Remarks by an Idealist on the Realism of 'the Limits of International Law'

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REMARKS BY AN IDEALIST ON THE REALISM OF
THE LIMITS OF INTERNATIONAL LAW

Kenneth Anderson*

1. GHOST IN THE MACHINE

The scholarly papers contributed to this University of Georgia symposium on Jack L. Goldsmith and Eric A. Posner's *The Limits of International Law*¹ have not hesitated to be sharply critical of the book. The criticisms come from a wide variety of angles. Andrew Guzman, for example, considers whether more sophisticated rational choice modeling and game theory might produce quite different results than the book does, even within its own rational choice paradigm.² Kal Raustiala asks whether the book’s conclusions concerning rational choice theory would change, even within its own paradigm, if it took into account rational choice theory as applied to American domestic politics that bear on U.S. international relations.³ Others challenge the book’s empirical and historical claims. David Golove questions the historical basis of the book’s discussion of Civil War era claims about customary international law in the matter of maritime neutrality.⁴ Allen Buchanan⁵ and Margaret

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⁵ Allen Buchanan, Democracy and the Commitment to International Law, 34 GA. J. INT’L
McGuinness' dispute, in different ways, its claims about cosmopolitan, other-regarding behavior and human rights. Peter Spiro challenges a central assumption in the book that the relevant actor is the "state," as distinguished from other actors within and outside the state which influence its behavior, such as nongovernmental organizations, and bureaucratic and other subsets within the state. Finally, Oona Hathaway and Ariel Lavinbuk, in a separately published review, question whether there is a necessary connection between what they see as the book's "rationalist" methodological agenda and its "revisionist" political agenda. They argue that not only does the former not imply the latter, but the revisionist political agenda of *The Limits of International Law* actually undermines the force of the rationalist methodology.

Yet for all the criticism directed toward *The Limits of International Law*, the critiques are all quite accepting of the basic utility of the rationalist method that underlies it. However badly or incompletely deployed rational choice theory, game theory, and rationalism may be in Goldsmith and Posner's book, these methodologies are nonetheless accepted as the coming wave of international law theory as a new generation of scholars arises, and as international relations and political science theory gradually become accepted as systematic methods of explanation in international law. Indeed, Hathaway and Lavinbuk, in the most elaborate of the critiques, state flatly that the very problems created by the linkage of Goldsmith and Posner's revisionism to rationalism "demonstrate[ ] the need for a new rationalist research agenda, informed by well-developed theory and unburdened by revisionist commitments."

This is a telling fact about shifts in international law scholarship, at least in the United States. Perhaps as telling is the fact that *The Limits of International Law* has not so far been reviewed, so far as I can tell (it is perhaps still early for law reviews to be on the record), by any of the leading scholars of the so-called "norm-based" methods of international law that still predominate in the international legal academy in both the United States and

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9 *Id.* (manuscript at 3).
Europe. Normative theories of international law, after all, dispute not only rational choice theory (as this book offers it), but claim something much stronger that is a fundamental target of *The Limits of International Law*. This claim is that international law itself exerts a discernible “pull” upon the behavior of states, as a moral and normative force distinct from anything else. Normative theories of international law claim for international law (and hence for its scholars, not merely as scholars but also as actors upon the social system they both study and strive to move along) a force in international affairs that is independent of the “mere” interests of states.

Several critiques offered from the symposium indeed support the claim that state interest is not the only thing acting with some measure of independent causal force in international affairs. Yet in identifying that force, those critiques seek by and large to move beyond assertions of the moral force of the law itself to break down cause and effect into various substate or non-state actors pursuing their own agendas, moralist and otherwise. It is notably not so very different from modernity’s philosophical agenda to remove definitively the ghost from the machine. These critiques may reach something like the same result that traditional norm-based theorists reach by plain appeal to the independent moral force of international law, but they get there by means that are very different from those of traditional normative international law with respect to the account of intentionality and behavior in international law.

Lacking here is either a robust defense of normative approaches to international law or an attack upon *The Limits of International Law* based upon the still-dominant Henkin paradigm, the Franck claim of legitimacy, the Koh claim of internalization of norms, or any other leading norm-based pillar of international law scholarship.¹⁰ This, despite the fact that these normative views have long been vigorously asserted.¹¹ This is also so despite the fact that normative international law remains (unsurprisingly) the overwhelmingly

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¹⁰ The exception to this, perhaps, is the scholarship of “disaggregation” of the state, represented in this symposium by Peter Spiro’s article, and found elsewhere as the basis of one of the few full-blown critiques of *The Limits of International Law*, Paul Schiff Berman’s impressive *Seeing Beyond the Limits of International Law*, 84 Tex. L. Rev. (forthcoming 2006) (reviewing Jack L. Goldsmith & Eric A. Posner, *The Limits of International Law* (2005)). I deal with the disaggregation issue further on, but for now note that it is a form, too, of taking the ghost out of the machine and explicating its effects by an account of substate actors or, in other words, a more detailed account of the workings of the machine. It can be seen, for purposes of the discussion here, as consistent with rationalism and rational choice.

favored paradigm among the non-scholarly parts of international law—the activists, the NGOs, and the activist-scholars. One might conclude from this either that The Limits of International Law is considered too lightweight a target—one not worth getting worked up about—or else that, internal problems notwithstanding, it represents a largely unanswerable challenge to normative international law methodologies. Is the threat it poses too small or too large? And from what does the threat arise—from methodological rationalism, from political revisionism, or from rationalism forcing revisionism?

2. STRIPPING AWAY THE VEIL OF IDEOLOGY

One way to address the threat to norm-based international law is as Hathaway and Lavinbuk do, by severing the link between The Limits of International Law’s rationalist methodological agenda and its revisionist political one. The consequences are peculiarly complicated.

On the one hand, at the level of method in international law, rationalism threatens the ghost-in-the-machine character of traditional norm-based international law. It demands an explanation of the normative force of international law in non-normative, rationalizing terms, which in turn, by eliminating the ghost, require a more elaborate explication of the machine. Yet even the rational method may come to the same empirical conclusion that is reached by the normative method: that international law, mediated through substate actors for example, or by some other mechanism, is more than mere state interest and must be accounted for as such. On the other hand, at the level of politics in international law, Goldsmith and Posner’s revisionism threatens not merely the normative method of international law, but also the particular political norms to which the dominant international law project is attached, viz., liberal internationalism. Yet if the revisionist agenda is not a logical consequence of the rationalist method, as Hathaway and Lavinbuk claim it is not, then the revisionist political agenda, like the particular norms of the dominant international law project of liberal internationalism, is just another particular set of political values. It is just ideology.

The threat of The Limits of International Law, if Hathaway and Lavinbuk are permitted to revise Goldsmith and Posner’s rationalism, is to a certain method, not to the particular political commitments—the liberal internationalism—typical of its norm-based adherents. Whereas the most provocative claim of The Limits of International Law (unrevised) is that liberal internationalism, insofar as it depends upon the independent weight of
international law and institutions, is chimerical. In effect, democratic sovereignty—not liberal internationalism—is the most one might normatively hope for, because in the end international law is (in semi-Marxist terms) just a superstructural illusion of the material base of state interest.\textsuperscript{12} The quasi-Marxist, quasi-critical theory promise of \textit{The Limits of International Law}—to strip away the veil of ideology in order to behold state interest—no longer as through a glass darkly, but face to face, for itself, for what it is—carries, of course, a certain irony, given the nation-state-bourgeois political values of Goldsmith and Posner's revisionism. And no doubt they, too, would be skeptical that the method of rational choice is really about piercing the veil of ideology.\textsuperscript{13} Still, seen from a level of abstraction one step up from rational choice theory, 'stripping away the veil of ideology' is a fair description of the project.

3.

\textbf{RESCUING LIBERAL INTERNATIONALISM}

The seemingly strategic aim of the Hathaway and Lavinbuk approach—indeed, seemingly that of most of the symposium critiques as well—is, contrary to Goldsmith and Posner's expressed views, to effect a rescue of the substantive politics of liberal internationalism. Hathaway and Lavinbuk seek a rescue even at the expense of liberal internationalism's traditional method.\textsuperscript{14} Or, if not definitively to rescue liberal internationalism as the substantive political outcome of international law methodology, properly understood, then at least to render it a possible outcome, one consistent with the new rationalism in international law. I understand this to be the fundamental commonality among most, if not all, of the critiques offered at the symposium. Rationalism as a method emerges, if not necessarily committed to the politics of liberal internationalism, then at least neutral with respect to it.

\textsuperscript{12} Not quite, of course, because as discussed below, interest is relaxed to include more than purely “material” interest. This is the “bourgeois” in Goldsmith and Posner, although even the broad meaning of “interest” could well be accommodated in several of the versions of Marxism described by, for example, PERRY ANDERSON, \textit{CONSIDERATIONS ON WESTERN MARXISM} (1979).

\textsuperscript{13} The curious resemblance to DUNCAN KENNEDY, \textit{LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM} (AFAR 1983) is deliciously unmistakable.

\textsuperscript{14} Sacrifices must be made.
Hathaway and Lavinbuk claim essentially that the revisionist political agenda of *The Limits of International Law* contaminates the purity of the rationalist methodological agenda; they set forth to cleanse it. In the process, they claim to make rationalism if not entirely hospitable, then at least *safe*, for liberal internationalism.

4. **REALISM IN THE SERVICE OF IDEALISM**

My reading of Goldsmith and Posner's fundamental claim is quite different. It is, however, likely quite different from what Goldsmith and Posner would see in their own work. The reason is that I speak as an idealist, not a realist. True, this idealism is not attached to liberal internationalism, as is usually the case in international law scholarship, but instead to "democratic sovereignty" as the ideal position in international relations and law. In other words, it attaches to something like the revisionist political position that Hathaway and Lavinbuk correctly ascribe to Goldsmith and Posner. Nevertheless, it is a form of idealism, arrived at from argument on moral grounds, through a process altogether similar to the idealism that brings thinkers such as Henkin, Franck, or Koh to liberal internationalism. We share a common moral framework of idealism even if we reach different conclusions with regard to democratic sovereignty and liberal internationalism.

How might one characterize that common moral framework? The tension between liberal internationalism and democratic sovereignty is profound. But as ideals, both seek reform of a certain version of Westphalianism. Liberal internationalism seeks to replace the Westphalian concert of nations with genuine global governance, a federal world, a cosmopolitan world. It is characterized by adherence to two ideal propositions: First, there is, or finally ought to be, a political authority higher than the nation-state; this is its federalism or its constitutionalism. Second, Kantian rectitude holds that in

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the ideal world—even if not in one we can fully bring about—neither borders nor distance, nor lack of affection, relation, membership, or affinity, carry moral weight with respect to moral duties of either the individual or the state. The problem of affection in morality is discussed with great acuity in Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 PHIL. & PUB. AFF. 134 (1984). This article was one of the first in a great wave of consideration of the ethics of affection and the particularity of love. But as Railton notes in that article, the inability fully to account for ordinary moral feelings for particular people—love, attachment, and affection for particular people over others—is a problem equally of Kantian duty and utilitarianism.

Democratic sovereignty as a moral position rejects both of those propositions. But it also rejects a certain Westphalianism that asserts that sovereignty consists merely of governmental control over a particular territory and its inhabitants. The full ideal of democratic sovereignty requires more, and it draws upon a Western conception of sovereignty that is older than Westphalia and certainly more exigent. As James Turner Johnson explains, the "rights of sovereignty are linked to its obligations," and sovereignty is therefore:

essentially a moral construct; a person (or people) in sovereign authority is responsible for the good of his, her, or their political community, for the 'common weal'. This implied establishing an order that served justice and achieved peace. Also implied as a part of this responsibility was an obligation to other political communities to support order, justice, and peace in and among them. Failure to discharge the sovereign's obligations removed the rights of sovereignty.

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18 This is, of course, describing the ideal position, not the necessarily more accommodating versions developed to exist in the real world. Goldsmith and Posner take pains, in their account of cosmopolitan duty, to note that most of the theorists of cosmopolitanism in fact take "plausibility" of enactment and execution, whether psychological, or social, or political, into account, thus allowing them a measure of departure from the severity of the ideal Kantian norm. *See* GOLDSMITH & POSNER, supra note 1, at 208-09. I discuss this in more detail later.


20 *Id.* The thinner Westphalian conception is not without its reasons, of course. The horrors of the Thirty Years War, which were motivated ostensibly by differences of religion, offered ample grounds that even a concern for order, peace, and justice, not to mention a care for eternal souls, might lead to intervention and imposition; better to give up the right to interfere
I do not suppose, in other words, that the great liberal internationalist representatives I have cited—Henkin, Franck, Koh et al.—would demur from any of this. The question is what form of political order can best bring liberalism about and, at the same time, be consistent with the great virtue of the Peace of Westphalia, toleration of difference.

With respect to rationalism, therefore, my interest is to see what it has to say about the realism, the realistic possibility, of the ideal position I have tentatively reached on ideal grounds. What does it have to say about the possibility of bringing about the ideal in the real world? I seek answers from this rationalist method to prudential questions which are at once practical and morally urgent. Is my beloved democratic sovereignty arguably the best ideal, but nonetheless, for reasons predicted by rationalist game theory, hopelessly and fatally utopian? Are there reasons for thinking that a world of cooperating democratic sovereigns cannot reasonably come about, or that it would not be very peaceable or even minimally cooperative? Or, perhaps worse, does this rationalist method inform me that my ideal brings with it unintended consequences that should cause me, however regretfully, to give it up as an ideal?

And I want to know the same about liberal internationalism. What would this rationalism tell me is the likelihood that its many good features could come about? Is it hopelessly, fatally utopian? What will all the elaborate game theory tell me about the unintended consequences of bringing about this ideal? Is this not, in the end, what game theory is best at doing in a practical sense—warning us of unintended consequences of varying likelihoods?

This way of looking at method and politics in international law—hardheaded and practical and realistic, yet a realism always in the service of idealism—might seem, I acknowledge, something out of place in an academic inquiry. It is rather unscholarly and indeed it may be unintellectual.

at all than risk a war between rival conceptions of the religious good. See generally GEOFFREY PARKER, THE THIRTY YEARS’ WAR (2d ed. 1987). It is thus upon historical grounds bitterly acquired that we arrive at Lincoln’s definition of sovereignty, “a political community, without a political superior.” Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, 434 (Roy P. Bassler ed., 1953). Nonetheless, the full conception of democratic sovereignty today is not indifferent to universal values—prohibitions against genocide, crimes against humanity, and violations of human rights—across borders and within a state. I am using “democratic” here as shorthand, in other words, for a panoply of liberal political goods, including constitutionalism and human rights, but within a particular sovereign political community.
It is the inquiry of a moraliste rather than an academic. Nonetheless I am unrepentant in believing that this is the urgent question for the rationalism that Goldsmith and Posner propose, and which the symposium participants as well as Hathaway and Lavinbuk propose to revise yet also extend, and which we seem generally agreed will come to occupy an important, perhaps even premier, methodological place in the academy of international law. What will this rationalism, this realism, tell us about our available choices among ideal positions in international law and relations?

5. DEFINING THE MORALISTE'S REALISM, OR, THE MORAL DUTY OF THE KING

"[M]aintain power in as decent a way as would yet be the most effective."  

6. AVAILABLE IDEALIST POSITIONS IN INTERNATIONAL LAW AND RELATIONS

If the above sentiment (it is what the Lady of the Lake tells King Arthur in Thomas Berger’s witty and profound retelling) captures the precise relationship of a realism and its rationalist methodology in service to idealism—conjoining decency and effectiveness, asserting power, yet yoking it to morality—what, then, are the possible idealist positions? We have so far discussed two idealist positions—liberal internationalism and democratic sovereignty. There are, however, several others. One way of conceptualizing these ideal positions is along a continuum, around the question of the role and force of sovereignty in international law. What would the range of positions look like?

21 I want to acknowledge my great debt to Henry Steiner in bringing me to think in this way about these questions, even though we reach somewhat different conclusions on the ideal position. And by moraliste here, I mean the French intellectual tradition of Albert Camus, Raymond Aron, and René Char, among others. I have also long been indebted to my friend Bernard Poulet, editor of L'Expansion (Paris), for many important conversations (over the years in the midst of meetings we have shared together as board members of the nonprofit Media Development Loan Fund) that have helped me locate these writers within contemporary French thought.


23 I am drawing much of this discussion in an abbreviated fashion from Kenneth Anderson,
1. Sovereignty as its own value, sovereignty for its own sake. The most
extreme position toward the sovereignty end of the range is the assertion
of sovereignty as its own value. It might seem, especially to some realists
and some liberal internationalists, peculiar to claim that sovereignty is
actually a
value, an ideal position, rather than simply the assertion of power. It
can be understood as an actual value, however, by understanding it as the
underpinning for any autonomous political community—understood as an
ideal, it ascribes a certain value simply to the fact that a political community
orders itself without outside interference. In this sense, it is an assertion
of value for a democratic sovereign such as the United States, but with
respect to the narrow value of sovereignty, just as much an assertion of
value for the
autocratic, repressive, theocratic, brutal monarchy that is Saudi Arabia. It is,
in other words, sovereignty understood as the value of self-determination,
even for societies that are cruel, unjust, and autocratic—we do acknowledge
that, within some limit gradually evolving as to genocide and massive internal
human rights abuses, even wicked societies have a right to
self-determination. How much to ascribe to the value of bare sovereignty, sovereignty which is
grounded in no virtue or value other than the bare claim of self-determination?
Only as much one would ascribe to Saudi Arabia, Zimbabwe, Sudan, and the
rest of the world's worst dictators. It is worth noting that China's foreign
policy and view of international law, to the extent that it has any root at all in
ideals and is not simply relentlessly self-interest, is fundamentally simply the
assertion of the right and value of sovereignty, for its own sake.

2. Democratic sovereignty. The resurgence of sovereignty as a position
among some academics in international law, as well as in the rhetoric of the
Bush administration, is not really about the assertion of bare self-
determination, sovereignty for its own sake. On the contrary, the 'new
sovereignty' positions put forward by such writers as Jeremy Rabkin, Julian
Ku, Jack Goldsmith, John Yoo, Curtis Bradley, and Jed Rubenfeld, among
others—the resurgence of a position that liberal internationalists thought was
buried permanently as an assertion of idealism, rather than merely a realist

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Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global
NEW WORLD ORDER (2005)).

24 This is essentially Walzer's argument in MICHAEL WALZER, JUST AND UNJUST WARS: A
MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS (2000). The account of self-determination
was possibly overly influenced by the experience of the Vietnam War; Walzer's more recent
writings, in Dissent and elsewhere, suggest that he has come to accept more external restrictions
on "bare" sovereignty than he did in the 1970s.
REMARKS BY AN IDEALIST

reminder of the inconvenient facts of power—are all fundamentally dependent upon the assertion of some value other than sovereignty. That value is, without exception, democracy, the popular sovereignty of a self-governing people. Sovereignty is essentially the vessel of power that protects within it another value, that of democracy. Self-determination is, on this account, a residual category, essentially subsumed within the value of democracy itself. It is for precisely this reason, of course, that this view of sovereignty is available to the world’s constitutional democratic sovereigns in a way that it is not to the world’s autonomous dictatorships, who at most can reach to the ‘bare’ value of sovereignty. But the fact of democratic self-rule, if it is robust, is that fidelity to ‘internal’ democratic mechanisms makes it difficult to accommodate to ‘external’ mechanisms of global governance, such as those urged by liberal internationalism and global constitutionalism. At bottom, the condition stated by Abraham Lincoln for constitutional sovereign democracy, a “political community, without a political superior,” will in practice, if not absolutely in theory, bar absorption into a larger global federal society. That is even more true if the theory upon which global governance asserts its legitimacy is not popular sovereignty from the bottom-up, the actual votes of people from the bottom up, but instead universal values (as liberal internationalism does with universal human rights) from the top down.

3. Sovereign state multilateralism. Just because states (re)assert the conditions of democratic sovereignty does not deprive them of the ability to work together closely, in active and deep ways. The choice in order to have an international political order is not liberal internationalism or nothing. On the contrary, one needs to go beyond the robust multilateralism available to freely cooperating sovereigns and, particularly, democratic sovereigns only if the aim is to go beyond a merely “international political” order of sovereign states to a genuinely global or transnational society—to transcend the merely political and international in favor of a social and transnational order. If the covert agenda is not this transformation of the international from a political order to a “society,” then strong multilateralism is what a functioning international order would look like as an ideal of sovereign cooperation.

4. Multilateral pooled sovereignty, looking toward global federalism. Multilateralism can be remade as an ideal by introducing to it an aspirational condition—multilateralism today, but looking forward to a future day when multilateralism is replaced by genuinely global institutions that transcend mere states. That aspirational condition is expressed in the present not merely by pious invocations of liberal internationalism, but instead by attempts to ‘pool’
soverignty in ways that, in practical terms if not absolute legal ones, make backing out difficult for a sovereign state.

5. **Global governance through NGOs partnered with public international organizations.** As NGOs asserted themselves throughout the 1990s with respect to both sovereign states and international organizations, a new ideal of global governance arose which idealized governance by a partnership of international organizations that would receive legitimacy for their expanded rule from international NGOs—recharacterized for the purpose of legitimation as "global civil society." The function of NGOs in this ideal is thought to be to supplying the missing democratic predicate that the international political order so conspicuously lacks. Global civil society would "represent" the peoples of the world to international organizations—the U.N. in particular—and thus provide a ground of legitimacy that aims to bypass sovereign states as the (limiting) source of international organization legitimacy, on the one hand, and overcome the charge of a 'democracy deficit,' on the other. These theories of global governance and legitimacy are still with us today, but they probably reached their apogee with the Millennium summit of 2000, when Kofi Annan essentially blessed global civil society as a stand-in for the peoples of the world. Since that moment, however, a host of critics have—quite successfully—challenged the bona fides of international NGOs to call themselves representatives of anything other than themselves or to overcome the democracy deficit of international institutions. It continues, however, to be a powerful element defining the dynamic of interaction between the U.N. and international NGOs—each grants the other the legitimacy it lacks. Moreover, it is a crucial element in the attempt by liberal internationalism to convert an international political order into a global social order, in order to attain the legitimacy that comes with being a society and not merely a politics. The ideal no longer strives quite so hard to suggest that

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25 The point here is essentially a Weberian one. In Weber's conception, institutions can have legitimacy, but institutional legitimacy is less a matter of politics than being institutions of a larger and broader legitimate social order—sharing as institutions in the legitimacy that really matters for Weber, the legitimacy that attaches to a larger legitimate social order. The task for liberal internationalism or global constitutionalism, however one styles it, then, is not essentially political. It is, far more importantly, social—the transformation of what is now essentially a political order into a social order. That is, at bottom, what is meant when senior U.N. officials, for example, talk wistfully—as Mark Malloch Brown does on occasion—of modernizing the U.N. to make it less a creature of member states. At one level, the issue is member states and their demands. At a deeper level, the desire is to move beyond the political order implied by 'states' to a society that is populated by states, yes, but also by individual actors such as diplomats and international bureaucrats, and above all, by NGOs that can serve as a kind of
NGOs should actually have a role in governance—while still asserting quite strongly that NGOs play a crucial role in the legitimation of presumed global governance institutions such as the U.N. Since it is legitimacy that transforms power into authority and presses forward an upward spiral of power reinforcing authority reinforcing legitimacy, the terms of this essentially ideological debate are highly important and, hence, highly contested.

6. Global governance by global government networks. The difficulties for legitimizing global governance because of the difficulties of the democratic legitimacy of the combination of NGOs and international organizations have not gone unnoticed. Accordingly, within the past few years, another proposal for global governance has emerged, championed by Anne-Marie Slaughter in her quite remarkable book, A New World Order. Her alternative proposal acknowledges from the outset that the problem of democratic legitimacy for NGOs and international organizations is real and cannot be overcome by forms of words that simply attempt to redefine the meaning of democracy to make it conveniently fit a liberal internationalist model. In place of international organizations or NGOs or both, Slaughter proposes networks of national government actors—bureaucrats and judges, principally, using their national authority in networks towards common goals. What makes this more than simply robust multilateralism is her vision that over time, these actors become socialized toward a “horizontal” global orientation, alongside their homologues in other places around the world, along with their “vertical” loyalties within their own societies. It attempts to solve the democratic deficit by using actors who indeed have democratic legitimacy within actual nation proxy for the “peoples of the world” necessary to claim that the international order is not merely a politics but a society—to claim the legitimacy that, for Weber, obtains for a social order. For those seeking an easier point of entry into this literature than launching directly into the two volume set Max Weber, Economy and Society: An Outline of Interpretive Sociology (Guenther Roth & Claus Wittich eds., 1978), and the famous discussion of the condition of a legitimate social order in volume 1, I recommend chapter 3 of the book Wolfgang J. Mommsen, The Political and Social Theory of Max Weber 44 (1989), entitled Max Weber’s Theory of Legitimacy Today.


27 The theorist most prone to “solving” the democracy problem by mere definitional fiat is surely David Held. See, among many similar works, David Held, Democracy and the Global Order: From the Modern State to Cosmopolitan Governance (1995).
states, while still finding a global basis for action by actors who see themselves as having obligations both nationally and globally. My own view is that this careful balancing act must eventually collapse into liberal internationalism—that is, into a set of loyalties that are finally international and global rather than national—but the attempt to solve the dilemma straight on, without definitional fiat, and without denying both that democracy cannot exist on a planetary level and that global government as such would be, for that reason alone, undesirable, is the most intelligent move forward in the global governance debate in at least a decade.

7. Liberal internationalism. Liberal internationalism is characterized by the unapologetic, naked claim that the point is finally not multilateralism exercised however robustly by sovereign states, but the irrevocable ceding of that sovereignty to a higher authority than the nation state or any political community other than the planet as a whole. This condition, as I note further on, requires a further condition, viz., the acceptance of a cosmopolitanism on the part of at least the governing elites of this global order—one that requires that they put their allegiance first to a global order over any merely national or local order and, in keeping with the move from a politics to a society, that they think of themselves as social actors within a global society, which is to say, as cosmopolitans who share a society, values, allegiances, and social relations with others of that global society. These are, of course, very strong conditions, and liberal internationalism acknowledges it as an aspirational ideal. But the fact that it is the central aspiration sets the terms for what multilateralism is supposed to be and supposed to accomplish. It is not, on this conception, enough for multilateralism to succeed at whatever its narrow task might be; it must also and, in some sense, more importantly serve to chip away at the conditions of sovereignty that underlie pure multilateralism. And finally, liberal internationalism is characterized by (and goes beyond aspirational multilateralism because it asserts) a system of values—universal human rights—which, in its view, actually trump even claims of democracy and the natural expression of democracy within a constituted national political community, popular sovereignty. Liberal internationalism looks to the ideology of human rights as a means of overcoming the claims of democracy and popular sovereignty of self-governing political community—it asserts that the universal—understood, in a certain sleight of hand, to be identical with international—values of human rights take precedence even over local democracy. Since 'universal' is assumed to be identical with 'international,' international values must inevitably be accepted over local ones. Liberal internationalists are quite correct in seeing it as global constitutionalism and
global federalism. Liberal internationalism is 'liberal' insofar as its human rights universals have a 'liberal' content (although increasingly, in the emerging conflicts with Islam-as-ideology, human rights are taking on not a liberal content, but a multicultural one that, in effect, blames 'dominant' Western culture for any lapses in respect for human rights by Muslims).  

28 See, e.g., the remarkable briefing statement by Human Rights Watch regarding the publication of the Muhammad cartoons in Denmark. For an organization devoted presumably to human rights with a 'liberal' content, it has shown itself strikingly less and less comfortable with the most 'liberal' value of all—at least Voltaire would have thought so—free expression. The storm over the cartoons broke open in violence and rioting in January 2006; Human Rights Watch, so impressively quick to comment on nearly everything else, did not manage to express any view at all for weeks, finally posting a briefing statement in the form of questions and answers on February 15, 2006. One wonders, frankly, what internal debates went on that required weeks for an organization ordinarily so swift to put statements in the hands of the press finally to issue a statement on a matter that a liberal, as distinguished from a multiculturalist, would have thought quite easy. See Human Rights Watch, Questions and Answers on the Danish Cartoons and Freedom of Expression: When Speech Offends, Feb. 15, 2006, http://hrw.org/english/docs/2006/02/15/denmarl2676.htm. The background statement manages—with significant multiculturalist hedging—finally to reach a conclusion that the publication of the cartoons could not be banned.

In reaching that final conclusion, however, HRW begins by essentially casting blame, in an exercise of multiculturalist responsibility-shifting, off of rioting and violent mobs and onto discriminatory European states: "The cartoon controversy should be understood," says HRW, "against a backdrop of rising Western prejudice and suspicion directed against Muslims, and an associated sense of persecution among Muslims in many parts of the world. In Europe, rapidly growing Muslim communities have become the continent's largest religious minority but also among its most economically disadvantaged communities and the target of discriminatory and anti-immigration measures." Id. Is that really how it should be understood—against a backdrop of rising Western prejudice and suspicion of Muslims? Is that really how a liberal, not a multiculturalist, would understand it? Surely a real liberal would write, instead, as Christopher Hitchens does:

The incredible thing about the ongoing Kristallnacht against Denmark (and in some places, against the embassies and citizens of any Scandinavian or even European Union nation) is that it has resulted in, not opprobrium for the religion that perpetrates and excuses it, but increased respectability! A small democratic country with an open society, a system of confessional pluralism, and a free press has been subjected to a fantastic, incredible, organized campaign of lies and hatred and violence, extending to one of the gravest imaginable breaches of international law and civility: the violation of diplomatic immunity. And nobody in authority can be found to state the obvious and the necessary—that we stand with the Danes against this defamation and blackmail and sabotage. Instead, all compassion and concern is apparently to be expended upon those who lit the powder trail, and who yell and scream for joy as the embassies of democracies are put to the torch in the capital cities of miserable, fly-blown dictatorships. Let's be sure we
8. Parliamentary world government. Parliamentary world government is frequently ridiculed as an ideal in global governance, not only by sovereigntists hostile to the whole idea of global governance, but frequently by liberal internationalists eager to show that there is something still further "out there" that is not liberal internationalism and presumably makes it seem less radical. The ridicule is misplaced, however, for a very important reason. The call for parliamentary world democracy—a new chamber in the U.N., for example, is sometimes suggested, one that might consist of parliamentarians

haven't hurt the vandals' feelings. You wish to say that it was instead a small newspaper in Copenhagen that lit the trail? What abject masochism and nonsense. It was the arrogant Danish mullahs who patiently hawked those cartoons around the world (yes, don't worry, they are allowed to exhibit them as much as they like) until they finally provoked a vicious response against the economy and society of their host country.


At some point, the break between a certain form of liberalism, as found in supposedly universal human rights values, and a form of liberalism rewritten by multiculturalism, seems inevitable. At that point, too, however, the evidence provided by HRW suggests that the "international community" is likely to incline toward multicultural, rather than liberal, content for the supposedly universal values of human rights, as these international elites attempt to ride the tiger of managing civilizational discord through assertions of universality whose terms they purport to control. But one of the many disasters of multiculturalism is that, as an essentially managerial discourse from above, it seeks to placate various threatening constituencies by excusing their extra-legitimate exercises of power, often through violence or threats of violence—but then it turns out not to be able to 'manage' them anyway, losing both the struggle over universals and substantive liberal values all at the same time.

If this be thought far afield from the definition of liberal internationalism, it is not. On the contrary, it points out what might, over time, turn out to be one of defining characteristics of liberal internationalism—that it turns out not to be 'liberal' internationalism but, instead, 'multicultural' internationalism. It might turn out that the values that underpin liberal internationalism—the content of its assertedly trumping human rights discourse—turn out not to be liberal in content after all, but gradually shift away from liberal values, Enlightenment values, to something quite different. All the more reason, therefore, to be skeptical of international human rights, as determined by international bodies and the managerial, top down culture of the "international community," as being identical with "universal" values. Global constitutionalism, that is, might turn out to be not about a liberal constitution at all.

The consequence of all this? Well, it might turn out that the most vehement supporters of democratic sovereignty in the future turn out to be not Americans, but Western Europeans seeking to defend a liberal secular order not merely from religious attack by religionists who have no use for modernity except as a vehicle to technology, but additionally from religious attack buttressed by a form of international human rights that has moved from liberalism to multiculturalism. It might well be those Europeans, not Americans, most eager to find an ideological ground on which to defend the social space of a substantive liberalism.
elected from countries in the manner of the European Parliament—has the profound virtue of acknowledging, without evasion or cant, that democracy matters. It acknowledges that no form of global governance can legitimately exist, at least with strong authority, without democratic structures in their ordinary sense—raising hands and voting. It attempts no definitional end-runs around the meaning of democracy and for that it should be admired and respected. You may believe, as I do, that parliamentary democracy cannot exist meaningfully at the level of the whole planet—democracy does not “scale up” forever, and what we call the world’s largest democracies, such as the United States or India, are only partially democratic precisely because of their size. But the forthrightness of the parliamentary world government ideal must be celebrated, not scorned.

It bears noting that this continuum is one of idealisms. It is not about a continuum from idealism to realism. Instead, it aims to show that the old realist-idealist divide is less important today than the debates among those who are all idealists. Once upon a time, idealism simply meant liberal internationalism, tempered by the brute facts of realism, of real power. Today, the debates are among different views of idealism.

7.

DEMOCRATIC SOVEREIGNTY AS LAST MAN STANDING?

Set against this range of possible ideal positions, and with realism put in service to some form of idealism, we can see what The Limits of International Law might imply. Contrary to what Hathaway and Lavinbuk argue, that political revisionism contaminates methodological rationalism, the rationalism (if successful at any rate) forces the revisionism. It forces the revisionism because the independent rationalism tells us that, in fact, international law and institutions simply reflect state interest. Liberal internationalist suprastate institutions and international law are thus not the independent repositories of moral values that their champions claim them to be, at least if it is supposed that these moral values independently sway state behavior. That is the consequence if Goldsmith and Posner successfully argue their rationalism.

This is emphatically not to say that the morality valued by liberal internationalism does not exist if Goldsmith and Posner’s rationalism turns out to be correct. Certainly it exists and carries weight. But it exists only insofar as it is the expression of states and state interest. Appearances notwithstanding, such values are not part of genuinely independent structures of liberal internationalism, because those structures are not genuinely
independent; they are (for this purpose strictly construed) illusory, a construct of ideology. In other words, it is not that rationalism is completely removed from any consideration of values. It is, rather, that rationalism in Goldsmith and Posner's hands demonstrates that the only place where values can obtain a purchase is within the behavior of states—not independently through international law or institutions of international law. Rationalism is neither hostile nor indifferent to moral values. But the only place where they obtain is within states which, one hopes, will be internally democratic (in the broad sense) and then reflect those values at least somewhat in their external behavior.

If Goldsmith and Posner are right, the consequence of the rationalist project for idealism is, in effect, to leave only state interest standing. The best one can hope for—as a matter of values, morality, and ideology—is that state interest incorporate into itself notions of democratic and human rights morality, because international law cannot and will not as a matter of independent force. Democratic sovereignty and the values one can build into the nation state are what matter—not what one builds into international law and institutions and governance, except to the minimal extent that those reflect—supervene upon—shifting configurations of state interest.

Democratic sovereignty, if Goldsmith and Posner's rationalism is right, is therefore the last man standing after stripping away the veil of ideology by rational choice method. Marxian, indeed.

8.
THE STAKES

The question of whether the method of rational choice (as Goldsmith and Posner offer it) forces revisionist politics or whether, as their critics would have it, it does not, raises immensely the 'value' stakes.

9.
RESCUING THE GHOST?

Yet no one seems willing to argue any more for the ghost in the machine, for the independent, something like spiritual, power of idealism to tug states qua states toward adherence to international law. Instead everyone seems to have accepted that the ghost, or the effects of the ghost, can be better explained by a more finely-tuned comprehension of the machine.
Let me suggest, however, that this judgment might be too quick. It might be too much in thrall to the buzz of rationalism. In at least some areas of international law, one might argue for the independent moral effect of international law. The case is ambiguous. The ambiguity itself, however, perhaps sheds light on the difficulty involved in arguing over questions that are ultimately of intention and motivation.

Consider the laws of war, and in particular *jus in bello*, legal rules for the conduct of war. Posner has written (with Goldsmith) on rational choice applied to international law; he has written equally provocatively on applying rational choice theory to the international laws of war, based around game theory and reciprocal responses in order to show the evolution of rules. The rationalist methodology has the effect, once again, of taking morality out of the machine of rules evolution and replacing it with a series of games based around repeat players, cooperation and defection, and so on. Based fundamentally on a state-to-state model, it does not give independent weight to the moral pull toward compliance of the international law of war.

Yet, to someone like myself, experienced on the ground as a human rights observer in numerous armed conflicts, the fact of the moral weight of international rules for the conduct of war seems undeniable. The commitment by soldiers on a personal moral and legal basis to the rules of war—something I have observed repeatedly in conflicts around the world—seems to me plainly a commitment based upon the legitimacy of the rules in Franck’s sense and the internalization of the rules in Koh’s sense. Legitimacy and internalization “tug” these actors toward granting an independent status for the rules of war as international law. This I have found to be true even where a knowledge of the legal rules was rudimentary at best, understood merely at the level of “don’t shoot the civilians.”

Put another way, the metaphor of the ghost in the machine is often characterized as a mythologizing construct that disappears once we look more closely at the detailed workings of the machine. The need for an animating force beyond the mechanisms of the machine disappears. Viewed from the outside, it appears to be magic, but viewed more closely, the spinning wheels can be seen. Rational choice gives us the more finely ground microscope lens to look through. Seen from afar, international law and institutions seem to be carrying out agendas independent of mere state interest and exerting a mysterious force upon states that cannot be accounted for except by the moral motivation of the ideal of international law itself. Seen more closely, the state

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interest turns out to be more finely tuned after all. Yet that said, the law of armed conflict, when observed as I and others have observed it, from within the machine, close up, at the most detailed level, appears to be unquestionably driven by idealistic motivation for the sake of morality, if not always for the law itself.

If that characterization is correct, then we might have an instance within international law in which a body of international law exerts independent moral weight, tugging toward compliance, not because of state interest, nor even because of state interest taking account of certain values, but instead because the individual actors within the system, i.e. soldiers and officers, accept the legitimacy of the international rules, internalize them in a literally psychological sense, as international rules, law and morality. They do this moreover as part of a transborder fraternity of warriors with obligations owed to warriors on the other side of the state-to-state divide, not because of the state, but independently of it and, indeed, in some cases despite it. Would

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30 As Michael Walzer accurately describes the ritualized nature of First World War aerial warfare: “[T]hey fought in accordance with a strict code of conduct that they invented themselves.” WALZER, supra note 24, at 35-36.

I set aside the obvious and correct retort to the idea that this counts as a “counterexample” to the Goldsmith-Posner thesis—that, as Walzer himself acknowledges in that same passage, in modern war such instances of warriors adhering to a code of conduct beyond that sanctioned by the state is quite rare, and rarer still is the instance of professional soldiers adhering to a transborder code of conduct that has been affirmatively rejected by the state. It therefore does not tell us anything about real behavior on a wide scale of soldiers and states. On the contrary, looking across the whole twentieth century, as technology changes, rules of war change or are swept away, even if states—consistent with Goldsmith and Posner’s “talk is cheap” claim—go through elaborate opinio juris aimed at showing what amounts to, when all is said and done: ‘consistent with x, not x.’ A good example of this is the use of gas warfare in the First World War. Having set upon the path of using gas, both sides nonetheless went to very considerable lengths to argue that the use of poison gas was not covered by customary international law of war prohibitions on the use of poison, which had most recently been affirmed at that point in the Hague Regulations of 1907 article 23(a), not even ten years before the use of gas in the Great War. Despite the qualms of a few commanders about their moral duties, the policies of states quite naturally prevailed as authoritative and binding international law. I discuss the history of the prohibition on poison in relation to First World War gas in a 2004 expert declaration in Agent Orange litigation, available at http://www.wcl.american.edu/faculty/anderson/docs/declaration_2004_11.pdf?rd=1, at paragraphs 38-40 and citations thereunder; for a general discussion of chemical weapons, see JONATHON B. TUCKER, WAR OF NERVES: CHEMICAL WARFARE FROM WORLD WAR I TO AL-QAEDA (2006). My interest in these Remarks lies in seeing, in the ambiguities, how the argument over the “tug” of international law, whether in general or the lex specialis of the international law of war, takes on the character of a more general philosophical debate over the nature of intention and motivation, a point I make slightly later.
this count as a counterexample, even a specialized one, against the claim of Goldsmith and Posner that international law as such demonstrates no independent weight? Is this an instance of international law carrying weight independently of state interest on account of its legitimacy, its internalization, or some other norm-based factor that cannot be accounted for by the calculus of The Limits of International Law?

10.

NUMQUAM PONENDA EST PLURITAS SINE NECESSITATE

The Goldsmith-Posner thesis thus appears to be a kind of Occam’s Razor for international law. Yet Occam’s Razor is never conclusive, only *prima facie*; a rule of methodology, not of proof.

11.

DISAGGREGATION

But now ambiguities that undermine the case. The pull spoken of here is a pull upon individuals, officers and soldiers, not upon states as such. Goldsmith and Posner attack a thesis that international law exercises an independent tug of obligation, whether one describes it as legal or moral, upon *states*. It is not surprising that individuals find themselves tugged one way or another by senses of moral and legal obligation. The question is whether states demonstrate such in their behavior.

This is a special case of an objection put by many critics—Peter Spiro and Kal Raustiala in this symposium and by Paul Schiff Berman in his review essay, among others. The model that Goldsmith and Posner rely upon depends, it is said, on an unrealistic view of the state as a unitary actor, represented at most by what Goldsmith and Posner call its leaders. The state as they conceive it does not suffer from multiple actors, multiple aims, multiple agendas. It is a simplifying assumption that proves fatal to the game theory models. Instead, the “state” should be seen as a nexus of competing and contradictory actors, with multiple motivations, pressures, agendas, and outcomes. The state, in other words, should be “disaggregated.” Once
disaggregated, the pull of international law upon the state becomes simply the pull of international law upon particular actors within the state, and the problem of motivation disappears. International law pulls them and they pull the "state." Rationalism and liberal internationalism are once again not inconsistent one with the other.

Goldsmith and Posner have various responses to the question of why the claim of disaggregation does not fatally undermine their model of state behavior. I wish to set all those aside and concede, for my part, that under some circumstances the state might very well be "disaggregated" in the way that the critics propose. My objection to that is not that it might not occur—it very well might. Indeed, many of the critics urge precisely the transformation of the state and its apparatus that would make such disaggregation possible. My objection, in contrast, is normative.

12.
DISAGGREGATION'S DISCONTENTS AND THE COMING METHODOLOGICAL ROLE OF SOCIAL THEORY IN INTERNATIONAL LAW

Those who celebrate the deus ex machina of disaggregation might consider precisely what they celebrate. After all, the thesis of The Limits of International Law is quite happy—descriptively and prescriptively—with the idea that in a democratic state values consonant with the precepts of international law should bubble up, whether from above or below, and become the policy of the state’s leadership and hence of the state. The disaggregation thesis does not challenge The Limits of International Law on this point—it is what, for Goldsmith and Posner (as well, I should add, for me), democratic sovereignty is supposed to be all about. If international law is a useful device for memorializing our democratically-reached intentions as a state, then that is all very well. All the disaggregation thesis adds to what is already in Goldsmith and Posner is the claim that one can achieve adherence to international law and institutions in ways that go outside the institutions of democratic governance. And critics not infrequently add this claim with a certain breathless frisson of moral approval—or else a sigh of relief. Whereas

35 Failed states, for example in Africa and elsewhere, are surely “disaggregated.” It is curious that no one seems to cite these purest examples of disaggregation; it is equally curious that the literature of disaggregation, so far as I am aware, fails to note that on a genuinely neutral view of disaggregation, the most disaggregating practices within a state are corruption, bribery, and rent-seeking by officials. Those, and civil war. Perhaps this is uncharitable, however, and I have missed this discussion in the literature.
I am at a loss to understand what I should celebrate in what amounts to an end run around democratic institutions. Disaggregation is, without question, the most important theoretical move in global governance theory in over a decade—the move to call for disaggregation of the state in order to disaggregate sovereignty itself in favor of liberal internationalism.\textsuperscript{36} It is an explicit call to achieve the primacy of international law and institutions by undertaking the long march through the explicitly undemocratic institutions of the state—state bureaucracies and judiciaries—to take advantage of their legitimacy within democratic states. Disaggregation seeks to resocialize these bureaucrats and judges, to shift their internalized loyalties away from the citoyen to the cosmopolitan, the citizen of nowhere.

This is supposed to be a moral step forward? I demur. Insofar as it is a political agenda, it is not an honest one, because it relies upon, and then betrays, the trust that citizens in a democracy put in the acknowledged undemocratic institutions of the state. It betrays their faith that even though undemocratic, the ‘undemocrats’ are themselves also citizens, still servants of the state and, ultimately, servants of its citizens as they themselves are citizens, and not servants of others elsewhere.

Far more than a political agenda, however, disaggregation is a social agenda: tentative but crucial steps in the formation of an internationalized bourgeoisie, a bourgeoisie sharing a common transnational set of loyalties that, in certain key matters, override their local loyalties. Which is why the most important enquiry arising from the disciplines underlying international law at this moment is not rationalism, game theory, rational choice, or indeed any form of economic or political theory. It is, instead, social theory, and specifically, the theory of the international new class.\textsuperscript{37} Social theory, and not solely rational choice and other rationalist theories, might well turn out to be

\textsuperscript{36} The difference between disaggregating the state and disaggregating sovereignty is an important one in Slaughter’s theory. I believe I have faithfully captured the distinction: The notion of a disaggregated state requires understanding the state not as a unitary institution, but instead as an agglomeration of different centers of power, different institutions, and competing actors...[t]he disaggregation of sovereignty signifies that the constituent institutions and actors of the disaggregated state achieve a measure of formal and legal sovereignty of their own—the formal legal capacity to undertake activities within government networks and make them binding upon their own disaggregated state. Anderson, supra note 23, at 1298.

\textsuperscript{37} The recent revitalization of the critical theory journal, \textit{Telos} (following the untimely death of its founding editor, the irascible, brilliant iconoclast Paul Piccone), under the leadership of its new editor, Russell Berman, offers an opportunity to explore this in the journal most attuned to the deep theory surrounding the sociology of the new class. \textit{Telos} has promised a special section on the international new class in 2006.
the most important basal discipline of international law in the next generation of scholarship. Intellectual how-to manuals for socializing judges and bureaucrats in their new cosmopolitan duties are starting to appear in the scholarly literature.\textsuperscript{38} Let me suggest, however, that there is already an extensive literature on the formation of class consciousness—why reinvent the wheel?\textsuperscript{39}

13.

THE MORALITY OF A PROFESSIONAL

The social theory so far suggested, insofar as the project of disaggregation is concerned, is that of the new class.\textsuperscript{40} More broadly, however, the disaggregation social project is concerned with the social identification of professionals.\textsuperscript{41} Anne-Marie Slaughter’s pioneering work, \textit{A New World}

\textsuperscript{38} For example, Ryan Goodman & Derek Jinks, \textit{How to Influence States: Socialization and International Human Rights Law,} 54 DUKE L.J. 621 (2004). Despite my normative reservations about the project, it is a superb article, closely argued in both legal and social theory. See also the extremely interesting colloquy among Ryan Goodman and Derek Jinks and Jose E. Alvarez and Harold Hongju Koh, Colloquy, \textit{Incrementalism and the Administrative State,} 54 DUKE L.J. 961 (2005). These materials, among others, convince me that many people within international law scholarship, committed to some version of liberal internationalism, believe that ultimately the formation of a new global bourgeoisie is the necessary social condition of the political project. Much rides on the social theory.

\textsuperscript{39} Just as I suggested earlier, somewhat mischievously, that Goldsmith and Posner are closet Marxists, at least of a Western Marxist tradition, let me suggest that the new scholars of socialization—socializing toward a sort of international bourgeoisie of judges and bureaucrats—might find their theoretical work already done in the now forgotten Marxist literature of class consciousness.

\textsuperscript{40} I have briefly, and rather satirically, proposed “new class” theory as a way of conceiving of international elites, in Kenneth Anderson, \textit{Secular Eschatologies and Class Interests of the Internationalized New Class, in Religion and Human Rights: Competing Claims?} (Peter Juviler & Carrie Gustafson eds., 1999), \textit{available at http://www.wcl.american.edu/faculty/anderson/docs/secular_eschato.pdf?rd=1}. A convenient entrance for legal academics into the literature of new class theory is found in Kenneth Anderson, \textit{A New Class of Lawyers: The Therapeutic as Rights Talk,} 96 COLUM. L. REV. 1062 nn.30-38 (1996). The international criminal law scholar Mark Osiel was recently amused, but not impressed, by the sketch of the argument I make there; I agree with him that there is a lot of work to be done to make it intellectually wholly defensible. See Mark Osiel, \textit{The Banality of Good: Aligning Incentives Against Mass Atrocity,} 105 COLUM. L. REV. 1751 n.315 (2005). For an explicitly Marxist version of the argument, see LESLE S. KLAIR, \textit{The Transnational Capitalist Class} (2006).

\textsuperscript{41} Two useful contemporary introductions to the sociology of professionals are, first, KEITH M. MACDONALD, \textit{The Sociology of the Professions} (1995) and, second, STEVEN BRINT, \textit{In an Age of Experts: The Changing Role of Professionals in Politics and Public Life}
Order, is specifically about bureaucrats and judges. In the case I earlier suggested, that of the laws of war, it is about soldiers and officers. Soldiering, too, is a profession, one with a particular professional morality attached to it.

The point here against Goldsmith and Posner’s conception of international law, at least as applied to the rules of war, is that adherence to the laws of war is as much or more the product of the individual soldier’s professional commitment to the code of the warrior as the state’s commitment to it. The pull, as it were, of the law of war arises from the professional self-conception of the soldier and the moral implications for how he or she fights. I repeat, this has been my strongest impression of armies where the rules of armed conflicts are obeyed, even in rudimentary form, and those where they are not. It was the individual commitment—the personal internalization of rules and the belief that they were legitimate, not just because of state policy, but across borders and armies—that mattered in compliance. “The experience of land war in two world wars,” Sir Adam Roberts observes in his The Laws of War, “must necessarily raise a question as to whether formal legal codification is necessarily superior to notions of custom, honour, professional standards, and natural law” in making for battlefield decencies. The great military historian Sir John Keegan, reviewing that book in the Times Literary Supplement, answers simply, “There is no substitute for honour as a medium for enforcing decency on the battlefield, never has been, and never will be.”

Yet this is ambiguous. It might be taken to mean that individuals feel the tug of international law upon them as law and act accordingly. But it might be taken to mean much more naturally what Roberts suggests, that what matters is not so much law as codification, but instead professional standards and professional morality in adherence to the laws of war. A state adheres to the laws of war because its officers do so as professionals. They have been trained, socialized, to do so, and their adherence is a matter not of law, but rather of professional morality and, in particular, professional honor. This

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Macdonald covers, in addition to his own theorizing, the basic classical sociological views of Durkheim, Weber, and Marx; Brint offers a critique of “new class” theory of the professions, which I in turn critique in my Columbia Law Review review. Slaughter, supra note 26. She raises the case of national legislators mostly, however, to note that they seem to lag behind in their cosmopolitanism. See generally William Bradford, In the Minds of Men: A Theory of Compliance with the Laws of War, 36 ARIZ. ST. L.J. 1243 (2004).

latter intervention counts against the norm-based view of international law because it is not finally about norms of law, but instead norms of morality, honor, status, and standing. The laws of war, qua law, are a useful template for the organization, the Restatement as it were, of the duties of professional soldiers; the codification is useful in order plainly to set them out. But let us not confuse the fact of codification with what supplies the motivation for adherence to them, the tug toward compliance, which is ultimately not law but professional honor. That is not a motivation of law, but one which merely happens to coincide with it.

14. INTENTION AND MOTIVATION

The ambiguities in the case of the laws of war undermine it as a counterexample to the Goldsmith-Posner thesis; it might be an example of the tug of international law upon states, or it might not. But the case does serve another purpose, however, which is to raise the peculiar nature of the argumentation, at the most abstract, philosophical level, between the theory of the “tug” of international law as a motivation and ground for intentional action, and the skepticism of *The Limits of International Law* toward the view that any such motivation or intention exists.

This observation is, I find, particularly hard to articulate, and it may simply serve to say that it is incoherent or not very important. Nevertheless, I am surely not the first person to feel, reading *The Limits of International Law* and listening to the criticism surrounding it, that the debate in some fashion recapitulates a much more general argument over intention and behaviorist skepticism about intention, not in legal or moral philosophy, but in philosophy of mind. It is, of course, why I have used the metaphor of the ghost in the machine in these remarks; there is something in all this that has caused me to take down from the shelf, after many years, Gilbert Ryle’s *The Concept of Mind* and Elizabeth Anscombe’s *Intention*. They are each classic texts, from the high flowering of English analytic philosophy, intensely concerned with making sense of what it means to have an intention or to act intentionally, to have a motive or to act from a motive.

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46 I could have picked, to be sure, a different philosophical literature in the philosophy of mind—from Continental philosophy and German idealism, for example. The rumination would
Reading the discussion in the traditional international law literature about the independent “pull” or “tug” of international law, on account of this motivation or that, whether internalization of norms or legitimacy or what have you, leading to acting from a certain intention—well, it brings to mind, despite the conceptual leap from individuals and their minds to states and international institutions reified as such, arguments over the mind-body problem, examined by Ryle, and the problem of the internal account of intention and behavioral skepticism about it, examined by Anscombe. Likewise, the skeptical account in *The Limits of International Law* has a certain behaviorist feel to it; it demands a look at the surface of the behavior of states rather than enquiring into the intentions and motivations behind it.

I understand that I have pushed the analogies already more than they can bear. My point is not to uncover some close correlation, but instead to suggest that they stand as a parable—a sort of intellectual warning. If there is anything to the thought that this argument between traditional international law (seeking to confirm the “internal” motivations of international law as an independent force within and upon states) and *The Limits of International Law* (expressing something akin to a behaviorist “external” skepticism about mysterious internal motivations, intentions, and pulls and tugs and independent weight) has an antecedent in the philosophy of mind, this is not actually a good thing for believing that our debate, the debate over international law methodology, is well-framed. If there is a recapitulation of argument that draws its problematic from so abstract a set of issues in the concepts of intention, motivation and so on, this suggests that the terms of debate over international law method are themselves misconceived.\(^47\) We cannot hope to settle the high level conceptual debate over motivation and intention. If, therefore, the conceptual questions of motivation and intention have something deeply to do with our (comparatively) practical argument over international law methodology, we are likely to bicker endlessly over practicalities, not recognizing that the root of the problem lies at a level of generality that is not

\(^{47}\) If this sounds like a Wittgensteinian form of argument, well, yes. If it sounds like sheer obscurantism, well, it is probably that, too.
susceptible to resolution by any method of international law. Deep questions of motivation and intention are not what international law methods are ever about resolving.

15.

A FORMALLY EMPTY VESSEL

In order to make the case simultaneously against norm-based international law and liberal internationalism, *The Limits of International Law* must show that states, rather than acting from motivations of compliance with international law for its own sake, in fact act based on interest. In order to make that argument, *The Limits of International Law* makes two crucial moves.

The first is to say that states act based on interest, where “interest” means anything that a state’s leadership chooses to put there. It is an empty vessel that can be filled by anything from “material interest” to “moral values.” Interest is deliberately left open as a substantive matter, to be given meaning according to a political process ending with a state’s political leadership.

This move is necessary in order to deal with what would otherwise be an extremely awkward, possibly fatal, objection to the theory of *The Limits of International Law*. It is simply that if “interest” were not defined broadly enough to encompass values, the theory would be open to the retort that it is altogether evident that many states, liberal democratic ones in particular, do indeed act from values that often appear to include the values promoted apparently independent adherence to international law. Such an objection would be hard to dispute, although it would make for a “harder” theory if *The Limits of International Law* sought to argue that states act from interest in some traditional, “tough” sense, such as “material interest.” One could perhaps make that “tough,” “material interest” argument—but only by defining “material” to include very indirect things such as long term strategic advantage, goodwill, and so on.

*The Limits of International Law* instead defines interest so as to wrap values—whatever values the leadership of a state opts to pursue—into the definition of interests. Thus stated, the theory is now formally sound—but substantively empty. It can now reach, by simply expanding the definition of interest to include any value, all the results that could be reached if one assumes that norm-based international law theory were correct. One cannot distinguish *The Limits of International Law* rational choice theory from norm-based theories on the basis of results alone. So long as altruism and other regarding behavior are accepted as values that can be incorporated into the
theory of state interest without limitation, there is no necessary clash between the results achieved by *The Limits of International Law* and traditional norm-based approaches. The Goldsmith and Posner thesis becomes, in other words, *The Limits of International Law*, without limits and therefore without content.

16. The Formally Empty Vessel, Filled

In order for the Goldsmith and Posner theory to have content, therefore, it requires some limit on the meaning of state interest and, in particular, the range of values that can be incorporated into it. This is the second crucial move of *The Limits of International Law*. The authors introduce the limit required to give the theory content in the form of an empirical assertion about the limits of other-regarding behavior that state interest is willing to accommodate. They argue against what *The Limits of International Law* calls “cosmopolitanism.” They claim that there are in fact limits on how far a state, democratic or otherwise, will go for those beyond its political community. It is a claim that other-regarding international behavior has limits—variable, to be sure, but a fact of international life whether one attributes the limit to individuals within a state or to the state itself.

How does this limit on transborder altruism serve as a limit on interest so as to prevent the Goldsmith-Posner thesis from being empty? It makes the Goldsmith-Posner thesis meaningful because it will now generate results that are significantly different—more constrained—than either the method of norm-based international law or the substantive requirements of liberal internationalism. If states have limits upon how other-regarding they will be, and if those limits are more constraining than would be asserted by traditional norm-based methods relying on the independent weight of international law to draw states (or at least some important states) beyond those limits, then state interest, even though able to accommodate values, will *still* be more constrained in terms of what states will do than liberal internationalism would seek it to be or norm-based international law would claim it is.

I have put this more grandiosely than the proposition really is, however. Goldsmith and Posner treat cosmopolitanism as a potential objection to their theory. They respond that transborder other-regarding behavior is in fact more limited than even “plausible cosmopolitanism” says it is, and is likely to

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48 Arguably, there are several ways in which the limit is introduced. I confine myself to the most important or, at least, the most provocative.
remain that way; hence it does not present a successful objection to their theory. I make the same point the other way around. If the cosmopolitan other-regarding impulse is indeed limited as Goldsmith and Posner say it is, the consequence is that state interest expresses a narrower range of interests and values than would be the case under liberal internationalism reached by a norm-based method. If that is the case, then there is a discernible difference between the outcomes of the two methods of approaching international law. And there is likewise a new discernible difference between the substance of liberal internationalism and democratic sovereignty. Showing the limited reach of cosmopolitanism is, in other words, a crucial step in showing that rationalism "forces" democratic sovereignty—revisionist politics—and that democratic sovereignty is not simply empty, reflecting an unconstrained range of values. It is a crucial step in arguing, contrary to Hathaway and Lavinbuk, that democratic sovereignty is the last man standing.49

Even if that is the strategic situation, however, are Goldsmith and Posner right concerning cosmopolitan duty? I think they are, and that they are especially right about the clash between cosmopolitan duty and the internal demands of democratic practice within a state. That said, it is curious to me that the discussion of cosmopolitan duty in the book begins from issues of welfare, distribution, and other-regarding obligations. The question of cosmopolitanism, it seems to me, necessarily—and for the purposes to which they put it—starts in a quite different place, which is the question of membership, membership in a political community.50 Only after that does it reach questions of distribution and welfare.

49 Not the only step, of course, as already noted. For example, the game theory must also work out according to plan. For an important argument that it does not, see David Sloss, Do International Norms Influence Stale Behavior?, 38 GEO. WASH. INT’L L. REV. 159 (2006) (reviewing JACK L. GOldsmirH & ERic A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005)).

50 My usual starting place on the question of cosmopolitanism in the contemporary world is FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM (Martha C. Nussbaum & Joshua Cohen eds., 1996), and MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1984). Both of these tend to emphasize the primacy of the issue of membership before reaching questions of distribution. The question of the origins of the concept of cosmopolitanism is addressed by Stephen Toulmin, Cosmopolis: The Hidden Agenda of Modernity 67-69 (1990). The philosopher Kwame Anthony Appiah has recently introduced an exciting new possibility in cosmopolitan theory, what he calls the "New Cosmopolitanism" of "mixture," "contamination," and individualism. He has set it out in a provocative essay, Toward a New Cosmopolitanism, N.Y. TIMES MAG., Jan. 1, 2006, at 30. I do not address that possibility here, preferring to see the full case when Appiah’s book on the subject appears later in 2006. See KwAmee ANthony AppiAH, Cosmopolitanism: Ethics in a World of Strangers (2006).
I have only one final remark to add. We move from the inside of the book to the outside. Two years ago, I spent a sabbatical in Spain, and was privileged to visit the Museo del Prado, where I spent much time looking at the painting that adorns the cover of The Limits of International Law, Diego Velázquez' justly famed La rendición de Breda.

The Dutch town of Breda’s surrender to the Spanish took place in 1625—in other words, several decades before the Treaty of Westphalia around which, at least by implication, so much of the preceding discussion has taken place. Breda was finally ceded back to the Netherlands in the Westphalian settlement of 1648. The surrender of Breda to the Spanish commander, Ambrosio de Spinola, marques de los balbases, is marked in Velázquez’ intensely narrative painting by the transfer of the key to the city from the Dutch citizens to the Spanish military commander. As the conventions of siege typically permitted the sack of a resisting city, this act marks a magnanimity of spirit otherwise almost wholly missing from the Thirty Years War. Spinola’s kindly expression, the arm on the shoulder of the Dutch emissary, and yet the picket fence of lances in the background—the famous Spanish lances raised to the sky in a gesture of power restrained but not absent—all this represents what was to be the best face of Westphalia two decades on. It is realism in service to idealism, power in service to decency.

I have not criticized The Limits of International Law in these remarks; mostly I have defended it against the critiques of others. It therefore seems fitting to close these remarks with a criticism of the book. It is a serious one. La rendición de Breda finds human complexity etched into every one of the many faces, the postures of the personages, all of the clothing and accouterments of war and peace of the participants. It is that attentiveness to the complexity of human affairs that caused me to spend so much time contemplating the painting in the Prado.

I find it therefore curious that a painting which invests so much human complexity in the affairs of state and the affairs of men and women should adorn the cover of a book which, despite the promise of its rational method, despite its many analytic virtues, and despite what it promises in the way of

51 They had not changed, in fact, very much from the rules applicable in Shakespeare’s day, analyzed with extraordinary care by international humanitarian scholar, Theodor Meron in his Bloody Constraint (2000).
realist-rational analysis in support of the program of an idealist like me, is in fact so relentlessly reductive. The reductivism seems to me wrong-headed. Not precisely wrong, but wrong if seen as anything other than the beginning of something vastly more complex and more subtle. Truer art for the cover of *The Limits of International Law* would be not the painting in all its glorious complexity, its nuances and subtlety, but rather one of Velázquez' initial sketches preparatory to the final painting, in pencil, not filled in.

I do not mean merely that the game theory and rational choice methodology that enlivens this book will inevitably become more complex over time. Of course that will be the case. I mean, rather, precisely what I take Don Diego Rodríguez de Silva de Velázquez to have meant—that human complexity, social complexity, the texture of living people and their politics can be informed, but not finally captured, by pure rationalism.