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# A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts (with response: Reflections on 'a Convenient Untruth')

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# A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts

Sarah Ludington &  
Mitu Gulati

## Reflections on “A Convenient Untruth”

Mark Weisburd

### Abstract

The few years since the U.S. incursion into Iraq in 2003 have witnessed an explosion in the literature on odious debts—that is, debts incurred (a) without the consent of the people (e.g., by a despotic regime); (b) from which no benefits accrued to the people; and (c) when the creditors had knowledge of the foregoing. The key question in the literature is whether successors to the despotic regime are obligated to pay the debts of the despot. That is, whether the newly democratic nation of Iraq is obligated to pay the debts of Saddam Hussein. The starting point for almost every discussion—scholarly or popular—of this doctrine is an obscure legal scholar named Alexander Nahum Sack, variously described as the pre-eminent scholar on public debts of his time, a former minister to Tsar Nicholas II, and a Russian professor of law who penned the doctrine of odious debts while teaching in Paris. This Article excavates the background of Alexander Sack, separating the reality of his life from the myth perpetuated in the odious debts literature. Instead of the heroic and eminent Tsarist exile, the evidence reveals a peripatetic legal scholar who taught in five different universities on two continents, and after being fired from a tenured position, ended his life penniless. We are left then with these questions: What does the reality of Sack mean for the legal status of the odious debts doctrine? And how is it that he achieved this iconic status when even minimal inquiry would have revealed a far more murky reality?

# A Convenient Untruth: Fact and Fantasy in the Doctrine of Odious Debts

Sarah Ludington

Mitu Gulati\*

## Reflections on “A Convenient Untruth”

Mark Weisburd<sup>‡</sup>

*The previous regime accumulated a heavy burden of foreign debts to states which financed the tyrant's wars against his people first, and then against our neighbors. The foreign loans helped him build a huge military apparatus and manufacture weapons of mass destruction, including chemical weapons which he used against the Iraqi people in Halabja. The loans supported his system of oppression and paid for his palaces and prisons during the war against Iran when Iraq's oil revenue was extremely low . . . .*

*There is a strong basis in international legal principle and precedent to define these debts as being "odious" and thus not legally enforceable. This legal doctrine of odious debt was formulated in the 1920s by Alexander Sack, a former Russian Minister working as a legal professor in the Sorbonne University in Paris. He published the most extensive and important works on the treatment of state debts in the event of regime change.*

November 2004 -- Recommendation (subsequently adopted) of the Economic and Finance Committee to the Iraqi Nation Assembly that it declare a willingness to repudiate Iraq's prior Odious Debts.<sup>∅</sup>

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<sup>‡</sup> Martha M. Brandis Professor of Law, University of North Carolina at Chapel Hill.

<sup>∅</sup> Available at <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=11907>

*Widely different views have been expressed about the appropriate treatment of Iraq's Saddam-era debts. Some have argued that all of this debt, in view of its provenance, should be classified as odious and cancelled outright. Lend to a despot, they say, and you should expect repayment only from the despot. If a country manages to free itself from the incubus of an odious regime, the citizenry should not be forced to carry the burden of that regime's immoral extravagances for generations to come.*

September 2005 Statement of Iraqi Finance Minister, Ali Allawi, to *Euromoney*.<sup>•</sup>

## I.

### **Introduction**

History has been kind to Alexander Nahum Sack<sup>1</sup>—kinder than life was, and kind rather than accurate. Unknown for much of his life and the half century that followed it, he has, in the years since the 2003 United States incursion into Iraq, emerged as an international academic superstar. In 1927, while lecturing in Paris, Sack published a treatise in French on the effect of state transformations on public debt: *Les Effets des transformations des Etats sur leurs dettes publiques et autres obligations financiers (Les Effets)*. In this treatise, Sack proposed that, following a state succession, a new sovereign government might be allowed to renege on the odious debts of the previous sovereign. According to Sack, odious debts were those (a) incurred without the consent of the people (e.g., by a despotic regime); (b) from which no benefits accrued to the people; and (c) when the creditors had knowledge of the foregoing.<sup>2</sup> Sack's work, which was never translated into English, has been discovered and placed at the center of a heated academic and policy debate—much of it in English—over the law of odious debts. His hitherto obscure theory has been discussed in the pages of the *New Yorker*, *Le Monde* and the

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(last visited October 8, 2007) (emphasis added). The Iraqi National Congress enthusiastically adopted the suggested resolution. See Justin Alexander, *Phony Relief*, 39 Int'l Socialist Rev. Jan-Feb (2005) (available at <http://www.isreview.org/issues/39/reports.shtml> (last visited October 8, 07)).

<sup>•</sup> See Ali Allawi, *Why Iraq's Debt Deal Makes Sense*, EUROMONEY, Sept. 2005, at 213 (emphasis added).

<sup>1</sup> 1890-1955. Alexander Sack, *A Writer on Law: Former N.Y.U. Professor Dead, Had Been Special Aide to U.S. Attorney General*, N.Y. TIMES, May 31, 1955, at 27 (obituary).

<sup>2</sup> The sovereign borrower had the burden of demonstrating the three conditions. A.-N SACK, LES EFFETS DES TRANSFORMATIONS DES ETATS SUR LEURS DETTES PUBLIQUES ET AUTRES OBLIGATIONS FINANCIERS 157-63 (1927).

Times, not to mention dozens of other news sources, policy briefs, academic essays, and blogs.<sup>3</sup>

In particular, Sack's three-part definition has found favor with the contemporary proponents of an odious debts doctrine. Among debt forgiveness circles, Sack is generally described in one of several ways, which this Article refers to as the Sackian myths: Sack is called a former Minister to Tsar Nicholas II, or a former tsarist minister; a Russian jurist or a professor of law in Paris; and the preeminent legal scholar on public debts, the originator of the odious debts doctrine, or a leading scholar of international law. Sack's name has become so ubiquitous in the literature that one sees references to the "Sackian view" of odious debts,<sup>4</sup> and one modern writer described him as the "crowned prince" of advocates of the legal principle of odious debts.<sup>5</sup> Sack's theory is the starting point for almost every discussion of the odious debts problem today; until recently, his contemporaries writing on the subject merited nary a mention.<sup>6</sup>

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<sup>3</sup> E.g., ERIC TOUSSAINT, YOUR MONEY OR YOUR LIFE! THE TYRANNY OF GLOBAL FINANCE, 329 (2005); CHARLES ABRAHAMS, A FRESH LOOK AT THE ODIIOUS DEBT DOCTRINE (available at [http://www.aktionfinanzplatz.ch/pdf/en/WebE\\_Abrahams.pdf](http://www.aktionfinanzplatz.ch/pdf/en/WebE_Abrahams.pdf)) (last checked July 1, 2007); Larry Backer, *Advancing the Application of Odious Debt Doctrine in Ecuador*, Posting on Tuesday, May 29, 2007 (available at <http://lbackerblog.blogspot.com/>); EURODAD, SKELETONS IN THE CUPBOARD: ILLEGITIMATE DEBT CLAIMS OF THE G7 (2007) (available at <http://www.eurodad.org/debt/report.aspx?id=114&item=0442>); William F. Buckley, Jr., *Odious Activities: Should Iraqi Debt be Repaid to Russia and France*, NAT'L REV., Oct. 7, 2003 (available at <http://www.nationalreview.com/buckley/buckley200310071228.asp>).

<sup>4</sup> See Adam Feibelman, *Contract, Priority and Odious Debts* 85 N.C. L. REV. 727 (2007) (using the adjective "Sackian"); Adam Feibelman, *Equitable Subordination, Fraudulent Transfer and Sovereign Debt*, \_\_\_ J. L. & CONTEMP. PROB. \_\_\_ (2007) (same); Omri Ben-Shahar & Mitu Gulati, *Partially Odious Debts*, \_\_\_ L. & CONTEMP. PROB. \_\_\_ (2007). Sack shows up on Wikipedia under the entry for Odious Debts; indeed he is the only scholar mentioned in the main text of entry there. See Odious Debts, [http://en.wikipedia.org/wiki/Odious\\_debt](http://en.wikipedia.org/wiki/Odious_debt) ("The doctrine [of odious debts] was formalized in a 1927 treatise by Alexander Nahum Sack, a Russian emigré legal theorist").

<sup>5</sup> Christoph G. Paulus, *"Odious Debts" or Debt Trap: A Realistic Help*, 31 BROOK. J. INT'L L. 83, 85 (2005).

<sup>6</sup> E.g., Robert Howse, *The Concept of Odious Debt in Public International Law*, UNCTAD Working Paper Number 185, July 2007 (starting the discussion of Odious Debt with Sack); Larry Cata Backer, *Odious Debt Wears Two Faces: Systemic Illegitimacy, Problems and Opportunities in Traditional Odious Debt Conceptions in Globalized Economic Regimes*, \_\_\_ L. & CONTEMP. PROB. \_\_\_ (2007) (starting with Sack and then going on to a five-page description of Sack's work on Odious Debt as a precursor to the discussion of odious debt in the contemporary context); ASHFAQ KHALFAN, JEFF KING & BRYAN THOMAS, CTR. FOR INT'L SUSTAINABLE DEV. LAW, ADVANCING THE ODIIOUS DEBT DOCTRINE 19 (2003), [http://www.odiousdebts.org/odiousdebts/publications/Advancing\\_the\\_Odious\\_Debt\\_Doctrine.pdf](http://www.odiousdebts.org/odiousdebts/publications/Advancing_the_Odious_Debt_Doctrine.pdf) (similarly, giving Sack center stage in the discussion of odious debt as a doctrine of international law). There are a handful of scholars in the area though who are beginning to realize that Sack was actually somewhat obscure. See, e.g., Jeff King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. INT'L & COMM. L. 605, 621-27 (2007).

Why has the odious debts movement invested such weight in the resume of one hitherto obscure legal scholar? And further, scholars typically achieve iconic status—of the sort where they are invoked by name as a source of authority—only after years of discussion and debate about their work.<sup>7</sup> With Sack, the iconic status arrived suddenly and with little biographical information about the man. How and why did this happen?

The answer to these questions lies partly in a quirk of customary international law. Sack’s prominence—and particularly, his status as a powerful minister in the tsarist government—lends authority to his doctrine of odious debts and buttresses the claims of its proponents that such a doctrine exists as part of customary international law. The “teachings of the most highly qualified publicists”<sup>8</sup>—which includes the writings of prominent scholars in international law—are among the secondary sources of authority that customary international law recognizes, and thus Sack’s eminence is directly linked to the validity of the doctrine of odious debts.<sup>9</sup>

It turns out that much of Sack’s contemporary identity was made up. But not by him. After a brief background discussion on the resurrection of Sack by the odious debts movement, this Article sets out the three Sackian mythologies related by the contemporary odious debts literature, and then juxtaposes the results of historical investigation with each of the stories. The conclusion is that large portions of the

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<sup>7</sup> Invocations by name are often used as a measure of status or reputation. David Klein & Darby Morrisroe, *The Prestige and Influence of Individual Judges on the U.S. Courts of Appeals* 28 J. LEGAL STUD. 371 (1999). The faculty editor of the forthcoming two-volume set for Law & Contemporary Problems on Odious Debts was so struck by the repeated invocations of Alexander Sack in almost every one of twenty-plus articles for the symposium that she used Sack as an example in her recent article on writing style. In discussing the rare occasions on which it is acceptable for an author to refer to other authors by name in the text of an article, she writes: “Or the source may be a person universally recognized as so authoritative that the topic cannot as credibly be discussed without his mention.” And then, the example she uses in her footnote is: “For example, virtually every paper in a symposium on odious debt at least mentioned Alexander Sack, widely believed to have first conceived of the doctrine.” Joan Magat, *Beware the “Monological Imperatives”*: *Writing for the Reader* (draft dated July 2007) (available on ssrn.com).

<sup>8</sup> Sources of international law include: 1) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; 2) international custom, as evidence of a general practice accepted as law; 3) the general principles of law recognized by civilized nations; and 4) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055, available at <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> [hereinafter ICJ Statute].

<sup>9</sup> E.g., Paul Stephan, *The Institutional Implications of an Odious Debt Doctrine*, 70 L. & CONTEMP. PROB. \_\_ (2007)

Sackian myths do not stand up to scrutiny. The legend of Sack has been a convenient untruth. The reality is less convenient, but (we hope) more interesting.

## II.

### **Iraq and the Resurgence of Odious Debts**

After languishing in obscurity for the better part of a century, the doctrine of odious debts was given new life after the United States toppled Saddam Hussein's regime. The doctrine is controversial because it proposes an exception to a general rule of public international law, which is that debts incurred by one government are inherited by the subsequent government. The underlying theory is that states are infinitely lived, and that governments contract debts as agents of the populace, which does not change even if the government does.<sup>10</sup>

Rarely have states asserted exceptions to this strict rule of succession, and the assertions were generally based on a theory that there was discontinuity between the old and new state, or that the debts were hostile to the new government.<sup>11</sup> The Soviets disavowed any obligation to pay the debts of the Tsar. Communist China refused to pay the debts incurred by their Imperial predecessors in the early twentieth century. The Islamic revolutionary government in Iran did not see itself as that succeeding to the debts of the Shah. For the most part, these assertions were tackled in the realm of diplomacy and politics, involving high-level meetings among finance ministers in fancy hotels in London and Paris. When the odious debts issue was raised with Iraq, however, the chessboard had changed and both the pieces and strategies were different. There were still high-level meetings in Paris, London, and elsewhere, and politics still trumped law. But today, sovereign borrowers and their creditors increasingly waive their sovereign immunity in domestic courts to appear credible to lenders (typically, agreeing to be sued

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<sup>10</sup> See ERNST FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION (1931); Michael H. Hoeflich, *Through a Glass Darkly: Reflections Upon the History of International Public Debt in Connection with State Succession*, 1982 U. ILL. L. REV. 39 (1982); Lee C. Buchheit, G. Mitu Gulati & Robert B. Thompson, *The Dilemma of Odious Debts*, 56 DUKE L. J. 1201, 1204-10 (2007).

<sup>11</sup> See Buchheit et al., *supra* note 10 at 1222; James Feinerman, *Odious Debts: Old and New*, 70 L. & CONTEMP. PROB. \_\_\_ (2007) (describing the history of odious debt claims).

in the two jurisdictions that are seen as most respectful of creditor rights – the U.S. and the U.K.). So Iraq in 2003 faced the prospect of creditors seeking to collect – some in domestic courts in the U.S. -- on billions of dollars in unpaid Saddam era debt.<sup>12</sup>

Many in the higher echelons of the U.S. administration did not savor the prospect of Saddam's creditors using the U.S. courts to attach Iraq's oil revenues to pay Saddam's bills (after all, those revenue streams were supposed to pay for the war). Paul Wolfowitz testified before the senate that the Iraqi people should not have to pay for the guns, palaces, and (nonexistent) weapons of mass destruction of Saddam Hussein—asserting, in words of a different sort, an odious debts justification for debt forgiveness.<sup>13</sup> At the other end of the political spectrum, NGOs and activist groups, concerned with the overwhelming debt burdens in the developing world, were eager to back any legal strategy that the Bush administration might advocate with Iraq, hoping that a similar strategy could be extended to unburden states that did not have the powerful political allies that the new state in Iraq did. Suddenly, there was a chorus of voices from the far ends of either side of the political spectrum—the Cato Institute and Oxfam pushing the same agenda—asserting that many of Saddam's debts should not have to be paid because they were “odious.”<sup>14</sup> And the unlikely jurist at the center of the chorus was Alexander Nahum Sack.<sup>15</sup>

As of mid 2007, the debate over the doctrine of Odious Debts continues. Apart from multiple conferences addressing the topic and new academic articles, the official sector has taken up the doctrine. With funding from the Norwegian government, both

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<sup>12</sup> For discussion of odious debt claims in the context of the U.S. incursion into Iraq, see Jai Damle, *The Odious Debt Doctrine After Iraq*, \_\_ L. & CONTEMP. PROB. \_\_ (2007).

<sup>13</sup> See Alan Elsner, *US Considering “Odious” Debts Doctrine in Iraq*, REUTERS NEWS, April 29, 2003 (Wolfowitz, U.S. Deputy Secretary of Defense, observed in testimony before the Senate Armed Services Committee, that much of the money borrowed by the Iraqi regime had been used "to buy weapons and to build palaces and to build instruments of oppression."); See also Soren Ambrose & Njeki Njoroje Njehu, *A Wolf in Wolf's Clothing*, *Econ. Justice News Online*, April 2005 (available at <http://www.50years.org/cms/ejn/story/258>) (last visited October 8, 2007).

<sup>14</sup> See Patricia Adams, *Iraq's Odious Debts*, Cato Institute POLICY ANALYSIS No. 526, September 2004; Nile Gardner & Marc Miles, *Forgive The Iraqi Debt*, Heritage Foundation Executive Memorandum #871, April 2003; *A Fresh Start For Iraq*, Oxfam Briefing Paper #48, May 2003.; see also Jonathan Shafter, *The Due Diligence Model: A New Approach to the Problem of Odious Debts*, 21 ETHICS & INT'L AFFAIRS 49 (2007) (observing this peculiar coalition and its implications).

<sup>15</sup> See, e.g., KHALFAN ET AL., *supra* n. 6.

UNCTAD and the World Bank have recently released reports on the topic and both contain invocations of Alexander Sack as the originator of the doctrine.<sup>16</sup>

### III.

#### **The Three Sackian Mythologies**

##### *i. From Tsarist Minister to Revolutionary Hero*

Repeatedly, modern commentators refer to Sack as having been a Tsarist minister.<sup>17</sup> The relevance is twofold. First, it gives Sack status in the government of a major power, which is relevant to modern assertions that Sack's views from the early 1900s are an authoritative source of public international law at the time. Second, the Tsar's debts were repudiated by the Bolsheviks in 1918. The Bolsheviks described these debts as belonging to the government of the "Tsar, the landowners, and the bourgeoisie." The repudiation was intended to deal a "first blow" to international capital, and to strengthen the government of the proletariat against its exploiters.<sup>18</sup> Thus Sack was familiar with the issue of odious debts—after all, the successor government to the Tsar was asserting a related argument. If Sack were a Tsarist minister, he might have had first-hand knowledge of how states viewed the odious debts at the time, and indeed, may have been in a position to shape state policy on odious debts

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<sup>16</sup> See UNCTAD: The Concept of Odious Debt in Public International Law: [http://www.unctad.org/en/docs/osgdp185\\_en.pdf](http://www.unctad.org/en/docs/osgdp185_en.pdf); & World Bank: "Odious Debt: Some Considerations": <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTDEBTDEPT/0,,menuPK:64166739~pagePK:64166681~piPK:64166725~theSitePK:469043,00.html>; see also Materials on Conferences at the CGSR Conference -- University of Warwick (July 2007); Mellon Series -- Cambridge University (September 2007); Ford Foundation – Akton Finance (October 2007); UNCTAD – Odious Debt (November 2007)..

<sup>17</sup> E.g., Toussaint, *supra* note 3; Irwin M. Stelzer, *Forgive Them His Debts*, Weekly Standard, April 21, 2003 (available at 2003 WLNR 13324849); Eric L., *11 000 personnes ont défilé à Paris pour proclamer que le triomphe militaire ne légitime pas la guerre*, Le Monde, April 15, 2003 (available at 2003 WLNR 10674373); Andrea Davis, *African Debt Package Not Good Enough*, GUELPH MERCURY, June 27, 2005 (available at 2005 WLNR 10122725); David Beatson, *Live 8, G8 and Heavy W8 for Africa*, INDEPENDENT-NZ June 15, 2005 (available at 2005 WLNR 9386166); Remi Ogunmefun, *Legalities in Repudiating Nigeria's Foreign Debt*, THIS DAY (NIGERIA), June 13, 2005 (available at 2005 WLNR 9481950); Joseph Hanlon, *Defining Illegitimate Debt and Linking its Cancellation to Economic Justice*, (unpublished manuscript prepared for Norwegian Church Aid, 2002) (available at <http://www.globalfairtrade.ca/Illegitimatedebt.pdf>).

<sup>18</sup> See Alexander N. Sack, *Diplomatic Claims Against the Soviets (1918-1938)*, 15 N.Y.U. L.Q. REV. 507, 510 (1938).

Modern commentators likely take their characterization of Sack as a minister of the Tsar from an article by the legal historian, Michael Hoeflich, who described Sack as “once minister of Tsarist Russia and thence, after the October Revolution, a Parisian law professor.”<sup>19</sup> In 1991, debt activist Patricia Adams echoed Hoeflich’s characterization, describing Sack as “a former minister of Tsarist Russia and, after the Russian Revolution, a professor of law in Paris,” in her influential book “Odious Debts: Loose Lending, Corruption and the Third World’s Environmental Legacy.”<sup>20</sup> Adams’ book became a key element of the post-Iraq odious debts debate and that, in turn, resulted in the rapid dissemination of the story of Sack as a Tsarist minister. The characterization has since appeared in scores of newspaper stories, academic articles, anti-debt activist speeches, websites, and most prominently, in the Iraqi National Assembly in November 2004.<sup>21</sup>

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<sup>19</sup> Hoeflich, *supra* note 10, at 41. Hoeflich obtained the information that Sack was a Tsarist minister from an inscription at the front of one of Sack’s books at the Squire library at Cambridge University, where Hoeflich was doing research at the time. See E-mail from Michael Hoeflich to Mitu Gulati, September 2007 (on file with author); see also *infra* notes 47-49 and accompanying text. The error, in what is one of the best pieces of work on state succession, appears to have been inadvertent. One of the authors (Gulati), along with Professor Gelpert of Rutgers University, went to the Squire library in September 2007, to look for the inscription that Hoeflich had seen. Unfortunately, the Squire library had changed locations since Hoeflich was doing his research there and we were unable to look at the same books Hoeflich likely looked at. Among all the books by Sack that we searched in the new Squire library, we found no books with inscriptions in them (in fact, the books by Sack that we looked at appeared to have almost never touched). See also Email from Head Librarian at the Squire Library, David Wells, to Mitu Gulati & Lauren Collins, September 2007 (on file with authors).

<sup>20</sup> PATRICIA ADAMS, *ODIOUS DEBTS: LOOSE LENDING, CORRUPTION AND THE THIRD WORLDS ENVIRONMENTAL LEGACY* \_\_\_\_ (chapter 17) (1991).

<sup>21</sup> See Iraqi Resolution of the Economic and Finance Committee, Presented to the Iraqi National Assembly, November 2004 (available at <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=11907> (last visited October 8, 2007) (emphasis added). The Iraqi National Congress enthusiastically adopted the suggested resolution. Justin Alexander, *Phony Relief*, 39 Int’l Socialist Rev. Jan-Feb (2005) (available at <http://www.isreview.org/issues/39/reports.shtml> (last visited October 8, 07)). For other materials describing Sack’s ministerial status, see e.g., Debats, *La dette de l’Irak n’a jamais existé*, LE MONDE, November 23, 2004; James Surowiecki, *A Clean Slate for Iraq*, THE NEW YORKER, April 7, 2003; Alternative Information and Development Center, *Apartheid Debt* (October 17, 1997) (available at <http://www.aidc.org.za/?q=book/view/17>); Doktrin “Odious Debt” HARUS DITEMPUH, February 5, 2000 (available at <http://www.aidc.org.za/?q=book/view/17>); Justin Alexander, *Saddam’s Odious Debts*, Swan’s Commentary, February 2, 2004 (available at <http://www.swans.com/library/art10/iraq/alexander.html>); World Development Movement, *Re-building Iraq: Start by Cancelling the Debt* (April 2003) (available at <http://www.wdm.org.uk/resources/reports/debt/rebuildingiraq01042003.pdf>); What are Odious Debts? (available at <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=subcontent&AreaID=3>) (excerpt from PATRICIA ADAMS, *ODIOUS DEBTS: LOOSE LENDING, CORRUPTION AND THE THIRD WORLDS ENVIRONMENTAL LEGACY* (1991)); Stephan Kinsella, *Repudiate the Iraqi Debt*, June 2, 2005 (available at <http://blog.mises.org/archives/003662.asp>); Urban Renaissance Institute, (available at <http://www.urban-renaissance.org/urbanren/index.cfm?DSP=content&ContentID=6945>); Patricia Adams, *Iraq’s Odious Debts*, POLICY ANALYSIS, No. 526, Cato institute, September 28, 2004 (available at

The story of Sack as a revolutionary hero—the man who authored a doctrine that will save poor nations from crippling debt burdens—is not one that is told explicitly; rather, it is implicit in the heroic status that he has achieved among the debt forgiveness crowd.<sup>22</sup> The websites of organizations such as Probe International and Jubilee feature Sack’s name, as do the writings of anti-debt activists such as Patricia Adams. But, as Adams acknowledges, there is an inherent tension in the story of Sack’s transformation from tsarist to revolutionary:

Professor Sack was no radical. He had been a minister in the Tsarist regime and had seen the Bolshevik repudiation of the Tsarist debt. He believed that government debts should be repaid when a new government came to power. Otherwise, he said, chaos would reign in relations between nations and international trade and finance would break down.

But he also believed there was one exception to this rule. Sack believed that debts not created in the interests of the state should not be bound to this general rule.

Some debts, he said, are odious.<sup>23</sup>

Adams later argues that Sack’s intent in developing the doctrine, and in particular in putting the onus on successor governments to prove odiousness, was to prevent “abuse of the doctrine by self-serving interpretation,” thus suggesting that Sack was trying to develop a method for identifying *truly* odious debts so that repudiation would occur only

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<http://www.cato.org/pubs/pas/pa526.pdf>); Susan George, *Down the Great Financial Drain*, Transnational Institute, July 25-27, 2006 (available at [http://www.tni.org/detail\\_page.phtml?page=archives\\_george\\_celsofurtado](http://www.tni.org/detail_page.phtml?page=archives_george_celsofurtado)); Leonce Ndikumana & James Boyce, *Congo’s Odious Debt: External Borrowing and Capital Flight in Zaire*, 29 DEVELOPMENT AND CHANGE 195 (1998).

<sup>22</sup> Howse comes closest to telling an explicit story of Sack as an anti-tsarist revolutionary hero. Howse invokes Sack’s status as a Tsarist minister in the context of using the Soviet repudiation of the Tsarist debt as an example of the invocation of an Odious Debts argument by a state. He writes:

Sack, who himself was a former minister in the Tsarist regime, notes a particular Soviet doctrine that regards acts of previous governments as incurring personal obligations only, and not ones that bind the state (Sack, *supra* p.68). Nevertheless even for Sack, it could be argued that the repudiated debts were “odious” and therefore were unenforceable against the successor regime, given the evidence that Tsarist Russia did not rule in the interests of its population (Sack, *supra* p. 157).

Howse, *supra* note 6, at 14.

<sup>23</sup> Patricia Adams, *Iraq’s odious debts: The odious debt doctrine and Iraq after Saddam*, March 16, 2004 (speech) (<http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=9892>).

in worthy cases. Despite stating that Sack was no radical, and acknowledging that his doctrine of odious debts is quite conservative—which might seem to disqualify Sack as a hero of the somewhat radical debt forgiveness movement<sup>24</sup>—Adams continues to lionize Sack in her writing.<sup>25</sup>

And so the tantalizing dichotomy of tsarist Sack persists. What was he really? A tsarist minister? A Bolshevik apologist? Or neither? What was the significance of Sack’s witness to the Bolshevik repudiation of tsarist debt—did it motivate him to believe more strongly in the prevailing rule of international law? Did it motivate him to develop a theory that justifies such repudiation? Or, as Adams suggests, did it motivate him to develop a doctrine that would justify repudiations when successor states were burdened by *clear* examples of odious debts—unlike the Tsar’s?

### ii. Russian Professor of Law in Paris

When Sack is discussed by contemporary commentators, he is generally referred to as a law professor in Paris (he was elevated to a professor at the Sorbonne in the Iraqi National Assembly discussions), or a Russian émigré law professor who was in Paris at the time he wrote the doctrine.<sup>26</sup> These commentators are presumably relying on the fact

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<sup>24</sup> Other commentators have described Sack as a champion of *creditors’* rights. See Gunter Frankenberg & Rolf Knieper, *Legal Problems of the Overindebtedness of Developing Countries: The Current Relevance of the Doctrine of Odious Debts*, 12 INT’L J. OF SOC. OF LAW 415 (1984) (noting that the French commentators of the 1920s, notably Jeze (1921) and Sack (1926), were at the extreme end of the spectrum in terms of their eagerness to protect creditor claims). See also Omri Ben-Shahar & Mitu Gulati, *supra* note 4, at \_\_\_ (forthcoming 2007).

<sup>25</sup> Adams was especially generous in helping us track down information on Sack. Adams found an inscription in a copy of Sack’s book in the University of Toronto law library that connected Sack to Dean Leon Green at Northwestern, which led us to examine Green’s papers, which contained letters regarding Sack’s hiring by Northwestern and then NYU.

<sup>26</sup> E.g., Probe International, *What are Odious Debts?* (available at <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=subcontent&AreaID=3>) (“Sack, a former minister of Tsarist Russia and, after the Russian Revolution, a professor of law in Paris”); Patricia Adams, *Nice Try*, Paris Club, NATIONAL POST, Canada (Nov. 26, 2004) available at <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=11940> (“Alexander Sack, a former Russian Minister working as a legal professor in the Sorbonne University in Paris”); Esther Pan, *Iraq: The Regime’s Debt* (Dec. 31, 2003) available at <http://www.cfr.org/publication/7796/#26> (“Alexander Sack, an expatriate Russian law scholar in Paris”); Patricia Adams, *Debt Forgiveness*, National Post, Canada (June 26, 2003) available at <http://www.odiousdebts.org/odiousdebts/index.cfm?DSP=content&ContentID=7759> (“Alexander Sack, the Russian legal scholar who coined the term “odious debt””); Charles Matsua, *Campaigning on Illegitimate Debt: Lessons, Prospects and Proposals*, AFRODAD, (“the role and contribution of Alexander Sack, the

that *Les Effets* was published in French in Paris,<sup>27</sup> and the title page of the volume, which describes Sack as “*ancien professeur agrégé a la faculté de droit de l’université de Petrograd*” (a former professor “*agrégé*” of the faculty of law at the University of Petrograd).<sup>28</sup> It is rarely mentioned that Sack also taught at two American law schools, New York University (NYU) and Northwestern, and was a staff attorney at the U.S. Department of Justice. And thus these references to Sack’s tenure in Paris or status as a Russian émigré seem designed to enhance Sack’s status—perhaps suggesting that Sack has both the melancholy wisdom of the Slavic soul and the fiery brilliance of the French intellectual. Not to mention that an association with two European countries makes Sack seem more worldly and, well, *international*.

The fact that Sack published his doctrine of odious debt while living in Paris in the 1920s also raises questions about the meaning of the doctrine, and whether Sack would have compromised his ideas in any way to please his French audience. The Soviet repudiation of the Tsar’s debt was a pressing political issue in France. In 1923, French citizens were owed 9 billion gold francs on the face value of their tsarist bonds, and that the arrears on payments added 400 million gold francs each year.<sup>29</sup> Resentment about the default was particularly high because many French bondholders saw themselves as having been defrauded, as the Russian government (assisted by the French government) had allegedly bribed the French press to paint an unreasonably rosy picture of the stability of the Russian regime.<sup>30</sup> It did not help matters that France was facing financial crisis in the late 1920s.<sup>31</sup>

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Professor of Law in Paris, in his 1920s codification of the Doctrine of Illegitimate Debt has been well recognized”) (available at

[http://www.afrodad.org/index.php?option=com\\_content&task=view&id=118&Itemid=50](http://www.afrodad.org/index.php?option=com_content&task=view&id=118&Itemid=50)).

<sup>27</sup> Sack does not state whether he wrote the manuscript in French or some other language. Sack thanks “Mme Nadine Stchoupack” of the Ecole des Hautes Etudes for her work on the French translation of his manuscript. SACK, *LES EFFETS*, *supra* note 2, at xvi.

<sup>28</sup> SACK, *LES EFFETS*, *supra* note 2 at (title page). The title “*agrégé*” refers to a professor who has passed a competitive, high-level teaching examination. *See generally* Agrégation de droit, [http://fr.wikipedia.org/wiki/Agr%C3%A9gation\\_de\\_droit](http://fr.wikipedia.org/wiki/Agr%C3%A9gation_de_droit).

<sup>29</sup> *See* Alexander N. Sack, *Diplomatic Claims Against the Soviets (1918-1938) (continuation)*, 16 N.Y.U. L.Q. REV. 253, 271 n. 217 (1938).

<sup>30</sup> *See* James William Long, *Russian Manipulation of the French Press, 1904-1906*, 31 SLAVIC REVIEW 343 (1972).

<sup>31</sup> *E.g.*, STEPHEN A. SCHUKER, *THE END OF FRENCH PREDOMINANCE IN EUROPE: THE FINANCIAL CRISIS OF 1924 AND THE ADOPTION OF THE DAWES PLAN* (1976)

When Sack published *Les Effets* in 1927, he was one of many Russian refugees fleeing the incipient soviet regime who alighted in Paris. France was a favored destination for Russian refugees at the time, and particularly ex-tsarists. But jobs were scarce and by the late 1920s, anti-refugee sentiments had bubbled to the surface.<sup>32</sup> As a professor at the university, Sack was likely doing better than many of his fellow refugees, including professionals, many of whom were reduced to the job of a taxi driver.<sup>33</sup>

This particular historical context raises the question whether Sack's doctrine of odious debts was consistent with his other writings on the subject, or whether his somewhat precarious position as an émigré in France may have influenced the way Sack presented his doctrine of odious debts. On the one hand, Sack might have been inspired to make a strong statement against the Soviet repudiation, thereby pleasing what he may have perceived as the popular audience for his book (the masses of French bondholders). On the other hand, as there was a debate among French intellectuals about the propriety of the Soviet repudiation, Sack may have wanted to finesse his opinion on the subject, hoping not to alienate either faction.

*iii. The Pre-Eminent Scholar on Public Debts and State Succession; a Scholar of International Law; the Origin of the Doctrine of Odious Debts*

Sack is often described as the “preeminent” (or “an eminent”) scholar of public debts and state succession of his time,<sup>34</sup> which is crucial for establishing Sack's credibility as publicist and the legitimacy of relying on his 1927 work as a source of customary international law. Modern scholars and activists appear to assume that Sack was a scholar of international law, and, to varying degrees, that he was preeminent. The

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<sup>32</sup> See, e.g., James E. Hassell, *Russian Refugees in France and the United States Between the World Wars*, 81 TRANSACTIONS OF THE AMER. PHIL. SOC. 1, Chapter 3 (1991); Tatania Schaufuss, *The White Russian Refugees*, 203 ANNALS OF THE AMER. SOC. OF POL. AND SOC. SCI. \_\_\_ (1939).

<sup>33</sup> See e.g., Michael Jabara Carley, *Episodes from the Early Cold War: Franco-Soviet Relations 1917-1927*, 52 EUROPE ASIA STUDIES 1275 (2000); John P. Sontag, *Tsarist Debts and Tsarist Foreign Policy*, 27 SLAVIC REVIEW 529 (1968).

<sup>34</sup> E.g., Emily F. Mancina, *Sinners in the Hand of an Angry God: Resurrecting the Doctrine the Odious Debt Doctrine in Law*, 36 GEO. WASH. U. L. INT'L L. REV. 1239, 1246 (2004) (Sack was “the world's pre-eminent scholar on public debts”); Nsongurua J. Udombana, *The Summer has Ended and we are Not Saved! Towards a Transformative Agenda for Africa's Future*, 7 SAN DIEGO J. INT'L L. 5, 25 (2005) (noting Sack's scholarly eminence); Bradley N. Lewis, *Reconstructing the Odious Debt Exception*, (draft dated 2007) (available on [ssrn.com](http://ssrn.com), id # 984369).

origins of Sack's reputation as the preeminent scholar in the field may have been Ernst Feilchenfeld's 1931 treatise, "Public Debts and State Succession," in which he called *Les Effets* a "remarkable" and "profound" work.<sup>35</sup> But Feilchenfeld also disagreed with Sack as to his "approach, method, and conclusions,"<sup>36</sup> and devoted eight pages to a repudiation of Sack's central thesis.<sup>37</sup> So, was Sack the preeminent scholar of public debts of his time?

Sack is also characterized as the originator of the odious debts doctrine, that is, the one who first formally articulated it as a doctrine.<sup>38</sup> His work on the topic is described as "seminal," "the first" and "original."<sup>39</sup> But others have pointed out that versions of the doctrine had already been articulated—most of the elements of Sack's doctrine are present in the arguments made by the United States regarding Spain's Cuban debt, and in Chief Justice Taft's opinion in the Tinoco arbitration in 1923,<sup>40</sup> and Sack was hardly the first legal scholar to address the topic. So what did Sack originate? Was he, in the positivist tradition of international law, synthesizing precedent into doctrine? Or was he engaged in the normative task of formulating a new (and to him, preferable) theory of what the law should be?

### **III.**

#### **The Less Convenient Story**

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<sup>35</sup> FEILCHENFELD, *supra* note 10, at 574, 575. We suspect that modern scholars who write (and read) primarily in English may turn to Feilchenfeld's book as a source of authority on the Odious Debt doctrine in the early 1900s. Patricia Adams and Jeff King, however, have relied on their own translations of Sack's work from French into English.

<sup>36</sup> FEILCHENFELD, *supra* note 10, at vii.

<sup>37</sup> *See, e.g.*, FEILCHENFELD, *supra* note 10, at 591-99 (delivering a blistering attack on the concept of international financial law in general, and on Sack in particular).

<sup>38</sup> *E.g.*, Jubilee Iraq – Odious Debt (<http://www.jubileequad.org/odiousdebt.htm>); Odious Debts, Wikipedia entry, *supra* note 4; Jubilee; SABINE MICHALOWSKI, UNCONSTITUTIONAL REGIMES AND THE VALIDITY OF SOVEREIGN DEBT: A LEGAL PERSPECTIVE (2007) at 55 (Sack, "the father of the odious debts doctrine") and at 60 (Sack, "the 'inventor' of the odious debts doctrine")

<sup>39</sup> *E.g.*, Adam Feibelman, *Contract, Priority and Odious Debt*, 85 N.C. L. REV. 727, 739 (2007) (Sack was the "first" to identify a doctrine of odious debts); Sanjay G. Reddy, *International Debt: The Constructive Implications of Some Moral Mathematics*, 21 ETHICS & INT'L AFFAIRS 33 (March 2007) (Sack "initiated" the discussion of Odious Debt in the 1920s); Patricio Pazmiño Freire, ILLEGITIMATE DEBTS, DEBT RELIEF, AND CITIZEN AUDIT IN UPHEAVAL IN THE BACKYARD: ILLEGITIMATE DEBTS AND HUMAN RIGHTS: THE CASE OF ECUADOR-NORWAY (November 2002, Centro De Derechos Economicos Y Sociales) (available at <http://www.globalfairtrade.ca/CDES%20Ecuador%20Norway%20Debt.pdf>) (Sack originated the doctrine);

<sup>40</sup> *See* Buchheit et al., *supra* note 10, at 1216-19.

Few of the Sackian myths withstand historical fact checking. Sack, a Russian Jew, was just twenty-seven years old when the virulently anti-Semitic Tsar Nicholas II was deposed, yet contemporary commentators have raised him to the rank of a precocious Tsarist minister. Sack spent the majority of his professional career in the United States, and yet is known as a Russian jurist living in Paris. Sack, whose reactionary writings were censored by the Bolsheviks, is thought today to have authored a revolutionary doctrine. Instead, Sack was a fierce and consistent defender of the rights of creditors and the notion that successor governments cannot lightly shrug off the burden of state debts.

Our search suggests that Sack did not misrepresent his own biography. His biographies in *Who's Who* and the *Dictionary of American Jewry*, his obituary in the *New York Times*, the applications he submitted to the Guggenheim Foundation, the New York Bar, and United States Department of Justice, and numerous resumes are remarkably consistent and almost completely verifiable.<sup>41</sup> Sack was not the source of his modern mythology.

Here are the broad outlines of Sack's life, as pieced together from his resumes, letters, and personal papers. Aleksandr Naumovich Zak was born in Moscow in 1890, the son of a Jewish medical doctor and professor at Moscow University.<sup>42</sup> He graduated from gymnasium in 1908 and studied economics at St. Petersburg University for one year before returning to Moscow to earn a degree from the law faculty and become a member of the bar in 1911.<sup>43</sup> For the next three years, he engaged in further study in a variety of

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<sup>41</sup> Sack claims only a few liberties, for example, by eliding the critical parts of book reviews when he provides prospective employers with typed excerpts of the reviews of *Les Effets*. We found two other deviations from strict truth. First, Sack allows himself to be called an "ancien professeur agrégé" on the title page of *Les Effets*. SACK, LES EFFETS, *supra* n. 2, (title page). The rank of professeur agrégé is quite rare as the professor must pass a series of advanced exams. There is no evidence that Sack achieved that title in France, or a similar rank in Russia. Second, on his New York bar application, Sack omits that he served on two government committees after the revolution. Questionnaire and Statement of Applicant, Alexander Nahum Sack, Filed in the Appellate Division of the Supreme Court of the State of New York, Sept. 22, 1937, responses to questions 12 & 13 (on file with authors).

<sup>42</sup> In a biography Sack wrote for Erwin Griswold in preparation for his case before the AALS, Sack notes that his father, Naoum Basil Sack, was "Doctor of Medicine, Professor of Medicine at Moscow University, Councillor of State in (old) Russian Government Service." Biography by Sack for Griswold (on file with authors). *See also* Faculty Biography for use of New York University Bureau of Public Information, Summer 1942 (on file with authors) (noting that father was a professor of medicine at Moscow University and a "Councilor of State (before the Revol.)")

<sup>43</sup> Questionnaire and Statement of Applicant, *supra* n. 39, responses to questions 5 & 7.

locations and published several articles.<sup>44</sup> From 1914-16 he was fighting for the Russian army on the front in World War I. In September of 1917, he was back in Petrograd, taking an oral examination to earn the degree of Magister, which entitled him to lecture as an assistant professor in the law faculty—something he could not have done in the tsarist regime. Sack notes on his New York bar application that he was allowed to take the exam based on his previously published writings; he was not required to submit a thesis.<sup>45</sup>

Sack left Russia permanently in 1921. He moved to Estonia—at that time, an independent country—where he advised the government on financial matters such as currency reform. He became a citizen of Estonia in 1922 and married his wife, Nina, in 1924. In 1925, the Sacks moved to Paris, where Sack taught at *SciencePo* and the *Ecole des Hautes Etudes* while writing *Les Effets*. In 1928, he lectured at the school of International Law at the Hague, and in 1929, appeared as an expert witness in London on behalf of Equitable Life Insurance. Sack's work for Equitable Life brought him into contact with John W. Davis, who employed Sack in one of the Equitable Life cases his firm was litigating in New York.

In 1930, Northwestern University invited Sack to visit as a professor of international law for one year; the Sacks left Europe permanently and became citizens of the United States. Sack lectured at Northwestern for two years, and then moved to NYU, where he taught for the next eleven years. NYU terminated Sack in 1943, claiming that the financial exigencies of the war required them to drop the salary of one full-time professor. Sack, who believed he had been fired for writing a controversial letter to the

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<sup>44</sup> It is not entirely clear what Sack did from 1911 to 1914. His New York Bar Application suggests that he may have practiced law, Questionnaire and Statement of Applicant, *supra* n. 39, responses to questions 12 & 13, although he testified as an expert witness in 1929 that he had never practiced law in Moscow. Transcript of Perry vs. Equitable Live Assurance Soc., vol. 5, 69 (on file with authors). His Guggenheim application indicates he was involved in special studies from 1912-13, but it is not clear where. Fellowship Application Form, John Simon Guggenheim Memorial Foundation, response to question 1, Education (on file with authors). The biography Sack wrote for Erwin Griswold indicates that he was studying in either Berlin, Munich, Paris, or London. Biography by Sack for Griswold, *supra* n. 40. During this time, he published five works: The Peasant Land Bank, 1883-1910, economic, financial and statistical researches (1911) (in Russian), Methods of the Science of Finance and Financial Law (1913) (in Russian), Participation of Legislative Bodies in the control and Supervision of State Banks in Russia and Abroad (1913) (in Russian), Germans and German Capital in Russian Industry (in Russian); Central Banks—Unions of Banks (1914) (in Russian); (in Russian). See Alexander N. Sack, Curriculum Vitae, Leon Green (1988-1972) Papers, 1929-1947, Series 17/29, Northwestern University Archives, Evanston, IL, Box 9, Folder 2 (on file with authors) ; SACK, LES EFFETS, *supra* n. 2 (Principaux ouvrages du meme auteur).

<sup>45</sup> Questionnaire and Statement of Applicant, *supra* n. 39, response to question 7.

New York Times, filed a complaint with the American Association of Law Schools (AALS), in which he was represented by Erwin Griswold—then Dean of the Harvard Law School. After losing his position at NYU, Sack worked for the Department of Justice (DOJ) from 1943-47, and then as a solo practitioner. By 1953, he and his wife were in a desperate financial situation; they were admitted as residents of the Andrew Freedman Home in the Bronx—“a retirement home for the previously wealthy.”<sup>46</sup> Sack died two years later.

Sack’s name is invoked today to conjure up the image of an *eminence grise*—a distinguished professor of international law puttering around an office stuffed with files of crumbling treaties. In real life, he was cantankerous, outspoken, querulous and litigious, and he ended his days penniless. Researching the life of Alexander Sack is a bit like discovering that Che Guevara was a faithful reader of the Wall Street Journal; the myth is destroyed, but replaced by a man more nuanced, complex, human, and real.

#### *i. Neither a Tsarist Minister nor a Revolutionary Hero*

An examination of the details of Sack’s life reveals that none of the prevailing mythologies about Sack’s Russian experience are true: he was never a tsarist minister nor either a sympathizer or fellow traveler with the Bolsheviks, and he firmly believed that the Bolshevik repudiation of the tsarist debt was legally indefensible.

It is certain that Sack never served as a minister to Tsar Nicholas II. Most importantly, Sack never claims this role for himself—not in the resume he submitted to obtain a job at Northwestern University, in his application to receive a Guggenheim

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<sup>46</sup> Sack’s obituary tells us that he died at the Andrew Freedman Home in the Bronx, New York. Alexander Sack, A Writer on Law: Former N.Y.U. Professor Dead, Had Been Special Aide to U.S. Attorney General, N.Y. Times, May 31, 1955, at 27 (obituary). The Freedman house was set up as a home for “the formerly wealthy.” Christopher Gray, Streetscapes/The Andrew Freedman Home; A Retirement Home Built for the Formerly Wealthy, N.Y. Times May 23, 1999. According to Jim Crocker, who directs the Freedman home, Andrew Freedman established the home particularly for married couples who had formerly been wealthy, to save them from having arguments in their later years over the loss of their elevated financial and social status. Apparently, Mr. Freedman’s parents had argued about money when he was young and he wanted to protect others from that trauma. Personal Interview with Jim Crocker, May 29, 2007. The application process for entry into the Freedman House was rigorous; Sack had to demonstrate both his formerly elevated status and his current penury. Yet, nowhere in his application does he suggest that he had held a position in the Tsar’s government. See Alexander Sack Archival Material Obtained From the Freedman House in May 2007 (on file at Duke University Law Library).

Fellowship, in his sworn application to the New York Bar, in the dossier he submitted to the DOJ, in his application to the Andrew Freedman home, in the biography he wrote for Erwin Griswold, nor in his biography in “Who’s Who in America.”<sup>47</sup> It is telling that he never claims to have held such a position—nor even to have worked in a tsarist ministry—in his sworn submissions to the New York Bar and the DOJ. He submitted those documents in 1937 and 1943, and being Russian by birth, would probably have been motivated to establish his anti-communist credentials by claiming an association with the Tsar or the pre-communist government.

The likely source of the misapprehension of Sack’s role as a Tsarist minister is the “biographical notice” that appears in a collection of international law lectures—including Sack’s lectures on the succession of public debt—sponsored by the Academy of International Law in Paris.<sup>48</sup> The biographical notice (written in French) lists, among Sack’s accomplishments, that he served in 1917 on the Ministry of Finance’s commission to reorganize Russian finances, and as legal counsel to the Committee on Commercial Banking.<sup>49</sup> Thus, while Sack was participating in the Russian government in 1917—although not as a minister—he was doing so under the auspices of either the provisional government or the Bolsheviks, not the Tsar.<sup>50</sup>

Not only does Sack never claim the role of tsarist minister for himself, but records of the Tsar’s government confirm that he never served in a ministerial role. Sack, if he had been one of the ministers of the Tsar, would likely have been the minister of finance since his expertise in his youth was on financial matters—exchange rates, currency stabilization and public finance. But the Tsar’s minister of finance from 1907-1913 was Vladimir Kokostov, followed by P.I. Bark from 1913-17.<sup>51</sup> Furthermore, Sack’s youth

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<sup>47</sup> WHO’S WHO IN AMERICA, 1911 (1942).

<sup>48</sup> The separately published version of these lectures does not have a biographical notice. ALEXANDER N. SACK, *LA SUCCESSION AUX DETTES D’ETAT PUBLIQUES* (1929).

<sup>49</sup> In English, Sack writes that he was a “Member of Council, Ministry of Finance, Russia, 1917; Counsel, All-Russian Committee of Commercial Banks, 1917-1918.” Faculty Biography for use of New York University Bureau of Public Information, *supra* note 40, at 2; *see also* Biography by Sack for Griswold, *supra* n. 40.

<sup>50</sup> Sack’s participation on the committees does not mean that he was a Bolshevik. To keep the government going, the Bolsheviks were forced to retain a bureaucracy of “old officials inherited from the Tsar and from bourgeois society.” EDWARD HALLETT CARR, *THE BOLSHEVIK REVOLUTION 1917-1923* (195) Vol. I at 247, Vol. III at 187.

<sup>51</sup> Kokostov was renowned for successfully balancing the budget after the political turbulence of 1904-1906. PETER GATRELL, *RUSSIA’S FIRST WORLD WAR: A SOCIAL AND ECONOMIC HISTORY* 133-34 (2005);

and inexperience in 1917 most likely precluded his service as a tsarist minister. Sack was twenty-seven and had been a member of the bar in Moscow for only three years when the Tsar abdicated; he had also been fighting on the front until 1916. This leaves about one year in which he could have been a minister (from when he was demobilized in 1916 until March 2, 1917), but the history books list the post as occupied by another man.

Finally, Sack's Jewish heritage makes it unlikely that he could have served as a minister to the Tsar, or even as a civil servant in the Tsar's government.<sup>52</sup> Sack's father probably benefited from one of the "great reforms" of Tsar Alexander II—a program of "selective integration" that allowed Jews to enter educational institutions, train for professions, and thereby gain the privilege of living "outside the pale."<sup>53</sup> By the time Sack reached school age, however, Tsar Nicholas II had significantly rolled back these reforms, imposing severe limits on the numbers of Jewish students who could be admitted to gymnasias (high schools) and universities.<sup>54</sup> Sack would have been among a handful of Jewish students admitted to these institutions at the turn of the century, showing that he was a very promising student. Furthermore, educated Jews were prohibited altogether from entering the civil service and joining university faculties.<sup>55</sup>

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Kokostov's first term, when Russia was involved in its ill fated war with Japan, was characterized by his attempt to finance the economy through borrowing (resulting in an enormous loan of \$ 620 million rubles from France). The focus during his second term was more on economic recovery and reconstruction. On Kokostov's economic policies, *see* VINCENT BARNETT, *THE REVOLUTIONARY RUSSIAN ECONOMY 1890-1940: IDEAS, DEBATE AND ALTERNATIVES* 29 (2004); *see also* L.N. YUROVSKY, *PROBLEMS OF A MONEYLESS ECONOMY*, IN *MARKETS AND SOCIALISM* (A. NOVE & L.D. THATCHER EDS., 1994). The other prominent Minister of Finance around that period was Sergei Witte, who was minister from 1892 until 1903. *See* Gatrell, *supra* at 133-34; Barnett, *supra* at 29. More broadly, Sack (or Zak)'s name is not mentioned in Barnett's list of prominent thinkers on economic matters of the time, suggesting that the very young Sack and his early writings had not reached a position of prominence before the Tsar's abdication. *See* Barnett, *supra* at 25.

<sup>52</sup> In today's terms, Sack might have been described as culturally, but not religiously, Jewish. On the one hand, he identifies himself as Jewish, and is listed in the dictionary of Jewish biography; on the other hand, he was married to a gentile. Sack wrote Griswold that, "though a religious man in a personal way, I have never been affiliated with any organized religion." Letter from Sack to Griswold, dated Febr. 13, 1944, page 4 (on file with authors). He quoted from the Old and New Testaments in several of his letters to Erwin Griswold. *See, e.g.*, Letter from Sack to Griswold, dated Jan. 9, 1944, pages 3-4 (Psalm 94); Letter from Sack to Griswold, dated March 4, 1944, page 4 (Psalm 35); Letter from Sack to Griswold, dated Aug. 5-6, 1944, page 3 (Eph. 6: 11). *See also* Alexander Sack Archival Material Obtained From the Freedman House in May 2007 (on file at Duke University Law Library) (application of Nina Sack indicating her religious affiliation); *WHO'S WHO IN AMERICAN JEWRY*, 912 (1938) (biography of Alexander Sack).

<sup>53</sup> BENJAMIN NATHANS, *BEYOND THE PALE: THE JEWISH ENCOUNTER WITH LATE IMPERIAL RUSSIA* 45-69 (2002).

<sup>54</sup> BENJAMIN NATHANS, *BEYOND THE PALE: THE JEWISH ENCOUNTER WITH LATE IMPERIAL RUSSIA* 201-259 (2002)

<sup>55</sup> *Id.* at 208-09.

When Sack entered the work force in 1911, the only professions open to Jews were medicine and law, and even the bar imposed a quota on Jewish membership in the waning days of the tsarist regime.<sup>56</sup> It was not until March 20, 1917, when the provisional government in St. Petersburg abolished all distinctions based on nationality, ethnicity, religion or estate,<sup>57</sup> that Sack could have pursued a government position or a career in academics.

While at this time it is difficult to imagine how anyone whose education and career options had been so drastically curtailed by the tsarist regime could be described as “tsarist,” it is also clear that Sack did not gain favor with the Bolsheviks during his tenure in St. Petersburg, and would not have called himself a communist. Sack remained in St. Petersburg from 1917 until 1921 (roughly, for the duration of the Russian civil war), when he decamped for Estonia.<sup>58</sup> During this time he served on the two aforementioned government committees, continued lecturing at the university, and published several articles. Although there is scant evidence about Sack’s political alliances during this time, in Paris, he became friendly with two prominent anti-Bolsheviks—Peter Struve and Baron Boris E. Nolde—suggesting that he may at one point have been allied with the Constitutional Democrat (Kadet) Party or later, the White Russians.<sup>59</sup>

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<sup>56</sup> *Id.* at 346-366.

<sup>57</sup> *Id.* at 12.

<sup>58</sup> After leaving Russia in 1921, Sack moves to Revel, Estonia, where he married Nina George Duguin and became an Estonian citizen. Alexander Sack Archival Material Obtained From the Freedman House in May 2007 (on file at Duke University Law Library) (copies of marriage certificate & Estonian citizenship papers). Sack published several articles on currency reform in the Baltic States and appears to have worked in the Finance Ministry, writing memos to the Minister on matters such as the gold standard and the issuance of paper money. Zak Archival Material from Bekmeteff Archives, Columbia University (on file with authors). He was not the minister of finance in Estonia. E-mails from Central Bank of Estonia to Mitu Gulati dated \_\_\_\_.

<sup>59</sup> Before the revolution, both Baron Boris E. Nolde and Peter Struve were members of the Constitutional Democratic Party. Struve fled Russia after the October revolution and joined forces with the White Russians, settling in Paris after 1920. See generally Richard Pipes, *Struve: Liberal on the Left, 1870-1905* (1970); Richard Pipes, *Struve, Liberal on the Right, 1905-1944* (1980). Baron Nolde was a professor of international law and the legal advisor in the Tsar’s Ministry of Foreign Affairs, and briefly the vice minister of Foreign Affairs after the February revolution. After resigning his post as vice minister, he remained active in the provisional government and, after the October revolution, continued lecturing in international law. In 1919, he emigrated to Paris. See generally Peter Holquist, *Dilemmas of a Liberal Administrator: Baron Boris Nolde*, 7 *Kritika: Explorations in Russian and Eurasian History* 241, 245-53 (2006).

In 1922, Struve was appointed to help review a dissertation that Sack submitted to the Russian law faculty in Prague to receive a master’s degree in financial law. Sack’s dissertation was rejected. G. Starodubtsev, “Voprosy prepodavaniya mezhdunarodnogo prava v protokolah Russkogo Yuridicheskogo Fakulteta v Prage”, “Pravo I Zhizn” v. 24, 1999. (Questions of teaching int’l law in protocols of Russian

Sack's written work precipitated his disfavor with the Bolsheviks. In the second preface to his 1923 book *Restructuring*, Sack writes that he had substantially completed the work in 1918 as part of a comprehensive study of the "bankruptcy of the state of Russia,"<sup>60</sup> but that the original printing matrix for the work had been destroyed by order of the Soviet minister of the press.<sup>61</sup> Not coincidentally, Sack in *Restructuring* expounds the prevailing theory of sovereign debt—that the debts of the previous government should be repaid when a new government comes to power—and does not articulate a theory of odious debt. In the preface, Sack asserts the view that the Bolshevik moment is a transient one, and addresses himself to the imminent rebirth of the Russian state, the attendant restoration of legality, and the task of restoring fiscal sanity to the bankrupt nation.<sup>62</sup> Poignantly, he cites to the many debt assumption proclamations by leaders of the factions opposed to the Bolsheviks such as Koltchak and Kerensky.<sup>63</sup> As for his view of the Bolsheviks and their repudiation of the debt, Sack describes Russia under the Bolsheviks as an "outlaw state"—in particular because it repudiated its debts and was not recognized by any civilized nation. *Restructuring* reveals that Sack is far from being the former tsarist minister who reforms and articulates a doctrine that would rid the proletariat of the burden of debt imposed from the grave by the Tsar; rather, Sack believed that the new debts incurred by the Soviets are the ones that risked being illegitimate, because the government was lawless. No wonder the commissars ordered the destruction of Sack's book.

Sack's contempt for the Bolsheviks resurfaced in his later writings. In 1938, he wrote an article recounting two decades of unsuccessful efforts by foreign nations to get satisfaction from the Soviets for their various property confiscations and repudiations of

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Law Faculty in Prague, *Law and Life*, v. 24, 1999) (citing to various documents in the State Archive of the Russian Federation). Nolde favorably reviewed *Les Effets* in a French journal. *See infra* note 121. In a 1927 letter, Sack thanks Struve for defending his honor as a researcher in the Prague incident. Letter from Sack to Struve dated 6 April 1927 (in Russian). Both Nolde and Struve wrote letters of recommendation for Sack to Columbia University. Letter from Sack to Struve dated 15 April 1927 (in Russian).

<sup>60</sup> A.N. SACK, *RAZVERSTKA GOSUDARSTVENNYKH DOLGOV (APPORTIONMENT OF STATE DEBTS) 19-22 (1923)*. Our thanks to Anna Gelpert for helping us with both the translation from Russian and the historical context. *Cf.* Anna Gelpert, *Odious, Not Debt*, \_\_\_ L. & CONTEMP. PROB. \_\_\_ (2007) (also discussing *Razverstka* and noting that it casts doubt on the modern view of Sack).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* Sack relies on much the same evidence historical in *Les Effets*. *See, e.g.*, Sack, *LES EFFETS*, *supra* n.2, at 2-9, 16-18, 22, 25, 47, 52, 82, 168, & 181.

public debt.<sup>64</sup> In the conclusion, he laments the “melancholy” state of these foreign claims, noting that the Soviet Union had become a “powerful industrial nation,” universally recognized and traded with, and “[y]et it has not recognized, nor paid, any claims arising from its decrees of repudiation, confiscation, and nationalization.”<sup>65</sup> Sack concludes by recounting a Russian fable of a cook and cat. The cook, who fancies himself a statesman, decides to employ reason instead of immediate sanctions with the cat, which he discovers eating the meat. While the cook scolds, however, the cat polishes off the meat. Sack, while making a point about the failed diplomatic efforts of the cook, is clearly disgusted by the result that the cat will suffer no harm from its greedy and wrongful actions.<sup>66</sup>

Four years later, Sack was so outraged by the suggestion that he sympathizes with the Soviets that he sues the New York Times for publishing *a letter* that, according to Sack’s complaint, “charged him ‘with being a defender and supporter of communism as a system’” (the letter, at most, charged Sack with showing sympathy for soviet interests).<sup>67</sup> When a colleague at NYU advised him strongly not to respond to the letter (in effect forbidding him to, as this colleague served as the law school censor), Sack was distraught, and indeed, this incident is the beginning of the decline of his employment relationship with NYU. In a hearing conducted by the university, Sack stated “you must remember that I was driven out of Russia because of the Communists, and for me then to be represented as an advocate of communism . . . and not be allowed to answer the attack, upset me profoundly.”<sup>68</sup> Later, in a statement submitted as evidence to the AALS, Sack wrote that he left Russia in 1921 “because of my opposition to the Soviet Government and its principles,” and that he has, as a “matter of public record,” always been “opposed to Communism.”<sup>69</sup>

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<sup>64</sup> Sack, *Diplomatic Claims*, *supra* n. 17.

<sup>65</sup> Sack, *Diplomatic Claims (continuation)*, *supra* n. 27, at 281.

<sup>66</sup> Sack, *Diplomatic Claims (continuation)*, *supra* n. 27, at 281.

<sup>67</sup> Sack’s lawsuit was dismissed because the letter was not libelous per se; it did not accuse Sack of being a communist or of having communistic beliefs. *Sack v. New York Times Co.*, 59 N.Y. Supp. 2d 888, 889 (App. Div. 1946). In the 1940s, even some of the most strident anti-Bolshevik refugees were defending aspects of the Soviet regime. See Pipes, *Struve, Liberal on the Right*, *supra* note 59, at \_\_\_\_\_. Thus, Sack was not alone in being both anti-communist yet advocating support for the plight of the Russian nation.

<sup>68</sup> Statement of Professor Sack at 3.

<sup>69</sup> Complainant’s Statement, In the Matter of Alexander N. Sack, Complainant, December, 1943, Page 1 ¶ & Exhibit B, page 4 ¶10; see also Letter from Eustice Seligman to Arthur T. Vanderbilt, Esq., dated Jan.

Finally, there is the matter of Sack's entry into the U.S. legal community. Sack came to the New York legal market via London, as a result of his work as an expert witness on Russian domestic law.<sup>70</sup> While in Paris, Sack was hired by an English law firm in a London based case defending Equitable Life Assurance from claims from Russian policy holder. Sack also appeared in New York iterations of the case, having been hired by firms such as Sullivan & Cromwell, Shearman & Sterling, and Davis Polk. Sack's arrival in the U.S. then, was not as an academic émigré from Paris, spouting radical ideas. He came to the attention of American lawyers as a result of his helpful testimony on behalf of a large insurance company. Not exactly the building blocks for a radical legend.

Thus, far from being a revolutionary hero, Sack in his lifetime was strongly opposed to the Bolsheviks, and their rise to power caused him to leave Russia to make a career for himself elsewhere. In 1918, when Sack prepared his manuscript that overtly condemned "lawless" Bolshevik policy, he was formulating and articulating principles of law that he consistently promoted throughout his career. Perhaps Sack hoped that one of the other factions in the civil war would ultimately wrest control of Russia from the Bolsheviks, and that *Restructuring* would put him in a good position for a ministerial position in a more law-abiding government. Unfortunately for him, Sack backed the wrong group; having been censored for strongly opposing the Bolshevik position on public finance and sovereign debt, Sack would have realized, at the end of the civil war, that he had no future in communist Russia.

*ii. An American professor of law teaching in New York, whose scholarship was consistently and uncompromisingly pro-creditor*

Sack's reputation as a Russian professor of law teaching in Paris, while technically true, does not withstand simple scrutiny. Sack taught for eight years on Russian and French law faculties, but he also spent thirteen years teaching in the United

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25, 1943, page 3 ("[Professor Sack] had been naturally greatly disturbed at being accused in the Weaver article [printed by the Times] of entertaining communist views when, in fact, he was a refugee from the communists . . .").

<sup>70</sup> See infra text accompanying notes \_\_ - \_\_\_\_.

States.<sup>71</sup> And while Sack was born and educated in Russia, he left Russia in 1922, never to return, and immediately became an Estonian citizen. He became an American citizen in 1936, shortly after emigrating.<sup>72</sup> Going by the numbers alone, it would be more accurate—if less romantic—to describe Sack as an American professor of law who taught in New York rather than a Russian professor of law who taught in Paris. But neither description fully accounts for the complexities of Sack’s background, citizenship, and peripatetic career.

And while Sack may have wanted to extend his stay in Paris, he did not go out of his way to court popular favor in France. Sack would not have needed to compromise his theories of state succession and odious debt to do so; his early and late writings confirm that he adhered to a strict interpretation of state succession and that he viewed the Bolshevik repudiation of the debt as illegal. But, one of the lasting puzzles about Sack is why, in *Les Effets*, he never clearly stated his views on the Soviet repudiation. Twice in *Les Effets* Sack promises to discuss the Soviet repudiation in greater depth in the “Annexes” to the book.<sup>73</sup> The “Annexes” may have referred to Sack’s planned second volume of *Les Effets*, which he never wrote.<sup>74</sup> In any event, in his magnum opus, published in Paris and largely sponsored by a French university, Sack never overtly articulates a stance on the repudiation. Unlike the hostile reception that his anti-

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<sup>71</sup> Sack was a “privatdotsent” at Petrograd University for four years, taught in Paris for four years and in the Hague for one. He taught at Northwestern University for two years and New York University for eleven.

<sup>72</sup> Archival material from Bekmeteff and Freedman home.

<sup>73</sup> SACK, *LES EFFETS*, *supra* note 2, at 52 (“Sur la répudiation des dettes russes par les SOVIETS, v. Annexes.”). Sack hints at his disapproval of the Soviet repudiation in a later chapter of *Les Effets*, in which he discusses the legal effect of treaties between debtor states concerning the debt of the prior government. Sack posits the rule that treaties which annul the obligation among debtor states are “null and void” from the point of view of the creditors of those states. Sack then describes extensively the treaties between the Bolsheviks and various states that broke apart from the former Russian Empire – e.g., the Baltic states – in which the Bolsheviks liberated the former Russian territories from any debts owed the soviet government as a result of debts incurred by the Tsar. Sack notes the “casualness” (*desinvolture*) with which the Bolsheviks took this step, commenting that it was caused by the Bolsheviks’ utter lack of intent to pay any part of the tsarist debt. Sack concludes this discussion with another (unfulfilled) promise to discuss the Soviet repudiation in the “Annexes.” *Id.* at 245 (“au sujet de la repudiation de la dette russe par les Soviets, v. Annexes.”). The unwritten conclusion of this chapter, however, is that the various treaties between the Soviets and the former territories of the Russian Empire are legally irrelevant as concerns the claims of the creditors against those states.

<sup>74</sup> SACK, *LES EFFETS*, *supra* note 2, at xiv (noting that he plans to put a special case study of the Russian debt in the planned second volume). Sack’s 1938 article on foreign diplomatic claims against the Soviets contains much of the historical information that he may have planned to include in this second volume, or the “Annexes.” See generally Sack, *Diplomatic Claims & Diplomatic Claims (continuation)*, *supra* nn. 17 & 27.

repudiation stance received in Russia, Sack could hardly have found a more receptive audience for his position than in 1920s France.

Reading *Les Effets*, it is certainly possible to infer that Sack disapproved of the Soviet repudiation. For example, he included his (incomplete) discussion of the tsarist debts in the section of *Les Effets* that discusses *political* transformations, where he asserts the “unanimously established” doctrine that the new state (i.e., the Bolsheviks’) must assume the debts of the old (i.e., the Tsar’s).<sup>75</sup> This choice of location suggests that Sack viewed the Russian revolution as a mere *political* transformation, ergo one that did not justify the repudiation of debts as odious. But, by stopping short without fully discussing the Soviet repudiation and pronouncing his opinion on the matter, Sack leaves open the possibility that Russia’s final transformation into a communist state after the civil war may have been something *other* than political—i.e., a state succession.

Sack does not include any reference to the Soviet repudiation in his chapters on odious debts, perhaps because he considered the transformation political rather than a state succession. But, he does discuss a mistaken instance of odious debt forgiveness in this section. In the Treaty of Versailles, newly independent Poland was not required to pay debts attributable to the German and Prussian efforts to colonize areas of Poland. Sack opined that the Treaty wrongly treated all such debts as hostile to Poland, and that some of the debts should have been partitioned among the various ceding territories.<sup>76</sup> Sack also disapproved of section 255 of the Treaty of Versailles, which exempted France from paying German debt attributable to the territories of Alsace and Lorraine because Germany had refused to pay France for any such debt when it annexed the territories in 1871. In *Les Effets*, Sack criticized France for repeating the wrong perpetrated by Germany,<sup>77</sup> which “astonished” one French reviewer of the book.<sup>78</sup>

If Sack was willing to criticize *mistaken instances* of odious debt forgiveness, why wasn’t he willing to criticize a *wrongful claim* of odious debt repudiation?

While it is impossible to know why Sack did not write more forcefully about the Soviet repudiation in *Les Effets*, his coyness on the subject is part of a recurring pattern in

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<sup>75</sup> SACK, LES EFFETS, *supra* note 2, at 46, 52.

<sup>76</sup> SACK, LES EFFETS, *supra* n.2, at 160.

<sup>77</sup> SACK, LES EFFETS, *supra* n. 2, at 149 (“Si l’Allemagne, en 1871, a commis une injustice, ce n’est pas une raison pour que la France en fasse autant en 1919.”)

<sup>78</sup> Book Review, *Revue de Droit International Privé* (1928) 604, 605.

his life: his rigid and uncompromising approach to all matters concerning him and his scholarship, and an uncanny ability to anger the people who might have been able to help him. Sack's dispute with NYU provides a case in point. Erwin Griswold represented Sack *pro bono* in his hearing before the AALS. Correspondence reveals that their relationship broke down badly in the summer of 1944, over Sack's inability to compromise. The AALS had issued a tentative report that, in Griswold's opinion, "clearly and overwhelmingly" favored Sack, and made a "real contribution to the cause of academic freedom."<sup>79</sup> Instead of reacting with elation (as Griswold did), Sack reacted with fury at the "inaccurate and baseless statements" in the report. Over Griswold's objections, Sack submitted a 102 page document of errata and requested changes to the AALS committee, jeopardizing his good favor with the committee and his negotiating position with NYU.<sup>80</sup> Griswold bemoaned Sack's almost fanatical attention to the minutiae of the report, pointing out that Sack "cannot expect [the committee] to decide everything [his] way."<sup>81</sup> In later letters, and in his inimitably frank style, Griswold criticized Sack for his inability to "take advice,"<sup>82</sup> and his selfish and "completely rigid" approach to the NYU matter.<sup>83</sup> According to Griswold, Sack was "the most serious obstacle to the success" of Griswold's effort to help him, and the type of man who "continuously adds to his own difficulties."<sup>84</sup>

Griswold was not the only member of the legal academy whose good will Sack squandered. Sack seems to have had little sense of tact, or of the smallness and insularity of the academic world. For example, Sack wrote a letter in response to Thomas Baty's review of *Les Effets*, asserting that Baty "thoroughly misrepresent[ed]" his ideas. Baty

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<sup>79</sup> Letter from Griswold to Sack, dated Aug. 5, 1944 (on file with authors).

<sup>80</sup> Memorandum of Requests for Corrections of and Additions to the Tentative Report of the Committee Submitted by the Complainant (written by Sack and submitted to the AALS committee in 1944) (on file with authors). The committee's final report was slightly less favorable to Sack, and Sack was not able to conclude a settlement with NYU until 1946. Settlement between New York University and Alexander N. Sack (on file with authors).

<sup>81</sup> Letter from Griswold to Sack, dated Aug. 5, 1944. Thomas Baty, in his 1927 review of *Les Effets*, makes note of—and pokes a bit of fun at—Sack's (over) confidence in the absolute correctness of his positions: "I wish," said Monckton Milnes once, "that I was as cocksure about anything as Macaulay is about everything." Professor Sack seldom leaves his readers in doubt as to what they are to believe." Thomas Baty, Review: *Les Effets des transformations des Etats sur leurs dettes publiques et autre obligations financiers*, 3 Yale Law Journal 273, 273 (1927).

<sup>82</sup> Letter from Griswold to Sack, dated Febr. 27, 1945, page 3.

<sup>83</sup> Letter from Griswold to Sack, dated Sept. 11, 1945, page 1.

<sup>84</sup> Letter from Griswold to Sack, dated Sept. 11, 1945, page 2; Letter from Griswold to Gerdes, dated April 11, 1946, page 1.

wrote a defense of himself, and the complete, unpleasant exchange was published in the Yale Law Journal.<sup>85</sup> Sack's review of Ernest Feilchenfeld's *Public Debts* can best be described as nitpicky and mean, and so full of parenthetical punctuation marks (?)(!) as to be almost unreadable in places.<sup>86</sup> Finally, instead of garnering support among the law faculty at NYU during his employment dispute, Sack managed to alienate *all* of it, for example, by accusing one professor of doctoring the transcript of the university hearing,<sup>87</sup> and by suggesting that the school should lower the salaries of all full time faculty proportionally rather than dropping his entirely.<sup>88</sup> In a remarkable letter submitted to the AALS, the entire full- and part-time faculty at the NYU law school (excluding the faculty directly involved in the dispute) *supported* the school in dropping Sack, and indicated that they preferred *not* "to continue association with [him] in view of his groundless and reckless charges against those who have befriended him."<sup>89</sup> Regardless of his scholarship and teaching abilities, Sack would have been treated as a pariah in academic legal circles after the events of the 1940s.

The question still remains, however, why Sack, with his rigid and uncompromising character, would not have strongly asserted his disapproval of the Bolshevik repudiation. It seems unlikely that he was hoping not to burn his bridges in

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<sup>85</sup> Sack, Letter to Yale Law Journal, 37 YALE L. J. 1178 (1928); Thomas Baty, Letter to Yale Law Journal, 37 YALE L. J. 1179 (1928)

<sup>86</sup> See, e.g., Sack, *Review of Public Debts & State Succession*, 80 U. PENN. L. REV. 608, 620-21 (1932). Sack and Feilchenfeld had many things in common. Feilchenfeld was a German Jewish scholar, who fled Germany before World War II and took refuge in the United States. Sack and Feilchenfeld may have encountered each other in Berlin in the 1920s. From the 1921 introduction to Sack's *Razverstka*, we know that Sack was in Berlin in the early 1920s; Feilchenfeld published a treatise on public debts in Berlin in 1922. The academic interests of Sack and Feilchenfeld also intersect at another point related to the Odious Debt question. They were both interested in the obligations and rights of belligerent powers and published monographs on the subject in the 1940s. ERNST FEILCHENFELD, *THE INTERNATIONAL ECONOMIC LAW OF BELLIGERANT OCCUPATION* (1942); SACK, *BELLIGERANT RECAPTURES IN INTERNATIONAL PRACTICE* (1940). Feilchenfeld had his share of troubles finding a permanent position in an American law school (although his troubles had a happier ending than Sack's). He wrote *Public Debts* while a visiting scholar at Harvard and appears to have believed himself in line for a permanent position. He was, however, denied a permanent position there (in part because of his "exceedingly unattractive personality"), and spent the remainder of his academic career at Georgetown University. The difficult Harvard had in extricating themselves from Feilchenfeld made them reluctant to offer positions to any further refugee jurists. *The Refugee Jurist and American Law Schools, 1993-1941*, 50 AMER. J. COMP. L. 777, 790 (2002) (quoting Edmund Morgan to Ralph J. Baker, Nov. 2, 1943, Ernst Feilchenfeld Folder, Box 3, Law School – Dean's Subject Files, 1932-46).

<sup>87</sup> American Association of Law Schools, Tentative Report In the Matter of Alexander N. Sack vs. New York University and New York University School of Law, ¶ 73 (hereafter AALS Tentative Report).

<sup>88</sup> AALS Tentative Report, *supra* note 86, at ¶ 4, ¶ 61.

<sup>89</sup> AALS Tentative Report, *supra* note 86, at ¶ 74.

Russia, as they had already been burned, or that he was reluctant to alienate a group of Bolshevik apologists in France, as he seemed to possess a talent for alienating groups of intellectuals. We don't have enough to speculate as to his motivations. But Sack's stinginess in supporting the popular French condemnation of the repudiation was perhaps one more manifestation of his knack for estranging the people in the position to best help him.

iii. Not the pre-eminent scholar on public debts and state succession, nor an eminent scholar of public international law, but maybe the first to use the term "Odious Debts" in the sovereign debt context

To determine whether Sack was the preeminent scholar on public debts and state succession of his day, and an *eminence grise* of the international law community, we examined his background and training, the contemporary reviews of his book, and the way he was discussed and treated by other legal scholars. We also examined the sources of his odious debts doctrine to determine whether Sack viewed the doctrine as a restatement of existing law, or as a new construct.

Sack, at the time he published *Les Effets*, was known (if at all) as a scholar of Russian banking and financial law rather than a scholar of sovereign debt or international law. He was not the preeminent scholar of sovereign debt *before* publishing *Les Effets*. Rather, the book was his effort to *become* the preeminent scholar of sovereign debt, but *not* a preeminent scholar of public international law. Sack presented *Les Effets* as an effort to develop a new (and controversial) area of law—international financial law—that he envisioned as a hybrid, fitting neither within the field of public international law nor the field of domestic law. Sack believed this new species of law would more adequately serve the needs of private creditors owed money by state debtors than public international law.

Also, Sack was not generally regarded as a scholar of international law by his peers, or as a pre-eminent scholar in any field. At the time of publication, *Les Effets* was widely reviewed and praised for its meticulous scholarship, the unprecedented scope of its collection of primary sources, and its usefulness for future writers in the area. But its central proposal—to create an international law of finance—was not well received, and

the doctrine of odious debts was all but overlooked in the reviews, and criticized by those who noticed it.

While Sack continued to write and consult on the topic of sovereign debt throughout his career, he never published the second planned volume of *Les Effets*,<sup>90</sup> and his later scholarship focused on topics such as conflicts of law, international taxation, and aviation law. And during World War II, when the American law school where Sack was teaching needed to cut costs, Sack was the first full time professor to be dropped—an unlikely fate for an eminent (or preeminent) scholar.<sup>91</sup>

a. Sack's background and training

Sack's educational, research and employment background indicate that, in 1927, he was not an international law scholar—that is, someone who focused his study on the laws governing the interactions of states with each other. He was interested in the domestic (Russian) laws governing finance, and specifically, public finance, which includes the study of how states raise capital (e.g., taxation versus debt financing).

Sack trained not only in law but also in economics, and his interest in public debts is probably an outgrowth of that training. His early files contain detailed charts of Russian public debts going back decades prior to the Tsar's abdication, and a study of the public finances of the British Raj.<sup>92</sup> He also studied and wrote about the provisions of bond indentures for Russian railroad bonds, many of which were backed by guarantees from the tsarist government.<sup>93</sup> But there are no records that indicate an interest in public international law (i.e., clippings about diplomatic actions prior to 1917).

Sack's early employment similarly shows his interest in public finance. He worked on a series of economic committees—for the provisional government that followed the Tsar and then, after leaving Russia, for the Estonian government. In his work on these committees, Sack advised and wrote about the impact of currency

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<sup>90</sup> Sack published a collection of lectures based on *Les Effets*, LA SUCCESSION AUX DETTES D'ETAT PUBLIQUES, *supra* note 46, but did not produce the volume he ambitiously outlined in the introduction to *Les Effets*. SACK, LES EFFETS, *supra* note 2, at xiv (stating that the proposed volume two would address state financial obligations arising from contracts of all sorts, pensions, paper money, etc.).

<sup>91</sup> See *infra* text accompanying notes \_\_\_\_-\_\_\_\_.

<sup>92</sup> Columbia University Archival Material on Alexandr N. Zak, Folders 4 & 5.

<sup>93</sup> Alexander N. Sack, Russian and Foreign Law Governing the Indentures Issued by the Russian Railway Society (1917) (in Russian).

fluctuations on public finance,<sup>94</sup> and for the first time, became interested in an international negotiation over sovereign debt. One of the important questions taken up by the Soviet and newly independent Estonian governments in 1918 was what to do with the Tsarist debt; specifically, whether it should be apportioned among the various territories of the Tsar's former empire. Sack may even have attended these meetings, as his files contain numerous paper clippings about the Estonian-Russian negotiations over the apportionment (and the Soviet's ultimate forgiveness) of the debt.<sup>95</sup>

Sack's expertise in Russian financial law helped secure his entry into the U.S. legal community. In 1929, Sack appeared as an expert witness for Equitable Life Assurance, which was then defending against claims on its pre-revolutionary insurance contracts. After taking control in 1917, the Bolsheviks shut down a number of foreign companies, including Equitable Life, seizing what assets they could.<sup>96</sup> Equitable and other companies like New York Life stopped paying on claims from Russian contracts.<sup>97</sup> Claimants sued the parent company both in London and New York.<sup>98</sup> Sack provided expert testimony on whether the insurance company was obligated to compensate the insureds (more likely, their descendants) who presumably had fled the Soviet regime. He opined that the insureds had no claim; that when Equitable was forced to leave the Soviet Union, Equitable's obligations were extinguished and the Soviet government inherited its obligations.<sup>99</sup> Sack appeared on behalf of Equitable in London, and subsequently in New York, and it was through this work that he gained the admiration of lawyers such as John W. Davis, who later sponsored his admission to the New York Bar.<sup>100</sup>

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<sup>94</sup> Alexander N. Sack, *Currency Reform in the Baltic States* (1924) (in German); Alexander N. Sack, *Fixing the Value of Money* (1925).

<sup>95</sup> Columbia University Archival Material on Alexandr N. Zak, Folders 4 & 5,

<sup>96</sup> *See To Force Regulation*, TIME, Jan. 4, 1926 (available at <http://www.time.com/time/magazine/article/0,9171,728784,00.html>); *see also Rubles for Rudkowsky*, TIME, Dec. 5, 1932.

<sup>97</sup> *Id.*

<sup>98</sup> *See International Law, Conflicts of Laws, Operation of Recognition of Soviet Union of Effect of Russian Decrees in American Courts*, 35 COLUM. L. REV. 292 (1935).

<sup>99</sup> Sack, *Non-Liability Defense*, Bekmeteff Archives, Columbia University (memorandum) (on file with authors).

<sup>100</sup> Letter from John W. Davis to Clerk of the Appellate Division dated 23 September 1937. Davis, the Davis in Davis Polk, a former U.S. Ambassador to the Court of St. James, Solicitor General of the U.S., and the Democratic nominee for President in 1924, was a legendary conservative lawyer who argued in favor of "separate but equal" in *Brown v. Board of Education*. *See WILLIAM H. HARBAUGH, LAWYER'S LAWYER: THE LIFE OF JOHN W. DAVIS* (1973); Jerold S. Auerbach, *Book Review*, 87 HARV. L. REV. 1100 (1974).

Thus, when he published *Les Effets* in 1927, Sack was a relative newcomer to the field of sovereign debt scholarship, having written more on topics related to banking, finance, and currency. According to the bibliography in *Les Effets*, Sack had published four works relating to public debt, as opposed to nine on banking, finance and currency.<sup>101</sup> In the Introduction to *Les Effets*, Sack explains that the recent events in Russian history sparked his initial interest in public debt. The Russian revolution of 1917 caused him to examine the effects of a *political* transformation of a State on its national debt, and the declaration of the independence of Poland, caused him to examine the effects of a *territorial* transformation of a state on its national debt. His interest grew in the succeeding years, with the Bolshevik “coup d’État,” the 1918 repudiation of the tsarist debts, and various post-war treaties—particularly the Treaties of Brest-Litovsk and Berlin in 1918, and with the Baltic states in 1920-21. But the Introduction confirms that Sack did not approach the topic from the point of view of public international law.

*b. A preeminent scholar of international financial law, not public international law*

In the Introduction to *Les Effets*, Sack explains that he perceived a gap in the field of international law on the subject of state succession and debts, and that he set for himself the project of filling this gap. But rather than approaching the project as an international lawyer, Sack proposes to locate his rules on state succession within a new and controversial field of law known as “international financial law.”<sup>102</sup> For Sack,

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<sup>101</sup>Sack’s works on public debt included an article on the law of Russian railway bonds, a book on state bankruptcy, *Razverstka*, which addressed the partition of debts after the dissolution of a debtor state, and an article on the distribution of the debts of the Austro-Hungarian empire. SACK, *LES EFFETS*, *supra* note 2, (bibliography page): “Le Droit des Obligations Émises par les Sociétés des Chemins de Fer en Russie et à l’Étranger, Pétersbourg, 1917, p. 47 (en russe), . . . La Banqueroute d’État, Pétersbourg, 1918, p. 128 (en russe), . . . La Repartition des Dettes Publiques en Cas de Démembrement de l’État Débiteur, Berlin, 1923 (Travaux des savants russes à l’étranger, t. III), p. 158 (en russe), . . . Die Verteilung der Schulden der Oesterreichisch-Ungarischen Monarchie, Kiel, 1926, p.22.”

<sup>102</sup> See, e.g., FEILCHENFELD, *supra* note 10, at 591-99 (criticizing the concept of international financial law); Clyde Eagleton 46 POL. SCI. Q. 616, 617 (1931) (reviewing ERNST FEILCHENFELD, PUBLIC DEBTS AND STATE SUCCESSION) (describing Sack’s theory as “international financial law” and noting Feilchenfeld’s “wide disagreement with the other important current work on the subject, by Sack”); N. Politis, *Preface* to SACK, *LES EFFETS*, *supra* note 2, at v (noting that Sack has made a remarkable contribution to the study of a new branch of law that people have rightly called international financial law) (“L’ouvrage de M. SACK marquera, dans l’évolution du droit international, une date pour avoir fait cette

international law governed only the relations among states. Left out of its ambit were the relations among states and private creditors—specifically, private creditors who were citizens of other states. Domestic financial law, which is specific to each country, was also inadequate to address the public debtor and private creditor. Given the absence of law to govern this important set of relationships, Sack’s innovation was to propose that a new body of law govern these relations. This new body of law was a species of private law—essentially, private contract law<sup>103</sup>—that would view states as private actors when they borrowed from foreign citizens on the international debt market. Sack described his proposed area of law as “*sui generis*,” and envisaged it as having universal reach (“*super-étatique*”).<sup>104</sup>

In a sense, Sack was prescient because this is indeed the way in which the law governing state debts to foreign bondholders has evolved.<sup>105</sup> Starting in the 1970s, and following the passage of sovereign immunities acts in a variety of jurisdictions, the borrowing of sovereigns from private creditors has become a species of municipal law; namely, the municipal law chosen by the parties to the contracts. Perhaps not anticipating that states would ever be willing to waive their immunity to suit in some other sovereign’s municipal courts, Sack proposed that a separate body of private law be created to deal with states’ relationships with private creditors.

Thus it was clear to Sack that he was not “doing” international law in *Les Effets*, and it also was clear to the contemporary reviewers of his book (of which there were many). *Les Effets* was reviewed in legal and financial reviews, in several different languages, and by some of the most prominent scholars in international law.<sup>106</sup> The

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démonstration au sujet d'un des aspects du crédit public et apporté une remarquable contribution à l'étude de la nouvelle branche du droit des gens qui a été justement appelée le droit financier international.”)

<sup>103</sup> See SACK, *LES EFFETS*, *supra* note 2, at 30-41.

<sup>104</sup> SACK, *LES EFFETS*, *supra* note 2, at xi, 84-88 (“Je crois pouvoir affirmer que la succession des dettes d’État est une institution de droit *sui generis* qui ne ressortit pas au droit international public, mais au droit public général. Sur ce point, mes conclusions concordent avec celles de A. RIVIER, E. NYS, F. LISZT, en partie avec celles de F. HOLTZENDORF.”).

<sup>105</sup> J.P. O’Connell, *State Succession and the Theory of the State*, PAPERS OF THE GROTIAN SOCIETY, 23, 66-67 (1972) (acknowledging that Sack’s “highly original” work was the “imaginative precursor of the contemporary school of international lawyers which is attempting to subject international financial transactions to the governance of general principles of law mediating between public . . . and private international law”).

<sup>106</sup> We have access to what we think were likely all of the reviews of Sack’s book at the time because Sack himself kept a detailed list of the reviews, with complimentary excerpts from each of the reviews. He sent such a list to Dean Leon Green when he sought employment at Northwestern in 1929, to the Guggenheim

reviews uniformly praise Sack's effort to exhaustively document the topic of sovereign debt and state succession. George Grafton Wilson, reviewing in the *American Journal of International Law*, writes that "students of international finance and of international law [are under] great obligations to the author, who has assembled such a wealth of material in such an admirable form."<sup>107</sup> In his 1931 treatise on the same subject, Ernst Feilchenfeld also praises the work as "perhaps the most profound treatise ever written on the subject," and "unrivaled in its careful analysis of the details."<sup>108</sup> But not one of the reviews describe Sack as the preeminent scholar in the area; rather, they view the work as establishing Sack as a scholar of note in this area, whom all other students of this area of law will need to study and consider.<sup>109</sup>

Some prominent reviewers in the positivist tradition of international law rejected Sack's theory outright. Phillip Jessup commented dryly that "in spite of the wealth of material which Mr. Sack provides, it is almost impossible to discover a rule of international law."<sup>110</sup> Hersch Lauterpacht mocked the notion of a set of rights that belonged neither to public international law or municipal law: "Where then *does* it belong? [Sack's] answer is: it is a right *sui generis* based on '*droit financier*' and '*droit publique general*,' whatever that may be."<sup>111</sup> Lauterpacht believed that Sack viewed international law through too narrow a lens; international law, while primarily concerned

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Foundation when applying for a grant in 1936, to Erwin Griswold when was preparing for the hearing before the AALS, and to the Andrew Freedman Home in 1953.

<sup>107</sup> George Grafton Wilson, 22 *AM. J. INT'L L.* 479 (1928) (reviewing *LES EFFETS*); see also Baty, *supra* note 80, at 275 (writing that the book "is most carefully, scientifically and elaborately planned, and the amount of research and thought expended on it must have been enormous"); Ch. R., *Revue Générale de Droit International Public*, Troisième Série—Tome I, Tome XXIV—1927, 841, 842 (reviewing *LES EFFETS*) ("Par son érudition, par la richesse de sa documentation, par la profondeur et l'ingéniosité de ses aperçus, il marque une date dans l'étude du Droit des gens.") Along similar lines, Nicholas Politis, in the Preface to *Les Effets*, calls Sack a "Benedictine layman," patiently finding and parsing the evidence of 150 years of state practice. N. Politis, *Preface* to SACK, *LES EFFETS*, *supra* note 2, at ii ("Avec la patience d'un bénédictin laïque et le discernement d'un savant averti, il a suivi de très près la longue liste des traités d'annexion et de règlement de dettes conclus depuis 150 ans et analysé une à une leurs clauses ; il a recherché la manière dont elles ont été appliquées, les mesures législatives, administratives et judiciaires auxquelles elles ont donné lieu ; il a recueilli et classé l'opinion de tous les auteurs qui ont écrit sur la matière.")

<sup>108</sup> FEILCHENFELD, *supra* note 10, at 575.

<sup>109</sup> See, e.g., N. Politis, *Preface* to SACK, *LES EFFETS*, *supra* note 2, at v ("Mr. Sack's work marks a date in the evolution of international law") ("L'ouvrage de M. SACK marquera, dans l'évolution du droit international, une date pour avoir fait cette démonstration au sujet d'un des aspects du crédit public et apporté une remarquable contribution à l'étude de la nouvelle branche du droit des gens qui a été justement appelée le droit financier international.")

<sup>110</sup> Phillip C. Jessup, 28 *COLUM. L. REV.* 521, 522 (1928) (reviewing *LES EFFETS*).

<sup>111</sup> H. Lauterpacht, *State Succession*, 10 *J. COMP. LEG. & INT'L L.* 164, 165-66 (reviewing *LES EFFETS*).

with the relations among states, also deals with a variety of state-individual relations (one state's relations with the diplomats of another state being an example).<sup>112</sup> Thomas Baty, reviewing *Les Effets* in the Yale Law Journal, criticized Sack for "importing wholesale into the simple and austere law of nations the ideas and conceptions of private law."<sup>113</sup> For these three members of the international law community, Sack's book was a useful resource for examples of treaties and national practice, but would not be ranked among the works of a great publicist.<sup>114</sup>

Sack's work was more generally praised by reviewers in financial or economic journals, who were (by discipline or nationality) less unsettled by Sack's hybridization of international and municipal law. Barbara Wootton (an economist at the University of London), praised Sack's effort to create a comprehensive "code" establishing the distribution of debt among various components of a former state, and the limits of creditors' and debtors' rights in a large variety of possible situations.<sup>115</sup> But Wootton criticized Sack for abandoning the systems of sanctions provided by the law of nations without supplying a new system to enforce his code.<sup>116</sup> French legal reviews were also more receptive to Sack's "constructive" efforts to propose a new code of law, one stating that this kind of scholarship gives practical effect to the field of international law, which had previously existed more as a form of literature than law.<sup>117</sup>

As a work of scholarship, *Les Effets* had only a slight impact on the field of public international law before the late 1990s, probably because Sack's idea of international

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<sup>112</sup> *Id.* at 166.

<sup>113</sup> Baty, *supra* note 80, at 273-2

<sup>114</sup> *See also, e.g.*, Wilson, *supra* note 100, at 479 ("the reader of this work of Professor Sack may find much with which he feels inclined to disagree"); Louis Trotobas, *L'Année Politique Française et Étrangère* (1928) 367, 368 (reviewing LES EFFETS) (questioning why Sack would abandon international law rather than trying to reform it and make it more responsive to the interests of private creditors); Charles Rousseau, *Revue Generale de Droit International Public*, TOME XXXIV, 1927 841, 842 (reviewing LES EFFETS) (expressing hesitation at the enormous potential of Sack's proposed "super-state" law).

<sup>115</sup> Barbara Wootton, 38 *ECON. J.* 95, 95-96 (1927) (reviewing LES EFFETS).

<sup>116</sup> *Id.* at 96.

<sup>117</sup> *REVUE DE DROIT BANCAIRE* (1927) 333 (reviewing LES EFFETS) ("L'ouvrage est le type des travaux à faire pour que le droit international cesse d'être une forme de littérature et devienne une codification de pratiques réelles.") *See, e.g.*, *REVUE DE SCIENCE ET DE LEGISLATION FINANCIERES* (1927) (reviewing LES EFFETS) (probably written by Gaston Jeze); P. Tager, *Book Review*, *BULLETIN DE LA SOCIETE DE LEGISLATION COMPAREE*, Tome Cinquante-sixième, 1926-27, 404 (reviewing LES EFFETS); Baron Boris Nolde, *JOURNAL DU DROIT INTERNATIONAL*, Tome 54, 838-39 (1927) (reviewing LES EFFETS); 7 *RECEUIL DES DECISIONS TRIBUNAUX ARBITRAUX MIXTES*, 1010-11 (1927-28) (reviewing LES EFFETS); SACK, *LES EFFETS*, *supra* note 2, at xii (describing his project as "essentiellement constructive")

financial law was too radical for its time. Feilchenfeld, writing on the same topic only four years later, accused Sack of being “misleading” as to the “existence and non-existence” of certain legal protections: “[Sack] does not . . . state existing rules, and claims as rules of international financial law non-existing and controversial rules which have not become generally recognized in international law. These omissions and errors are not accidental, but a consequence of his attempt to base legal results on an unrecognized system of law.”<sup>118</sup> J.P. O’Connell, writing in 1972, additionally attributed Sack’s failure to “attract[] sympathetic attention” to his unworkable scheme of creating a “property relationship” between a territory and its creditors.<sup>119</sup>

It was only after publishing *Les Effets* and emigrating to the United States that Sack gained expertise in the area of public international law. In 1930, James Garner, a public international law scholar, recommended Sack to be a visiting professor at Northwestern University.<sup>120</sup> Garner was concerned that the faculty at Northwestern would assume that Sack was a public international law scholar, so he wrote Dean Leon Green on at least two occasions to emphasize that Sack was not a public international law scholar and unlikely to be able to teach that subject. Rather, Garner explains, Sack is an expert on “International Financial Law.”<sup>121</sup> Despite his lack of experience in the subject, Sack taught the general course on international law for the two years he spent at Northwestern, and each year that he taught at NYU.

*c. Inventing, rather than synthesizing, the doctrine of Odious Debt*

While Sack may have been trying to invent a new code of international law in *Les Effets*, it is still possible that his doctrine of odious debts restates an existing state practice, and thus that modern proponents of the doctrine are justified in arguing that it is a rule of customary international law. Sack, after all, was noted for his meticulous research, and even Feilchenfeld admitted that “the thorough study of international

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<sup>118</sup> FEILCHENFELD, *supra* note 10, at 596-97.

<sup>119</sup> O’Connell, *supra* note 98, at 67.

<sup>120</sup> Garner was on the faculty of the University of Illinois Law School. See Letters of James W. Garner to Dean Leon Green, March 31, 1930 and April 2, 1930.

<sup>121</sup> Letter from Garner to Green, March 31, 1930, p.2; Letter from Garner to Green, April 2, 1930.

practice which [Sack] has undertaken in his book provides an extraordinary amount of valuable information for the student of international law.”<sup>122</sup> But an examination of Sack’s sources for the doctrine—and the scant reviews it received—shows that Sack was not stating a rule based exclusively on state practice.

Significantly, Sack did not base his doctrine of odious debts primarily or only on a synthesis of existing precedents. Writing in 1927 about odious debts, Sack knew of several examples of state practice that, in combination, could have provided a basis for the three requirements (consent, benefit, and creditor knowledge) of his odious debts doctrine: the United States’ position in its negotiations following the Spanish American war in 1898 and Justice Taft’s opinion in the *Tinoco* arbitration in 1923.<sup>123</sup>

Sack does refer to the arguments advanced by the United States in favor of Cuba’s repudiation of Spanish debt following the Spanish-American War as support for his doctrine of odious debts. In that negotiation, Cuba sought to repudiate debt contracted by Spain and secured by Cuban revenue streams. The United States argued, in part, that the debts were invalid for *moral* reasons because they were “‘imposed upon the people of Cuba without their consent and by force of arms,’” and “‘contracted by Spain for national purposes, which in some cases were alien and in others actually adverse to the interest of Cuba,’” such as “‘the purpose of supporting a Spanish army in Cuba.’”<sup>124</sup> Thus Sack could have based his requirements of benefit and consent on the assertions of the United States.

However, the position of the United States on Cuba was not exactly state practice at the time—not even for the United States<sup>125</sup>—and Sack knew as much.<sup>126</sup> At most, it

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<sup>122</sup> FEILCHENFELD, *supra* note 10, at 596.

<sup>123</sup> See e.g., See Buchheit et al., *supra* note 10, at 1216-19; Paul Stephan & Robert Scott, THE LIMITS OF LEVIATHAN (2006); Jeff King, JEFF KING, THE DOCTRINE OF ODIUS DEBT IN INTERNATIONAL LAW: A RESTATEMENT, Draft of 21 January 2007, n. 328; Feinerman, *supra* note 11, at \_\_\_.

<sup>124</sup> SACK, LES EFFETS, *supra* note 2, at 159, quoting J. B. MOORE, *Digest International Arbitrations*, vol. I, p. 358-359 & 367.

<sup>125</sup> Historian Lou Perez and legal scholar Deborah Weissman point out that scholars of that period cannot assert with a straight face that U.S. practice was consistent with a doctrine of odious debts. In cases such as that involving Santo Domingo, the U.S. was front and center in arguing that all debts should be paid, regardless of their despotic roots (the despots in that case having been foisted on the people of Santo Domingo by the U.S.). See Deborah Weissman & Louis A. Perez, Jr., *Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony*, 32 N.C. J. INT’L & COMM. REG. \_\_\_ (2007).

<sup>126</sup> Maybe, by refusing to follow existing state practice at the time, the U.S. was trying to alter the default rule of customary international law. But that seems implausible in light of the broader U.S. position at the time. See Weissman & Perez, *supra* note 118.

was an exception to the more generally accepted rule that a ceding territory becomes responsible for debts specifically attributed to the territory. Previously, in *Restructuring*, Sack had not treated the U.S.-Spain negotiation as meaningful precedent. After describing a number of cases in which debt succession did not follow territorial cession, Sack noted that: “theoreticians of international law considered the position initially taken by the Spanish as flawless from the perspective of international law.”<sup>127</sup> This tells us two things. First, Sack was reporting that in 1898, the majority position in international law was set against acknowledging an odious debt defense. Second, Sack’s failure to criticize Spain and international law scholars on this point suggests that he agreed with the Spanish position.

Oddly, in the odious debt discussion in *Les Effets*, Sack did not refer to the most immediate precedent for an odious debts defense—the *Tinoco* arbitration involving a dispute between Costa Rica and the Royal Bank of Canada—which Sack discusses elsewhere in *Les Effets*.<sup>128</sup> Sack’s doctrine of odious debts is largely consonant with the one implicitly expressed by the arbitrator in that case, Chief Justice Taft. Taft ratified Costa Rica’s nullification of a loan contracted by the previous (Tinoco) government with the Bank of Canada, on the grounds that the Bank had not acted in good faith in making the loan, which was secured by patently irregular currency, for obviously irregular purposes (the personal support of the soon-to-flee dictator, and payment of four years salary in advance to the dictator’s brother).<sup>129</sup> The rule that Taft articulated is based on common-law fraud: the loan was invalid because debtor failed to prove that it had, in good faith, “furnished money to the government for its legitimate use.” Rather, the Bank actually knew, or should have known, that the funds were intended for “personal and not

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<sup>127</sup> SACK, RAZVERSTKA, *supra* note 57.

<sup>128</sup> *See, e.g.*, SACK, LES EFFETS, *supra* note 2, at 2-3 (citing Tinoco’s coup as an example where the holder of power changed but the form of government did not); 11, 15 (quoting and citing Taft’s opinion in the arbitration). Sack also does not cite to the 1900 decision of Great Britain not to honor the war debts of the South African Republic after the Anglo-Boer War, which others views as an example of the British theory of odious debts. *See, e.g.*, Mohammed Bedjaoui, Special Rapporteur—Draft articles on succession in respect of State debts, with commentaries, Extract from the Yearbook of the International Law Commission, 1997 (<http://www.un.org/law/ilc/index.htm>), at 70.

<sup>129</sup> Arbitration Between Great Britain and Costa Rica 1 U.N. REP. INT’L ARB. AWARDS 369 (1923), reprinted in 18 AM. J. INT’L L. 147, 168 (1924)

for legitimate government purposes.”<sup>130</sup> Had Sack cited to Taft, he could have based his requirements of lack of benefit and creditor awareness on Taft’s approach.

Perhaps Sack’s omission of the *Tinoco* decisions was an oversight.<sup>131</sup> But Sack’s merit, according to his reviewers, was his painstaking thoroughness and his careful attention to detail in referencing the relevant materials to whatever point he was making. Another possibility is that Sack did not view the *Tinoco* decision as correct because Taft specifically declined to find that there had been a state succession and not a mere change of government in the case, and state succession (i.e. territorial change) was a condition precedent for Sack’s doctrine of odious debts.<sup>132</sup> But since Sack included the (in his view, incorrect) absolution of Poland for German colonial debt in his discussion of odious debts, it seems unlikely that he would fail to discuss *Tinoco* on the grounds that it was incorrectly decided.<sup>133</sup> Another possibility is that Sack, in formulating his doctrine, was not especially concerned to ground it in the precedents of international practice, and was more interested in asserting his view of what the law should be, rather than what it actually was.

Other than state practice, Sack relied on a broad array of scholars in *Les Effets*, many of whom had written about sovereign debt, although not in such depth as Sack. The notion that some debts—such as hostile, war, or subjugation debts—might be invalid for reasons of equity or morality was not new to international law scholars.<sup>134</sup> Sack’s work on odious debt appears to have synthesized the preexisting notions of hostile, war, and subjugation debts under the umbrella of odiousness, and added a more fleshed-out concept of the duty of creditors to discover the purposes to which a state puts the money it borrows. For example, Sack borrowed the idea of debts “hostile” to a territory transferred between sovereigns from Charles Cheney Hyde, who devoted several

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<sup>130</sup> Arbitration Between Great Britain and Costa Rica (1923) 1 U.N. REP. INT’L ARB. AWARDS 369, reprinted in 18 AM. J. INT’L L. 147, 168 (1924); Anna Gelpern, *What Iraq and Argentina Might Learn from Each Other*, 6 CHICAGO J. INT’L L. 391, 411 (2005).

<sup>131</sup> King suggests that Sack’s failure to include the *Tinoco* arbitration in this section was an oversight. KING, *supra* note 121, n. 328.

<sup>132</sup> Gelpern, *supra* note 123, at 411-412.

<sup>133</sup> SACK, LES EFFETS, *supra* note 2, at 160, 163-64.

<sup>134</sup> E.g., Michalowski, *supra* note \_\_, at 47 & n.77 (citing to the work of the Italian scholar, Nitti, writing in 1931).

paragraphs to the idea in his 1922 text on international law.<sup>135</sup> Sack cites to Hyde and uses the phrase “hostile” several times in his discussion of odious debts.<sup>136</sup>

Sack relied on another scholar, Gaston Jèze, for the phrase “*debts de regime*.” Jèze, a scholar of French public finance, used the phrase to describe debts incurred by one of the warring *regimes* during a civil war, if the money was used to pay for the war effort (not public services). Successor states were not legally obligated to pay “*debts de regime*.” Otherwise, Jèze—who generally backed the rights of creditors—believed that any debt incurred by a “regular” government should be considered a state debt, regardless of the uses to which that government puts the money.<sup>137</sup> Thus Jèze believed that, in the absence of a civil war, a lender was not responsible for inquiring as to the uses of the money he lent to a government. While Sack cited to Jèze for the phrase, he gave it a significantly different meaning, defining “regime debts” as debts incurred by a despotic regime for the purposes of propping up its regime or subjugating the population that fights against it.<sup>138</sup> Sack thus blended the idea of hostile debts and regime debts, and rejected Jèze’s principle that creditors, except in times of civil war, were not obligated to inquire into the intended purposes of the money they lend.<sup>139</sup>

Finally, while Sack’s use of the word “odious” to describe invalid state debts was new, the descriptor “odious” previously had been applied to immoral personal debts in an

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<sup>135</sup> CHARLES CHENEY HYDE, I INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES 218 (1922) (discussion of hostile or harmful debts on pp. 209, 213-14, 216-17, 218 & 223).

<sup>136</sup> See, e.g., SACK, LES EFFETS, *supra* note 2, at 157, 160, 165, 166, 167, 168.

<sup>137</sup> GASTON JEZE, COURS DE SCIENCE DES FINANCE ET DE LEGISLATION FINANCIERE FRANÇAISE: DEPENSES PUBLIQUES—THEORIES GENERALE DU CREDIT PUBLIC, 6th Ed. (1922) 302-03. Jèze emphatically dismisses the efforts of “défenseurs du bolchevisme” to justify the Soviet repudiation of the tsarist debt. According to Jèze, the tsar’s debts were state debts because, no matter how “execrable” the tsarist regime was, it was the “regular” government and not engaged in a civil war at the time it contracted the debt. Jèze considered the soviet repudiation to be unjustifiable from both a legal and a political perspective. *Id.* at 304-05.

<sup>138</sup> SACK, LES EFFETS, *supra* note 2, at 157-58.

<sup>139</sup> In the introduction to *Les Effets*, Sack acknowledges a special debt of gratitude to Gaston Jèze, a scholar of French public finance, whom Sack considered the preeminent scholar in the area. Still, Sack notes that he diverges from Jèze in particular in trying to construct a legal system (“système juridique”) to govern the relations between states and creditors. SACK, LES EFFETS, *supra* note 2, xi (“Je considère que notre problème ne saurait être régulièrement résolu si on ne l’analyse pas dans le plan des rapports juridiques entre les créanciers et l’État débiteur. Aussi ai-je commencé par un examen de la nature juridique des dettes d’État. Ma manière de voir et les conclusions auxquelles j’aboutis se rapprochent sur bien des points, s’écartent sur certains autres, de celles énoncées dans les ouvrages de M. JÈZE. C’est en partant de ces conclusions que j’en arrive à construire le système juridique du problème qui fait l’objet des présentes recherches ; c’est ici surtout que mes vues divergent d’une façon plus marquée de celles de l’éminent savant français.”).

international law treatise.<sup>140</sup> In Book III of *De Jure Belli ac Pacis*, Grotius uses the word “odious” several times to describe the action of punishing or binding one person for the misdeeds or personal debts of another.<sup>141</sup> When searching for an adjective to describe the immorality of holding a successor state responsible for the personal (because hostile) debts of the previous regime, Sack—or perhaps his translator, Mme. Schtoupak—may have relied on Grotius for using the word “odious” in that context.<sup>142</sup>

But despite adding the term “odious” and flagging the notion of creditor awareness, Sack did not expand the doctrine of odious debts beyond the ideas advanced by Taft, Jèze, Hyde, or the United States. At the end of his discussion of odious debts, Sack emphasizes that the defense should only be recognized in exceptional circumstances, when it is incontestable that a debt is odious—not just in the eyes of the successor government.<sup>143</sup>

Only a handful of the contemporary reviews of Sack’s work mention his doctrine of odious debts,<sup>144</sup> suggesting that it was viewed as insignificant to Sack’s general thesis, or perhaps that it was an unexciting synthesis of the work of prior writers that bore no

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<sup>140</sup> Even here, it is by no means certain that Sack’s use of the term “odious” in the context of invalid state debts was new. We have found the term “odious debt” used in the early 19<sup>th</sup> century. For example, the populist Massachusetts lawyer, Robert Rantoul, used the term in speeches in the United States to describe the debts of the French monarchy. Rantoul was not using the term in a legal sense, but the question of whether Sack got the term from these prior discussions is raised. See LUTHER HAMILTON, ED., MEMOIRS, SPEECHES AND WRITINGS OF ROBERT RANTOUL, JR., *The Value of the Federal Union Calculated*, 183, 204 (using the phrase “odious debt” in an 1833 speech) (available at [http://books.google.com/books?id=IssAAAIAAJ&pg=PA203&dq=odious+debt+date:1820-1865&as\\_brr=0](http://books.google.com/books?id=IssAAAIAAJ&pg=PA203&dq=odious+debt+date:1820-1865&as_brr=0); see also, William B. Dana, *Our Financial Policy*, *Merchants’ Magazine and Comm. Rev.* 32 (essay, published during the Civil War) (available at [http://books.google.com/books?id=4IkEAAAQAQAJ&pg=RA1-PA32&dq=odious+debt+date:1820-1865&as\\_brr=0#PRA1-PA32,M1](http://books.google.com/books?id=4IkEAAAQAQAJ&pg=RA1-PA32&dq=odious+debt+date:1820-1865&as_brr=0#PRA1-PA32,M1)).

<sup>141</sup> See, e.g., Grotius, “Seneca says, ‘if any one lends money to my country, I am not to be considered as his debtor, nor to take the debt upon myself, though I am bound to pay my due proportion of it.’ There was a special provision made in the Roman law, that one peasant should not be bound for the debts of another, and it is laid down as a rule, that the goods of one person shall not be distrained for the debts of another, even if they be public debts; and in Justinian’s Novels, pledges for others are forbidden, and the cause assigned for it is, because it is unreasonable that one person should incur the debt, and another be bound to the payment of it, an exaction to which the name of ODIIOUS is given. King Theodoric Cassiodor, calls it a shocking licence for one man to be detained as a pledge for another.” (Vol. III, Ch. 2) Trans. A.C. Campbell, London, 1814. The French translation of this passage of Grotius uses the word “odieuses.” Grotius, Hugo, II *Le droit de la guerre, et de la paix*, 223 (Jean Barbeyrac, trans., Basle, 1746) (“exécutions odieuses, comme elles sont appellées au meme endroit”).

<sup>142</sup> Sack clearly was familiar with Grotius’ seminal treatise, as he cites to it numerous times in *Les Effets*. E.g., SACK, *LES EFFETS*, *supra* note 2, at 23, 31, 46, 65, 89, 90, 93.

<sup>143</sup> SACK, *LES EFFETS*, *supra* note 2, at 162-63.

<sup>144</sup> Other than Baty and Lauterpacht, we found only two reviews that mention odious debts. *REVUE DE DROIT BANCAIRE* (1927) 333; *REVUE DE DROIT INTERNATIONAL PRIVE* (1928) at 605

mention. Baty criticized it, regarding it as a mere expedient to “save the credit” of Sack’s “startling” central thesis that public debt adheres to the territory of the state. Anticipating many of the modern critics of Sack’s doctrine, Baty pointed out that the determination of whether a debt is odious depends, in large part, on whether the government that incurred the debt was “good or bad—and that is a question which international law has always refused to answer.”<sup>145</sup> Further, Baty noted that Sack leaves a gaping loophole for odious governments trying to finance the suppression of a revolution: “The “odious” government can always cover up its tracks by mixing the “odious” loans with other more agreeable ones. . . . So the “odious” financier who backs a despot has only to stipulate that the loan is partly for black-boards and test-tubes.”<sup>146</sup> Lauterpacht commented that Sack’s treatment of the debts of unsuccessful revolutionary governments—a topic closely related to odious debts—is unsatisfactory, as it fails to distinguish between debts incurred for the purpose of discharging normal governmental duties, which should be honored by the successor state, and those incurred to keep the revolutionary government in power, which need not be (in effect, failing to distinguish between debts that might be considered to benefit the populace and those considered odious to the populace or the successor state).<sup>147</sup>

Finally, Feilchenfeld—who uses the term “odious debts” in his 1931 book, without explanation or citation to Sack—curtly notes that the “American and English doctrines on imposed and odious debts have not . . . become rules of law.”<sup>148</sup> Thus, Feilchenfeld characterized odious debts as a theory—not a rule of law—and implicitly assigned its origin to arguments advanced by America and Great Britain—not Sack.<sup>149</sup> Further, Feilchenfeld argued against the idea of excusing war debts in the case of annexation, dismissing the arguments advanced by the British after the Boer war (and by

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<sup>145</sup> Baty, *supra* note 80, at 274.

<sup>146</sup> Baty, *supra* note 80, at 274.

<sup>147</sup> Lauterpacht, *supra* note 104, at 166, also 165 (mentioning the theory of “obnoxious” debt but not commenting on it).

<sup>148</sup> FEILCHENFELD, *supra* note 10, at 558. Feilchenfeld also uses the term “odious debts” in a 1928 article about German war reparations, again with no cite to Sack or anyone else. Ernst Feilchenfeld, *Reparations and German External Loans*, 28 COLUMBIA L. REV. 300, 310 (1928).

<sup>149</sup> Howse, while crediting Sack with originating the doctrine of Odious Debts, suggests that the American delegation negotiating with Spain in 1898 may have used the term “odious debts.” If so, then Sack and Feilchenfeld may have derived the term from this source. Howse, *supra* note 6.

extension, Sack) as “sentimental rather than logical.”<sup>150</sup> Feilchenfeld’s work on public debt, like that of Sack, turned out not to be especially influential during his lifetime.<sup>151</sup> Like Sack, Feilchenfeld has also enjoyed a surge of citations in the modern odious debt debate,<sup>152</sup> but no one in the debt forgiveness circle calls Feilchenfeld or, for that matter, Jèze,<sup>153</sup> a preeminent scholar of public debt—probably because Feilchenfeld believed that Sack’s doctrine of odious debt was *not* a rule of law.<sup>154</sup>

To summarize, there are several problems with the tendency of modern scholars to rely on Sack as a source of customary international law. First, Sack did not consider himself to be an international law scholar, which is shown not only by his background, training, and academic interests, but also by the Introduction to *Les Effets*. Second, while Sack was, to some extent, engaging in the Anglo-American “positivist” task of international law scholarship, he was also engaging in the continental tradition of

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<sup>150</sup> FEILCHENFELD, *supra* note 10, at 719 (full discussion at 716-721).

<sup>151</sup> A search for Feilchenfeld in Westlaw’s “All Law Reviews, Texts & Bar Journals” database on July 1, 2007, for example, yielded no citations to *Public Debts* prior to 1982, but three citations to his 1942 monograph entitled THE INTERNATIONAL ECONOMIC LAW OF BELLIGERENT OCCUPATION.

<sup>152</sup> A search for Feilchenfeld in Westlaw’s “All Law Reviews, Texts & Bar Journals” database yielded six citations to *Public Debts* after 1982. See also Michael Kremer & Seema Jayachandran, *Odious Debts* 96 AMER. ECON. REV. 82 (2006).

<sup>153</sup> While Jèze was a proponent of the rights of creditors, he was in many regards a better friend of the developing nations than Sack. Jèze represented Haile Selassie, the exiled Négus of Ethiopia, in negotiations with the League of Nations regarding Mussolini’s invasion of Ethiopia. See *Jig Up?*, TIME, Jul. 6, 1936 (referring to Jèze as Selassie’s “wily French lawyer”). Conservative Royalist elements in France were outraged that Jèze would represent an African against Italy, the “Latin sister” of France, and demonstrated in Paris, provoking nationwide student strikes and riots between liberal and conservative students. Jèze was forced to hold his lectures outside of the university, and even then, conservative students attempted to block entrance to his classes, while his supporters would attempt to keep them open. See, e.g., Edward Jones, *Royalism in French Politics*, 8 PHYLON 53, 58-59 (1940-56). Jèze also, despite his supposed conservative leanings, took the radical step of advocating increased taxation of the elites in the 1920s, when France was facing financial crisis. See WILLIAM L. SHIRER, THE COLLAPSE OF THE THIRD REPUBLIC 156 (1969). To the extent the modern odious debt movement needed to find a French intellectual as their hero, maybe Jèze would have been a better candidate than Sack. And for the Americans, there is the added attraction that Jèze was significantly influenced by both the Federalist Papers and the U.S. Supreme Court’s pronouncements regarding taxation and representation. See *Apropos of Translation* 8 AM. J. COMP. L. 204 (1959) (noting that Jèze published his translation of the Federalist papers in 1902, the second such translation into French, the first having been in 1792). KING, *supra* note 121, at 16

<sup>154</sup> In 1977, an important United Nations report on state succession and public debt, written originally in French, cites to Sack in discussions on the nature of state debts, whether a state acquiring a new territory also acquires its debts, and of localized debts. Bedjaoui, *supra* note 121, at 57 & n. 26, 60 & nn. 50-51, 75-76 & nn. 127, 132, 83 & n. 166. But, in its lengthy discussion of odious debts, it never cites to Sack; rather, it cites extensively to Feilchenfeld, including Feilchenfeld’s argument against the equitable reasons for excusing even war debts. *Id.* at 67-74 & text accompanying nn. 107-109.

constructing and proposing new rules of international law. The third problem is that Sack was not considered by his peers to be an eminent publicist of international law.

*d. A phantom, not a publicist*

Sack was not treated by his peers or his employers as a preeminent scholar of international law or public debts (or anything, for that matter). Had Sack truly been the preeminent scholar of some field, it is likely that the academy or the various academic institutions where he taught would have memorialized him in some way—as, for example, with the Philip C. Jessup International Law Moot Court Competition, or the Lauterpacht Research Centre for International Law at the University of Cambridge. Short of chairs named in his honor, there might have been conferences or lecture series, portraits of him on the walls, photographs of him surrounded by colleagues and students, and at least a few doctoral dissertations and master's theses written under his supervision.

Sack's resume indicates that he taught at five academic institutions: the University at Petrograd, the Academy of International Law in the Hague, the *Institute des Sciences Sociales et Politiques* and the *Ecole des Hautes Etudes Internationales* in Paris, Northwestern University and finally, New York University.<sup>155</sup> With the exception of the Hague, where Sack taught for one year, the libraries of these institutions, had no record of Sack—no dissertations or theses that he supervised, not even a photograph from an old yearbook.<sup>156</sup> Needless to say, there were no buildings, chairs, lecture series, or conferences named for Sack. Forget preeminence; he seems to have been a phantom.

It is especially poignant that New York University Law School, the institution where Sack spent eleven years—eight of them as a full professor—had no record of his tenure there. Despite being a full professor, NYU dropped Sack from the faculty in 1943 as part of the law school's cost-cutting measures during World War II. Sack engaged in a protracted and contentious dispute with the law school over the manner in which he was dropped, claiming that it was in retaliation for publishing an article in the New York

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<sup>155</sup> Biography by Sack for Griswold, *supra* note 40.

<sup>156</sup> The *Ecole des Hautes Etudes Internationales* had no record that Sack had ever taught there. The librarian explained that any records on him were likely lost in a flood. Telephone Interview with Katherine Topulos, June 2007.

Times urging co-operation between the United States and the Soviet Union. The AALS eventually found that the law school had wrongfully dismissed Sack, not because of what he wrote, but because they dropped him from a *tenured* position.<sup>157</sup> The simple fact remains, however, that Sack was the first full time professor that the school deemed fully expendable, suggesting that he had not achieved the eminence that would cause a university to seek alternative methods (i.e., seeking grants or donations) for funding his salary.<sup>158</sup> Sadly, it seems that Sack was just not important enough to the law school—or any of the schools where he taught—for it to preserve his memory.

#### IV.

##### Conclusion

Sack's life did not end happily. He was devastated by his firing from NYU—physically, emotionally, and financially. During the employment dispute, Sack told the law school “I have always been a Professor, since 1917. I have always dreamed of continuing until my old days in this great work of a man of science and teacher. . . . For me, it is my whole life.”<sup>159</sup> He suffered a severe hearing loss in December of 1942, from which he never quite recovered (NYU cites the hearing loss as one of the reasons for terminating his employment).<sup>160</sup> Sack worked as a special advisor to the Justice Department from 1943-46, and as a consultant until about 1950. After that, he was unable to find work and his meager savings ran out. In 1953, Sack and his wife, Nina, moved to the Andrew Freedman Home, a retirement home for the “formerly wealthy,” located on the Grand Concourse in the Bronx. He died two years later.

Sack, were he able to write his own epitaph, would no doubt say that he was misprized, mistreated and misunderstood in his lifetime. But he might also protest that he has been egregiously misconstrued and mischaracterized in the twenty-first century. From the large corpus of his scholarly works, only a few sentences have been exhumed

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<sup>157</sup> AALS Tentative Report, *supra* note 86, at 3 (basic findings V, VI & VII).

<sup>158</sup> *See, e.g., The Refugee Jurist*, *supra* note 85, at 794-99 (describing the efforts of Columbia, Chicago, and Yale to keep Reinstein and Kessler on their faculties).

<sup>159</sup> Transcript of Vand. Hearing, 362-63, reprinted in Memorandum of Requests for Corrections of and Additions to the Tentative Report of the Committee Submitted by the Complainant, 96-97 (written by Sack and submitted to the AALS committee in 1944).

<sup>160</sup> Statement of Chancellor Harry Woodburn Chase in the case of Professor Alexander N. Sack at 2; Letter from Frank H. Sommer, Dean, to Chancellor Harry Woodburn Chase, dated March 9, 1943.

by modern anti-debt activists as the legal support for a proposition (that successor regimes may repudiate debts incurred by their distasteful predecessors) that Sack in his lifetime consistently disparaged and would have vigorously opposed today. Why has Sack been subjected to this indignity?

There are at least two possible answers. The first has to do with international law's prescription that distinguished publicists are among the sources of customary international law. In an area of law as murky as sovereign debt, where there are few sources of state practice through the ages, modern scholars have an incentive to search for a publicist from the past—preferably one who articulates a view of past state practice that is consistent with what the modern scholar wants. If that publicist happens to have been long dead, European, and had some fancy title, he is even more likely to impress modern judges. Sack presented just such a figure.<sup>161</sup>

But one of the problems with modern scholars drawing authority from the writings of long deceased scholars, particularly ones writing in a foreign language, is the ease with which mistakes can be made. Somewhere along the line, there was an error in translating Sack's resume—his brief work on economic matters for the Kerensky government in 1917 was translated into his having been a tsarist minister—and better still, his doctrine of odious debts (read selectively) appeared to lean against the interest of his tsarist background. And then there was the fact that he had once taught at a university in Paris. Put all of this together and Sack makes a wonderful headliner for the modern odious debts movement and the argument that the doctrine of odious debts is part of customary international law. We have no doubt that the error and its perpetuation were not intended to mislead. But the enthusiastic perpetuation of the Sackian myth only

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<sup>161</sup> In international law circles today, there is debate over the use of the writings of “publicists” to make arguments about what customary international law is. The concern of those who criticize the use of writings of publicists is not the misreading of history and the misuse of historical figures—the matter at the heart of our project—but the failure to differentiate between normative and positive statements about the law by modern publicists. See Jack Goldsmith, *Panel Discussion: Scholars in the Construction and Critique of International Law*, 94 AM. SOC'Y INT'L L. PROC. 317 (2000); William C. Aceves, *Scholarship as Evidence of Customary International Law*, 26 LOY. L.A. INT'L & COMP. L. REV. 1 (2003). The controversy over the use of these statements of publicists arises within the context of a larger debate over the expansion in recent years of customary international law, particularly in the context of human rights. See A. Mark Weisburd, *American Judges and International Law*, 36 VAND. J. TRANSNAT'L L. 1475 (2003); Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 819 (1997); Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1827 (1998); Ernest A. Young, *Sorting Out the Debate Over Customary International Law*, 42 VA. J. INT'L L. 365 (2002)

occurred (and perhaps will continue to occur) because no one had an incentive to unearth the true Sack; the myth was too convenient.

The second answer lies in a single word: "odious." Sack's 1927 book on state succession did not try to expand the category of state debts—war, hostile, or subjugation debts—that might legally be disavowed by a subsequent regime. Based on his sources, Sack was merely trying to restate what those criteria were and constrain any tendency toward irrational exuberance in their application. Other scholars of his time had written about the topic, but none of them have attracted the attention of a curious combination of twenty-first century neoconservatives and liberal debt relief activists. Only Sack added the winning adjective. When Sack's text was discovered by modern scholars, the word "odious" glinted through the sediment of the passing decades, causing Sack's name, above all others, to be associated with this putative doctrine of public international law. It was a verbal coup that would have ensured the career of an advertising executive on Madison Avenue.

"Odious" satisfied the three criteria required for a successful buzzword. First, it is highly emotive. Second, most people understand the literal meaning of the word and subliminally sense its emotive baggage. Among legal scholars, especially, it is rare to hear a word that carries such clear moral condemnation; it grabs the attention of people who are used to dealing in deliberately ambiguous and fuzzy locutions. Third, most people do not use the word in everyday speech; if we heard someone use it in ordinary conversation instead of a word like hateful, we might think her somewhat pompous. This third criterion is key; a buzzword must not be cliché, and odious is fresh and piquant. And so, when succeeding generations plucked from the turgid academic prose of the 1920s a single word—odious—they also pulled from the grave the pen, the hand, and the scholar who first associated that word with a small body of legal precedents.

Before returning Alexander Sack to his eternal rest, let us ask ourselves this question: how many obscure, pencil-pushing legal academicians of our day would not cheerfully trade places with Professor Sack? To achieve fame, to have one's name turned into an adjective, to have one's writings posted on the Internet a century hence, to have scholars of the twenty-second century research and tell one's story, this—for law professors—is the stuff of Mephistophelean bargains. And if that fame is bought cheaply

by the clever (or inadvertent) use of a single word, and if one's fate is to be misunderstood for all eternity, what matter?

## REFLECTIONS ON “A CONVENIENT UNTRUTH”

The excellent article by Professors Ludington and Gulati provides food for thought on several levels. In some ways its most important contribution, though I give it little attention, is to force readers to ask themselves how a man of obvious intelligence and energy could find himself, in his last years, poverty stricken, friendless and humiliated. On a much more prosaic level, it helps to throw light on the difficulties of dealing with issues of public international law.

The concept of odious debt which has brought Sack so much belated attention does not, as a matter of logic, depend on the facts of Sack's life. If it is claimed that the concept reflects the general practice of states accepted as law, that is, that the concept is an existing rule of customary international law, the claim can be checked against the facts of state behavior. Either the facts bear out the claim or - more likely - they do not, but in neither case does it make any difference whether the person who is cited as originating the concept was the Tsar's finance minister or an undergraduate writing a term paper. Similarly, if it is argued that international law should incorporate the concept as an element of the law of state debt, for example, through the negotiating of a multilateral treaty, whether or not the idea is a good one depends in no way whatever on Alexander Sack's biography.

Even given these points, however, the account of the way Sack has been inaccurately characterized offers valuable insights into the problems international law presents for those who seek to apply it or study it.

In considering these difficulties, it helps to start by asking why someone might care if some governmental action was contrary to international law. Unless the action is also one within the jurisdiction of the International Criminal Court, no individual need be concerned with the

possibility of criminal sanctions. And, given the absence of any method of executing the judgments of those international tribunals with jurisdiction to hear claims against governments, a government held by such a tribunal to have violated international law need be concerned only if the victim state is in a position to resort to self-help to vindicate the rights the tribunal has recognized.

The fact that international institutions are unlikely to be able to act against a law-breaker does not, however, mean that violations of international law have no consequences. A claim that a particular action is a violation of law can trigger diplomatic difficulties, not only with the state against which the action is directed, but also with third states, as is shown by the international reaction to the invasion of Iraq by the United States and its coalition partners. An allegation of an international law violation can also be an effective advocacy tactic, helping to pressure governments to oppose the action. Finally, in at least some cases, domestic law will provide remedies for violations of international law; the remedies are available, however, only if a judge in such a domestic court system can be convinced that international law has been violated. It is this last use of claims of international law violation which bears closer examination.

How does one make a showing to a domestic court of a violation of international law? If the alleged violation is the breach of a treaty, one may at least start with the language of the treaty. If, however, the violation is of customary international law, the situation is more complicated. Customary international law (CIL) is defined as the general practice of states accepted as law.<sup>1</sup> Thus, ideally one would determine the content of this body of law by examining the actions of the entities - states - supposed to be governed by the law and by

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<sup>1</sup> Statute of the International Court of Justice art. 38.

deciding, somehow, when a particular general practice has been accepted as law. This is not the sort of legal inquiry normally made by either common law or civil law courts. Judges in these systems expect to find the law in statutes, administrative regulations or - in some cases - in judicial decisions. While any of these sources might be difficult to interpret, there is at least rarely any doubt whether any particular group of words really is a statute or judicial decision. In contrast, it can be difficult to determine what sorts of action count as “practice” or whether some statement or action or reaction demonstrates a given state’s belief regarding the legal character of an asserted rule of CIL.

This context explains the significance of labeling “the teachings of the most highly qualified publicists of the various nations” as “subsidiary means for the determination of rules of law.”<sup>2</sup> Not to put too fine a point on it, scholars of international law can save judges of domestic courts a very great deal of work. The scholars can collect both instances of state practice regarding particular subjects and manifestations of states’ understandings of the law on those subjects, summarize their findings and, one hopes, even abstract from a mass of state actions and reactions the formulation of a rule of law. But these writings are “subsidiary means” for determining rules of law because the scholars are not legislators. Their view of what the law ought to be does not signify; their function is not to make law, but to make clear what has been done by the entities with the authority to make law - states. Thus, a scholar’s assertion as to the content of a particular rule of CIL can be falsified; if the scholar has mischaracterized the practice of states, or omitted from his discussion crucial instances of practice, or failed to consider the effect of behavior casting doubt on the legal significance of some behavior, his

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<sup>2</sup> *Id.*

assertion as to the content of the law is not merely incorrect - it is *demonstrably* incorrect, and thus can be ignored.

How probable is it, however, that a domestic court judge will be in a position to conduct the research necessary to verify the correctness of a scholar's opinion? It is much more likely that the judge will assume that the scholar knows what he is talking about, and accept his views. And, of course, the more distinguished the scholar is understood to be, the more deference his views are likely to command.

So, however true it is, as noted above, that Alexander Sack's biography is logically irrelevant to the correctness of his view of the law, it is also true that his biography is of considerable practical importance. The views of an obscure refugee law professor who commanded so little respect that even his faculty colleagues supported depriving him of his tenured position would carry much less weight with a U.S. District Judge than those of the Tsar's former Minister of Finance. Once Sack is understood to be a refugee from NYU as well as the Soviet Union, his prestige value is reduced, and the position he advocated must stand on its own, as good or bad policy, as an accurate or inaccurate characterization of state behavior.

While the story of Alexander Sack's role in the odious debt debate has few exact parallels in international law, it nonetheless relates to a larger phenomenon - that of using doubtful evidence to bolster arguments as to the state of CIL, at least before domestic courts. For example, the court in *Alvarez-Machain v. U.S.*<sup>3</sup> purported to find a rule of customary international law forbidding arbitrary arrest by citing a scholar's compilation of provisions of 119

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<sup>3</sup> *Alvarez-Machain v. U.S.*, 331 F.3d 604 (9<sup>th</sup> Cir. 2003), *rev'd sub. nom.* *Sosa v. Alvarez-Machain*, 542 U.S. 692.

national constitutions, the Universal Declaration of Human Rights,<sup>4</sup> the International Covenant on Civil and Political Rights,<sup>5</sup> the Restatement on Foreign Relations Law,<sup>6</sup> several of its own decisions, various treaties to which the United States is not a party, a decision of the European Court of Human Rights, and a non-binding study by a United Nations body.<sup>7</sup> What is striking in this list of sources is the absence of anything approaching an account of whether states generally actually refrain from carrying out arbitrary arrests.

With courts approaching the subject of CIL in such a way, it is easy to understand the importance to persons arguing that CIL does not require repayment of odious debts to be able to enlist in their cause Alexander Sack as he was imagined to be. Of course, the Supreme Court rejected the customary law analysis in *Alvarez-Machain v. U.S.* in its decision in *Sosa v. Alvarez-Machain*,<sup>8</sup> but the Supreme Court can hardly review every lower court case involving CIL. The temptation to resort to doubtful authorities regarding the content of CIL therefore ought to remain powerful. And, as long as that is true, we will probably continue to see the equivalent of phantom Tsarist ministers cited to support insecure legal arguments.

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<sup>4</sup> Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1<sup>st</sup> plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

<sup>5</sup> International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, 6 I.L.M. 368.

<sup>6</sup> Restatement of the Law, Third, Foreign Relations Law of the United States (1987).

<sup>7</sup> *Alvarez-Machain v. U.S.*, *supra* n. ?, at 620-22.

<sup>8</sup> *Sosa v. Alvarez-Machain*, 542 U.S. The Court rejected reliance on the Universal Declaration because it was non-binding, on the International Covenant on Civil and Political Rights because it is non-self-executing in the United States, and on the survey of national constitutions as speaking at too general a level to be useful, and sees the Restatement of Foreign Relations Law as cutting against the holding of the lower court, *id.* at 734-38.