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RECENT BOOKS ON INTERNATIONAL LAW

EDITED BY JEFFREY L. DUNOFF

BOOK REVIEWS

International Legal Theory: Foundations and Frontiers. Jeffrey L. Dunoff and Mark A. Pollack, eds. Cambridge, UK: Cambridge University Press, 2022. Pp. xii, 435. Index.
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What is international legal theory and what is it good for? These are the questions that Jeffrey Dunoff and Mark Pollack's latest edited collection seeks to address. Dunoff, an international lawyer, and Pollack, an international relations scholar, have had many fruitful collaborations, including a co-edited volume on the relationship between international law and international relations theory.[1] Their new book aims to provide a broad overview of international legal theory, and includes chapters on both staples of the field, such as positivism, natural law, legal realism, transnational legal process, critical international legal theory (CILT), Third World Approaches to International Law (TWAIL), feminist theories, and rational choice, as well as more recent approaches, such as global administrative law (GAL), constitutionalism, global legal pluralism, behavioralism, sociological approaches, and the practice of interpretation.

For Dunoff and Pollack, the book has several goals, among them: (1) "to highlight the richness, pluralism, and complexity of contemporary theorizing about international law" (p. 14); (2) to respond to "the need for a comprehensive and critical, yet user-friendly, review of the theoretical landscape," which "provide[s] a synoptic overview of competing theoretical approaches" (p. 4); and (3) to show that "international legal theory is less a set of received truths than an ongoing dialogue over a set of evolving questions as fascinating as they are urgent" (p. 35). *International Legal Theory* succeeds admirably with respect to the first goal—namely, to show the richness, pluralism, complexity, and dynamism of international legal theory—but only partially in providing a synoptic overview of the field or in stimulating a dialogue between different theories about a common set of questions. It serves more as a smorgasbord than an integrated meal, both because the theories the book addresses are highly heterogeneous in their animating questions, methods, and character, and because the chapters themselves differ widely in tone and approach.

The book's title, *International Legal Theory*, raises the preliminary question: What exactly is international legal theory? Dunoff and Pollack struggle to provide an answer. They say that "theory" is a "contested term that lacks a stable or invariable meaning" (p. 9); "encompasses a wide variety of inquiries, which arise from different concerns expressed in different contexts" (p. 14); and has "porous and shifting boundaries" (p. 10). But these characterizations do not take us very far in understanding the nature of "theory." Dunoff and Pollack attempt to further explicate the concept by addressing the questions, "what," "who," "when," "where," and "how" (pp. 9–13). But although their answers help delimit the scope of their book, they do not come to grips with the underlying conceptual question, what is theory? Instead, they are either statements of the obvious —for example, that international legal theory is "centrally concerned with international law" (p. 10), or that it "is primarily produced by international legal academics working at law schools" (p. 11), mostly in Western countries (p. 12)—or statements that seem questionable at best and, in any event, do not get to the heart of what defines

[1] INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2012).

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theory—for example, that international legal theory is "centrally about 'the art of making meaning move across time'" and is "'inherently genealogical'" (*id.*, quoting Anne Orford).

To my mind, what characterizes "theory" as a category is that, to one degree or another, it abstracts from particulars in order to say something of a more general nature. The theory of universal gravity abstracts from the particulars of how apples fall to the ground to say something general about the mutual attraction of objects. A theory of revolutions abstracts from specific revolutions (the French Revolution, the Russian Revolution, and so forth) to say something general about revolutions—for example, why they occur or why they do (or do not) succeed. And a theory of international law abstracts from specific legal rules, actors, and processes to say something more general about international law.[2]

The theories discussed in *International Legal Theory* share the common feature of abstraction, but they differ widely in the questions they address and the degree of abstraction they entail. As Dunoff and Pollack recognize, they "take multiple forms and adopt various goals" (p. 7):

- Some address the question, "what is law?" and are hence ontological in nature. For example, positivism says that law is a body of rules defined by their sources rather than by the merits or demerits of their contents.[3] Natural law says that ethical rules also form part of the law. Global legal pluralism includes as law informal or private bodies of rules. And transnational legal process understands law as a process of interaction.
- Some are descriptive. For example, one feature of both GAL and constitutionalism is to abstract from a variety of developments internationally to argue that a body of global administrative law or a global constitution is emerging.
- Some are hermeneutic—they provide a theory of how to understand what a legal text means. As Ingo Venzke summarizes in his chapter on "The Practice of Interpretation in International Law," hermeneutic theories of international law include formalism and instrumentalism.
- Some are explanatory. For example, rational choice explains the development and influence of international law in terms of actors (primarily states) rationally pursuing their self-interest; behavioralism in terms of biases and other cognitive processes; sociological approaches in terms of the structure of international society and the social environment of international decision-makers; TWAIL in terms of racism, imperialism, and colonialism; and both legal realism and transnational legal process, albeit in slightly different ways, in terms of the interaction of various national and international actors.
- Finally, some theories are normative. For example, transnational legal process seeks to use the strategies of interaction, interpretation, and internalization to promote compliance with international law. TWAIL seeks to "defang international law of its imperialist and exploitative biases against the global South" (Gathii, p. 173, quoting Makau Wa Mutua). Natural law, GAL, and constitutionalism seek to promote the legitimacy of international law.

Of course, these different types of theories—ontological, descriptive, hermeneutic, explanatory, and normative—are ideal types; most theories combine multiple elements. For example, "non-ideal" moral theory is concerned with ends that are achievable in a given context and thus has a descriptive/explanatory component. Conversely, normative judgments may infiltrate descriptive or explanatory theories. For example, claims about what the law "is" may reflect the theorist's views about what the law "ought" to be.

Although a few of the theories in *International Legal Theory* are relatively single-minded (rational choice, for example, is an explanatory theory, and positivism, properly understood, is an ontological or conceptual one), most are constellations of different types of theory. For example, TWAIL sets forth a descriptive/explanatory

[2] As Dunoff and Pollack note, "at its core international legal theory 'asks general questions about the nature and role of law in the international world'" (p. 14, quoting Martti Koskenniemi).

[3] John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURIS. 199 (2001).

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theory that provides the basis for a normative one. As a descriptive theory, it sees international law "as a system of domination that entrenches asymmetrical power relations between former colonial powers and their former colonies" (p. 20); as a normative theory it seeks to rid international law of its European biases.

All of the different types of theories, in isolation or combination, can be more or less general or specific, depending on their degree of abstraction. As Dunoff and Pollack observe: "[T]here is no single optimal level of abstraction, or simplicity, for theory to aspire to. Rather, different theories have different aims, and hence we should expect (and welcome) theories pitched at different levels of abstraction" (p. 8). The new legal realism is formulated at a higher level of abstraction than global administrative law or constitutionalism. Rational choice tries to explain behavior generally, while a theory of treaty compliance is mid-level. Indeed, since virtually all academic scholarship involves some level of abstraction, it could all be considered "theory," as Laurence Boisson de Chazournes apparently does (pp. 352–53). But there is a big difference in abstraction between theories about, say, intergenerational equity, the World Trade Organization dispute settlement mechanism, or treaty compliance, and the theories that *International Legal Theory* addresses.

A final preliminary point: Many of the chapters of *International Legal Theory* discuss what might be better characterized as "approaches" or "perspectives" than "theories." For example, sociology is a discipline not a theory and encompasses many different theories of society, as Moshe Hirsch succinctly discusses. Likewise, feminist legal theory encompasses different waves and approaches, reflecting different descriptive and normative views. Indeed, even more discrete theories—such as positivism, natural law, transnational legal process, and legal pluralism—come in different flavors. Few describe a single, well-defined theory, like Newton's theory of universal gravitation.

Although the contributors to *International Legal Theory* vary in their approach and tone, most aim to introduce their subject to the general reader. Nico Krisch's excellent chapter on global legal pluralism, for example, provides an easily accessible introduction to global legal pluralism, which discusses the causes of its emergence, its different strands, its implications for legal theory, and its normative appeal. In his "Dialogic Conclusion," Joseph Weiler aptly praises the chapter with a saying from Jewish tradition, "a little that contains a lot." As he elaborates, it is "a brief text which both initiates the field to those not familiar but also leaves the cognoscenti with much food for thought," for which "most if not all readers will be extremely grateful" (p. 403).

Another model of exposition is Greg Shaffer's densely argued chapter on the new international legal realism—which he somewhat grandly describes as the "third pillar of jurisprudence, alongside legal positivism and normative legal theorizing" (p. 100). The new legal realism, according to Shaffer, has both descriptive and normative aims, reflected in its empiricism and pragmatism respectively. On the one hand, legal realism seeks to understand "how law obtains meaning, operates, and changes through practice" (p. 82) through "the interaction of internal 'legal' and external 'extra-legal' aspects" (p. 83). At the same time, "legal realism has a constructive, pragmatic dimension regarding how law can be adapted and reformed in light of new challenges" (p. 96). Shaffer's approach brings to mind Marx's proclamation in "Eleven Theses of Feuerbach": "The philosophers have only *interpreted* the world, in various ways; the point is, to *change* it."[4] For Shaffer, like Marx, the descriptive and normative projects are closely linked, since to change the world, we first need to understand how it works. In Weiler's pithy formulation: "*'Is' must inform 'Ought' for 'Ought' to shape 'Is' effectively*" (p. 374). That is why Shaffer stresses the need to "gather empirical data methodically to assess how law is operating before drawing conclusions and reaching decisions" (p. 93).

Harold Koh's and James Gathii's chapters on transnational legal process and TWAIL, respectively, provide similarly useful introductions for

[4] Karl Marx, Selected Writings 101 (Lawrence H. Simon ed., 1994) (emphasis in original).

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the uninitiated reader. Both take a largely historical approach. Koh traces the development of transnational legal process from Yale's New Haven School and Harvard's International Legal Process approach, both of which saw law as a process rather than a set of rules, wanted to connect law and policy, and were interested in transnational as well as traditional international law (pp. 104–06). Gathii, similarly, describes how TWAIL emerged from earlier third world attitudes to international law and documents its increasingly prominent role in legal scholarship (pp. 156–57).

Anne van Aaken's chapter on rationalist and behavioral approaches to international law, and Moshe Hirsch's chapter on sociological approaches, have the unenviable task of summarizing entire disciplines and applying them to international law in a mere twenty pages. They succeed admirably, given this constraint, but their chapters can only whet the reader's appetite for more extensive treatments. Both deal with explanatory theories of how and why international law emerges and is applied. But, like most of the theories discussed in the book, both also have normative implications. Behavioral economics can be used to develop a "choice architecture" to guide state behavior—for example, through the use of default rules in multilateral agreements. Likewise, sociological theories have normative implications "regarding the desirable structural design of international regimes" (p. 294): a structural-functional perspective, for example, attaches "particular significance" to achieving equilibrium and therefore values comprehensiveness and uniformity, with little scope for state discretion (*id.*), while a symbolic interactionist theory "prefers more flexible regimes" and has an "ingrained aversion . . . towards uniformity and large-scale integration" (*id.*).

Fleur Johns has perhaps an even more difficult task in introducing her subject, since CILT "does not denote any single movement, school or approach" (p. 133), but rather a constellation of related "critical" approaches to international law, including TWAIL and feminist approaches (each of which has its own dedicated chapter), as well as the critical theories of David Kennedy and Martti Koskenniemi. Her chapter provides a very interesting intellectual history of the critical movement, but it necessarily operates at a high-level of generality, at times using abstruse formulations that may be unintelligible to many readers —for example, when she speaks of "the provocative unmooring of identity as a basis for post-critique redemption" (p. 143), "strategies of avoidance and deferral on which authoritative sensibilities of international law often depend" (*id.*), or "redistributing symbolic, social and economic capital on the global plane" (p. 149). Johns herself recognizes the danger that CILT scholarship "has tended towards the overwrought and abstruse, making it stylistically poorly aligned with the worries about exclusion and disentitlement often voiced within it" (p. 150), but she occasionally falls into this trap herself, using words such as "actants" (p. 152) and "moirés" (p. 151) likely to make many readers reach for the dictionary.

In contrast to the chapters that describe international legal theories for the general reader, Andreas Follesdal's piece on natural law aims to provide a sympathetic reconstruction of a theory of international law that has few contemporary proponents. Although Follesdal admits that "many historical natural law theories are implausible by our standards," he argues that "a wholesale rejection of the natural law tradition is unwarranted" and that "proclamations" of its death are "premature" (p. 39). He proposes a "plausible core" of natural law features—which he calls Human-Oriented Minimalist International Natural Law, or HOMINAL—and argues that it could provide a basis of normative legitimacy for public international law (p. 40). In brief, HOMINAL "holds that there are *objective* standards of right actions and rules, discernable by *human reason* based on features of *human nature, law* and of the *natural* and malleable *social order"* (*id.*, emphasis in original).

Jean d'Aspremont and Jan Klabbers take almost the opposite approach as Follesdal in their chapters on international legal positivism and constitutionalism, respectively, deconstructing rather than sympathetically reconstructing their subjects. D'Aspremont's chapter operates at a meta-level. It is not about positivism itself,

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which d'Aspremont dismisses as "a very empty notion" (p. 69). Instead, the chapter seeks to describe and explain the international law *discourse* about positivism. In essence, d'Aspremont contends that positivism is "best understood as a mythical construction" (p. 80), invented by international lawyers as an adversary to define themselves in opposition to. The mythical construction consists of a few "simplistic claims" (p. 75)—namely, that international law is state centric, voluntaristic, formalistic, can be interpreted mechanically, and serves to displace politics—views that d'Aspremont acknowledges actual positivists often do not hold (pp. 69–71). Although the chapter is a clever exercise in rhetoric, the reader trying to get a basic understanding of positivism would do better looking elsewhere. Jan Klabbers's almost flippant obituary for constitutionalism makes more of an effort to describe its subject but is equally dismissive.

Finally, the chapter on feminist approaches to international law by Karen Engle, Vasuki Nesiah, and Dianne Otto reflects intramural skirmishes within feminist legal theory. Rather than provide a general overview of its subject, it targets mainstream feminist theories that focus on the role of the state in addressing violence against women. These mainstream approaches, the authors argue, "reflect and entrench dominant power structures" (p. 185), resonate with "old colonial tropes" (p. 184), heighten "carceralism, militarism and securitization" (p. 185), and crowd out other perspectives more attentive to "structures of colonialism, racism, gender normativity, and gross economic inequality" (p. 175). In their place, the authors propose giving more attention to alternative types of feminism, including queer, anti-imperial, and sex-positive feminism.

In addition to its chapters on particular theories or schools, *International Legal Theory* contains several quite interesting elements. First, in a chapter on "The Practice of Interpretation in International Law," Ingo Venzke surveys four theories of interpretation, two hermeneutical (formalism and instrumentalism), a third explanatory (realism), and a fourth critical (immanence). The hermeneutical theories seek to understand what a legal text means, either by studying the text itself (formalism), or by looking outside the text to external standards (instrumentalism). In contrast, realism seeks to understand "what is really going on in the practice of interpretation?" (p. 306). Finally, immanence theory involves a dialectical process in which the standards of interpretation and critique change through the interpretative process.

Second, the book includes more general reflections by two leading scholars and practitioners, Georges Abi-Saab and Laurence Boisson de Chazournes, on international legal theory and its relationship to international legal practice. Abi-Saab, by now an elder statesman of international law, expounds on his sociological view of law, which "considers law as a social product expressing a collective social will" (p. 333) and reminisces on how he tried to bring this approach to bear in his work on international humanitarian law and international economic law. Laurence Boisson de Chazournes likewise reflects in her chapter on the relationship between theory and practice, which she characterizes as "consubstantial." On the one hand, "[t]heory shapes the practitioner's mind and facilitates his or her action" (p. 360). For example, the International Court of Justice's decision to reject the World Health Organization's request for an advisory opinion on the legality of nuclear weapons was based on a theory of functionalism (p. 348). "On the other hand, practice underlines the relevance (or irrelevance) of theory and provides food for thought" (p. 360). It provides the raw material for theorizing.

Finally, perhaps the most novel and interesting element of *International Legal Theory* is its concluding "dialogue and dialectic" between Joseph Weiler and the other authors. Weiler's penetrating, challenging, and often subversive questions are a highlight of the book. All too often, however, the authors' responses do not fully come to grips with the questions, and space constraints presumably precluded more back and forth between Weiler and his interlocutors. Given the interconnections and tensions between the various chapters, more "dialogue and dialectic" both between Weiler and the authors and among the authors themselves would have been fascinating.

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What are some of the broad takeaways from *International Legal Theory*?

First, the self-congratulatory view of international law as a "heroic agent of progress, security, order, human rights and democracy" (Gathii, p. 162, quoting Anne Orford), once common among international lawyers, has few defenders among the authors of *International Legal Theory*. Not surprisingly, the critical theories discussed in the book see international law in negative terms, as a system in which "domination and repression are a central feature" (Gathii, p. 154); with "racist and colonial legacies" (Engle, Nesiah, and Otto, p. 195); which is "long complicit" in problems such as "the continuing immiseration of the many for the benefit of the few" and "our seemingly incessant march towards an ever-more depleted and destructive climate" (Johns, p. 148). Against these broadsides, the other authors say little in explicit defense of international law. Most take no position one way or the other about whether the overall impact of international law has been positive or negative. Global constitutionalism—one of the relatively few theoretical approaches that is clearly "pro" international law —is dismissed by its exponent, Jan Klabbers, as a theory "with little to recommend it" (p. 238), which was simply "a Western liberal political theory presented as of global validity" (p. 236) and "left the highly exploitative economy . . . untouched—or even facilitated its further development by its (ordo)liberal focus" (p. 239). Another potential upholder of international law—positivism—is deconstructed by Jean d'Aspremont, as discussed earlier, and portrayed as nothing more than a straw person constructed by international lawyers to have something to argue against.[5] The only apparent proponent of the heroic view of international law is Harold Koh, who clearly believes that international law is a good thing and praises transnational legal process scholars who made "normative commitments to upholding human rights and the rule of law against overreaching by any powerful nation, including the United States" (p. 118).[6] Abi-Saab also questions the critical perspective, cautioning: "At the end of the day, criticism without constructive alternatives leads to the destruction of the rule of law. To my mind a defective but perfectible law is vastly preferable to no law at all" (p. 328).

Second, history is clearly "in." More than half of the chapters—including those on legal realism, transnational legal process, critical perspectives, TWAIL, global administrative law, constitutionalism, global legal pluralism, and sociological approaches—take a genealogical approach, identifying the roots and tracing the development of their respective theories.

Third, despite the diversity of perspectives represented in *International Legal Theories*, several elements are widely shared, including:

- *A more expansive view of international law*. For example, global legal pluralism "direct[s] our attention to the multiplicity of institutional normative orders relevant to fields of social action" (p. 248).[7] Global administrative law is interested in the role of independent experts, informal and private norms, transnational networks, and other types of "new global rulers" (p. 209). The new legal realists, Shaffer writes, "show how global norm-making becomes effective through recursive processes involving hard and soft law, and state and non-state actors" (p. 100). Indeed, as d'Aspremont acknowledges, "[e]ven . . . self-declared international legal positivists have shown amenability to the idea that

[5] See, for example, d'Aspremont's claims that international legal positivism "constitutes one of these central anti-models around which an argumentative community like international law articulates itself" (p. 75), that "international legal positivism plays the role of the anti-model that is necessary for theoretical debates to sustain their adversarial thrust" (p. 76), or that international legal positivism is "the adversarial construction without which the discipline could not construct itself" (p. 77).

[6] In a similar vein, Koh argues for the transnational legal processes of interaction, interpretation, and internalization as the "best strategies to promote compliance" with international law (p. 120) and advocates that states pursue their national interests using "international law as smart power" (p. 121).

[7] As Krisch argues: "Formal international law is . . . only one part of the picture, and retaining it as the sole focus of attention . . . would mean losing sight of its place in the broader complex of postnational, or global, law" (p. 248).

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international law can . . . emanate from non-state entities" (p. 70).

- *A focus on process*. "Law is more than anything, a process without a clear beginning and end" (p. 252). The sentence was written by Nico Krisch in discussing global legal pluralism, but it equally well might have been written by a proponent of the original or "new" New Haven School or by a legal realist. For example, Greg Shaffer, writes: "International law forms part of a recursive process in which actors and institutions interact at different levels of social organization, propagating, resisting, and adapting norms over time, shaping their meaning and practice and giving rise to the settlement and unsettlement of the norms" (p. 95).
- *A concern with the persistence of bias in international law*. Critical perspectives are best known for their focus on bias. But their concern about bias is echoed by many other writers, including Shaffer (p. 96), Klabbers (p. 236), Venzke (pp. 306–07), Abi-Saab (p. 328), Hirsch (p. 419), and, in a different sense, Von Aaken.

Fourth, as the identification of common themes suggests, several of the theories have close interconnections, which the book might have done more to tease out. *International Legal Theories* groups its theories into four categories: traditional, critical, post-Cold War, and interdisciplinary. This organization highlights the interconnections between CILT, TWAIL, and feminist approaches. But it does not sufficiently highlight the close relationships between legal realism, transnational legal process, global legal pluralism, and, to some degree, global administrative law and Venzke's chapter on practice approaches.[8] These interconnections raise the question, could legal realism and global legal pluralism—the two approaches with the broadest reach—be combined and, if so, do they also subsume transnational legal process and global administrative law? Shaffer gives a qualified yes, when he writes, "Normative-oriented international law theories—such as those of international constitutionalism, global administrative law, and global legal pluralism—can thus complement legal realism, but only to the extent that they retain a pragmatist orientation that builds from experience and focuses on consequences" (p. 99).

Fifth, even theories that are not interconnected could be seen as complementary rather than mutually exclusive. To the extent they address different types of questions, this is clearly true. Positivism addresses ontological issues about the nature of law, while legal realism is primarily explanatory in its orientation. So one can be a legal realist and a positivist (as, in fact, many American legal realists were). But even when different approaches seek to address the same question, the answer one approach gives could complement or incorporate that of another. In explaining the legal system, for example, legal realism can and should incorporate insights from the sociological, rational, or behavioral perspectives, as Shaffer recognizes (p. 84).[9] As Georges Abi-Saab observes, "[M]any of these new schools hold some grain of truth. . . . [T]hey are a bit like the fable of the blind men touching different parts of the elephant. The new schools illuminate some aspect of the legal landscape, but they also ignore other important parts" (p. 328).

The audience of *International Legal Theory* will likely be academics. Should the book also be of interest to practitioners? What are the implications, if any, for the practice of international law of the various theories or approaches it addresses?

It has become something of a cliché to say that "all practice unavoidably rests upon theoretical presuppositions, even if they are implicit or unacknowledged" (Dunoff and Pollack, p. 6). But the

[8] For example, Venzke sounds very much like a legal realist when he writes: "Choices for one interpretative stance rather than another are frequently subordinate to the overriding goal of defending a certain claim with the maximum available plausibility in the eyes of the relevant audience" (p. 314). Or when he states: "Interpreters are invested in a struggle in which they seek to align the law with their interests or convictions. They seek to pull the law onto their side" (p. 315).

[9] According to Shaffer, the new legal realism "attends empirically and pragmatically to external political, economic, social and cultural factors that shape law as a going institution" (p. 84).

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fact that all practice implicitly or explicitly relies on theory does not imply that all theory is equally relevant to practice. Nor does it imply that international practitioners need a deep understanding of theory to be excellent at their craft. Georges Abi-Saab notes that, although he and Prosper Weil had very different theories of law (Abi-Saab a sociological theory and Weil a positivist one), Abi-Saab generally agreed with what Weil wrote in investment arbitration awards (p. 333). As Ingo Venzke observes, practitioners may actually be more effective if they lack any consistent theory, since in one case, they may need to rely on a strict reading of sources doctrine to convince their audience, reflecting a formalist outlook, and in another case, on arguments about justice, reflecting a natural law mindset (pp. 313–14).

Many of the contributors to *International Legal Theories* show little interest in legal doctrine as such, which they see as indeterminate and lacking in explanatory power. But the theories most likely to be relevant to legal practitioners are, in fact, mid- or lower-level theories about legal doctrine—theories like Edward Levi's *An Introduction to Legal Reasoning*[10]—since doctrinal arguments still occupy much of legal practice. As Abi-Saab emphasizes, "to be effective, the first task [of the legal practitioner] is to master the machine. . . . [U]se your technique properly. You are credible and respected to the extent that you are a good professional who knows what he is speaking about" (p. 344). He says of judges that what they say "must be reasoned, reached on the basis of certain generally perceived and shared premises" (p. 342), and the same presumably is true of lawyers more generally if they wish to be persuasive. They must master the machine; they must know how to make legal, doctrinal arguments. Greg Shaffer's account of the new legal realism is one of the few chapters to acknowledge this need to "take doctrine seriously" (p. 98)[11] and not "cut out an understanding of interpretations as a practice of normative argument" (Venzke, p. 318).

Of course, legal practice involves much more than doctrine, as legal realism emphasizes, and many international legal theories speak to these other elements. For example, legal realism highlights the importance of empiricism and pragmatism. Transnational legal process highlights the various strategies that legal practitioners can use to promote the adoption and implementation of norms. Global legal pluralism highlights that legal practitioners need to consider in their work a much wider range of processes and norms than the rules adopted through formal inter-governmental institutions. And rationalism and behavioralism can help legal practitioners design legal rules and institutions likely to be effective in influencing behavior and achieving desired outcomes.

Finally, for practitioners interested in legal reform, critical international legal theory, TWAIL, feminist approaches, and legal realism, to name a few, can help practitioners diagnose deeper structural problems, in order to make possible reform. Before you can slay the dragon, Oliver Wendell Holmes famously said, you must first get it "out of his cave on to the plain and in the daylight" so you can "count his teeth and claws."[12] But this critical work, for which theory can be very useful, must go together with traditional doctrinal work to be effective. As Abi-Saab cautions, "The more radical your [proposal], the more exacting your duty . . . to show that it can work and be integrated within the parameters of the international legal system" (p. 336).

In his questions to Fleur Johns, Weiler asks her to give a "taste" of critical international legal theory "in action"; what it would say about substantive international law questions regarding the law of the sea, armed conflict, the environment, and human rights (p. 383). Regrettably, *International Legal Theories* does not do more to respond to Weiler's question: that is, to illustrate for

[10] Edward H. Levi, An Introduction to Legal Reasoning (1949).

[11] Anne van Aaken also says that a behavioralist approach "does not exclude normative, doctrinal or analytical reasoning" (p. 264).

[12] Oliver Wendell Holmes, Jr., *The Path of the Law,* 10 Harv. L. Rev. 457, 469 (1897).

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legal practitioners the value-added of theory for thinking through both traditional topics like the ones Weiler identifies, as well as new ones like autonomous weapons systems or the law of cyberspace.

Nevertheless, *International Legal Theory* has much to offer practitioners and academics alike. While perhaps falling short of its larger aims, it succeeds admirably in giving readers a sense of the richness and diversity of contemporary international legal theory.

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Jan Klabbers, *Virtue in Global Governance: Judgment and Discretion*. Cambridge, UK: Cambridge University Press, 2022. Pp. xvi, 309. Index.
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In a famous passage in *Perpetual Peace*, Kant claimed that even a race of devils could live in a stable, peaceful, and law-abiding state, provided it had a constitution that checked each devil's unbridled self-interest by the self-interest of the other devils. As rational calculators, they understand the utility of general laws; as devils, they secretly intend to exempt themselves whenever they can get away with it. Hence the need to pit devil against devil to keep each other in check. This, Kant tells us, is a purely technical problem, and rational devils will solve it.[1] To international relations (IR) scholars, Kant's conceit will sound familiar or even obvious. IR realists who model state behavior through rational choice theory treat states as if they are Kantian devils. Balance-of-power politics offers a concrete example of the diabolical solution of keeping the peace by pitting interest against interest. Moral virtue has nothing to do with it, and to IR realists the vocabulary of virtue has no place in political science.

Like IR realists, international lawyers seldom talk about virtue. Virtue-talk sounds soft and squishy and quaint—suitable for press releases and high-sounding preambles, but not for serious work by serious people. "If you want to know the law and nothing else," Oliver Wendell Holmes famously wrote, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."[2] Holmes's bad man is a Kantian devil, and lawyers are by and large instinctive Holmesians. Lawyers traffic in legal rules and their material consequences, not in Sunday school lessons on virtue and vice.

But can we really expect a lawful international order from a race of devils or bad men? Kant to the contrary, it seems unlikely. Perpetually policing all the other devils is too costly for a devil to do on his own; even devils need allies to share the burdens, agents to whom they can delegate monitoring and enforcement, and leaders to coordinate the efforts. In short, Devil World needs guardians, but who guards the guardians? If it is other devils, their problem has not been solved; it has only been replicated. Somewhere, somehow, the devils need to find allies, agents, and leaders who are not devils—guardians with virtue. A world without virtue is a world without trust, and a world without trust is doomed.

Lawyers steeped in the "bad man" theory should absorb the same lesson. Even Holmes insisted that practicing law "tends to make good citizens and good men"; if it did not, clients could never trust their lawyers.[3] Holmes's own ethical system, in judging and in life, extols

* Pursuant to the *Journal's* recusal policies, Professor Jeffrey L. Dunoff took no part in this review. The review was commissioned and edited by Professor Monica Hakimi, Co-Editor in Chief of the *Journal*.

[1] Immanuel Kant, *Toward Perpetual Peace: A Philosophical Project* (1795), *in* IMMANUEL KANT, PRACTICAL PHILOSOPHY 335, *8:366 (Mary J. Gregor ed. and trans., 1996). Kantian devils are not driven by hate like Milton's Lucifer; they are driven solely by self-interest.

[2] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897).

[3] *Id.* On Holmes's conception of duty and virtue, see David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 449 (1994).

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