

Ideals and Things: International Legal Scholarship and the Prison-house of Language

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INTRODUCTION

The search for a "theory" of international law, no less than the oft-repeated claims about "new directions," seems to me to be the incarnation, within the formalized language of scholarship, of a number of complex and contradictory yearnings—yearnings which are a central feature of the lives of international lawyers, scholars and activists. The strange thing about these yearnings (and it may also be sad, inevitable, or merely comical, depending on your perspective) is that the very language in which they are expressed tends both to exacerbate them and to deny us the possibility of ever dealing with them. I want to discuss these yearnings and the kinds of thinking they might lead us to engage in.

I have recently been reading the work of Alain Robbe-Grillet, a French writer who belongs to a school known as the *chosists*.¹ The *chosists* pay an inordinate amount of attention to the description of apparently unimportant household objects. This surfeit of description is supposed to bring on a sort of bittersweet melancholy. The reader contemplates the obsessive concern with the personification of the physical environment and thus becomes all the more aware of the fateful and absurd contrast between the infinite quality of human aspiration and the unrelenting indifference of a world of brute objects. Something in this idea reminds me very much of international legal scholarship.

The resemblance comes from more than the mere coexistence of lofty ideals with mundane reality. It also comes from the fact that the

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1. See A. ROBBE-GRILLET, *POUR UN NOUVEAU ROMAIN* (1963); see also J. STURROCK, *THE FRENCH NEW NOVEL* (1969).

very discourse in which we describe our experiences and hopes as lawyers and scholars is incapable of evoking (let alone exorcising) the feelings of cognitive dissonance that seem to be an occupational hazard of our profession.

Whereas the chosists spent their time describing trivial objects, international lawyers express their theoretical angst by defining international law.² It should be obvious that under this layer of definition-alism several very different activities are going on. Some people are trying to give a convincing account of the normative source of international law. Some are describing a normative meta-system that is supposed to give determinacy and neutrality to the everyday acts of legal interpretation within the international legal process. Others are engaged in the creation of models which, by describing how international law operates, will make it a more attractive problem-solving system to states and other international actors. Finally, some are combining all of these activities in an attempt to redefine the boundaries of the discourse in order to give more weight to the views of some particular group. All of these activities have been described as "definitions" of international law, or as attempts to answer the question "Is international law, law?" It is still true, despite Wittgenstein, that when people feel unsure as to what they should be doing they try to define the *essential elements* of their activity and thus, like medieval philosophers, to find refuge from the world in a prolonged contemplation of the word. My thesis in this article is that this fascination with definitions is not simply a "mistake." Instead I will argue that it is the manifestation of something rather more important: a pervasive reification³ that operates on the level of everyday politics as well as in the conceptual netherworld of international legal scholarship. Here is a summary of my argument.

(1) Reification is hard to describe for two reasons. First, it is omnipresent and thus invisible. Second, when people do recognise its

2. For an earlier criticism see Williams, *International Law and the Controversy Concerning the World "Law"* 12 BRIT. Y.B. INT'L L. 146 (1945). Although Williams explains the linguistic fallacy inherent in the search, he does not deal with the connection that this essay tries to sketch out—that between "essentialism" and *social* reification such as sexism or role-fetishism. See *infra* note 3.

3. "Reification," in the narrow sense, is the making of a concept into a thing. In this essay I am talking about something broader and less exclusively conceptual. In this sense reification refers to the phenomena that link sexist advertisements to formalistic legal argument and then connects both of them to the debates about "what is law?". All these things rely on the *power* that can be exercised by incorporating a contentious political choice into the act of "representation"; it doesn't matter whether it is Coke commercials presenting women as "essentially" sex objects, or judicial opinions defining sovereignty as an "essential" attribute of a state, the mechanism is the same. See, Gabel, *Reification in Legal Reasoning*, 3 RESEARCH IN L. & SOC. 25 (1980); Peller, *The Metaphysics of American Law* (forthcoming CALIF. L. REV.); Boyle, *The Politics of Reason* (forthcoming U. PENN. L. REV.).

existence, they explain it in very different ways. Its basic form is “the conversion of an idea into a thing” but there is much more to it than that. Some people see it as being an attempt to “naturalize” the here-and-now through the claim that it is actually the universal and timeless state of affairs. Others describe it as an attempt to deny both “contingency” and choice by incorporating some political decision about a subject into the *description* of that subject. The latter form is particularly easy to recognize because it depends on claims about “essences.” For example, a sexist or racist comment will habitually be couched in the form of mere description. “That’s a woman for you” or “It’s human nature to be acquisitive” are statements which make political decisions about the role of women and the value of social change while disguising those decisions by incorporating them into the description of “the way things are.” Who can argue with “the essential nature of women” or “human nature”? But this phenomenon of “reification” is more than just an argumentative trick which happens to be used both in international legal scholarship and in defenses of the status quo. It is the key to a particular kind of social theory—one that combines the traditional scholarly concern about the theory of the state with a predilection for small-scale descriptions of the realities of social power, in the workplace and the classroom as well as in the prison and the courtroom.

(2) One way to tackle the project of creating such a social theory would be to focus on the way that reification operates to ‘close’ the social world, the way that it makes the most mundane workplace hierarchy seem divinely ordained. “But what does all this have to do with international legal scholarship?”, one might ask. Actually, I think that it has a great deal to do with international legal scholarship, but in order to make that point I will tackle the problem from another direction.

(3) For a long time I saw the problems with international legal scholarship as being a set of separate issues: a little xenophobia here, a little formalism there, a hint of technocracy and the rule of “the best and the brightest” somewhere else. But the more that I looked at it, the more that all the problems started to seem the same. Part of this can be dismissed as “concept fatigue,” but I think that there is a sense in which all of the problems can usefully be understood to be the same—they all represent the reification, the “thing-ifying,” of the ideals and aspirations that drew scholars to the subject in the first place.⁴ This reification happens on many different levels. I have chosen

4. The reification that I have mentioned is rarely a deliberate attempt by a scholar to obscure the political implications of her work. It is more like a general “oppression of ourselves by ourselves” in which concepts are made into things and then treated as though they *were* things

to feature its effects in two main areas; scholarship about the "nature of" international law and the source of its "binding quality" and scholarship about doctrinal interpretation, application and effectiveness. By understanding the way that reification has operated to frustrate the goals of scholars in each of these areas we will not only be able to salvage a set of scholarly projects, but also to link scholarship to our everyday attempts to act as moral beings, whether we are dealing with a workplace dispute or an anti-nuclear campaign.

I. THE "NATURE" OF INTERNATIONAL LAW: SOURCES AND OBLIGATION

It is in scholarship that deals with the "nature," or "definition," or "source" of international law, or with its "binding quality," that one finds the most obvious form of reification—the search for "essences." In our century the dominant debate in this area of scholarship has been between the purveyors of natural law and the purveyors of positivism.⁵ Through the use of hypothetical examples and ingenious scholastic conceits, both have attempted to show that *they* rather than the other group have actually discovered the "essence" of law in general and international law in particular. Like all such definitionalist debates, the resulting discourse may seem to be full of sound and fury and yet to signify nothing, but there is more to it than that.

As I pointed out earlier, there are a number of very different projects being carried out under the rubric of an investigation of the "source," or the definition of international law. Some scholars are attempting to prove that treaties are more authoritative than custom,⁶ or vice versa,⁷ while others are attempting to argue that some new "source," such as General Assembly resolutions or the dictates of utilitarian philosophy, should be given greater prominence as a fountain-head of authoritative norms.⁸ Still others are trying to retell the story of international law in order to make it appear that the things we had thought of as defeats

which existed prior to our invention of them. Thus my argument is closer to being a critique of idolatry than a conspiracy theory. However, one should still remember that each time we give our own creations the status of golden idols and then worship them, we are reinforcing the grip of the status quo. So there *is* a sense in which reification is paradoxically both "innocent" and profoundly supportive of the existing structures of social power.

5. See generally A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* (1947).

6. See, e.g., G. TUNKIN, *THEORY OF INTERNATIONAL LAW* (1974) (given objective differences of interest between states of differing socio-economic systems, most international law must be formed by the explicit concordance of wills made possible by treaties).

7. See, e.g., H. KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* (1952) (custom is fundamental law-creating fact that gives international law its status as law).

8. See, e.g., R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); M. BEDJAOU, *TOWARDS A NEW INTERNATIONAL ECONOMIC ORDER: NEW CHALLENGES FOR INTERNATIONAL LAW* (1979).

were actually victories. By doing so they hope to stop the so-called "realists" from burying international law before it is dead.⁹ But all these projects share one attribute: they are all in one way or another engaged in showing how, and under what conditions, authority can be distinguished from power, right from might, within the international legal system. In short, they are trying to develop some conceptual way of differentiating between law and politics. Once the lawyer has such a system, she can go down her conceptual checklist and make the decision "Is this Law or Not-law?" At the same time these theorists are trying to explain (again, on a *conceptual* level) why law has normative force—what are the hidden ingredients, the analytical components that imbue law with its authoritative status?

It is not that the task of explaining or justifying the normative force of international law is *conceptually* any more difficult than the equivalent task with respect to domestic law. In fact, the problems that theorists encounter are exactly the same; the difference comes from the absence of the veil of normality, of "natural-ness," that covers the internal operations of the state, the veil that would lead us to say that "it goes without saying" that the mugger's demand for one's wallet is "essentially" different from the state's demand for income taxes.¹⁰ Now, of all the multitude of things one might think about this quality of "authoritativeness," one of the strangest would be the belief that there was something about legal norms, some conceptual thread woven into them, that distinguished them from other phenomena and thus provided the source, or test, or surety of their authoritative nature. Nevertheless, that is the line that legal theorists have taken—and if some, like Henkin, or Tunkin, seem to have moved beyond this fascination with conceptualism, it is only because they have shifted the axis along which one asks the questions.¹¹

I have already said that one would have to embrace a complicated and unlikely set of ideas in order to believe that there was some point to a search for the "essence" of law. However, in order to believe that this essence not only existed, but that it would somehow provide the key to the normative force of law—the explanation of its "authority"—one would have to jettison most of the ideas about philosophy developed since the Enlightenment.

For a start, one would have to ignore the central insight that "social constructs," such as law, do not have some pre-existing shape prior to

9. See, e.g., L. HENKIN, *HOW NATIONS BEHAVE* (1979); P. JESSUP, *A MODERN LAW OF NATIONS* (1968).

10. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* 79–88 (1961). Hart claims that the legal demand is perceived as more than mere force. But since the initial impulse of the discussion was to find out *why*, this does not get us very far.

11. See *infra* text accompanying notes 30–46.

human intervention. The idea of finding the essence or the real source of law distracts us from the reality that, in a very important sense, it is being created by our categories and definitions rather than being described by them. If we accept the pragmatists' insight that all definitional activity must be guided by some chosen purpose, then we must surely come to the conclusion that definitions can never be true or false but only useful or useless.¹² And if we accept that proposition, then post-medieval jurisprudence comes to resemble its scholastic ancestors fairly closely.

But there is one difference. The scholastic philosophers believed that timeless essences existed which could be uncovered by the exercise of "right reason." As I will try to demonstrate below, both the positivists and the natural law theorists relied on this notion of essences. But attacks on the essentialist approach were so common that they penetrated even the wall of anti-intellectualism surrounding lawyers and legal scholars. Consequently, the current justification for the definitional activity at the heart of international legal scholarship is not that it seeks transcendental essences, but that, being based on timeless and uncontroversial *purposes*, it provides us with a correct view of the "nature" of law. Of course, neutral, universally valid purposes seem about as likely as transcendental essences—and so they should, being basically the same thing—but the interesting thing about this strategy of confession and avoidance is that it has brought the cognitive dissonance in legal thought to the surface. On the one hand, this seems like a bad thing; scholarship appears simultaneously more irrelevant from practice and more Balkanized as these metaphysical "purposes" diverge, each claiming that it possesses the *real* fragment of the true cross.¹³ On the other hand, this seems like a good thing. It brings us closer to the utopian goals that actually inspire, yet are denied by, these multifarious scholarly projects. I am going to discuss the history of this process in international legal thought about sources

12. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 835 (1935); L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* 30 (G. Anscombe trans. 1958).

13. I am thinking of, for example, the different political agendas that are served by the theoretical approaches of McDougal, Tunkin, and Henkin. But this confused oscillation from essence to purpose is a more general jurisprudential phenomenon than these examples would indicate. For example, H.L.A. Hart oscillates between the realization that there are no "essences" and a series of attempts to resurrect essentialism on the basis of (supposedly uncontroversial) purposes. Thus the chapter in *The Concept of Law* that deals with international law is devoted to an analysis of whether international law is "law." If one reads closely, one finds that law has been implicitly defined according to a set of purposes that are mentioned but never fully articulated, that there is no explanation of how these purposes could acquire the fundamental character that Hart imputes to them, and that the defects of this argument are compounded when the analogy is made from domestic law to international. See H.L.A. HART, *supra* note 10, at 1-13, 208-231.

in the hope that the critique I have outlined will allow us to conduct an investigation of the conceptual and political repression it has engendered. I will follow the argument I have laid out in this paragraph, beginning with the positivist/natural law debate, explaining the reliance that both sides put on reified essences, linking this reliance to the question "what is law," and finally describing the shift to "purposeful" scholarship about sources—a shift that resurrected the same practices under different names.

The debate between positivism and natural law has dominated legal thought about the sources of international law. This definitional debate is harder to penetrate than one might expect. The main reasons for this are, first, that each side means something different by the question, "What is international law?", and second, that even when one looks *within* either camp, one finds that the question has markedly different implications in different situations. All the preconditions for a futile and circular discussion are thus present. In order to give the maximum of information about this debate in the minimum of space, I will list some of the main inquiries that are subsumed under the positivist and naturalist theories about the source of law. I will then try to show how the reification involved in the way the question was posed has limited, warped and frustrated both sets of theoretical efforts. Throughout the rest of this essay I will try to demonstrate that, at a minimum, the fact that so many people were asking so many different questions and believing that they were all the same question—"What is law?"—has stultified and trivialized the scholarly debate.

A. *Positivist Arguments*

Positivism is, or was until recently, the dominant school of jurisprudential thought in international law.¹⁴ Confronted with the question "What is law?", positivists tended to give answers that concentrated on the institutional procedures of the state and the coercion it wielded.¹⁵ This positivist "line" could be repeated at a number of different levels of abstraction. At the most abstract level, positivists claimed that the essence of law was that it was a command backed by a threat, or a norm stipulating a sanction—this was its *imprimatur*, the way that you could distinguish it from morals, religion or mere

14. See A. NUSSBAUM, *supra* note 5.

15. See generally H.L.A. HART, *supra* note 10; H. KELSEN, *THE PURE THEORY OF LAW* (1967).

habit.¹⁶ Having set up such a reified description, positivists could then argue among themselves as to whether "international law" was really "Law". At a more concrete level, positivists claimed that the "hidden ingredient" that infused international law with normative force was some state-centered attribute such as the consent of the sovereign, rather than some more general "intangible" standard such as the sense of justice held by a nascent world-community.¹⁷ Finally, at the most concrete level, positivists would use their definitional ideas as the basis for doctrinal arguments. But in order to do any of these three things they needed to somehow bring in the implicit purposes to which, for all their universalistic claims, their "definitions" had to appeal if they were to be convincing. This point is one of the major contradictions at the heart of classical international legal theory.¹⁸

In other words, my argument is that the positivists, at every level of their project, rested their claims to legitimacy on the supposedly

16. Notice that the task has already been implicitly structured by the assumption that law is to be distinguished from those things which are conceptually similar (other normative systems, or "norms" of behavior) rather than from those things that are ideologically, physically, or professionally similar. For example, what would jurisprudential scholarship look like if scholars had thought that the "obvious" task was to distinguish between law and the ideological belief that the social world is divided into a public and a private sphere; or between law and the sexist or racist prejudices that tend to support and reinforce the status quo; or between law and the acts of class violence carried out by the "invisible" hands of the market; or even to juxtapose "law-stuff" and the procedures and customs of accountants?

17. The "evolving world community" seems to be the main modern natural law idea in international law. Just as in domestic legal theory Dworkin has resurrected the idea that there are clear political rights prior to legal interpretation, so the international natural law thinkers have relied on a quasi-teleological notion that the normative consequences of some hypothetical trend towards internationalism can be both accurately identified and clearly applied. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130, 266-90 (1977). See generally P. JESSUP, *supra* note 9; C. JENKS, *THE COMMON LAW OF MANKIND* (1958).

18. For example, Hans Kelsen begins his *Principles of International Law*, *supra* note 7, with the claim that "the social phenomena called law present a characteristic in common, distinguishing them from other social phenomena of a similar kind." This characteristic is the only element "by which we are able to differentiate definitely and successfully between a legal and a moral or religious order." *Id.* at 3. This "criterion of law" is that, as a "coercive order", "[i]t provides for socially organized sanctions." *Id.* at 5. The question then becomes, "[i]s international law 'law' in the true sense of the term?" *Id.* at 18. Kelsen's answer is that it is, provided that, "the forcible interference of a state in the sphere of interests of another state, [is], in principle, permitted only as a reaction against a delict, and accordingly the employment of force to any other end is forbidden . . ." *Id.* The imprimatur of law is the application of coercive sanctions under a regime that distinguishes them from wrongful acts. The state is the body that applies these coercive sanctions against other states. One can identify legal obligations by knowing when a state has the (legal) power "to bring about a certain legal effect . . . , especially the power to apply the sanction . . . in case another individual does not fulfill his obligation." *Id.* at 8. If this seems obviously circular as well as deeply essentialist, one should remember that Kelsen thought that he had avoided these problems by postulating a "basic norm," "the hypothesis that international custom is a law-creating fact." *Id.* at 314. Kelsen thus follows all of the stages that I described as typical of an essentialist argument but, most important, he relies on the particular purpose underlying his study (the construction of a secular theory of the legal hierarchy which also separates fact and value) to confer a misplaced "universal" or "scientific" status on his ideas. Compare H. KELSEN, *supra* note 7, with L. WITTGENSTEIN, *supra* note 12.

universal character of their analysis of the international legal system.¹⁹ Their arguments were supposed to have a fundamental quality precisely because they told us not "what is Law here and there; but what is Law; as Plato, Aristotle, Cicero and divers others have done."²⁰ But if, as I am claiming, the positivist analysis could only be convincing if it was actually shaped by some concrete, particular, contingent purpose, then the claims to universality cannot be taken seriously. The positivist view becomes just another way to slice up the world; but by the positivists' own standards this is not enough.

The point that I have just made may sound confusing in the abstract, but it is easy to grasp if we look at concrete examples. One of the implicit purposes to which positivism actually caters is the lawyer's need for operational definitions. If one needed to predict which pieces of paper would actually produce a formal reaction from some state organ, then the "evolving world consensus" is not going to be of much use, while a positivist's explanation of the procedural hierarchy might be. Of course this does not mean that positivism is the true definition of law. For example, one might also need to know, as a matter of practice, how far inside the Icelandic fishing limits one could get without being chased by the Icelandic coastguard, or which compensation procedures are accepted as legitimate by Third World states. What is more, we can certainly say that the answers to these questions are "the law on the subject," provided that we make clear how we are defining law and, more importantly, why we are doing so. The positivist has the same freedom, but she does not have the right to say that her definition is the "real" one. But if this is true—if all definitions are founded, implicitly or explicitly, on purpose and convention—then how can the positivist (or anyone else for that matter) use their definition of law as the basis for a claim about the essence of law, or about the normative source of law, or even as the basis for a doctrinal argument? And why did so few people notice that the arguments supporting such claims were threadbare?

I think that the answer to the last question lies in the fact that a vast number of intellectual projects are subsumed under the heading of the positivist definition of law. Even if we leave aside the ones that I mentioned earlier, such as the attempts to give more weight to General Assembly resolutions, or to utilitarian philosophy, one is still left with a staggering number of implicit purposes. Now if these purposes were shared by the reader, they could give a false patina of

19. See H. KELSEN, *supra* note 7, at viii, 3, 18. He contrasts the "political ideologies" of other theorists to the "scientific theory of international law," and claims to deal with "the element suited in *all regards* to form the decisive criterion for an investigation into the nature of law." *Id.* at 3 (emphasis added).

20. T. HOBBS, *LEVIATHAN* 311–12 (C. McPherson ed. 1968).

"correctness" to the theorist's claims of having discovered the essence of international law. Some theorists were attempting to vindicate scientific views of knowledge and to maintain the logical positivist's dichotomy between fact and value.²¹ Others were trying to establish the primacy of the national sovereign over competing centers of authority both within and outside the state. Still others, coming to an intellectual field that had been constructed around a definitionalist question (and coming to it in a historical era in which the lawyer's main task was to predict the reaction of state institutions to pieces of paper produced by other state institutions) actually thought that the positivist definition was *true* in a sense that the natural law definition was not. They did not see this quality of truthfulness as related to their historical, political or professional position, however. It was not that the positivist way of carving up the world was more useful in terms of certain functions of lawyers. Instead, it was that only positivism could accurately describe the *essence* of law.

The conceptual dogmatism I have been describing may sound unconvincing even when positivism is being applied to the standard, formalized posers of twentieth century jurisprudence. But its monomaniacal qualities become truly obvious when extended to history. Do "primitive" people fail to distinguish among the norms that govern their lives on the basis of whether the "source" of those norms was in religion, morality or the power of the state? Then that simply serves to show that they are, indeed, primitive. Since their societies have not yet "developed" a differentiated system of profane power and authority, they are obviously at an "earlier" and "lesser" stage of social development.²² In other words, the positivist view has actually been read back into history as an indicator of some deep teleological process. And once one has this mythical teleology established in national legal systems one can then use it to "prove by analogy" almost anything one wants to about international law. How strange that this should be done by the same sort of people who, given their professional attachment to one of the drier forms of analytic philosophy, tended to react against Marxist history because of its theoretical reliance on an economic teleology.²³

B. Natural Law: The Arguments Reversed

The main "opposition" to positivist international legal scholarship has always come from the proponents of natural law.²⁴ Positivists

21. See H. KELSEN, *THE PURE THEORY OF LAW* 1-3, 70-76 (1967).

22. See H.L.A. HART, *supra* note 10, at 89-91 ("primitive" vs. "developed" legal systems).

23. See, e.g., H. KELSEN, *THE COMMUNIST THEORY OF LAW* (1955).

24. See A. D'ENTREVES, *NATURAL LAW* (1970).

asserted that the normative force of international law came from the fact that the sovereign had consented to it. The natural law thinkers claimed that this answer was insufficient. How could the sovereign bind itself to bind itself in the future? Why was the initial consent to law given higher normative status than some subsequent decision to renounce the applicability of international law? The natural lawyers argued that this circularity involved the positivists in an endless set of boot-strapping exercises in which they sought some higher source which could, in turn, imbue the sovereign's consent with the kind of normative force they wanted.²⁵ These "higher" sources generally had some kind of Latin tag, the most famous one being "pacta sunt servanda." Alternatively they relied on language of sublime generality, such as "states should act in such a way so as not to disappoint legitimate expectations." But neither Latin nor vagueness is protection against the realization that the process is endless. "Consent" must rely on a higher source if it is to bind the state to do something against its will. This higher source must rely on a still higher source and so on until one reaches something that can be called the "grundnorm," the "rule of recognition," or the "authority constituting social-legal construct," but which sounds like a definitional stop by any other name.²⁶

How did the natural law theorists themselves resolve this problem of the source of legal authority? Whereas the positivists relied on state consent (validated by some mysterious normative background), the natural lawyers relied on some putative normative deep-structure which emanated from the commands of the deity, or from the dictates of right reason, or from a discoverable teleology immanent in the natural state of affairs. And this is where we get to the strange mirror images produced by the reified question at the heart of international legal theory. I say this because the natural lawyer must walk a narrow line between saying that this normative deep-structure is already clearly evidenced by the actions of states (and thus implying that whatever states do is legal) and saying that the deep-structure is *not* evidenced by what states do (and thus implying that it is hopelessly irrelevant). In order to "privilege" the particular line that she chooses, the theorist must thus give some subordinate importance to the consent and the actions of states. Thus whereas the positivists started by positing consent as the source of international law and were driven to rely on some ever-receding normative background, the natural lawyers

25. *Id.*

26. See H.L.A. HART, *supra* note 10, at 97-114 (rule of recognition); H. Kelsen, *supra* note 21, at 193-220 (*grundnorm* as transcendental-logical proposition); M. McDougal, *STUDIES IN WORLD PUBLIC ORDER* (1960) (constitutive processes of authoritative decision-making).

started by relying on a deep normative order and ended up depending on manifestations of consent in order to save their project from being branded as either hopeless idealism or craven apologetics.²⁷

The mirror-image structure to the arguments I have just described is no accident. If you found a discipline on a question like "What is law?", your arguments are bound to be circular. They will be circular because you will have to alternate between giving precedence to your theory and giving precedence to "the facts," and you will be unable to make it seem as though your choices in this regard are necessary unless you appear to be describing something fairly close to an "essence." This sounds more complicated than it is. Suppose you have a theory about what Law *really* is. Sometimes you will have to give "precedence" to your theory by saying that it shows that something normally talked about as law (say, international law) is not *really* Law at all. At other times you will have to give precedence to the "facts" by saying that a certain feature of "legal reality" shows that your ideas are true. For example, you might say that the familiar internal division of the law into substantive and procedural rules corroborated your theory's emphasis on the difference between rules granting authority and those exercising it. But in order to defend your choice of when to give precedence to the theory and when to the "facts," you would need a meta-theory which would run into the same problem. And so on, *ad infinitum*.

Now look at the framework of the theories put forward by positivists and natural lawyers. The oscillation between state consent and normative deep-structure that I described as a set of mirror-image arguments is simply a local version of the larger problem in the structure of jurisprudential discourse. This oscillation also reappears at each of the levels of abstraction that I described within the positivist and natural law theories. In other words, when the positivists or the natural law theorists use their theory about the essence of law to make further claims about the binding nature of international law, or even to make doctrinal arguments, the same oscillation makes their claims terminally unconvincing unless the indeterminacy of the analysis is concealed by a little judicious reification.

For example, a positivist might claim that the essence of law is that it is a norm that stipulates a sanction. International law is thus dependent on the right of a state to use sanctions, including force, if its legal rights have been infringed. Since this right of self-help is

27. David Kennedy's work on the history of international legal scholarship demonstrates the structural contradictions that this led to in the work of the early natural lawyers. See D. Kennedy, *International Legal Structures* (1984) (unpublished manuscript available in Harvard Law School Library).

actually the basis of the binding quality of international law, it cannot be abridged by international law; the state may make a political choice to revoke it, but it can never be legally alienated. The natural law theorist might respond by saying that the essential purpose of international law is to provide a stepping-stone to a peaceful world community; that its binding force depends on the fact that it serves this trans-historically valid normative goal of "world peace through world law"; and thus, that states not only can, but should legally renounce their rights of self-help. It is not simply that positivists and natural lawyers disagree. Rather, their debates are entirely circular. One could argue from the same positivist premises with just as much logic that, *because* the sanction provided by the right of self-help is the foundation of international law, the state must *always* be able legally to renounce that right; otherwise it is not truly a state and international law is not binding on it. Or, to complete the symmetrical pattern, the natural law premises can be made to produce the argument that because the goal of international law is, in a sense, to annihilate itself by moving to a world community, the one peaceful act which a state cannot take under international law is to renounce its right to self-help. Such an act could only be "legally" accomplished in a binding way under a "higher" stage of law than international law—perhaps under "world law."

My point is not that international lawyers had bad arguments. In a sense it is the reverse: their arguments were too good. Theorists founded their discussion of sources on a definitional question. They claimed that the authoritativeness of their arguments depended on the "universal quality" of their definitions of law. Yet they could only be convincing when they covertly appealed to some "purpose," be it the operational perspective of practitioners, or the teleological perspective of internationalists. In order to maintain their arguments, they had to believe (or at least, seem to believe) that their purpose was woven into the essence of law. But once they had "reified" law in this manner (by incorporating their choice into the concept itself) they were left with arguments that were completely "flippable." As my example above may have shown, the arguments are so "essentialist" that they have been emptied of all content. In the end, both the natural law and the positivist arguments become blank assertions. One might just as well say, "Because." This fate is not particular to the theorists I have been discussing. It will always be the fate of any inquiry founded on the definition, the "essence," or the "nature" of law, or of any other phenomenon for that matter.²⁸

28. In a work in progress, I am attempting to describe the way that this process affects not only traditional analytic jurisprudence, but also the philosophy of science, aesthetic theory, linguistic philosophy and "meta-mathematics."

There is another level on which reification has operated in international law—the way in which it has presented the (mainly Western) theories of natural law and positivism as being neutral perspectives on the structure of law, in contrast to the culturally and ideologically influenced theories of the Third World or the Soviet Union. Again it is the claim to be dealing with the essence of law that supports these assertions of neutrality. The positivist (or the natural law theorist) is analysing the definitional components, the *form* of international law, not propounding an ideological view of the *content* of international law. The study of such ideological views is shunted off to some poor neighbor called “the sociology of international law,” or “comparative international law,” and the positivist emerges with renewed authority. The self-imposed constraints on the “object” of her study reflect the fact that her “discipline” is just as chastening as its name suggests; by excluding the messy and value-laden details of these “ideological views” the theorist supposedly justifies our reliance on her analytical power. As I now move to a discussion of contemporary thought about sources, I will try to show how Western “analytic” or “formal” jurists produced exactly the same kind of arguments as the contemporary “ideological” theorists they have excoriated for being partisan.

C. Contemporary Thought About Sources

If one looks at some of the more influential jurisprudential works at the present one might think that theorists have finally escaped from the positivist/natural law merry-go-round. In a sense that is true. The works of Henkin, McDougal, and Tunkin are not as redolent of scholasticism as those of their predecessors.²⁹ But I would claim that they are all dependent on the same reified form of argument, the difference simply being that they have switched the reification from essence to purpose. Instead of resting their arguments on a search for the essence of international law, they claim to be working from (or towards) some timeless purpose, a “purpose” somehow “privileged” over all other purposes. Once again this process is a lot easier to understand when one has some examples.

1. Contemporary Thought: The USSR

As always, when one has a purpose, certain things recede into the background while others become more prominent. This is particularly obvious in the writings of the Soviet Union’s foremost international

29. See *supra* text accompanying notes 18–26.

legal theorist, G.I. Tunkin.³⁰ In Tunkin's picture, international law is founded on a socio-economic reality which changes according to the logic of the "Marxist-Leninist science of foreign relations."³¹ Thus law has, incorporated within itself, a profoundly historicist element. History is not seen as some external supplement to law, a transformatory medium in which law develops. Instead, history is embedded within law; it would be meaningless to talk of "law" without specifying the historical period because "law" is simply the conceptual working out of the logic of some particular stage in world history. This historicist element provides the deep purpose of law which, in Tunkin's theory, is that it should act as a temporary method of peacekeeping and as a mode of communication between "states of differing socio-economic systems", while the world makes the inevitable transition from capitalism to socialism.³² This deep purpose is not simply an academic conceit or a theoretical ornament. Like the essences that the positivists relied on, it actually dictates the more concrete aspects of the theory. That is to say, Tunkin uses the "historical logic of international law" as a basis for the claims he makes about the "source" of international law, for the precedence he gives to some sources rather than others, and for the doctrinal arguments he puts forward, whether general (trends within the doctrine) or specific (correct resolution of this case).

There is also a further resemblance between Tunkin and the Western jurists. The positivists and natural law theorists found themselves dealing with a world which they had structured according to a tension between two concepts—state consent and some general normative background. This tension could not be resolved, but resolution was exactly what their theorizing demanded. This contradiction played itself out on each successive theoretical level, in discussions of the "nature" of law, discussions of the source of its normative authority, and in the doctrinal arguments which were based on the master theory. Compare this with Tunkin's work.

In terms of the *nature of law* Tunkin must uphold the theory that law is a reflection of the interests of the dominant class in each society. Since he describes international law as being the result of the explicit concordance of the wills of states (thus safeguarding the Soviet Union from having Western legal norms imposed on it by custom), Tunkin must explain how a capitalist ruling class and a socialist ruling class could ever have anything sufficiently in common to actually make

30. See, e.g., G. TUNKIN, *THEORY OF INTERNATIONAL LAW* (1974) [hereinafter cited as *THEORY*]; Tunkin, *The Contemporary Soviet Theory of International Law*, 31 *CURRENT LEGAL PROBS.* 177 (1978) [hereinafter cited as *Soviet Theory*]; Tunkin, *International Law in the International System*, 147 *RECUEIL DES COURS* 1 (1975) [hereinafter cited as *International Law*].

31. G. TUNKIN, *THEORY*, *supra* note 30, at 22.

32. See *id.* at 251–52. See also Tunkin, *International Law*, *supra* note 30, at 20.

law.³³ When he deals with the *source of law's normative authority*, Tunkin is faced with the task of showing that international law reflects, and to some extent reinforces, the inevitable historical progression from capitalism to socialism. At the same time, however, he must argue that it also represents a set of general, external standards which can command the respect of states of differing socio-economic systems precisely because those standards are neither completely manipulable, nor tilted in favor of one side or another.³⁴ Finally, on the level of *doctrinal argumentation* he must distinguish between those situations to which "general international law" applies³⁵ (such as, the law of non-intervention: Dominican Republic 1965, Chile 1976, Grenada 1984) and those situations to which the "more specialized" rules of socialist international law apply³⁶ (such as, the mutual security rules of the socialist brotherhood: Hungary 1956, Czechoslovakia 1968, Afghanistan 1980).

It does not seem to be stretching a point too far to say that these contradictions, appearing at each of our three levels of concreteness, are actually the same and that, on another level of generality, they are even the same as those faced by the positivists and the natural lawyers.

2. Contemporary Thought: Behaviorism and International Law

In a number of different ways, some of the most important contemporary Western work in international legal thought seems to be based on some kind of behaviorism. By "behaviorism" I mean a theoretical approach that focuses on the behavior of states and which has a philosophical commitment to the idea that one can somehow strip behavior of the explanations given for it by the actors themselves and thus reach a more profound understanding of what is really going on. In its most extreme forms, for example in the work of B.F. Skinner,³⁷ behaviorism dismisses as fallacy the claim that there are actually any "internal" thought processes at all. Everything is explained as the product of stimulus and response. In international law the method has not been applied in such an extreme way. The most one could say is that scholars have been attracted by the allure of "rigor" to which the social "sciences" have long appealed. An early article by Dahl captures this perspective rather neatly. He characterizes behaviorism

33. See Tunkin, *International Law*, *supra* note 30, at 19; Tunkin, *Soviet Theory*, *supra* note 30, at 177; Note, *Socialist Principles of International Relations*, 65 AM. J. INT'L L. 796 (1971).

34. See G. TUNKIN, *THEORY*, *supra* note 30, at 251.

35. See *id.* at 21-24.

36. See Tunkin, *International Law*, *supra* note 30, at 23; THE SOVIET STATE AND LAW 264 (V. Chkhikvadze ed. 1969); see HAZARD, *Renewed Emphasis on Socialist International Law*, 65 AM. J. INT'L L. 142, 145 (1971) (quoting Tunkin concerning Czechoslovakia).

37. E.g., B.F. SKINNER, *BEYOND FREEDOM AND DIGNITY* (1972).

as being based on the belief that "additional methods and approaches existed or could be developed that would help to provide political science with empirical propositions and theories of a systematic sort, tested by closer, more direct, and more rigorously controlled observation of political events."³⁸

Once again international lawyers are searching for the "real" story about what is going on. Faced with an international system that we cannot even describe without taking a political position, it is tempting to "simply look at what happens" without attempting to construct a descriptive or prescriptive international theory about it. The resulting attempts to construct theory-free statements about behavior are remarkably similar to traditional scholarship about sources. Both projects rely for their "authority" on a claim to be describing an essence, which is supposed to be prior to ideological interpretation or factional polemic. Or, to put it another way, in their attempt to escape the circular arguments of positivists and natural lawyers, behaviorist legal scholars actually rely on the same reification, the same essentialism, that was the cause of the very circles they were trying to avoid.

A most interesting example of the invidious effects that the dilemma of formalism and scientism can have is that of the Yale Studies in World Public Order, the series of books and research projects produced under the aegis of Myres McDougal.³⁹ To reduce the study of international legal discourse to a technocratic means-end manipulation of strategically useful concepts seems unhelpful. The fact that this manipulation almost always ends up favoring the American national interest is disquieting. To claim that one can inject a universal value ("human dignity") into an avowedly means-end technique is a contradiction in terms. For this to become one of the dominant approaches to international law is a travesty.

It could be objected that I have deliberately chosen a dogmatic, scientific example to make my point. In order to show that the contradictions I describe extend even to the non-scientific forms of behaviorism, I will use Louis Henkin's influential work on national behavior and international law as a further example.

Henkin may seem a dubious example of a behaviorist. Admittedly, his book is called *How Nations Behave*,⁴⁰ but he explicitly points out that he sees governments as being capable of "thought," "awareness" and other "internal" qualities that seem ill-suited to a theory which, in its most extreme forms, denies the reality of "consciousness."⁴¹ On

38. Dahl, *The Behavioral Approach in Political Science: Epitaph For a Monument to a Successful Protest*, 55 AM. POL. SCI. REV. 763, 766 (1961).

39. See, e.g., M. McDOUGAL, *STUDIES IN WORLD PUBLIC ORDER* (1960).

40. L. HENKIN, *supra* note 9.

41. *Id.* at 5.

the other hand, his central goal is to focus on "the influence of law on how nations behave," a subject to which jurisprudential discussion is only "incidental."⁴² This sounds as though he believes that behavior can be stripped of its conflicting ideological "meanings" and analyzed from some independent standpoint. Let me say immediately that it is not so much that Henkin believes that he can provide a neutral or objective picture of what is going on, but rather that, like the legal realists, he thinks he can cut through the Gordian knots of formalist debate by presenting law as it appears in behavior. This interpretation is strengthened when one looks at the motivation for his project.

As the horrors of war fade from the minds of national elites, Henkin sees the slow decline of the old dreams of world peace through world law. How can he maintain or even expand the role of international law at a time when most people see it as an infinitely manipulable sham? Henkin's answer is that international law is actually much more important, much more influential on the day-to-day actions of states, than the old conceptual model of "hard legal rules" would have us imagine. In trying to prove that this is the case Henkin provides us with an excellent example of a major intellectual shift in conceptions about law, a shift that will be much more familiar if we compare it to its counterpart in domestic law. Richard Parker describes the domestic version of this shift, as manifested in constitutional law, in the following terms.

The constitution of our polity—the essence of its "good order"—may be depicted, first of all, as inhering in the constitutional document or in a system of abstract doctrine of constitutional law. In that case, constitutional order is seen as transcending—disembodied from—the clash of wills and movement of passions that characterize day-to-day political life. It may then be enforced *on* political life to discipline those wills and passions. Its enforcement is necessarily a process totally divorced from politics—detached, objective, a matter of abstract legal "reason."

At the other extreme, our constitutional order may be depicted as inhering not in a document or a doctrine, but in our day-to-day politics. In that case, it is seen not as transcending the political process, but as embodied in it. The political process, in turn, is seen not as threatening, but as operating spontaneously in "good order." We can count on our political system, once set up, to work well enough. Hence constitutional order need not be enforced on politics. It need hardly be enforced at all.⁴³

42. *Id.* at x.

43. Parker, *The Past of Constitutional Theory and Its Future*, 42 OHIO ST. L.J. 223, 225 (1981).

It seems to me that Henkin's work is a striking example of the second picture of law. Like the legal realists who transformed our understanding of constitutional law, Henkin is convincing until he tries to reconcile his picture of law as enmeshed in behavior with the picture provided by the "rule of law." At that point he is faced with an impossible task. As David Kennedy has pointed out,⁴⁴ Henkin, in order to make his project succeed, must claim that law is implicated in the actions of states, so that law is what states do. But, at the same time, he must maintain some residual amount of the first picture of law—the picture that law is separate from, and critical of, state behavior. If he does not retain this residual picture of law as a set of a-political rules, then it appears that anything that states do is legal. Thus Henkin would be contradicting the body of thought that forms the implicit background to his project, the ideology of the "rule of law" with its insistence on a sharp separation between law and politics. But the second picture is in tension with the first—to explain when law is behavior and when law is imposed on behavior he would need a meta-theory . . . and so on, and so on.

My point is not simply that Henkin's argument is contradictory—David Kennedy has provided a "close reading" of Henkin's work that goes into the aporetic structure of his ideas in detail.⁴⁵ Rather, I mean to point out that, once again, the search for the "stripped-down" reality of law leads us into a morass of question-begging, circular arguments.

Henkin's work is undoubtedly more advanced than the theories it criticizes. He even disavows the intention of providing an account that is more than "impressionistic." But underneath his impressionistic project lie two contradictory pictures of what law is all about. Like Holmes in the *Lochner* opinion,⁴⁶ Henkin is trying to create a vision of dynamic law, embedded in international social life. But, also like Holmes, he carries with him another, opposite image—the image contained in the ideal of the "rule of law." In this, other, image the law is a set of external rules that must sometimes be imposed on social life so that everyday reality can be forced to live up to the utopian blueprint contained in the legal documents.

It may provide an interesting comparison to note that Holmes, unlike Henkin, confronts this problem explicitly. He tries to establish a residual category, a "supplement" to his picture of law as being enmeshed in social life. This "supplement" expresses the opposite view of law. It talks of statutes being unconstitutional if they contravene

44. Kennedy, Book Review, 21 HARV. INT'L L.J. 301 (1980).

45. *Id.*

46. *Lochner v. New York*, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting).

"fundamental principles as they have been understood by our peoples and our law."⁴⁷ But the supplement is "dangerous" to the main project. It is the expression of a contradictory "essence"—an opposing reification. The title of the theory may be different and a focus on behavior may seem to be a far cry from the positivist obsession with hierarchies of procedural norms. Nevertheless, both theories share exactly the same underlying structure, and both must conceal their definitional groundlessness by recourse to reification.

II. DOCTRINE

I want to move straight from this discussion of the scholarship about the nature and the source of international law, to a discussion of scholarship about doctrine. I will not attempt the same kind of analysis as I gave in the last section. Instead I will give a brief impressionistic account, relying on the familiarity of the picture I paint to compensate for the absence of citations to particular examples.

What are doctrinal articles about international law like? "Mush," says the cynic. "Just as definite as a domestic law article," says the scholar. Are they both right? One standard type of doctrinal article springs out of some recent happening—for example, the invasion of Grenada. The scholar gives a useful little potted history of the conflict, discusses the applicability of various norms, and then pronounces a conclusion. Unfortunately the very next article does the same, but comes to the opposite conclusion. Another type of article starts from some norm and then proceeds to discuss the extent to which it is obeyed by states. Things often look grim. "Ah ha!," says the cynic, "this all goes to prove my point. Even scholars cannot agree on the meaning of the law, and states do not obey it anyway. International law is a sham." "Not at all," says the scholar, "people disobey domestic law all the time and lawyers would not exist if there were not differing interpretations of the law. Yet neither of these two facts causes anyone to say that domestic law is a sham. Why should they do so over international law?" Standard argument is followed by standard response. Is there life beyond this debate?

I think that there is. Just as the arguments about sources were warped and frustrated by the implicit framework within which they were conducted, so the arguments about the interpretation, and even the effect of doctrine are constructed around a set of hidden premises that create and then perpetuate the sterile debate I have just described. In other words, I am claiming that scholarship about doctrine has its own pervasive reification, a reification that is similar in form to the

47. *Id.* at 76.

one that I described in my discussion of scholarship about sources. Let me explain what I mean.

Doctrinal scholarship often appears to be an attempt to show that rules can achieve determinacy, to show that there are correct interpretations of international legal norms. My claim is that this attempt is only explicable as the objectified manifestation of a different, more contentious political project. International lawyers are not attempting to show that rules are definite, firm and predictable because they believe this exercise will be good for their health. Their aspiration is to show that international law is a legitimate system for constraining power and irrationality, and, *in their minds*, they carry the assumption that it could only be such a system if there are neutral, objective answers to legal questions. This assumption is occasionally referred to in passing, is rarely debated and is hardly ever seriously questioned. Nevertheless, it is this assumption that provides the hidden logic to the debates about international legal doctrine.

The scholars of the Western countries have modelled international law along the familiar lines of liberal state theory. Their utopian vision is that politics can somehow be constrained by (a-political) rules.⁴⁸ This vision leads them to attempt to show that language can somehow provide a neutral conduit for power. The state's consent is to something called "a rule." This rule is made up of words and the words can be interpreted in a non-political way. Thus, ideological conflict can be separated from legal argument and the nation state can logically give its obedience to the resulting "objective" structure. In doing so it is merely following the lead set by its conceptual role model, the atomistic citizen, who makes decisions according to arbitrary, subjective value-judgments. An external source of power like "the law" might seem to pose an ineradicable danger to such a citizen, or to a nation-state. It is this problem which made theorists believe that the law's normative force would depend on the possibility of objective legal interpretation, on a body of materials and a mode of reasoning which, together, could triumphantly pierce the murky subjectivity of the social world.

So far I have suggested that the debate on "whether or not international law is mush" is actually a reified place-holder for a more important aspiration, the aspiration that law can be separated from, and then enforced on, politics. If this is true and we are dealing not with a mere argument over the meaning of doctrine but with a utopian vision expressed in the arcane iconography of the law, then we can begin to understand two features of this debate that otherwise seem inexplicable. First, there is the passion with which the debate has

48. See R. UNGER, *KNOWLEDGE AND POLITICS* 80-93 (1975).

been carried on. Second, there is the marked reluctance of international lawyers to incorporate the most basic insights from legal realism, post-Wittgensteinian linguistic philosophy, or any other source of knowledge that tends to undermine the possibility of neutral legal interpretation. These phenomena seem bizarre in the extreme if taken in isolation. They become meaningful only if one sees them as a manifestation of the utopian urges that often bring people to the study of international law in the first place but which most international legal scholarship seem so incapable of expressing.

But even if scholars did want to chain power with reason (or at least with words), this is surely not an unfamiliar, let alone reprehensible, ideal. In both international affairs and in the everyday pattern of Op-Ed pieces, civics classes, and bus-stop conversations that make up "the public sphere of debate," this ideal goes under the name of the rule of law. The defense of the rule of law can be the expression of a profoundly utopian goal. It should not be confused with apologetics simply because they are so often neighbors. But the thesis of this essay is that the ideal of power constrained by reason is expressed through a discourse, the professional language of scholarship as well as the ideology of the public sphere, which actually in some cruel fashion negates it, transforms it, turns its utopia into a suburb of the place we were trying to escape.

To those not interested in the mythology of the liberal state, or in the search for world peace through world law, this matter might appear to be happily irrelevant. It is not. If there is something interesting about this critique it is that it gives us insight into the mundane actuality of power, oppression and suffering as well into the formal language in which we express our opposition to these things. My argument is that legal theorists had the same fixations on the international level as they did on the domestic level and that the method they employed to deal with those obsessions is used in almost every situation of social power. Let us start with the theoretical obsessions and work down to this mysterious method.

Most of contemporary doctrinal scholarship is founded on two basic and mutually contradictory premises. The first is that values are subjective; there can be no demonstrably correct answer to a question that involves a value judgment. The second is the claim that words have "essences," or "core meanings," that can be interpreted mechanically, or at least neutrally. The second belief is necessitated by the first, but also denied by it. This is how it happens.

There is a "legitimizing story" that supports the manifestations of the liberal state which appear in legal scholarship. This story operates to justify the exercise of power. But how is power to be justified if there can be no rational defense of value judgments? There are three

answers. First, the market place is defensible because it merely records the (arbitrary) choices made by millions of consumers. Second, the democratic system of government is defensible because it merely records the (arbitrary) choices made by millions of voters. Third, the legal system is justifiable because the judge only applies the words of the law to the case in hand. There is simply no value choice to justify. In order to be true to the fundamental tenet that there are no moral or political essences that would allow us to know what "the good" was, and to act upon it, liberal thinkers have had to postulate that there were essences to *words* and that these essences would allow judges to make "correct" decisions without interposing their subjectivity. When legal theorists turned their eyes to international law, in which the problems of legitimacy were more obvious, it was not surprising that they would play out their obsession with words and values all the more strongly.

I want to discuss this obsession, and the utopian goals that fueled it, at the same time as I deal with the aspirations that motivated the search for an essence of law. After describing these various utopian goals, I will make some suggestions about what "new directions" in scholarship this mode of analysis actually suggests. In the last section, I will try to describe the implications of my argument for the teaching of international law; the arena in which most of these issues have had the greatest impact.

III. UTOPIAN ASPIRATIONS IN INTERNATIONAL LEGAL SCHOLARSHIP

If we look back over the discussion of scholarship about the nature and source of international law, it seems as though all of the theorists had a single desire, a single method. Tunkin seems to share a methodology with McDougal, McDougal with Kelsen, Kelsen with Jessup, Henkin, and Hart. All of them seem to be "using" reification to establish that the thing they want us to recognise about international law is already there woven into every strand. All we have to do is to admit its presence in, and its essentiality to, international legal discourse. The same seems to be true of doctrinal scholarship. Admittedly there is less hubris involved in the claim to have identified the essential meaning of a word within a rule than there is to the claim to have identified the essence of law. Nevertheless, the substance of the claims appear remarkably similar.

Why does this "reification" seem to reappear in every new theoretical project? Are the projects really all the same? The answer to the second question is "No." The answer to the first question depends on finding out why the projects are *not* the same. To do that, we need to look to

the things that I have been calling the "utopian aspirations"—the implicit political, moral, and epistemological goals that seem to motivate each project.

Reason and Enlightenment

What do international lawyers want? A car in every driveway? Tofu in every pot? For me, the goals of scholarship are easiest to understand if one sees their relationship to politics and rationality. Like all "disciplines," international law is a "rationalist" project. One feature shared by all the scholarship we have looked at, doctrinal or jurisprudential, is the belief that (if carried on according to the plan put forward by that particular author) scholarship can live up to the image of reason exemplified by the Enlightenment. Knowledge itself will be a force for progress, moral autonomy and "the good." As it happens, I hold this vision of enlightened, critical self-reflection very dear. Yet the experience on which this essay is based is that the dominant forms of discourse, the ways of conceiving of the possible and desirable that we call "reason," may be far from emancipatory. Precisely because they are the dominant forms of discourse—be "they" positivist legal theory, traditional psychoanalysis, dialectical materialism, or representational painting—they exclude, "delegitimate," or undermine other modes of thought, other ways of life.⁴⁹ We are all aware that knowledge is power, and if we are not, we have everyone from Marx to the late Michel Foucault⁵⁰ to remind us. What does this mean for the utopian goals of scholarship?

I think that the answer is something of a paradox. In attempting to pursue their own versions of the Enlightenment project, scholars incorporated the antithesis of self-critical reason into their theories. Take Kelsen as an example. Kelsen's *Pure Theory of Law*⁵¹ and his writings on international law are based on a particular vision of reason, a utopian vision of scientific thought, free from the distortions, myths and half-truths that he saw in moral, political and religious thinking. By knowing the limits of rational thought (which basically consisted of the realm of facts) we will free ourselves from the grandiose normative mysticism of natural law thought. But if we look more closely at Kelsen's theory we see not a hyper-rational, scientific analysis of law, but a dogmatic and repetitive brand of logical positivism, long

49. I may seem to be presenting a rather heartless picture in which theorists of different schools institutionalized the Enlightenment view of truth and thus destroyed it completely, amidst utterances of self-congratulation. The self-doubt brought on by the caricatured similarity in the theorists I have described is matched only by my amazement at the reappearance of essences in each new project.

50. See, e.g., M. FOUCAULT, *POWER/KNOWLEDGE* (C. Gordon ed. 1980).

51. H. KELSEN, *supra* note 15.

discredited. Kelsen presents himself as an enemy of dogma, myth and medieval thought, and yet he bases his whole theory on those paradigmatically medieval devices, definitions and essences.

Kelsen is not the only one to use methods that are the epistemological antithesis of the Enlightenment vision of reason in an attempt to support a purportedly "rationalist" project. The depressing merry-go-round of positivist and natural law theories which I described in the section on sources is the result of precisely this contradiction. The "authority" that a theorist supposedly gains by describing the "essence" of law is exactly the kind of armor against rational inquiry that the Enlightenment vision of reason takes as its stock villain.

Contemporary thought is not as obviously internally contradictory until one realizes that the "uncontentious" purposes animating each theory are actually extremely contentious, whether we are dealing with Tunkin's attempt to plug international law into the inexorable cycle of history, or McDougal's attempt to "square the circle" by claiming that his theoretical perspective is both a neutral means-end technique and normatively loaded in the service of "human dignity." Once again, "rational" projects are mounted on the basis of the philosophical techniques which insulate political choices from criticism, whether those techniques claim the imprimatur of "nature" or of "science" (natural, social, or Marxist-Leninist—pick one).

When we move our focus to doctrinal scholarship the picture looks more or less the same. The utopian aspiration at the heart of doctrinal scholarship was the attempt to cage power (whether of the state or the citizen) with rules. But, as I pointed out in the last section, this aspiration was pursued with tools that seem incompatible to the beliefs that motivated the pursuit in the first place. Let us assume, as liberal theorists do, that values are subjective, that there are no moral essences and thus that we must depend on the "artificial reason" of the law if we wish to restrain power. Where then, do we get these miraculous powers of neutral interpretation? Ah, from the "essential" meanings of words. But wait a minute . . .

I do not mean to argue that there is no "felt-difference" between the proceedings of the International Court of Justice and the brainstorming sessions in a political affinity-group. Nor am I forgetting the long history of lynch-mobs and pogroms (to say nothing of the bombings of abortion clinics). What I am arguing is that it was never the essential meanings of words that allowed us to do the good things we associate with the rule of law. Nor was it the essential meaning of words that caused the *Lochner* case,⁵² the *Korematsu* case,⁵³ or any other

52. *Lochner v. New York*, 198 U.S. 45 (1905).

53. *Korematsu v. United States*, 323 U.S. 214 (1944).

decision. In all of these cases, inescapably political choices are made—some of them systemic, some substantive. The utopian aspect of these choices does not come from any a-political process of neutral reason, but from the struggles and ideals of courageous men and women.

If as a last resort you wish to argue that it is a good thing to maintain the myth of the neutral rule of law (while privately acknowledging its emptiness), I would remind you that those who rely for their defense on myths are always misdirected and often disappointed. Besides, does it not seem a trifle Kafka-esque to be promoting myths we acknowledge to be false, all in the name of "enlightened reason?"

IV. "WHAT IS TO BE DONE?"

It would be fairly ironic if, at the end of a long essay about the perils of reification and the dangers of "the real level of what is going on," I was to provide a description of the "essence of good international law teaching and scholarship." Nevertheless, it would be craven, as well as unsatisfying, to finish a critique and not offer something in the way of a utopian proposal of my own. The suggestions that follow have their roots in the criticism of reification, but of course they are not logically derived from it.

Throughout this essay I have talked about the "utopian aims" of scholarship and of the ways that those aims are distorted or frustrated by the "language" in which they are expressed. But I have also fudged the question of what those utopian aims are; I only deal with their "manifestation" in scholarship about sources, doctrine and so on. I want to now make some implausible and "personal" claims about utopian thinking in international law.

The thing that first attracted me to international law was the lure of internationalism. There was a hefty dose of an adolescent desire to be truly cosmopolitan, there was some connection to my membership in the Campaign for Nuclear Disarmament, and there was the burgeoning outrage against war, famine and pestilence that we condescendingly refer to as "youthful idealism." If you had asked me then whether these ideas were connected to my other political views I might have given a confused answer about monopoly capitalism, or the Judeo-Christian ethic, but in reality I would not have made a connection between, say, my opposition to the sexist Student Union at my university and my belief in world peace through world law.

Things at present look a bit different. As this essay no doubt demonstrates, I now spend a lot of time thinking about reification—the way we turn other people, or social systems, or institutional hierarchies into objects which we then confront as disempowered observers. And a sense of outrage at this "objectification"—this fateful

separation from “the Other,” who is seen as “a woman,” or “a Professor” or “a foreigner,” or “a famine victim”—seems to me to be the general purpose fuel for a commitment to internationalism as well as to the demonstrations outside an all-male pub. Which is all very nice, but so what?

This essay is part of a symposium on new directions in international legal scholarship—a fairly abstruse subject, and one that does not seem likely to be connected to the intimate realities of our lives as lawyers, let alone those of the rest of the world’s population, people who appear in our texts as populations to convince, victims of war, subjects of human rights violations, or, at best, as part of a “growing world consensus.” I alluded to this disjunction—between the intensity of our aspirations and their impact on everyday life—in my comparison of international legal scholarship to the works of the chosist novelists. Is this the end of the story?

I think not. It is precisely because the utopian aims of international lawyers do express a hostility to the division of the world into Self and Other, North and South, Commie and Plutocrat, that their writing is still compelling even when it is covered over with medieval preoccupations about the “nature” of law. It is for the same reason that the disjunction between the world of international law as it is taught and written about, and the political and moral dilemmas of everyday life, that this disjunction is neither irrevocable nor completely disabling. As I have just argued, there is a plausible way of connecting these two arenas—of seeing internationalism as being inextricably intertwined with an opposition to sexism, racism and the calcification of authority. If we tried to concentrate on this connection and the general opposition to *social* as well as to *conceptual* reification that it suggests, what would our “new directions” look like?

For one thing, it would be hard to maintain the same kind of separation between “big” politics and “small” politics. This is not just a matter of realizing every day that there are things wrong with having a classroom structure in which “a professor” stands on a dais at the front of room and tells the people who are sitting down that they must always question authority and take the underdog’s position. It is not just a matter of understanding that the teacher who is “Mr. Human Rights” may be dictatorial in the extreme in the classroom, or that the workplace hierarchies of “good” non-governmental organisations may mirror in microcosm the authoritarian politics of governments they condemn.

It more than understanding these things because it depends on a grasp of *how* they happen—the way that (public) politics is roped off from (private) work-life and thus the way that the fatal political paralysis induced by law school is amplified when we come to inter-

national politics. If I conceive of state politics as the only real politics, then I am unlikely to be able to conceive of being an effective political actor and doubly unlikely to be able to imagine myself as an effective actor in international political issues. So the University will go on investing in South Africa, and when I don't do anything about *that* it will be all the easier to explain the advantages of Krugerrands to my clients ten years hence, and still think I am an internationalist. After all, it's international law, isn't it?

What follows is an attempt to describe some of the other implications of this focus on both conceptual and social reification. I have chosen to deal with some of the areas that I criticised earlier (scholarship about sources and doctrine), but also to deal with the question of how one might teach using the kind of approach I outlined.

A. Scholarship and Teaching About Sources

It may seem bizarre to resurrect this category of scholarship. Surely it was the worst offender when it came to essentialism? Actually, in my own teaching, I have found that it was extremely important to start with a history and critique of the jurisprudence of international law. Otherwise students had the feeling that we were either trying to trick them into accepting a mass of formalistic premises (the same kind of premises they were so used to dissecting in their other first-year classes), or trying to make them believe that people could get excited about a set of definitional formulations that were obviously meaningless. I think of all the case-books that start with the *Lotus* case. Students who have carefully worked their way through the court's reasoning as to how international law is compatible with sovereignty are apt to drop international law straight away. Since the court starts out by trying to explain conceptually how it is that states can be bound when they do not want to be bound, it can hardly solve the problem by claiming that, because of their prior consent, they actually *do* want to be bound. It's just like saying that the small print in the contract represents the will of the parties. It may be an argument that convinces a judge, but it is not an answer to the question "under a will theory, how can this person be obligated to perform terms she did not know about?" In fact it is simply a restatement of the question. How many international law courses never get beyond the stage of restating the questions?

Instead of doing it that way, I introduce the court's heroic attempts to "answer the unanswerable" in terms of the utopian aims that motivated their project and the structural contradictions that made it impossible for them to complete it successfully. It is my perception at least, that rather than getting confused and angry at the circularity

of the court's reasoning, the students come to see it as their first exposure to the legal version of a laudable internationalist aim.

I carry on using this general method as we deal with the ideas behind positivist, natural law, and behaviorist thinking. At the same time I try to introduce the class to some of the approaches to international law developed by scholars from the Third World and the USSR. My main aim here is to avoid the uncritical view that I described earlier. If the student decides that, say, Tunkin's ideas are both deeply apologetic and politically objectionable, that is fine. What I want to avoid is the belief that these "outsider's" views are somehow qualitatively distinct from the "real, neutral legal theory" produced by Western scholars. A modest enough little piece of relativism, but one that is more honoured in throwaway introductory lectures than in practice, as far as I can see.

B. Doctrinal Scholarship and Teaching

In terms of doctrinal scholarship, I think that we should pursue two apparently contradictory strategies. First, there is the possibility of developing a structuralist account of legal doctrine. Second there is the possibility of using the highly contextualized, politicized knowledge produced by working in clinical programs with international agencies and non-governmental organizations.

1. Structuralism and Doctrine

David Kennedy seems to have provided the best model for the structuralist part of the project.⁵⁴ A structuralist account takes the approach, familiar to the legal realists, of dealing with "binary oppositions," pairs of contradictory principles or premises about social life. It differs from the legal realist method in that it tries to explain all of the doctrine, or the legal arguments in a particular area, as being a product of the most basic of these tensions.

Kennedy's own work has focused on the conflict between the cooperative, communal, socialized aspect of international sovereignty, and the atomistic, individualized, and independent aspect. By using this familiar opposition, he tries to show how *all* of the rules, sub-rules and even the arguments by which they are manipulated, can be developed if one simply postulates an unconscious desire to "mediate the contradiction." By "mediating the contradiction" he means the attempt to make it seem as though the two aspects are actually perfectly compatible and thus that the doctrinal edifice has a suffi-

54. See Kennedy, *supra* note 27.

ciently coherent and logical structure to maintain its qualitative distinction from all that messy political and ideological conflict.

My favorite example of mediation is a theological one. If I believe that given the existence of a benevolent deity, virtue should be rewarded, but have the experience that wickedness is actually rewarded, I must develop a mediating structure to cover up the conflict between these two beliefs. A common mediator of this particular opposition is "God moves in mysterious ways"—asserting that some deep divine plan is actually going on underneath the (apparently) successful venality all around me. But this raises new problems. If God moves in mysterious ways, how can I ever know Her will with sufficient certainty to act on it as a good person myself? A new mediator must be deployed—common examples include direct, or textual revelation, preselection, or a sense of "reason" tilted toward the divine plan. But each of these And so on and so on.

If we look at international law this way, what happens? The focus on the generation of mediators for a set of recurring contradictions seems to capture something about the experience of "making a good legal argument." At the same time it becomes obvious that there is a Sisyphean quality to all of this. Why are we trying so hard to cover up these contradictions? Why does it seem as though law has this inner dynamic towards determinacy, this compulsion to make it look as though we are dealing with a "closed system?" One possible answer is the argument raised by my discussion of scholarship about sources and doctrine. The dominant background conception of "reason," self-interest and politics—and the utopian vision of power constrained by rules that is generated within that conception—seem to *require* a set of a-political rules. Since the mark of a neutral set of rules is their ability to provide one logically correct answer to each case, both the compulsive denial of contradiction and the doctrinal structure that this denial "generates" can be seen as products of the initial reification—the attempt to define "what law is," in order to separate it conceptually from morals and political argument.

Theoretically speaking this is all very tidy, but what use is it to teachers, students or practitioners? One of the exciting things about this kind of scholarship is that it lays out both doctrine and the arguments used to manipulate doctrine in a way that is almost reminiscent of classical legal thought, and yet it does so without the same tendency to turn what is into "what should be." In other words, structuralist legal theory has the analytical power of the great formalistic doctrinal edifices without the same commitment to apologetic politics.

What this means, I think, is that we can teach a large amount of doctrine and a large number of analytical techniques quickly, but

because this method lays out doctrine in structural terms, we will not be concentrating on the trees to the exclusion of the forest. More importantly, we can give the student a perspective on doctrine that is neither formalistic, nor apologetic. Because the rules and the arguments used to manipulate them are presented as attempts to cover up a set of contradictions, the student does not get the misleading sense that these are the "right answers." What is more, there is no reason why this method should be confined to the (now-decaying) doctrinal structure established by the Western colonial powers. It is quite capable of being turned on the theoretical constructions produced by the USSR and the Third World.

2. Clinical Internationalism

I argued earlier that it was important to see the connection between internationalism and a general opposition to reification in social and intellectual life. I also claimed that this was necessary if we did not wish to become politically disempowered by a constraining vision of politics—"the only good politics is 'big' politics and I can't do anything to influence 'big' politics." One of the implications that I draw from this argument is that it is extremely important to show students that political activity with very real consequences can go on far away from the world of Kondratieff cycles, or trans- versus inter- nationalism. International clinical programs seem to provide the ideal method to accomplish this and at the same time to escape from the constraining world of formalistic international doctrinal scholarship.

Here we have some models to copy from, and some mistakes to avoid. The revolt against formalism in domestic law was connected with the idea that there were other methods to teach students than by relying on the antiseptic words of appellate opinions. This is the obvious connection between theory and practice, clinic and jurisprudence. The mistakes are also obvious. Clinical programs started out as being both politically and pedagogically threatening to the ideology of law schools. Gradually they have been assimilated; the ideals of "justice for all" and legal services for poor people have been traded in for video recorders and simulation classes. This is a mistake that international clinical programs in economic development or human rights should not make.

CONCLUSION

At the beginning of this essay I mentioned the chosists—those who sought to throw the universal quality of human aspiration into sharp relief by counterposing it against lengthy descriptions of objects. I said that international legal thought was similar to chosism, and in

the body of the essay I have tried to show both why and how this could be the case. Theorists got their "authority" by being essentialist—by claiming they were dealing with the essence of law, or the "true" source of international obligations, or the "real" meaning of a doctrinal rule. I am going to assert blankly that they often wanted this authority for profoundly utopian reasons—internationalism, world peace through world law, enlightened international dialogue. Yet the fetishism of essences, the belief that this is how one showed oneself to be correct, actually subverts the commitment to enlightened rationality and replaces it with reified ideas, thus ruling out the possibility of real discussion.

So as we read international legal scholarship we might think that it is very like chosist writing—an ironic contrast between high aspiration and mundane description. The crucial difference is that scholars don't seem to *intend* the irony. They think that they are merely describing something—whether that "something" is a rule, or an obligation, or the source of law—when in fact they are putting forward a profoundly political set of arguments. For me it is this, the political effect of reification, that makes the critique put forward in these pages more than an academic exercise. There is something demeaning, something evil, about blindly obeying the imagined "dictates" of some social construct, whether it is the portrayal of women as sex objects, the ethnocentric circularity of positivist legal arguments, or the restrictive set of roles for "partner and associate," "child and parent." And this evil is precisely the one addressed by the critique of reification, or idolatry, or objectification. So what is one to do?

Part of the answer consists of presenting the structure of doctrine and the interplay of the arguments without pretending that they are the "real" level of what is going on. Part of the answer consists in trying to explain why all of the international legal scholars did what they did. It turns out, for example, that the international legal arguments of the USSR are a lot easier to understand if you can discern the mirror-image pattern of arguments that we found in Tunkin and Henkin, as well as in positivism and natural law. Part of the answer consists of thinking up methods of getting ourselves away from the objectified fantasy world of state sovereignty, and towards the actual human beings whose lives our abstractions affect—this means more international clinical programs, but is also means teaching and learning our subject by using poems and pictures as well as treaties and *travaux préparatoires*. Finally, and this seems to be the most important point, part of the answer consists in realizing that one should not divide one's life into tiny, discrete worlds—the struggle against racism and sexism and class-violence in one box, relationships with one's co-workers in another, the production of scholarly utopias in still another.

If one does this, one is simply recreating, in the social world, the kind of mirror-image contradictions that we saw in the conceptual structure of international law.

While I was writing this essay, I was looking for the best examples of attacks on reification; I hate to say this, but it ended up that my two favorites involved Marx⁵⁵ and God.⁵⁶ If one thing links Marx with the God of the Old Testament it is that both of them seemed to get fairly angry when people not only gave up their ability to choose, but gave it up to the very objects—be they industrial goods or the golden calf—that they had just created. International lawyers are making the same mistake. And that is something that even the chosists could understand.

55. See Marx, *Estranged Labour* (from *The Economic and Philosophical Manuscripts of 1844*) and *The Fetishism of Commodities and the Secret Thereof* (from *Capital*), in *THE MARX-ENGELS READER* 53–67, 215–25 (R. Tucker ed. 1972).

56. See *Exodus* 32:1–35, 34:17.

