

**LUNCHEON ADDRESS**  
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**The Closing of the American Mind**

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**I. Introduction**

This talk appropriates the title of Allan Bloom's bestseller of the late 1980s, an outgrowth of then fashionable U.S. "culture wars."<sup>2</sup> As some of you may recall, Bloom's targets were the sixties reforms within universities, especially the demise of the Great Books Western canon, and the rise of fashionable critiques (feminism, racism) leading to other bad "isms," such as nihilism, historicism, deconstructionism, and cultural relativism. Bloom argued that the U.S. mind was closing due to the leveling rhetoric of "second rate" philosophers like John Rawls, because we had neglected European culture, because our minorities no longer wanted to assimilate, and because we no longer revered our Constitution and the values of our Founders. His recipe for opening young minds included study of Immanuel Kant's categorical imperative, Greek classics, and the Bible as sacred text. His book was nostalgic for the golden age of American private elite universities, namely the 1950s -- when Cold War competitiveness gave direction to a liberal education, when we recognized "evil" and dared call it such, and when few were afraid of defending American values of freedom and equality. Bloom's book ended with a frank plea for American stewardship of the world: "This is the American moment in world history, the one for which we shall forever be

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2 Allan Bloom, *The Closing of the American Mind* (1987).

judged. Just as in politics the responsibility for the fate of freedom in the world has devolved upon our regime . . . .”<sup>3</sup>

The current Bush Administration and many of our most prominent international lawyers appear to have taken Bloom’s lessons to heart. Especially after 9/11, several of the most highly qualified publicists of international law on my side of the border, along with others in positions of great power within the Washington Beltway, are hastily retreating from all of Bloom’s dreaded “isms.” Spurred on by a new, intensely patriotic, and a not-so-cold new war against “evil” (whether or not as part of an axis), many of us make no apology for new interpretations of law that defend, and promote the spreading of, frankly American values. Kant is back, at least in liberal circles and on the pages of our law reviews.<sup>4</sup> The Administration, and its lawyers, are bent on reshaping the World, beginning with the Middle East, and on spreading Euro-American values, and perhaps the Western canon and the U.S. Constitution, to those who have been unfairly deprived of such things. As was suggested by initial loose talk of a “crusade” against Islam, there even has been, particularly within the hard right wing of the Republican party, an undertone of religious war and not merely of a “clash of civilizations.”<sup>5</sup> Post-9/11, it is Americans’ turn to proselytize, to bring Judeo-Christian values to heathen capable of inflicting great harm in the misbegotten belief of a reward of compliant virgins in the hereafter. The prevailing Washington Consensus is that, as Bloom suggested, this is the unipolar American moment to remake the world in our image, starting with the Middle East -- for the security of our nation and the benefit of the world.<sup>6</sup> That some Europeans and others around the world fail to understand the inherent benevolence of our hegemony (or even that we are on the same side)

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3 Bloom, *supra* note 2, at 382.

4 Indeed, even the previously maligned distinction between “civilized” and “uncivilized” is making a comeback. See e.g., David P. Fidler, *The Return of the Standard of Civilization*, 2 Chi. J. Int’l L. 137 (2001); David Fidler, *A Kinder, Gentler System of Capitulations? International Law, Structural Adjustment Policies, and the Standard of Liberal, Globalized Civilization*, 35 Tx. Int’l L. J. 387 (2000).

5 For views reminiscent of the clash of civilizations thesis among U.S. international lawyers, see W. Michael Reisman, *In Defense of World Public Order*, 95 AJIL 833 (2001).

6 See, e.g., Madeline K. Albright, *Bridges, Bombs, or Bluster?*, 82 Foreign Affairs 2, at 10 (September/October 2003)(describing the Bush Administration’s goals for Iraq and the Middle East).

is regarded as merely a problem that can be overcome through the application of proper Madison Avenue/public relations techniques.<sup>7</sup>

The premise of my talk, as you might guess, is that the closing of minds is now occurring precisely because we appear to be following, perhaps superficially, Bloom's prescriptions. Whether Bloom would have approved of where we are heading in foreign policy and whether he would have regarded (as I do) the current Washington consensus as reflecting a fundamental misreading of Kant, are not my concerns here.<sup>8</sup> I am interested here in laying out some of the legal cleavages now dividing the U.S. from the rest and possible explanations for them.

One final word by way of introduction. Bloom, not particularly sensitive to the views of others who live in this hemisphere (or minorities who refuse to be assimilated), simply assumed that "American" covers only the United States. In stealing his title, I have also replicated (unfortunately) his nationalistic arrogance. I briefly considered altering the title to delimit the domain to the United States mind but ultimately decided to leave it as is, since ambiguity has its purposes. I hope to seek your guidance during the question period as to whether the title extends beyond the U.S. mind, for example.

To much of the world, and not merely to legal elites in "old Europe", the mind of United States internationalists seems to be closing. This view was manifest in the General Assembly's frosty reception to the President Bush's address to that body last month when he asserted, to stony silence (and undoubtedly circumspect derision), that the United States' action in Iraq was undertaken to buttress the credibility of the UN.

As we all know, Operation Iraqi Freedom is the most prominent divisive issue between international lawyers, particularly across the Atlantic. While outside of the United States prominent international lawyers (especially but

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7 See, e.g., Council on Foreign Relations, *Finding America's Voice: A Strategy for Reinvigorating U.S. Public Diplomacy* (2003) (recommending greater attention to "public diplomacy" to counter growing anti-American sentiments around the world).

8 For an argument that some of today's neo-Kantians, on both sides of the Atlantic, may be misreading him, see Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersman*, 13 Eur. J. Int'l L. 815 (2002).

not solely in Europe) were virtually unanimously of the view that the Iraqi war was manifestly illegal and unwise,<sup>9</sup> a number of the most prominent U.S. international lawyers have defended it: from the President of the ASIL, Anne-Marie Slaughter (who has suggested that while the war might be illegal, it might be legitimate if WMDs were found, the Iraqi people welcomed us, and the U.S. turned over significant post-war responsibilities to the UN) to far more forceful defenses of the operation and the cause by Michael Reisman, John Yoo, Ruth Wedgwood, Michael Glennon, and even Canadians in exile like Rob Howse.<sup>10</sup> While the majority of U.S. international lawyers probably opposed the war, with some prominent exceptions (like another Canadian exile Thomas Franck),<sup>11</sup> many were silent or qualified their criticism by suggesting that a number of high level U.S. government officials had merely confused the issue by enumerating too many legally questionable justifications. For some, such as my colleague Richard Gardner, the war was legal because other Security Council members had failed to respond to Iraq's material breach of the Council's dictates, but

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9 See, e.g., *Letter to the Editor*, *Guardian*, Mar. 7, 2003. In this open letter to 10 Downing Street, 16 prominent international law professors, including all but one of those presently teaching at the Universities of Oxford, Cambridge, the London School of Economics, and University College of London, argued that the use of military force against Iraq in the absence of explicit Security Council authorization would violate international law, including the law of the UN Charter. See also Canadian Law Professors, *Military Action In Iraq Without Security Council Authorization Would Be Illegal*, 29 *Canadian Council on International Law Bulletin* (Winter/Spring 2003), at <http://www.ccil-ccdi.ca/bulletin/lawprofs.html> (bearing 31 signatures from across Canada); Communiqué, Société Québécoise de droit international <http://www.sqdi.org/communiqué/archive/04042003/petition.html>. This is not to suggest that all international lawyers everywhere opposed the war. See, e.g., Ed Morgan, *No proof' needed to go after Iraq*, *National Post*, Oct. 24, 2002, at A22; Ed Morgan, *Use of force against Iraq is legal*, *National Post*, Mar. 19, 2003, at A20.

10 See, e.g., Anne-Marie Slaughter, *Good Reasons For Going Around the UN*, *N.Y. Times*, Mar. 18, 2003, available at 2003 WL 17089910; Anne-Marie Slaughter, *A Chance to Reshape the U.N.*, *Wash. Post*, Apr. 13, 2003, available at 2003 WL 18817152; Michael J. Glennon, *Why the Security Council Failed*, 82 *Foreign Affairs* 16 (May/June 2003); Michael Reisman, *Assessing Claims to Revise the Laws of War*, 97 *AJIL* 82 (2003); John Yoo, *International Law and the War in Iraq*, 97 *AJIL* 563 (2003); Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 *AJIL* 576 (2003); Robert Howse, *The Road to Baghdad is Paved with Good Intentions*, 13 *Eur. J. Int'l L.* 89 (2002)

11 See Thomas M. Franck, *What Happens Now? The United Nations After Iraq*, 97 *AJIL* 607 (2003).

not because of the newly minted doctrine of preemptive self defense.<sup>12</sup> For others, such as my colleague Lori Damrosch and prominent public intellectuals like Canadian native Michael Ignatieff, the war was a legitimate (and therefore perhaps lawful) extension of humanitarian intervention à la Kosovo, despite the Council's lack of explicit approval.<sup>13</sup> It should be lawful to topple a proven genocidal regime engaged in on-going serious human rights abuses (if not on-going genocide), they argue, when the Council fails to act decisively in response to its own determinations of threat to the international peace and when a government has materially breached the Council's innumerable resolutions. International lawyers elsewhere, especially in Europe, not terribly comfortable with the Kosovo intervention to begin with, were more apt to distinguish that case or to suggest that in hindsight, going around the Council, even for humanitarian purposes, was not a good idea.<sup>14</sup>

12 Richard N. Gardner, *Neither Bush nor the "Jurisprudes"*, 97 AJIL 589, 590 (2003)(urging a reinterpretation of international law that among other things, would permit armed force even without Security Council approval "to destroy terrorist groups operating on the territory of other members when those other members fail to discharge their international law obligations to suppress them").

13 See, e.g., John Geddes, *Smart Guy, Eh?*, Maclean's, 20, at 21-23, June 23, 2003 (quoting Michael Ignatieff's views). Lori Damrosch's views were presented at fora in Columbia Law School and confirmed in conversations with the author. See also Lori F. Damrosch, *The Permanent Five as Enforcers of Controls on Weapons of Mass Destruction: Building on the Iraq Precedent?*, 13 Eur. J. Int'l L. 305 (2002)(arguing that restraining weapons of mass destruction is "not simply a policy preference but a legal obligation rooted in widely-ratified treaties and general international law"). Interestingly enough, this humanitarian justification for Operation Iraqi Freedom has not been advanced by the Administration's lawyers, perhaps because it raises questions as to the selectivity with which such human rights concerns have been pressed by this Administration (as well as prior ones) as well as difficult questions as to which countries may have been complicit in the genocide of Iraq's Kurds. Cf. William H. Taft IV and Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AJIL 557 (2003)(offering a more limited legal justification for Operation Iraqi Freedom).

14 For documentation of the divide, see, e.g., Christine Gray, *From Unity to Polarization: International Law and the Use of Force against Iraq*, 12 Eur. J. Int'l L. 1 (2002); Nico Krisch, *Review Essay: Legality, Morality and the Dilemma of Humanitarian Intervention after Kosovo*, 13 Eur. J. Int'l L. 323 (2002). For examples of views outside the United States critical of current U.S. government positions on the use of force, see, e.g., Jutta Brunnée, *How to restore global law*, Toronto Star, Apr. 14, 2003, at <http://www.law.utoronto.ca/faculty>; Michael Bothe, *Terrorism and the Legality of Preemptive Force*, 14 Eur. J. Int'l L. 227 (2003).

Of course, Iraq was only the latest controversial use of U.S. force. Most European lawyers, but not all U.S. international lawyers, had criticized U.S. actions in Sudan, Libya, Afghanistan (both before and after 9/11), and Iraq (in 1998) and if, we reach just a bit farther back, U.S. interventions in the Dominican Republic, the Bay of Pigs, Panama, Vietnam, Cambodia, and of course, Nicaragua and Grenada.<sup>15</sup> (In fact, at the latest ASIL annual meeting in Washington, Cambridge Professor James Crawford suggested that Operation Iraqi Freedom was just a “big Panama.”<sup>16</sup>)

Given the propensity of the United States to stretch the concept of individual and collective self defense, the most recent Iraqi war might elicit only a yawn except that, as we all know, the present Bush Administration has upped the ante. Not content with committing the occasional breach of the UN Charter (usually in our hemisphere), the Administration is threatening to turn breach into doctrine and deploy it worldwide. The Administration’s newly minted doctrine of preemptive self-defense, whether with respect to terrorists, states that harbor terrorists, or those possessing weapons of mass destruction (WMDs), as well as the clear suggestion that it will be applied to the members of an ‘Axis of Evil,’ are understandably regarded by most international lawyers, outside the United States, as clear threat to, if not itself a violation of, the UN Charter’s Article 2(4).<sup>17</sup> Yet, pre-emptive force has illustrious defenders within the United States – from former Secretary of

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15 But note that Thomas M. Franck who, as noted, has been critical of the latest Iraqi invasion, had criticized earlier U.S. interventions as well. See, e.g., Thomas M. Franck, *Who Killed Article 2(4)? or: Changing Norms Governing the Use of Force by States*, 64 AJIL 809 (1970).

16 James Crawford, *Remarks*, American Society of International Law, Proceedings of the 97th Annual Meeting (notes by the author).

17 See, e.g., *Russia, France, Germany say Iraq war illegal*, Reuters, Mar. 20, 2003, at <http://www.gazeta.ru/2003/03/20/RussiaFrance.shtml>; Dietrich Mursweiek, *The American Strategy of Preemptive War and International Law*, Albert-Ludwigs-Universitat Friburg Institute of Public Law – Papers and Reprints, Mar. 2003, at [www.jura.uni-freiburg.de/ioeffr3/papers/papers.htm](http://www.jura.uni-freiburg.de/ioeffr3/papers/papers.htm). For the adverse reactions to President Bush’s ‘Axis of Evil’ speech, see, e.g., Joantha Freedland, *Patten lays into Bush’s America: Fury at president’s ‘axis of evil’ speech*, The Guardian, Feb. 9, 2002, Guardian Home Pages at 1; *French FM renews attack on US foreign policy*, Agence France Presse, Mar. 1, 2002 at . For the underlying U.S. policy statements, see National Security Strategy of the United States (Sept. 2002), available at <http://www.whitehouse.gov/response/index.html>; National Security Strategy to Combat Weapons of Mass Destruction (Dec. 2002), available at <http://www.whitehouse.gov/response/index.html>.

State Madeleine Albright who has suggested that the doctrine is really nothing new, to those who apparently acknowledge its novelty but would defend it as a necessary response to the new terrorist world order, such as Ruth Wedgwood.<sup>18</sup> The former editor in chief of the *American Journal of International Law*, Michael Reisman, has even compared it, presumably favorably, to the Monroe Doctrine.<sup>19</sup>

Use of force is not the only issue that divides U.S. international lawyers from the rest. Over the past decade, the United States and much of the world have been at odds over U.S. refusal to adhere to significant global treaties. The ever expanding list of these would include the ABM, Comprehensive Test Ban, Biological and Toxin Weapons Convention protocol, Kyoto Protocol, the Statute of the International Criminal Court (ICC), the amended Convention on the Law of the Sea, the Convention on Biological Diversity, the Landmines Convention, global human rights conventions including core obligations of the ILO, the CEDAW, the Convention on the Rights of the Child, the International Covenant on Economic, Social, and Cultural Rights, and protocol one of the International Covenant on Civil and Political Rights.<sup>20</sup> As is discussed below, while European lawyers especially suggest that the failure to adhere to such treaties is evidence of a lawless failure to negotiate in good faith or to cooperate multilaterally, U.S. international lawyers are far more inclined to view such instances benignly – as merely the exercise of a sovereign right to refuse to contract – if not with outright favor

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18 Wedgwood, *supra* note 10 (97 AJIL). See also Abraham D. Sofaer, *On the Necessity of Pre-emption*, 14 *Eur. J. Int'l L.* 209 (2003). Albright apparently regards the Bush Administration's current pre-emption policy as re-stating a position on anticipatory self-defense that "every President has quietly held in reserve." Albright, *supra* note 6, at 4.

19 Reisman, *supra* note 10 (97 AJIL 82), at 90.

20 See generally, *Unilateralism and U.S. Foreign Policy* (David M. Malone and Yuen Foong Khong, ed. 2003)(particularly chapters by David M. Malone, Yen Foong Khong, and Nico Krisch); Symposium Issue, *Between Empire and Community, The United States and Multilateralism 2001-2003: A Mid-Term Assessment*, 21 *Berk. J. Int'l L.* (Number 3, 2003). With respect to human rights, see, e.g., Rosemary Foot, *Credibility at Stake: Domestic Supremacy in U.S. Human Rights Policy*, in Malone and Khong, *supra*, at 95. Europeans are also highly critical of many of the U.S. reservations, understandings and declarations (RUDs) attached to its ratification of the International Covenant on Civil and Political Rights. These RUDs are widely regarded, certainly within Europe, as effectively gutting the effects of that Convention as a tool with which to challenge those U.S. laws and practices which might be at odds with global human rights standards. See *id.*, at 97, n. 2 (noting Dutch complaints about U.S. RUDs).

(as where it is argued that the goals of the treaty might be accomplished better through unilateral action).

Tensions arise as well over alleged U.S. violations of its international obligations. The complaints extend to the U.S. death row phenomenon, to our defiance of ICJ orders to defer executions of individuals whose rights under the Vienna Convention on Consular Relations may have been violated, and to apparent U.S. violations of international human rights and international humanitarian law norms arising from its post-9/11 treatment of immigrants, foreigners detained in that rights-free zone known as Guantánamo, and even with respect to U.S. nationals branded as enemy combatants and (apparently) no longer "human beings entitled to rights."<sup>21</sup> Most recently, friction between the U.S. and others around the world, including close U.S. allies, have emerged with respect to U.S. efforts to undermine the ICC through all the tools at the command of the hegemon: unilateral measures (passage of the so-called Hague Invasion Act), bilateral agreement ("Article 98" agreements between ICC party states and the U.S.), and multilateral action (S.C. resolutions preventing peacekeepers from being

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21 See, e.g., Douglass W. Cassel, *Ignoring the World Court*, Chicago Daily Law Bulletin, Jan. 10, 2002 (surveying U.S. courts' widespread flaunting of the ICJ ruling requiring the United States to defer the execution of a foreign national whose rights under the Vienna Convention of Consular Relations had been arguably denied); *Soering v. United Kingdom*, European Court of Human Rights, 161 Eur. Ct. H.R. (ser. A), 11 E.H.R.R. 439 (1989) (denying the right to extradite to the United States because of the U.S.'s death row phenomenon'); Mireille Delmas-Marty, *Global Crime Calls for Global Justice*, 10 Eur. J. of Crime, Criminal Law and Criminal Justice 286, at 288-291 (criticizing the U.S. plans for military tribunals for suspected terrorists and proposing an international tribunal instead); European Parliament Resolution on the detainees in Guantanamo Bay, PE 313.865, available at [www.europarl.eu.int/meetdocs/delegations/usam/20020219/004EN.pdf](http://www.europarl.eu.int/meetdocs/delegations/usam/20020219/004EN.pdf); Patrick Jarreau, *Les Etats-Unis confrontes aux demandes d'explications officielles d'une demi-douzaine de pays*, Le Monde, May 21, 2003 at [http://www.lemonde.fr/imprimer\\_article\\_ref/9,5987,3226-320906,oo.html](http://www.lemonde.fr/imprimer_article_ref/9,5987,3226-320906,oo.html). U.S. actions in defiance of the World Court have led Europeans (and others) to renew their doubts concerning the United States' commitment to the peaceful settlement of international disputes. Such doubts had been expressed a decade earlier in reaction to the United States' refusal to participate in the merits stage of the Nicaragua Case before the ICJ and subsequent termination of its participation in the Court's Optional Clause. See, e.g., G.A. Res. A/Res/43/11, Oct. 25, 1988 (calling for U.S. compliance with ICJ judgment in the Nicaragua Case).



sent to The Hague).<sup>22</sup> While few prominent U.S. international lawyers defend outright violations of the law, they are far more likely than others abroad to dispute the categorization of all of these acts as clear violations of the law.

Of course, complaints about the U.S. actions vis-a-vis international law predate the current Bush Administration. U.S. unilateral action on a number of fronts have drawn fire, such as extra-territorial economic sanctions (most prominently with respect to Helms-Burton sanctions on Cuba, but also including unilateral sanctions against Libya and Iran); the threat of unilateral action not sanctioned by the WTO (pursuant to section 301 of the U.S. Trade Act); and unilateral certifications of drug-producing and transit countries.<sup>23</sup> Certain U.S. initiatives within international organizations have also been controversial, including U.S. positions on permissible WTO remedies, on UN peacekeeping in Bosnia-Herzegovina from 1992 to 1995; and on continued Security Council sanctions on Iraq at least from 1998 to 2001.<sup>24</sup>

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22 See generally, documents filed at [www.iccnw.org](http://www.iccnw.org) (especially chart prepared by the NGO coalition for the ICC indicating widespread opposition to U.S. relevant proposals at the Security Council: Statements Made or endorsed at the Open Meeting of the Security Council Discussion of the UN Mission in Bosnia and Herzegovina on July 10, 2002). See also Carsten Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 EJIL 85 (2003); Salvatore Zappalá, *The Reaction of the US to the Entry into Force of the ICC Statute: Comments on UN SC Resolution 1422 (2002) and Article 98 Agreements*, 1 J. Int'l Crim. Justice 114 (2003).

23 See, e.g., *European Union: Demarches Protesting the Cuban Liberty and Democratic Solidarity (Libertad) Act*, 35 I.L.M. 397 (1996); Monica Serrano, *Unilateralism, Multilateralism, and U.S. Drug Diplomacy in Latin America*, in Malone and Khong, *supra* note 20, at 117 (discussing criticisms around the world of U.S. unilateral efforts in the battle against drugs); Pierre-Marie Dupuy, *The Place and Role of Unilateralism in Contemporary International Law*, 11 EJIL 19, at 26-27 (2000) (criticizing U.S. unilateral sanctions and deployment of force); Vera Gowlland-Debbas, *The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance*, 11 EJIL 361 (2000) (criticizing U.S. claims to resort to force in defense of Security Council interests).

24 See generally, David M. Malone, *A Decade of U.S. Unilateralism?*, in Malone and Khong, *supra* note 20, at 19; Per Magnus Wijkman, *U.S. Trade Policy: Alternative Tracks or Parallel Tracks?*, in Malone and Khong, at 251; Ramesh Thakur, *UN Peace Operations and U.S. Unilateralism and Multilateralism*, in Malone and Khong, at 153. For a harsh critique of the UN Iraqi sanctions regime, see Erika de Wet, *Human Rights Limitations to Economic Enforcement Measures Under Article 1 of the United Nations Charter and the Iraqi Sanctions Regime*, 14 Leiden J. Int'l L. 277 (2001).

It is, of course, true that the U.S. is not the sole outlier on many of these issues. Other states have refused to ratify many of the same treaties, others (including that supposed paragon of international virtue, France) have breached international law (including with respect to the use of force in the Rainbow Warrior affair), and others have not always been faithful to their commitments to international organizations (including compliance with UN sanctions).<sup>25</sup>

It is also true that the U.S. has not always acted alone. A ragtag 'coalition of the willing' joined the U.S. action on Iraq, the U.S. secured virtually unanimous agreement with respect to Security Council initiatives to exempt peacekeepers from the ICC, and obviously it takes two to dance the 'article 98' tango exempting U.S. nationals from the ICC's jurisdiction.

But singling out the U.S. for criticism is warranted. Many of these instances involved explicit U.S. pressure on others to act in concert or cases in which the action taken by the collective was regarded, properly or not, as the better option given the likelihood of unilateral action by the hegemon. Singling out the United States for violations that others are also guilty of is not entirely unfair since the United States is the state after all that has most often lectured the rest of the world on international legality – at least when the rights of its own foreign investors or its own nationals require international law's protections. Reciprocal acceptance of obligations required of others has not been the United States' strong suit. Moreover, what the United States does in this regard can hardly be ignored since its power and membership privileges in international institutions may permit it to turn breach into seed of new rule and at a minimum permits it to get away with violations that others cannot.<sup>26</sup> And, given the United States' prominence as a principal rule of law state, its defiance of international rules and misuse of international institutions sets a powerful adverse example for others. Some would blame, for example, recent Australian backpedaling with respect to compliance with international

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25 *See, e.g.*, Ruling Pertaining to the Differences between France and New Zealand Arising from the Rainbow Warrior Affair, 26 ILM 1349 (1987).

26 *But see* Stephen J. Toope, *Powerful but Unpersuasive? The Role of the United States of America in the Evolution of Customary International Law*, in *United States Hegemony and the Foundations of International Law* 287 (Michael Byers and George Nolte, ed. 2003)(arguing that the U.S. has not been terribly successful in altering the rules of customary law through unilateral action).

law at least partly on the adverse models for behavior set by the current Bush Administration.<sup>27</sup> (Others here can tell me whether U.S. attitudes and actions have had comparable effects on this side of the border.) There is a sense as well that the United States merits singling out because of the cumulative impact of its actions, as well as the intemperate rhetoric that so often accompanies them. The end result, for many around the world, is that it is the United States that is the "rogue nation."<sup>28</sup>

What explains this legal divide? It is easier to explain the actions of governments, whether of the U.S. or of those reacting against it, than it is the attitudes of prominent members of the U.S. legal academy. Political scientists of the realist persuasion have ready explanations for many of these frictions, especially as between Europe and the United States: smaller, weaker states have a correspondingly greater interest in the institutions of public international law, from the UN to the ILO, and much greater fear of the deployment of unilateral military or economic power than does the hyperpower. For France, upholding the power of the Security Council and using the threat of its veto to defy the United States is its best hope of ensuring its influence within Europe and the world. While other governments' greater affinity for certain treaty regimes, from those securing human rights to the ICC, are perhaps more difficult to explain in terms of traditionally defined national interests, criticizing the United States for its failure to cooperate in these regimes is not difficult to explain; everybody has an interest in venting against the overbearing hegemony. But what explains the sometimes stark differences in legal philosophy emerging between at least some U.S. international lawyers and their colleagues abroad?

These differences were appearing even prior to 9/11, as in a joint European/U.S. conference on unilateralism in 2000 whose proceedings were carried in the *European Journal of International Law*. At the conference, the Europeans identified the legal obligation to cooperate as the "basis for the

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27 For a description of recent Australian difficulties with international law, see Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, *Deep Anxieties: Australia and the International Legal Order*, (forthcoming Sydney Law Review, copy on file with author).

28 See, e.g., Clyde Prestowitz, *Rogue Nation: American Unilateralism and the Failure of Good Intentions* (2003).

whole post-war international legal order.”<sup>29</sup> Across a range of issues, from trade sanctions to environmental actions, the Europeans, including Pierre-Marie Dupuy, Vera Gowlland-Debbas, and Philippe Sands, asserted that the law of the Charter, as well as the rules within particular treaties, accorded fundamental importance to the duty of states to respect the sovereign equality of states by not unilaterally imposing their will on others nor substituting a “diktat” for concerted action.<sup>30</sup> For them, the Lotus presumption was dead: a state’s right to act alone is “residual and conditioned.”<sup>31</sup> The Europeans took seriously the premise that there was a “law of coexistence” generally requiring states to exhaust multilateral remedies before turning to unilateral ones, especially, but not limited to, the use of force. As Dupuy put it, international law now requires states to “choose the path of compromise and negotiated settlement.”<sup>32</sup> The Europeans tended to see the Charter’s rules on the use of force, even in instances involving grave and on-going human rights atrocities, as clear, emphatic, and subject to no exception. Nervous about the implications of Kosovo, they were rigid textualists when it came to interpreting the UN Charter’s rules governing use of force. As Vera Gowlland-Debbas put it: “resort to unilateral action in the absence of express Council authorization . . . remains an act of usurpation of Council powers and a resort to force which is prohibited under international law.”<sup>33</sup>

The U.S. international lawyers participating at that conference were far more sanguine about unilateralism, far more dubious about the value of

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29 See, e.g., Dupuy, *supra* note 23, at 22. See also Gowlland-Debbas, *supra* note 23; Philippe Sands, *Unilateralism, Values, and International Law*, 11 EJIL 291 (2000). This perspective is not unique to the European scholars attending this conference. See generally, Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 Recueil des Cours (1994-VI).

30 Dupuy, *supra* note 23, at 23. See also Gowlland-Debbas, *supra* note 23; Sands, *supra* note 29.

31 Dupuy, *supra* note 23, 23-24 (citing as examples of the principal, specific international rules such as those banning reprisals and unilateral denunciations of treaties). For Dupuy, “international law requires states to seek in good faith to find through dialogue a solution compatible with the interests of all states concerned. It obliges them . . . where cooperation and negotiation structures have been opened to them through treaties and the creation of international institutions, to have recourse to these norms and these institutions, on pain of incurring, if they are ignored, international liability vis à vis the states concerned.” *Id.* at 24.

32 Dupuy, *supra* note 23, at 25.

33 Gowlland-Debbas, *supra* note 23, at 378.

multilateral action, and far more willing to bend text to achieve what they considered to be desirable substantive ends.<sup>34</sup> For most, like Michael Reisman, the starting point for assessing the legality of unilateral action was neither normative principle nor treaty text but rather the structure of the international legal system and its ability to achieve laudable goals.<sup>35</sup> Particularly when it comes to the vindication of human rights, where agreement of all the relevant members of the Security Council is unlikely, Reisman suggested that the present UN system fails to vindicate the interests of democratic governments that are under pressure to act and have the power to effectuate a unilateral remedy.<sup>36</sup>

Ruth Wedgwood was more blunt: the Security Council machinery has never worked quite as planned, we have constantly had to adapt the Charter given this fact, and now we need far more latitude for non-UN sanctioned uses of force to confront WMDs, a war against terrorism that may never end, and undeterrable non-state terrorists.<sup>37</sup> Wedgwood disparaged Europeans' tendency to rely on the governing text of international instruments. "The interpretative principles deployed in the application of a constitutive text may also depend," she argued, "on the nature of the values and interests at stake – the teleology of an instrument as much as its literal form."<sup>38</sup> She called for a "morally driven" teleologic reading of Chapter VII and the UN Charter not grounded in original intention and defended the legality of Kosovo, the U.S./U.K. air-raids on Iraq in 1998, and U.S. missile strikes in Sudan and Afghanistan in 1999.<sup>39</sup> Another U.S. international lawyer at that conference un-apologetically asserted the right of powerful states to invoke political concerns to trump formal legal commitments (such as the United States did when it refused to pay its UN dues), while a fourth contended that U.S. was justified in withholding its consent to the Landmines Convention because that suspect treaty was the product of fundamentally undemocratic modes of supranational law-making, especially involving the participation of

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34 See generally, José E. Alvarez, *Multilateralism and Its Discontents*, 11 EJIL 393 (2000) (questioning the value, legitimacy or efficacy of a number of multilateral initiatives).

35 W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EJIL 3 (2000).

36 *Id.* at 15.

37 Ruth Wedgwood, *Unilateral Action in the UN System*, 11 EJIL 349 (2000).

38 *Id.* at 352.

39 *Id.* at 356-359.

unaccountable and sole-issue NGOs.<sup>40</sup> Another U.S. scholar defended unilateral action intended to promote environmental ends while yours truly questioned the efficacy of multilateral approaches more generally, as with respect to the adjudication of international crimes.<sup>41</sup>

The numbers of prominent U.S. international legal scholars who have emerged as defenders of U.S. foreign policy or who criticize international law and its institutions are now a deluge. They include established scholars as well as, more ominously, a number from the next generation anxious to make their mark. John McGinnis, who has provided a public choice rationale for the WTO regime, has argued that treaties dealing with social issues, such as human rights and the environment have no such justification and are as illegitimate as many of the so-called "progressive" reforms of the New Deal.<sup>42</sup> Andrew Guzman, who deploys game theory to suggest the ineffectiveness of international rules dealing with high profile security issues, concludes that international lawyers should devote themselves to building the regimes of international economic law, rather than concern themselves with questions of war, arms control, territorial limits, neutrality, or human rights.<sup>43</sup> These prescriptions coincide nicely with the goals and premises of the current Administration. And of course there are the Four Horsemen of the Constitutional Apocalypse, namely John Yoo, Curtis Bradley, Jack

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40 Allan Gerson, *Multilateralism à la Carte: The Consequences of Unilateral Pick and Pay Approaches*, 11 EJIL 61 (2000); Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-Governmental Organizations and the Idea of International Civil Society*, 11 EJIL 91 (2000). For contrasting European reactions to these issues, see Francesco Francioni, *Multilateralism a la Carte: The Limits to Unilateral Withholdings of Assessed Contributions to the UN Budget*, 11 EJIL 43 (2000); Peter Malanczuk, *The International Criminal Court and Landmines: What Are the Consequences of Leaving the U.S. Behind*, 11 EJIL 77 (2000).

41 Dan Bodansky, *What's So Bad about Unilateral Action to Protect the Environment?*, 11 Eur. J. Int'l L. 339 (2000); Alvarez, *supra* note 34 (11 EJIL 393).

42 See John O. McGinnis, *The Political Economy of Global Multilateralism*, 1 Chi. J. Int'l L. 381 (2000). See also John O. McGinnis and Mark Movsesian, *Commentary: The World Trade Constitution*, 114 Harv. L. Rev. 511 (2000).

43 Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 Calif. L. Rev. 1823, at 1885 (2002). Oona Hathaway, deploying the new empiricism that is all the rage in compliance circles, has also, perhaps inadvertently, added fuel to the fire by casting doubt on the wisdom of adhering to human rights treaties since these, in her view, may actually permit states to get away with murder, or at least greater human rights violations. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L. J. 1935 (2002).

Goldsmith, and Ernest Young, who have argued that many international commitments – from according status under national law to customary international law to treaty-authorized inspections for chemical weapons, from participation in the ICC to participation in UN peacekeeping – pose grave difficulties under the U.S. Constitution.<sup>44</sup> These scholars are highly critical of the first post-WW II generation of U.S. international lawyers who have, in their view, used their status as highly qualified publicists to elevate their policy preferences to the status of law.<sup>45</sup>

The impact these scholars are having on U.S. government policy is becoming increasingly obvious. Many of them, including Ruth Wedgwood, John Yoo, and Jack Goldsmith, are being consulted at the highest levels for their views or have been members of the Bush Administration. They have supplied the legal justifications offered for even the most controversial aspects of the Administration's policies, such as the use of military tribunals or the newly minted doctrine of pre-emptive force. Some of their views, once considered radical within the U.S. legal academy, are now re-emerging within U.S. government briefs before U.S. courts.<sup>46</sup>

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44 See, e.g., Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich. L. Rev. 391 (1998); Curtis A. Bradley, *International Delegations, The Structural Constitution, and Non-Self-Execution*, 55 Stan. L. Rev. 557 (2003); Ernest A. Young, *The Trouble with Global Constitutionalism*, 38 Tx. Int'l L. J. 527 (2003); John C. Yoo, *Kosovo, War Powers, and the Multilateral Future*, 148 Un. Pa. L. Rev. 1673 (2000); John C. Yoo, *New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 Const. Comment 87 (1998). For responses to some of these contentions, see, e.g., Carlos Manuel Vasquez, *Laughing at Treaties*, 99 Colum. L. Rev. 215 (1999); Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as "Supreme Law of the Land"*, 99 Colum. L. Rev. 2095 (1999); Martin S. Flaherty, *Are We to Be a Nation?: Federal Power vs. "States' Rights in Foreign Affairs"*, 70 U. Colo. L. Rev. 1277 (1999); David Golove, *Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*, 98 Mich. L. Rev. 1075 (2000); David Golove, *The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 Stan. L. Rev. 1698 (2003).

45 See, e.g., Curtis A. Bradley and Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815 (1997).

46 See, for example, Brief for the United States as Amicus Curiae, *John Doe v. Unocal*, 9th Cir. Court of Appeals, May 8, 2003 available at <http://www.hrw.org/press/2003/05/doj050803.pdf> (urging the Appellate court to limit ATCA cases to violations of international law that would have been tenable in 1789 when that statute was passed, lest claimants bring cases that may undermine the efforts of our allies in counter-terrorism).

As noted, the divide between international lawyers appears particularly obvious across the Atlantic. What accounts for such differences among people ostensibly equally committed to the rule of law in international affairs, trained in the same methods and often in the same schools, and working with the same legal texts? Let us consider three explanations.

(1) *Blame Yale.*

One of Canada's own, James Hathaway, has suggested, at the conference mentioned previously, that the fault lies with the policy-oriented school of international law established by Professors McDougal and Lasswell at Yale Law School and that school's inordinate impact on the U.S. professorate.<sup>47</sup> Hathaway, among others, has argued that the Yale School provides little more than a "rationalization for unilateral action by powerful governments, most obviously that of the United States."<sup>48</sup> Others have cast their net a little wider: the problem is not Yale per se, but the inter-disciplinary approach to law which it encourages. James Crawford implied as much during his closing remarks to the most recent ASIL meeting when he critiqued what he had heard in the preceding panels on the basis that lawyers ought to practice what lies within their comparative expertise and not engage in bad (or even good) political science.<sup>49</sup> Perhaps then it is American inter-disciplinarity, whether associated with the political right (e.g., law and economics), the liberal middle (e.g., building bridges with political science), or the political left (e.g., post-modern or critical approaches), that leads U.S. international

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47 James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EJIL 121, at 128-131 (2000). See also Gowlland-Debbas, *supra* note 23 (11 EJIL), at 380 (expressing a preference for the 'pure theory of law' over more open-ended sociological exercises focused on ends not means).

48 See, e.g., Hathaway, *supra* note 47 (11 EJIL), at 127. Hathaway argues that the Yale School approach "depletes international law of the certainty required for meaningful accountability . . . [It] is too readily exploited by powerful states anxious to disguise their particularistic agendas as compelled by, or at least consistent with, international law . . . By rejecting legal positivism, with its concern to limit the scope of international law to those standards agreed by sovereign states to bind them, the policy-oriented perspective on international law facilitates an equation of international law with whatever norms are of value to dominant states . . . [B]y equating political and economic power with legitimate rule-making authority, the policy-oriented school of international law provides a ready-made justification for defiance of established international norms and procedures by powerful countries." *Id.*, at 128-129. Hathaway would presumably cite, as evidence, Reisman's recent suggestion that those undertaking to revise the rules on the use of force to permit "anticipatory and preemptive defensive actions" should seek guidance from the Yale School framework. See Reisman, *supra* note 10 (97 AJIL 82), at 90.

49 Crawford, *supra* note 16.



lawyers astray -- into a policy or goal oriented perspective on law at odds with what lawyers are best able to do and what clients hire them for.<sup>50</sup>

(2) *U.S. exceptionalism.*

A second explanation connects U.S. internationalist sensibilities to variations on a single national trait: a shared 'civic religion' that all legitimate law, at the international and national levels, must be traced to acts of popular sovereignty as understood and mediated by the U.S. Constitution.<sup>51</sup> For many in the U.S., including some of its international lawyers, the only legitimate law is that which promotes or protects the particular form of democracy, human rights, and the free market sanctioned by the U.S. Constitution (and which Americans generously seek to export to others).<sup>52</sup> This is suggested by the scholarly justifications offered for U.S. failures to pay UN dues or for the illegitimacy of the Landmines Treaty negotiations. For some U.S. lawyers it is inconceivable to have legitimate political authority exercised outside the internal structures for governance established by the U.S. Constitution.<sup>53</sup> Even some cosmopolitan international lawyers believe that theirs is the 'city on the hill' that others should emulate; that U.S.

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50 See generally, *Symposium on Method in International Law*, 93 AJIL 291 (1999)(surveying several of these interdisciplinary approaches).

51 See, e.g., Paul W. Kahn, *Popular Sovereignty, Human Rights and the New International Order*, 1 Chi. J. Int'l L. 1, at 3 (2000). But see Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 Chi. J. Int'l L. 291 (2000)(suggesting that some defenses of U.S. sovereignty along these lines masks a partisan or ideological agenda).

52 See Kahn, *supra* note 51, at 4 and 18. See also Harlan Grant Cohen, *The American Challenge to International Law: A Tentative Framework for Debate*, 28 Yale J. Int'l L. 551 (2003)(describing the United States' belief in its special moral vision and its presumptions of moral and ideological superiority).

53 This is suggested by much of the scholarship produced by the Four Horsemen, discussed above. Thus, Ernest Young writes: "The American people expect that certain decisions affecting them will be made through specified constitutional processes by people who are accountable to them. These constitutional processes . . . are designed to preserve liberty not only through direct mechanisms of accountability but through separating and dividing power. When law binding on American actors is made or enforced outside these processes, the problem is not simply one of affront to the "grandeur or "dignity of the State. Rather, the concern is that the circumvention of ordinary domestic processes renders those processes ineffective in their role of safeguarding liberty." Young, *supra* note 44, at 542-543.

values, readily assumed to be universal, are the ones international rules and institutions must advance, lest they be legitimately ignored or bypassed.<sup>54</sup>

On this view, the difference between European international lawyers and some of their U.S. counterparts is not that the former approach law from a value-free perspective while the latter do not. The difference is that the Europeans prioritize a different set of values. They value “orderly decision, preceded by due deliberation and followed by authorized and inclusive application,”<sup>55</sup> especially those codified in the UN Charter, out of a belief that this is the best way to protect the diversity of cultures and claims, over the more particularized agenda of some of their U.S. counterparts interested in promoting a distinct view of human dignity, democracy or the proper balance between the market and government regulation.<sup>56</sup> While both the European and the U.S. international lawyer are on a mission to save the world, the European’s civic religion is multilateralism, a shared preference for the international over the national, integration and cooperation over the exercise of sovereignty.<sup>57</sup>

This cultural or sociological explanation for trans-Atlantic differences has soft and hard variants. In its mild form, it explains why some U.S. international lawyers, accustomed to a teleological reading of their own laconic but sacred constitution, might be more amenable to ‘dynamic’ readings of the UN Charter that license unilateral action. In its most extreme form, it explains the views of John Bolton, presently the Undersecretary for Arms Control and International Security in the Bush Administration. Bolton argues that the absence of a credible tie between the rules of international law and politically accountable governmental action as provided by the U.S. Constitution means that international “law” does not exist; nations might be “politically” or “morally” bound to adhere to their treaties but they cannot be said to be legally bound.<sup>58</sup> In his view, it does a great deal of harm to extend the legitimacy of the term “law” to instruments as fundamentally different as

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54 See Kahn, *supra* note 51, at 4.

55 See Reisman, *supra* note 35 (11 EJIL), at 6.

56 See e.g., Cohen, *supra* note 52. See also Gowlland-Debbas, *supra* note 23 (11 EJIL), at 361 (abstract).

57 See Alvarez, *supra* note 34 (11 EJIL), at 394.

58 John R. Bolton, *Is There Really “Law in International Affairs?”*, 10 *Transnat’l L. & Contemp. Probl.* 1 (2000)

the U.S. Constitution and the Statute of the ICC (or the UN Charter). To Bolton, the U.S. battle against the ICC and other forms of supranational “undemocratic” government is about nothing less than protecting U.S. sovereignty and Americans’ rights to accountable government.<sup>59</sup> (Not to be outdone, Eric Posner has argued more recently that there is no moral duty to obey international law.<sup>60</sup>)

### (3) *European exceptionalism.*

This explanation associates European attitudes towards international law to European integrative processes, ably described by scholars like Eric Stein and Joseph Weiler, and their consequent constructivist effects.<sup>61</sup> The argument is that European experiences, especially involving the Courts at Luxembourg and Strasbourg, have subtly altered Europeans’ perceptions of themselves and of the nature of the nation state. Much more so than Americans, Europeans define sovereignty, as have Abram and Antonia Chayes, as “no longer consist[ing] in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing the regimes that make up the substance of international law.”<sup>62</sup> Europeans are far more likely than Americans to give priority to status as a member of the international system, achieved through participation in the “various regimes that regulate and order the international system.”<sup>63</sup> Relative to Americans, Europeans are more acclimated to the idea that sovereign rights can be traded away or pooled; that external intervention in the internal affairs of states by collective legal mechanisms is acceptable and often necessary; and that even matters dealing with foreign relations are under a rule of law determined by a greater community of nations.<sup>64</sup>

59 Bolton, *supra* note 58, at 43-48. See also John R. Bolton, *Unsign that Treaty*, Wash. Post, Jan. 4, 2001, at A21; John R. Bolton, *Should We Take Global Governance Seriously?*, 1 Chi. J. Int’l L. 205 (2000). For comparable views outside the United States, see, e.g., Andrew Coyne, *Which precedent? What law?*, National Post, Oct. 7, 2002, at A17.

60 Eric A. Posner, *Do States Have a Moral Obligation to Obey International Law?*, 55 Stan. L. Rev. 1901 (2003).

61 Eric Stein, *Lawyers, Judges and the Making of a Transnational Constitution*, 75 AJIL 1 (1981); J.H.H. Weiler, *The Transformation of Europe*, 100 Yale L. J. 2403 (1991).

62 Abram and Antonia Chayes, *The New Sovereignty*, at 27 (1995).

63 *Id.*

64 See, e.g., Moravcsik, *supra* note 51, at 308-314 (suggesting that among the effects of “pooling” of sovereignty within Europe is a “more cosmopolitan conception of individual responsibility”).

If Europeans have greater (some would say naive) faith in the ability of international institutions to bring errant states into line, perhaps it is because they have seen it done with considerable success not just within the treaty structures of the European system of human rights and the European Union, but also in the OSCE and the Helsinki process.<sup>65</sup> Europeans are now more acclimated than are U.S. nationals to the use of treaties by both national and international judges and by both national and international public servants. Since they have, for decades, seen some of their rights and duties as citizens, including in the so-called "private" sphere, affected by "public" international law rules, they are more amenable to the notion that the 'social contract' extends beyond the nation-state. It should not surprise us therefore if Europeans take all treaties, along with multilateral cooperation, more seriously.

While I believe that there is a grain of truth in all these explanations, all fall short. Blaming Yale does not take us very far when we consider the scholarship of many prominent Yale School adherents, such as Burns Weston, Oscar Schachter, or Richard Falk, much less those abroad trained at Yale, such as Christine Chinkin. While all of these scholars are, in their approaches and even occasional language, products of McDougal-Lasswell, no one would consider these (or many other prominent graduates of Yale or even other current Yale law professors (such as Harold Koh)) apologists for the United States or for unilateralism. Upon close inspection, the fundamental tools used by Yale School adherents – from their "base values" to their insistence on close attention to one's "observational standpoint" – are sufficiently malleable to accommodate a range of outcomes.<sup>66</sup> Nor is it clear that the alternative posited by Yale School critics like Hathaway – adherence to strict European positivism – has been any better, historically, as a tool to

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65 See, e.g., Thomas Buergenthal, *The CSCE Rights System*, 25 Geo. Wash. J. Int'l & Econ. L. 333 (1993).

66 See generally, Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J. Int'l L. 188 (1968). For a recent example of the application of the work of McDougal-Lasswell in the context of a critique of "U.S. hegemony," see, e.g., Henry J. Richardson III, *U.S. Hegemony, Race, and Oil in Deciding United Nations Security Council Resolution 1441 on Iraq*, 17 Temp. Int'l & Comp. L. J. 27 (2003), especially fn. 9 (praising the work of McDougal-Lasswell).

battle the excesses of nationalist fervor, whether of the fascist or communist kind.<sup>67</sup>

Blaming inter-disciplinarity is problematic as well since some of those who lobby this charge, such as David Kennedy (who attacks attempts to bridge the political science/law divide), appear themselves to be superb practitioners of inter-disciplinary borrowing.<sup>68</sup> Indeed, the fact that the scholarship of scholars as different as McGinnis, Slaughter, Kennedy, Yoo, Oona Hathaway, Goldsmith, and Guzman –spanning a spectrum of political sympathies and approaches to multilateralism within the U.S. academy– can all be characterized as “inter-disciplinary” suggests the problem. Uncritical unilateralism is not the necessary by-product of inter-disciplinary reading. It depends on who one reads and is influenced by: Gramsci, Foucault, Morgenthau? I have always considered the U.S. legal academy’s tendency to borrow from other disciplines to be a source of strength and creativity. (My own work, which is often critical of what I would call thoughtless multilateralism, is influenced by the work of non-lawyers. After a few years in the hardened environment of New York, I would characterize myself as an “internationalist with an edge.”)

Reaching beyond positivist analyses of text provides us with powerful weapons with which to reform unjust or unwise law. It makes it possible, for example, to criticize what the IMF, the WTO, or the Security Council does, no matter how ostensibly legal, as the product of ideology or hegemony.<sup>69</sup> Reaching to other disciplines, such as anthropology, make us understand how international law and institutions work.<sup>70</sup> Erroneous prescriptions stemming

67 See, e.g., Lon Fuller, *Positivism and Fidelity to Law – A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 658 (1958)(describing a causal connection between positivist tendencies in German jurisprudence and the rise of Hitler). Nostalgia for old-fashioned positivism seems particularly ironic at a time when even some European positivists are adopting a kind of ‘positivism lite’ that accepts at least some Yale School premises. See, e.g., Bruno Simma and Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AJIL 302 (1999).

68 See, e.g., David Kennedy, *The Disciplines of International Law and Policy*, 12 Leiden J. Int’l L. 9 (1999). See also Martti Koskenniemi, *Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations*, in *The Role of Law in International Politics* 17 (Michael Byers, ed. 2000)(critiquing Slaughter’s attempt to build bridges between international law and political science).

69 See, e.g., José E. Alvarez, *Hegemonic International Law Revisited*, 97 AJIL 873 (2003).

70 For an interesting example, see Annelise Riles, *The Network Inside Out* (2000).

from inept attempts to engage other disciplines are not reasons to give up on the effort. The scholarly market will show the flaws of conclusions born of the (mis) application of game theory, public choice or quantitative analyses, no less than for flawed positivist analyses. Although empirical testing of effective compliance with international law can be done poorly or wisely, and the implications of one's conclusions can be properly cabined or unwisely extended, I have little doubt that it ought to be attempted.<sup>71</sup> This is how I would defend Slaughter's (and others') attempts at building bridges across disciplines – so long as we remember that the lawyer's first priority is to uphold the rule of law.

The second purported explanation, "American exceptionalism," whether of the "soft" or "hard" variety, seems more of a description than an explanation. It tells us what some American lawyers believe without telling us why. While it may be true that the United States foreign policy establishment has always sought to promulgate a particularized view of "liberal constitutionalism as utopian world vision," this description presumes a sameness among all U.S. Presidents that would eviscerate distinctions between, for example, Woodrow Wilson and George W. Bush. This description also does not explain the absence of comparable foundational ideologies elsewhere.<sup>72</sup>

In addition, the range of views embraced by "American exceptionalism" detracts from its explanatory force. We learn little from the proposition that U.S. academics are, sociologically, more apt to adopt teleological over positivist textual readings of the UN Charter even if this were true -- if the real dispute concerns which provision of the Charter ought to be given a wide or narrow reading. Europeans are equally capable of justifying their views on the basis of the broad object and purpose of legal instruments. Further, while "hard" American exceptionalism of the type exemplified by John Bolton does appear radically at odds with European sensibilities, Bolton's extreme skepticism as to the existence of international law is at odds with the

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71 See generally, José E. Alvarez, *Measuring Compliance*, American Society of International Law, Proceedings of the 96th Annual Meeting, at 209 (2002).

72 Indeed, Cohen, who advances such an account of U.S. perceptions of international law, suggests that possible comparable ideologies have appeared elsewhere. See Cohen, *supra* note 52, at 567 (comparing U.S. ideology to Communism in the former USSR, Islam in Iran, or beliefs in national/ethnic greatness in Europe).

views of most academic international lawyers even in the U.S. Even in the context of the U.S., it is difficult to classify Bolton as an international lawyer at all.<sup>73</sup> It is one thing to believe, as apparently John Bolton does, that only forms of governance expressly sanctioned by the U.S. Constitution ought to be established, quite another to use constitutional principles – such as judicial review, separation of powers, and federalism – to raise questions about the democratic legitimacy and accountability of international fora for law-making. While I disagree with most of the conclusions reached by the Four Horsemen of apocalyptic constitutionalism – from Yoo to Young – I believe that the questions these “revisionists” address need attention. While it is true that much of their concerns have been raised by prior generations of critics, the evolution of international institutions and the intrusiveness and sweep of today’s international law requires that we constantly revisit them. As Karen Knop reminds us, the effort to “translate” international norms into politically acceptable law at the domestic level is not a simple or mechanical process and can never be said to be fully achieved.<sup>74</sup>

European exceptionalism is better than American exceptionalism insofar as it purports to be a causal account and not a mere description. But it too fails to satisfy since at most it would explain the trans-Atlantic divide among international lawyers. Many nations, outside of Europe, such as Canada and South Africa, have managed to incorporate successfully a great deal of international law, including intrusive human rights norms, without an integrative process as extreme as that of the European Union. And many international lawyers outside of Europe, without the benefit of its socialization effects, seem equally affronted by U.S. actions and inactions. As for Europe itself, the argument based on European integrative processes can too easily be confused with a contention that Europeans are actually more compliant with global international rules. At best, the history of European integration provides an account of how and why Europeans

73 The same might be said of other prominent advisers to the Bush Administration who are equally hostile to the institutions of international law. See, e.g., Richard Perle, *Thank God for the death of the UN: Its abject failure gave us only anarchy. The world needs order*, *The Guardian*, Mar. 21, 2003. (At the time he was writing, Perle was chairman of the defense policy board, an advisory panel to the Pentagon.)

74 See Karen Knop, *Here and There: International Law in Domestic Courts*, 32 *N.Y.U. J. Int'l L. & Pol.* 501 (2000). For a thoughtful view of the challenges multilateral institutions pose to sovereignty, see Kal Raustiala, *Sovereignty and Multilateralism*, 1 *Chi. J. Int'l L.* 401 (2000).

comply with European norms as well as a partial account for why Europeans *perceive* themselves as more compliant with international law and sympathetic to its institutions, not proof that they actually are.<sup>75</sup>

But if none of these accounts fully explains the “closing of the American legal mind” what does? One possibility is that what we are witnessing is merely a temporal gap between the U.S. and the rest. On this view, the difference between the U.S. lawyers and others on the question of use of force lies precisely in the fact that Al Qaeda has targeted primarily the U.S. and the rest can ignore the threat (at least for now). On this view, the international lawyers of France, Germany or Canada are only one 9/11 disaster away from adopting comparably “flexible” interpretations of international rules. I believe this view is incorrect as a matter of fact since other societies around the world have indeed faced comparable threats. (It also assumes considerable short-sightedness since Al Qaeda has made it pretty clear that its target includes others as well, including the UN itself.) Moreover, I believe that this rationale itself reflects an intolerant refusal to think about all possible alternatives. We should not justify the closing of the American mind on the unproven and ungenerous premise that everyone’s minds would be similarly paralyzed if only they were in our shoes. (Of course, even if it were true that Americans are ahead of others with respect to the need to re-think the rules on the use of force, it is strikingly arrogant to presume that we are equally prescient with respect to all the other legal questions that now divide the U.S. from the rest.)

Nor am I convinced by the argument, recently suggested by Jack Goldsmith, that differences between American and European attitudes towards multilateral cooperation are less than they appear to be since all liberal democracies are congenitally incapable of genuine cosmopolitan action.<sup>76</sup> His argument flips liberal theory on its head, proposing that altruistic action – such as genuinely humanitarian intervention – is less likely among democracies. This argument turns U.S. international selfishness into a virtue. It is not our fault that we refuse to play with others: it is just that the citizens of our vibrant democracy demand tangible benefits from foreign play. On

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75 See, e.g., José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter’s Liberal Theory*, 12 EJIL 183, at 220-223 (2001).

76 Jack Goldsmith, *Liberal Democracy and Cosmopolitan Duty*, 55 Stan. L. Rev. 1667 (2003).



this view, fellow liberal democracies are just whistling dixie when they suggest (hypocritically) otherwise. If Goldsmith is right, all democracies on both sides of the Atlantic will eventually show their innate self-centeredness.

While I admire these ingenious arguments – much as I grudgingly admire comparable explanations for selfish behavior volunteered by my child – we might want to entertain a more simple account. Maybe the United States government, at a time characterized by a striking imbalance of power, refuses to play with others merely because its officials (whether from Texas or Arkansas), and not necessarily its people, are short-sighted and un-cosmopolitan. And perhaps some of our best and brightest, particularly in the post 9/11 haze, attempt to justify such behavior simply because they want to have the ear of the Prince. It's just a thought.

Thank you.