresources/WCMS_IPEC_PUB_23480/lang—en/index.htm

[132] *See, e.g.*, JOHN RAWLS, A THEORY OF JUSTICE 275-76 (1971).

[133] JOHN DOUGLAS BISHOP, ETHICS AND CAPITALISM 11-12 (John Douglas Bishop ed., 2000) ("A Pareto optimal distribution means only that no one can be made better off without someone else being made worse off.").

goods purports to ensure only human utility (the total satisfaction from consuming a good or resource) and not the common good, justice, or human welfare.[134]

To be just in the distribution of entitlements and resources, the law and legal institutions must consider a nation state's reference point against which the grant or removal of an entitlement or resource will be seen as a loss or gain because loss aversions, status quo biases, and endowment effects will determine whether a distribution of a resource will be considered just or unfair.[135] Brain research has shown that retaliating against a stranger for an unfair imposition of loss on another stranger triggers the "pleasure centers of the brain," and Kahneman points out that "maintaining the social order and the rules of fairness [by retaliating against the imposition of unfair losses]in this fashion is its own reward."[136] The retaliation against economic globalization that we see today could be attributable to the initial focus of the proponents of globalization on its benefits—e.g., shared prosperity, economic growth, and democratic governance (which are valued significantly less)—without giving adequate consideration to the losses globalization might bring—e.g., loss of local jobs due to immigration, loss of culture due to the importation of foreign culture, the degradation of forests and natural resources (which are valued significantly more), etc. In fact, Kahneman remarks that "our brains are not designed to reward generosity as reliably as they punish meanness."[137]

To be fair in the distribution of scarce resources on a global scale, with the knowledge that people (and state actors) consider the cost of losing an entitlement or good much more than gaining the same entitlement or good, laws and legal institutions must begin with a basic social structure for the international community and commit to fundamental principles of justice. The way to avoid loss aversion, status quo bias, and the endowment effect in the allocation of entitlements and resources to the international community is to begin from a reference point that is clean or blank—i.e., to imagine that the particular nation state does not have any entitlement to begin with, and that any allocation of an entitlement will amount to the receipt of a benefit and not the reallocation (and therefore the loss) of goods or entitlements. In *A Theory of Justice,* John Rawls calls this blank state

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[134] *Id.*
[135] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 308.
[136] *See id.*
[137] *See id.*

reference point the "original position," where certain things, such as personal beliefs and interests of the parties making distributive decisions; their relationship with one another; and "the alternatives between which they are to choose, the procedure whereby they make up their minds,"[138] are treated as irrelevant from the standpoint of justice. Parties distributing resources at the negotiation table must be deprived of information that would cause them to decide that particular distributive measures are unfair or unjust. Thus, by excluding "the knowledge of those contingencies which sets men at odds and allows them to be guided by their prejudices,"[139] parties involved with the distribution of resources and entitlements in the international community make distributive decisions behind a "veil of ignorance"[140] without the prejudices and biases that make international negotiations difficult.

While this sounds ideal on a theoretical level, allocating scarce resources behind Rawls's "veil of ignorance" may be difficult on a practical level, especially if the global community attempts to reallocate resources through international organizations. One of the difficulties with Rawls's Pareto optimal method of redistributing resources is the notion that building social order on the intuitive idea that those who are wealthy should not be able to hold on to their wealth as long as there are others who are less fortunate would create disincentives for individual people or countries to take the initiative to succeed.[141] Without the incentive of being able to benefit from one's own labor, effort, and business acumen, there is nothing to encourage individuals to provide value to society and accumulate wealth from engaging in commercially productive activity. It will also be difficult to determine when Pareto equilibrium is attained. How do we decide when taking from countries who are resource rich and distributing those resources to poorer countries has reached its optimal level, and taking any more from the rich would make the poor worse off? The optimal distribution level is difficult to assess, and leaving the question open might create a reverse problem where taking from the wealthy to support the less fortunate creates a disincentive for wealth creation to the point where socially and economically productive activities such as capital investments, entrepreneurship, and research

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[138] RAWLS, *supra* note 132, at 15-16.

[139] *Id.* at 17.

[140] *Id.*

[141] Anthony D'Amato, *International Law and Rawls' Theory of Justice*, 5 DENV. J. INT'L L. & POL'Y 525, 527 (1975).

and development start decline. As Professor D'Amato asked a few years after *A Theory of Justice* was published: "Would we wait for rich persons to quit their corporate jobs and make public statements that they are not any longer able to keep enough after taxes to make it desirable for them to put in another day's work?"[142] D'Amato goes on to state that the application of Rawls' theory to cross-border questions of wealth distribution poses a series of other questions:

> Yet, even if this principle is operationalized within a society, can it apply across societies? Should there be enormous taxes upon the incomes of rich persons in industrialized societies so that the money can be paid over to masses that are near starvation in India, China, and other populous and developing nations? Should there be an "excess profits" tax levied upon individuals and corporations for this purpose? To some extent, of course, the "have-not" nations are making this claim today; it takes the form of demands upon limited United Nations resources and capital, explanations for expropriation of foreign-owned industries, justifications for exploiting oceanic resources, and so forth. The "relative deprivation" sensed by disadvantaged nations is itself put forward as a justification for international measures designed to reduce the disparity of wealth between rich and poor nations. Rawls' book would probably provide an ethical basis for such claims, assuming that his scheme can transcend social boundaries.[143]

B. Facilitate Cooperation and Collaboration

Many of the severe problems that we as a humanity face today—"global warming, acid rain, AIDS, drug trafficking," nuclear proliferation, and the lack of world peace—are inherently international in scope and cannot be resolved at a national level despite calls from isolationists and populists to return sovereignty and autonomy back to the nation state.[144] Nation states must cooperate to address these problems through bilateral or multilateral agreements with the help of international institutions.[145] A world without international institutions lacks a system to deescalate tensions and conflict that might threaten world peace and security. For example, the League of Nations and Treaty of Versailles was intended "to promote

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[142] *Id.*
[143] *Id.* at 527.
[144] Kobrin, *supra* note 29, at 229.
[145] *See id.*

international cooperation and to achieve peace and security" after the First World War.[146] The United Nations was formed at the end of the Second World War to maintain peace at an international level and operate as a forum for conflict resolution between nations after the League of Nations failed to prevent the outbreak of the War.[147] At the center of the United Nations operations today is the rule of law.[148] With immense disparities in terms of economic status, political power, and social stability among nation states in the international arena, the need for mechanisms to prevent gross abuses of power among nation states is significant. The rule of law, which was originally developed to protect "the less powerful in an organized hierarchy and [ ] invoked to challenge arbitrary misuse of power by the state,"[149] introduced "basic norms enabling equal and fair treatment of citizens, accountability to the law, access to justice, legal certainty, and transparency, as well as institutions that would faithfully implement these norms."[150]

In international relations—where hierarchical structures produce divisions of power, haves and have nots, and economic divides—there is a significant necessity for the rule of law to protect not only individuals, but also less powerful or wealthy states and organizations from arbitrary decisions of individuals, nation states, and organizations who are higher up in the existing hierarchical structure.[151] Where the affect heuristic and availability bias work to influence impressions of other nation states and international organizations and produce quick intuitive judgments that erroneously fail to consider other information that would guide decision towards a more deliberate (and accurate) conclusion, state actors and nation states tend to cooperate and collaborate less because of negative feelings or critical perceptions about the other participants in a negotiation.[152] Knowing that the rule of law is upheld and adhered-to will assist in dispelling negative emotions caused by the affect

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[146] *See* JAN KLABBERS, AN INTRODUCTION TO INTERNATIONAL ORGANIZATIONS LAW 19 (Cambridge Univ. Press 2015).

[147] *Id.* at 20-21.

[148] Axel Marschik, *Enhancing Rule of Law*, *in* THE UNITED NATIONS SECURITY COUNCIL IN THE AGE OF HUMAN RIGHTS 247 (Jared Genser & Bruno Stagno Ugarte eds., 2014).

[149] *Id.* at 249.

[150] *Id.*

[151] *See id.*

[152] *See generally* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL'Y 71 (2010).

heuristic and availability bias to the point where there can be honest and open dialogue that facilitates collaboration and cooperation for mutual benefit.

In recent years, there has been movement to encourage development in countries around the globe through good internal governance for sustainable development and this includes adherence to and implementation of the rule of law. The Millennial Development Goals of 2010 committed world leaders to work collaboratively to eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and develop a global partnership for development.[153] There are increased calls for the international community to focus on governance issues, which include greater attention to the rule of law as a way of attaining sustained economic development, improving education and health, attaining gender equality, and eradicating poverty and hunger.[154] While there are many nuances to the rule of law,[155] one core tenet is citizen access to justice. To engender goodwill among countries in the pursuit of common development goals, countries must exhibit commitment to the rule of law that goes beyond merely having clear, widely publicized rules that apply prospectively. There must be access to quick, transparent, and easy access to justice and the settlement of disputes. Courts, especially in countries that have long dealt with pervasive corruption, may not be able to provide access necessary for the rule of law to thrive fully. In these circumstances, it is important that rigorous alternative dispute resolution mechanisms are implemented.[156]

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[153] The Millennium Development Goals Report 2015, U.N. (2015), https://www.un.org/millenniumgoals/2015_MDG_Report/pdf/MDG%202015%20rev%20(July%201).pdf.

[154] James Michel, *Alternative Dispute Resolution and the Rule of Law in International Development Cooperation,* 2011 J. DISP. RESOL. 21, 28–32 (2011).

[155] *See id.* at 36-37 (explaining the U.S. Department of International Development's and the World Justice Project's definition of the rule of law).

[156] Michel, *supra* note 154, at 39. It is important that alternative dispute resolution mechanisms meet basic standards of the rule of law, such as being legitimate, having links to formal enforcement mechanisms, operating within the realm of legal rules, is of good quality, being accessible to the poor, and being consistent with human rights standards and principles. Without meeting these basic standards, there is a chance that these informal institutions of resolving disputes could become a "second-class justice system for the poor rather than an instrument of societal inclusion within a rule of law that aspires to equal justice."

C. *Building Trust*

It is difficult to build trust in an era when individuals, state actors, and nation states have negative feelings about a borderless world and open markets where goods and services can move seamlessly across international borders. The response to this lack of trust appears to be a retreat from globalization into localization strategies, where goods or services are produced, innovated, and sold at the same locality.[157] For example, an analysis of media mentions for the term "globalization" across major newspapers—such as the Wall Street Journal, the New York Times, and the Washington Post in the United States and the Times of London, the Guardian, and the Financial Times in the United Kingdom—reveals that the public has a generally bleak view about globalization and what the term stands for.[158] With the affect heuristic and availability bias causing cognitive errors, it is no surprise that individuals, state actors, and nation states are turning away from globalization and turning towards localization, populist, and even isolationist ideas. Business executives tend to believe that "the world is a lot more globalized than it actually is;"[159] surveys show that when "businesspeople think the world is more globalized than it really is, they tend to underestimate the need to understand and respond to differences across countries when operating abroad."[160] "In the public policy sphere, leaders tend to underestimate the potential gains from additional globalization and to overestimate its harmful consequences for society."[161]

When there is an underestimation of the need to understand social and cultural differences in countries around the globe and an overestimation of the harms and costs of globalization, trust breaks down. Laws and legal institutions can rebuild trust to facilitate international cooperation and collaboration by introducing formal legal language to unify the international community. As the late Harold J. Berman indicates: "language can be used to enslave an individual or indeed, a whole nation. It can be used to whip men into fury against each other. It can be used to break a person down."[162] But

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[157] Pankaj Ghemawat, *Globalization in the Age of Trump*, HARV. BUS. REV. (July-Aug. 2017), https://hbr.org/2017/07/globalization-in-the-age-of-trump.

[158] *Id.*

[159] *Id.*

[160] *Id.*

[161] *Id.*

[162] HAROLD J. BERMAN, LAW AND LANGUAGE: EFFECTIVE SYMBOLS OF COMMUNITY 43 (John Witte, Jr. ed., Cambridge Univ. Press 2013).

it is this same destructive power of language that gives language its constructive power—"that is, the power of men through speech to reach out to each other, to share each other's experience, to achieve some sort of meeting of minds and hearts, some sort of agreement."[163] Because law is a type of language,[164] law and legal institutions have the capacity to bring people together and build trust through shared language, organized society, and civil government. It is particularly important for the international community to come together under a common international legal system and agree to be bound by its legal norms. To this end, institutions such as the United Nations, International Court of Justice, Security Council of the United Nations, and international conventions—such as the well-known Universal Declaration of Human Rights and the lesser known Berne Convention (that protects literary and artistic expressions), the Patent Law Treaty (to formalize and harmonize patent filing procedures), and the Convention on Registration of Objects Launched into Outer Space (to support the exploration of space by making countries responsible for their activities in outer space)—are instrumental in bringing the international community together through common values and building trust among each other through common language. When the entire international community accepts international legal norms as morally binding, if not legally binding, nation states can come together to form a global community with shared values and be more open to the common pursuit of mutually beneficial interests and goals to the betterment of the global community.[165]

IV. THE ROLE OF INTERNATIONAL COURTS IN PROMOTING REGIONAL AND INTERNATIONAL COOPERATION

International treatises can be used to facilitate cooperation among nation states and, in a perfect world, cooperation and collaboration in the pursuit of sustained global welfare and economic development would occur among nation states. Bilateral and multilateral agreements would be agreed upon entered into and nation states would agree to pursue the common good even if it means that some national sovereignty and autonomy may have to be surrendered. If policy-makers in every nation state are able recognize and set aside their cognitive biases that cause isolationist world views, nation states can

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[163] *Id.*
[164] *Id.* at 64.
[165] *Id.* at 76.

then cooperate and collaborate to identify workable solutions to common global problems without the effects of implicit biases holding them back and committing them to views that are isolationist in nature. This notion exists to some extent with the Millennium Development Goals and international effort to eradicate child labor and human trafficking.[166] However, sometimes effective global legislative compromise and action can prove elusive with bilateral and multilateral negotiations coming to a standstill.[167] When international negotiations break down, nation-states cannot work together for the betterment of the common good. And even if international agreements are in place, nation-states may choose to breach their obligations under the treaty and ignore their commitments to the international community.[168] There is no guarantee that legislative action can address the cognitive errors that cause isolationist views among nation-states and promote cooperative and collaborative behavior among nation-states.

However, international courts offer ways to facilitate compliance with international standards even if cooperation and collaboration with other countries cannot be achieved. Pressuring multinational companies to comply with international labor standards is one way to address the problem of child labor, and litigation or the threat of litigation against large multinational companies can sometimes pressure countries to adhere to international standards.[169] The class action law suits against American clothing manufacturers such as The Gap, Tommy Hilfilger, J. Crew, Gymboree, Jones Apparel Group, Walmart, J.C. Penney, Sears, and others over sweatshop conditions in Saipan resulted in these companies settling and adhering to more

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[166] *See* U.N. OFF. ON DRUGS AND CRIME, *The Global Initiative to Fight Human Trafficking* (2007), https://www.unodc.org/pdf/gift%20brochure.pdf (last visited Oct. 29, 2018). *See also* Thomas, *supra* note 121.

[167] Philippe Sands, QC, *Climate Change and the Rule of Law: Adjudicating the Future in International Law, Lecture at the Dickson Poon School of Law Symposium (Sept. 17, 2015)*, 28 J. ENVTL. L. 19 (2016).

[168] Nicar. v. U.S., 1986 I.C.J. 137 (where the United States was found by the International Court of Justice to be "in breach of its obligations under customary international law not to use force against another State," "not to intervene in its affairs," "not to violate its sovereignty," "not to interrupt peaceful maritime commerce," and "in breach of its obligations under Article XIX of the Treaty of Friendship, Commerce and Navigation between the Parties signed at Managua on 21 January 1956.").

[169] *See* Nancy L. Mensch, *Codes, Lawsuits Or International Law: How Should the Multinational Corporation Be Regulated with Respect to Human Rights?*, 14 U. MIAMI INT'L & COMP. L. REV. 243 (2006).

acceptable working conditions for factory workers.[170] The settlement established a system, comprised of a panel of three retired judges, to independently monitor labor practices in these factories through surveillance, random spot checks, and training of factory workers on basic labor rights.[171] The prohibition against torture and slavery also works as a *jus cogens* preemptory norm from which national governments cannot derogate,[172] thus obligating nation states to comply with certain international standards, even where governments do not agree, because these norms are so fundamental to the international community that to violate them would "shock the conscience of humankind . . . ."[173] Child labor would ostensibly amount to torture and slavery, and how countries view the practice of child labor—whether they choose to see the practice as wrong or not—would be largely irrelevant to the international community because of *jus cogens* status. In situations such as these, a country does not have much of a choice in whether to sanction the practice or not because derogation from the preemptory norm prohibiting torture and slavery would not be allowed by the international community.

International courts—whether regional or global, permanent or ad hoc—can play a role in facilitating cooperation and collaboration among nation states as they resolve particular disputes and/or contribute to how international law unfolds and develops by reviewing nation-states obligations under international treatises and customs. They can also help nation states recognize the issue at hand more clearly and guide nation states as to what needs to be achieved, how they fall short, or how they have failed to act. Whether international courts are able to exert enough influence that their decisions facilitate cooperation and collaboration among nation states depends on how they are perceived. The greater their legitimacy capital, the greater their sphere of influence. Legitimacy capital and international courts' sphere of influence over nation states to correct implicit biases and encourage cooperation and collaboration is important given that the

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[170] Nancy Cleeland, *Firms Settle Saipan Factory Workers Suit*, L.A. Times (Sept. 27, 2002), http://articles.latimes.com/2002/sep/27/business/fi-saipan27.

[171] *Id.*

[172] Madeleine Grey Bullard, *Child Labor Prohibitions are Universal, Binding, and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer*, 24 HOUS. J. INT'L L. 139, 182-84 (2001).

[173] Ligia M. De Jesus, *Revisiting* Baby Boy v. United States*: Why the IACHR Resolution Did Not Effectively Undermine the Inter-American System on Human Rights' Protection of the Right to Life from Conception*, 23 FLA. J. INT'L L. 221, 270 (2011).

decisions of international courts are only persuasive and not binding.[174] To increase legitimacy capital and increase the persuasiveness of the decisions of international courts, international courts as an institution should also capture the viewpoints of decision makers with different geographical origin, gender, legal systems, legal culture, education and professional backgrounds.[175] Countries will have greater respect for the decisions of international judges and arbiters and see them more as their peers with a common interest or goal as gender, cultural, educational, and geographical diversity increases on the international bench.[176]

V. REDUCING THE IMPACT OF IMPLICIT BIASES ON THE INTERNATIONAL BENCH

As we increase diversity of judges and arbiters in international courts by making international courts as an institution more heterogenous and representative of the international community as a whole,[177] the propensity for implicit biases of these judges to influence decisions and actions becomes heightened as well. One of the more pressing issues with increasing diversity on the international bench would be how to address unacknowledged biases and assure the public that the judiciary on the international bench are not influenced by their own implicit biases. To deal with implicit biases among the bar and bench, we would have to know when we are having a biased, stereotypical, or prejudiced thought and to make the concerted effort to acknowledge the thought and not act on it. Judges must be aware of unwanted processes in their mind, the direction and magnitude of a bias, and be aware enough to know how to adjust his or her responses to the bias-triggering stimuli.[178] The presence of a biases does not mean that we are maleficent—the presence of biases is normal considering how our minds are wired.[179] However, when we are in a position where our decisions and judgements affect the lives of others, we have a civic and moral responsibility to address that bias and

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[174] Cohen et al., *supra* note 25.

[175] Vera Shikhelman, *Diversity and Decision-Making in International Judicial Institutions: The United Nations Human Rights Committee as a Case Study*, 36 BERKELEY J. INT'L LAW 60, 62-63 (2018).

[176] *Id.* at 63.

[177] *Id.*

[178] Evan R. Seamone, *Judicial Mindfulness*, 70 U. CIN. L. REV. 1023, 1051–53 (2002).

[179] TVERSKY & KAHNEMAN, JUDGMENT UNDER UNCERTAINTY, *supra* note 33.

prevent it from influencing our decisions. As part of its public service, the American Bar Association has an "Implicit Bias Initiative" to help the bar and the bench grasp the pervasiveness of implicit biases and obtain tools and strategies to reduce and minimize the influence of these biases in their professional, and, where relevant, personal, judgement and decision-making.[180]

Biases work in the same way on the international bench, but as diversity on the international bench increases there will also be an increase in biases based on the judges' national origins, cultural identities, educational backgrounds, gender, and other proxies used for group affiliation. It would be worthwhile for judges on the international bench to continuously educate themselves (and attend continuous education where appropriate) on what implicit biases are, why they exist, and how to overcome them. There are several strategies that judges in the international courts can use to minimize or counter the effects of implicit biases and heuristics.

A. Test for The Existence of Implicit Biases

As biases and heuristics are a predictable function of the human brain and are not necessarily a negative characteristic of how people think,[181] judges in international courts can benefit from just being aware of the kinds of biases that may exist in their decision-making processes. Researchers at Harvard University have developed a computerized system to collect data for implicit biases research[182] called "Project Implicit" that has a variety of "Implicit Association Test(s)" ("IAT"), which allow participants to look at various images and words and to sort them out into categories.[183] The responses, based on the speed in which the participant reacts to the image, will then be scored and analyzed to provide the participant with information on whether she has an implicit preference for a particular quality or

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[180] *Implicit Bias Initiative*, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/litigation/initiatives/task-force-implicit-bias/ (last visited Oct. 31, 2018).

[181] Thomas Gilovich & Dale Griffin, *Introduction – Heuristics and Biases: Then and Now*, *in* HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 8 (Thomas Gilovich, Dale W. Griffin & Daniel Kahneman eds. 2002).

[182] *See Published Papers Using Project Implicit Demo Site Data*, PROJECT IMPLICIT, https://www.projectimplicit.net/demopapers.html (last visited Oct. 18, 2019) (providing a list of research publications).

[183] *See About the IAT*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/iatdetails.html (last visited Oct. 18, 2019) (explaining the Implicit Association Test ("IAT")).

characteristic in a person, e.g., a preference for thin people relative to fat people, labeled as "slight," "moderate," or "strong."[184]

Although the IAT has been subject to some criticism about its psychometric validity and reliability,[185] it is still the most popular test among other measures for studying implicit biases.[186] Judges on the international courts can use this test to determine whether they are working under any form of biases of which they may not be consciously aware.

B. Mitigation of Biases through Awareness and Mindfulness

Judges on the international bench can take proactive steps to mitigate the effects of implicit biases by being more aware and mindful of how those biases manifest in their daily professional and personal lives. The Kirwan Institute for the Study of Race and Ethnicity is an interdisciplinary engaged research institute at The Ohio State University, which has some excellent resources on mitigating implicit biases in health care.[187] Although the suggestions provided are intended to be for the health care field, they apply equally and as effectively in law. The four strategies suggested on the Ohio State University's website—fostering and increasing motivation toward egalitarian goals, perspective taking and empathy building, mindfulness, and building new associations[188]—are effective tools that can help judges remain impartial, unbiased, and fair in their deliberation and decisions at an international level.

For example, by fostering and increasing motivation toward egalitarian goals, such as to treat each party before their court as a party who has the right to a fair trial and just outcome, a judge can reinforce and uphold his or her commitment to the rule of law and justice while at the same time mitigating the influence of implicit bias against one or both of the parties before the court. As another example,

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[184] *See Frequently Asked Questions*, PROJECT IMPLICIT, https://implicit.harvard.edu/implicit/faqs.html#faq3 (last visited Oct. 18, 2019) (explaining the meaning of IAT score labels).

[185] Beth Azar, *IAT: Fad or Fabulous? Psychologists Debate Whether the Implicit Association Test Needs More Solid Psychometric Footing Before It Enters the Public Sphere*, 39 AM. PSYCHOL. ASS'N 44, 46 (2008) (*available at* https://www.apa.org/monitor/2008/07-08/psychometric).

[186] *Id.*

[187] *Mitigating Implicit Bias*, THE OHIO ST. UNIV., https://u.osu.edu/breakingbias/tools-for-mitigating-bias/ (last visited Oct. 18, 2019) (discussing approaches for "embracing active bias mitigation strategies").

[188] *Id.*

by being mindful and focusing on the important role that the court has to play in resolving international disputes to the best of its ability, a judge is less likely to fall back on short cuts to make quick judgements that might be influenced by heuristics and biases.

C. Be More Conscious About Deliberation

The third strategy that an international judge can employ to overcome the influence of implicit biases is to be more deliberative in their decision-making process and to undertake Kahneman's System 2 mode of careful more thoughtful deliberation as opposed to the more intuitive and reactionary System 1 mode of thinking.[189] Research by Chris Guthrie, Jeffrey J. Rachlinski, and Andrew J. Wistrich show that "intuitive, heuristic-based decision making led the judges to make erroneous decisions that they probably would have avoided had they adopted a deliberative approach."[190] They go on to comment that "intuition is also the likely pathway by which undesirable influences, like the race, gender, or attractiveness of parties, affect the legal system."[191]

Judges in the international courts can employ this strategy as a de-biasing technique by "paying attention"[192] to the immediate task at hand, whether it is listening to an oral argument presented by a party before the court or deliberating on a judgement they are about to give. As "System 2 has some ability to change the way System 1 works, by programming the normal automatic functions of attention and memory,"[193] judges can mitigate the influence of implicit biases in quick intuitive judgement by being more deliberative and attentive to the matter before them.

D. Undergo Training

International judges can also undergo training programs that might help them be aware of their implicit biases and provide strategies and tools to help them mitigate the effects of these biases. Some states, such as California, are taking steps to require their Bar Associations to develop training programs that their lawyers and

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[189] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42.

[190] Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 31 (2007).

[191] *Id.* at 31-32.

[192] KAHNEMAN, THINKING, FAST AND SLOW, *supra* note 42, at 22-23.

[193] *Id.* at 23.

judges will have to attend every couple of years (it would be every two years in California) to "ameliorate bias-based injustice in the courtroom."[194] For international judges, the International Organization for Judicial Training, for example, can be tasked with providing international judges and arbiters with the training necessary to address the presence of implicit biases at an international court and the specific strategies that international judges can employ to mitigate the influence of such biases and be effective judges that can provide both fair and just resolution to international disputes and the direction to facilitate cooperation and collaboration among countries for the common good.

These techniques proposed here can be used for the international bench to help judges see the extent that implicit biases affect their judgement and decision-making process subconsciously. Being aware of the implications is half the battle won; once judges are aware of their implicit biases, counteracting their effects will be easier.

VI. CONCLUSION

The immediate solution to the problem of unreasonable resistance to globalization is to understand how heuristics and biases work to produce predictable and systematic errors in human cognition and to recognize that a lot of what we think about the globalized economy and its failures may be unwarranted because of these errors. But an awareness of cognitive errors only introduces reasons for why the forces of anti-globalization, nationalism, and populism exist and continue to grow. It does not provide long-term solutions to the real challenges facing us globally, challenges such as global property and hunger, access to healthcare, environmental devastation, and human rights violation, which require the international community's commitment to solve. These challenges cannot be solved by nation states acting unilaterally. In fact, nation states' singular actions to address global issues may cause more damage than good.[195]

To address global challenges, laws and legal institutions must step in to create the right conditions for international cooperation and

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[194] Joyce E. Cutler, *Implicit Bias Training May Be Required for Calif. Judges, Lawyers* (May 14, 2019), https://biglawbusiness.com/implicit-bias-training-may-be-required-for-calif-judges-lawyers.

[195] Chris Huhne, *Nation States are Too Small to Fix Global Problems*, THE GUARDIAN (June 23, 2014, 2:00 EDT), https://www.theguardian.com/commentisfree/2014/jun/23/nation-states-too-small-for-global-problems.

collaboration to occur and to correct some of the errors of judgement that happen because of the presence of heuristics and implicit biases. In an era fraught with distrust, anxiety, and even fear of the "other"—all of which are feelings exacerbated by cognitive biases in an environment where quick intuitive judgments help people rapidly size the "other"—law and legal institutions need to facilitate open and honest dialogue by forcing state actors and nation states to set aside these cognitive biases. The solution to global issues will only become clear once we set aside these biases and engage in more deliberate analysis of global concerns. Being aware of our cognitive biases and calling them out is the first step towards eliminating beliefs and feelings about the "other." Once we have set aside our biases, laws and legal institutions can then engage the international community in open and honest dialogue about the hard challenges facing us globally. Trust must be rebuilt and international moral norms must be introduced, and where necessary reintroduced, to guide nation states towards global goals that are mutually beneficial.