

International Law in the Curriculum, 2 Pace Yearbook of International Law 83 (1990), by Anthony D'Amato [FNa] Code A90a

Students coming to law school are increasingly demanding courses in international law. Almost perversely, law schools are cutting back on such courses. Why has this curricular paradox come about? And what should be done about it?

I.

Parochialism and myopia are the reasons often given to explain why law schools are losing interest in international law offerings. While I disagree, FN1 the situation today is certainly far worse for international law than it was in the decade following World War II. At that time there was an unprecedented surge in interest in international law, both in undergraduate and law schools. Then, the nation's preoccupation with isolation had been rudely shattered by the war, and the Ford Foundation and other organizations were pouring money into international education, while the Marshall Plan was pouring money into war torn Europe. Many of the great names in international law were young teachers in the years between 1945 and 1955. Yet, I do not attribute the gradual falling off of interest in international law since those days to a resurgence of isolationist thinking.

[p.84] Rather, I think the root of the present curricular paradox lies in the relative failure of international law since 1945, to contribute to the intellectual development of other law school subjects.

Compare this failure to the history of criminal law. When I went to law school from 1958 to 1961, criminal law was extremely unpopular. No one wanted to take it and no one wanted to teach it. The Warren Court changed this attitude in the next decade. It gave the same boost to criminal law in the 1960's, that Senator Vanderberg and Harry S. Truman gave to international law in the 1950's. The difference was that criminal law went onto become an important source of contribution to general legal theory and analysis, and it has remained so up to the present. Why did international law not make a comparable contribution toward the jurisprudence of the law? There are several reasons or perhaps excuses for this. First, the one theoretical approach to international law that was attempted on a grand scale, Myres McDougal's policy-oriented jurisprudence, was not inherently strong enough to make an impact upon other fields.FN2 This approach was based on Harold Lasswell's contribution to political science in the 1930's and 1940's, a movement which exhausted its welcome in its own discipline by the 1950's. Carried over to international law by Professor McDougal, the Lasswellian analysis failed to convince other international lawyers. The net result, despite some exceptional individual work by Professor McDougal and associates, was to tar international law with the brush of "that policy-oriented stuff that isn't really law." Second, international law is intrinsically difficult to theorize about. Lacking courts of compulsory jurisdiction and centralized legislation, it is a kind of law that must be inferred from the accommodations that sovereign States make with each other in their daily interactions. In the 1960's, I was engrossed in research on the basic generating mechanism of international law, international custom. I was appalled to find enormous holes and startling inconsistencies in the best writings addressing this topic. Manley Hudson, to take the most prominent example, said that a customary rule of international law is one involving a [page 85] "conception that

the practice [of a number of States] is required by, or consistent with, prevailing international law." [FN3] This key phrase conveys the enormity of the problem, for we might well ask whose "conception" counts? If it is the state's own conception, how can we psychoanalyze a "state"? Most critically, how can a rule of custom ever get started? If a condition of the formation of a rule of custom is that it be consistent with prevailing international law, then no international law could ever have come into existence in the first place. Even if we posit rule creation of some sort, Hudson's formula cannot account for changes in the rules. All practices inconsistent with prevailing law must be illegal and cannot generate custom. Thus, the best statement of customary law was hopelessly incoherent.

Finally, apart from intrinsic difficulty, any resolution of how international law is generated does not transfer readily to other courses in the curriculum, since those courses by and large do not have to face the problem of law generation. That problem is solved for them by courts and legislatures, though some resonances of the international law creation problem may be found in the law merchant. The cognate basic issues in international law (i.e. what weight should be given to U.N. resolutions, unilateral declarations by states, unratified treaties, etc.) also do not have ready analogues in domestic law.

Professors of domestic law subjects at this point might say: "Well, the problem you are having in international law is simply that you are trying to make law out of something that is not law." But I think they would be profoundly mistaken. In the last few years, we have become increasingly aware that "law" does not consist of why a judge makes a decision but that he makes a decision. The decision is less important for what it says than for what it does, that is to say, we pay attention to decisions because they are enforced. Decisions are not enforced because the state has a monopoly on power, but because they attempt to regularize existing patterns of behavior. Moreover, judicial and administrative decisions comprise only a minute fraction of the transactions and interactions of society. Therefore, we have to look elsewhere to find the mechanism that deserves the name of "law."

[page 86]Where we must look, is to socially reinforced patterns of expectations of interpersonal behavior. "Law" really consists of our inductive articulation of these regularities of social interactions. Courts only exist to monitor and correct unexpected deviations from expected patterns of behavior. The legislatures exist, for the most part, only to ratify those patterns of behavior. Although, occasionally, legislation attempts to push people into new behavioral patterns.

Viewed in this manner, international law is no less "law" than domestic law, provided, of course, that there are regularly reinforced expectations of interstate behavior. While there are few courts on the international scene to correct these deviations from expected interstate behavior, the general regularity of behavior does not require many courts to correct these deviations. When deviations do occur, states themselves assume a corrective role. There are many countermeasures that one state can institute against a legally deviant state. FN4 These are more or less regularized by community expectations as to the appropriateness of countermeasures in light of the initial deviation FN5 Louis Henkin's much-quoted assessment of the efficacy of international law, " Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time," FN6 is a

statement that could not be made if there was not a great deal of perceived regularity in interstate interactions. FN7

Even if these arguments are convincing however, professors of domestic law may nevertheless see no reason to give international law a curricular push. At best they might say that international law has some claim to representation in the curriculum [page 87] but that is as far as it goes. Hence, we have to consider what international law can do from now on to earn its keep.

II.

To indicate what the study of international law might contribute to the central questions facing legal scholarship today, requires identification of those questions. They are not something I can attempt to defend, much less prove, in this limited space. Hence, I will have to ask the reader's indulgence in allowing me to make some bold and bald assertions about the central problem of legal scholarship. These assertions may or may not resonate with the reader's own perceptions.

It seems that the huge task facing serious academic researchers today is trying to find out what "law" is and how it works. This is not the same as the two hundred year old jurisprudential mission to define law. We now know that any such definition begs the question and can spin out an endless stream of definition-dependent theories of law. Using interdisciplinary methodologies, this task may take decades. Instead, the present task is to investigate what law is and does. The convergence of interdisciplinary work is exciting, and perhaps some good answers will be forthcoming sooner than we think.

The investigation of what law is and how it works is far from being a matter of purely philosophical interest. Rather, it affects how we argue cases, what we expect judges to do, how we should select judges and juries, and indeed all the critical questions that academic lawyers should be asking about the way law works in practice.

Where we are now is en route to building a general consensus that "law" itself is mysterious in a way that has outrun the ability of *legal theory* to explain. All we really can be sure of in a legal system, is that people in society behave in generally regular and predictable ways, and that people generally have reasonable expectations about the behavior of others. Whether all the "law" in statutes and cases is a pale reflection of these regularities of behavior, or in some way helps bring them about, are the consuming inquiries of our time.

[page 88]Deconstructionists FN8 are helping us unpack the bundle of ethereal notions that make up what might be called the microlevel in torts, contracts, criminal law and similar areas. Whether the deconstructionists are right or not, is less important at this stage than the light they are throwing upon our fundamental notion of what law is.

International law can add to this vital inquiry at the macrolevel. Beyond the investigation or deconstruction of law is the investigation or deconstruction of government and state. A state is a legal entity. It differs from the trust or corporation in that it purports to create, change, or abrogate the law itself, including the law that defines and constitutes the state. At the state (or

governmental) level, law is perhaps self-referential. Attempting to unpack it is a formidable task indeed.

It might be said that we should first understand law at the microlevel before attempting to construct or deconstruct states and governments. But, the history of thought does not work that way. Sometimes an attack on the larger problem brings insights into the smaller ones. In any event, our understanding of law can never be complete unless we also understand the apparent macrosource of that law, the state, in a way that does not involve the implicit use of the term law in explaining what the state is.

International law has been confronted with this very problem since the Nuremberg trials following World War II. Those trials caused a paradigm shift in international law that disrupted the fundamental viewpoint of the preceding two centuries. More importantly for present purposes, they have presented international lawyers with a challenge that necessitates reflection on the macro issue identified above.

Prior to Nuremberg, the reigning conception of international [page 89] law was, as its name implies, an inter-nation sort of law. FN9 Nations were simultaneously the creators and subjects of the inter-nation law. Jeremy Bentham coined the term "international law" in 1789 to reflect this state based concept. FN10 Hans Kelsen regarded international law as the authorizing law for all the individual state laws. FN11

The primary real-world consequence of these theories was to help convince observers that what governments did to their own citizens did not concern people in other countries. Positivist international law thinking disabled, people from condemning Stalin's vast genocide of the 1930's. We had no legal "right" to complain about what the dictator did within his own borders to his own people. Unfortunately, legal blinders promote moral blinders; Hitler's holocaust was almost as invisible as Stalin's. But Nuremberg changed everything. Government leaders were tried and sentenced for crimes against humanity. The "human rights revolution" had commenced.

When I was in law school, the faculty, almost without exception, regarded the Nuremberg trials as a political aberration, as not "legal." Thirty years later, the legal culture has changed. Nuremberg stands for the primacy, albeit in the limited areas of warfare and genocide, of individual rights over the state's. Human rights as a subject has an acknowledged place on the legal map. However, we are still in the uncomfortable position of attempting to accommodate human rights in a statist setting. No figure personifies this compromise better than Louis Henkin.

His writings FN12 and the recent Restatement of Foreign Relations Law for which he was the rapporteur, FN13 for all their rhetorical insistence upon the fundamentality of human rights, makes [page 90] those rights derivative from states' rights. Not only are we left with the muddle of trying to figure out what a state's rights can be, FN14 but also with the uneasy feeling that human beings can be bargained away in the diplomatic accommodations among states. These accommodations lie at the heart of Henkin's conception of international law. International legal scholarship is presently buffeted between those who cling to an abstract

formalistic states' rights position and those who are trying to unpack that concept by specific examples. Recently Kirsten Engal and I wrote an article whose reception brought home this clash to US. FN15 Our thesis was that a developed nation that exports nuclear power plant technology to an underdeveloped nation may be liable to the people of the importer nation. Liability would attach if negligence in the manufacture of that technology, or specifications that resulted in an inherently dangerous plant (i.e. one which would not have been allowed to be built in the exporter's own country), resulted in a catastrophic nuclear accident in the importer's country. We proposed this theory of liability even where absolute waivers from all parties, including the manufacturer, the exporting nation and the importing nation, were obtained. We postulated that the people of the importing nation have a claim under international law against the exporting nation.

This thesis was apparently too far-out for many international lawyers. Comments I have received suggest that one cannot possibly make out a legal theory that could override the explicit waiver of the importing government. It seems, one must accept that the importing government speaks for its people. My only rejoinder to those comments, apart from the legal arguments we make in the Article itself, is that the commentators are not taking the human rights revolution seriously enough. Existentially, our scenario is that a nuclear power plant melts down and thousands of people are irradiated. The cause of this meltdown is a combination of greed and negligence on the part of the manufacturer, the exporting state, and the importing state. Has Nuremberg not taught us to unravel the legal strands [Page 91] that weave a cloak of immunity over the acts of these corporations and "sovereigns"?

That, of course, is the question that currently faces us. I think that international law will be increasingly challenged with hypothetical questions, such as those we posed in the article on the exportation of nuclear power technology, and even more so with real questions coming daily from the infinite variety of transnational contacts.¹⁶ Legal doctrine will continue for a time, to fight a holding action against these challenges. Sooner or later, however, the reified concepts of law will begin to unravel and we will gain new insights, and hopefully an expanded moral sense of concern for people in other countries, into the mechanisms of that complex pattern of behavior that we simplistically call "law."

III.

International law as a discipline is intellectually exciting and challenging. As a law school subject, it is our window on the world. Yet, such considerations will not move law school curriculum committees to add international law courses. I know, I've served on such committees. They stir up a lot of rhetoric while leaving the curriculum pretty much the way it was. The reason is simple: any curricular change is an invasion of some professor's protected turf.

If there is going to be change, it has to come from student demand. To be most effective, students should demand international law courses not just because of subject matter, but also because of the light that they throw upon the study of "law" in general. Already, there is considerable demand for courses in international law. I hope in the near future there will be a turnaround in law school curricular decisions.

Footnotes

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FN1 But, Professor David Kennedy might agree. He refers to the "tragic voice of post-war [Vietnam war] public law liberalism" in Kennedy, *A New Stream of International Law Scholarship*, 7 WISC. INT'L L. J. 1, 2 (1988).

FN2 Yet in a curious way McDougal was the first international deconstructionist. "Law" to him was simply a way of presenting alternative considerations to a policy-maker.

FN3 Quoted in A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 7 (1971).

FN4 For example, a state can: Recall an ambassador for lengthy consultation; refuse to facilitate negotiations on other issues; make overtures to the other state's enemies; suspend economic assistance; denounce a treaty; harass the other state's tourists; interfere with the other state's shipping in the name of public health or safety; confiscate the other state's bank deposits; and take numerous military, paramilitary, covert and overt actions against the other state's territory, vessels or possessions.

FN5 For a more general discussion, see A. D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECT 13-25 (1987).

FN6 L. HENKIN, HOW NATIONS BEHAVE 47 (2d ed. 1979).

FN7 One does not have to agree with Professor Henkin to note that his statement is possible only as to a very low-entropic system. One may believe, as I do, that nations do not "observe" principles of international law, but rather we are the "observers" who induce such principles from our perceptions of the regularities of interstate behavior.

FN8 Stanley Fish is a prominent example of a deconstructionist. See, e.g., FISH, IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES (1980); Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983); Fish, *Fish v. Fiss*, 36 STAN L. REV. 1325 (1984); Fish, *Anti-Professionalism*, 7 CARD. L. REV. 645 (1986); Fish, *Consequences*, in AGAINST THEORY (W. Mitchell ed. 1985); Fish, *Dennis Martinez and the Uses of Theory*, 96 YALE L.J. 1773 (1987); Fish, *Still Wrong After All These Years*, 6 LAW & PHIL. 401 (1987); Fish, *Don't Know Much about the Middle Ages: Posner on Law and Literature*, 97 YALE L.J. 777 (1988).

FN9 See generally, L. OPPENHEIM, *INTERNATIONAL LAW* (A. McNair 4th ed. 1926). This most influential book, which embodied the positivist state based concept of international law, extended into eight editions.

FN10 See generally, J. Bentham, *An Introduction to the Principles of Morals and Legislation* 26 n.1 in *A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* (2d ed. Oxford 1948) (1st ed. Oxford 1789); see also Janis, "Jeremy Bentham and the Fashioning of "International Law", 78 *AM. J. INT'L L.* 405 (1984).

FN11 See, H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 328-88 (A. Wedberg trans. 1949).

FN12 See, e.g., L. HENKIN, *THE RIGHTS OF MAN TODAY* (1978).

FN13 *RESTATEMENT (THIRD) FOREIGN RELATIONS LAW* (1987).

FN14 Is the state the source of the right, or vice versa, and how can anyone tell?

FN15 D'Amato & Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 *VA. L. REV.* 1011 (1988).

FN16 Even the dissolving notion of "human rights" is under fire as species chauvinistic (consider the rights of whales and other sentient creatures) and myopic (consider the rights of future generations to a livable ecosphere). These challenges to international law cannot be postponed while the discipline attempts to unpack the idea of governments and states.