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## POWER AND INTERNATIONAL LAW

*By Richard H. Steinberg and Jonathan M. Zasloff\**

A hundred years ago, the *American Journal of International Law* (AJIL) was founded by a group of publicists who believed that international law could abolish (or at least substantially diminish) the role of power in world affairs. So deep was this belief that it often served as a background operating assumption in international legal scholarship and did not even require discussion. But since 1940, dozens of articles in the *Journal* have focused on the relationship between law and power. Indeed, many AJIL articles have been written by scholars and practitioners whose life work has focused on power and international law—how power constrains international law (or dooms it to irrelevance), how the powerful can harness international law to their ends, and how international law may autonomously reconfigure power in its own right.

This essay elaborates and analyzes the range of stances on the relationship between power and international law that have appeared in the *Journal* in the last century. While views of the relationship between power and international law are diverse, and many approaches straddle heuristic lines, they can be grouped into four intellectual movements. Each major intellectual movement may be seen as a reaction to the ideas that preceded it, and each may be better understood in the context of international developments contemporaneous with their emergence. While most of the intellectual movements born since 1980 originated in political science, economics, or sociology, all have eventually found their way into the pages of the *Journal*. In recent years, each major movement has evolved to employ elements from earlier theoretical traditions.

Part I distills “classical legal thought.” Classicists generally believed that power and coercion could become far less prominent in world affairs through the development of international law. The early twentieth-century classical legal thinkers who founded the *Journal*, and some contemporary thinkers, including many legal positivists, consider law and politics to be intrinsically and appropriately separate realms of inquiry.

Part II analyzes realist reactions to classicism. With Fascist aggression in the late 1930s, realism emerged to launch an epistemological, heuristic, and normative attack on the classical approach. While realism generally views international law as a reflection of the interests of powerful states, and *structural* realism—at its core—denies that international law is consequential, realists display a range of views, from those who find international law meaningless to those who find it crucial to understanding state behavior.

The structural realist position (and oversimplifications of other versions of realism)—suggesting that law is little more than a reflection of power—catalyzed decades of reaction, which attempted to show how international law affects behavior. Part III distills the elements of this reaction: early efforts to use sociology or the social sciences more broadly; rationalist institutionalism’s demonstration that international law is plausibly autonomous; and the application of liberal theory, usually in conjunction with institutionalism, to show how law affects the behavior of states, rulers, groups, and individuals.

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Part IV considers constructivist approaches to the relationship between power and international law, an ontological revolution that has challenged a central assumption of the movements that preceded it: that, for analytic purposes, the interests and identities of individuals may be taken as given. Constructivists see interests and identities as intrinsically inseparable from social groups. International law both reflects and reinforces identities and interests.

The conclusion identifies and evaluates trends in the treatment of power and international law in the *Journal's* first century. In sharp contrast to the focus of its first thirty years, much work in the *Journal* now consciously considers the relationship between power and international law. A range of metatheories—theories of first principles that guide and subsume a host of lower-order explanations—has emerged in the last half century to explain the autonomy and limits of international law, yet the literature using these approaches is now so extensive that no one has deep expertise in all of them. Increasingly, articles on the topic focus less on establishing the primacy of a single metatheory, and more on using the heuristics and methods of more than one approach to understand the relationship between power and law in a particular legal or policy context. Isms are in decline, and hybridized heuristics in ascendance. Yet we should see this trend as a triumph for international law, not a failure, for it demonstrates that international lawyers and legal scholars are adjusting to the limits of metatheory, bringing order to our discipline by embracing complexity and resisting the temptation to value parsimony over explanation.

## I. CLASSICISM: THE *JOURNAL'S* EARLY YEARS

The founders of the American Society of International Law could not have imagined in 1906 that subsequent generations of international law scholars and practitioners would become transfixed by power. The United States had emerged at the turn of the twentieth century as a player in great-power politics, yet it could boast no foreign policy infrastructure of any kind—no professional foreign service, no experienced diplomatic corps, no university study of international relations, no think tanks or study groups. Policymakers had to search for some sort of paradigm to make this new world clear and coherent.

They found that paradigm in law.<sup>1</sup> The era's dominant framework of legal ideology, sometimes called "classical legal thought," explained why law was effective and how it was enforced.<sup>2</sup> And it carried massive implications for international law and foreign policy, for it suggested that legal rules and institutions did not arise out of the power of the coercive state but, rather, out of custom, consensus, and private ordering. Law was built upon norms. In this sense, the distinction between international and municipal law melted away and neither needed the state

<sup>1</sup> For more background on the legal ideology of American foreign policy between 1900 and 1933, see Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003) [hereinafter Zasloff, *Gilded Age*]; Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: The Twenty Years' Crisis*, 77 S. CAL. L. REV. 583 (2004) [hereinafter Zasloff, *Twenty Years' Crisis*].

<sup>2</sup> Classical legal principles formed a coherent and workable ideology because they legitimated lawyers' work to lawyers themselves. And this ideology represented a congenial worldview for elite lawyers because it suggested that law created order without coercion, and maintained order without necessary conflict. It thus assured elite lawyers—all of whom were wealthy, and many of whom exercised political power—of the essential justness of their social position and the worthiness of their profession. But as with all ideologies, such service hardly meant that its adherents used it for obfuscation. As one prominent commentator has noted, "It is difficult to read [their] correspondence . . . without feeling they believed what they espoused." RICHARD L. MCCORMICK, FROM REALIGNMENT TO REFORM: POLITICAL CHANGE IN NEW YORK STATE, 1893–1910, at 112 (1981). A prominent analyst of the career of Charles Evans Hughes also notes how closely his private letters and notes match his public statements and actions. See BETTY GLAD, CHARLES EVANS HUGHES AND THE ILLUSIONS OF INNOCENCE 3 (1966).

to be effective. But if law was not the instrument of state power, then what was it and how did it become effective?

First, law and legal institutions served as neutral, apolitical institutions and principles that could resolve conflicts while giving groups and individuals complete liberty within their respective spheres of action. Classical legal thinkers obviously did not deny the existence of conflict. But they believed that it resulted either from failure to provide proper institutional mechanisms,<sup>3</sup> or from a misconception of problems that obscured a more basic harmony.<sup>4</sup> Law was a science, and thus could be divorced sharply from politics.

Second, law served as the expression of community custom.<sup>5</sup> The emphasis on custom reflected classicism's assumption that conflicts were more apparent than real, for custom derived from the sense of a unified community.<sup>6</sup> As a result, custom was linked not with stifling conformity, but with democratic norms suitable for free societies—or a free society of states.

Third, law *evolved* and grew in both strength and effectiveness through a voluntary process of arbitration and informal mechanisms. The evolutionary character of classical legal thought lent powerful support to the belief that the weaknesses of international institutions did not signify fundamental problems but, rather, temporary difficulties on the way to more robust institutions. Legal evolutionary thought was not Darwinian: it advanced no unified theory of the evolutionary mechanism. This gap allowed classical legal thinkers to believe that institutions would become stronger without having to pay too much attention to potential obstacles.

U.S. foreign-policymakers knew about classical legal thought (although they would not have called it that) because so many of them were lawyers—particularly in the Republican Party, the nation's majority party from 1896 to 1932. Every American secretary of state from 1889 to 1945 was a lawyer; the same could be said of only one British foreign secretary during the same period.

Thus, classicism both provided the intellectual underpinning for international legal scholarship and guided actual American policy. Both trends came together in the person of Elihu Root, the *éminence grise* of GOP foreign policy, the leader of the American bar, and a founder of the Society.<sup>7</sup> Fittingly, Root authored the first article in the *AJIL*, and clearly set forth the most basic of classical premises:

[T]he true basis of the peace and order in which we live is not fear of the policeman; it is the self-restraint of the thousands of people who make up the community and their willingness to obey the law and regard the rights of others. The true basis of business is not the sheriff with a writ of execution; it is voluntary observance of the rules and obligations of business life which are universally recognized as essential to business success.<sup>8</sup>

<sup>3</sup> James Brown Scott, *The Work of the Second Hague Peace Conference*, 2 *AJIL* 1, 21–22 (1908) (celebrating neutral international prize court).

<sup>4</sup> See Richard Olney, *The Development of International Law*, 1 *AJIL* 418, 422 (1907) (remarking about the “Eastern question,” that the “collective will of all civilized states overrides the will of any recalcitrant state” and that “the underlying and justifying principle is . . . the best interests of Europe as a whole as compared with those of a single state or of a few states”).

<sup>5</sup> Olney, *supra* note 4, at 420; Scott, *supra* note 3, at 3; Alpheus Henry Snow, *Law of Nations*, 6 *AJIL* 890, 893 (1912) (stating that the lawgiver is “society,” not the state apparatus).

<sup>6</sup> Scott, *supra* note 3, at 4; Snow, *supra* note 5, at 898 (arguing that national executives enforce the law of nations and do not act solely in the national self-interest).

<sup>7</sup> Root served as secretary of war from 1899 to 1904, secretary of state from 1905 to 1909, and U.S. senator from New York from 1909 to 1915. His nonpolitical résumé is hardly less distinguished: president of the American Society of International Law (ASIL) from 1906 to 1924, a founder of this *Journal*, and also the founder of the American Law Institute, the think tank of American elite lawyers. Little wonder that *American Lawyer* listed him as one of the hundred most influential attorneys of the twentieth century.

<sup>8</sup> Elihu Root, *The Need of Popular Understanding of International Law*, 1 *AJIL* 1, 2 (1907). Root's protégé, James Brown Scott, the former dean of the University of Southern California and Illinois law schools, and professor of law at Columbia University, became the *AJIL*'s first editor in chief. Root had hired Scott as solicitor of the State

Thus, “the difference between municipal and international law, in respect of the existence of forces compelling obedience, is more apparent than real, and . . . there are sanctions for the enforcement of international law no less real and substantial than those which secure obedience to municipal law.”<sup>9</sup>

Root’s views echoed throughout the first three decades of the century. In the *AJIL*, authors frequently made analogies between municipal and international law,<sup>10</sup> argued that international institutions fostered agreement because they allowed for discovery of essential harmony,<sup>11</sup> and contended that international law was—or at least could soon be—a neutral, apolitical venue in which to settle international disputes.<sup>12</sup> Legal evolution was working as well: former secretary of state Richard Olney explained that new conceptions of sovereignty were taking hold because “[s]tate independence . . . has become radically qualified by state interdependence.”<sup>13</sup>

In the same way that distinguished practitioners dominated much early *AJIL* scholarship, concrete U.S. foreign policies formed the context for the development of classical international law theory. For example, President Taft’s secretary of state Philander Knox, a corporate attorney deeply influenced by classicism,<sup>14</sup> stunned the powers in late 1909 by proposing the internationalization

Department, a position he held at the time of the *Journal*’s founding. For details on the Root-Scott relationship, and the organization of conservative legalism throughout the first three decades of the twentieth century, see CHARLES DEBENEDETTI, *ORIGINS OF THE MODERN AMERICAN PEACE MOVEMENT, 1915–1929*, at 46–58 (1978); WARREN F. KUEHL, *SEEKING WORLD ORDER: THE UNITED STATES AND INTERNATIONAL ORGANIZATION TO 1920*, at 105, 116, 158, 161, 209 (1969).

<sup>9</sup> Elihu Root, *The Sanction of International Law*, 2 *AJIL* 451 (1908); see also Editorial Comment, *Elihu Root*, 3 *AJIL* 423 (1909) (extensively quoting Root’s speech, “Causes of War,” which made similar arguments).

<sup>10</sup> Scott, *supra* note 3, at 4; Snow, *supra* note 5, at 890, 894, 896, 897; James Brown Scott, *The Legal Nature of International Law*, 1 *AJIL* 831 (1907).

<sup>11</sup> Olney, *supra* note 4, at 427. Codification bred cooperation in the classical worldview because it enabled parties to know their obligations and also to know who had violated them. And this cooperation, in turn, would promote the “voluntary observance of . . . rules and obligations” because the alternative was being shunned by the rest of the community. Root, *supra* note 8, at 2. This contention underlay the drive for the codification of international law, which occupied hundreds of *AJIL* pages throughout the period. See L. Oppenheim, *The Science of International Law: Its Task and Method*, 2 *AJIL* 313, 320 (1908) (“[O]nly codification . . . can create agreement and unanimity, and thereby universally recognized rules of law.”); see generally Elihu Root, *The Function of Private Codification of International Law*, 5 *AJIL* 577 (1911); Ernest Nys, *Codification of International Law*, 5 *AJIL* 877; Henry G. Crocker, *Codification of International Law*, 18 *AJIL* 38 (1924); Elihu Root, *Codification of International Law*, 19 *AJIL* 675 (1925); Manley O. Hudson, *The Progressive Codification of International Law*, 20 *AJIL* 655 (1926); James Brown Scott, *The Gradual and Progressive Codification of International Law*, 21 *AJIL* 417 (1927); Jesse S. Reeves, *The Hague Conference on the Codification of International Law*, 24 *AJIL* 52 (1930); Manley O. Hudson, *The First Conference for the Codification of International Law*, 24 *AJIL* 447; Philip Marshall Brown, *The Codification of International Law*, 29 *AJIL* 25 (1935). Societies built on reciprocity can, of course, be highly violent and unstable, escalating instability. See ROBERT O. KEOHANE, *Reciprocity in International Relations*, in *INTERNATIONAL INSTITUTIONS AND STATE POWER* 132, 138–39 (1989). This is why the underlying harmony of interests, or at least a preponderance of common interest, was crucial for classicism in making reciprocity desirable: reciprocity would not spin out of control because at the end of the day interests were aligned. But this belief did lead international legal scholars to view things as clear even when they were not. The Root-Takahira Agreement of 1908, which concerned the Japanese sphere of influence in Manchuria, is famously vague. See, e.g., Raymond A. Esthus, *The Changing Concept of the Open Door, 1899–1910*, 46 *MISS. VALLEY HIST. REV.* 435, 444–51 (1959) (detailing historiographical debate and arguing for a new interpretation). But the editors of the *AJIL* claimed that the Agreement was so clear as not even to require comment. Editorial Comment, *The United States and Japan in the Far East*, 3 *AJIL* 168 (1909). One of us has written at greater length about the classicists’ connection of clear rules, reciprocity, and social peace. Jonathan Zasloff, *Abolishing Coercion: The Jurisprudence of American Foreign Policy in the 1920’s*, 102 *YALE L.J.* 1689, 1695–98 (1993).

<sup>12</sup> Oppenheim, *supra* note 11, at 322–23; James Brown Scott, *The Codification of International Law*, 18 *AJIL* 260, 267, 269 (1924) (emphasizing that international law formed a part of Langdellian legal science).

<sup>13</sup> Olney, *supra* note 4, at 429; see also Editorial Comment, *Secretary Knox and International Unity*, 4 *AJIL* 180 (1910) (making the same argument); Oppenheim, *supra* note 11, at 317 (claiming “the ultimate victory of international law over international anarchy”).

<sup>14</sup> See Letter from (British ambassador to U.S.) James Bryce to (foreign secretary) Sir Edward Grey (Jan. 5, 1909), FO 371/706, Public Record Office, London, quoted in MICHAEL H. HUNT, *FRONTIER DEFENSE AND THE OPEN*

of Manchurian railways, a step that would destroy Japanese and Russian spheres of influence in the rich province. For traditional diplomats, such a move was shockingly naive: why would a power give up a dominant position? But for American classicists, the move made sense because it would bring the railways “under an economic, scientific, and impartial administration.”<sup>15</sup> *AJIL* editorials firmly backed Knox, insisting that neutralization would actually help Russia and Japan “to shift their onerous duties, responsibilities and expenses in connection with these railways to the shoulders of the combined powers” and thus the proposal “is to the interest of all alike.”<sup>16</sup> If Tokyo and St. Petersburg could not see that it would be best for them to relinquish their advantages—and in fact the proposal was ridiculed in foreign capitals—then so be it: as Knox told President Taft, “[I]t would be much better for us to stand consistently by our principles even though we fail in getting them generally adopted.”<sup>17</sup> Establishing principles was crucial because only that could lead to the spread of law.

This story is somewhat familiar to students of nineteenth-century beliefs in progress and human perfectibility, but the American outlook was different because it persisted in American legal thought and in this *Journal* beyond World War I.<sup>18</sup> Throughout the 1920s—when European thought slid into pessimism and cynicism—American legal thinkers publishing in the *Journal* remained committed to evolutionary thought, the popular, customary basis of law, the idea of the harmony of basic interests, law’s ability to remove politics from public affairs, and perhaps most important, a continuing denial of coercion as the basis for legal efficacy.<sup>19</sup>

Classicism became the central hallmark of American foreign policy in the 1920s. No less a figure than President Coolidge argued that Republican public policy “represent[s] the

DOOR: MANCHURIA IN CHINESE-AMERICAN RELATIONS, 1895–1911, at 181 & n.2 (1973) (stating that Knox is “‘first, last, and all the time’ a lawyer, with the characteristic habits of mind which belong to that profession, and disposed to look at the questions primarily from the legal side”); Letter from (British ambassador to U.S.) Mitchell Innes to Grey (Nov. 11, 1910), FO 371/85, *quoted in id.* at 224 (“To [Knox] a treaty is a contract, diplomacy is litigation, and the countries interested parties to a suit.”).

<sup>15</sup> Telegram from Philander Knox to (U.S. ambassador to Britain) Whitelaw Reid (Nov. 6, 1909), Dep’t St. Numerical File 5315/559, National Archives, *quoted in* Zasloff, *Gilded Age*, *supra* note 1, at 319.

<sup>16</sup> Editorial Comment, *Railways in China*, 4 *AJIL* 687, 689 (1910); and Editorial Comment, *The Chinese Railway and Currency Loans*, 5 *AJIL* 705, 707 (1911), respectively.

<sup>17</sup> Letter from Knox to Taft (Jan. 7, 1911), Philander H. Knox Papers, Library of Congress, *quoted in* Zasloff, *Gilded Age*, *supra* note 1, at 320.

<sup>18</sup> Scott, *supra* note 12, at 262–63 (arguing that World War I would yield increasing stringency and effectiveness of international law, “which restrains even sovereign nations, in the exercise of their sovereignty”).

<sup>19</sup> On evolutionary thought, see Gordon E. Sherman, *The Nature and Sources of International Law*, 15 *AJIL* 349, 356–57 (1921); Pitman B. Potter, *Is the Establishment of Peace and Disarmament Dependent upon the Perfection of International Law and Organization?* 27 *AJIL* 125, 128 (1933) (observing that “people and nations at large come to the conclusion, more or less subconsciously, that coöperation and non-violence are more beneficial ways of living than competition *à outrance* and the use of violence,” and they do so “long before they are willing to bind themselves by law to such forbearance and coöperation and long before they are willing to establish common sanctions to compel such coöperation”).

On the customary basis of law, see Sherman, *supra*, at 351, 357.

On harmony of basic interests, see *id.* at 359; George A. Finch, *The Dawes Report on German Reparation Payments*, 18 *AJIL* 419, 434–35 (1924) (hoping that “the universal conscience” will agree that the report is based “‘upon . . . principles of justice, fairness, and mutual interest’”) (latter quotation from letter of transmittal of Dawes Report to Reparation Commission).

On law, politics, and public affairs, see *id.* at 432 (“The plan is not considered to be in the nature of a political compromise . . .”).

On coercion and legal efficacy, see Philip Marshall Brown, Editorial Comment, *The Geneva Protocol*, 19 *AJIL* 338, 339–40 (1925); Potter, *supra*, at 128 (“In our most civilized communities today, where the arts of law and government are most advanced, social peace and coöperation depend more upon spontaneous individual behavior than upon organized coercion.”); Edwin M. Borchard, *The “Enforcement” of Peace by “Sanctions,”* 27 *AJIL* 518, 524 (1933) (“To engender peace by the threat of force is inherently incongruous, for it arouses, when applied to groups, fear and resentment.”); John Bassett Moore, *The New Isolation*, 27 *AJIL* 607.

processes of reducing our domestic and foreign relations to a system of law.”<sup>20</sup> In the international sphere, it was quite clear what this framework required: the United States must “put [its] trust not on force but on a reign of law and the administration of justice”<sup>21</sup> in order “to see all the world relieved from strife and conflict and brought under the humanizing influence of a reign of law. . . . We wish to discard the element of force and compulsion in international agreements and conduct and rely on reason and law.”<sup>22</sup>

The 1920s saw a new emphasis on the classical idea of “science” as yielding noncoercive solutions to the problem of “ruinous competition,” an old common law doctrine reinvigorated in a series of U.S. domestic and foreign policies.<sup>23</sup> Cooperative institutions armed with technical expertise could derive mutually beneficial solutions for parties that had hitherto believed their interests to be inimical. In this view, international law did not coerce so much as educate and benefit all parties. Gains were seen as absolute, not relative.<sup>24</sup>

The era’s diplomatic giant was Secretary of State Charles Evans Hughes, a once and future Supreme Court Justice. Brilliant and disciplined, Hughes crafted a foreign policy committed to classical premises, rarely doubting that international institutions peopled with men of the highest integrity could find and apply clear rules that would harmonize seemingly irreconcilable conflicts.<sup>25</sup>

<sup>20</sup> CALVIN COOLIDGE, *Government and Business*, in *FOUNDATIONS OF THE REPUBLIC: SPEECHES AND ADDRESSES* 317, 330 (photo. reprint 1968) (1926).

<sup>21</sup> *Ways to Peace*, Memorial Day Address Delivered May 31, 1926, *in id.* at 429, 432.

<sup>22</sup> *Coolidge Declares Observance of Law Is Basis of Peace*, N.Y. TIMES, May 31, 1927, at 1.

<sup>23</sup> For details on the relationship between ruinous competition theory and world politics, see Zasloff, *Twenty Years’ Crisis*, *supra* note 1, at 589–97. Ruinous competition theory held that firms would overinvest in capital because of a lack of knowledge of other firms’ behavior, incurring high fixed costs, and continue to operate because their marginal profit still exceeded their marginal cost, until they eventually collapsed. Merger and cooperative marketing arrangements were the best solutions.

Ruinous competition theory held enormous meaning for classical international legal thinkers, for it implied that cooperation between supposedly competitive firms could give each the market “security” it craved. In the same way, states’ battling for relative position was destructive and unnecessary because all could benefit from cooperation. Edwin M. Borchard served as the primary exponent of this approach. See EDWIN M. BORCHARD, *THE DISTINCTION BETWEEN LEGAL AND POLITICAL QUESTIONS*, S. DOC. NO. 68-118, at 5 (1st Sess. 1924); Edwin M. Borchard, *The Problem of Backward Areas and Colonies*, in *THE LEAGUE OF NATIONS: THE PRINCIPLE AND THE PRACTICE* 201, 211 (Stephen Pierce Duggan ed., 1919); Letter from Edwin M. Borchard to John Bassett Moore (Jan. 11, 1926), Edwin M. Borchard Papers, Sterling Memorial Library, Yale University. But President Coolidge suggested a similar approach. *Ways to Peace*, *in* COOLIDGE, *supra* note 20, at 429, 432–33; Calvin Coolidge, Press Briefing (Jan. 9, 1925), *in* *THE TALKATIVE PRESIDENT: THE OFF-THE-RECORD PRESS CONFERENCES OF CALVIN COOLIDGE* 157 (Howard H. Quint & Robert H. Ferrell eds., 1964); Calvin Coolidge, Press Briefing (Feb. 23, 1926), *in id.* at 162.

<sup>24</sup> A relative gain, as the term suggests, denotes a gain relative to other states in the international system. The structural realist Kenneth Waltz explains the fundamental distinction between absolute and relative gains, and argues for the primacy of the latter in an anarchical state system:

When faced with the possibility of cooperating for mutual gain, states that feel insecure must ask how the gain will be divided. They are compelled to ask not “Will both of us gain?” but “Who will gain more?” . . . Even the prospect of large absolute gains for both parties does not elicit their cooperation so long as each fears how the other will use its increased capabilities. . . . [T]he condition of insecurity—at the least, the uncertainty of each about the other’s future intentions and actions—works against their cooperation.

KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 105 (1979). Classicism rejected this kind of realist thinking in part because it rejected the primacy of relative gains over absolute ones.

<sup>25</sup> Not surprisingly, these men of high integrity were most often lawyers: Hughes frequently argued that lawyers made the best American diplomatic representatives. See Letter from Frank B. Kellogg to Cordenio A. Severance (Sept. 19, 1924), reel 14/frame 61, Frank B. Kellogg Papers, Minnesota Historical Society. Kellogg, Hughes’s successor, concurred with this assessment:

Hughes evidently has the idea that lawyers make the best Ambassadors. Since I have been here [as ambassador to Great Britain] I have been particularly impressed with the advantage of a wide legal experience in the Diplomatic Service. As you know many of the questions which come up involve international law, and many times domestic laws of the countries, especially of one’s own country, and it would seem to me exceedingly difficult for an Ambassador to handle them unless he had a legal education . . .

A host of his policy initiatives—the Nine-Power Treaty on China, the Dawes Commission on reparations, U.S. adherence to the World Court, the U.S.-Mexico Mixed Claims Commissions, just to name some of the most significant—reflect Hughes's and classicism's ideology.<sup>26</sup> Politics could be evaded through impartial adjudication and honest legal reasoning.<sup>27</sup>

Hughes's successors, Frank B. Kellogg and Henry L. Stimson, followed in his path, but the Great Depression's annihilation of the global economy blew apart the web of legal relationships created in the classical mode. Stimson, a Root protégé who attended Harvard Law School during the classical heyday and hired elite lawyers as his favored subordinates, found himself trying to apply old rules in a new world, and failed miserably in the attempt. When the Japanese Army forcibly occupied Manchuria in September 1931, Stimson's most well-known response was a pious declaration that the United States would not recognize such territorial gains, which did little to raise fear in Tokyo. Stimson's attempt to redraw the Japanese into the classical worldview was similarly ineffective: he explained that attempts to achieve relative power gains would simply result in ruinous competition.<sup>28</sup> But Japan had already gone down a different road, as would Germany.

Not surprisingly, then, international legal theory disintegrated during the 1930s. Some maintained the old classicist faith, now becoming more and more obsolete;<sup>29</sup> others settled into

*Id.*, quoted in Zasloff, *Twenty Years' Crisis*, *supra* note 1, at 608 n.77; see also Letter from Frank B. Kellogg to Herbert Hoover (Sept. 11, 1925), reel 17/frame 1, Frank B. Kellogg Papers, Minnesota Historical Society (noting that someone was appointed to a sensitive diplomatic post primarily because "he is an able lawyer"), quoted in Zasloff, *supra*, at 608 n.77.

This was a common opinion in the international law community. See, e.g., Editorial Comment, *Lawyer-Secretaries of Foreign Relations of the United States*, 3 AJIL 942 (1909) (arguing that lawyers were the most competent to serve as secretary of state, even above those with diplomatic experience).

<sup>26</sup> A fuller account of Hughes's policies and their relationships to classicism can be found in Zasloff, *Twenty Years' Crisis*, *supra* note 1, at 603–11, 617–26, 629–39.

Hughes's policy on postwar German reparations exemplified his entire approach. France struggled to enforce the Versailles settlement, fearing a resurgence of German power; for its part, Berlin was just as eager to show that the treaty was a "scrap of paper," and to reassume its great-power status. For Hughes, however, the reparations struggle was a technical matter: the key to resolving it, Hughes told Henry Cabot Lodge, was "to endeavor to get the question out of politics." Letter from Charles Evans Hughes to Henry Cabot Lodge (Feb. 1, 1923), Charles Evans Hughes Papers, Library of Congress. The secretary's solution: an independent, impartial commission, made up of men of "prestige, experience, and honor," to determine the "most authoritative" answer to the problem "in such circumstances of freedom as will insure a reply prompted only by knowledge and conscience." CHARLES E. HUGHES, *THE PATHWAY OF PEACE* 57 (1925); see Editorial Comment, *Joint Resolution to Authorize the Appointment of a Commission in Relation to Universal Peace*, 5 AJIL 433, 435–36 (1911).

<sup>27</sup> Hughes privately told Ambassador Jean Jusserand of France:

If a professional man, or a man of highest authority in finance and business, were approached for his opinion upon a question relating to his profession or to the sphere in which he was an authority his answer would be as clear as crystal. He could not by virtue of his own integrity and prestige give any answer except that which corresponded to his intellectual conviction based upon his experience and knowledge.

Memorandum of interview with the French ambassador (Dec. 14, 1922), Charles Evans Hughes Papers, Library of Congress, quoted in Zasloff, *Twenty Years' Crisis*, *supra* note 1, at 620. This was a typical view of legal classicism. Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870–1920*, in *PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA* 70, 98 (Gerald L. Geison ed., 1983).

<sup>28</sup> See, e.g., Henry L. Stimson Diary, Feb. 27, 1933, Sterling Memorial Library, Yale University. Stimson began to see the collapse of classicism by the end of his term in office. See *id.*, Feb. 14, 1933 ("I am trying to make up my mind . . . what the ultimate objective will be with regard to sanctions for . . . treaties . . . after we reach the point where public opinion will not be effective.").

<sup>29</sup> See, e.g., Manley O. Hudson, *The Report of the Assembly of the League of Nations on the Sino-Japanese Dispute*, 27 AJIL 300, 300 (1933) (arguing that the Lytton Commission report is an "epoch-making document. . . [that] marks a triumph for the collective system of handling international disputes" (footnote omitted)); *id.* at 305 ("[I]ts recommendations may have a far-reaching influence on future developments."); see also John Bassett Moore, *The New Isolation*, 27 AJIL 607, 622 (decrying the idea that prewar international law was outdated and condemning "[t]he tendency to confuse war and peace and to magnify the part which force may play in international affairs");

more highly technical studies and avoided the bigger questions. But as David Bederman points out in his essay in this issue,<sup>30</sup> despair became the leading trope, particularly by 1936. When *AJIL* authors considered the rise of fascism, they recognized the implications that such a challenge held for traditional concepts,<sup>31</sup> and they often objected to American isolation, protesting the Neutrality Acts of the 1930s.<sup>32</sup> Their lives' work had been international law, and that work was disintegrating.

Yet they were unable to conceptualize an approach to international law that related practically to the realities of world politics, or held out any hope of preserving world stability or democratic values. Even protests against Hitler seemed to come from left field. Quincy Wright vehemently objected to the Munich accords, correctly noting that they were made under Hitler's duress. But instead of reconsidering whether the entire project of a legally bound world might need to be abandoned, Wright strangely insisted that "[t]he fundamental legal criticism of the settlement rests on the fact that the statesmen responsible for it placed the substance of the settlement ahead of the procedure by which it was achieved." Wright did not explain why the best way to view the Nazi threat was through the prism of substance and procedure, saying simply that "[u]ntil the people of the world are . . . determined to place procedures ahead of substance, we may expect the world to alternate between dictates of Versailles and dictates of Munich, with little respite from wars and rumors of wars."<sup>33</sup> Essentially, international legal scholarship had become an exhortation for moral regeneration. Classicism had collapsed, and no new paradigm had arisen to take its place.

## II. THREE FACES OF REALISM

In 1940, in the pages of this *Journal*, Hans Morgenthau launched a broad epistemological, heuristic, and normative attack on classical legal thought in international law.<sup>34</sup> Epistemologically, he argued that international law had missed the behavioralist revolution,<sup>35</sup> as well as the related transformations of American and European legal thought since the late nineteenth century. Classical legal thought, he argued, ignored observable relationships between power, international law, and state behavior. International law that did not enjoy compliance was not law-like. By the time Morgenthau's article appeared in print, general war had erupted in Europe.

Charles Cheney Hyde, *Legal Aspects of the Japanese Pronouncement in Relation to China*, 28 *AJIL* 431 (1934); Manley O. Hudson, *The United States and the World Court*, 29 *AJIL* 301 (1935); Brown, *supra* note 11, at 25; Philip Marshall Brown, *Malevolent Neutrality*, 30 *AJIL* 88 (1936); Denys P. Myers, *The Bases of International Relations*, 31 *AJIL* 431 (1937); Quincy Wright, *The End of a Period of Transition*, 31 *AJIL* 604. Readers may also consult virtually any of the articles by Edwin M. Borchard, who maintained his classicist beliefs even after World War II.

<sup>30</sup> David J. Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 *AJIL* 20 (2006).

<sup>31</sup> Virginia Gott, for example, argued that Nazi theories of international law were "never completely understandable." Virginia L. Gott, *The National Socialist Theory of International Law*, 32 *AJIL* 704, 718 (1938); see also, e.g., James W. Garner, *Recent German Nationality Legislation*, 30 *AJIL* 96 (1936); Ellery C. Stowell, *Intercession Against the Persecution of the Jews*, 30 *AJIL* 102 (condemning discriminatory laws, albeit in the most polite terms).

<sup>32</sup> See, e.g., Philip C. Jessup, *The New Neutrality Legislation*, 29 *AJIL* 665 (1935); Ellery C. Stowell, *The Fallacies of Neutrality*, 30 *AJIL* 256 (1936).

<sup>33</sup> Quincy Wright, *The Munich Settlement and International Law*, 33 *AJIL* 12, 31–32 (1939).

<sup>34</sup> Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *AJIL* 260 (1940).

<sup>35</sup> While the definition of "behavioralism" is contested, we use the term to mean the study of actions and reactions of individuals, groups, states, and international organizations through observational and experimental methods. This stands in contrast with "formalism," which studies rules and usually assumes that behavior is in accord with them. David Truman, in *POLITICAL SCIENCE IN AMERICA: ORAL HISTORIES OF A DISCIPLINE* 135 (Michael A. Baer, Malcolm E. Jewell, & Lee Sigelman eds., 1991).

Nazi Germany had dismembered Czechoslovakia, annexed Danzig, and attacked Poland, Denmark, and Norway; Britain had declared war. The idealism of the League of Nations system had been exposed, and state behavior clearly did not accord with international law. In contrast to the prewar dominance of classical legal thought in U.S. foreign policy, realism became the modal position among U.S. foreign policy officials in the postwar period.<sup>36</sup>

Normatively, echoing Machiavelli's advice to economize on violence and E. H. Carr's condemnation of policies based on a fatal inconsistency between strong words and weak action, Morgenthau warned of the dangers inherent in a reliance on international law that ignored underlying power realities.<sup>37</sup> For example, it would be foolish to rely on a peace treaty for security in the face of a gross power imbalance or vacuum; doing so would probably cause unnecessary bloodshed.<sup>38</sup>

It certainly came as no coincidence that realism's appearance in international legal discourse occurred shortly after the emergence of legal realism, for the connections between the two were deep. Both emphasized the role of power and coercion: for legal realists, legal rules were not neutral principles arising from community consent but, rather, politics by other means. They relished demonstrating the incoherence of these rules and saw the state as a necessary enforcer of social peace.<sup>39</sup> In similar fashion, international realists viewed international outcomes as a

<sup>36</sup> The classic historical survey on postwar American foreign policy, which suggests realism as a driving factor, remains JOHN LEWIS GADDIS, *STRATEGIES OF CONTAINMENT: A CRITICAL APPRAISAL OF AMERICAN NATIONAL SECURITY POLICY IN THE COLD WAR* (rev. ed. 2005). An excellent brief piece demonstrating the persistence of realism in U.S. foreign policy is Gideon Rose, Op-Ed, *Get Real*, N.Y. TIMES, Aug. 18, 2005, at A25 (noting that realism is "American foreign policy's perennial hangover cure"). For examples of recent realist analyses of U.S. foreign policy and their relationship to international law, see John Yoo, *International Law and the War in Iraq*, 97 AJIL 563, esp. 575–76 (2003); Michael J. Glennon, *Why the Security Council Failed*, FOREIGN AFF., May/June 2003, at 16. On the U.S. refusal to join the International Criminal Court, see Jack Landman Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89 (2004). For a recent critique of a realist stance on the legality of the second Iraq war, and an analysis of the legality of U.S. actions in both Kosovo and Iraq, see Thomas Franck's essay in this issue, Thomas M. Franck, *The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium*, 100 AJIL 88 (2006).

We do not claim that the shift to realism as the modal position in U.S. foreign policy derived wholly from the shift to realism in international law scholarship, or from the shift to legal realism in American jurisprudence. Indeed, although lawyers maintained a position of high influence in American diplomacy, a whole series of other institutions arose after World War II that diminished the prewar primacy of law as the organizing paradigm for American foreign relations. Think tanks fostering the professional study of international relations, and the growth of the U.S. military establishment, created two central loci for thinking about national security. See MELVYN P. LEFFLER, *A PREPONDERANCE OF POWER: NATIONAL SECURITY, THE TRUMAN ADMINISTRATION, AND THE COLD WAR* (1992) (demonstrating broad consensus of a variety of groups concerning the necessity of geopolitical thinking). For the continuing role of lawyers in the development of postwar U.S. foreign policy, see Jonathan Zasloff, *Some More Realism About Realism: Dean Acheson and the Jurisprudence of Cold War Diplomacy* (draft on file with authors).

<sup>37</sup> Morgenthau, *supra* note 34; see NICCOLÒ MACHIAVELLI, *THE PRINCE*, chs. XV, XVII; *DISCOURSES*, bk. I, chs. XXI, LIX, & bk. III, ch. XLII (New York: Early Modern Library, 1978); EDWARD HALLETT CARR, *BRITAIN: A STUDY OF FOREIGN POLICY FROM THE VERSAILLES TREATY TO THE OUTBREAK OF WAR* (1939); Robert B. Stewart, Book Review, 35 AJIL 742 (1941) (reviewing *id.*); see also EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* (2d ed. 1946).

<sup>38</sup> Hedley Bull, *The Grotian Conception of International Society*, in *DIPLOMATIC INVESTIGATIONS* 51 (Herbert Butterfield & Martin Wight eds., 1966).

<sup>39</sup> The literature on legal realism is vast, and contentious about what legal realism actually meant. We believe that the anthology and interpretations presented in *AMERICAN LEGAL REALISM* (William W. Fisher III, Morton J. Horwitz, & Thomas A. Reed eds., 1993) represent the best set of definitions. Another good treatment is found in Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960* (1986)). Two important articles that reflect some of the most specific ways in which legal realism related to power are Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). Our interpretation of realism is not uncontested: for other views, see KALMAN, *supra*; Bryan R. Leiter, "Is There an 'American' Jurisprudence?" 17 OXFORD J. LEGAL STUD. 367 (1997) (reviewing NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* (1995)).

product of the global balance of power.<sup>40</sup> Without the state to enforce order, conflict is inevitable and the result predictable: the strong do what they may, and the weak do what they must.<sup>41</sup>

Realists of all stripes<sup>42</sup> generally share Morgenthau's positive and normative orientation, treat the state as the fundamental actor in international law (a stance that resonates with international lawyers because of its Westphalian roots),<sup>43</sup> and argue that international law reflects the interests of powerful states, but from there realist approaches diverge into three schools.

### *Traditional Realism*

For forty years after the publication of Morgenthau's *AJIL* article, traditional realism<sup>44</sup> dominated political scientists' and diplomats' understandings of international law, and infused much international legal scholarship.<sup>45</sup> For Morgenthau and other traditional realists, the key to analyzing international law was to see it as a reflection of *both* the interests of powerful states and norms held in common across states. Hence, a better scientific understanding of how international politics and society work was needed to ascertain what is meaningful international law.

Morgenthau's approach signaled a shift in thinking about international law that seemed new at the time it appeared and has run through the *Journal* since its publication. In point of fact, as Alfred and Detlev Vagts would later show, conscious attention to the relationship between balance of power and international law was as old as the Westphalian system; moreover, throughout much of the 1648–1914 period, many jurists saw the international balance of power either as “an integral part of the system of rules of the law of nations” or as a “necessary precondition to the existence of such a law.”<sup>46</sup> Yet notice of that relationship seemed to have

<sup>40</sup> Such a view appeared in the pages of the *Journal*. See, e.g., Josef L. Kunz, *The United Nations and the Rule of Law*, 46 *AJIL* 504, 504 (1952) (“There is no doubt that we are in the present epoch living in a climate of so-called ‘realism’; power, not international law, prevails in the thinking of many . . .”).

<sup>41</sup> There are, of course, important differences between (American) legal realism and international realism. For example, the American legal realism movement, which was directed to municipal law, concentrated on the relationship between law mediated through the courts and the values and functioning of relevant economic and social communities; whereas international realism has tended to concentrate on law mediated through the political organs of the state with less interest—until recently—in international law mediated through municipal or international courts.

<sup>42</sup> Unless otherwise noted, we speak from now on only of international realists, and will specifically refer to legal realism if necessary.

<sup>43</sup> See Leo Gross, *The Peace of Westphalia, 1648–1948*, 42 *AJIL* 20, 40 (1948) (noting that the Westphalian system was one of “rugged individualism of territorial and heterogeneous states, balance of power, equality of states, and toleration”).

<sup>44</sup> Many refer to the tradition of realism prior to the structural realist formulation as “classical,” “modern,” or “neoclassical” realism. See *Theory of World Politics: Structural Realism and Beyond*, in KEOHANE, *supra* note 11, at 35, 42–43. In the context of this essay, however, we adhere to “traditional” realism out of concern that some other terms could cause confusion with our discussion of classical legal thought. For two excellent accounts of prestructural realism, see JONATHAN HASLAM, *NO VIRTUE LIKE NECESSITY: REALIST THOUGHT IN INTERNATIONAL RELATIONS SINCE MACHIAVELLI* (2002); MICHAEL JOSEPH SMITH, *REALIST THOUGHT FROM WEBER TO KISSINGER* (1986).

<sup>45</sup> For political scientists and diplomats, see, for example, Stanley Hoffmann, *International Law and the Control of Force*, in *THE RELEVANCE OF INTERNATIONAL LAW* 21 (Karl Deutsch & Stanley Hoffmann eds., 1971). See also GEORGE KENNAN, *AMERICAN DIPLOMACY, 1900–1950* (1951); Clyde Eagleton, *International Law and the Charter of the United Nations*, 39 *AJIL* 751, 751 (1945) (“It would be gratifying to be able to say that the Charter of the United Nations established, or assured, the reign of law among nations; but the Charter does very little toward strengthening the law of nations.”).

More recently, echoes of traditional realism by international lawyers may be seen, for example, in Frederick M. Abbott, *The WTO Medicines Decision: World Pharmaceutical Trade and the Protection of Public Health*, 99 *AJIL* 317 (2005); Michael Byers, *The Single Superpower and the Future of International Law*, 94 *ASIL PROC.* 64 (2000); Bernard H. Oxman, *The Future of the United Nations Convention on the Law of the Sea*, 88 *AJIL* 488, 493 (1994).

<sup>46</sup> Alfred Vagts & Detlev F. Vagts, *The Balance of Power in International Law: A History of an Idea*, 73 *AJIL* 555 (1979). The Framers were acutely conscious of the relationship between international law and balance-of-power

been lost in American legal thought during the first half of the twentieth century, so that Josef Kunz could properly refer to the renewed attention to power and interest as a “great” change in the science of international law.<sup>47</sup>

That did not mean that the shift was universally accepted. Normatively, several commentators objected to it, as many were concerned about an approach that focused on the interests of powerful states; they suggested, for example, that it would be dangerous or morally wrong to reconceptualize international law strictly in terms of advancing a hegemon’s national interest.<sup>48</sup>

### *Structural Realism*

As realist thought evolved, the element of power became increasingly dominant and the identification and understanding of norms lost ground. After all, the power element gave realism its distinctiveness, and power considerations could be seen as driving forces in world politics in the early and middle Cold War periods. By 1980, a second, more parsimonious, and harder version of realism—which has since come to be known as “structural realism”—had emerged, and this strand became the conceptual core of the movement. Structural realism, and institutionalist reactions to it, originated in political science literature,<sup>49</sup> but they slowly seeped into the international law literature and by the 1990s structural realism had found its way into the *Journal*. Structural realists argued that very few, if any, norms are shared across states, so that norms did not offer a reliable basis for international law, as Morgenthau had suggested. Moreover, Morgenthau’s framework failed to give priority to power over norms: if the norms of most states diverge from the interests of powerful states, then traditional realism could not explain which prevails in international law.

Structural realists simplified the argument: international law could be explained by knowing only the interests of powerful states. Kenneth Waltz generated pure structural realist theory, using deductive-axiomatic logic to argue that the theory of international politics cannot depend upon state interests that are derived from a “reductionist” domestic political analysis; instead, some fundamental state interests (such as survival) may be assumed to be predominant and characteristic of the state, which he identified as the fundamental unit of analysis in an anarchic system.<sup>50</sup> In an anarchic self-help state system, security depends on relative state power, which means that international outcomes are zero-sum; in the international system, relative gains predominate.

Building on that work, Stephen Krasner distilled a pure structural realist view of international law and organizations: state behavior and associated international outcomes may appear to be shaped by international law, but because international law mirrors the interests of powerful states, international law is merely an epiphenomenon of underlying power.<sup>51</sup> International disagreements about the content of international regimes are zero-sum battles on the Pareto frontier—they usually concern the distributive consequences of agreements—and those battles are

concepts. See DANIEL G. LANG, *FOREIGN POLICY IN THE EARLY REPUBLIC: THE LAW OF NATIONS AND THE BALANCE OF POWER* (1985).

<sup>47</sup> Josef L. Kunz, *The Changing Science of International Law*, 56 AJIL 488, 499 (1962).

<sup>48</sup> See, e.g., Clyde Eagleton, *International Law or National Interest*, 45 AJIL 719 (1951); Detlev F. Vagts, *Hegemonic International Law*, 95 AJIL 843 (2001).

<sup>49</sup> Structural realism’s *urtext* is KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS*, *supra* note 24. Early reactions to Waltz’s work, and his response, are found in *NEOREALISM AND ITS CRITICS* (Robert O. Keohane ed., 1986).

<sup>50</sup> WALTZ, *supra* note 24.

<sup>51</sup> Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, in *INTERNATIONAL REGIMES 1* (Stephen D. Krasner ed., 1983).

won by powerful states.<sup>52</sup> Hence, international law may explain the details of process, but it has no autonomous power to explain international outcomes.

Some political scientists<sup>53</sup> and international lawyers<sup>54</sup> adopted this structural realist stance and some have perpetuated it. For example, twenty-five years after Krasner distilled this theory of international law in the political science literature, Jack Goldsmith and Eric Posner imported a modified version of it into international law scholarship. They acknowledged that international law might facilitate cooperation but argued that international law reflecting genuine multilateral cooperation is unlikely to emerge; much of international law results from a coincidence of state interests or coercion by powerful states, they claim, and some from the need for simple coordination.<sup>55</sup>

The structural realist stance makes a nice conceptual contrast—a null hypothesis backdrop—for arguments about how international law does matter. And many international law articles perpetuate the common misunderstanding that all realists share this view that international law has no autonomous explanatory power.<sup>56</sup> In fact, other than structural realists, few make this claim.<sup>57</sup>

### *The Realist-Institutionalist Hybrid*

Not all those who call themselves “realist” believe that law is inconsequential. Traditional realists did not go that far. And for most theorists of power and international law—including most contemporary mainstream realists, such as Krasner—the pure structural realist stance was short-lived.<sup>58</sup> Indeed, in the very same volume in which the pure structural realist stance on international law was presented, a competing approach to international law was introduced,<sup>59</sup> suggesting that international law could facilitate cooperation by states and that international law is therefore consequential. This approach charted new paths, one of which has become a third, hybridized line of realist thought.

<sup>52</sup> Stephen D. Krasner, *Global Communications and National Power: Life on the Pareto Frontier*, 43 WORLD POL. 336 (1991).

<sup>53</sup> See, e.g., John Mearsheimer, *The False Promise of International Institutions*, INT’L SECURITY, Winter 1994/1995, at 5.

<sup>54</sup> See, e.g., Edwin D. Williamson, *Realism Versus Legalism in International Relations*, 96 ASIL PROC. 262 (2002).

<sup>55</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 36–37, 118, 225 (2005).

<sup>56</sup> See, e.g., Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AJIL 205, 206 (1993); Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 AJIL 361, 365 (1999).

<sup>57</sup> During George W. Bush’s presidency, some U.S. government officials and commentators calling themselves “realists” have argued that law does not and should not constrain pursuit of the U.S. national interest. In supporting various foreign policies, definitions of the “national interest” have sometimes been based on an ideological commitment to the propriety of democratizing the world, or parts of it. Mahmoud Abbas, then the Palestinian prime minister, recounts how President Bush told him: “I have a moral and religious obligation. I must get you a Palestinian state. And I will.” Ewen MacAskill, *George Bush: ‘God Told Me to End the Tyranny in Iraq,’* GUARDIAN, Oct. 7, 2005, Home Pages, at 1. This stance differs from that of structural realists, who define the core national interest as survival, advancing policies that maximize the prospects for national survival. WALTZ, *supra* note 24, at 91. It also differs from that of most other realists, who see a foreign policy that is based on ideology and consumes vast national economic, diplomatic, and military resources as an imprudent luxury available only to a hegemonic state for a limited historical period—until pursuit of that policy undermines its hegemonic position. STEPHEN D. KRASNER, *DEFENDING THE NATIONAL INTEREST: RAW MATERIALS INVESTMENTS AND U.S. FOREIGN POLICY* (1978). Indeed, efforts to stretch the realist paradigm to advance a particular ideology may be seen by some as a root of miscalculations in Iraq—which may be catalyzing a return to realism, evidenced (at the time of this writing) by suggestions of disengagement from Iraq concurrently with attempts to curry favor with disgruntled European allies.

<sup>58</sup> As suggested by the analysis here, it is incorrect to claim that realism sees international law as inconsequential; only that *structural* realism and its progeny deem international law inconsequential.

<sup>59</sup> Robert O. Keohane, *The Demand for International Regimes*, in INTERNATIONAL REGIMES, *supra* note 51, at 141; Stephen D. Krasner, *Regimes and the Limits of Realism: Regimes as Autonomous Variables*, in INTERNATIONAL REGIMES, *supra* note 51, at 355.

This version of realism, in contrast to structural realism, does not see politics as a pure zero-sum conflict between states. Positive-sum possibilities exist and cooperative, Pareto-improving outcomes may be facilitated by international law. However, like other realists, adherents of this approach believe that the relative power of states shapes international law: both cooperative and coerced outcomes are distributed asymmetrically, reflecting the relative power of states.<sup>60</sup>

In this view, which may be seen as a hybrid between realism and rationalist institutionalism (described below), international law is consequential: even if it facilitates outcomes favored by powerful states, it may simultaneously facilitate positive-sum outcomes that would not otherwise emerge. For example, international law may facilitate cooperation by powerful states in their relations with weaker states;<sup>61</sup> generate information flows that are useful to powerful states;<sup>62</sup> establish legitimate international judicial processes that produce a pattern of outcomes constrained and favored by powerful states;<sup>63</sup> constitute incentives and opportunities for weaker states to adopt particular policies and change the structure of their domestic institutions in ways favored by powerful states;<sup>64</sup> and legitimate the actions of powerful states—or legitimate the very existence of the state system.<sup>65</sup>

### III. INTERNATIONAL LAW MATTERS: SOCIOLOGICAL, RATIONALIST-INSTITUTIONALIST, AND LIBERAL RESPONSES

Beginning in the 1950s, realism set into motion a series of intellectual responses that adopted the social scientific shift advocated by Morgenthau, but consciously attempted to distill and demonstrate how international institutions and law may facilitate international outcomes (usually, cooperation, order, or justice) that would not otherwise occur. In these views, international law is usually an independent variable or a meaningful intervening variable that affects behavior, defining opportunities and incentives that rechannel or reconfigure the behavior of powerful actors. Three lines of rules-based argumentation developed, based largely on sociology, rationalist logic (which became the core of the rebuttal to pure realism), and liberal analysis, respectively.

#### *Sociology and International Law*

Rules-based approaches launched in the first thirty postwar years were anchored in process<sup>66</sup> and a sociological exploration of factors that might make international law consequential.

<sup>60</sup> LLOYD GRUBER, *RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS* (2001); Richard H. Steinberg, *In the Shadow of Law or Power? Consensus-Based Bargaining and Outcomes in the GATT/WTO*, 56 INT'L ORG. 339 (2002).

<sup>61</sup> Richard H. Steinberg, *The Prospects for Partnership: Overcoming Obstacles to Transatlantic Policy Cooperation in Asia*, in PARTNERS OR COMPETITORS? THE PROSPECTS FOR U.S.-EUROPEAN COOPERATION ON ASIAN TRADE 213 (Richard H. Steinberg & Bruce Stokes eds., 1999).

<sup>62</sup> Steinberg, *supra* note 60.

<sup>63</sup> Geoffrey Garrett, R. Daniel Kelemen, & Heiner Schulz, *The European Court of Justice, National Governments, and Legal Integration in the European Union*, 52 INT'L ORG. 149 (1998); Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AJIL 247 (2004); Heiner Schulz, *The Political Foundations of Decision Making by the European Court of Justice*, 99 ASIL PROC. 132 (2005). For a competing view, see Laurence Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

<sup>64</sup> STEPHEN D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 73–219 (1999); Richard H. Steinberg, *The Transformation of European Trading States*, in THE STATE AFTER STATISM (Jonah Levy ed., forthcoming 2006).

<sup>65</sup> KRASNER, *supra* note 64, at 14–20; Richard H. Steinberg, *Who Is Sovereign?* 40 STAN. J. INT'L L. 329 (2004).

<sup>66</sup> David Kennedy argues that international law became obsessively process oriented during this period. David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988).

These approaches had faith in the ability of law to affect the behavior even of powerful states, but they differed from classicism by offering an explicit logic by which law could do so. While they relied on sociological processes by which law could shape behavior, and by which individuals and groups reacted to law, the authors of these approaches generally started from an assumption that law matters and then offered an explanation as to why. They rarely, if ever, rigorously tested or confirmed that their theories were right.

Harold Lasswell and Myres McDougal shared Morgenthau's critique that American thought about international law had ignored the behavioralist revolution and changes in thinking about domestic law. Moreover, like Morgenthau, they were acutely aware of the dominant position of the United States in the postwar world. In that context, they sought to develop a jurisprudence that could help U.S. lawyers and policymakers meet their newfound responsibilities, advancing a just and democratic image. Hence, power was not irrelevant to Lasswell and McDougal, but it took a historically unique, enlightened, and unfamiliar form: they wanted the United States to maintain a position of power so as to lead the processes and advance the outcomes they prescribed.<sup>67</sup> Yet much like the classicists, Lasswell and McDougal had faith in the ability of decision makers, not just courts, to develop a body of law that reflects the global common interest in approximating a world public order of human dignity, which they defined as a "social process in which values are widely . . . shared, and in which private choice, rather than coercion, is emphasized as the predominant modality of power."<sup>68</sup>

In the same way that early twentieth-century international legal theory drew deeply from classical legal thought, and foreign policy realism parallels legal realism, Lasswell and McDougal relied on currents in American legal thought, in their case Progressive-era "sociological jurisprudence."<sup>69</sup> Basing themselves largely on psychology, sociology, anthropology, and classic works of political theory, Lasswell and McDougal asserted that every person seeks fulfillment of eight values: security, wealth, respect, well-being, skills, enlightenment, rectitude, and affection.<sup>70</sup> Like scholars of sociological jurisprudence such as Roscoe Pound, Lasswell and McDougal relied heavily upon intensive fact investigation: they wanted social problems to be "mapped" through deep case studies, employing the best social science methods of the day, and appropriate legal rules and procedures were to be prescribed though specific "principles of procedure" that would help realize those values.<sup>71</sup>

This policy-oriented jurisprudence, which became known as the New Haven School, was not a wholly satisfying answer to realism. The success of policy-oriented jurisprudence depended, inter alia, on identical weighting of competing values across societies, as well as a powerful government's willingness to pursue the realization of those values in foreign states

<sup>67</sup> Kunz, *supra* note 47, at 495.

<sup>68</sup> Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AJIL 1, 11 (1959); see also Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in the World Constitutive Process: How International Law Is Made*, in INTERNATIONAL LAW ESSAYS 355 (Myres S. McDougal & W. Michael Reisman eds., 1981).

<sup>69</sup> Two excellent sources on this movement are G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972); Thomas C. Grey, *Modern American Legal Thought*, 106 YALE L.J. 493, 495–500 (1996) (reviewing DUXBURY, *supra* note 39).

<sup>70</sup> In so doing, they were following a similar effort by Pound several decades earlier. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 445 (1914–1915). Importantly, McDougal and Lasswell's scientific templates—the behavioral sciences—resembled less those used by adherents of sociological jurisprudence than those used by realists. See White, *supra* note 69, at 1013 (noting that realists relied more on behavioral sciences, and adherents of sociological jurisprudence relied more on economics and statistics). Nevertheless, McDougal and Lasswell used behaviorism for sociological purposes.

<sup>71</sup> For a more contemporary application of policy-oriented jurisprudence, see Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AJIL 316 (1999).

with the same vigor that those values were pursued domestically. Moreover, the prescribed mapping exercise implied that for each social problem, there was a discoverable correct theory to explain its cause and a solution; in practice, it has not been easy to discover the “correct” theories that explain and solve many global social problems. More broadly, policy-oriented jurisprudence is a method and broad framework for analysis with faith in its capacity to prescribe international law that will advance human dignity and world order, but as a mere framework and method, it does not offer testable theories and cannot systematically show that international law can reliably and consistently advance “world order.”

Like the New Haven School, international legal process, which emerged in the early 1970s, is sociological in orientation and trusts international law’s capacity to shape state behavior. International legal process tries to understand how judicial and nonjudicial decision makers operate in the world of law.<sup>72</sup> The movement’s positive sociological analyses are more circumscribed than the New Haven School’s, focusing not on how society as a whole works, but on specific legal processes. Operationally, the approach has been used mainly to build midlevel theories as to how discrete areas of law or process may be modified to achieve the goals of their framers. Used in this way, international legal process has not rebutted realist claims about the limits of international law: it has primarily been a framework and method that does not purport to constitute a testable metatheory of the consequences of international law.

These descriptions demonstrate just how much both the New Haven School and international legal process owe to Henry Hart and Albert Sacks’s legal process theory.<sup>73</sup> Hart and Sacks’s emphasis on law’s dynamic purposiveness as a means toward satisfying human wants found obvious echoes in New Haven; their focus on the coordination of institutions each operating within its fields of competence, and the legitimating role of procedure, clearly resonates with the international legal process approach.<sup>74</sup> Yet revealing the pedigrees of the New Haven School and international legal process demonstrates the difficulty of translating legal process theory to the international sphere. Whatever the strengths and weakness of their jurisprudence, compared to internationalists Hart and Sacks had less reason to grapple with questions of effectiveness, for they were dealing solely with the domestic sphere, which enjoys centralized enforcement by the state. Any international application of this jurisprudence needed to grapple seriously with effectiveness—but for decades it did not.

Eventually, Abram and Antonia Chayes used international legal process to explain compliance with international regulatory agreements, and to prescribe better ways to achieve compliance, offering a “managerial” theory as to how international law might constrain even powerful states.<sup>75</sup> Nonetheless, their theory was built to explain the express assumption, borrowing from Louis Henkin, that “almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” It has not been clear how to test the extent to which the managerial theory explains compliance, in practice.<sup>76</sup>

<sup>72</sup> ABRAM CHAYES, THOMAS EHRLICH, & ANDREAS F. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* (1968); Mary Ellen O’Connell, *New International Legal Process*, 93 AJIL 334 (1999).

<sup>73</sup> The literature on Hart and Sacks is large and growing. The beginning, of course, is HENRY M. HART JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge Jr. & Philip P. Frickey eds., 1994) (tentative draft 1958).

<sup>74</sup> Our description of the central themes of legal process theory comes from Eskridge and Frickey’s outstanding introduction to the Hart and Sacks materials. William N. Eskridge Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HART & SACKS, *supra* note 73, at li, liii.

<sup>75</sup> ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1998).

<sup>76</sup> See George W. Downs, David M. Rocke, & Peter N. Barsoom, *Is the Good News About Compliance Good News About Cooperation?* 50 INT’L ORG. 379 (1996) (demonstrating that most compliance would have occurred in the

*Rationalist Institutionalism*

Rationalist institutionalism may be considered the core of the “rules matter” reaction to structural realism. This approach emerged in the political science literature in the early 1980s but found its way into the international law literature only at the end of that decade. Using a structural realist approach, some international relations theorists had interpreted history to argue that hegemons create world order through international institutions, but that those institutions and order collapse as power diffuses in the international system.<sup>77</sup> By the 1980s, evidence of diffusion of power in the contemporary world system had surfaced: in contrast to the early postwar years, now the United States increasingly had to share power with Europe in governing the General Agreement on Tariffs and Trade and the International Monetary Fund, and in containing the Soviet Union. Yet international institutions and order were not collapsing.

The strongest counterpunch to the pure realist claim that international institutions and international law were inconsequential came from Robert Keohane’s explanation why international institutions were not collapsing, even as U.S. power was declining. Keohane used a rationalist logic that built on the same assumptions employed by structural realism: states are the fundamental units of analysis in an international system characterized by anarchy. Under those conditions, international institutions could facilitate cooperative, positive-sum outcomes that would not otherwise emerge. Keohane’s paradigm was the prisoners’ dilemma, which he (and others following him) argued was a metaphor for much of international life. Robert Axelrod had shown that the prisoners’ dilemma could be solved by iteration: repetition of the game led to cooperation.<sup>78</sup> Keohane argued that international organizations, creatures of international law, could provide venues for the repeated interaction that would yield a cooperative solution. More generally, international institutions could reduce transaction and information costs. Such information sharing favors cooperation, reduces uncertainty about intentions, and facilitates international stability.<sup>79</sup>

In making that argument, Keohane never used the word “law,” but it is hard to overestimate the impact of his rationalist insight on subsequent analyses of the relationship between international law and power. Political scientists began using rationalism to identify means by which international law could facilitate cooperation that would otherwise not occur. Some early work showed how simple games could be used as metaphors for the kinds of cooperation problems that could be solved by international organizations and international law.

In 1989 Kenneth Abbott imported these arguments into international law discourse,<sup>80</sup> setting off a chain reaction of rationalist analyses by international law scholars. Others expressly showed how economics could be used to understand international law.<sup>81</sup> Dozens of international legal rules and institutions were subsequently explained by games in international law journals.<sup>82</sup>

absence of international agreements and distinguishing compliance from effectiveness); see also Kal Raustiala & Anne-Marie Slaughter, *International Law, International Relations, and Compliance*, in *HANDBOOK OF INTERNATIONAL RELATIONS* 538, 543 (Walter Carlsnaes et al. eds., 2002) (describing Downs’s article as “trenchant”).

<sup>77</sup> See, e.g., ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* (1981); Stephen D. Krasner, *State Power and the Structure of International Trade*, 28 *WORLD POL.* 317 (1976).

<sup>78</sup> ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984).

<sup>79</sup> ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* (1984).

<sup>80</sup> Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335 (1989).

<sup>81</sup> Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 *AJIL* 394 (1999).

<sup>82</sup> For examples of analyses using the prisoners’ dilemma, see Kenneth W. Abbott, *Trust but Verify: The Production of Information in Arms Control Treaties and Other International Agreements*, 26 *CORNELL INT’L L.J.* (1993);

Political science and law scholarship then developed an arsenal of concepts, rationalist argumentation, and formal models that explained the consequences of law. Law and legal institutions could make the transgression of a clear rule transparent,<sup>83</sup> serve as a source of credible commitment by powerful states,<sup>84</sup> and establish focal points for coordination.<sup>85</sup> Rationalist logic and formal models were used to explain a range of legal phenomena, including such things as the conditions under which “soft law” may emerge, the emergence of the law merchant and champagne fairs in late medieval France, and why some international agreements are informal.<sup>86</sup> Ultimately, in this *Journal* rationalism was used to rebut the structural realist suggestion that international law is epiphenomenal, formally modeling the possibility that customary international law can facilitate cooperation<sup>87</sup>—although the extent to which that possibility is realized in practice was not examined.

Recently, this rationalist scholarship has shifted from inquiring into how international law matters to asking why treaty design varies.<sup>88</sup> For example, rationalist arguments or formal models have been used to explain the conditions under which treaties contain escape clauses, the extent to which dispute settlement provisions are legalized, and how treaty design can affect compliance.<sup>89</sup> A central critique of this approach has been that it fails to consider informal means that states might adopt (and anticipate adopting) to defeat or circumvent particular aspects of treaty design.

### *Liberalism*

In the 1980s, at roughly the same time that rationalist arguments about the consequences of international law emerged, so did a group of international law and international relations scholars who have used liberal analysis, usually alongside institutional considerations, to show how international and domestic law can favor outcomes that would not otherwise occur. Much rationalist work in international law—particularly the early work—treats states as unitary

John Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT'L L.J. 139 (1996).

<sup>83</sup> The notion of clarity as an important law function echoes the classicists' rationale for codification. See, e.g., JOSEPH M. GRIECO, COOPERATION AMONG NATIONS 23 (1990) (noting “consensus that international cooperation cannot be separated from rule-governed state behavior and that rules may in fact be the most important element of international regimes or institutions”). The idea of this law function applies to the domestic context as well. See, e.g., Robert Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1106–07 (1986) (“The law tends to define obligations much more clearly than does an informal norm. A social norm might say that a landlord should provide safe housing for tenants, but a housing code is more likely to define safety in terms of fire escapes.”); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 608 (1988) (observing that clear rules “enhance sociability and facilitate ongoing social interactions”).

<sup>84</sup> LISA L. MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION (2002); James D. Fearon, *Signaling Foreign Policy Interests: Tying Hands Versus Sinking Costs*, 41 J. CONFLICT RESOL. 68–90 (1997); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

<sup>85</sup> Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585 (1998).

<sup>86</sup> See, respectively, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Paul R. Milgrom, Douglass C. North, & Barry R. Weingast, *The Role of Institutions in the Revival of Trade: The Medieval Law Merchant, Private Judges, and the Champagne Fairs*, 2 ECON. & POL. 1 (1990); and Charles Lipson, *Why Are Some International Agreements Informal?* 45 INT'L ORG. 495 (1991).

<sup>87</sup> George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AJIL 541 (2005).

<sup>88</sup> Barbara Koremenos, Charles Lipson, & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 761–80 (2001).

<sup>89</sup> See, respectively, Barbara Koremenos, *Loosening the Ties That Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. 289 (2001); James McCall Smith, *The Politics of Dispute Settlement Design: Explaining Legalism in Regional Trade Pacts*, 54 INT'L ORG. 137 (2000); and Ronald B. Mitchell, *Regime Design Matters: International Oil Pollution and Treaty Compliance*, 48 INT'L ORG. 425 (1994).

actors with interests that are exogenous to the model. This approach swept under the carpet a crucial question: where do state interests come from? Liberalism offered an answer: state interests are best understood as an aggregation and intermediation of individual interests. Sources of power and interests are found within and between states. International law is driven from the bottom up. Domestic and international rules reaggregate and reconfigure individual and group interests into new blocs of power and interests.

By the early 1990s, this approach seemed sensible to many in light of various international developments. Nonbusiness nongovernmental organizations (NGOs) were visibly active in lobbying several international organizations and their constituent governments. The Soviet Union had collapsed from within: internal bottom-up political demands (not external, systemic pressures or war, as realism had suggested) seemed to have most proximately catalyzed its downfall. And with the fall of the Soviet Union, some saw the possibility that international law would gain greater hold.<sup>90</sup>

Few have been more influential in applying liberal theory to international law than Anne-Marie Slaughter, former ASIL president. Slaughter defines the liberal paradigm according to three basic assumptions: the fundamental actors in politics are members of domestic society, understood as individuals and privately constituted groups seeking to promote their independent interests; all governments represent some segment of domestic society, whose interests are reflected in state policy; and the behavior of states—hence levels of international conflict and cooperation—reflects the nature and configuration of state preferences. In its pure form, liberal theory explains international law as a function of what states want: “the strength and intensity of a particular preference will determine how much the state is willing to concede to obtain that preference, which in turn will determine its likelihood of success in achieving the bargaining outcomes it desires.”<sup>91</sup> State will is pivotal in international negotiations; state power—in the material sense—is not central to the equation. This liberal framework, Slaughter argues, can explain much of the development of transnational law, public international law, and European Union law, and can provide a normative basis for prescriptions that favor justice and order.<sup>92</sup> Several scholars have explained or critiqued international legal developments by means of this approach.<sup>93</sup>

Liberal analysis has also been used to explain particular international legal phenomena as an interaction between institutions and pure liberal theory. For example, domestic legal arrangements may interact with international law to configure a government’s and civil society’s calculations of opportunities and incentives in ways that favor the successful conclusion of treaties<sup>94</sup> and compliance with them.<sup>95</sup> In the judicial context, the accretion of authority by the European Court of Justice has been explained by its strategic maneuvers given European Community institutional incentives and opportunities available to European lawyers, judges, and

<sup>90</sup> See, e.g., Anne-Marie Slaughter, *Toward an Age of Liberal Nations*, 33 HARV. INT’L L.J. 393 (1992); see also FRANCIS FUKUYAMA, *THE END OF HISTORY* (1992).

<sup>91</sup> Slaughter Burley, *supra* note 56, at 228.

<sup>92</sup> Slaughter Burley, *supra* note 56; Anne-Marie Slaughter, Andrew S. Tulumello, & Stepan Wood, *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AJIL 367 (1998); see also Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513 (1997).

<sup>93</sup> See, e.g., Kal Raustiala, *Form and Substance in International Agreements*, 99 AJIL 581 (2005); Daniel M. Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AJIL 596, esp. 617–19 (1999).

<sup>94</sup> Michael A. Bailey, Judith Goldstein, & Barry R. Weingast, *The Origins of American Trade Policy: Rules, Coalitions, and International Politics*, 49 WORLD POL. 309 (1997).

<sup>95</sup> MARTIN, *supra* note 84; Judith Goldstein & Lisa L. Martin, *Legalization, Trade Liberalization, and Domestic Politics: A Cautionary Note*, 54 INT’L ORG. 219 (2000).

civil society.<sup>96</sup> More broadly, the expansiveness of law generated by an international dispute settlement system depends upon the behavior of civil society and governmental actors, but that behavior must be understood in the context of particular institutional mechanisms: judicial independence, accessible standing rules, and direct effect favor expansiveness.<sup>97</sup> Indeed, some consider this intersection between liberalism and institutionalism the core of the international law/international relations movement.<sup>98</sup>

#### IV. CONSTRUCTIVISM: IDENTITIES, INTERESTS, AND THE RECIPROCAL RELATIONSHIP BETWEEN POWER AND INTERNATIONAL LAW

In the analytical approaches above, interests—whether those of individuals, the group, or the state—are taken to be real, solid, and usually driven by material considerations. And the actors that are privileged in various theories—whether individuals, interest groups, or the state—are presumed to matter because they have power based on various material assets. At its core, constructivism offers a revolutionary, ontological challenge to that stance, claiming that neither power nor interests exist independently of the group. Interests and identity are constructed socially; they are plastic and may be redefined. International law may be understood as both a reflection of identities and interests of the powerful, *and* as a social artifact that reinforces identities, interests, and power. While constructivist approaches have permeated sociology, political science, and international law literature, only a few self-consciously constructivist articles have appeared in the *Journal*.

There is a range of constructivist stances. “Hard”<sup>99</sup> social constructivism sees the most fundamental elements of the international legal system—the state, sovereignty, consent—as social constructs that reflect and pattern behavior. This view is manifest in Friedrich Kratochwil’s application of postmodern constructivism to international legal theory.<sup>100</sup> For Kratochwil, international relations *is* international law because international law actually constitutes states through a discursive process guided by intersubjectively shared ideas, norms, and values. Only through the process of international socialization can states come to understand and even define themselves: to speak of state interests (as diplomats might) or even of an international system structure (as structural realists might) begs the question of how any state or system came to be. Ontology thus trumps epistemology: law is about defining, not regulating. As Kratochwil puts it, “the international legal order exists simply by virtue of its role in defining the game of international relations.”<sup>101</sup> And because these discursive practices are plastic and malleable, anarchy does not create an international system. Rather, in Alexander Wendt’s felicitous phrase, “anarchy is what states make of it.”<sup>102</sup> Power is not material, but ideational, and the

<sup>96</sup> Eric Stein, *Lawyers, Judges, and the Making of a European Constitution*, 75 AJIL 1 (1981); Anne-Marie [Slaughter] Burley & Walter Mattli, *Europe Before the Court: A Political Theory of Legal Integration*, 47 INT’L ORG. 41 (1993); Joseph H. H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991).

<sup>97</sup> Robert O. Keohane, Andrew Moravcsik, & Anne-Marie Slaughter, *Legalized Dispute Resolution: Interstate and Transnational*, 54 INT’L ORG. 73 (2000).

<sup>98</sup> Slaughter Burley, *supra* note 56; Slaughter, Tulumello, & Wood, *supra* note 92.

<sup>99</sup> “Critical” (i.e., postmodern) constructivist theory is referred to here as “hard,” and modern theory as “soft,” to avoid confusion with later references to critical legal studies, which includes modernists and postmodernists. See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); *Critical Legal Studies Symposium*, 36 STAN. L. REV., Nos. 1 & 2 (1984).

<sup>100</sup> FRIEDRICH V. KRATOCHWIL, RULES, NORMS, AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS (1989).

<sup>101</sup> *Id.* at 251.

<sup>102</sup> Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391 (1992).

importance of power in the material sense depends critically on the social milieu in which the state exists. It is all ideas, all the way down.

Wendt himself does not go so far, instead advancing a “softer,” modern constructivist theory that accepts the powerful influence of objective material forces in world politics and holds that states exist prior to international discursive praxis.<sup>103</sup> This research program has brought him criticism from hard constructivists<sup>104</sup> but has had a significant impact on international relations theory.<sup>105</sup> Wendt concedes that states are real entities, but—instead of merely claiming that ideas are more fundamental than material interests in constituting states’ behavior—he argues that ideas construct the very material interests upon which neorealist theory hinges. Depending upon whether Hobbesian, Lockean, or Kantian ideas predominate, identical groups of state formations can produce widely divergent results. There is no internal logic underlying the system: what matters is international culture. Although Wendt does not explicitly say so, his theory implies that international law helps determine the nature of this culture.

Whether of the modern or postmodern variety, constructivism connects deeply with sophisticated critical legal studies (CLS) theorists. Many CLS theorists contend that a central role of lawyers lies in the production of ideology,<sup>106</sup> thereby advancing a significant role for international lawyers in creating the basic framework of the international system. Yet the links between constructivism and critical legal studies run more deeply, for both systems of thought reflect a profound hostility to the idea that “laws” (i.e., assumed “natural” ordering principles) drive a system. Constructivism’s attack on such laws of the international system closely resembles CLS’s contempt for the laws of the market. The more radical strain in each school argues that reference to such laws obscures the essentially ideological nature of belief in them, and holds out hope of a thoroughgoing transformation of social life, whether domestic or international.<sup>107</sup>

Some constructivists have used discourse analysis to dissect the language of international law in order to understand its internal systems of signification (e.g., the relationships and binary oppositions between signs), the ways it is productive or reproductive of things defined by the discourse (e.g., who is authorized to speak and act, what practices are logically and properly implemented), and the way it changes and interacts with other overlapping discourses.<sup>108</sup> For example, David Kennedy’s analysis of international law discourse suggests that international

<sup>103</sup> ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); see also Alexander Wendt, *The Agent-Structure Problem in International Relations Theory*, 41 INT’L ORG. 335 (1987). A superb critical review of Wendt’s book from a neorealist perspective is Dale C. Copeland, *The Constructivist Challenge to Structural Realism*, INT’L SECURITY, Fall 2000, at 187. 52 INT’L ORG., No. 4 (1998), is entirely devoted to the rationalist-constructivist debate.

<sup>104</sup> See Friedrich Kratochwil, *Constructing a New Orthodoxy? Wendt’s ‘Social Theory of International Politics’ and the Constructivist Challenge*, 29 MILLENNIUM: J. INT’L STUD. 73 (2000).

<sup>105</sup> Examples of the vast and rapidly growing constructivist literature in international relations theory generally include MICHAEL BARNETT & MARTHA FINNEMORE, *RULES FOR THE WORLD: INTERNATIONAL ORGANIZATIONS IN GLOBAL POLITICS* (2005); JOHN GERARD RUGGIE, *CONSTRUCTING THE WORLD POLITY*, ch. 1 (1998); Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 EUR. J. INT’L REL. 319 (1997); Ted Hopf, *The Promise of Constructivism in International Relations Theory*, INT’L SECURITY, Summer 1998, at 171; and Christian Reus-Smit, *The Constitutional Structure of International Society and the Nature of Fundamental Institutions*, 51 INT’L ORG. 555 (1997).

<sup>106</sup> See Gordon, *supra* note 27; Robert W. Gordon, *‘The Ideal and the Actual in the Law’: Fantasies and Practices of New York City Lawyers, 1870–1910*, in *THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICA* 51 (Gerard W. Gawalt ed., 1984); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

<sup>107</sup> A powerful (albeit somewhat prolix) statement of this position in CLS is found in ROBERTO MANGABEIRA UNGER, *POLITICS: VOL. 1, FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (rev. ed. 2004); *VOL. 2, SOCIAL THEORY: ITS SITUATION AND TASK* (2004); *VOL. 3, PLASTICITY INTO POWER* (2004).

<sup>108</sup> Jennifer Milliken, *The Study of Discourse in International Relations: A Critique of Research and Methods*, 5 EUR. J. INT’L REL. 225 (1999); Kennedy, *supra* note 66.

law is intrinsically indeterminate.<sup>109</sup> In their analysis of international law discourse, Hilary Charlesworth, Christine Chinkin, and Shelley Wright have developed a feminist theory of international law, arguing that the private/public distinction silences international law from more fully addressing abuse and repression of women, which is generally treated as a private matter.<sup>110</sup> In his more flexible analysis of language, Benedict Kingsbury argues that the concept of “indigenous peoples” is not sharply defined; it is instead a dynamic abstraction, continuously drawing from and shaping the diverse categories and circumstances of different societies and institutions.<sup>111</sup>

Some international law scholars have theorized the processes by which international law reshapes preexisting national interests and identities. Harold Koh’s theory of transnational judicial process stems from interactions between governing and judicial elites, generating rules for future interactions that are eventually internalized.<sup>112</sup> Building on Max Weber’s conception of the legitimating effects of law, Thomas Franck (whom constructivists generally consider a constructivist, even though he does not think of himself as such) developed a theory of the sociological microprocesses that lend legitimacy to international law, which explains what may give international law its “pull power,” enhancing compliance with international rules and procedures, even those that would otherwise be seen as contradicting the interests of powerful rulers or states.<sup>113</sup> Others have offered a more general theory of sociological microprocesses that could explain how international law affects identities and interests.<sup>114</sup>

At the soft end of the continuum, some constructivists have focused on bottom-up politics reminiscent of liberalism, empirically tracing the social processes by which particular areas of international law have developed, and then distilling ways that law has cognitively and normatively reinforced the ideas that gave rise to it.<sup>115</sup> Some early work in this genre conceptualized “transnational epistemic communities” that may redefine global policy debates over issues such as the regulation of chlorofluorocarbons.<sup>116</sup> More recently, Kathryn Sikkink and others have developed ideas about how transnational advocacy networks redefine thinking about a range of international issues, arguing, for example, that such networks set off a “norms cascade” in support of human rights in Latin America, catalyzing the development of human rights law there, which has in turn reinforced the very norms and ideational categories that gave

<sup>109</sup> Kennedy, *supra* note 66; see also DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

<sup>110</sup> Hilary Charlesworth, Christine Chinkin, & Shelley Wright, *Feminist Approaches to International Law*, 85 AJIL 613 (1991); see also Hilary Charlesworth, *Feminist Methods in International Law*, 93 AJIL 379 (1999).

<sup>111</sup> Benedict Kingsbury, *Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy*, 92 AJIL 414 (1998).

<sup>112</sup> Harold Hongju Koh, *Transnational Public Law Litigation*, 100 YALE L.J. 2347 (1991); Harold Hongju Koh, *How Is International Human Rights Law Enforced?* 74 IND. L.J. 1397 (1999).

<sup>113</sup> THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Thomas M. Franck, *Legitimacy in the International System*, 82 AJIL 704 (1988) [hereinafter Franck, *Legitimacy*]. Like Louis Henkin, Franck assumes that almost all international law is followed almost all of the time, and his theory is offered as a post hoc explanation of why that might be. Franck, *supra* note 36; see also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AJIL 46 (1992) (arguing that an emerging international legal norm requiring democratic governance has legitimated democratic governments and processes and undermined nondemocratic ones).

<sup>114</sup> Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005); see also Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 MICH. J. INT’L L. 109 (1995).

<sup>115</sup> MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL LAW* (1998); see also Steve Charnovitz, *Nongovernmental Organizations and International Law*, 100 AJIL (forthcoming 2006).

<sup>116</sup> Peter Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 INT’L ORG. 1 (1992).

rise to the movement.<sup>117</sup> Similarly, this approach has been used to explain how a network of lawyers in New York, Washington, and a few European capitals developed the international system of private commercial arbitration and replicate that system's practices.<sup>118</sup> Used in this way, constructivism may accessibly explain many recent developments in international law, particularly those that can be seen as advanced through the norm entrepreneurship of NGOs.

## V. CONCLUSION: POWER, LAW, AND THE DECLINE OF ISMS

When this *Journal* was founded a century ago, power was not accounted for in international law analysis. Now it cannot be ignored. World War II and the rise of behavioralism confronted international lawyers with discord between the mandates of international law and the behavior of states. In its pure form, realism taunted international lawyers with the claim that international law was inconsequential. Since the appearance of the realist challenge, no positive claim about international law—e.g., how it has developed or will develop, or the extent to which it is effective—could be made safely unless it accounts for power, and no meaningful prescription could be offered unless it meets a standard of political feasibility and sustainability. Considerations of power are here to stay.

At the same time, today, unlike a century ago, there is an understanding of the conditions and mechanisms that may enable international law to affect behavior autonomously. Most commentators are confident that international law has at least some autonomous power. Structural realism engendered a reaction that has distilled precise mechanisms by which international law can cause outcomes that would not otherwise occur. Rationalist analyses have identified several functions performed by international law that facilitate cooperation, such as reducing information and transaction costs, establishing focal points for state behavior, and constituting credible commitments. Liberal analyses have been combined with institutionalist arguments to show how individual and group incentives and opportunities may be transformed by alternative institutional structures and processes. Sociology, psychology, and linguistics explain how international law may cognitively and normatively reinforce views about the identity of appropriate actors, the nature of appropriate behavior, and the identities of those who act and do not act in international affairs. At the same time, we now command a range of quantitative methods and modeling techniques for understanding the relationships between law and power. In short, there is now a heterogeneous set of metatheories and tools for understanding the autonomy and limits of international law.<sup>119</sup>

In her essay in this issue, Lori Damrosch examines what is uniquely “American” about the *AJIL*'s first century.<sup>120</sup> To some extent, the mix of theoretical orientations found in the *Journal* is uniquely American. In jurisprudence, the theoretical movements identified here clearly drew from domestic legal theories (although each has its foreign and international counterpart): classicism in American law and international law; legal realism and international realism; sociological jurisprudence and the New Haven School; legal process theory and both the New Haven School and international legal process; critical legal studies and constructivism. While

<sup>117</sup> Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 249 (2000).

<sup>118</sup> YVES DEZALAY & BRYANT GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* (1996).

<sup>119</sup> For more evidence of this heterogeneity, see Steven R. Ratner & Anne-Marie Slaughter, *Symposium on Method in International Law*, 93 AJIL 291 (1999).

<sup>120</sup> Lori Fisler Damrosch, *The “American” and the “International” in the American Journal of International Law*, 100 AJIL 2 (2006).

rationalist theoretical strains—structural realism, rationalist institutionalism, formal modeling, and quantitative analysis—may be found in work done in other countries, these strains have fared particularly well in the United States, perhaps because neoclassical economics is seen by many in the United States as the most successful branch of the social sciences.<sup>121</sup> Constructivism seems to have been embraced more widely in Europe than in the United States.<sup>122</sup> And classical legal thought has never lost its currency outside the United States.

In the United States, classicism may be gone, but it is not forgotten: many rationalist institutionalist and liberal arguments echo the classicists' confidence in international law. Contemporary publicists with faith in the autonomy of international legal institutions commonly proclaim that interdependence has transformed the international system,<sup>123</sup> that absolute gains predominate over relative ones,<sup>124</sup> that international community norms can transcend conflicts of interests and values,<sup>125</sup> and that the failure of international institutions simply reflects incomplete evolution rather than a fundamental mismatch in an anarchic system.<sup>126</sup> While in many ways these arguments echo the past, clear logics now stand behind many of the classicists' intuitions and often convincing empirical studies illustrate those logics.

The plethora of approaches for understanding how international law matters is complemented by the diversity of analysts considering the relationships between power and international law. In the *Journal's* first thirty years, most of its contributors were white American men, mostly practitioners. In the last few decades, the *AJIL* has opened up to authors with a substantially greater range of experiences, diversifying to include a substantially higher proportion than before of women, foreign nationals, and scholars. As Damrosch documents in her essay,<sup>127</sup> the range of insights and views appearing in the *Journal* has been broadened by this diversity.

This heterogeneity of heuristics, contributors, methods, and techniques has fundamentally shifted the way most observers are now trying to understand the relationships between power and international law. A half century of efforts to build metatheories that explain the autonomy and limits of international law have paid off, and continued effort to build such theories remains important and ultimately central to understanding international law. Yet metatheories have their limits. Few believe that international relations are actually defined by an anarchic, ideal-typical state of nature ruled by raw power and violence. And no one believes that we live in a purely cooperative world characterized by international law and order. None of the metatheories of the last century have been able to deliver the knockout blow that some may have once thought possible. No one trying to understand international relations can ignore power, *or* law, *or* the state, *or* civil society, *or* norms, *or* language. Increasingly, the great metatheories either operate in the background, or lend themselves to a conscious engagement across isms, with a focus on midlevel analysis of international legal and political developments using hybrid theories.

Hence, as suggested above, each of the main orientations identified above now has a substantial—or dominant—camp that uses a combination of heuristics to understand international law. It is increasingly the modal position of today's realists to use elements from both realism and rationalist institutionalism, although both traditional and structural realism still

<sup>121</sup> Stanley Hoffmann, *An American Social Science: International Relations*, DAEDALUS, Summer 1977, at 41.

<sup>122</sup> Philippe C. Schmitter, Seven (Disputable) Theses Concerning the Future of "Transatlanticized" or "Globalized" Political Science (rev. Oct. 2001) (unpublished essay, Istituto Universitario Europeo, on file with authors).

<sup>123</sup> ROBERT O. KEOHANE & JOSEPH S. NYE, *POWER AND INTERDEPENDENCE* (2d ed. 1989).

<sup>124</sup> KEOHANE, *supra* note 79.

<sup>125</sup> Franck, *Legitimacy*, *supra* note 113.

<sup>126</sup> CHAYES & CHAYES, *supra* note 75.

<sup>127</sup> Damrosch, *supra* note 120.

pervade many international law analyses pertaining to security matters.<sup>128</sup> Similarly, as suggested above, it is increasingly common to see hybridized arguments employing liberalism and institutionalism, particularly to explain developments in international economic and human rights law. Constructivists are also using hybridized approaches, some blending a constructivist orientation with liberal analysis (described above), and others blending it with realist analysis.<sup>129</sup> Some commentators vary the theoretical tradition they employ depending on the problem being addressed,<sup>130</sup> and others employ complex frameworks with a myriad of variables that echo the approaches of sociological jurisprudence or early postwar frameworks. Quantitative analyses of the development and effect of international law, which demand controlling for alternative explanations, also reflect this complexity.<sup>131</sup> Metatheory is necessary to our understanding of the social forces that shape international law and behavior, but with only metatheory we would miss the complexity of international phenomena, risk forsaking their explanation, and limit the effectiveness of associated prescriptions.

If all this seems to suggest limits on international law as science, it signals the forceful return of international law as *law*, that is to say, as a disciplined craft requiring practical wisdom and sophisticated judgment.<sup>132</sup> The finest practitioners of international law have less resembled chemists with equations than decision makers glimpsing through a glass darkly to guide human affairs against the brute fact of conflict and a fierce desire for cooperation. They have all operated with a keen consciousness of the primacy of power and the inevitability of conflict, yet have also skillfully developed cooperative institutions for the betterment of humanity. Dean Langdell, after all, was wrong: law is not a science; the lawyer's materials are not all found in printed books; and law cannot divorce itself from politics.<sup>133</sup> World politics is not a mere struggle of all against all; neither is it gliding toward progressive cooperation.<sup>134</sup>

<sup>128</sup> This is not to suggest that rationalist institutionalism is unused in the security field. See, e.g., James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J. LEGAL STUD. 41 (2002).

<sup>129</sup> See, e.g., Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369 (2005).

<sup>130</sup> Compare, e.g., David D. Caron, *War and International Adjudication: Reflections on the 1899 Peace Conference*, 94 AJIL 4 (2000), with David D. Caron, *The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures*, 89 AJIL 154 (1995).

<sup>131</sup> See, e.g., Oona Hathaway, *Do Human Rights Treaties Make a Difference?* 111 YALE L.J. 1935 (2002); Beth A. Simmons, *The Legalization of International Monetary Affairs*, 54 INT'L ORG. 189 (2000).

<sup>132</sup> Cf. C. Wilfred Jenks, *Craftsmanship in International Law*, 50 AJIL 32 (1956). Our notion of international legal craftsmanship differs somewhat from that of Jenks: he distinguished sharply between offering opinions to justify the national interest and building a solid foundation for international law, forthrightly arguing that the "complete" international lawyer should do the latter. We contend, on the contrary, that international lawyers must look to develop cooperative international institutions without doing violence to the interests of powerful states: the World Trade Organization, the Montreal Protocol, and the World Bank might serve as useful examples. Ignoring national interest in deference to universalism is a recipe for international legal failure.

<sup>133</sup> This alludes to a famous Langdellian catechism:

[A]ll the available materials of that science [law] are contained in printed books. . . . [T]he library is . . . to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.

Christopher Columbus Langdell, Address to the Harvard Law School Association (Nov. 1886), quoted in ARTHUR E. SUTHERLAND, *THE LAW AT HARVARD* 175 (1967).

<sup>134</sup> "[I]t is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician scientific proofs." ARISTOTLE, *NICOMACHEAN ETHICS*, bk. I, ch. 3 (W. D. Ross trans., Clarendon Press 1908).