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EUstitia: Institutionalizing Justice in the European Union

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If it has taken forty years to create an Internal Market, and thirty years to create a single currency, we will be doing well if we achieve a *single judicial space* within twenty years.

— French Justice Minister Elisabeth Guigou (July 2000)[1]

A whole millennium ... is being thrown over board. ... In the dawning era of private international law, national parliaments are out and only a weak European Parliament remains. Legal science swoons in anticipation of what lies ahead.

— Prof. Dr. Erik Jayme (2000)[2]

The notion of "European judicial space" or "Judicial Europe" is altogether old and fuzzy.

— Antoine Vauchez (2001)[3]

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[1] *Justice and Home Affairs: French Call for "Nationalisation" of Member States' Legal Decisions*, EUROPEAN REPORT, July 29, 2000, *available at* 2000 WL 24318389. Madame Guigou made this comment during the French Presidency of the European Council.

[2] Erik Jayme, *Das Internationale Privatrecht zwischen Postmoderne und Futurismus, in* RECHT UND RECHTSWISSENSCHAFT: SIGNATUREN UND HERAUSFORDERUNGEN ZUM JAHRTAUSENDBEGINN at 159, 161 (Peter-Christian Müller-Graf & Herbert Roth, eds., 2000).

[3] Antoine Vauchez, *Justice and Politics in Europe: Studying the Transformations of the Judicial Profession* 10 (July 2001) (unpublished manuscript, on file with author).

I. INTRODUCTION

Madame Guigou's prediction that a "single judicial space" might be in place by the year 2020 signals a brave new horizon for the rule of law in the European Union. Yet even her dramatic claim fails to convey the range, depth, and momentum of changes wrought by the Treaties of Maastricht[4] and Amsterdam[5] in the realm of justice. The European Union is installing new infrastructure upon which to build a "genuine European area of justice."[6] This "European *judicial* area"[7] constitutes a key component of the

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4 Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191/1) [hereinafter TEU]. The TEU, which entered into effect on November 1, 1993, calls upon Member States to "develop close cooperation on justice and home affairs." *Id.* at art. 2. A consolidated version containing subsequent amendments to the TEU is available at 2002 O.J. (C 325/5).

[5] TREATY OF AMSTERDAM AMENDING THE TREATY ON EUROPEAN UNION, THE TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES AND CERTAIN RELATED ACTS, Oct. 2, 1997, 1997 O.J. (C 340/1) [hereinafter Amsterdam Treaty]. The Amsterdam Treaty entered into effect on May 1, 1999.

[6] The term "genuine European area of justice" derives from the Presidency Conclusions of the Tampere European Council (Oct. 15-16, 1999), BULLETIN E.U. 10-1999, ¶¶ I.1 – I.16, ¶ I.8 [hereinafter Tampere Milestones]. This special meeting of the European Council was devoted to the creation of an area of freedom, security, and justice in the European Union, and formulated "political guidelines and concrete objectives" aimed at promoting the "full and immediate implementation" of the Amsterdam Treaty. *Id.*, ¶¶ I.3 – I.11, ¶ I.3.9. The Commission adheres to this terminology in its biannual "scoreboard" reports. *See* Communication from the Commission to the Council and the European Parliament, *Scoreboard to Review Progress on the Creation of an Area of "Freedom, Security and Justice" in the European Union*, COM(00)167 final [hereinafter First Scoreboard]. *See also* Second Scoreboard (covering the second half of 2000), COM(00)782 final; Third Scoreboard (covering the first half of 2001), COM(01)278 final; Fourth Scoreboard (covering the second half of 2001), COM(2001)628 final; Fifth Scoreboard (covering the first half of 2002), COM (02)261 final; Sixth Scoreboard (covering the second half of 2002), COM(02)738 final; Seventh Scoreboard (covering the first half of 2003), COM(03)291 final.

[7] Council and Commission Action Plan of December 3, 1998, on how best to implement the provisions of the Treaty of Amsterdam on the creation of an Area of Freedom, Security and Justice, 1999 O.J. (C 19/1), at 4 [hereinafter Vienna Action Plan] ("Reinforcement of *judicial* cooperation in *civil* matters . . . represents a fundamental stage in the creation of a European *judicial* area which will bring tangible benefits for every Union citizen." (emphasis in original)). *See also* Commission Proposal for a Council Regulation Establishing a General Framework for Community Activities to Facilitate the Implementation of a *European Judicial Area* in Civil Matters, Explanatory Memorandum, COM(01)221 final, at 2 [hereinafter Explanatory Memorandum] ("The overriding aim is to create a *European judicial area* in civil matters, where citizens have a common sense of justice throughout the Union and where justice is seen as facilitating the day-to-day life of people." (emphasis added)). *See also* Amended Proposal for a Council Regulation Establishing a General Framework for Community Activities to Facilitate the Implementation of a European Judicial Area in Civil Matters, 2002 O.J. (C 51/390). The Commission consistently favored the term "European Judicial Area," but the Council has refrained from using it, preferring instead a more constrained formulation. *See, e.g.*, Council Regulation 743/2002 Establishing a General Community Framework of Activities to Facilitate the Implementation of *Judicial Cooperation in Civil Matters*, 2002 O.J. (L 115/1) [hereinafter Framework Regulation] (emphasis added).

"area of freedom, security and justice" ("AFSJ").[8] The Amsterdam Treaty added the AFSJ as a dimension of the Union, in order to promote the free movement of persons.[9]

"EUstitia"[10] is a neologism that aims to capture both pragmatic and aspirational aspects of this new European governance project. The term is used here to refer solely to the *civil law* component of the AFSJ.[11] This article both examines EUstitia's key features, and explores the implications of institutionalizing civil justice in the European Union. In particular, it contextualizes and examines measures that have been taken, proposed, or planned to establish the "genuine European area of justice" since the Amsterdam Treaty entered into effect in May 1999. EUstitia comprises the "communitarization"[12] of private international law,[13] together with other

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Still, one encounters frequent references to the "European Judicial Area" in the literature, as well as to the notion of "European Judicial Space." *See, e.g.*, CREATING A EUROPEAN JUDICIAL SPACE: PROSPECTS FOR IMPROVING JUDICIAL COOPERATION IN CIVIL MATTERS IN THE EUROPEAN UNION (Gavin Barrett ed., 2001) [hereinafter BARRETT, EUROPEAN JUDICIAL SPACE]. The Sixth Scoreboard, *supra* note 6, at 7, introduced the term "European Law-enforcement Area."

[8] Since the effective date of the Amsterdam Treaty, the TEU aims "to facilitate the free movement of persons, while ensuring the safety and security of their peoples, *by establishing an area of freedom, security and justice* . . ." TEU, *supra* note 4, at pmbl.

[9] The amended TEU calls upon the Member States to "maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime." *Id.* at art. 2. The Amsterdam Treaty also amended the TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11, 4 EUR. Y.B. 412, as amended [hereinafter EC Treaty], by adding Title IV ("Visas, Asylum, Immigration and other Policies related to *Free Movement of Persons*") (emphasis added). A consolidated version incorporating subsequent amendments to the EC Treaty—which is still often referred to as the Rome Treaty (1957)—is available at 2002 O.J. (C 325/33).

[10] EUstitia is pronounced like the Latin term *justitia* and refers broadly to the evolving notion and apparatus of justice in the legal order of the European Union.

[11] This article does not examine parallel and far-reaching developments pertaining to asylum, immigration, or police and judicial cooperation in criminal matters, though these comprise equally vital aspects of the AFSJ. *See generally* Scoreboards, *supra* note 6.

[12] The term "communitarization" connotes that the Amsterdam Treaty transferred some degree of competence in this field from the Member States to the European Community. *See* Jürgen Basedow, *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*, 37 COMMON MKT. L. REV. 687 (2000). *See also* Dirk Besse, *Die justitielle Zusammenarbeit in Zivilsachen nach dem Vertrag von Amsterdam und das EUGVÜ*, 1999 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 107; Gerrit Betlem & Ewoud Hondius, *European Private Law after the Treaty of Amsterdam*, 9 EUROPEAN REV. PRIVATE L. 3 (2001); Jona Israël, *Conflicts of Law and the EC after Amsterdam: A Change for the Worse?*, 7 MAASTRICHT J. EUR. & COMP. L. 81 (2000); WENDY KENNETT, THE ENFORCEMENT OF JUDGMENTS IN EUROPE 21 (2000); Oliver Remien, *European Private International Law, the European Community and its Emerging Area of Freedom, Security and Justice*, 38 COMMON MKT. L. REV. 53 (2001). "Communitarization" is sometimes used as a synonym for "Europeanization" (or "Europeanisation"). However it may be spelled, this term has been defined as the phenomenon of shifting the "locus of control . . . from the Member States to the Euro-

measures related to "judicial cooperation in civil matters."[14] The European Union's efforts to create a "genuine area of justice . . . based on the principles of transparency and democratic control"[15] have been rapid and dramatic.[16] Yet, however remarkable the initial burst of activity, the European Union has just crossed the threshold of this burgeoning field of law- and policy-making. The developments surveyed in this article are the leading edge of a wave that will alter the European legal landscape in the years ahead. These institutional, procedural, and (possibly even) substantive innovations permeate the legal infrastructure upon which the European Union's legal order is constructed and may—despite their humble origins—edge Member States towards the new *ius commune* to which some aspire.[17]

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pean Community." Francis Snyder, *Europeanisation and Globalization as Friends and Rivals: European Union Law in Global Economic Networks*, *in* THE EUROPEANISATION OF LAW: THE LEGAL EFFECTS OF EUROPEAN INTEGRATION 293, 302 (Francis Snyder, ed., 2000). This term is also used to denote "the emergence and the development at the European level of distinct *structures of governance*." MARIA GREEN COWLES, JAMES CAPORASO & THOMAS RISSE (EDS.), TRANSFORMING EUROPE: EUROPEANIZATION AND DOMESTIC CHANGE 1 (2001) (emphasis added).

[13] The Commission has explained that private international law "is made up of mechanisms to facilitate the settlement of international disputes," and noted that "it does not have the same meaning in all Member States." Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation, COM(02)654 final ¶ 1.2. I use the term "private international law" broadly to encompass *all* aspects of private transnational dispute resolution *other than* the substantive norms applied to resolve the particular legal question(s) presented to the tribunal. Thus, my definition includes rules pertaining to choice of law (or conflict of laws), as well as rules pertaining to jurisdiction and judgments, judicial assistance (*e.g.*, service of process or taking evidence abroad), and other aspects of international civil procedure. *See generally* Symposium, *The Future of International Civil Procedure Law*, 4 EUR. J. OF L. REFORM 1 (2002).

[14] Article 65 of the EC Treaty empowers the Community to take "measures in the field of judicial cooperation in civil matters having cross-border implications." Part III *infra* shows that the scope of "judicial cooperation in civil matters" has rapidly expanded to include a wide range of procedural and substantive matters that reach beyond the literal language of the EC Treaty.

[15] Tampere Milestones, *supra* note 6, ¶¶ I.3.5, I.3.7.

[16] *See, e.g.*, Explanatory Memorandum, *supra* note 7, ¶ 3 ("rapid and extensive developments . . . [followed] the entry into force" of the Amsterdam Treaty).

[17] Methodologically speaking, *ius commune* (or European common law) refers to the process of ascertaining the "common background and principles of all national systems of law in Europe." Bernd von Hoffman, *The Europeanization of Private International Law*, *in* EUROPEAN PRIVATE INTERNATIONAL LAW 13, 15 (Bernd von Hoffman ed., 1998). The term has traditionally been used in connection with private law—principally torts, contracts, family law, successions—but is now relevant in the context of European administrative and criminal law as well. *See* JOHN A.E. VERVAELE ET AL., COMPLIANCE AND ENFORCEMENT OF EUROPEAN COMMUNITY LAW (1999) [hereinafter VERVAELE, COMPLIANCE AND ENFORCEMENT]. Full consideration of the controversy surrounding the *ius commune* is beyond the scope of this article. *See generally* Guido Alpa, *European Community Resolutions and the Codification of 'Private Law'*, 8 EUR. REV. PRIVATE L. 321 (2000); Mauro Bussani, *'Integrative' Comparative Law Exercises and the Inner Stratification of Legal Systems*, 8

Supplemented by efforts to build networks, strengthen interpersonal relations among legal professionals, and foster European legal culture, these innovations have both the aim and the potential to transform the European system of civil justice into a more comprehensive, coherent, and effective whole. In this way, EUstitia bears upon the development of citizenship, identity, and democracy in the European Union.

Part II of this article sets the stage for an analysis of changes in the European Union's rule of law by examining the treaty framework for building the AFSJ. This historical context provides a necessary backdrop against which to assess recent changes. Next, Part III traces the topography of the emergent EUstitia by analyzing the steps that have been taken to date—as well as those that have been proposed or are being planned at the E.U. level—under the banner of "judicial cooperation in civil matters."[18] For the most part, these measures are formally justified by reference to the traditional "negative" integration goal, namely, the overarching need to remove barriers to ensure free movement of persons.[19] Yet institutionalizing EUstitia is also motivated by a broader vision of a European legal order, which is discernible beneath the thicket of new measures and proposals, as well as

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EUROPEAN REVIEW OF PRIVATE LAW 85 (2000); Helmut Coing, *European Common Law: Historical Foundations*, *in* NEW PERSPECTIVES FOR A COMMON LAW OF EUROPE 31 (Mauro Cappelletti, ed., 1978); Helmut Coing, *Europäisierung der Rechtswissenschaft*, 15 NEUE JURISTISCHE WOCHENSCHRIFT 937 (1990); THE COMMON LAW OF EUROPE AND THE FUTURE OF LEGAL EDUCATION (Bruno De Witte & Caroline Forder eds., 1992) [hereinafter DE WITTE & FORDER, THE COMMON LAW OF EUROPE]; TOWARDS A EUROPEAN CIVIL CODE (Arthur Hartkamp et Al. eds., 2nd ed. 1998) [hereinafter HARTKAMP, EUROPEAN CIVIL CODE]; Thijmen Koopmans, *Towards a New "Ius Commune"*, *in* DE WITTE & FORDER, *supra* at 43; Hein Kötz, *A Common Private Law for Europe*, *in* DE WITTE & FORDER, *supra* at 31; Pierre Legrand, *Against a European Civil Code*, 27 MOD. L. REV. 44 (1997); Pierre Legrand, *On the Unbearable Localness of the Law: Academic Fallacies and Unseasonable Observations*, 10 EUR. REV. PRIVATE L. 61 (2002); Walter van Gerven, *The ECJ's Recent Case-Law in the Field of Tort Liability: Towards a European Ius Commune?*, *in* EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY 91 (R.H.M Jansen et al., eds., 1997) [hereinafter van Gerven, *The ECJ's Recent Case-Law*]; Walter van Gerven, *A Common Law for Europe: The Future Meeting the Past?*, 9 EUR. REV. PRIVATE L. 485 (2001) [hereinafter van Gerven, *A Common Law for Europe*] ; Walter van Gerven, *Codifying European Private Law? Yes, If ...!*, 27 EUR. L. REV. 156 (2002) [hereinafter van Gerven, *Codifying European Private Law*]; C.H. van Rhee, *Civil Procedure: A European Ius Commune?*, 8 EUR. REV. PRIVATE L. 589 (2000); Alain Wijffels, *A New Software-Package for an Outdated Operating System?*, *in* THE HARMONISATION OF EUROPEAN PRIVATE LAW 101 (Mark von Hoecke & François Ost eds., 2000); Reinhard Zimmerman, *Civil Code and Civil Law: The 'Europeanisation' of Private Law within the European Community and the Re-emergence of a European Legal Science*, 1 COLUM. J. EUR. L. 63 (1994-1995).

[18] Article 65 of the EC Treaty describes the sort of "[m]easures in the field of judicial cooperation in civil matters having cross-border implications" that the Community may take following the procedures laid down in Article 67 of the EC Treaty. For a detailed analysis of these provisions, *see infra* notes 55-56 and accompanying text.

[19] The Amsterdam Treaty added a new Title IV to the EC Treaty (Visas, Asylum, Immigration and other Policies related to Free Movement of Persons).

by the explicit goal of making Union citizenship more relevant in day-to-day life. The institutional devotion to these goals is so great that the Commission has proclaimed an annual "European Day of Civil Justice."[20] The developments described in Part III can best be evaluated in this larger context. Part IV concludes by exploring some implications of institutionalizing civil justice in the European Union.

It bears mention, before delving into the details of these changes, that not all of the policies being pursued under the banner of establishing the AFSJ are newcomers to the European Union's agenda. For example, previous efforts have been made to improve judicial protection and access to justice and to de-nationalize private international law.[21] Yet, these themes are enjoying renewed vitality as Europe strides into the new millennium and embraces the challenge of its next enlargement. The AFSJ and the "genuine European area of justice" have become rallying points for a startling program of legal reform.

II. THE EMERGING AREA OF FREEDOM, SECURITY AND JUSTICE

Serial amendments to the European Union's basic treaties have communitarized law- and policy-making on fundamental aspects of the administration of civil justice in the European Union. Relevant here are changes wrought by the treaties concluded in Maastricht (1992), Amsterdam (1997), and Nice (2000).[22] Both the Maastricht and Amsterdam Treaties institutionalized cooperative practices pertaining to justice and home affairs that

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[20] *Launch of the "European Day of Civil Justice,"* IP/03/699 (May 16, 2003) [hereinafter European Day of Civil Justice]. The first European Day of Civil Justice will be on October 26, 2003, and the event will be celebrated during the last week in October in subsequent years. This initiative and the related events have emerged from cooperation between the Commission and the Council of Europe (COE), in particular the COE's "European Commission on the Efficiency of Justice" (CEPEJ). *See* Draft Organisational Charter of the European Day of Civil Justice, CEPEJ 2000(13) (July 4, 2003).

[21] *See, e.g.,* Convention on the Law Applicable to Contractual Obligations, June 19, 1980, as amended, 1998 O.J. (C 27/34) [hereinafter Rome I Convention]; Hague Conference on Private International Law, *available at* http://www.hcch.net/e/conventions/index.htm (last visited on May 16, 2003) (listing 42 private international law conventions).

[22] Treaty of Nice amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80/70) [hereinafter Nice Treaty]. The Nice Treaty entered into effect on February 1, 2003. *See* Presidency Conclusions of the Copenhagen European Council (December 12-13, 2002), BULLETIN E.U. 12-2002, ¶¶ I.1 – I.9, at ¶ I.1.3. A consolidated version containing subsequent amendments to the EC Treaty is available at 2002 O.J. (C 325/33). *See generally* DAVID GALLOWAY, THE TREATY OF NICE AND BEYOND: REALITIES AND ILLUSIONS OF POWER IN THE E.U. (2001); Xénophon A. Yataganas, *Treaty of Nice: The Sharing of Power and the Institutional Balance in the European Union: A Continental Perspective* (Feb. 2001), *available at* http://www.jeanmonnetprogram.org/papers/01/010101.html (last visited May 16, 2003).

began much earlier, but gained momentum during the 1980s, especially around the time of the Single European Act (1986).[23] As a direct consequence of these amendments, matters related to "judicial cooperation in civil matters"[24]—and particularly to private international law (including civil procedure)—have been shifted from an intergovernmental to the supranational realm of E.U. governance. Yet, this characterization fails to convey the sea change that is underway, albeit still at an early stage. It may help put the current state of affairs into perspective to recall that the last time Europe had anything like a uniform procedural system was at the fall of the Roman Empire.[25] Luckily, one need not recapitulate developments since Roman times in order to grasp the nature and likely impact of the changes underway in the European Union at the turn of the millennium.

A. The European Union's Remodeled Institutional Architecture

The 1986 Single European Act[26] (SEA) formally institutionalized European political cooperation, by placing it within an intergovernmental framework. Although the SEA made no explicit mention of judicial cooperation, an intergovernmental working party on this topic was established in 1986. The activities of this group, which were carried out by Member State representatives on the fringes of the scope of activities by the European Community's own institutions, resulted in the conclusion of a number of treaties relating to judicial cooperation.[27]

The Maastricht Treaty (1992) introduced profound changes to the European institutional architecture, which came to resemble "a Greek temple with three pillars joined together by a roof, the whole of which is the

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[23] SINGLE EUROPEAN ACT, 1987 O.J. (L 169/1) [hereinafter Single European Act].

[24] TEU, *supra* note 4, at art. 61 ("In order to establish progressively an area of freedom, security and justice, the Council shall adopt: (c) measures in the field of judicial cooperation in civil matters . . .").

[25] Mario P. Chiti, *Towards a Unified Judicial Protection in Europe*, 9 EUR. REV. PRIVATE L. 553, 553 (1997) ("Europe has not, since the fall of the Roman Empire, experienced another uniform procedural system, not even during the periods of maximum development of the *ius commune*."). I do not argue that current developments represent a return to Roman traditions, nor that recent changes go so far as to create such a "uniform procedural system." What I do argue is that the changes mark a new stage that will shape the future course of European integration, as elaborated in Part IV *infra*.

[26] SINGLE EUROPEAN ACT, *supra* note 23.

[27] French Ministry of Justice, *History of European Cooperation on Justice and Home Affairs - In Five Stages, available at* http://www.justice.gouv.fr/anglais/acoopjudi.htm (visited Oct. 18, 2000). The three conventions dealing with civil matters were: (1) Convention Abolishing the Legalisation of Documents in the Member States of the European Communities, May 25, 1987; (2) Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1998; and (3) Convention on the Simplification of Procedures for the Recovery of Maintenance Payments, Nov. 6, 1990.

European Union."[28] The three pre-existing European Communities[29] were folded together into a single European Community (First Pillar),[30] which is the realm of *supranational* governance, where Community institutions are empowered to exercise the legislative, executive and adjudicative powers conferred upon them by the Member States. But the Maastricht Treaty did not stop at that. It also supplemented the First Pillar by adding a Second Pillar (comprising common foreign and security policy)[31] and a Third Pillar (comprising common justice and home affairs policy).[32] The Third Pillar crystallized into institutional structure those practices that had emerged for cooperation in the fields of justice and home affairs (JHA).[33] The form of European governance provided in the Second and Third Pillars is *intergovernmental* in nature.[34] Still, creating the Second and Third Pillars was a

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[28] Elspeth Guild, *The Constitutional Consequences of Lawmaking in the Third Pillar of the European Union*, *in* LAWMAKING IN THE EUROPEAN UNION 65, 65 (Paul Craig & Carol Harlow eds., 1998) [hereinafter CRAIG & HARLOW, LAWMAKING]. *See also* Bruno De Witte, *The Pillar Structure and the Nature of the European Union: Greek Temple or French Gothic Cathedral?*, *in* THE EUROPEAN UNION AFTER AMSTERDAM: A LEGAL ANALYSIS 51 (Ton Heukels & Marcel Brus eds., 1998).

[29] The original three communities were the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (EURATOM). Each community was established by a separate treaty: Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty]; EC Treaty, *supra* note 9; TREATY ESTABLISHING THE EUROPEAN ATOMIC ENERGY COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 167, 5 EUR. Y.B. 454. The ECSC Treaty expired on July 23, 2002. *See* Council Decision of July 19, 2002 on the consequences of the expiry of the Treaty establishing the European Coal and Steel Community on the international agreements concluded by the ECSC, 2002 O.J. (L 194/36).

[30] The core of the First Pillar is the EC Treaty, which itself comprises the 1957 Treaty of Rome establishing the European Economic Community, as amended.

[31] TEU tit. V (Provisions on a Common Foreign and Security Policy), TEU, *supra* note 4, at art. J - J.11. In the consolidated version, provisions on Common Foreign and Security Policy are found in *id.* at art. 11-28.

[32] TEU tit. VI (Provisions on Cooperation in the Fields of Justice and Home Affairs), TEU, *supra* note 4, at art. K - K.9. In the consolidated version, provisions on Justice and Home Affairs are found in TEU art. 29-42. *See generally* Peter Müller-Graff, *The Legal Bases of the Third Pillar and its Position in the Framework of the European Union Treaty*, 31 COMMON MKT. L. REV. 493 (1994); Julian J.E. Schutte, *Judicial Co-operation under the Union Treaty*, *in* THE THIRD PILLAR OF THE EUROPEAN UNION 181 (Jörg Monar & Roger Morgan, eds., 1994); ROLAND BIEBER & JÖRG MONAR, JUSTICE AND HOME AFFAIRS IN THE EUROPEAN UNION: THE DEVELOPMENT OF THE THIRD PILLAR (Bieber & Monar, eds., 1995).

[33] Guild, *supra* note 28, at 65-66. *See also* Anne Weyembergh, *Building a European Legal Area: What has been Achieved, and What has still to be Done?*, Cicero Foundation Lectures Online, *at* http://www.cicerofoundation.org/lectures/p4weyembergh.html (April 2000) (last visited May 16, 2003) (summarizing the origins of cooperation in the field of justice and home affairs, as well as the criticisms of the Third Pillar).

[34] The Maastricht Treaty provided two main tools for the Union to use in the conduct of foreign and security policy: "systematic cooperation" and "joint action" pursuant to TEU Article J.1(3). *See generally* Title V of the pre-Amsterdam version of the TEU. In contrast, the Third Pillar referred only to "cooperation" (Article K) in regard to "certain matters of com-

milestone, insofar as it formally brought these matters within the Community's institutional structure for the first time.[35]

The impetus for creating the Third Pillar came from the growing need to coordinate national asylum, immigration and policing policies in the context of ever-freer movement of persons.[36] The need for coordination in these fields had become acute as a result of the collapse of communism in Central and Eastern Europe and the violent breakup of former Yugoslavia.[37] Most of the provisions formally incorporated into the European Union's treaty structure in 1992 codified practices that had emerged, particularly in the areas of asylum, immigration and police cooperation. The scope of JHA was not limited to these areas,[38] however, though it does appear that civil justice rode into the Third Pillar on the coattail of pressing developments in more politically-sensitive areas. Two treaties relating to judicial cooperation in civil matters were concluded under the Third Pillar procedures introduced by the Maastricht Treaty.[39] Civil justice may initially have been an afterthought, but it has become a key element of the emerging vi-

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mon interest" (Article K.1) in the fields of justice and home affairs. *See generally* Title VI of the pre-Amsterdam version of the TEU.

[35] Title VI of the pre-Amsterdam version of the TEU gave the right of initiative in civil matters to the Member States, as well as to the Commission. The European Parliament had the right to be informed and consulted. Decisions were taken in the Council of Ministers ("JHA Council"), which had the power to adopt treaties (under a rule of unanimity), to direct the work of groups of experts, and to decide on work programs.

[36] Guild, *supra* note 28, at 66-67. The third pillar "constitutes an uneasy compromise between the intergovernmentalism, which was apparently running amok without producing substantial results towards the objective of abolishing internal border controls, and the classic structure of E.U. law characterised by weak democratic legitimacy but strong implementation and enforcement through the powers of the European Commission and legal certainty from the Court of Justice." *Id.* at 67.

[37] The collapse of Communism in Europe in the late 1980s and the early 1990s, as well as war in the Balkans during the early 1990s, unleashed a flood of migrating people (and organized crime) from Eastern and Central Europe into Western Europe. However, these developments were not wholly new to Europe, which established the "Terrorism, radicalism, extremism and international violence group" in 1975 ("Trevi Group"). French Ministry of Justice, *supra* note 27.

[38] "Judicial cooperation in civil matters" was one among nine "areas of common interest" that were listed in Article K.1(6) of the pre-Amsterdam version of the TEU, which also included: asylum policy; rules governing the crossing by persons of the external borders of the Member States; immigration policy and policy regarding nationals of third countries; conditions of residence by national of third countries (including family reunion and access to employment); combating unauthorized immigration, residence and work by nationals of third countries; combating drug addiction; combating fraud on an international scale; judicial cooperation in criminal matters; customs cooperation; and police cooperation for the purposes of preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime.

[39] Convention on the Simplification of the Transfer of Judicial and Extrajudicial Documents in Civil and Commercial Matters, May 26, 1997; Convention on Jurisdiction, Recognition and Enforcement of Decisions in Matrimonial Matters, May 28, 1997, 1998 O.J. (L 221/1) [hereinafter Brussels II Convention].

sion of EUstitia.

The innovations introduced by the Maastricht Treaty (1992) can be assessed through comparison with the baseline set by the original EC Treaty.[40] None of the JHA matters that were brought under the "roof" of the Union and into the Third Pillar had fallen within the scope of the original European Communities.[41] Matters relating to criminal law, asylum, immigration, criminal law, police cooperation and the like were wholly excluded.[42] As for private international law, Article 220[43] of the Treaty of Rome charged Member States— "so far as is necessary . . . for the benefit of their nationals" —to negotiate and possibly conclude treaties on procedural matters, such as the recognition and enforcement of judicial or arbitral judgments.[44] Thus, the starting point for discussion of civil justice in the European Union was a treaty provision that exhorted Member States to address such matters on their own time, and outside the Community's formal institutional architecture.[45] Measured against this starting point, the creation of the Third Pillar represents a significant step towards a new form of Europeanized justice. At the institutional level, the Commission set up a task force for justice and home affairs in 1992.[46]

And yet, despite its pragmatic and symbolic importance, the 1992 Maastricht Treaty merely portended, without concretely working much dramatic change. It made only a "partial transfer of incomplete compe-

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[40] The Maastricht Treaty (1992) changed the name of the European Economic Community (EEC) to the European Community (EC). EC Treaty, *supra* note 9, at art. 1.

[41] It bears repeating that the practices and policies brought into Third Pillar are related to free movement of persons, which is one of the fundamental freedoms upon which the Community is based. *See* EC Treaty, *supra* note 9, at tit. III, art. 39-42 (ex 48-51). In the preamble of the pre-Amsterdam version of the TEU, the Member States "[reaffirmed] their objective to facilitate the free movement of persons, while ensuring the safety and security of their peoples, but including provisions on justice and home affairs in this Treaty."

[42] *See, e.g.,* Nicolien Dirkzwager, *The Shifting Boundaries of European and National Enforcement: A Case Study of Customs Law, in* VERVAELE, COMPLIANCE AND ENFORCEMENT, *supra* note 17, at 253.

[43] EC Treaty, *supra* note 9, at art. 293.

[44] The leading example of an Article 220 convention is the Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 1998 O.J. (C 027/1) [hereinafter Brussels I Convention]. Other conventions that are consistent with the pre-Amsterdam intergovernmental model—albeit not formally adopted pursuant to Article 220—are the Rome I Convention, *supra* note 21, and the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 1988 O.J. (L 319/9) [hereinafter Lugano Convention].

[45] This is not to say that conventions negotiated pursuant to Article 220 of the Treaty of Rome stayed completely outside the scope of the Community. Indeed, a protocol to the Brussels I Convention, *supra* note 44, conferred interpretive authority on the European Court of Justice, which has rendered many decisions interpreting that treaty.

[46] Directorate-General for Justice and Home Affairs of the European Commission, *available at* http://europa.eu.int/comm/dgs/justice_home/index_en.html (last visited May 16, 2003) [hereinafter DG-Justice and Home Affairs].

tence" in the fields comprising the Third Pillar,[47] which turned out to be "rather ineffective."[48] Still, this modest first step laid the cornerstone for the dramatic Europeanization of law- and policy-making that is now underway. The real breakthrough came with the Amsterdam Treaty (1997), which unleashed a tidal wave of new proposals and measures after it entered into effect in May 1999.[49] This treaty articulated a new objective for European integration: "to maintain and develop the union as an area of *freedom, security and justice*, in which the free movement of persons is assured."[50]

The Amsterdam Treaty did not stop at expressing this new goal; it also took concrete steps towards implementing it. The Amsterdam Treaty hijacked key components of "freedom, security and justice" from the Third to the First Pillar. In particular, Article 65 of the EC Treaty transferred competence over asylum, immigration, and "judicial cooperation in civil matters"[51] to the EC, but left police and judicial cooperation in criminal matters behind in the Third Pillar.[52] This communitarization[53] of private interna-

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[47] Guild, *supra* note 28, at 87.

[48] Basedow, *supra* note 12, at 691. Basedow has observed that the only "achievement" in the field of judicial co-operation in civil matters under the procedures in TEU, *supra* note 4, at art. K.3 was the Brussels II Convention, *supra* note 39, which never entered into effect, and has been displaced by Council Regulation 1347/2000 of 29 May 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of Both Spouses, 2000 O.J. (L 160/19) [hereinafter Brussels II Regulation].

[49] The changes introduced by the Amsterdam Treaty are limited in one key respect. The new provisions are "incomplete, since three Member States—Denmark, Ireland and the United Kingdom—do not, for the time being, take part in the adoption of measures under Title IV and consequently are not bound by them." Basedow, *supra* note 12, at 695.

[50] TEU, *supra* note 4, at art. 2 (emphasis added). This language replaces that part of Article B of the pre-Amsterdam TEU, which included among the Union's objectives the goal of developing "close cooperation on justice and home affairs."

[51] New Article 61(c) of the post-Amsterdam version of the EC Treaty provides that the Council shall adopt "measures in the field of judicial co-operation in civil matters as provided for in Article 65." Accordingly, references to judicial co-operation in civil matters were deleted from the provisions regulating the Third Pillar, which continues to exist—albeit in significantly reduced scope—under the post-Amsterdam version of the TEU. *See* TEU, *supra* note 4, at art. 29 (ex K.1).

[52] From this point on, the article focuses exclusively on "judicial cooperation in civil matters," and only refers to other aspects of "freedom, security and justice" when it is necessary to do so. A proposal has been made to the Convention on the Future of Europe to eliminate the Third Pillar and move all matters remaining there to the First Pillar. *See* Cristina Pineda Polo, *A "New" Area of Freedom, Security and Justice?*, The European Policy Center (Mar. 26, 2003) [hereinafter Polo, *A "New" Area*], *available at* http://www.theepc.be/europe (last visited Sept. 25, 2003). *See also* Cristina Pineda Polo, *Abolishing Pillar III: Differences Still to be Resolved* (Apr. 8, 2003) [hereinafter Polo, *Abolishing Pillar III*], *available at* http://www.theepc.be/europe (last visited Sept. 25, 2003); Cristina Pineda Polo, *Towards a Common E.U. Policy in Justice and Home Affairs: Slowly but Surely* (June 4, 2003) [Polo, *Towards a Common E.U. Policy*], *available at* http://www.theepc.be/europe (last visited Sept.

tional law marks the shift of law- and policy-making in the field of civil justice away from intergovernmental[54] and towards supranational[55] decision-making. Article 65 of the EC Treaty now provides:

> Measures in the field of judicial co-operation in civil matters having cross-border implications, to be taken in accordance with Article 67 and insofar as necessary for the proper functioning of the internal market, shall include:
> (a) improving and simplifying: the system for cross-border service of judicial and extra-judicial documents, co-operation in the taking of evidence, the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases,
> (b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;
> (c) eliminating obstacles to the good functioning of civil proceedings, if neces-

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25, 2003).

[53] *See, e.g.*, Basedow, *supra* note 12.

[54] The intergovernmental model was represented in these matters by the Third Pillar (Title VI of the pre-Amsterdam version of the TEU).

[55] Once inside the European Community (or First Pillar), recourse can be had to the traditional Community instruments—regulations, directives, decisions, recommendations, and opinions—in accordance with EC Treaty, *supra* note 9, at art. 249 (ex 189). The decision-making procedures applicable to measures taken pursuant to EC Treaty, *supra* note 9, at art. 65 are found in EC Treaty, *supra* note 9, at art. 67. During the first five years after the Treaty of Amsterdam entered into effect—i.e., until May 2004—measures require that "the Council shall act unanimously *on a proposal from the Commission or on the initiative of a Member State* and after consulting the European Parliament." EC Treaty, *supra* note 9, at art. 67(1) (emphasis added). The Commission's right of initiative in JHA areas is shared with Member States, but becomes exclusive in May 2004. After that date, however, the Commission will be obliged to "examine any request made by a Member State that it submit a proposal to the Council." EC Treaty, *supra* note 9, at art. 67(2)(1). *See* European Parliament Resolution on Progress in 2002 in Implementing an Area of Freedom, Security and Justice, B5-0193/2003, ¶ D (noting that "Member States' use of the co-right of initiative with the Commission in the field of justice and home affairs has undermined coherence and clarity because initiatives have been driven too often by domestic political considerations and media agendas").

With regard to voting procedure, Article 67(2) provides that "the Council, acting *unanimously* after consulting the European Parliament, shall take a decision with a view to providing for all or parts of the areas covered by [Title IV of the EC Treaty] to be governed by the procedure referred to in Article 251 and adapting the provisions relating to the powers of the Court of Justice." EC Treaty, *supra* note 9, at art. 67(2) (emphasis added). The Nice Treaty amends Article 67 to provide that the co-decision procedure—including qualified majority voting in the Council—will apply to "the measures provided for in Article 65 *with the exception of aspects relating to family law*." EC Treaty, *supra* note 9, at art. 67(5)(2) (emphasis added). *See* Nice Treaty, *supra* note 22, at Protocol on Article 67, 184. For a thorough analysis of the complex legislative details in this area, as well as an argument that the legislative changes introduced by the Treaty of Amsterdam did not represent a dramatic advance over the pre-existing procedures for lawmaking in this field, *see* Basedow, *supra* note 12, at 692-695. *But see* Remien, *supra* note 12, at 72-73 (greeting with "happy surprise" the Community's new work program pursuant to Articles 61 and 65 of the EC Treaty). Judicial review of measures adopted pursuant to Title IV of the post-Amsterdam version of the EC Treaty is subject to the special rules contained in EC Treaty, *supra* note 9, at art. 68.

> sary by promoting the compatibility of the rules on civil procedure applicable in the Member States.[56]

The Council is charged not only with the task of taking "measures to ensure cooperation between . . . the Commission" and the "relevant departments of the administrations of the Member States," but must also "ensure cooperation between the . . . Member States" themselves.[57] This is significant because it reinforces Article 65's emphasis on cooperation among Member States. Indeed, it suggests that the drafters might have been aiming at the limited goal of adopting rules of "coordination and authorization," rather than at more comprehensive "genuine Community solutions," such as harmonization or common rules (i.e., unification).[58]

Notwithstanding some glitches in the new system put in place by the Amsterdam Treaty,[59] the European Union has come a long way from the original EC Treaty, which "hardly took account of the legal framework of the business transactions . . . it was meant to favour. It did not provide for the harmonization or unification of contract law, nor did it touch [directly] upon the issues of private international law."[60] The communitarization of private international law has yielded a plethora of new, proposed and planned measures, which are significant not only in their own right, but also because of their wider implications for the rule of law in Europe.

B. The Scope of Judicial Cooperation in Civil Matters

The concept of "judicial cooperation in civil matters having cross-border implications" is not self-defining. Even under the Third Pillar, there was considerable disagreement over the scope of "judicial cooperation."[61]

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[56] EC Treaty, *supra* note 9, at art. 56.

[57] EC Treaty, *supra* note 9, at art. 57.

[58] Kamiel Mortelmans, *The Relationship Between the Treaty Rules and Community Measures for the Establishment and Functioning of the Internal Market: Towards a Concordance Rule*, 39 COMMON MKT. L. REV. 1303, 1308, 1310 (2002) (coordination rules are primarily aimed at "coping with national rules" and have a lesser "integrative effect" than those secondary rules taking the form of "common or harmonized measures").

[59] Basedow, *supra* note 12, at 695, sees a "crisis in the conflict of laws," stemming largely from ambiguities in the Amsterdam Treaty, as well as from the fact that Denmark, Ireland, and the United Kingdom do not participate.

[60] *Id.* at 687. However, that author also notes that the EC "has been active in the field of conflicts legislation for many years." *Id.* at 696.

[61] *See generally* Ulrich Drobnig, *European Private International Law after the Treaty of Amsterdam: Perspectives for the Next Decade*, 11 KING'S C. L.J. 190, 191-2 (2000). In practice, the Third Pillar emphasized "cross-border civil procedure, especially service of documents in another member state, revision of the Brussels and Lugano Conventions, and elaboration of a Brussels II Convention on matrimonial matters and custody of children. Private international law was also covered, but to a lesser degree, especially the elaboration of a Rome II Convention on the law applicable to extra-contractual obligations and consultations on the stands to be taken at the Hague Conference of Private International Law. . . " *Id.*

Yet, this concept is clearly broad in scope, however contestable its precise contours may be.[62] On its face, the concept of *judicial cooperation* defined in Article 65 of the EC Treaty includes, but is not limited to the traditional concept of "judicial assistance."[63] Moreover, *judicial cooperation* also includes a practically open-ended range of matters relating to conflict of laws, jurisdiction, and civil procedure.[64] The types of measures specified in Article 65 are mere examples of what might be deemed necessary to ensure "the proper functioning of the internal market."[65] Measures in the field of judicial cooperation are means of serving the larger goal of progressively establishing an area of freedom, security and justice,[66] which in turn aims at ensuring free movement of persons.[67] The effect of linking judicial cooperation to the free movement of persons is to incorporate virtually "the whole area of conflict of laws and jurisdiction" into the European Community.[68] Thus, matters of personal status and family relations are brought within Community competence,[69] as are matters of *substantive* private law.

In the four years since the Amsterdam Treaty entered into effect, the steps taken pursuant to Article 65 to institutionalize EUstitia have surpassed even the broadest reading of *judicial cooperation*. Indeed, the scope and pace of these developments have been so dramatic that even European experts have been caught by surprise.[70] This points out a paradox. Most de-

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at 192.

[62] EC Treaty, *supra* note 9, at art. 65 imposes two express limits on the European Union's ability to act in this area: the measures must have "cross-border implications," and they must be "necessary for the proper functioning of the internal market." Moreover, the objective of maintaining and developing the European Union "as an area of freedom, security and justice" is subject to the "principle of subsidiarity as defined in Article 5 of the [EC Treaty]." TEU, *supra* note 4, at art. 2.

[63] Judicial assistance refers to situations where a court (or other organ) in one country assists a court (or other organ) of another country to perform an act connected to legal proceedings that are ongoing in the latter country (e.g., serve process or take evidence). *See generally* BRUNO A. RISTAU, INTERNATIONAL JUDICIAL ASSISTANCE (2000).

[64] EC Treaty, *supra* note 9, at art. 65(b), 65(c).

[65] EC Treaty, *supra* note 9, at art. 65. The European Court of Justice has recently taken a restrictive view of what may be necessary under EC Treaty, *supra* note 9, at art. 95 (ex 100a) for the "establishment and functioning of the internal market." *Germany v. Parliament and Council (Tobacco Advertising)*, Case C-376/98, [2000] ECR I-8419.

[66] EC Treaty, *supra* note 9, at art. 61.

[67] TEU, *supra* note 4, at art. 2.

[68] Bernd von Hoffman, *supra* note 17, at 30. In his view, anything that subjects *personal status* to different national legal orders in different Member States impedes the free movement of persons. This logic can be extended to the law of succession, which may be an important factor in a person's choice of where to maintain his or her place of habitual residence. *Id. See also* Christian Kohler, *Status als Ware: Bemerkungen zur europäischen Verordnung über das internationale Verfahrensrecht für Ehesachen, in* VERGEMEINSCHAFTUNG DES EUROPÄSCHEN KOLLISIONSRECHTS 41 (Heinz-Peter Mansel, ed., 2001).

[69] Bernd von Hoffman, *supra* note 17, at 29-30.

[70] *See, e.g.*, Sjef van Erp, *European Union Case Law as a Source of European Private*

bate and controversy over "justice and home affairs" and the "area of freedom, security and justice" have focused on the more sensitive and overtly political issues associated with public law, particularly asylum, immigration, police cooperation, and judicial cooperation in criminal matters. The pace of progress in those "public" fields has been slowed somewhat by controversy, but not so in the field of civil justice, where developments have been rapid and dramatic. It appears that cooperation in those more volatile and politically salient fields has opened a route along which private law developments could follow virtually unheeded. The afterthought has taken center stage.[71]

C. Distilling the Vision: The AFSJ and the "Genuine European Area of Justice"

Once born to the light of day in the Amsterdam Treaty, the "area of freedom, security and justice" (AFSJ) rapidly took on a life of its own.[72] The Heads of State and Government of the Member States, meeting periodically in the European Councils, have played a major role in guiding the vision of the "area of freedom, security and justice." Yet, despite the Member States' exceptionally active role in this new field of European law- and policy-making,[73] the Community institutions have been quick to orient their action toward this new goal. Institutionally, the Commission's task force for justice and home affairs was expanded into a full directorate general in October 1999.[74]

The key policy statements on the "genuine European area of justice" were articulated in Vienna (1998) and Tampere (1999). In response to a

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Law: A Comparison with American Federal Common Law, 5.4 ELECTRONIC J. COMPARATIVE LAW (December 2001), *available at* http://www.ejcl.org/54/art54-1.html (last visited May 16, 2003) [hereinafter van Erp, *European Case Law*] ("The changes . . . follow one another so rapidly that it sometimes takes even specialists by surprise as to which legal areas can be 'Europeanised'—I need only refer to the recent regulations in the area of private international law."). *Id.* In conversations with European legal academics and practitioners about these developments, I have encountered reactions ranging from rage to sheer disbelief *vis-à-vis* the changes described in Part III *infra*.

[71] By this statement, I do not mean to imply that judicial cooperation in civil matters has displaced other efforts to build the AFSJ, but claim rather that efforts in the arena of civil justice have coalesced around a shared vision, and are not ancillary to some other agenda.

[72] The basic heads of the AFSJ are: a common E.U. asylum and migration policy, a genuine European area of justice, a Unionwide fight against crime, and stronger external action. Tampere Milestones, *supra* note 6, at headings A-D.

[73] As noted in Part III *infra*, a number of the measures that have been taken (or proposed) are based on legislative initiatives taken by Member States.

[74] DG-Justice and Home Affairs, *supra* note 46. The Justice and Home Affairs DG is the "newest and smallest Commission department, with approximately 180 officials out of a total of 17,000 Commission officials." *Id. See generally* Emek M. Uçarer, *Sidekick no More? The European Commission in Justice and Home Affairs* (May 2001) (unpublished manuscript, on file with author).

call issued by the Cardiff European Council in June 1998,[75] the Commission and Council prepared and submitted an Action Plan[76] to the Vienna European Council, which was approved in December 1998.[77] The Tampere European Council, held in October, 1999, during the Finnish Presidency, played the pivotal role in elaborating the "policy orientations and priorities" necessary to ensure that the AFSJ could be put into place quickly.[78] In Tampere, the European Council declared that it would "place and maintain" the goal of making the AFSJ "a reality" as quickly as possible "at the very top of the political agenda," and promised to make "full use of the possibilities offered by the Amsterdam Treaty."[79] Despite some delays that have occurred along the road mapped out in Tampere, the pace of change has been breathtaking.

The AFSJ has kept the Commission's new Directorate-General for Justice and Home Affairs very busy, in large part because of its key role in the legislative process. In addition, the new Directorate-General is responsible for maintaining a biannual "scoreboard"[80] and for keeping "under constant review progress made towards implementing the necessary measures and meeting the deadlines" that have been set.[81] The European Parliament has also been active in this new field, both by expressing its views in the form of resolutions[82] and opinions given in the context of the legislative process,

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[75] Presidency Conclusions of the Cardiff European Council (15-16 June 1998), BULLETIN E.U. 6-1998, ¶ I.14.48 [hereinafter Cardiff European Council]. The Cardiff European Council indicated its view that the European Union was facing "new opportunities to tackle an area of major public concern and thus to bring the European Union closer to the people." Vienna Action Plan, *supra* note 7, ¶ I.2.

[76] *Id.* The Vienna Action Plan laid out detailed priorities for the first five years after the entry into force of the Treaty of Amsterdam, i.e. 1999-2004. *See also* Commission Communication of July 14, 1998 "Towards an area of freedom, security and justice," COM(98)459 final.

[77] Presidency Conclusions of the Vienna European Council (Dec. 11-12, 1998), BULLETIN E.U. 12-1998, ¶ I.12.84.

[78] Tampere Milestones, *supra* note 6, ¶ I.2.

[79] *Id.*

[80] *See* Scoreboards, *supra* note 6.

[81] Tampere Milestones, *supra* note 6, ¶ I.2. The Third Scoreboard from May 2001, *supra* note 6, indicates that the Commission was getting bogged down, and falling behind the ambitious schedule set in the Vienna Action Plan. This can hardly come as a surprise, considering the sheer quantity of measures that were supposed to have been completed in 2001, as well as the reorientation of priorities after September 11, 2001. *See* Extraordinary Brussels European Council (Sept. 21, 2001), BULLETIN E.U. 9-2001 ¶¶ I.1 – I.9, I.3.9. At its meeting in Laeken, the European Council called for "new impetus and guidelines to make up for delays." Presidency Conclusions of the Laeken European Council (Dec. 14-15, 2001), BULLETIN E.U. 12-2002, ¶ IV.37. The Sixth Scoreboard, *supra* note 6, at 4, conveys the Commission's sense of urgency to complete its work by 2004, which is the deadline for implementing the Tampere Milestones.

[82] *See, e.g.*, Resolution on the Progress made in 1998 in the Implementation of Cooperation in the Fields of Justice and Home Affairs Pursuant to Title VI of the Treaty on European

and via the involvement of its committees.[83]

Close examination of the Vienna Action Plan, Tampere Milestones and Scoreboards reveals not only a blueprint for institutionalizing EUstitia (along with other aspects of the AFSJ), but also the driving vision behind the astonishing number of new measures in this field. The first systematic statement of the "general approach and philosophy inherent in the [AFSJ] concept" is articulated in the 1998 Vienna Action Plan.[84] It states that the notion of "freedom" includes not only the free movement of persons—which provides the jurisdictional bedrock for Community measures in this new arena—but also "freedom to live in a law-abiding environment . . . , complemented by the full range of fundamental human rights, including protection from any form of discrimination."[85] Conceptually, the pragmatic and aspirational *telos* that emerges from a reading of Community documents is EUstitia—a "genuine European area of justice" —in which people:

> can approach courts and authorities in any Member State as easily as in their own. . . . Judgements [sic] and decisions should be respected and enforced throughout the Union, while safeguarding the basic legal certainty of people and economic operators. Better compatibility and more convergence between the legal systems of Member States must be achieved.[86]

The civil justice component of the "genuine European area of justice" is, like the AFSJ itself, part of an overarching strategy to "bring the European Union closer to the people"[87] and to facilitate "the day-to-day life of people."[88] According to the Vienna Action Plan:

Union, 1999 O.J. (C 104/135); Resolution on Strengthening the Union's Institutions with a View to Establishing an Area of Democracy and Liberty, 1999 O.J. (C 150/359); Resolution on the Draft Action Plan of the Council and Commission on How Best to Implement the Provisions of the Treaty of Amsterdam on an Area of Freedom, Security and Justice, 1999 O.J. (C 219/61) [hereinafter EP Resolution on the Draft Action Plan].

[83] Among the most active were the former Committees on Civil Liberties and Internal Affairs, on Institutional Affairs, and on Legal Affairs and Citizens' Rights. *See* EP Resolution on the Draft Action Plan, *supra* note 82, at pmbl. The EP's Committee structure has been reconfigured. At present, the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (i.e., "LIBE" or the "Citizens' Rights" committee) has primary responsibility for AFSJ matters. *See* EP Committee on Citizens' Freedoms and Rights, Justice and Home Affairs, *available at* http://www.europarl.eu.int/committees/libe_home.htm (last visited May 16, 2003). *See also Freedom, Security and Justice: An Agenda for Europe*, *available at* http://www.europarl.eu.int/comparl/libe/elsj/default_en.htm (last visited May 16, 2003).

[84] Vienna Action Plan, *supra* note 7, ¶ I.5.

[85] *Id.* ¶ I.6. In practice, it may be difficult to disentangle "justice" from "freedom" and "equality." The Commission has suggested that a "shared sense of justice" is a "means . . . of calling to account those who threaten the freedom and security of individuals and society." Sixth Scoreboard, *supra* note 6, at 28.

[86] Tampere Milestones, *supra* note 6, ¶ I.3.5.

[87] Vienna Action Plan, *supra* note 7, ¶ I.2 (citing the Cardiff European Council).

[88] *Id.* ¶ 15.

> The ambition is to give citizens a common sense of justice throughout the Union. Justice must be seen as facilitating the day-to-day life of people and bringing to justice those who threaten the freedom and security of individuals and society. This includes both access to justice and full *judicial* cooperation among Member States. What Amsterdam provides is a conceptual and institutional framework to make sure that those values are defended throughout the Union.[89]

The Tampere Milestones defined the key components of the "genuine European area of justice" as better access to justice, mutual recognition of judicial decisions, and greater convergence in civil law.[90] The far-reaching character of these components reveal "judicial cooperation in civil matters" as a modest treaty basis[91] upon which an ambitious agenda to institutionalize civil justice in the European Union has been built.

There are clear indications that EUstitia can be expected to transcend its humble "cooperative" origins. For example, the Vienna European Council made clear at the outset that "judicial cooperation in civil matters" is merely a "stage in the creation of" the "genuine European area of justice."[92] Moreover, the Community has already extended the boundaries of the three tasks that constitute the core of the "genuine European area of justice": access to justice, mutual recognition, and convergence in civil law. For example, Article 2 of the Community's 2002 Framework Regulation articulates the following objectives:

> (1) to promote judicial cooperation, aiming in particular at:
> (a) ensuring legal certainty and improving access to justice;
> (b) promoting mutual recognition of judicial decisions and judgments;
> (c) promoting the necessary approximation of legislation; or
> (d) eliminating obstacles created by disparities in civil law and civil procedures;
> (2) to improve mutual knowledge of Member States' legal and judicial systems in civil matters;
> (3) to ensure the sound implementation and application of Community instruments in the area of judicial cooperation in civil matters; and
> (4) to improve information to the public on access to justice, judicial coopera-

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[89] Vienna Action Plan, *supra* note 7, ¶ 15 (emphasis in original). The Commission routinely reiterates these goals in its periodic Scoreboards. *See, e.g.*, Sixth Scoreboard, *supra* note 6, at 28 ("The aim is to give the general public a shared sense of justice throughout the European Union, seen as a means of facilitating the daily life of persons . . .").

[90] Tampere Milestones, *supra* note 6, at Part B (headings V-VII). *See also* Scoreboards, *supra* note 6 (tracking progress under these same three headings).

[91] EC Treaty, *supra* note 9, at art. 65.

[92] Vienna Action Plan, *supra* note 7, ¶ I.16. "Law-abiding citizens have a right to look to the Union to simplify and facilitate the JUDICIAL environment in which they live in the European Union context." *Id.* (emphasis in original).

tion and the legal systems of the Member States in civil matters.[93]

This Article of the Framework Regulation leaves no doubt that "judicial cooperation" is just the core of a larger project that reaches beyond private international law, into substantive law, and beyond government officials and legal professionals, into civic education.[94]

The measures taken, proposed or planned to institutionalize a "genuine European area of justice" clearly articulate their motivating circumstances. Still, much can be gained by considering the context in which EUstitia is being institutionalized. Even the most cursory examination reveals a melange of rhetoric and reasons. At a pragmatic level, the communitarization of private international law pursuant to Article 65 of the EC Treaty reflects dissatisfaction with the Third Pillar approach to justice and home affairs.[95] The "limitations inherent in the intergovernmental approach . . . are responsible for the fragmentary character of many measures," which deficiency affected "both their nature and their implementation."[96] Another oft-noted pragmatic concern is the perceived need "to tackle the problems affecting the life of the individual citizens . . . by facilitating the settlement of cross-border disputes . . . and access to justice."[97]

Further examination suggests three additional explanations for the Community's deep incursion into the terrain of civil justice. First, the "genuine European area of justice" is justified by appeal to the familiar but nonetheless fundamental negative integration logic, which demands removal of all barriers to free movement in the internal market. EUstitia is explicitly and inextricably linked to the goal of ensuring free movement of persons.[98] The Commission has recognized that "barriers impede the free movement of judgments between Member States,"[99] and that, in the context

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[93] Framework Regulation, *supra* note 7, at art. 2.

[94] "This Article lists the specific objectives of the framework for activities. The first objective is the cornerstone of the framework, with its direct connection to the policy of judicial cooperation in civil matters. The second objective is essential in providing the necessary basis for judicial cooperation, that is, mutual knowledge of legal systems. The third objective reflects the need to ensure the sound implementation and monitoring of Community instruments in this area . . . The fourth objective reflects a priority of the Tampere conclusions; to ensure that progress in establishing an area of freedom and security is accessible and made known to the public." Explanatory Memorandum, *supra* note 7, ¶ 3.1.

[95] *See, e.g.,* Drobnig, *supra* note 61, at 192 ("The working method and the achievements of the third pillar during the more than five years of its existence (November 1993 to April 1999) have been generally criticized."). *See also* Weyembergh, *supra* note 33.

[96] EP Resolution on the Draft Action Plan, *supra* note 82, at point E. *See also* Drobnig, *supra* note 61, at 192 ("The required unanimity and the unwieldy, rather inflexible instrument of conventions are primarily blamed for the slow progress.").

[97] EP Resolution on the Draft Action Plan, *supra* note 82, ¶ 20.

[98] Articles 61(c) and 65 are located in Part IV of the EC Treaty, which deals expressly with policies related to free movement of persons.

[99] Commission Communication to the Council and the European Parliament: Towards

of private-law relations, the existence of "widely-divergent procedural systems . . . render procedures less transparent than they might be."[100] National procedures are not only "opaque and costly to varying degrees," but they "also vary in their degree of effectiveness."[101] These deficiencies are problematic in "an integrated area," where:

> all ought to have easy access to the rules of the game, and ought to know, before deciding to embark on proceedings, what their rights and duties are, what formalities are to be complied with, what the effect of the resultant documents will be, what effect the judgment will have and what redress procedures are available, not to mention the rules governing enforcement of judgments.[102]

Overall, negative integration logic supports each of the three components of the genuine European area of justice: better access to justice, mutual recognition of judgments, and greater convergence in civil law.[103]

Second, there is more to EUstitia than the goal of eliminating barriers to free movement within the internal market. Of equal, if not overriding importance, is the European Union's growing preoccupation with *positive* integration goals, such as the need to ensure certainty[104] and efficiency[105] in the European Union.[106] Even more fundamental than those are the perceived needs to promote equality and to prevent discrimination.[107] For example, the Commission considers it unacceptable that the "heterogeneity of national procedural systems" places litigants in the European Union on an unequal footing, and deprives them of "access to instruments of equal performance levels," since "*equality* of citizens and business partners in an integrated area *presupposes equal access to the weapons of the law*."[108] More

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Greater Efficiency in Obtaining and Enforcing Judgments in the European Union, 1998 O.J. (C 33/3), ¶ 5 [hereinafter Commission Communication on Judgments].

[100] *Id.* ¶ 6.

[101] *Id.*

[102] *Id.*

[103] Tampere Milestones, *supra* note 6, ¶¶ V-VII.

[104] Explanatory Memorandum, *supra* note 7, ¶ 1.2 ("important . . . that legal certainty is provided to individuals and business").

[105] *See* Commission Communication on Judgments, *supra* note 99, ¶ 13 (noting the "extreme importance" of measures "to eliminate obstacles to the smooth working of civil rulings . . . for European integration and for the efficiency of the internal market in particular").

[106] These goals are closely linked to the logic of negative integration, but are increasingly characterized as ends in themselves, rather than just as instrumental means to an end.

[107] The EC Treaty prohibits discrimination on ground of nationality. EC Treaty, *supra* note 9, at art. 12. Moreover, it empowers the Council to "take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." EC Treaty, *supra* note 9, at art. 13.

[108] Commission Communication on Judgments, *supra* note 99, ¶ 30 (emphasis added). *See also id.* ¶ 12 (noting the "principle of equality of armaments"). The disparity tends to "weight the scales in favour of litigants who have access to a very efficient recovery procedure and against those at the other extreme who have no such option and have to rely on the

generally, the Tampere European Council concluded that "individuals and businesses should not be prevented or discouraged from *exercising their rights* by the incompatibility or complexity of the legal and administrative systems in the Member States."[109] The goal of ensuring to "each European citizen security for themselves and their property and the respect of individual freedoms and fundamental rights"[110] is a crucial component of the evolving notion of European citizenship. The European Parliament, for example, believes that the area of freedom, security, and justice "is urgently demanded by European public opinion . . . that its consolidation is intimately linked to the development of real—and not merely theoretical—European citizenship."[111] Taken together, these diverse "positive" justifications reveal that EUstitia is expected to play a central role in the move to construct an "ever closer union," thereby to transcend the European Union's humble origins as a mere market.[112]

Third, the institutionalization of civil justice is inextricably linked to the European Union's engagement with the fate of post-communist countries in Central and Eastern Europe, many of which have applied—and some of which in April 2003 signed accession treaties—to join the European Union.[113] The perceived need to ensure "the development and sound operation of the Community's frontier-free area" after the fall of the Berlin Wall in 1989 generated new concerns about "[s]ecurity as to the law and trust in judicial institutions."[114] These concerns have been especially salient in connection with the public law side of the area of freedom, security, and justice. Yet, the private side has also come to play a key role in the enlargement process, since candidate countries are required not only to adopt, but also to implement the *acquis communitaire* as a pre-condition to acces-

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'normal' procedures—which are generally synonymous with much higher costs and lengthy delays." *Id.* ¶ 38 (noting the availability of special procedures to handle small claims).

[109] Tampere Milestones, *supra* note 6, ¶ I.8.28 (emphasis added).

[110] French Ministry of Justice, *Declaration of Avignon (Oct. 16-17, 1998), The European Judicial Area: A New Challenge for Tomorrow's Europe*, *at* http://www.justice.gouv.fr/anglais/adefieuro.htm (last visited Oct. 16, 2000).

[111] EP Resolution on the Draft Action Plan, *supra* note 82, at point K.

[112] EC Treaty, *supra* note 9, at pmbl.

[113] The following Central and East European countries signed the Treaty of Accession in Athens on April 16, 2003: the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, and Slovenia. Treaty of Accession, *at* http://europa.eu.int/comm/enlargement/negotiations/treaty_of_accession_2003/table_of_content_en.htm (last visited May 16, 2003). These eight countries, along with Malta and all—or at least part—of Cyprus, will become members of the European Union on May 1, 2004, provided that all necessary ratifications take place "in due time" for the treaties to enter into force on that date. Presidency Conclusions of the Copenhagen European Council (Dec. 2002), BULLETIN E.U. 12-2002, ¶¶I.1 – I.9, ¶I.3.9. *See generally* Jörg Monar, *Enlargement-Related Diversity in E.U. Justice and Home Affairs: Challenges, Dimensions and Management Instruments*, WRR (Dutch Scientific Council for Government Policy) Working Document W 112 (Dec. 2000).

[114] Commission Communication on Judgments, *supra* note 99, ¶11.

accession.[115] Thus, the collapse of Communism and the ensuing challenge of post-communist transformation in Central and Eastern Europe spurred the European Union to elaborate and refine its own rule of law.[116] Impelled by these multiple objectives, the European Union has set out to reconfigure the arena within which the bulk of Community and national claims are contested at the level of European citizens.

III. INSTITUTIONALIZING THE "GENUINE EUROPEAN AREA OF JUSTICE"

Now that civil justice—including private international law—is no longer a domain reserved exclusively to E.U. Member States,[117] the tools of Community law are available to address such matters. Issues that for generations have been the province of Member State diplomats and their legal experts have suddenly dropped into the laps of E.U. bureaucrats.[118] Despite the formal limitations imposed upon the Community's ability to act in the field of civil justice, a wide array of measures have been taken, proposed, or planned since the Amsterdam Treaty entered into effect in May 1999.[119] Such measures aimed at institutionalizing the "genuine European area of justice" represent a significant incursion into the legal terrain of the European Union's Member States. The arrangement of this Part III departs in two respects from the Community's own scheme, which is organized around three overlapping categories: 1) mutual recognition of judicial deci-

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[115] The Explanatory Memorandum, *supra* note 7, ¶ 13, states that "participation in this framework for activities of the candidate countries for accession to the European Union will provide a useful preparation for accession, in particular as regards these countries' ability to apply the Community *acquis*." For an overview of the efforts by candidate countries to adopt international (and particularly Community) private international and civil procedure law, *see* Helmut Heiss & Anna Supron-Heidel, *E.U.-Enlargement: Aspects of (International) Procedural Law*, 4 EUR. J. L. REFORM 147 (2002).

[116] Respect for the "principles set out in Article 6(1)" is a precondition to membership of the Union. TEU, *supra* note 4, at art. 49. These principles are "liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law." *Id.* at art. 6(1).

[117] Denmark, Great Britain, and Ireland have opted out by means of protocols to the Amsterdam Treaty. However, Ireland and Great Britain can—and occasionally do—opt in and participate in particular measures on a case-by-case basis.

[118] Further research is needed to ascertain the precise reconfiguration of expertise and authority in regard to these matters. Anecdotal reports from France, Germany and the Netherlands indicate a measure of displacement—and attendant dissatisfaction—among traditional elites (including some long-standing Member State expert bodies). It bears repeating that Member States and their representatives do play an important role in connection with these activities, not least because the Member States formally share the right of initiative with the Commission until 2004.

[119] A good many of these measures have been "on the drawing board" for some time. My point is not that these developments have their origins in the Amsterdam Treaty, but rather that the communitarization of private international law was the necessary precondition to the European Union's recent success in regard to EUstitia measures.

sions, 2) better access to justice, and 3) greater convergence in civil law.[120] First, this Part subdivides the category of "mutual recognition of judicial decisions" into measures pertaining to civil and commercial matters, on the one hand, and measures pertaining to family law, on the other. Second, this Part adds a new category that covers measures aimed at judges and legal professionals.

A. Recognition and Enforcement of Judicial Decisions and Judgments in Civil and Commercial Matters

The Tampere Milestones identify "mutual recognition" as one of the three key components of the AFSJ.[121] According to the Commission, a "prompt and efficient system for enforcing court judgments is vital for justice to be accessible."[122] Indeed, the Commission views mutual recognition of judgments in civil and commercial matters as the "key to judicial security."[123] The 1968 Brussels I Convention[124] has long constituted the core of the European Union's system for recognition and enforcement of judgments for civil and commercial matters. This treaty was in the process of being reviewed and amended when the Amsterdam Treaty entered into effect in 1999.[125] After an abortive attempt to adopt the revised Brussels I Convention by an act of the Council,[126] the Commission proposed that it be reformatted into a Community law regulation.[127] The Brussels I Regulation[128]

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[120] These correspond to the headings established in the Tampere Milestones, *supra* note 6, and used in the Commission Scoreboards, *supra* note 6, to track progress in this field.

[121] Tampere Milestones, *supra* note 6, Part B(VI), ¶¶ I.10.33 – I.10.37. For an overview of civil and common law approaches to enforcement of judgments, *see* KENNETT, JUDGMENTS, *supra* note 12, at 61-98.

[122] Commission Communication on Judgments, *supra* note 99, ¶ 42.

[123] DG-Justice & Home Affairs, *Mutual Recognition of Judgments in Civil and Commercial Matters: The Key to Judicial Security throughout the E.U.*, *at* http://europa.eu.int/comm/justice_home/doc_centre/civil/recognition/doc_civil_recognition_en.htm (last visited May 5, 2003).

[124] The Brussels I Convention, *supra* note 44, was adopted pursuant to EC Treaty, *supra* note 9, at art. 293 (ex 220). It was a "particularly complete Convention: it establishes rules governing the international jurisdiction of the courts of the Member States, which enables judgments given to be recognized downstream, together with strict rules for cases of non-recognition, and it provides for an enforcement procedure that is not only uniform but also unilateral, at least at the initial stages." Commission Communication on Judgments, *supra* note 99, ¶ 1.

[125] For an extensive analysis of the problems under the Brussels I Convention, see Commission Communication on Judgments, *supra* note 99.

[126] Proposal for a Council act establishing the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters in the Member States of the European Union, 1998 O.J. (C 033/20).

[127] Commission Proposal for a Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 1999 O.J. (C 376/1), BULLETIN E.U. 7/8-1999, ¶ 1.5.2. Following the opinions of the Economic and Social Committee, 2000 O.J. (C 117/6), and the European Parliament, BULLETIN E.U. 9-2000, ¶ 1.4.13,

was adopted in December 2001, and entered into effect on March 1, 2002. With the exception of Denmark,[129] this Regulation now provides the Member States' main "domestic" framework for recognizing and enforcing judgments in civil and commercial matters.[130]

The European Union's current system—which consists of the Brussels I and Lugano Conventions, together with the Brussels I Regulation—is hobbled by numerous limitations.[131] The first major weakness is that many areas of private law are excluded from the scope of these general rules on civil and commercial matters. For example, the Brussels I Regulation expressly excludes from its scope the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession, bankruptcy and related proceedings, social security, and arbitration.[132] The European Union has moved slowly but surely in the direction of adopting separate common rules providing for recognition and enforcement of judicial decisions or judgments in such matters. For example, very soon after the Amsterdam Treaty entered into effect, the Council adopted

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the Commission adopted an amended proposal. *See* Amended Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (C 62/243).

[128] Council Regulation 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments on Civil and Commercial Matters, 2001 O.J. (L 12/1) [hereinafter Brussels I Regulation]. The United Kingdom and Ireland have elected to adopt and apply the Brussels I Regulation. *Id.* at art. 20. *See* Commission Regulation 1496/2002 of 21 August 2002 amending Annex I to Council Regulation 44/2001, 2002 O.J. (L 225/13).

[129] Article 1(3) of the Brussels I Regulation, *supra* note 128, defines the term "Member State" to mean "Member States with the exception of Denmark." Denmark did not participate in the adoption of the Brussels I Regulation. *Id.* at pmbl.; art. 21. Accordingly, the Brussels I Convention, *supra* note 44, remains in force between Denmark and the other Member States. Brussels Regulation, *supra* at art. 22.

[130] The Lugano Convention, *supra* note 44, provides the legal framework for relations among E.U. Member States, on one side, and countries belonging to the European Free Trade Area (EFTA), currently Iceland, Norway, and Switzerland, on the other. Article 62(1)(b) of the Lugano Convention allows for the possibility that third countries belonging neither to the European Union nor to EFTA may be invited to join. Poland is the only country that had become a party to the Lugano Convention as of September 2003, though Hungary, the Czech Republic, and Estonia have commenced accession negotiations. Heiss & Supron-Heidel, *supra* note 115, at 152-153. *See also* Dieter Martiny & Ulrich Ernst, *Der Beitritt Polens zum Luganer Übereinkommen*, 2001 IPRAX (PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS) 29 (Jan-Feb. 2001); Lajos Vékás, *Hungary and the Lugano Convention*, 4 EUR. J. L. REFORM 135 (2002).

[131] *See generally*, Draft Programme of Measures for Implementation of the Principle of Mutual Recognition of Decisions in Civil and Commercial Matters, 2001 O.J. (C 12/1) [hereinafter Mutual Recognition Program]. The Mutual Recognition Program was approved at the 2314th Council Meeting (30 November-1 December 2000), 13865/00 (Presse 457). No final version was published, and subsequent Commission documents cite to this draft as authoritative. *See* Fifth and Sixth Scoreboards, *supra* note 6, ¶ 3.2.

[132] Brussels I Regulation, *supra* note 128, at art. 2. Revenue, customs, and administrative matters are likewise excluded from its scope according to Article 1.

the Insolvency Regulation,[133] which lays out measures for coordinating liquidation proceedings where the insolvent debtor's assets are located in different Member States.[134] Measures have also been taken or proposed in the area of family law and related property relations.[135] Still, the Commission insists that existing Community instruments are not sufficiently comprehensive.[136] The second weakness of the European Union's current system is that the existing instruments do not liberalize movement of judgments enough, since they "retain certain barriers to the free movement of judicial decisions," such as the registration (exequatur) requirement.[137] Thus, the European Union remains dissatisfied with the existing system for recognizing and enforcing judgments in civil and commercial matters, despite the relative success of the 1968 Brussels I Convention, its modernization via the Brussels I Regulation, and the recent enactment of regulations covering the two special issues noted above. This dissatisfaction, in turn, has led to proposals for more penetrating reform.

As early as January 1998, the Commission observed that "the freedom of movement of judgments, which ought to be the corollary of the other

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[133] Council Regulation 1346/2000 of 29 May 2000 on Insolvency Proceedings, 2000 O.J. (L 160/1) [hereinafter Insolvency Regulation]. The Insolvency Regulation applies to collective proceedings that involve appointment of a liquidator and either partial or total divestment of the debtor. Insurance undertakings, credit institutions, and some other investment companies are excluded from the Insolvency Regulation's scope. *See generally* Horst Eidenmüller, *Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches internationales Insolvenzrecht*, 1 IPRAX (PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS) 2 (Jan./Feb. 2001).

[134] Efforts to find a Community solution to problems arising in the context of insolvency proceedings began as early as 1963. The 2000 Insolvency Regulation, *supra* note 133, corresponds substantially to the text of a convention that was concluded in 1995 under the Third Pillar, but never entered into effect. *See* DG-Justice and Home Affairs, *Improving Cross-border Insolvency Proceedings*, *at* http://europa.eu.int/comm/justice_home/fsj/civil/ insolvency/fsj_civil_insolvency_en.htm (last visited May 5, 2003).

[135] Developments pertaining to these issues are discussed at length, *infra* in Part III.B.

[136] *See* Mutual Recognition Program, *supra* note 131, at pmbl.; 2 (excluded are "family situations arising through relationships other than marriage, rights in property arising out of a matrimonial relationship, and succession"). The "existing instruments" to which the Commission refers in the Mutual Recognition Program include not only the Brussels I Regulation, described *supra* in text accompanying notes 128-129, but also the Brussels II Regulation (described *infra* in text accompanying note 180) and the Insolvency Regulation (described *supra* in text accompanying notes 133-134).

[137] Mutual Recognition Program, *supra* note 131, at pmbl.; 2 ("The intermediate procedures enabling a ruling handed down in one Member State to be enforced in another are still too restrictive."). Elsewhere the Commission refers to the requirement that a judgment rendered in one Member State have a "passport" in order to be enforced in another Member State. Commission Communication on Judgments, *supra* note 99, ¶ 9 ("[A]ny writ, be it judicial or not, needs a passport . . . in the form of an endorsement for execution or the equivalent."). *Id. See generally* KENNETT, JUDGMENTS, *supra* note 12, at 213-241; Katja Stoppenbrink, *Systemwechsel im internationalen Anerkennungsrecht: Von der EUGVVO zur geplanten Abschaffung des Exequaturs*, 10 EUR. REV. PRIVATE L. 641 (2002).

freedoms of movement, has no practical reality in positive law."[138] The Cardiff European Council (June 1998) responded by asking the Council to identify the scope for greater *mutual recognition* of decisions emanating from the courts of the Member States.[139] The Tampere European Council (October 1999) declared that the "principle of mutual recognition . . . should become the cornerstone of judicial co-operation in both civil and criminal matters within the Union,"[140] in order to "provide legal *certainty* to individuals and to economic actors"[141] and to "facilitate cooperation between authorities and the judicial protection of individual rights."[142] The mutual recognition principle provides that any measure "taken by a judge in exercising his or her official powers in one Member State . . . would automatically be accepted in all other Member States, and have the same or at least similar effects there."[143] For all of these reasons, the European Union is exploring the possibility and desirability of extending the mutual recognition concept from the Single Market to criminal,[144] as well as to "civil and commercial" matters.[145]

The Commission called early on for a European "enforcement order" that would "purely and simply" abolish the registration (exequatur) procedure, but acknowledged that such a "radical solution" would have to wait until "definitions, statuses and procedures" had been approximated.[146] As a first step towards creating a genuine "frontier-free law-enforcement area,"[147] the Tampere European Council called upon the Commission to:

> make a proposal for further reduction of the intermediate measures which are... required to enable the recognition and enforcement of a decision or judgement

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[138] Commission Communication on Judgments, *supra* note 99, ¶ 9. This statement hints at problems experienced under the Brussels I Convention, *supra* note 44 (noting that the existing system is slow, cumbersome, and often uncertain).

[139] Cardiff European Council, *supra* note 75, ¶ 39 (emphasis added).

[140] Tampere Milestones, *supra* note 6, ¶ I.10.33. This principle should be applied "both to judgements and to other decisions of judicial authorities." *Id.* "To that end, judgments and decisions should be respected and enforced throughout the Union." Third Scoreboard, *supra* note 6, ¶ 3.2.

[141] Sixth Scoreboard, *supra* note 6, ¶ 3.2 (emphasis added).

[142] *Id.* Enhanced mutual recognition of judicial decisions and judgments, together with the "necessary approximation of legislation . . . *will make it possible to respond to the call made at the [2001] Laeken European Council for 'efforts to surmount the problems arising from differences between legal systems.'*" *Id.* (emphasis in original).

[143] Communication from the Commission to the Council and the European Parliament "Mutual Recognition of Final Decisions in Criminal Matters," COM(00)495 final at 2 [hereinafter Commission Communication on Mutual Recognition in Criminal Matters].

[144] *Id.* Since criminal law matters are beyond the scope of this article, this proposal will not be analyzed.

[145] *See* Mutual Recognition Program, *supra* note 131.

[146] Commission Communication on Judgments, *supra* note 99, ¶¶ 16-17.

[147] *Id.* at ¶ 16.

> in the requested State. As a first step these intermediate procedures should be abolished for titles in respect of small consumer or commercial claims and for certain judgements [sic] in the field of family litigation (e.g. on maintenance claims and visiting rights). Such decisions would be automatically recognised throughout the Union without any intermediate proceedings or grounds for refusal of enforcement. This could be accompanied by the setting of minimum standards on specific aspects of procedural law.[148]

The Commission responded by issuing a Mutual Recognition Program, which proposes an ambitious framework for implementing the principle of mutual recognition in four designated substantive areas.[149] It also takes into account various *ancillary measures* "of procedural law on which common minimum standards are considered necessary in order to facilitate the application of the principle of mutual recognition."[150] The Program elaborates an exceedingly complex, multi-stage approach to achieving various 'degrees' of mutual recognition in the four specified legal areas.[151]

The Mutual Recognition Program identifies three types of *procedural* measures that will be considered in each of the four designated areas: minimum standards for certain aspects of civil procedure, measures that would make enforcement of judgments more efficient, and other measures that might improve judicial cooperation in general.[152] Moreover, it takes a broad view of the types of measure that might be deemed ancillary to mutual recognition, and thus also potentially needed in each of the four substantive areas. In particular, the Program names the following eight types of ancillary measures: measures for taking evidence,[153] establishment of a European Judicial Network,[154] minimum standards of civil procedure, harmonization of rules on (or minimum standards for) the service of judicial documents,[155] measures to facilitate the enforcement of judgments (including those allowing identification of a debtor's assets),[156] measures for easier

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[148] Tampere Milestones, *supra* note 6, ¶ I.10.34.

[149] Mutual Recognition Program, *supra* note 131. The four areas are sketched out *infra* in the text accompanying notes 161-162.

[150] Tampere Milestones, *supra* note 6, ¶ I.10.37.

[151] Having learned its lesson pursuant to the Vienna Action Plan, the Mutual Recognition Program, *supra* note 131, at part III, stipulates that "[p]rogress should be made in stages, without any precise deadlines . . . ," and thus that a "stage is begun when the previous one has ended." For a matrix showing the stages, areas, and specific measures envisioned, *see* Mutual Recognition Program, *supra* at 9.

[152] Mutual Recognition Program, *supra* note 131, ¶¶ II.B.1, II.B.2 & II.B.3.

[153] *See* text accompanying notes 249-251 *infra*.

[154] *See* text accompanying notes 279-281 *infra*.

[155] *See* text accompanying notes 247-248 *infra*.

[156] *See* Parts III(A) and (B) *infra*. The Commission Communication on Judgments, *supra* note 99, at 4, calls for reflection on the establishment "in each Member State of a rapid procedure for the payment of money debts but also of high-performance instruments for effective enforcement of judgments (concentrating initially on seizures of bank accounts). The

access to justice,[157] measures for easier provision of information to the public,[158] and measures relating to harmonization of conflict of law rules.[159] By including all these ancillary measures in the framework established by the Mutual Recognition Program, the Community demonstrates its commitment to achieving a comprehensive integrated solution to the problems of legal diversity among E.U. Member States.

Regarding the need for minimum procedural standards in the four designated substantive legal areas, the Mutual Recognition Program provides that:

> It will sometimes be necessary, or even essential, to lay down a number of procedural rules at European level, which will constitute common minimum guarantees intended to strengthen mutual trust between the Member States' legal systems. These guarantees will make it possible, *inter alia*, to ensure that the requirements for a fair trial are strictly observed, in keeping with the European Convention for the Protection of Human Rights and Fundamental Freedoms.[160]

This passage reveals that the Commission and Council perceive a mandate for importing (if not actually incorporating) fundamental notions of "fair trial" or due process into Community law. The Mutual Recognition Program thus illustrates one way in which the "mere" procedural reforms underway can implicate more fundamental notions of justice.

Another indication that the Mutual Recognition Program portends far-reaching reform is the wide range of legal issues affected. The Program maps a reform agenda in four *substantive* areas of action. Two of these areas are discussed here in Part III(A),[161] while the other two are discussed below in Part III(B), which focuses on matters pertaining to family law.[162] With regard to the area of *civil and commercial matters covered by the Brussels I Regulation*, the Program calls for taking, in stages, a number of measures designed to "make the existing machinery work better by reducing or abolishing obstacles to the free movement of judicial decisions."[163]

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effectiveness of enforcement depends heavily on knowledge of the debtor's assets; consequently, thought also needs to be given to the various means of improving, transparency in this respect and to the development of cooperation between enforcement authorities."

[157] *See* Part III(C) *infra*.

[158] *See* text accompanying notes 229-233 *infra*.

[159] *See* text accompanying notes 255-262 *infra*.

[160] Mutual Recognition Program, *supra* note 131, ¶ II.B.1.

[161] The Mutual Recognition Program, *supra* note 131, covers matters of commercial and civil law that fall within the scope of the Brussels I Regulation, ¶ III.A, as well as matters of wills and succession, ¶ III.D.

[162] The Mutual Recognition Program, *supra* note 131, covers family situations based on marriage or relationships other than marriage, ¶ III.B, as well as property matters related to such family situations, ¶ III.C.

[163] *Id.* ¶ I.B.

Regarding the area of *wills and succession*, on the other hand, the Mutual Recognition Program proposes a more modest set of goals aimed at streamlining enforcement.[164] The Commission has taken major strides toward the goals established for the former area, although no final measures had been adopted as of September 2003. The area of wills and succession, however, has been placed on the Commission's back burner.[165]

In the area of *civil and commercial matters*, the Program's "First Stage" objectives involve streamlining enforcement procedures for maintenance and uncontested claims, and devising methods to simplify and expedite litigation involving small claims.[166] The Commission initially set out to address separately the issues of uncontested and small claims litigation,[167] but subsequently combined these overlapping projects in its December 2002 Payment Order and Small Claims Green Paper.[168]

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[164] The First Stage involves drafting one or more instruments to adapt the Brussels II machinery to the particular field, while the Second and Third Stages would follow the same pattern as established for measures taken within the scope of the Brussels I and II Regulations. In particular, the Second Stage would continue to streamline enforcement procedures, and also introduce measures to "strengthen the effects in the requested State of judgments made in the State of origin," such as matters providing for provisional enforcement and protective measures. Mutual Recognition Program, *supra* note 131, ¶ I.B. The Third Stage would involve abolition of exequatur in all areas covered by the instrument(s) drawn up. *Id.*

[165] The Fifth and Sixth Scoreboards, *supra* note 6 ¶ 3.2, report detailed activity in regard to the other three areas covered by the Mutual Recognition Program, but little pertaining directly to wills and succession. The work in this area appears to be at a very preliminary stage. The Commission reportedly launched "preparatory studies" in 2001, and organized a joint conference on succession with the Council of Europe in October 2002. *Id.*

[166] Mutual Recognition Program, *supra* note 131, ¶ I.B. The Sixth Scoreboard, *supra* note 6 ¶ 3.1.4, reports that the Commission launched a preparatory study on special issues pertaining to alimony (maintenance) claims in the spring of 2002, and announces the Commission's intention to present a legislative proposal in 2003 to establish a European injunction-to-pay procedure. As of September 2003, however, no documentation pertaining to such matters was publicly available.

The Second Stage of the Program would continue to streamline enforcement procedures and introduce measures to "strengthen the effects in the requested State of judgments made in the State of origin," such as providing for provisional enforcement and protective measures (including the attachment of bank accounts). Mutual Recognition Program, *supra* ¶ III.A. In connection with seizure of bank accounts, *see also* Commission Communication on Judgments, *supra* note 99 ¶ 2 (emphasizing need for knowledge about debtor's assets, hence transparency and cooperation between enforcement authorities). Both the Brussels and the Insolvency Regulations already provide for "streamlined exequatur" procedures. Mutual Recognition Program, *supra* at Part II. The Third Stage would involve abolishing exequatur in all areas covered by the Brussels Regulation. *Id.*

[167] See Mutual Recognition Program, *supra* note 131, ¶¶ I.B.3 & I.B.4. The Tampere European Council emphasized the need to facilitate enforcement "in respect of small consumer or commercial claims and for certain judgments in the field of family litigation." Tampere Milestones, *supra* note 6, ¶ I.10.34.

[168] Commission Green Paper on a European Order for Payment Procedure and on Measures to Simplify and Speed Up Small Claims Litigation, COM(02)746 final [hereinafter Payment Order & Small Claims Green Paper]. The overlap consists in the fact that small

The Commission has taken significant strides toward creating the "order for payment" procedure, for which it has devised a two-tier strategy. The *first step* involves abolishing exequatur "for all enforceable titles on uncontested claims regardless of the nature of the proceedings that have led to it."[169] A concrete proposal to this effect was made in April 2002,[170] and came under discussion in 2003, but had not yet been adopted as of September 2003. The *second step* would involve creating "a specific harmonized procedure for the recovery of debts that are presumed to remain uncontested, namely the European order for payment."[171]

The 2002 Green Paper presents the Commission's views, along with an exhaustive list of questions to which interested parties are invited to respond.[172] Moreover, in regard to the urgent need to simplify and speed up small claims litigation, the Green Paper starts the ball rolling by surveying existing law in the European Community and its Member States, and by presenting the Commission's views and inviting responses to numerous questions.[173]

The two-tier approach to the matter of uncontested claims illustrates both the dilemmas and the opportunities facing the Community as it searches for solutions to the problems that have accompanied increasing movement of persons. On the one hand, the Community seeks quick and non-intrusive solutions, while on the other, it seeks the most effective and appropriate solutions. The Commission has explained that:

> The [program] of measures for implementation of the principle of mutual recognition of decisions in civil and commercial matters . . . is, true to its name, primarily focused on facilitating the recognition and enforcement of judgments that were delivered in another Member State and not on the approximation or

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claims may be, but are not necessarily uncontested.

[169] *Id.*, *supra* note 168, ¶ 2.8.

[170] Proposal for a Council Regulation Creating a European Enforcement Order for Uncontested Claims, 2002 O.J. (C 203/86). *See also* Opinion of the European Economic and Social Committee on the Proposal, 2003 O.J. (C 85/1); European Parliament Legislative Resolution on the Proposal for a European Parliament and Council Regulation Creating a European Enforcement Order for Uncontested Claims, A5-0108/2003. The legislative procedure applicable to this proposal has changed from "consultation" to "codecision" since the Nice Treaty entered into force. *See* Communication from the Commission to the European Parliament on Effects of the Entry into Force of the Nice Treaty on Current Legislative Procedures, COM(03)61 final, ¶ 1. The Council held an "orientation debate" on at its meeting in June 2003. 2514th Council Meeting (June 5-6, 2003), 9845/03 (Presse 150), at 26.

[171] Payment Order & Small Claims Green Paper, *supra* note 168, ¶ 2.8. "This approach allows swift progress in dispensing with exequatur for all situations that are characterized by the verifiable absence of any dispute over nature and extent of a debt (not only orders for payment) while carefully preparing the establishment of a harmonized order for payment procedure." *Id.*

[172] *Id.* at 5.

[173] *Id.* §§ 4 - 6.

> harmonization of procedural law. Nevertheless, the program recognizes that in some areas the abolition of intermediate measures that are still necessary to enable recognition and enforcement might coincide with the creation of a specific procedure laid down within the Community, either a uniform procedure laid down in a regulation or a harmonized procedure set up by each Member State pursuant to a directive.[174]

This methodological dilemma pervades the European Union's civil justice project, and is exacerbated by the press of time. The year 2004 looms large on the horizon, and not just because it is the deadline set by the Tampere Milestones. It is also the scheduled date for massive enlargement of the Union, as well as for negotiations on an E.U. constitution. The mandate for and pace of change in the field of civil justice are dizzying, and the European Union appears at times to meet itself coming and going. Indicative of this trend is the fact that discussions aimed at relegating a significant portion of the new Brussels I Regulation to the dustbin were already underway by the time that (long-awaited) new measure entered into effect. The momentum is so great that the Community has repeatedly overtaken itself on the road towards EUstitia.

Overall, however, the Community is still far from fully implementing the principle of mutual recognition in connection with judgments. Confident proposals and reports notwithstanding, the fact remains that discussions on mutual recognition are still at an early stage, and can be expected to encounter significant obstacles. Judicial decisions and judgments continue to be a repository of "imperium, the power of governance, . . . a privileged expression of national sovereignty."[175] Abolishing the intermediate step of registration (exequatur) entails relinquishing the traditional *ordre public* (public policy) exception to recognition and enforcement of a judgment rendered by the courts of another sovereign. If this step is already controversial enough among existing Member States, it can only become more difficult once new members from Central and Eastern Europe and the Mediterranean are added to the mix.[176] Moreover, national practices and procedures in this field of law are deeply embedded and very different,[177] even after decades of experience with the Brussels I Convention. Until such time as consensus can be reached on these sensitive questions, scholars are rightly dubious about the wisdom and viability of substituting the principle of mutual recognition for choice of law analysis.[178]

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[174] *Id.* at 6, ¶ 1.

[175] Commission Communication on Judgments, *supra* note 99, ¶ 17.

[176] Stoppenbrink, *supra* note 137, at 641, 664-666 (noting that abolition of exequatur presupposes trust in the civil law and justice system of the country that rendered the judgment).

[177] Commission Communication on Judgments, *supra* note 99, at Part II.

[178] *See, e.g.*, Erik Jayme & Christian Kohler, *Europäisches Kollisionsrecht 2001: Anerkennungsprinzip statt IPR?*, 21 IPRAX (PRAXIS DES INTERNATIONALEN PRIVAT- UND

B. Recognition and Enforcement of Judicial Decisions and Judgments in Regard to Families and Family Situations Arising Through Relationships Other Than Marriage

Even before the Treaty of Amsterdam communitarized private international law, Member States had made some effort under the Third Pillar to agree on principles pertaining to family law. The so-called "Brussels II" Convention[179] on judgments in matrimonial matters and in matters of parental responsibility for joint children was concluded in 1998, but never entered into effect. Instead—as with the 1968 Brussels I Convention—the Commission reformatted the Brussels II Convention into a Community law regulation soon after the Amsterdam Treaty entered into effect in May 1999.[180] The new Brussels II Regulation entered into effect on March 1, 2001 binds all Member States except Denmark. Yet, this Community measure by no means occupies the entire field of EC family law.

Various other family law measures have been proposed or are planned. In July 2000, for example, the French government proposed a regulation on the mutual enforcement of judgments on rights of access to children, which aimed at tackling child abduction.[181] The Mutual Recognition Program, which contemplates extending the Brussels II Regulation to family situations arising through relationships other than marriage, provides another example.[182] The fate of these proposals further illustrates the methodological dilemma that was noted above in Part III(A).

The Commission has worked up a variety of initiatives pertaining to children. Early in 2001, it presented a working paper relating to "matters of

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VERFAHRENSRECHT) 501, 502 (Nov./Dec. 2001) (arguing that the principle of mutual recognition is confused and imprecise, and that applying it without clarifying its relationship to underlying questions about applicable law will result in uncertainty).

[179] *See* Explanatory Report on the Convention of 28 May 1998 drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters, 1998 O.J. (C 221/27).

[180] Brussels II Regulation, *supra* note 48. This Regulation provides rules on jurisdiction, recognition and enforcement of judgments in civil proceedings relating to divorce, legal separation or marriage annulment. It applies as well to judgments relating to parental responsibility for the children of both spouses when the judgment is rendered on the occasion of the matrimonial proceedings.

[181] Initiative of the French Republic with a view to adopting a Council Regulation on the mutual enforcement of judgments on rights of access to children, 2000 O.J. (C 234/7). *See also* Opinion of the Economic and Social Committee, 2001 O.J. (C 14/17).

[182] Mutual Recognition Program, *supra* note 131, ¶ III.B. "Here it is a matter of supplementing the area covered by the Brussels II Regulation to take account of sociological reality . . ." *Id.* ¶ I.A.2(a). The Second Stage would continue to streamline enforcement procedures, and also introduce measures to "strengthen the effects in the requested State of judgments made in the State of origin," such as matters providing for provisional enforcement and protective measures. *Id.* ¶ III.B. The Third Stage would involve abolition of exequatur in all areas covered by the Brussels II Regulation or pertaining to family situations arising through relationships other than marriage. *Id.*

parental responsibility."[183] Later that year, the Commission proposed a regulation on jurisdiction and the recognition and enforcement of judgments in such matters.[184] In 2002, the Commission moved to consolidate its efforts in the sphere of family law, as it did in connection with its efforts (discussed *supra* in Part III(A)) to implement the principle of mutual recognition for civil and commercial matters. Thus, in May 2002, it issued a new proposal combining a number of prior measures and proposals in the field of family law. This proposal aims to complete the legal framework for mutual recognition in regard to divorce and parental responsibility throughout the European Union.[185] In a nutshell, the Commission's May 2002 proposal would abolish the free-standing Brussels II Regulation, and incorporate its provisions into a single legal framework, along with pertinent provisions of the July 2000 French initiative and the August 2001 Commission proposal. The European Parliament proposed amendments to the Commission's draft in November 2002.[186] The Council reached agreement in principle in June 2003, but as of September 2003, no new regulation had been adopted.[187]

Yet, even those developments do not occupy the entire field of EC family law. The Mutual Recognition Program breaks further new ground by designating *property rights* arising out of a matrimonial relationship, together with the *property consequences* of the separation of an unmarried couple, as areas in which the principle of mutual recognition should also be

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[183] Commission Working Document on Mutual Recognition of Decisions on Parental Responsibility, COM(01)166 final.

[184] Proposal for a Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Matters of Parental Responsibility, 2001 O.J. (C 332/269). This regulation would extend the principle of mutual recognition to all decisions on parental responsibility, whenever taken outside the context of matrimonial proceedings. The goal is to "consolidate the fundamental right of children, whether their parents are married or not, to maintain relations with both parents, even if the parents decide to live in different countries in Europe." BULLETIN E.U. 9-2001, ¶ 1.4.14.

[185] Proposal for a Council Regulation concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, repealing Regulation (EC) 1347/2000 and amending Regulation (EC) 44/2001 in matters relating to maintenance, COM(02)222 final, 2002 O.J. (C 203/155).

[186] European Parliament Legislative Resolution on the Proposal for a Council Regulation concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility, A5-0385/2002.

[187] The Justice and Home Affairs Council reached political agreement on the proposed regulation in November 2002. 2469th Council Meeting (Nov. 28-29, 2002), 14817/02 (Presse 375), at 14. At its June 2003 meeting, the Council instructed the Permanent Representatives Committee and the Committee on Civil Law matters to finalize technical matters in time for the Council's October 2003 meeting. 2514th Council Meeting (June 5-6, 2003), 9845/03 (Presse 150), at 24. If passed at that time, the regulation would enter into force on 1 July 2004. BULLETIN E.U. 6-2003, ¶ 1.4.19.

implemented.[188] Here, as with *wills and succession* (*discussed supra* in Part III.A), the "First Stage" entails drafting one or more instruments that would adapt the Brussels machinery to the particular substantive field, while the Second and Third Stages follow the same pattern established for measures taken within the scope of the Brussels Regulations.[189]

Early doubts about whether the EC Treaty provided any basis upon which to build a Community family law have been laid to rest,[190] but controversy persists over developments in this fast-moving field.[191] Full consideration of the arguments for and against E.U. family law are beyond the scope of this article. Still, it would leave too much unsaid to overlook this controversy. The prospect of Community action regarding family law and related property issues vividly exemplifies the extent to which the Community is stretching "judicial cooperation in civil matters" to exercise competence over matters that have long been within Member State prerogative.[192]

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[188] Mutual Recognition Program, *supra* note 131, ¶ III.C.

[189] *Id.* Presumably, the stages outlined in the Mutual Recognition Program will be adapted in conformity with whatever changes might be made in the Brussels II Regulation, as noted in *supra* note 180.

[190] For a compelling argument that it is "possible . . . to talk about a European Union family law," see Clare McGlynn, *A Family Law for the European Union?*, *in* SOCIAL LAW AND POLICY IN AN EVOLVING EUROPEAN UNION 223, 223 (Jo Shaw, ed., 2000). *See generally* Dieter Martiny, *Is Unification of Family Law Feasible or Even Desirable?*, *in* HARTKAMP, EUROPEAN CIVIL CODE, *supra* note 17, at 151; Remien, *supra* note 12, at 74 (summarizing early debates over whether Article 65 EC Treaty would be applied in the area of family law).

[191] *See, e.g.*, Stéphane Drouet, *La Communautarisation de "Bruxelles II" Chronique d'une Mutation Juridique*, 447 REVUE DU MARCHÉ COMUN ET DE L'UNION EUROPÉENE 247 (Apr. 2001); Jayme & Kohler, *supra* note 178; Wendy Kennett, *Current Developments: Private International Law*, 48 INT'L & COMP. L. Q. 465 (Apr. 1999); Peter McEleavy, *The Brussels II Regulation: How the European Community has Moved into Family Law*, 51 INT'L & COMP. L. Q. 883 (2002); Clare McGlynn, *supra* note 190; Clare McGlynn, *The Europeanization of Family Law*, 13 CHILD & FAM. L. Q. 35 (2001); Jörg Pirrung, *Europäische justitielle Zusammenarbeit in Zivilsachen—insbesondere das neue Scheidungsübereinkommen*, 1999 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT 834; Haimo Schack, *The New International Procedure in Matrimonial Matters in Europe*, 4 EUR. J. L. REFORM 37 (2002); Helen Stalford, *Regulating Family Life in Post-Amsterdam Europe*, 28 EUR. L. REV. 39 (2003); Rolf Wagner, *Die Anerkennung und Vollstreckung von Entscheidungen nach der Brüssel II-Verordnung*, 21:2 IPRAX (PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHT) 73 (Mar./Apr. 2001).

[192] As for the foreign relations aspect of family law, Remien, *supra* note 12, at 76, has noted that the "complete abolition of national private international law rules . . . for . . . third country-related cases certainly is not 'necessary for the proper functioning of the internal market'." Still, the Community's reach clearly extends beyond *internal* competence, and captures some aspects of *external* competence as well, as three recent examples illustrate. First, the Commission proposed that the Council authorize Member States to sign the 1996 Hague Convention on Parental Responsibility and the Protection of Children "in the interest of the European Community." *See* Proposal for a Council Decision Authorizing the Member States to Sign in the Interest of the European Community the Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Re-

The scope of Community action in pursuit of the "genuine European area of justice" appears to be potentially unlimited. One scholar has observed that:

> if measures relating to uniform rules on recognition of divorce can be subsumed within the general aim of securing the internal market or common judicial area, there seems to be no reason why harmonization of divorce laws could not similarly be justified. . . . These current proposals constitute the first direct Community regulation of the status of individuals, rather than just the rights which are accorded to them.[193]

It remains to be seen whether the new, proposed or planned measures in the area of family law will be challenged before the European Court of Justice. Two factors diminish the likelihood that a challenge will be mounted to measures enacted on the basis of Article 65 of the EC Treaty.[194] First, the list of potential challengers is significantly reduced by the fact that Denmark, Ireland and the United Kingdom are not required to participate in measures taken to institutionalize EUstitia. And second, the Nice Treaty reduces the potential for conflict by preserving the unanimity requirement for most measures taken in the sensitive area of family law.

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sponsibility and Measures for the Protection of Children, COM(01)680 final. The Commission considered such a step necessary, since the 1996 Hague Convention "now [falls] partly under Community competence." *Id.* at pmbl., ¶ 3. The Council gave its approval, noting that the "Community has exclusive competence for the relevant provisions of the Convention insofar as those articles affect Community rules adopted in this area. The Member States should retain their competence in the areas covered by the Convention which do not affect Community law." Council Decision of 19 December 2002, 2003 O.J. (L 48/1), at pmbl., ¶ 4. The Member States (except Denmark) "shall make the necessary arrangements for the Convention to be signed before 1 June 2003." *Id.* at art. 3, 2. The text of this Convention is available at 2003 O.J. (L 48/3). Second, in another family law matter, the Commission has gone a step further and called for the European Community to sign a treaty. *See* Commission Proposal for a Council Decision on the Signing by the European Community of the Council of Europe Convention on Contact Concerning Children, 2003 O.J. (C 20/369). The third example does not pertain particularly to family law (or even to civil justice), but provides yet another clear indication of the external reach of Union action in regard to the AFSJ. See E.U. Action Plan on Justice and Home Affairs in Ukraine, 2003 O.J. (C 77/1), ¶ I.2, which aims to develop "with Ukraine the principles of rule of law, access to justice, independence of the judiciary and good governance, on which the objective of the European Union to establish an Area of Freedom, Security and Justice is based."

[193] McGlynn, *supra* note 190, at 235-236. This author's reasons for criticizing the Community's intrusion cannot be dismissed as mere Euroskepticism. McGlynn offers a substantive critique of the exclusionary notion of the "model European family" that has emerged in the jurisprudence of the European Court of Justice. *Id.* at 223-229.

[194] These limiting factors would not be present if measures related to justice were enacted pursuant to a different basis in the EC Treaty, such as Article 95 on the internal market. It seems unlikely that Article 95 could serve as the basis for measures in family law, though clearly it is available for procedural measures relating to economic activity, such as debt collection. *See infra* text accompanying notes 217-220.

C. Better Access to Justice

Free movement of judgments, while necessary in the eyes of the Commission, is not sufficient to "enable [European] citizens and firms to take full advantage of the rights conferred on them."[195] Consequently, the Commission proposed even before the Amsterdam Treaty entered into force that a debate was needed:

> on the substance of the problem of litigation in Europe, not just in terms of co-operation between courts but in much broader terms of *equal access to rapid, efficient and inexpensive justice.*[196]

The Commission has expressed particular concern about the conditions affecting litigation involving consumers, as well as small and medium-sized businesses.[197] "Obstacles to justice" caused by the maintenance of "legal/judicial borders . . . are most acutely felt"[198] by such parties. After studying the matter, the Commission concluded that the European Union should "provide the consumer and commercial firm, along with all the European Union citizens, an improved procedural environment."[199]

This ambition is amply reflected in the Tampere Milestones, which identify "better access to justice" as one of the key components of the AFSJ.[200] More concretely, the European Council insisted that individuals and businesses must be able to "approach courts and authorities in any Member State as easily as in their own."[201] No one should be "prevented or discouraged from exercising their rights by the incompatibility or complex-

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[195] Commission Communication on Judgments, *supra* note 99, at 3. *See generally* Jörg Pirrung, *Zugang zum Recht in der Europäischen Union*, *in* BARRETT, EUROPEAN JUDICIAL SPACE, *supra* note 7, at 35.

[196] *Id.* ¶ 11 (emphasis added).

[197] The Commission has also noted that one-quarter of insolvency cases in the European Union are associated with late payments. DG-Justice & Home Affairs, *Improving Cross-border Insolvency Proceedings*, *supra* note 134.

[198] Commission Communication on Judgments, *supra* note 99, at 3. For consumers, these obstacles present a problem because of the "small sums in play," whereas they affect businesses by "acting as a brake on commercial activity." *Id.*

[199] *Id.* This finding echoes the conclusions of a group of experts which, at the Commission's behest, prepared a study on the need for harmonization of civil procedural law, well before private international law was communitarized by the Amsterdam Treaty. *See* MARCEL STORME (ED.), APPROXIMATION OF JUDICIARY LAW IN THE EUROPEAN UNION: FINAL REPORT OF THE WORKING GROUP FOR THE APPROXIMATION OF THE CIVIL PROCEDURAL LAW IN EUROPE ix (1994) ("This working group . . . delivered an initial study to the European Union in order to convince the Union's authorities of the need for an approximation of judicial laws, since the existing divergencies in the field of civil procedure directly and most seriously affect the establishment and functioning of the internal market.").

[200] Tampere Milestones, *supra* note 6, Part B(V), ¶¶ I.9.29 – I.9.32.

[201] *Id.* ¶ I.5.

ity of legal and administrative systems in the Member States."[202] One timeworn technique for improving access to justice in the European Union is to codify rules that have been frequently amended.[203] But the European Union has many other means at its disposal for pursuing this goal. Five types of measures that have been taken, proposed or planned as means toward the end of promoting better access to justice are examined here.

The first type of measure promotes extra-judicial settlement of disputes. The Commission considers the existence of "effective mechanisms" providing "realistic and affordable options to obtain redress" a prerequisite to consumer and business confidence in the internal market.[204] Initially, the Commission established a set of principles to guide out-of-court bodies in certain cases.[205] This infrastructure was subsequently expanded to address further issues that arise in connection with consensual resolution of consumer disputes, particularly in the context of e-commerce transactions.[206] Yet, in this field of endeavor, as in those already surveyed, the Commission has not rested on its laurels. Spurred on by the Council, it has continued to address a broad range of theoretical and practical problems that arise in the context of extra-judicial dispute settlement.[207] At the Council's request, the Commission prepared a Green Paper that identifies ADR as a "political priority" having special relevance "in the context of the information soci-

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[202] *Id.* ¶ I.2.28. *Accord,* Sixth Scoreboard, *supra* note 6, ¶ 3.1. The goal of "greater convergence in civil law" is inextricably linked to the goal of enhancing access to law. *Id.* ¶ 3.3.

[203] *See, e.g.,* Proposal for a Directive of the European Parliament and of the Council on Injunctions for the Protection of Consumers' Interests (Codified Version), COM(03)241 final, at 2, 4 (proposing fast-track adoption of a measure to "codify" a directive from 1998 that has been substantially amended several times).

[204] Communication from the Commission on Widening Consumer Access to Alternative Dispute Resolution, COM(01)161 final, at 2. There have been "loud calls for out-of-court measures for resolving disputes . . . as the courts were seen as too expensive and time consuming." *Id.* Such redress is also essential for "ensuring that there is effective competition and access to the Internal Market, especially for SME's." *Id.* at 3. The Tampere Milestones, *supra* note 6, ¶ I.9.30, called upon the Member States to create alternative extra-judicial procedures.

[205] Commission Recommendation of 30 March 1998 on the Principles Applicable to the Bodies Responsible for Out-of-Court Bodies Settlement of Consumer Disputes, 1998 O.J. (L 115/31) (limited to out-of-court bodies where a third party proposes or imposes a decision to resolve the dispute).

[206] Commission Resolution of 25 May 2000 on a Community-wide Network of National Bodies for the Extra-Judicial Settlement of Consumer Disputes, 2000 O.J. (C 155/1); Commission Recommendation of 4 April 2001 on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes, 2001 O.J. (L 109/56).

[207] *See* Council Conclusions on Alternative Methods of Settling Disputes under Civil and Commercial Law, BULLETIN E.U. 5-2000, ¶ 1.4.6 (taking the view that "discussions on alternative methods of settling disputes under civil and commercial law should be initiated at European level" and inviting Commission to present a Green Paper "taking stock of the existing situation and possible future measures, with priority being given to the establishment of basic principles").

ety,"[208] and aims to ascertain *inter alia* the "minimum quality standards" which are necessary.[209] The European Parliament subsequently passed a resolution on the ADR Green Paper,[210] and the Economic and Social Committee published an opinion,[211] but no final measures had been adopted as of September 2003.[212] In addition, the Commission announced its intention to publish a communication pertaining to online dispute resolution ("ODR"), but none had appeared as of September 2003.[213] Finally, at the more pragmatic level, the Commission established two networks of national bodies that aim to facilitate access for consumers to out-of-court procedures in cross-border disputes.[214]

The second type of measure aimed at improving access to justice consists of common procedural rules for litigating certain types of cross-border claims, such as small consumer and commercial claims, maintenance claims, and uncontested claims.[215] Though still on the horizon, the Commission's "second tier"[216] program for creating uniform procedural rules promises to have a significant impact on the administration of justice within Member States. Thus far, however, the only new civil procedure measure is the Directive on Combating Late Payment in Commercial Transactions (Late Payments Directive),[217] which creates a special collection procedure.

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[208] Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, COM(02)196 final, at 5 [hereinafter ADR Green Paper].

[209] *Id.* ¶ 72.

[210] European Parliament Resolution on the Commission's Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, A5-0058/2003.

[211] Opinion of the Economic and Social Committee on the Green Paper on Alternative Dispute Resolution in Civil and Commercial Law, 2003 O.J. (C 85/8).

[212] For documentation from the February 2003 hearing on ADR, including responses to the ADR Green Paper, *see* DG-Justice and Home Affairs, *supra* note 46, *at* http://europa.eu.int/comm/justice_home/news/consulting_public/adr/news_hearing_adr_en.htm (last visited May 16, 2003).

[213] ADR Green Paper, *supra* note 208, ¶40.

[214] *Id.* ¶ 38. The European Extra-Judicial Network ("EEJ-Net") is a "consumer support and information structure which consists of national contact points . . . located in each Member State and in Iceland and Norway." *Id. See also* Commission Working Document on the Creation of a European Extra-Judicial Network (EEJ-Net), SEC(2000) 405, *available at* http://europa.eu.int/comm/consumers/redress/out_of_court/eej_net/acce_just06_en.pdf (last visited May 16, 2003). EEJ-Net was launched in October 2001 and was due to be evaluated in April 2003. Sixth Scoreboard, *supra* note 6, ¶ 3.1. The Financial Services Complaints Network ("FIN-NET") is a "network of the competent national ADR bodies" which provide "direct access to an ADR facility" to "consumers who have problems relating to financial services (banks, insurance companies, investment services)." ADR Green Paper, *supra* note 208, ¶ 38.

[215] Tampere Milestones, *supra* note 6, ¶ I.9.30; Sixth Scoreboard, *supra* note 6, ¶ 3.1.4. These matters are discussed in Part III(A) above. *See generally* text accompanying notes *supra* 166-173.

[216] *See* text accompanying *supra* note 171.

[217] Directive 2000/35 of 29 June 2000 on Combating Late Payment in Commercial

This Directive is remarkable in a number of ways. First, it breaks new legislative ground by approximating various substantive, procedural and remedial issues in order to ensure redress for late payment.[218] Various justifications were mobilized in support of this measure, ranging from the need to eliminate obstacles to the proper functioning of the internal market, to the need to discourage late payment and prohibit abuse of freedom of contract. Second, despite its obvious link to the matters of access to justice and enforcement of judgments, the directive was enacted pursuant to Article 95 of the EC Treaty, as an approximation measure having as its "object the establishment and functioning of the internal market."[219] Two major consequences flow from basing a measure on Article 95, instead of Article 65 of the EC Treaty. The first is that Denmark, Ireland and the United Kingdom do *not* have the option to opt out under Article 95. Second, Article 95 empowers the Council to act by qualified majority, pursuant to Article 251 of the EC Treaty. The Late Payments Directive thus presents a potential test of the European Court of Justice's willingness to address the Community's competence over procedural matters affecting private law.[220]

The third type of measure intended to improve access to justice pertains to legal aid. The Tampere European Council called for minimum standards ensuring an adequate level of legal aid in cross-border cases throughout the European Union.[221] In February 2000, the Commission took the first step toward that objective by issuing a Green Paper on Legal Aid in Civil Matters.[222] The Legal Aid Green Paper explored the obstacles facing

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Transactions, 2000 O.J. (L 200/35) [hereinafter Late Payments Directive]. The Member States were obliged to transpose the directive into Member State law by 8 August 2002.

[218] The Late Payments Directive, *supra* note 217, requires that Member States ensure payment of interest in accordance with the guidelines stated in Article 3(1) and 3(2). In addition, Member States must ensure that agreements that do not satisfy the directive's guidelines "either shall not be enforceable or shall give rise to a claim for damages if . . . it is grossly unfair to the debtor." *Id.* at art. 3(3). Moreover, in cases involving grossly unfair terms, Member States are obliged to "ensure that . . . adequate and effective means exist to prevent" their continued use, Article 3(4), which are to include the means specified in Article 3(5) (*i.e.*, access to courts for "organisations officially recognised as, or having a legitimate interest in, representing small and medium-sized enterprises"). Moreover, Member States "shall provide in conformity with applicable national provisions designated by private international law that the seller retains title to goods until they are fully paid for." *Id.* at art. 4(1). Finally, Member States must ensure that an "enforceable title" can be obtained within 90 days of lodging the complaint. *Id.* at art. 5(1).

[219] EC Treaty, *supra* note 9, at art. 95(1).

[220] The Commission flagged this issue in its Payment Order & Small Claims Green Paper, *supra* note 168, at 13, n.26, where it expressly reserves the question whether "Articles 61(c) and 65 are the only possible legal basis" for a procedural measure such as the European order for payment procedure (discussed *supra* in Part III(A)). The Nice Treaty diminished the importance of the second consequence, since it amended Article 67 EC Treaty to permit qualified majority voting, except in matters involving family law.

[221] Tampere Milestones, *supra* note 6, ¶ I.9.30.

[222] Commission Green Paper on Legal Aid in Civil Matters: The Problems Confronting

cross-border litigants for whom legal aid is a condition of access to justice, and proposed various possible solutions. Nearly two years later, in January 2002, the Commission presented a proposal for a directive establishing minimum common rules relating to legal aid and recovery of legal costs and lawyers' fees.[223] Finally, in January 2003, the Council adopted the Legal Aid Directive, which binds all Member States except Denmark.[224]

The adopted version of the Legal Aid Directive has a substantially narrower scope than was foreseen in the Commission's original proposal.[225] Yet, despite its narrower scope, this Directive will profoundly affect the conduct of litigation in the European Union. It requires that Member States enable natural persons[226] involved in civil and commercial disputes to "assert their rights in the courts even if their personal financial situation makes it impossible for them to bear the costs of the proceedings."[227] Each Member State is to assess the economic situation of litigants and to define relevant thresholds, although it remains a question of E.U. law when legal aid is necessary to "ensure . . . effective access to justice."[228]

The fourth type of measure addresses the need for information. In par-

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the Cross-Border Litigant, COM(00)51 final. *See also* BULLETIN E.U. 1/2-2000, ¶ 1.4.4. *See generally* Michael Wilderspin, *Cross-Border Access to Legal Aid*, *in* BARRETT, EUROPEAN JUDICIAL SPACE, *supra* note 7, at 65.

[223] Commission Proposal for a Council Directive to Improve Access to Justice in Cross-Border Disputes by Establishing Minimum Common Rules relating to Legal Aid and other Financial Aspects of Civil Proceedings, 2002 O.J. (C 103/368) [hereinafter Commission Legal Aid Proposal]. *See also* Opinion of the Economic and Social Committee, 2002/C 221/15, 2002 O.J. (C 221/64); European Parliament Legislative Resolution, A5-0312/2002.

[224] Council Directive 2002/8/EC of 27 January 2003 to Improve Access to Justice in Cross-Border Disputes by Establishing Minimum Common Rules relating to Legal Aid for such Disputes, 2003 O.J. (L 26/41) [hereinafter Legal Aid Directive]. Member States are obliged to transpose the Legal Aid Directive law by November 30, 2004, except that the deadline for guaranteeing pre-litigation advice is May 20, 2006. *Id.* at art. 21(1).

[225] The Commission Legal Aid Proposal, *supra* note 223, ¶ 2, would have covered "all litigation in matters of civil law, including commercial law, employment law and consumer protection law." However, the actual scope of the Legal Aid Directive, *supra* note 224, covers only "cross-border disputes," *id.* at art. 1, which are defined as those "where the party applying for legal aid ... is domiciled or habitually resident in a Member State other than the Member State where the court is sitting or where the decision is to be enforced." *Id.* at art. 2(1).

[226] "All Union citizens, wherever they are domiciled or habitually resident in the territory of a Member State, must be eligible for legal aid in cross-border disputes if they meet the conditions provided for by this Directive. The same applies to third-country nationals who habitually and lawfully reside in a Member State." Legal Aid Directive, *supra* note 224, at pmbl., ¶ 13. *See also id.* at art. 4 (prohibiting discrimination in the granting of legal aid).

[227] Legal Aid Directive, *supra* note 224, at pmbl., ¶ 10. Legal aid must cover the costs of pre-litigation advice with a view to reaching a settlement prior to bringing legal proceedings, legal assistance and representation in court, as well as exemption from, or assistance with the cost of proceedings. *Id.* at art. 3(2). Legal aid shall also be available in connection with extrajudicial proceedings under certain conditions. *Id.* at art. 10.

[228] *Id.* at art. 3(1) and 5.

ticular, better access to justice calls for "an information campaign" and publication of "appropriate 'user-guides' on judicial co-operation within the Union and on the legal systems of the Member States."[229] The European Day of Civil Justice, commencing in 2003, is not just intended to be a "symbolic event," but is also a way to "[bring] civil justice closer to the citizen" by fostering knowledge about the "working of justice and how to assert [one's] rights."[230] More concretely, the Tampere European Council called for the "establishment of an easily accessible information system to be maintained and up-dated by a network of competent national authorities."[231] The task of maintaining this information system has been delegated to the European Judicial Network for Civil Matters.[232] The Framework Regulation reflects these informational challenges, insofar as its four-year activity plan aims *inter alia* at "improving mutual knowledge of legal and judicial systems between the Member States" and at providing "better information to the public on access to justice, judicial cooperation and the legal systems of the Member States."[233]

The fifth and final type of measure aims to ensure access to justice by developing "common minimum standards" for "multilingual forms or documents," which should be "accepted mutually as valid documents" in all cross-border proceedings throughout the Union.[234] The Legal Aid Directive calls for the establishment of a standard form;[235] so do the existing Service and Evidence Regulations, as well as the Commission's proposed regulations on uncontested claims and on parental responsibility. Such measures, despite their technocratic formality, can deeply influence the conduct of litigation, particularly when they move away from providing mere notice and towards constituting forms of action.

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[229] Tampere Milestones, *supra* note 6, ¶ I.9.29. *See* Sixth Scoreboard, *supra* note 6, ¶ 3.1.1 (providing details of the steps that have been taken to make more information available to users of the system).

[230] European Day of Civil Justice, *supra* note 20.

[231] Tampere Milestones, *supra* note 6, ¶ I.9.29.

[232] Council Decision 2001/470 of 28 May 2001 establishing a European Judicial Network in Civil and Commercial Matters, 2001 O.J. (L 174/25) [hereinafter European Judicial Network in Civil and Commercial Matters] (discussed *infra* in text accompanying notes 281-287). The European Judicial Network for Civil and Commercial Matters follows in the wake of the European Judicial Network that was created in 1998 to deal with serious crime, pursuant to a joint action adopted by the Birmingham Council on Justice and Home Affairs. *See* Joint Action 98/428/JHA of 29 June 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on the creation of a European Judicial Network, 1998 O.J. (L 191/4).

[233] Framework Regulation, *supra* note 7, at art. 2(2) and 2(4). *See also* Commission Framework Programme for Judicial Cooperation in Civil Matters: Annual Programme and Call for Proposals 2003, 2002 O.J. (C 301/10) [hereinafter 2003 Annual Program].

[234] Tampere Milestones, *supra* note 6, ¶ I.9.31. *See* Sixth Scoreboard, *supra* note 6, ¶ 3.1.6 (providing details of the steps that have been taken to create multilingual forms).

[235] Legal Aid Directive, *supra* note 224, at art. 16.

D. Greater Convergence in Civil Law

The Tampere Milestones identify "greater convergence in civil law" as one of the three key components of the AFSJ.[236] The Commission has heartily embraced the mandate to achieve "better compatibility and more convergence between the legal systems of the Member States."[237] The EC Treaty suggests that there are two avenues for approaching this task. The first is by "promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction."[238] The second is by "eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States."[239] Moreover, although the EC Treaty does not explicitly authorize measures pertaining to *substantive* private law, such measures have found their way into the scope of the "genuine European area of justice." The Tampere European Council offered the following expansive reading of Article 65(c) of the EC Treaty:

> As regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings.[240]

The call for "greater convergence" may lead to the deepest incursions into Member State terrain, since it invites any measures that might help to "smooth judicial cooperation and enhance access to law."[241] The Amsterdam Treaty itself left no doubt that the Community would take measures in all core areas of private international law. The EC Treaty, as amended, expressly mentions the possible need for rules on conflict of laws, jurisdiction, and civil procedure.[242] The Treaty also expressly mentions the need to improve and simplify the rules on service of process and cooperation in the taking of evidence, along with the rules on recognition and enforcement of

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[236] Tampere Milestones, *supra* note 6, Part B(VII), ¶¶ I.11.38 – I.11.39.

[237] DG-Justice and Home Affairs, *supra* note 46, *available at* http://europa.eu.int/comm/justice_home/fsj/intro/fsj_intro_en.htm (last visited Mar. 24, 2003).

[238] EC Treaty, *supra* note 9, at art. 65(b).

[239] *Id.* at art. 65(c). *But see* Sixth Scoreboard, *supra* note 6, ¶ 3.3 (stating the goal of eliminating "obstacles created by disparities *in law* and procedures") (emphasis added). *Accord*, Framework Regulation, *supra* note 7, at art. 1(d) (stating the goal of "eliminating obstacles created by disparities in *civil law* and civil procedures") (emphasis added).

[240] Tampere Milestones, *supra* note 6, ¶ I.11.39. Article 65(c) of the EC Treaty contemplates measures "eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States." The European Council appears to have read the limitation to civil procedure out of the treaty.

[241] Sixth Scoreboard, *supra* note 6, ¶ 3.3.

[242] EC Treaty, *supra* note 9, at art. 65(b), 65(c).

decisions (discussed above in Parts III(A) and III(B)).[243] Yet, some may be surprised to learn that "judicial cooperation in civil matters" has also become the basis for considering the need for European contract law.[244]

In regard to the "arcane"[245] matter of *procedural law*, a predictably wide range of measures have been taken, proposed, or planned under the EUstitia banner. In addition to the action areas expressly identified in Article 65(a) of the EC Treaty—service of process, taking evidence, and mutual recognition—the Tampere Milestones added other areas, such as provisional measures, orders for money payment, and time limits, to the Community's agenda.[246] In a pattern that has by now become familiar, the Community moved quickly after the Amsterdam Treaty entered into effect in May 1999 to reformat an earlier convention into a Community law regulation.[247] The new Service Regulation entered into force on May 31, 2001, and binds all Member States except Denmark.[248] That same week, the Council also adopted a new Evidence Regulation, which entered into force on July 1, 2001, and similarly binds all Member States except Denmark.[249]

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[243] Id., at art. 65(a). These procedural issues overlap the topics of "mutual recognition" and "convergence in civil law" set forth in the Tampere Milestones. They are analyzed here in Part III(D), along with other convergence topics, since this is compatible with the Commission's own classification scheme in the Scoreboards. *See, e.g.*, Sixth Scoreboard, *supra* note 6, ¶ 3.3.1 ("new procedural legislation in cross-border cases").

[244] Discussed *infra* in text accompanying notes 263-264, 268, and 272-274.

[245] Commission Communication on Judgments, *supra* note 99, ¶ 6 (rules of "procedure are already substantially arcane in the purely national context they [sic] are even more so in the cross-border context").

[246] Tampere Milestones, *supra* note 6, ¶ I.11.38.

[247] Council Regulation 1348/2000 of 29 May 2000 on the Service in the Member States of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 2000 O.J. (L 160/37) [hereinafter Service Regulation]. This regulation basically reproduces the content of the convention on that same issue of 26 May 1997, but is adapted to the European Union's post-Amsterdam framework. *See generally* Opinion of the European Parliament, BULLETIN E.U. 11-1999, ¶ 1.6.7; Opinion of the Economic and Social Committee, 1999 O.J. (C 368/47); Information Communicated by Member States under Article 23 of Council Regulation 1348/2000, 2001 O.J. (C 151/4). *See also* KENNETT, JUDGMENTS, *supra* note 12, at 173-211; Walter F. Lindacher, *Europäisches Zustellungsrecht: Die VO (EG) Nr. 1348/2000: Fortschritt, Auslegungsbedarf, Problemausblendung*, 114 ZEITSCHRIFT FÜR ZIVILPROCESS 179 (2001); Astrid Stadler, *Neues europäisches Zustellungsrecht*, 2001 IPRAX (PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS) 514 (Nov./Dec. 2001).

[248] The Service Regulation, *supra* note 247, replaces the systems referred to in Article IV of the protocol to the Brussels I Convention, *supra* note 44. Fourteen Member States have adopted the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, *at* http://www.hcch.net/e/conventions/menu14e.html (last visited May 16, 2003). The Service Regulation replaces the Hague Convention as between those Member States that were parties to the Hague Convention.

[249] Council Regulation 1206/2001 of 28 May 2001 on Cooperation between the Courts of the Member States in the Taking of Evidence in Civil or Commercial Matters, 2001 O.J. (L 174/1) (27 June 2001) [hereinafter Evidence Regulation]. *See generally* Christian Berger,

Unlike the Service and Brussels I and II Regulations, however, the Evidence Regulation was based on a German initiative,[250] rather than on an earlier convention that had been prepared under E.U. auspices.[251]

Various other convergence measures have been taken, proposed, or planned, although the main emphasis in the procedural arena has been on the projects discussed above, under the headings of mutual recognition and access to justice. Still, a few other procedural measures warrant brief mention. First, the Council has adopted negotiating briefs for international negotiations leading to revision of the Lugano Convention,[252] and for negotiations in The Hague on a world convention on jurisdiction and on recognition and enforcement of judgments.[253] Second, some procedural measures in the criminal law field appear to, or at least have the potential to, overlap with the field of civil law.[254] As these examples indicate, the

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Die EG-Verordnung über die Zusammenarbeit der Gerichte auf dem Gebiet der Beweisaufnahme in Zivil- und Handelssachen (EuBVO), 2001 IPRAX (PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS) 522 (Nov./Dec. 2001).

[250] Initiative of the Federal Republic of Germany with a view to adopting a Council Regulation on cooperation between the courts of the Member States in the taking of evidence in civil and commercial matters, 2000 O.J. (C 314/1). *See also* Opinion of the European Parliament, 15-0073 (Mar. 14, 2001); Opinion of the Economic and Social Committee, 2001 O.J. (C 139/10).

[251] Eleven Member States have adopted the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters, *at* http://www.hcch.net/e/conventions/menu20e.html (last visited May 16, 2003). The Evidence Regulation replaces the Hague Convention as between those Member States that were parties to the Hague Convention.

[252] The Sixth Scoreboard, *supra* note 6, ¶ 3.3.3, reports that the Council adopted the negotiating brief for an agreement between the Community and the Lugano States in October 2002. *See* Commission Recommendation for a Council Decision Authorising the Commission to Open Negotiations for a Convention between the Community and, Having Regard to the Protocol on its Position, Denmark, and Iceland, Norway, Switzerland and Poland, SEC(2002) 298 final. This Recommendation was adopted at the 2455th Council Meeting (14-15 October 2002), 12894/02 (Presse 308).

[253] Sixth Scoreboard, *supra* note 6, ¶ 3.3.3.

[254] The first type of measure relates to extending the principle of mutual recognition in the context of criminal matters. Developments in this field are extensive and beyond the scope of this article, but are summarized in the Scoreboards, *supra* note 6, alongside the civil matters examined in this article. Two Member State initiatives illustrate the potential overlap with matters pertaining to civil law: first, the Initiative by the Governments of the French Republic, the Kingdom of Sweden and the Kingdom of Belgium for the adoption by the Council of a Framework Decision on the execution in the European Union of orders freezing assets or evidence, 2001 O.J. (C 75/3); and second, the Initiative of the United Kingdom, the French Republic and the Kingdom of Sweden with a view to adopting a Council Framework Decision on the application of the principle of mutual recognition to financial penalties, 11178/01 (Sept. 12, 2001). The second type of overlapping measure involves the creation of a new procedure. This is illustrated by discussions about whether the Community should provide compensation to the victims of crime. *See* Green Paper on Compensation to Crime Victims, COM(01)536 final; Commission Proposal for a Council Directive on Compensation to Crime Victims, COM(02)562 final. *See also* Sixth Scoreboard, *supra* note

European Union's efforts to unify or harmonize the law of civil procedure must be understood in a broader transnational context.[255]

Another arena in which the Community is seeking to eliminate obstacles created by legal or procedural disparities is the *conflict of laws*. The Commission is examining all basic areas of civil law through this lens. The Community has had common choice of law rules for contract since the 1980 Rome Convention on the Law Applicable to Contracts.[256] In January 2003, a discussion was formally launched on the desirability of modernizing this Convention and converting it into a Community measure, such as a regulation or a directive.[257] Second, the Commission launched public consultation on a preliminary draft proposal[258] on the law applicable to non-contractual obligations ("Rome II") in May 2002, and presented a proposed regulation in 2003.[259] Third, in regard to the law applicable to divorce, both the Council[260] and the Commission[261] have studied the topic. The Commission announced its intention to present a White Paper on the law applicable to divorce in 2003,[262] but no such document had appeared as of September 2003. Fourth, in 2002, the Commission launched large-scale preparatory studies on the law applicable to matrimonial property and successions.[263]

Last but not least come the steps taken in connection with *substantive private law*. The Commission initially planned to prepare a Green Paper on European Private Law, which were meant to launch a debate on the need for harmonization in certain areas of substantive private law.[264] Instead, the

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6, ¶¶ 3.1.7 - 3.1.8.

[255] *See* Paolo Biavati, *Is Flexibility a Way to the Harmonization of Civil Procedural Law in Europe?*, *in* ESSAYS ON TRANSNATIONAL AND COMPARATIVE CIVIL PROCEDURE 85 (Federico Carpi & Michele Angelo Lupi, eds., 2000).

[256] Rome I Convention, *supra* note 21.

[257] *See* Rome I Convention Green Paper, *supra* note 13.

[258] *See* Commission Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations, *at* http://europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm (last visited May 16, 2003).

[259] Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-contractual Obligations ("Rome II"), COM(03)0427 final. *See also* Sixth Scoreboard, *supra* note 6, ¶ 3.3.4.

[260] *Id.* ¶ 3.3.6 (noting that the Council produced a comparative study on national legislation and the positions of the Member States in May 2000).

[261] *Id.* (noting that the Commission launched a complementary study in 2001, and that the results would be available during the latter part of 2002). *See generally*, T.M.C. Asser Instituut, *Practical Problems Resulting from the Non-Harmonization of Choice of Law Rules in Divorce Matters*, JAI/A3/2001/04 (December 2002), *at* http://europa.eu.int/comm/justice_home/ doc_centre/civil/studies/doc_civil_studies_en.htm (last visited May 16, 2003).

[262] Sixth Scoreboard, *supra* note 6, ¶ 3.3.6.

[263] *Id.* ¶ 3.3.7. The Commission stated that the results of its study would be available by the end of 2002, and announced an October 2002 conference on successions with the Council of Europe. *Id.*

[264] Third Scoreboard, *supra* note 6, ¶ 3.3.2.

Commission presented a Communication on European Contract Law[265] and a Green Paper on European Consumer Protection[266] during the second half of 2001. These documents provoked, as intended, a wide debate among "stakeholders" from Member State governments, business, consumers' organizations, legal practitioners, and academics.[267] After studying the responses to its two proposals and conducting hearings, the Commission issued a Follow-up Communication to the Green Paper on E.U. Consumer Protection[268] and an Action Plan for a More Coherent European Contract

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[265] Communication from the Commission to the Council and the European Parliament on European Contract Law, 2001 O.J. (C 255/1).

[266] Green Paper on European Union Consumer Protection, COM(01)531 final. *See also* Opinion of the Economic and Social Committee, COM(01)531 final, 2002 O.J. (C 125/1); EP Resolution on Prospects for Legal Protection of the Consumer in the Light of the Commission Green Paper on European Union Consumer Protection, A5-0054/2003.

[267] To get the flavor of the recent academic debate surrounding the desirability of a European contract law, *see, e.g.*, Jürgen Basedow, *Codification of Private Law in the European Union: The Making of a Hybrid*, 9 EUR. REV. PRIVATE L. 35 (2001); Klaus Peter Berger, *Harmonisation of European Contract Law: The Influence of Comparative Law*, 50 INT'L & COMP. L. Q. 877 (2002) [hereinafter Berger, *Harmonisation*]; Klaus Peter Berger, *The Principles of European Contract Law and the concept of the "Creeping Codification" of Law*, 9 EUR. REV. PRIVATE L. 21 (2001) [hereinafter Berger, *The Principles of European Contract Law*]; Stefan Grundmann, *The Structure of European Contract Law*, 9 EUR. REV. PRIVATE L. 505 (2001); Martin Hesselink, *The Politics of European Contract Law: Who has an Interest in What Kind of Contract Law for Europe?*, GLOBAL JURIST FRONTIERS, Vol. 2 [2002], No. 1, Article 3 [hereinafter Hesselink, *The Politics of European Contract Law*]; Martijn Hesselink, *The Structure of the New European Private Law*, 6.4 EUR. J. COMP. L. (2002) [hereinafter Hesselink, *The Structure of the New European Private Law*], *available at* http://www.ejcl.org/64/art64-2.html (last visited Jan. 17, 2003); Ole Lando, *Optional or Mandatory Europeanisation of Contract Law*, 8 EUR. REV. PRIVATE L. 59 (2000); Ugo Mattei & Anna di Robilant, *The Art and Science of Critical Scholarship. Post-modernism and International Style in the Legal Architecture of Europe*, 10 EUR. REV. PRIVATE L. 29 (2002); Ewan McKendrick, *Traditional Concepts and Contemporary Values*, 10 EUR. REV. PRIVATE L. 95 (2002); Mathias Reimann, *Towards a European Civil Code: Why Continental Jurists Should Consult Their Transatlantic Colleagues*, 73 TUL. L. REV. 1337 (1999); Jan Smits, *How to Take the Road Untravelled? European Private Law in the Making*, 6 MAASTRICHT J. EUR. & COMP. L. 25 (1999); Dirk Staudenmayer, *The Commission Communication on European Contract Law: What Future for European Contract Law?*, 10 EUR. REV. PRIVATE L. 249 (2002); Sjef van Erp, *The European Union and Private Law*, 5.3 EUR. J. COMP. L. (Nov. 2001), *available at* http://www.ejcl.org/54/editor54.html (last visited May 16, 2003); Christian von Bar & Ole Lando, *Communication on European Contract Law: Joint Response of the Commission on European Contract Law and the Study Group on a European Civil Code*, 10 EUR. REV. PRIVATE L. 183 (2002); Thomas Wilhelmsson, *The Legal, the Cultural and the Political—Conclusions from Different Perspectives on Harmonisation of European Contract Law*, 16 EUR. BUS. L. REV. 541 (2002).

[268] Communication from the Commission, *Follow-up Communication to the Green Paper on E.U. Consumer Protection*, COM(02)289 final [hereinafter Consumer Protection Follow-up]. *See also* Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions: Consumer Policy Strategy 2002-2006, COM(02)208 final.

Law.[269]

The Consumer Protection Follow-up reports strong support for reformed consumer protection legislation in the form of a framework directive, as well as for formalized "cooperation between national enforcement bodies responsible for consumer protection."[270] The Commission laid out an action plan for further consultation with Member States and other stakeholders, to consider in detail the issues that should be covered in such a framework directive.[271] A major goal of such legislation would be to "harmonise the legal provisions of the Member States relating to the fairness of commercial practices."[272] Though clearly related to building the "genuine European area of justice," consumer protection measures would presumably be based on Articles 95 or 153, rather than on Article 65 of the EC Treaty.

For its part, the Contract Action Plan proposes a mix of regulatory and non-regulatory measures that are designed to solve the problems that were identified during the initial consultation and discussion process.[273] In particular, the Contract Action Plan elaborates three strategic areas for action: increasing coherence of the Community *acquis* in the area of contract law, promoting the elaboration of E.U.-wide standard contract terms, and examining whether non-sector specific measures, such as an optional instrument, may be necessary.[274] Like the Consumer Protection Follow-up, the Contract Action Plan is intended as a "further step in the ongoing process of discussion" with stakeholders, and accordingly refrains from proposing any concrete measures or set a legislative agenda, but instead invites further comments by a particular date.[275] But unlike the consumer protection measures mentioned above, the treaty basis for discussions about contract (and other substantive) law at E.U. level is Article 65 of the EC Treaty.

As to the desirability of achieving at European level substantive rules in other areas of civil law, the Justice, Home Affairs and Civil Protection Council has called upon the Commission to "conduct a study into whether the differences in Member States' legislation, in the areas of non-

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[269] Communication from the Commission to the European Parliament and the Council, *A More Coherent European Contract Law: An Action Plan*, 2003 O.J. (C 63/1) [hereinafter Contract Action Plan].

[270] Consumer Protection Follow-up, *supra* note 268, at 2; ¶¶ 7-13 & 21-22.

[271] *Id.* at 2. Annex I to the Consumer Protection Follow-up, *id.* at 15-19, contains a working document that lays out a series of issues pertaining to scope, structure, and substance of the anticipated framework directive. No proposal had been published as of September 2003.

[272] *Id.*, at Annex I, ¶ I. The Commission suggested basing the framework directive on a general clause that would require Member States to "ensure that traders established in their territory should not engage in unfair commercial practices, *id.* at Annex I, ¶ II.1, supplemented by an "exhaustive number of specific rules (the 'fairness/unfairness categories') concerning different stages of the business to consumer relationship." *Id.* at Annex I, ¶ II.2.

[273] Contract Action Plan, *supra* note 269.

[274] *Id.* ¶ 3.

[275] *Id.*

contractual liability and property law, constitute obstacles to the proper functioning of the market in practice."[276] As of September 2003, however, no further official discussions along these lines could be discerned, though debates on the need for common European rules of tort (*i.e.*, non-contractual obligations)[277] and of succession[278] exist in academic circles.

E. Measures Aimed at Judges and Legal Professionals

The roots of the "genuine European area of justice" can be traced at least as far back as the cooperation that emerged under the Third Pillar.[279] Given this provenance, we can safely expect that more or less formal cooperation will remain an important avenue for institutionalizing civil justice in the European Union. It can hardly come as a surprise, therefore, that some of the measures taken, proposed, or planned for institutionalizing EUstitia relate specifically to legal professionals, notably judges and lawyers. The Economic and Social Committee urged the Commission to place greater emphasis on standardizing "legal institutions" when building the AFSJ.[280]

The key component of the European Union's institutional strategy is to create and foster professional networks. The centerpiece is the European Judicial Network in Civil and Commercial Matters, which was established in 2001[281] and held its first general meeting in Brussels in December 2002.[282] The European Judicial Network for Civil and Commercial Matters will, among other activities, regularly bring together all the designated "national contact points" and other relevant Member State authorities to "ex-

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[276] 2,385th Council Meeting (16 November 2001), 13758/01 (Presse 409), at II, point (d).

[277] *See, e.g.*, Stathis Banakas, *European Tort Law: is it Possible?*, 10 EUR. REV. PRIVATE L. 363, at 366-368 (2002); Michael Faure, *Toward a Harmonised Tort Law in Europe? An Economic Perspective*, 8 MAASTRICHT J. EUR. & COMP. L. 339 (2001); David Howarth, *The General Conditions of Unlawfulness*, *in* HARTKAMP, EUROPEAN CIVIL CODE, *supra* note 17, at 397.

[278] *See, e.g.*, Alain Verbeke & Yves-Henri Leleu, *Harmonization of the Law of Succession in Europe*, *in* HARTKAMP, EUROPEAN CIVIL CODE, *supra* note 17, at 173.

[279] In fact, professional legal networks—particularly those involving judicial cooperation—have always been a key element in European integration. *See, e.g.*, Vauchez, *supra* note 3, at 10. Although Vauchez focuses on the criminal side of the judicial profession, he also offers valuable insights for the study of the civil and commercial side of the professions.

[280] Economic and Social Committee Opinion of 23 October 2001 on the Proposal for a Council Regulation Establishing a General Framework for Community Activities to Facilitate the Implementation of a European Judicial Area in Civil Matters, BULLETIN E.U. 10-2001, ¶ 1.4.13.

[281] The European Judicial Network for Civil and Commercial Matters, *supra* note 232. *See also* Amended Proposal for a Council Decision Establishing a European Judicial Network in Civil and Commercial Matters, COM(01)234 final; Economic and Social Committee Opinion on the Proposal for a Council Decision establishing a European Judicial Network in Civil and Commercial Matters, 2001 O.J (C 139/6).

[282] DG-Justice and Home Affairs, *Newsroom* (Dec. 2002), *at* http://europa.eu.int/comm/justicehome/news/intro/news_1202_en.htm (last visited May 16, 2003).

change information and experience" with each other, as well as with the Commission, which serves the Network as its secretariat.[283] The Network, which includes all Member States but Denmark, is designed to serve two distinctly articulated, but ultimately related goals. The first is to improve judicial cooperation by networking the authorities of the Member States in a uniform manner throughout the European Union.[284] This, in turn, serves the second goal, which is to simplify the life of Europe's citizens by giving them easier access to justice in a Member State other than their own.[285]

In concrete terms, the European Judicial Network aims to remove practical barriers which citizens may come up against when engaged in cross-border civil or commercial cases, to ease the process by making information available to the public, and to improve the implementation of Community instruments or conventions in force.[286] Yet, these are clearly not the only goals that the Network aims to serve. Frequent meetings of Member State and Commission officials, occurring within the framework of the European Judicial Network in Civil and Commercial Matters, will also establish personal relationships among participants. Moreover, the Network will provide a platform for discussing a wide range of topics, including but not limited to the "practical and legal problems encountered by the Member States in the course of judicial cooperation."[287] The significance of this aspect of the Network is brought into sharper focus by developments in regard to training.

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[283] *Id.* The designated "central contact points" are supposed to meet more often and can exchange information with one another "via a secure limited-access system set up by the Commission." *Judicial Network in Civil and Commercial Matters*, *at* http://europa.eu.int/scadplus/leg/e/lvb/133129.htm (last visited May 5, 2003).

[284] European Judicial Network for Civil and Commercial Matters, *supra* note 232, at art. 3(1)(a).

[285] *Id.* at prmbl., ¶ 9.

[286] European Judicial Network for Civil and Commercial Matters, *supra* note 232, at art. 3(2). The Network is responsible for maintaining a multi-lingual Internet site for European citizens—the "European Judicial Atlas"—which will "provide user-friendly access to information" about the Member States' legal systems in the field of civil and commercial matters, as well as pertinent multilingual forms. 2003 Annual Program, *supra* note 233, at 10. The European Judicial Atlas was launched in March 2003, and is available at http://europa.eu.int/comm/justice_home/ejn/index_en.htm (last visited May 16, 2003). *See generally*, DG-Justice and Home Affairs, *Newsroom* (Mar. 2003), *at* http://europa.eu.int/comm/justice_home/news/intro/news_0303_en.htm (last visited May 16, 2003); Sixth Scoreboard, *supra* note 6, ¶ 3.1.2.

[287] European Judicial Network for Civil and Commercial Matters, *supra* note 232, at art. 10(1)(b). The Decision establishing the Network maps a wide range of information to be gathered within its framework, and covers virtually all aspects of the legal system in Member States, as they pertain to civil and commercial matters. *See, e.g., id.* at art. 15(3)(a)(g) (including "the principles of the legal system and judicial organisation of the Member States" and "organisation and operation of the legal professions" among the information sheets to be prepared by each country).

A related, but separate, movement in Europe involves the establishment of the European Judicial Training Network ("EJTN"). The Member State authorities responsible for judicial training adopted a Charter in Bordeaux in October 2000.[288] The French Government, toward the end of its Presidency of the European Council during the second half of 2000, took the initiative to seek a Council decision establishing a European judicial training network.[289] The EJTN has been up and running since late 2000, even without formal Council action on the French proposal.

The French Judicial Training Initiative articulates a clear vision of the road to EUstitia. It recognizes that the key to promoting judicial cooperation is to foster "mutual understanding and trust"[290] among members of the Member State judiciaries. Indeed, the Initiative goes so far as to claim that judicial training is the "sine qua non for the success of the European judicial area."[291] It further asserts that European judicial training would contribute to the effectiveness of current laws, facilitate the implementation of new measures, and help to "create a *genuine European judicial culture.*"[292] In more concrete terms, the Judicial Training Initiative calls for launching a network of training establishments for Member State judiciaries, in order to "foster consistency and efficiency in the training activities carried out by the members of the judiciary of the Member States."[293] Among the joint activities that should take place within the framework of the EJTN are: language training, the organization of training programs and exchanges involving members of the profession, the dissemination of good practices, and the training of trainers.[294] The French proposal also foresaw an elabo-

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[288] European Judicial Training Network, *About the European Judicial Training Network, at* http://www.ejtn.net/english/a.htm (last visited May 16, 2003). The Bordeaux meeting involved criminal law judges and prosecutors, but the European Judicial Training Network [hereinafter EJTN] that has emerged includes civil law judges as well. Thus, the EJTN does not institutionally separate civil from criminal law judges, as the European Judicial Networks do.

[289] Initiative of the French Republic with a view to Adopting a Council Decision setting up a European Judicial Training Network, 2001 O.J. (C 18/9) [hereinafter Training Network Initiative].

[290] Training Network Initiative, *supra* note 289, at pmbl.; ¶ 2.

[291] *Id.* at pmbl., ¶ 3. The French Training Network Initiative would also apply to prosecutors in those Member States where prosecutors form part of the judiciary. *Id.* ¶ 2(1).

[292] *Id.* at pmbl., ¶¶ 3 - 4 (emphasis added). *But see* EP Resolution on Draft Action Plan, *supra* note 82, ¶ 16 ("The objective of the Union should be to simplify the relationship the citizen and the business sector have with the judicial system and to make the judicial system more effective within an integrated European area . . . *by encouraging the emergence of a common judicial culture.*") (emphasis added).

[293] Training Network Initiative, *supra* note 289, ¶ 3(1). The EJTN aims to "offer members of European judiciaries a programme of training with a genuine European dimension." European Law Academy, *Justice in the World, at* http://www.justiceintheworld.org/n08/oo_era_x_e.htm (last visited May 16, 2003).

[294] Training Network Initiative, *supra* note 289, ¶ 4(2).

rate governance structure for the EJTN.[295] Thus, the Initiative combines a substantive mission with the additional goals of strengthening person-to-person relationships among legal professionals and institutionalizing cooperation within yet another new governance framework.

Even absent a formal Council decision on the Judicial Training Initiative, the EJTN has been busy. It held its first meeting in Stockholm in March 2001, and organized a host of programs since the Bordeaux Charter.[296] The EJTN has sought formal recognition by the Commission, at least in part because this would facilitate the process of obtaining funding.[297] Late in 2002, the European Parliament approved the 2000 French Initiative, subject to a number of amendments that would broaden the Training Network's mandate, and called upon the Council to take a decision in line with its amended version of the French proposal.[298] Meanwhile, the General Assembly of the EJTN amended the 2000 Bordeaux Charter at its meeting in Copenhagen in December 2002, pending action by the Council of the European Union.[299] In June 2003, the Council formally adopted conclusions on the EJTN, but refrained from acting on the French proposal to establish a "more permanent structure for judicial training at the European level."[300]

The new EJTN Charter spells out even more explicitly the vision of EUstitia that was first articulated in the earlier French Initiative. Two

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[295] For example, the Training Network Initiative calls for the creation of a Governing Board, a General Secretariat, and a Scientific Committee. *Id.* ¶¶ 7-9. The Secretary-General would draw up Rules of Procedure to govern the Network. *Id.* ¶ 10.

[296] European Law Academy, *Justice in the World, at* http://www.justiceintheworld.org/n08/oo_era_x_e.htm (last visited May 16, 2003). At its Stockholm meeting (Mar. 29-30, 2001), the EJTN commissioned the European Law Academy ("ERA") in Trier, Germany, to serve as its secretariat. *Id.*

[297] Judicial Studies Committee, *Business Plan For Year Commencing 1 April 2002, at* http://www.judicialstudies-scotland.org.uk/plan.htm (last visited May 16, 2003), at point 3.

[298] European Parliament Legislative Resolution on the Initiative by the French Republic with a view to adopting a Council Decision setting up a European Judicial Training Network, A5-0276/2002 [hereinafter EP Resolution on Training Network]. In March 2003, the European Parliament called for strengthening the EJTN, and indicated its intention to launch a pilot project to promote the training and exchange of judges in Europe, on the basis of the Erasmus model. A5-0039/2003.

[299] The European Judicial Training Network Charter, Dec. 6, 2002, *at* http://www.ejtn.net (last visited May 16, 2003) [hereinafter EJTN Charter], at pmbl., ¶ 10. *See also* EJTN, Consolidated Articles of Association, Feb. 24, 2003, *at* http://www.ejtn.net (last visited May 16, 2003) (establishing the EJTN as a not-for-profit association under Belgian law, having its head office in Brussels).

[300] 2,514th Council Meeting (5-6 June 2003), 9845/03 (Presse 150), at III-V, point 4(g). The Council expressed broad support for the EJTN, but declined to adopt a binding act, preferring instead to request that the Commission report "on the establishment and functioning of the network before the end of 2004." *Id.* at points 3 & 4(g). The Council did urge, however, that the EJTN should "foster the consistency and efficiency of its members' training activities," *id.* at point 4(c), and "reinforce its autonomy and independence and increase its capacity to finance its activities." *Id.* at point 3.

points are particularly relevant to the broader theme of this article. First, the EJTN expressly states its intention to "uphold judicial independence," and thus to "decide itself on its activities and administration."[301] This points to the potential for tension between the Member State legal establishments, on the one hand, and the European Union, on the other, should the Council ultimately decide to recognize (and attempt to regulate) the activities of the EJTN. And second, the new EJTN Charter asserts that: "It is through the organisation of regular training for members of the judiciary that the basis of a *common European judicial culture and identity* can progressively emerge."[302] The EJTN thus reinforces the importance of personal relationships in eroding cultural and other differences among members of the judiciary, and thereby forging a new European identity. This belief, together with the central role of the *acquis communautaire* in preparing new countries for E.U. membership, helps to explain why judicial networks have played an important role in relations between the European Union and its Member States, on the one hand, and the applicant countries in Central and Eastern Europe and the Mediterranean, on the other.[303] The European Union often cooperates with the Council of Europe, and particularly with its Commission on the Efficiency of Justice, in connection with these (and other rule of law) activities.

With regard to legal practitioners, the Council adopted the first Grotius-Civil program providing incentives and exchanges in 1996.[304] This program aims to foster mutual knowledge of legal and judicial systems, and to facilitate cooperation in the area of civil law between Member States. It is "aimed at legal practitioners, and provides funding for training, exchange and work-experience programmes, organisation of meetings, studies and research, and the distribution of information."[305] The 2002 Framework Regu-

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[301] EJTN Charter, *supra* note 299, at pmbl., ¶ 8.

[302] *Id.* at pmbl., ¶ 6 (emphasis added).

[303] The Training Network Initiative, *supra* note 289, at pmbl., ¶ 8, provides that the network should be open to exchanges with bodies responsible for legal training in the candidate countries. The EJTN Charter, *supra* note 299, at pmbl., ¶ 9, reinforces this by noting that "training is an essential means of improving the efficiency of judicial systems and the reinforcing of the rule of law," not just for "candidate countries" but also "for the benefit of" any non-member States.

[304] Joint Action 96/636/JHA of 28 October 1996 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on a programme of incentives and exchanges for legal practitioners ('Grotius'), 1996 O.J. (L 287/3). The program was extended in connection with promoting "judicial cooperation in civil matters" in 2001. Council Regulation 290/2001 of 12 February 2001, 2001 O.J (L 43/1). The Grotius program expired on December 31, 2001. DG-Justice and Home Affairs, *Grotius Programme Civil*, *at* http://europa/eu/int/comm/justice_home/project/grotius_civil_en.htm (last visited May 16, 2003). *See generally* Commission Staff Working Paper: Report to the European Parliament and the Council on the implementation of the Grotius-civil programme 2001, SEC(2002) 320 final.

[305] Economic and Social Committee Opinion of 29 November 2000 on the Proposal for a

lation brought such activities under the same broad umbrella that also covers judges and civil society.[306] With regard to training, the European Parliament has recognized that "[t]raining in national and European judicial and legal systems is needed in all the legal professions involved in ensuring that the administration of justice operates smoothly, in particular European bars and notaries.[307] Yet, at the same time, the European Parliament also acknowledged that the need to provide European training for judges and prosecutors was more urgent than for legal practitioners.[308] Thus, as of September 2003, no concrete plans were discernible what would create for lawyers, notaries or other legal professionals at European level any officially sanctioned counterpart to the European Judicial Network or the European Judicial Training Network.

IV. IMPLICATIONS OF INSTITUTIONALIZING CIVIL JUSTICE IN THE EUROPEAN UNION

The European Union's civil justice project stakes out a "new political field" for Europeanization, which not only empowers Community institutions, but also imposes on them a duty to realize the European judicial area as a "new step in the integration process."[309] While legal experts clearly recognize the significance of developments in this field,[310] their broader implications for European integration have not yet been thoroughly explored. The steps that have been taken (or proposed) thus far to create the "genuine area of justice" are largely procedural in nature, and address themselves to concrete problems arising from the diversity of the Member State legal systems that are bound together into the Union. The European Union is creating a "European Transnational Procedural Law" that constitutes a "distinct ... new procedural type between national and international civil procedure law."[311] This, in itself, is significant, since it represents a hybridized legal form that has emerged in the context of transnational governance. Yet, it would be a mistake to search for EUstitia's significance solely within the narrow confines of private international and procedural law. There is more to the European Union's civil justice project than meets the eye. EUstitia is

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Council Regulation extending the programme of incentives and exchanges for legal practitioners in the area of civil law ("Grotius-civil"), 2001 O.J. (C 116/97), ¶ 1.2.

[306] Framework Regulation, *supra* note 7.

[307] EP Resolution on Training Network, *supra* note 298, at amend. 7.

[308] *Id.*

[309] Burkhard Hess, *The Integrating Effect of European Civil Procedure Law*, 4 EUR. J. L. REFORM 3, at 4-5 (2002).

[310] For example, Biavati, *supra* note 255, at 92, states that "[n]obody could underestimate the importance" of the communitarization of private international law pursuant to Article 65 of the EC Treaty. *See also* Konstantinos Kerameus, *Procedural Implications of Civil Law Unification*, *in* HARTKAMP, EUROPEAN CIVIL CODE, *supra* note 17, at 121.

[311] Hess, *supra* note 309, at 5 (*Binnenmarktprozess*).

intimately linked to some of the most fundamental challenges facing the European Union, and portends further deepening of European integration. My goal here is to propose a framework for understanding these broader implications.

The significance of building the "genuine area of justice" has been obscured by a number of factors. First, some of the new regulations surveyed in Part III cover "old" topics that had been the subject of prior lengthy negotiations, and occasionally even a treaty among E.U. Member States. In some cases, the new measures consist of "reformatted" treaties that appear to be mere technical fixes. Second, since many (if not most) of the measures surveyed in Part III deal with highly technical and complex matters of private international and procedural law, all but the most devoted legal specialists tend to overlook them. Yet, even technocratic tinkering in procedural fields can influence outcomes, spur the development of substantive law (*e.g.*, definitions of private law concepts) under Community law,[312] and alter the sheer availability of justice within the European Union. Finally, and more generally, there is a widespread tendency to underestimate — if not to overlook entirely — the implications of private and procedural law[313] for European governance.[314] Yet, none of these factors should obscure the fact that the European Union itself views civil justice as a vital dimension of European governance[315] and citizenship.[316]

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[312] My argument relies on the insights of new (or neo-) institutional theory, which links litigation to governance, and pays close attention to the role of procedure and rules. The term *governance* has become fashionable for "examining the pattern of rule in the E.U." Simon J. Bulmer, *New Institutionalism and the Governance of the Single European Market*, 5 J. EUR. PUB. POL'Y 365, 366 (1998).

[313] I do not claim that all scholars of European private or comparative law ignore the broader implications of the comparative enterprise, but rather that they have been historically ignored in European legal scholarship. For a contrary example, *see* van Erp, *European Case Law*, *supra* note 70, at text accompanying note 12 ("[T]o fully understand the impact of . . . European integration . . . , it is vital to understand the relationship between European institutional law (the public law side of the institutional process) and European substantive law. This tends to be forgotten by private lawyers, who consider the development of European private law the end result of comparative research aimed at finding underlying principles. Such an approach towards European private law runs the risk of defending a re-created natural law paradigm."). *See also* Berger, *Harmonisation*, *supra* note 267.

[314] The Commission's Governance White Paper does not treat litigation as a mode of governance. European Governance: A White Paper, COM(01)428 final [hereinafter Governance White Paper]. It does, however, call for "simplification of existing rules," *id.* at 23, and call upon "national lawyers and courts" to become "more familiar with Community law, and assume responsibility in ensuring the consistent protection of rights granted by the Treaty and by European legislation." *Id.* at 25.

[315] For general discussions, *see* Paul P. Craig, *Democracy and Rule-Making within the E.U.: An Empirical and Normative Assessment*, *in* CRAIG & HARLOW, LAWMAKING, *supra* note 28, at 33; Andreas Maurer et al., *Justice and Home Affairs and Democracy in the E.U.*, 10 CURRENT POL. & ECON. EUR. 313 (2001); FRITZ SCHARPF, GOVERNING IN EUROPE: EFFECTIVE AND DEMOCRATIC? (1999); Joseph H.H. Weiler, *European Models: Polity, People*

The first step towards assessing the implications of EUstitia is to explore its relationship to the broader role of procedural law in European integration. Second, I summarize new institutional theory as it applies in the context of European integration. And finally, relying on this theoretical basis, I explore the implications of the European Union's civil justice project in terms of governance, legitimacy, citizenship, and identity in the European Union.

A. Procedural Law and European Integration

The communitarization of private international and procedural law has occurred suddenly, with little fanfare. Yet, it is shaking the European house down to its foundations, which are embedded in the national systems of the Member States. Judicial co-operation in civil matters is the backbone of institutional infrastructure that aims to, and is capable of, transforming the rule of law in the European Union. The importance of these measures can best be appreciated by viewing them in their historical context, as well as in the context of the ECJ's rulings in the procedural field.

Historically, the various legal doctrines that comprise private international and procedural law have been firmly lodged in State sovereignty. Like the substantive laws found in each country, private international and procedural laws reflect local culture, legal philosophy, and the trajectory of national history, and tend to vary significantly.[317] A national court normally applies its own rules of jurisdiction, procedure, and choice of law, even though it may apply the substantive norms of another State to a dispute

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and System, *in* CRAIG & HARLOW, LAWMAKING, *supra* note 28, at 3.

[316] The EC Treaty provides that "[e]very person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship." EC Treaty, *supra* note 9, at art. 17(1). Citizens "shall enjoy the rights conferred by" the EC Treaty, "and shall be subject to the duties imposed thereby." *Id.* at art. 17(2). The rights of citizens of the Union include the "right to move and reside freely within the territory of the Member States," *Id.* at 18(1), and the "right to vote and stand as a candidate at municipal elections in the Member State in which he resides." *Id.* at 19(1). Other rights of citizens are spelled out in Part Two of the EC Treaty, Articles 17-22. *See also* Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364/1), at art. 39-46 [hereinafter Charter of Fundamental Rights].

[317] The Commission Communication on Judgments, *supra* note 99, ¶32, notes "the deep-rooted situation of procedural law in national traditions," and explores the diverse procedural rules found in Member States (*e.g.*, those pertaining to enforcement of judgments, availability of provisional and protective measures, and procedures for handling small claims). In contrast, von Hoffman argues that for private international law "a common conceptual framework exists" in Europe (including the United Kingdom)—a *ius commune*—and thus that few impediments stand in the way of creating a common European private international law. Bernd von Hoffman, *supra* note 17, at 15. He argues that this is because European private international law (particularly conflicts theory) was predominantly judge-made, unlike Continental private substantive law, which was "affected by the nationalization of private law by way of codification." *Id.* at 14.

properly before it. Some States have concluded bilateral or multilateral treaties that substitute common rules of private international or procedural law for their local ones. However, such internationally uniform solutions constitute exceptions to the traditional rule, according to which the courts of each State apply local rules to resolve fundamental questions arising in the course of civil litigation. The European Union itself offers some of the most successful examples of such multilateral conventions,[318] despite the fact that the Community deferred from its inception to Member State sovereignty in matters of private international and procedural law.

Community law, despite its preeminently supranational character, is anchored in the E.U. Member States, whose national bureaucracies are charged with the task of implementing EC legislation into their procedures and practices, and whose courts are called upon to enforce Community law alongside national law.[319] This localization contributed much of the legitimacy to the constitutionalization of European law since the 1960s. In this context, the main consequence of the traditional deference to State procedural autonomy is that E.U. Member States are generally "free to organize national civil proceedings" as they wish, even in cases involving norms derived from Community sources.[320] However, this autonomy is constrained by Community law, which requires Member States (including their courts) to ensure the full force and effect of Community law.[321] Member State courts "exercise a *general* competence with respect to Community law disputes," and act "as Community courts of general jurisdiction."[322] The European Court of Justice has steadily eroded the procedural autonomy of Member State courts for handling such cases by articulating a series of

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[318] The leading examples are the Brussels I and Lugano Conventions, *supra* note 44, and the Rome I Convention, *supra* note 21.

[319] "Community law has traditionally left it up to the Member States to determine how their authorities and courts operate, even though they are heavily involved in the process of applying Community law. There is no European law-enforcement area but rather a juxtaposition of national systems each configured as an autonomous body of civil procedure. Their respective bodies of law are the fruit of their respective historical backgrounds and vary widely in consequence." Commission Communication on Judgments, *supra* note 99, at intro., ¶ 3.

[320] Biavati, *supra* note 255, at 87. *See also* John McKendrick, *Modifying Procedural Autonomy: Better Protection for Community Rights*, 8 EUR. REV. PRIVATE L. 565 (2000).

[321] Biavati, *supra* note 255, at 88 (noting that "procedural autonomy does not mean full freedom" in the context of the "living law of the European Union"). Article 10 of the EC Treaty imposes a duty of cooperation on the Member States.

[322] René Barents, *The Rule of Law in the European Union*, *in* EUROPEAN AMBITIONS OF THE NATIONAL JUDICIARY, *supra* note 17, 61, at 66-67. *See also* I. Maher, *National Courts as Community Courts*, 14 LEGAL STUD. 226 (1994). The preliminary reference procedure specified in Article 234 of the EC Treaty promotes the unity of Community law by providing a mechanism by which questions of Community law can be referred by Member State courts to Community courts. *See* Barents, *supra* note 322, at 68-70.

minimum standards for judicial protection in private enforcement actions involving Community norms.[323] The ECJ has tended to refrain from establishing any "positive detailed prescription," and instead has left Member States "free to shape the judicial proceedings within a wide range of solutions."[324] Yet, Member States only enjoy a small and rapidly diminishing space within which to establish their own procedural rules.[325] Academic debates consider whether the European Union is developing a *ius commune* on legal protection.[326] Clearly, procedural and remedial matters pertaining to the enforcement of Community law in Member State courts have become "a battleground for the protection of rights, the effectiveness of EC law and the search for justice."[327] This is the broader context in which the commu-

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[323] The European Court of Justice (ECJ) requires the "full and uniform effect of Community law within the framework of the judicial systems of the member states," and has stated that the "requirement of effective judicial remedies constitutes an inherent principle of Community law." Barents, *supra* note 322, at 70. The ECJ has laid down two fundamental principles: first, the principle of effectiveness (*i.e.,* that there must be an effective remedy for the enforcement of Community law), and second, the principle of non-discrimination (*i.e.,* that Community law may not be treated less favorably than comparable claims based on domestic law). Biavati, *supra* note 255, at 90, argues that the "movement towards harmonization" in this field is "not a triumphal parade: it looks more like a [conquest], house by house, of the fortified town of national self-determination."

While a thorough discussion of this topic is beyond the scope of this article, some leading cases deserve mention. In Case 33/76, Rewe-Zentralfinanz EG v. Landwirtschaftskammer für das Saarland, [1976] ECR 1989, ¶ 5, the ECJ ruled that, absent harmonized rules, a "right conferred by Community law must be exercised before the national courts in accordance with the conditions laid down by national rules," unless those conditions "made it impossible in practice to exercise the rights" established by Community law. In Case 14/83, von Colson and Kamann v. Land Nordrhein-Westfalen, [1984] ECR 1891, ¶ 23, the ECJ expanded its earlier ruling by requiring that the sanction granted by Member State law for violation of a Community norm must "be such as to guarantee real and effective judicial protection" and "must have a real deterrent effect." In Case 213/89, The Queen v. Secretary of State for Transport, ex parte Factortame Ltd., [1990] ECR I-2433, ¶ 20, the ECJ required a Member State court to disapply a rule of national law that "might prevent, even temporarily, Community rules from having full force and effect." In further cases, the ECJ has applied and elaborated these principles in cases involving a variety of different procedural rules, such as those pertaining to time bars, burdens of proof, taking evidence, and remedies. *See generally* Biavati, *supra* note 255, at 88-89, 93; SIONAIDH DOUGLAS-SCOTT, CONSTITUTIONAL LAW OF THE EUROPEAN UNION 312-339 (2002); Claire Kilpatrick, *Turning Remedies Around: A Sectoral Analysis of the Court of Justice, in* THE EUROPEAN COURT OF JUSTICE 143 (Gránne de Búrca & J.H.H. Weiler, eds., 2001) [hereinafter de Búrca & Weiler]; THE FUTURE OF REMEDIES IN EUROPE (Claire Kilpatrick et al. eds., 2000); *Symposium: Towards a Unified Judicial Protection in Europe*, 9 EUR. REV. PUB. L. (Autumn 1997).

[324] Biavati, *supra* note 255, at 95.

[325] *Id.* at 89. In recent cases, the ECJ appears to have backed off somewhat from the principle of effectiveness and yielded some ground to Member State procedural autonomy, but the results are inconclusive. *See* DOUGLAS-SCOTT, *supra* note 323, at 318-321.

[326] *See, e.g.*, Barents, *supra* note 322, at 72-73; DOUGLAS-SCOTT, *supra* note 323, at 336-339).

[327] DOUGLAS-SCOTT, *supra* note 323, at 312.

nitarization of private international law and measures taken (or proposed) to promote "judicial cooperation in civil matters" must be located.

The steady encroachment on Member State procedural autonomy "intrudes on the assumptions and traditions of national law."[328] Yet, disparities in procedural law also "distort the internal market just as much as differences in substantive law,"[329] and thus provide a basis for arguments that harmonization or even unification is necessary.[330] This situation has attracted Community attention throughout the years,[331] but no direct E.U. efforts to achieve common legislative solutions succeeded before Article 65 of the EC Treaty became effective in May 1999. It bears repeating here that, on its face, Article 65 aims mainly at private international law. Still, the measures surveyed in Part III demonstrate the expansive nature of the European Union's civil justice project, and suggest that broader issues of procedural and even substantive law are also encompassed. It is a short step from private international and international civil procedure law to more general aspects of procedure that affect the enforcement of Community law in Member State courts.[332] At the very least, embracing private international law fills an important gap in the European Union's system of civil justice.

The European Union's civil justice project entails a wide variety of direct interventions into Member State courts, which remain a key source of persistent diversity in the European Union's legal order.[333] To this extent,

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[328] *Id.* at 329.

[329] *Id.* at 336.

[330] Biavati, *supra* note 255, at 90, (notes that the doctrine of subsidiarity—far from serving as the "last bastion of national independence and self-determination"—appears to allow the Commission to justify proposals for common legal instruments, since no single Member State acting alone can resolve problems arising from the diversity of procedural laws).

[331] In connection with procedural law, the European Parliament's 1983 Sieglerschmidt report resolved that "the uniform, complete and simultaneous application of Community law in all member states is a fundamental pre-requisite for the existence of a Community governed by the rule of law." DOUGLAS-SCOTT, *supra* note 323, at 336. In 1990, the Commission established a group of experts, known as the Storme Commission, which called for approximation of procedural law, despite the "particularly national characteristics of procedural law." *Id.* For a brief overview of the activities of the Storme Commission, *see* KENNETT, JUDGMENTS, *supra* note 12, at 35-39. *See generally* STORME, *supra* note 199. The work of the Storme Commission has been subject to heavy criticism. *See, e.g.,* Biavati, *supra* note 255, at 90-91; DOUGLAS-SCOTT, *supra* at 323, note 155.

[332] The Commission has already recognized in a number of concrete situations that it may be necessary or desirable for measures adopted pursuant to EC Treaty art. 65 to apply in "purely internal" as well as cross-border cases. For example, the Commission Legal Aid Proposal, *supra* note 223, did not restrict the availability of legal aid to cross-border cases. *See also* Payment Order & Small Claims Green Paper, *supra* note 168, ¶ 1.1.

[333] This statement refers not just to the practical difficulties that the new measures are addressing head-on, but also to substantive legal diversity. Efforts to unify or harmonize substantive law continually falter when it comes to ensuring uniform application and

the "genuine area of justice" is a complementary (not a substitute) strategy for achieving uniformity in the application of Community law.[334] EUstitia appears to signal a (partial) return to private international law and procedural solutions to the challenges posed by legal diversity.

This article is not the first to herald the emergence of a European legal or judicial area or judicial space, or of European civil procedure.[335] Yet, earlier developments were fundamentally different from what Article 65 of the EC Treaty has unleashed. The discussions of procedural developments that emerged in the late 1980s and early 1990s arose out of the prospective expansion of the Brussels I and (then) EC Treaty rules to EFTA countries via the Lugano Convention[336] and the Agreement on the European Economic Area.[337] Contemporary efforts to create a "genuine area of justice" also arise in a context of geographical "widening" of the European Union's legal framework to incorporate new members largely (but not exclusively) from Central and Eastern Europe. Yet, they can be distinguished from earlier developments in a number of respects. First, the current innovations involve extensive "deepening" of legal and policy integration among E.U. Member States, and are not limited to "widening" of the scope of European integration. The European Union's civil justice project is not being driven solely or directly by the prospect of geographical widening. Second, the "genuine area of justice" is more expansive than earlier moves to extend the European Union's regime for private international law. What was formerly "international" procedure is being "domesticated" at the regional level. And third, as elaborated below, EUstitia has more profound implications for

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interpretation. The ECJ and the Court of First Instance are sources of authoritative interpretation of EC laws, but it is increasingly difficult for these two courts alone to handle the task of ensuring uniform interpretation, owing to the ever-expanding scope of the European Union's subject matter competence and the growing volume of litigation in Member State courts that involves substantive norms sourced directly or indirectly (via directives) from Brussels.

[334] Hilson clearly differentiates between European legislation and its subsequent effect within the national legal orders. He uses the term "Europeanization" to refer to the former, and "harmonization" or "convergence" to refer to the latter. Chris Hilson, *The Europeanization of English Administrative Law: Judicial Review and Convergence*, 9 EUR. PUB. L. 125, 127-128 (Mar. 2003).

[335] *See, e.g.,* CIVIL JURISDICTION AND JUDGMENTS IN EUROPE: PROCEEDINGS OF THE COLLOQUIUM ON THE INTERPRETATION OF THE BRUSSELS CONVENTION BY THE COURT OF JUSTICE IN THE CONTEXT OF THE EUROPEAN JUDICIAL AREA (Helen Britton & Sandra Dutczak eds., 1992); EIN INTERNATIONALES ZIVILVERFAHRENSRECHT FÜR GESAMTEUROPA: EUGVÜ, LUGANO-ÜBEREINKOMMEN UND DIE RECHTSENTWICKLUNGEN IN MITTEL- UND OSTEUROPA (Erik Jayme ed., 1992); Lesley Pellis, *All Roads Lead to Brussels: Towards a Uniform European Civil Procedure*, 37 NETH. INT'L L. REV. 372-396 (1990); Antonio Saggio, *The European Judicial Area for Civil and Commercial Matters: The Brussels and Lugano Conventions*, 31 RIVISTA DI DIRITTO EUROPEO 617-637 (1991).

[336] Lugano Convention, *supra* note 44.

[337] Agreement on the European Economic Area, May 2, 1992, 1994 O.J. (L 1) [hereinafter EEA Agreement]. The EEA Agreement entered into effect on Jan. 1, 1994.

European integration than its procedural nature might lead one to expect, not least because it encompasses cultural and professional developments that aim to transform the rule of law in the European Union.

Member State courts have already played a vital role in creating and maintaining the European Union's legal order.[338] EUstitia represents an effort to enhance their role as key sources of integration. In this regard, my analysis supplements the body of literature that analyzes the roles played by Member State courts and the ECJ in constructing the rule of law in Europe.

B. New Institutional Theory and European Integration

The general significance of developments surveyed in Part III transcends the details of the particular enactments and proposals. The currents propelling these developments run silent and deep, yet are gathering into a wave that will wash over the legal systems of current and future Member States. This burgeoning inundation, viewed in conjunction with the persistent efforts to achieve convergence of substantive European legal norms, has the potential — indeed the goal — to lift the boats of national courts and judiciaries away from their domestic moorings and into Europeanized transboundary waters. The European Union's civil justice project aims to raise the European legal water-table, and thus further to erase national boundaries. Efforts to alter the European legal seascape by creating a "true European area of justice" open the way for further dramatic changes.

In practical terms, institutionalizing justice in the European Union will affect the resolution of myriad civil and commercial conflicts in Member State courts, both by changing the rules of the game and by transforming the institutional environment itself. The European Union is out to reconfigure the judicial arenas where the bulk of global, E.U., and national legal claims are pressed by individual and corporate citizens. The long-term consequences of reshaping the terrain for legal contests within current (and prospective) E.U. Member States are sure to outstrip the technocratic (negative integration) goal of overcoming the barriers inherent in "the incompatibility or complexity of the Member States' legal and administrative systems."[339] Indeed, developments aimed at building a "genuine area of

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[338] *See, e.g.*, Karen Alter, *The European Court's Political Power: The Emergence of an Authoritative International Court in the European Union*, 19 W. EUR. POL. 458-487 (1996); KAREN J. ALTER, ESTABLISHING THE SUPREMACY OF EUROPEAN LAW: THE MAKING OF AN INTERNATIONAL RULE OF LAW IN EUROPE (2001); Anne-Marie Burley & Walter Mattli, *Europe before the Court: A Political Theory of Legal Integration*, 47 INT'L ORG. 41-67 (1983); Joseph H.H. Weiler, *The Transformation of Europe*, 100 YALE L. REV. 2403 (1991) [hereinafter Weiler, *The Transformation of Europe*]; Joseph H.H. Weiler, *A Quiet Revolution: The European Court and Its Interlocutors*, 26 COMP. POL. STUD. 510 (1994) [hereinafter Weiler, *A Quiet Revolution*].

[339] Tampere Declaration, *supra* note 6, ¶ 1.8.28.

justice" have the downstream potential to deepen European integration in profound ways.

New institutional theory lends itself readily to the task of theorizing the dynamic nature of European integration over time and across policy domains,[340] and provides a useful framework for exploring the implications of EUstitia. One attractive feature of this theoretical approach is that it transcends the traditional debate between intergovernmentalist and neo-functionalist accounts of European integration. Another advantage is that it facilitates "the reconnection of . . . political and legal aspects" of the integration process,[341] and "helps to bring law back into the study of European integration."[342] New institutionalist scholars seek to explain how the European Union developed from a treaty among sovereign States to a system of supranational governance, mainly by investigating the symbiotic relationship between rules and the construction of the internal market. Institutionalists understand this process as a deeply cultural and social project.[343]

Institutions are often understood as systems of rules (including but not limited to formal law), while institutionalization is the "process by which rules are created, applied, and interpreted by those who live under them."[344] Rules, such as those derived from Community law, both structure (constrain) and enable the activities of economic, social, and political actors.[345] Under contemporary — in contrast to initial, post-war — conditions, European integration is catalyzed by transnational activity. Many institutional-

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[340] My discussion of new institutional theory here is necessarily brief, and does not explore the differences among historical, sociological, and choice theoretic versions of institutionalism. *See generally* Ellen M. Immergut, *The Theoretical Core of the New Institutionalism*, 26 POL. & SOC'Y 5 (1998); THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS (Walter E. Powell & Paul J. DiMaggio eds., 1991); DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE (1990); WAYNE SANDHOLTZ & ALEC STONE SWEET, EUROPEAN INTEGRATION AND SUPRANATIONAL GOVERNANCE (1998) [hereinafter STONE SWEET, EUROPEAN INTEGRATION] ; MARTIN SHAPIRO & ALEC STONE SWEET, ON LAW, POLITICS, AND JUDICIALIZATION (2002); ALEC STONE SWEET, GOVERNING WITH JUDGES: CONSTITUTIONAL POLITICS IN EUROPE (2000) [hereinafter STONE WEET, GOVERNING WITH JUDGES] ; ALEC STONE SWEET, WAYNE SANDHOLTZ & NEIL FLIGSTEIN, THE INSTITUTIONALIZATION OF EUROPE (2001) [hereinafter THE INSTITUTIONALIZATION OF EUROPE].

[341] Bulmer, *supra* note 312, at 366.

[342] BEN ROSAMOND, THEORIES OF EUROPEAN INTEGRATION 118 (2000).

[343] Neil Fligstein, *Markets as Politics: A Political-Cultural Approach to Market Institutions*, 61 AM. SOC. REV. 656 (1996).

[344] Alec Stone Sweet & Wayne Sandholtz, *Integration, Supranational Governance, and the Institutionalization of the European Polity*, *in* THE INSTITUTIONALIZATION OF EUROPE, *supra* note 340, at 16.

[345] In other words, "institutions not only provide opportunities for actors to act . . . , but condition how they actually do behave." Neil Fligstein & Alec Stone Sweet, *Institutionalizing the Treaty of Rome*, *in* THE INSTITUTIONALIZATION OF EUROPE, *supra* note 340, at 30. *See also* ROSAMOND, *supra* note 342, at 116 (institutional theory takes account of the "way in which institutions structure individual and collective policy choices").

ists have ascribed the main causal role in European policy innovation to economic actors, who are presumably driven by the desire to eliminate transaction costs associated with cross-border transactions, and to seek out new opportunities for profitable exchange.[346] However, institutionalist accounts of European integration also recognize the role of other public and private actors who may be involved in cross-border economic, social, or political transactions and communications, and who perceive a need for supranational governance in the form of European standards, rules, and dispute resolution mechanisms.[347] European integration has been defined as the ongoing process by which the "horizontal and vertical linkages between social, economic, and political actors emerge and evolve."[348] Institutionalists thus examine the dynamic relationship between the micro-level of actors (or agents) and the macro-level of rules (or structures).

The logic of institutionalization consists of two elements: first, demand for rules, and second, feedback loops. Demand, as noted above, is usually viewed as stemming from the micro-level of public or private actors.[349] As transnational interactions increase "in any specific domain . . . , so do the costs, for governments, of maintaining disparate national rules. As these costs rise, so do incentives for governments to adjust their policy positions in ways that favor the expansion of supranational governance."[350] Thus, for example, economic actors may seek to ensure predictability or economic advantage by seeking favorable rules at some available site of governance. In the institutionalist account, such activity is inevitable in rule-making, since actors eventually run up against the limits of an existing rule structure, either because the meaning of a rule is unclear or contested, or because the existing rules do not provide guidance for new kinds of

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[346] *See, e.g.,* Fligstein & Stone Sweet, *supra* note 345, at 33-34; Stone Sweet & Sandholtz, *supra* note 344, at 2. The central role of business interests has often been cited as the reason for the predominately neo-liberal character of European integration, since institution building in and around markets tends to reflect the interests of the most powerful actors. Fligstein & Stone Sweet, *supra* at 32-33.

[347] Stone Sweet & Sandholtz, *supra* note 344, at 11. Indeed, institutionalism considers the roles played by any and all institutional entrepreneurs who enlist the aid of powerful organized interests, both within the State and beyond it, to create new sets of social arrangements.

[348] *Id.* at 9.

[349] Some scholars challenge the institutionalist argument that demand comes from transnational activity. For example, Schepel and Blankenburg note that "the penetration of Community law in national legal and economic systems increasingly means that Community law will be invoked for purely internal matters. It also means that an increasing proportion concerns civil litigation and even criminal prosecution, and not just administrative litigation."). Harm Schepel & Erhard Blankenburg, *Mobilizing the European Court of Justice, in* DE BÚRCA & WEILER, *supra* note 323, at 9, 31.

[350] Stone Sweet & Sandholtz, *supra* note 344, at 4.

transactions or behaviors.[351] When this happens, actors turn to legislators, courts, or administrators in their quest for interpretation of existing rules or creation of new ones. The evolving rule structures henceforth shape actors' expectations and guide their behavior in the affected domains. Thus, new (or newly interpreted) rules establish the context for subsequent interactions and thereby influence how actors define their interests, as well as how they perceive their options and the mechanisms available for dispute resolution.

In the E.U. context, institutionalists claim that once European rules have been fixed in a given domain, they "generate a self-sustaining dynamic, that leads to the gradual deepening of integration in that sector" through a feedback process.[352] For example, economic actors ratchet up the demand for rules that foster conditions conducive to more market growth, which in turn increases further demand for rules. Thus, spurred on by their success, such actors continue helping to build institutional capacity, which in turn offers the prospect of further success. New rules become entrenched, until such time as they are modified or replaced in a subsequent round of rule-making. In this way, transnational exchange and the European legal system can be seen as "developing along mutually reinforcing paths."[353] This logic of institutionalization in the E.U. context is not limited to transnational economic activity, but applies to social and political interaction as well.

Before exploring the relationship between new institutional theory and the European Union's civil justice project, a brief word of caution is necessary. Institutionalist analyses of European integration appear to smack of the *a priori* reasoning of neo-functionalism. It is too easy to point to past instances of successful integration as proof that this route will remain viable in the future. Yet, it would be a mistake to dismiss new institutional theory for this reason. Whether or not institutionalization works in the manner predicted is an empirical question, and empirical analyses have already provided some support for the hypotheses outlined above.[354] Further research

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[351] *Id.* at 17-19.

[352] *Id.* at 5.

[353] Fligstein & Stone Sweet, *supra* note 345, at 36.

[354] A number of investigators have sought to test their hypotheses about the relationships among various dimensions of institutionalization. One study demonstrated that increasing trade led to more cases being brought to the ECJ. Alec Stone Sweet & Thomas Brunell, *Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community*, 92 AM. POL. SCI. REV. 63 (1998). Another study confirmed that supranational governance arises where there are cross-border activities — regardless of whether the EC Treaty explicitly confers competence in that field — by demonstrating that pressure group and legislative activity expanded during the 1970s in precisely those policy domains where EC competence was later expanded in the 1980s by revisions to the Treaty of Rome. Neil Fligstein & Jason McNichol, *The Institutional Terrain of the European Union*, *in* THE INSTITUTIONALIZATION OF EUROPE, *supra* note 340, at 59. A third study used relatively comprehensive quantitative measures of integration to demonstrate the reciprocal ef-

in this vein is needed if we wish to draw confident conclusions about the ongoing relationship between law and European integration.

C. EUstitia and European Integration

New institutional theory is an apt tool for exploring the implications of the European Union's civil justice project for European integration, owing to its concern with the interactions among actors and institutions (rules) in the process of constructing governance. By "governance" I mean the "authority to make, interpret, and enforce rules in a given social setting."[355] The particular settings that matter here are the courts of E.U. Member States. My analysis of EUstitia provides an occasion for expanding the discussion of European governance to include the activities of Member State courts, and to press beyond their roles as mere implementers or enforcers of Community law, or interlocutors for the ECJ. In this sense, my approach is consistent with the polyarchical vision of the judiciary as "not . . . standing in an aloof place in the political order, . . . as opposed to society, but rather as part of a continuum on which other governance arrangements are also placed."[356] In this view, Member State courts are "glocal" sites where transnational governance is produced. Thus, I argue that the European Union's civil justice project creates the conditions for Member State courts to play an increasing role in constituting legitimate governance in Europe, and in constructing European identity and citizenship. EUstitia occupies the middle ground between macro-constitutional approaches to European integration that tend to focus on the role of the Luxembourg (and even Strasbourg) courts, the constitutionalization of the E.U. treaties, and the efforts to draft a constitution for the European Union, on the one hand, and the

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fects between market-making and rule-making. Fligstein & Stone Sweet, *supra* note 345.

[355] Alec Stone Sweet, et al., *The Institutionalization of European Space*, *in* THE INSTITUTIONALIZATION OF EUROPE, *supra* note 340, at 7. However, the term "governance" carries a number of different meanings. The Governance White Paper, *supra* note 314, at 8 n.1, uses the term in the familiar sense of "good governance," which refers to the "rules, processes and behaviour that affect the way in which powers are exercised at European level, particularly as regards openness, participation, accountability, effectiveness and coherence." Yet scholars of European integration are more likely to use the term to suggest the erosion of the distinction between governmental and non-governmental in the context of collective decision-making. The distinction between public and private is collapsed into the notion of "governance without government." Some embrace it, others deplore it, but most would agree that the term refers to a multi-level and centerless, decentered or polycentric "world in which both constitutionalism and national governments are being bypassed by structures of global governance: a turmoil of '*gouvernance sans frontières*'." Carol Harlow, Deconstructing Governance (Apr. 2003) (unpublished manuscript, on file with author). Harlow, an administrative law scholar, explicitly rejects the suggestion that the label "governance" should be applied to the activities of courts. *Id.* at 13 ("This is not the same thing as the slippage from government to governance.").

[356] Oliver Gerstenberg, *Expanding the Constitution Beyond the Court: The Case of Euro-Constitutionalism*, 8 EUR. L. REV. 172, 184 (2002).

movement towards new forms of non-state governance and soft law,[357] on the other.

The European Union's civil justice project conceptualizes Member State courts as increasingly important players in the process of European integration. Unlike early neo-functional accounts, which emphasized the role of Brussels and new supranational institutions as the locus of transnational governance,[358] new institutional theory broadens our range of vision to take in virtually all arenas where actors interact and produce collective governance. Fligstein insists that political processes should not be studied in "isolation from the larger social and economic processes in which they are embedded."[359] Accordingly, he stresses the importance of emerging European social arenas, in which "firms, governments, and organizations comprised of citizens from European societies construct new local orders."[360] A distinction has crystallized between institutionalized European *social space*, defined as "a system of rules defining the actors and their appropriate interactions," and European *political space*, which refers to "those social spaces in which the actors claim the right to make authoritative rules for all social spaces."[361] In this view, Member State courts can be seen as spaces in which social, economic, and political forces interact, both in the pursuit of private justice, and in the process of developing rules that may govern other social spaces. Integration emerges from the dynamic process of judicialization, which links the micro-level strategic behavior of individual actors to the development of the macro-level normative structure.[362]

Member State courts can produce policy innovation and change, while simultaneously exercising their role as enforcers of Community law. Implementation behavior "has strong law-making components," insofar as "*interpretation* of law necessarily involves a certain amount of making law."[363] There is no "sharp separation between law-making, law-application, and compliance with law."[364] Judges in Member States, as "suppliers of reasons," have "jurisgenerative responsibility"[365] as participants in the dialogic

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[357] *See, e.g.*, Sabrina Regent, *The Open Method of Coordination: A New Supranational Form of Governance?*, 9 EUROPEAN L.J. 190 (2003); Joanne Scott & David M. Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, 8 EUR. L.J. 1 (2002).

[358] *See* ERNST B. HAAS, THE UNITING OF EUROPE: POLITICAL, SOCIAL, AND ECONOMIC FORCES 1950-1957 (1958) (analyzing the European Coal and Steel Community).

[359] Neil Fligstein, *The Process of Europeanization*, 1 POLITIQUE EUROPÉENNE 25, 26 (2000).

[360] *Id.* at 28.

[361] Stone Sweet, et al., *supra* note 355, at 13.

[362] STONE SWEET, *supra* note 340, at 196.

[363] Martin Shapiro, *The Institutionalization of European Administrative Space*, *in* THE INSTITUTIONALIZATION OF EUROPE, *supra* note 340, at 95.

[364] Gerstenberg, *supra* note 356, at 190.

[365] *Id.* at 184. Gerstenberg analyzes comitology in the European legislative process. My

process through which norms are generated. Member State courts, like the European Union's Luxembourg-based courts, do "not merely clarify the meaning of the law" and remit "parties to 'private' ordering of their affairs."[366] Rather, the "principles and procedures developed by parties to a conflict themselves take on precedential weight in the course of repeated rounds of interpretive conflict and contestation."[367] Thus, through "principle-guided 'deliberative' problem solving," Member State courts can participate in "an expanding pluralist discourse in which learning takes place."[368] Through this "practice of radical constructivism," Member State courts can "generate [a] chain of precedent" in dialogue with the European Union's Luxembourg-based courts.[369]

There is a historical nexus between litigation and European integration.[370] The European Union's civil justice project enhances the capacity of Member State courts to participate in generating European governance through the process of judicialization. Private dispute resolution enables social and economic actors to play a role in the development of European norms, and thus to participate (albeit indirectly) in European governance.[371] EUstitia can be expected to establish conditions that will encourage further litigation-driven integration.[372] For example, legal aid and more accessible

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work extends his analytical framework to a different context.

[366] *Id.* at 190.

[367] *Id.* Gerstenberg explains that this process occurs "through both pragmatic necessity of building on experience, gained through collaboration, and a shared understanding that precedent-building is a self-correcting, 'rolling' enterprise." *Id.* He characterizes the task of governance as "writing the protocol of jurisgenerative processes," and uses the term ""co-originality" to describe the symbiotic relationship between constitutionalism and governance. *Id. See also* Biavati, *supra* note 255, at 97 (indicating that "after two centuries of law enacted by acts and written legislation, the pendulum of history is probably going back to law made, above all, by judges. . . . [C]ase law is a source of living law, not only in the United States or in Great Britain, but also . . . in the E.c. [sic] system and somehow in the continental European countries too.").

[368] Gerstenberg, *supra* note 356, at 191.

[369] *Id.*

[370] *See, e.g.,* Rachel A. Cichowski, *Judicial Rulemaking and the Institutionalization of European Union Sex Equality Policy,* in THE INSTITUTIONALIZATION OF EUROPE, *supra* note 340, at 113; STONE SWEET, *supra* note 340.

[371] Alec Stone Sweet & James A. Caporaso, *From Free Trade to Supranational Polity: The European Court and Integration*, THE INSTITUTIONALIZATION OF EUROPE, *supra* note 340, at 92 (European integration is produced by "transnational interactions" involving "three factors: transnational exchange, triadic dispute resolution, and the production of legal rules."). *See also* Martin Shapiro, *Administrative Law Unbounded*, 8 IND. J. GLOBAL LEGAL STUD. 369, 369 (2001) ("[N]ow everyone, or at least potentially everyone, is also seen as a participant in the collective decision-making process. Today, elected and nonelected government officers, nongovernmental organizations, political parties, interest groups, policy entrepreneurs, 'epistemic communities,' and 'networks' are all relevant actors in the decision-making processes that produce government action.").

[372] For a discussion of developments pertaining to individual standing to challenge Community legal measures, *see* Filip Ragolle, *Access to Justice for Private Applicants in the*

Member State courts will allow a wider range of litigants to mobilize their rights under Community law.[373] Since the arena of civil justice is a public forum where values as well as norms are in play, enhanced access to civil justice may deepen integration by bringing a greater diversity of values into play.

Moreover, Member State courts operating under increasingly aligned procedural (and possibly even substantive) rules, and in an increasingly explicit European legal culture, may be further co-opted to the task of European integration. By fostering European judicial networks and judicial culture, the European Union's civil justice project not only moves the European Union towards an increasingly unified system for the administration of justice, but also lays the foundation for producing profound changes in Community law. The call to "create a genuine European judicial culture"[374] points to a strategy that would supplement the pragmatic and mundane task of eliminating obstacles through judicial cooperation, by smoothing the rough edges of cultural difference. Efforts to foster a more Europeanized legal consciousness among Member State judiciaries and legal professionals, if successful, will create conditions favorable for the *ius commune* (or European common law)[375] in substantive and other areas of Community law. Judges and lawyers may become more prone to consider European common law as a source of legal norms. In this way, the European Union's civil justice project has the potential to erode the legal terrain of the Member States, and generate fresh soil in which a common European legal order might flourish. By transforming Member State courts into European common ground,[376] EUstitia may help the *ius commune* and

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Community Legal Order: Recent (R)evolutions, 28 EUR. L. REV. 90 (2003).

[373] For a study of patterns of mobilizing the ECJ, *see* Schepel & Blankenburg, *supra* note 349.

[374] Training Network Initiative, *supra* note 289, pmbl., ¶ 4.

[375] For general references on *ius commune*, *see supra* note 17. This term is often encountered in connection with discussions of the development or discovery of common European principles of tort, contract, or property law, but can also be found in discussions of procedural and private international law. In principle, it could be used in connection with any legal domain. In connection with tort law, *see* Christian von Bar, *Vicarious Liability*, *in* HARTKAMP, EUROPEAN CIVIL CODE, *supra* note 17, at 431; David Howarth, *The General Conditions of Unlawfulness*, *in* HARTKAMP, *id.* at 397; WALTER VAN GERVEN, ET AL., CASES, MATERIALS AND TEXT ON NATIONAL, SUPRANATIONAL AND INTERNATIONAL TORT LAW (2000); Ulrich Magnus, *European Perspectives on Tort Liability*, 1995 EUR. REV. PRIVATE L. 427. In connection with contract law, *see* Jürgen Basedow, *A Common Contract Law for the Common Market*, 1996 COMMON MARKET L. REV. 1169; HARTKAMP, *supra* note 17; Ewoud Hondius, *European Contract Law: The Contribution of the Dutch*, *in* EUROPÄISCHES VERTRAGSRECHT 45 (Hans-Leo Weyers ed., 1997); HEIN KÖTZ, EUROPEAN CONTRACT LAW (1997); PRINCIPLES OF EUROPEAN CONTRACT LAW (Ole Lando & Hugh Beale eds., 2000); Reinhard Zimmerman, *Konturen eines europäischen Vertragsrechts*, 1995 JURISTISCHE ZEITUNG 477. In connection with property law, *see* Hans G. Wehrens, *Real Security regarding Immovable Objects: Reflections on a Euro-Mortgage*, *in* HARTKAMP, *supra* at 3.

[376] I am indebted to Sjef van Erp for this notion.

European fundamental rights[377] to take root.

Institutionalized justice in the European Union is not only the bedrock upon which the internal market is established, but also a key strategy for legitimating European governance and constituting the core of European citizenship. The European Union's civil justice project reflects the European Union's growing commitment to orient itself toward its citizens. Although not explicitly recognized as such, EUstitia is a governance initiative insofar as it aims to "connect Europe with its citizens" and to get "more people and organizations involved in shaping and delivering E.U. policy"[378] by opening up a forum close to home. Civil litigation in Member State courts provides an opportunity for citizens to interact with the European legal order, as well as for people and organizations to play an active role in developing Community law and policy. As European society becomes increasingly juridified, "judges will be called upon more and more to uphold not just the law, but moral standards, legitimate expectations, fairness."[379] As this happens, the social interaction in Member State courts will both reflect and affect the identity of European citizens and firms, which new institutional theory predicts will feed back into the political process. EUstitia aims at nothing less than transforming the judicial arenas where European citizens' claims are resolved, and where European identity and citizenship can be constructed.[380]

Efforts to create the "genuine area of justice" are anchored in, but ultimately transcend the traditional *negative* integration logic that emphasizes the need to reduce barriers to the free movement of persons. European policy papers and other discussions of EUstitia are filled with familiar market

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[377] The Presidents of the European Parliament, the Council and the Commission signed and proclaimed the Charter of Fundamental Rights, *supra* note 316, on behalf of their institutions in Nice on December 7, 2000. The Charter has not yet been formally incorporated into the Community's legal structure, but this does not necessarily prevent judges from drawing upon the norms contained in the Charter in an actual case.

[378] Governance White Paper, *supra* note 314, at 3. The Governance White Paper recognizes that "despite [the European Union's] achievements, many Europeans feel alienated from the Union's work," and "no longer trust the complex system to deliver what they want." *Id.* at 8. The principal concern of the Governance White Paper is with improving the regulatory environment, though it also attends to legal matters, such as improving implementation and the quality of legislation. For example, the Governance White Paper urges that "national lawyers and courts should be made more familiar with Community law, and assume responsibility in ensuring the consistent protection of rights granted by the Treaty and by European legislation." *Id.* at 25. *See also* Contract Action Plan, *supra* note 269, ¶¶ 71-72.

[379] Schepel & Blankenburg, *supra* note 349, at 9. Those authors argue that "[g]rowing distrust of government and administration has elevated the judge into the position of 'a kind of anti-bureaucratic hero.'" *Id.* at 10, (quoting Martin Shapiro, *The Globalization of Law*, 1 IND. J. GLOBAL LEGAL STUD. 37 (1993)).

[380] Schepel and Blankenburg, *supra* note 349, at 13 (analyzing the premises by which the "people's Europe" is being constructed through law).

rhetoric, which provides the necessary formal justification for many measures. Yet, the real vision driving EUstitia is a set of amorphous, but fundamentally *positive* integration goals. The European Union's civil justice project is designed to do much more than simply facilitate trade and establish the internal market[381] by ensuring free movement of persons. Rather, it aims to achieve justice, fairness, and equality for their own sake. The "genuine area of justice" is being designed to ensure to "each European citizen security for themselves and their property and the respect of individual freedoms and fundamental rights."[382] Reconfiguring the terrain for legal contests (particularly rights claims) in Member State courts will open up local spaces for actors to pursue their preferences for global, E.U., or national policies and principles. Paradoxically, achieving the "top-down" positive goals of equality, fairness, and access to justice will facilitate, if not actually produce further "bottom-up" integration through litigation, insofar as the affected Member State legal arenas become increasingly receptive to claims based on explicit (or implicit) European norms.

Even the humblest technocratic procedural innovation under the EUstitia banner is linked to the European Union's problematic legitimacy.[383] The European Union is a complex and rapidly evolving trans-supranational politico-legal system that challenges the traditional notion of legitimacy based on representative democratic institutions. To begin with, the European Union is "not a constitutionally constructed polity," but has been "assembled piecemeal" over the course of nearly five decades, upon the substrate of preexisting liberal democratic states.[384] Representative democracy is weak—albeit existent—at the E.U. level. Most democratic concerns in the European context have been relegated to the level of the member states that comprise the Union.[385] However, the European legislative process involves

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[381] "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of this Treaty." EC Treaty, *supra* note 9, at art. 14(2).

[382] Declaration of Avignon, *supra* note 110.

[383] The "condition of 'forced reflection' about the justification for political authority could be said to be a chronic one for the European Union; the question of its legitimacy is continuously present." DAVID BEETHAM & CHRISTOPHER LORD, LEGITIMACY AND THE E.U. 124 (1998). *See also* CHRISTIAN JOERGES, GOOD GOVERNANCE IN EUROPE'S INTEGRATED MARKET (2002); David Kennedy, *The Forgotten Politics of International Governance*, 2 EUR. HUM. RTS. L. REV. 117 (2001); Peter L. Lindseth, *Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community*, 99 COLUM. L. REV. 628 (1999); Peter L. Lindseth, *'Weak' Constitutionalism? Reflections on Comitology and Transnational Governance in the European Union*, 21 OXFORD J. LEGAL STUD. 145 (2001); SCHARPF, *supra* note 315.

[384] LIESBET HOOGHE & GARY MARKS, MULTI-LEVEL GOVERNANCE AND EUROPEAN INTEGRATION 40 (2001).

[385] In fact, most E.U. institutions are "based on some form of representation." *Id.* at 40. However, neither the Commission nor the Luxembourg-based E.U. courts has any direct rep-

a small measure of direct representation of E.U. citizens via the European Parliament, and a large measure of indirect representation in the Council of Ministers via the elected governments of the Member States.[386] Any analysis of legitimacy in the European Union must examine the "process of interaction" between the levels of Member State and E.U. governance.[387]

The European Union's weak representative dimension has prompted persistent calls for direct democratic accountability, as Brussels has gradually assumed competency over tasks that were previously performed by the Member States themselves. Concerns about its own legitimacy led the European Union to call for reform of "how the E.U. uses the powers given by its citizens."[388] The reform proposals aim to overcome this "disenchantment" by rendering policy making "more inclusive and accountable," and by "connecting the E.U. more closely to its citizens."[389] The Governance White Paper leans toward a participatory vision of democracy that envisions an increasing role for civil society.[390] It emphasizes regulatory processes as sites of new governance, but pays little heed to the role of courts, beyond their traditional role as implementers of Community law.

Beetham identifies three dimensions of legitimacy,[391] of which one—*legitimation*—is useful in discussing the European Union's civil justice project.[392] "Legitimation" asks whether there have been acts of consent by

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resentational legitimacy. *Id.* at 41.

[386] The Commission refers to the phenomenon of indirect representation as the European Union's "double democratic mandate." Governance White Paper, *supra* note 314, at 8. Integration has strengthened direct representation at the E.U. level over time, by gradually enhancing the powers of the European Parliament, but has paradoxically "weakened democracy in Europe as a whole." HOOGHE & MARKS, *supra* note 384, at 42.

[387] BEETHAM & LORD, *supra* note 383, at 3.

[388] Governance White Paper, *supra* note 314, at 8.

[389] *Id.*

[390] Harlow, *supra* note 355, at 5. *See also* Kenneth Armstrong, *Rediscovering Civil Society: The European Union and the White Paper on Governance*, 8 EUR. L.J. 102 (2002).

[391] DAVID BEETHAM, THE LEGITIMATION OF POWER 15-20 (1991). The author claims that these three "constitute basic criteria for legitimacy in all historical societies, past and present." *Id.* at 21. BEETHAM & LORD, *supra* note 383, confirm the view that the "overall structure of legitimacy . . . is a universal one," *id.* at 5, but question whether the European Union's legitimacy "should be understood according to the same criteria as those applicable to political authority in the nation state, or quite differently." *Id.* at 2-3. Ultimately, they argue that the "criteria of liberal-democratic legitimacy are indeed appropriate for the E.U. level, although they may be insufficient on their own, and the institutional forms which embody them may differ from those of individual states." *Id.* at 5.

[392] The other two dimensions of legitimacy are *legality* (or *legal validity*) and *normative justifiability*. *Legality* asks whether power has been acquired and exercised according to established rules. BEETHAM, *supra* note 391, at 16. The distinctive liberal-democratic mode of legality is the constitutional rule of law. BEETHAM & LORD, *supra* note 383, at 9. *Normative justifiability* asks whether the rules governing a power relationship can be justified in terms of beliefs and values that are current in a given society and shared by both dominant and subordinate. BEETHAM, *supra* note 391, at 17-18.

subordinates or recognition by other authorities to the exercise of power.[393] Dehousse argues more broadly that an "input-based" approach to legitimacy is needed in the E.U., where people "want a say in policy choices that affect their destiny."[394] These are viable starting points for considering the European Union's current attempt to use judicial enforcement of rights claims as a way to bind citizens to "their" Union.

There appears to be a misfit between the effort to anchor legitimacy in civil litigation, on the one hand, and the traditional role of courts in most E.U. Member States, on the other. This is particularly true in civil law countries that have historically drawn a strict line between law and politics. How, if at all, might the European Union's civil justice project help to close the gap and render the European Union more legitimate? This is ultimately an empirical question, but one that invites further discussion.

There are a number reasons to think that EUstitia might well enhance the European Union's legitimacy in the eyes of European citizens. One argument in favor is that Member State courts are the ideal, indeed the "natural" sites for more fully integrating national and European legality, and bringing the benefits of citizenship home to roost.[395] Elections to the European Parliament happen once every five years, but civil litigation can occur whenever the need arises. In this sense, civil justice can serve as a responsive site to social demands.[396] Moreover, Member State courts are not perceived as alien by citizens—who often take a different view of Community law—since they are local and inextricably linked to national history and culture. In this sense, local courts are a good choice for the European Union's "glocalization" strategy. Finally, this strategy is consonant with the attempt to substitute "participatory" for "representative" democracy, as evidenced by the Governance White Paper.

Democracy, according to Dahrendorf, is an "institutional arrangement

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[393] BEETHAM & LORD, *supra* note 383, at 8. In liberal democracy, consent is largely "subsumed in the *authorisation* of government through the electoral process." *Id.*

[394] Renaud Dehousse, *The Legitimacy of European Governance: The Need for a Process-Based Approach*, CAHIERS EUROPÉENS DE SCIENCES PO #124 (2001). He criticizes the "mechanical, transmission belt vision of public policy, in which voters control the Parliament, Parliament controls the executive, and the latter is supposed to keep the bureaucracy under control," since each "link of the chain develops interests of its own and may be captured by specific interests." *Id*, at 24-25. "Moreover, the sovereign which is to be represented, the people, is far from being an homogenous creature. . . . These structural problems, which undermine the functioning of representative democracy at national level, are magnified at European level. . . . The longer the command chain gets, the looser the ties between rulers and ruled." *Id.* at 25.

[395] This is consonant with Dehousse's suggestion that "national ties may prove to be more important than the supranational logic of parliamentary democracy" in a system like the European Union, "where primary allegiances remain firmly rooted at the national level." Dehousse, *supra* note 394, at 19.

[396] Dehousse calls for the "emergence of a truly pan-European public sphere." *Id.* at 20.

that regulates underlying sociopolitical conflicts peacefully."[397] Given that premise, he argues that traditional "democratic institutions are most effective when the underlying conflicts concern the extension of basic civil and political rights and the social conditions that lend substance to these rights. . . . Once citizenship rights have become general, conflicts become more diffuse, . . . democracy works less well, [and] representative government is no longer as compelling a proposition as it once was. Instead, a search for new institutional forms to express conflicts of interest has begun."[398] Dehousse also calls for "new paradigms" for assessing the legitimacy of European governance, and argues that greater weight should be placed on the "post-legislative phase."[399] If we accept these arguments that different modes of legitimation may be appropriate in different historical and political settings, then it is at least conceivable that civil litigation—governing by judges—might serve as a partial substitute for representative democracy in the European Union.

Yet, there are as many reasons to doubt that civil justice and rights-based litigation can serve to ground legitimacy in the European Union. Numerous difficulties lie along this road. First, judges (at least in civil law countries) are unlikely agents for enhancing legitimacy, since they tend to be historically and culturally constrained against acting politically.[400] Second, there is some evidence that legal systems have been losing (rather than gaining) public confidence in recent decades,[401] though this is contested and

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[397] Ralf Dahrendorf, *Afterword, in* DISAFFECTED DEMOCRACIES: WHAT'S TROUBLING THE TRILATERAL COUNTRIES? 311 (Susan J. Pharr & Robert D. Putnam, eds. 2000) [hereinafter DISAFFECTED DEMOCRACIES].

[398] *Id.*

[399] Dehousse, *supra* note 394, at 25-26. "Additional techniques ought . . . to be considered if the legitimacy of European governance is to be put on firmer ground." *Id.* at 20. "Representative democracy has become the focus of widespread criticism in Western Europe, where it is often perceived as a system that enables a cartel of elites to exert tight control over the policy agenda. Arguably, the gap between the rulers and the ruled may be even wider at the Community level." *Id.* at 18. "Moreover, changes in the scale of the polity unavoidably affect the way in which a democratic political system must respond to the preferences of its citizens: new paradigms are needed." *Id.* at 25. Though Dehousse, like Gerstenberg and Harlow, is primarily concerned with regulatory policies, his call (*id.*) for a "*process-oriented* [approach] in which interested citizens would be given a say in the post-legislative . . . phase" is relevant to the European Union's civil justice project.

[400] *See, e.g*, Lisa Hilbink, Judges for Democracy? An Initial Inquiry into Judicial Activism in Post-Authoritarian Italy and Spain 1 (June 2003) (unpublished manuscript, on file with author). Hilbink shows that this tendency does not necessarily prevent judicial activism, but rather makes it more difficult.

[401] *See, e.g.*, Kenneth Newton & Pippa Norris, *Confidence in Public Institutions: Faith, Culture, or Performance?*, DISAFFECTED DEMOCRACIES, *supra* note 397, at 52, 55 (World Values Survey for 1980-84 and 1990-93 show a 6% decline in public confidence in the "legal system"). This evidence is wholly insufficient to substantiate a claim, but at least suggests one type of evidence that is available and should be sought out.

needs further study.[402] Third, it cannot be taken for granted that rising legalism will produce more satisfied citizens.[403] There is ample sociological literature to suggest that litigation is not the level playing field it might appear to be.[404] This literature dovetails with the critique of "governance without government," *i.e.,* that privatizing public functions serves to hide lurking structural inequalities.

Whether EUstitia will actually enhance the European Union's legitimacy must remain an open question. What we know now is that the European Union's civil justice project aims to give European citizens a greater personal rights-based stake in Europe, and to draw them into the process of articulating norms in Member State courts. The goal is to "gradually 'bootstrap' [the European Union] to legitimacy" by generating an increasingly common chain of precedent,[405] and to build loyalty to the increasingly proceduralized Europeanized legal order.[406]

The European Union's civil justice project is expressly linked to the overarching goals of constituting of European identity and citizenship. As the European Union's legal order emerges and solidifies, it constitutes European "society by establishing bases for interaction and access points for influencing policy."[407] Participation—whether in litigation, or in regulatory or political processes—generates a sense of belonging and authorship, and can have an "identity-forging constructivist dimension."[408] "European identity is never far from the institutionalized forms taken by the European Union, since '[i]nstitution and identity are in constant historical reciprocal determination.'"[409] Whereas Haas emphasized the key role of transferring

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[402] *See, e.g.,* Dahrendorf, *supra* note 397, at 312 (suggesting that "ostensibly nonpolitical institutions" have become "more acceptable to many citizens than explicitly political, especially party-political, ones. There is consequently much support for . . . increasing the decision-making role of the judiciary.").

[403] Indeed, legalistic strategies can backfire and lead to even greater alienation. ROBERT A. KAGAN & LEE AXELRAD, REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS AND AMERICAN ADVERSARIAL LEGALISM (2000). *See also* ROBERT A. KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2001).

[404] *See, e.g.,* Marc Galanter, *Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

[405] Gerstenberg, *supra* note 356, at 191.

[406] *See, e.g.,* Julia Black, *Proceduralizing Regulation: Part I*, 20 OXFORD J. LEGAL STUD. 597 (2000); Julia Black, *Proceduralizing Regulation: Part II*, 21 OXFORD J. LEGAL STUD. 33 (2001); Dehousse, *supra* note 394; Gerstenberg, *supra* note 356; Karl-Heinz Ladeur, *Proceduralization and its Use in Post-Modern Legal Theory*, European University Institute Economics Department # 96/5, *at* http://ideas.repec.org/p/fth/euroin/96-5.htm (last visited May 8, 2003).

[407] Stone Sweet & Sandholtz, *supra* note 344, at 11.

[408] Gerstenberg, *supra* note 356, at 183.

[409] J. Peter Burgess, *What's so European about the European Union? Legitimacy between Institution and Identity*, 5 EUR. J. OF SOC. THEORY 467, 480 (2002).

actors' loyalty from nation-states to E.U. institutions,[410] new institutionalists take the broader view that increasing social interaction will affect the identity of European citizens and firms, which in turn feeds back into the political process.[411] EUstitia is nothing less than a project to render E.U. citizenship relevant by making the benefits of European integration "more tangible to the populations of the member states."[412] In this sense, the European Union's civil justice project is a procedural means towards a profoundly substantive end. The EUstitia ideal remains distant, yet serves as a beacon that lights the path along which the European Union is gradually transcending its original identity as a mere market, and serving more fully the European citizens that are its *raison d'etre*.

My goal in this article has been to consider each proposal made under the banner of EUstitia as evidence of current thinking about how to further the project of European integration, and to speculate on how these developments might affect the rule of law, rather than to praise, critique, or predict particular outcomes. If nothing else, the Amsterdam Treaty has opened a window through which a new and distant European horizon is visible. Further research is needed before the European Union's civil justice project can be evaluated. One question having broad implications for the general study of European integration is why these developments are occurring at this historical juncture. A second empirical challenge will be to assess the degree to which the European Union's civil justice project detaches procedural and substantive law from the tenacious hold of the tradition-bound Member State legal systems, and affects legal culture and patterns of mobilizing Community law. In particular, the forces impelling and hindering movement towards a unified E.U. judicial system require further investigation, before we can predict with confidence how or when civil justice will be fully institutionalized in the European Union, or how Europeanizing Member State courts will affect other aspects of integration.

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[410] HAAS, *supra* note 358, at 16 ("Political integration is the process by which political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities toward a new centre, whose institutions possess or demand jurisdiction over the pre-existing national states."). See generally ROSAMOND, *supra* note 342, at 50-73.

[411] Fligstein, *supra* note 359, at 37-40.

[412] Richard Bellamy & Alex Warleigh, *Introduction: The Puzzle of E.U. Citizenship*, *in* CITIZENSHIP AND GOVERNANCE IN THE EUROPEAN UNION 3 (2001). *See also*, CITIZENSHIP, DEMOCRACY AND JUSTICE IN THE NEW EUROPE (Percy B. Lehning & Albert Weale eds. 1997).