Recent Publications

Human Rights


Emerging from the ruins of the Second World War, human rights doctrine remains plagued by a set of dilemmas that the past fifty years have left largely unresolved. Should individuals be held accountable for criminal violations, or does a theory of collective guilt more accurately reflect historical and political realities? Are prosecutions essential to compensate victims morally and renounce the methods of past governments? Do amnesties insure a peaceful transition to democracy and therefore bolster the rule of law?

The difficulties nascent democracies endure when facing the human rights violations of preceding regimes motivate the essays in *Human Rights in Political Transitions: Gettysburg to Bosnia.* Carla Hesse and Robert Post have compiled an assemblage of writers, mostly academics, whose diversity of views insure that the hard questions of human rights are given a nuanced treatment. While most of the contributors focus their efforts on the how-to questions of implementing human rights regimes, the volume as a whole is a provocative, factually and theoretically informative dialogue that effectively introduces the issues central to confronting violent, unjust pasts.

The book is divided into three parts—“Punishment,” “Reconciliation,” and “Creating a Culture of Law”—each corresponding to an element the editors deem necessary to a government’s successful human rights policy. Aryeh Neier, President of the Open Society Institute, opens Part I with a discussion of two paradigms of accountability. Accountability, according to Neier, implies a demand for both truth and justice. He argues that “the view that long prevailed in the movement” that “the critical need is to ensure the disclosure and acknowledgment of the truth” (p. 39) is not appropriate for the Bosnian or Rwandan experiences. Given that perpetrators in both places brazenly broadcast calls to violence and publicized their misdeeds with impunity, a truth commission to make public these violations would have been useless. Neier recommends hard justice in the form of prosecution of the guilty under a notion of individual accountability.

The subsequent essay by David Cohen, a professor of rhetoric and classics, contrasts the Nuremberg trials with the prosecutions of Japanese war criminals to illustrate the conundrum of individual versus collective responsibility. While not eschewing the notion of collective guilt entirely, the Nuremberg tribunal limited indictments based on conspiracy. Its emphasis on
individual accountability implicated the Nazi regime but not necessarily the German people as a whole. The International Military Tribunal for the Far East, on the other hand, relied heavily on conspiracy charges—and thus collective guilt—to convict Japanese civilian leaders, and Cohen argues that this reliance helps to explain its relative lack of influence on the current human rights debate.

Finally, Human Rights Watch President Kenneth Roth echoes Neier's insistence on both truth and justice in his useful, straightforward account of regime changes in Haiti and the desultory effects of each succeeding government's failure to hold its predecessor accountable. Permitting perpetrators to escape judgment and not acknowledging atrocities have created a sense of impunity among those responsible for violations. Victims have resorted to vigilante vengeance instead of legitimate redress that would support the rule of law.

Part II, "Reconciliation," begins with Robert Meister's essay on Abraham Lincoln and the American experience with forgiveness. Meister, a professor of politics and legal studies, sees Lincoln's idea of reconciliation between North and South as a conjoining of victim and perpetrator under the umbrella of survivorship. An "official truth" of the past history of abuse is created that allows forgiveness without forgetting. Implicit in Lincoln's (and Meister's) argument is the idea that reconciliation works better through forgiveness than through vengeance-driven prosecutions of the guilty.

In the following essay, New York University Professor of Law Ruti Teitel wonders if the International Criminal Tribunal for Yugoslavia (ICTY) can contribute to reconciliation and peace. The court's inability to arrest war criminals weakens the stigmatizing effect of the superindictments, the court's frequently-used weapon. To the suggestion that the tribunal operates as a quasi-truth commission, Teitel argues that unlike in South Africa, no political peace or consensus exists in the Balkans to give truth-telling legitimacy. On a different level, the ICTY, with its emphasis on "a strange deracinated form of individual accountability" (p. 185), allows the international community to escape without chastisement for its inaction in the Balkans, further bringing into question the legitimacy and therefore conciliatory power of the tribunal. Teitel gives a mixed prognosis. On one hand, the tribunal, relying on premises of international justice where national justice falls short, is too detached from the political and ethnic realities of the Balkans to contribute to peace. On the other hand, the tribunal operates as a powerful symbol, offering a forward-looking model of the potential of justice.

Finally, an interview by law professor Naomi Roht-Arriaza of Chilean human rights lawyer Jose Zalaquett offers a glimpse of reconciliation in practice with the example of Chile. Admitting the shortcomings of Chile's means of holding violators accountable, Zalaquett argues that these limitations do not render the process futile. President Patricio Aylwin's public admission of Chile's guilt and the ceremonial remembrance of the victims of the Pinochet regime have smoothed the path toward a moral reconstruction of
Chile, if not achieving actual retribution for past wrongs. This moral reconstruction, not perfect justice, at least allows Chileans to live peacefully with one another. Interesting though the interview is in its current form, it is too bad that the timing of the interview did not allow Zalaquett to talk about how the recent attempted prosecution of Pinochet in Europe has affected Chile's "moral reconstruction."

Law professor Mark Osiel opens Part III, "Creating a Culture of Law," with a Durkheimian interpretation of trials as media through which a society can express ideals and forge solidarity. Trials, according to Osiel, are dramas where competing stories are told and essentially serve as procedural mechanisms that ensure the emergent story's legitimacy. Ideally, a solidarity of the "discursive variety" (p. 226) emerges, and a collective consciousness essential to the rule of law is thus born. Yale Law School Professor Owen Fiss's understanding of human rights has its roots in a similarly Durkheimian notion—rights as expressions of social ideals. The bringing to justice of Argentine junta leaders responsible for the crimes of the late 1970s convinces Fiss that human rights are social norms guiding politics and not legal rules. Motivated by a human rights discourse that transcended law, Argentineans protested the military junta and demanded trials, thus directing the legal direction of the newly-formed democracy. When President Raul Alfonsin halted the trials, and when President Carlos Menem pardoned the convicted, human rights anchored the vantage point from which people criticized these actions. Interestingly, Fiss does not attribute the transcendent quality of human rights rhetoric to a deontological notion of rights; instead, he believes human rights are embedded in a cultural context and are expressions of a people's most important aspirations.

In contrast to Fiss, Elaine Scarry, a professor of English, argues with graceful logic for the vision of the individual as an abstract rights bearer stripped of all cultural accoutrements. A tightly-structured piece of writing that draws as much from Thomas Hardy as from John Rawls, Scarry's essay is unique in the volume in that it attempts to explain why the concept of human rights is needed as much as it tries to answer how human rights are to be respected or implemented. Scarry starts from the presumption that respect for another's rights cannot be secured through informal processes of empathy. Because imaging oneself in another's place—"acquiring knowledge about the weight and complexity of others" (p. 291)—is too difficult, she suggests a Rawlsian "imaginative recovery" of an original position stripped of all personal knowledge. This position offers individuals a vantage point from which they can recognize the importance of securing protection for their human rights. Scarry believes individuals thus positioned will realize the necessity for the constitutional codification of rights rather than relying on empathy to secure them.

The volume closes with three summaries of the history and problematics of human rights. Canadian author Michael Ignatieff offers an optimistic account of the development of a consensus on human rights language over the
course of the past fifty years. He argues that the current language of human rights is universal in scope, having survived challenges from both neocolonialist and Marxist critiques. Sharing Scarry’s liberal vision of human rights, Ignatieff believes that the discourse is universal in character and has become “a moral vernacular for the demand for freedom within local cultures” (p. 320). Ultimately the human rights perspective represents a moral revolution, according to Ignatieff, a progression to a more liberal world political order.

Editor and author Michael Feher’s essay systematically addresses the recurrent question of the book—amnesty or punishment? The pragmatists, those who believe in the centrality of amnesties to peaceful democratic transitions, view the establishment of the rule of law as an evolutionary process. This “cultural leap” hypothesis views democratic transition as a movement away from the chaos of two warring factions and toward a democratic polity wherein the factions are reconciled. In contrast, the purists, those who emphasize punishment, view democratic transitions less as an opportunity for reconciliation and more as the defeat of the previous nondemocratic regime. Sympathetic to the purists, Feher bemoans the current infatuation with the pragmatists’ model, finding it a mechanism that allows European and American governments complicit in atrocities to hide their transgressions in the spirit of pardoning all past sins. Ruti Teitel closes the book with a realistic assessment of the transformative power of human rights rhetoric. She criticizes the belief that human rights discourse can substantively create rights and single-handedly mold peaceful democracies. But her skepticism is not global, as she praises the power of human rights as a “humanizing language,” a procedural mechanism that provides a substitute for “vicious expressions of identity politics” (p. 340).

The editors of Human Rights in Political Transition deserve high praise for masterfully integrating the volume’s essays; each piece seems to engage in direct dialogue with its neighbors, and each author takes a unique and useful look at the difficult conundrums faced by nascent democracies. The focus on how different procedures—amnesties, prosecutions, punishments—contribute to or detract from the rule of law is strong throughout. If one can criticize the book at all, it is only because one yearns for more essays like Elaine Scarry’s that look to ground procedures in first principles. Also, while the book offers a wide variety of perspectives, one would have appreciated the views of those more involved in the practice of human rights law—an ICTY justice or litigator, perhaps. All in all, the compilation is an engaging and provocative contribution to the literature on human rights, and one hopes it gains a wide readership.
Aptly eulogized as a "public intellectual," Carlos Nino was as devoted to the development of a functional democracy in his native Argentina as he was consumed by the world of ideas. Nino not only served as a legal adviser on human rights to President Raul Alfonsin and as director of the Commission for the Consolidation of Democracy, but he was also a prolific academician. After Nino's untimely death in 1993, a group of scholars and friends convened at the Yale Law School in 1994 in his memory. By testing the theoretical muster of Nino's contributions to the dialogue on deliberative democracy and human rights, they sought to define the elusive nexus between theory and practice in international human rights. They focused their inquiry on four major areas: (1) the moral justification for the concept and content of universal human rights; (2) the relationship among nation-building, constitutionalism, and democracy; (3) the relationship between moral principles and political practice; and (4) confronting Kantian "radical evil" by addressing the moral principles and practical realities successor regimes must contemplate in order to hold prior regimes accountable. This collection of essays arose out of their debate.

Editors Harold Hongju Koh and Ronald C. Slye divide the work into five major sections. The first section, designated "Introduction," includes a theoretical overview of the work and what amounts to a eulogy for Nino by Professor Owen Fiss. Part II—"Ethical Bases of International Human Rights"—opens with a provocative essay by law professor and philosopher Thomas Nagel. Nagel seeks to articulate a single operative moral principle behind "fundamental human rights" and "civil liberties." In morally equating the right to be free from torture with the right to rent a pornographic video, Nagel invokes two basic principles he terms inviolable: (1) the distinction between what is private and what is public and (2) a notion of personal sovereignty. By extension, Nagel proclaims the "radical communitarian view that nothing in personal life is beyond the legitimate control of the community if its dominant values are at stake [to be] the main contemporary threat to human rights" (p. 48).

Part II also contains responses to Nagel's thesis from Bernard Williams, Martin Farrel, and Elaine Scarry. Of particular interest is the piece by philosopher Bernard Williams. Williams abandons the premise that universal rights emanate primarily from autonomy, inviolability, and dignity—as Nagel argued to the extreme and as Nino contended through his constructivist arguments—but that they are informed by historical context as well. A universal right, according to Williams, would be one that is self-evident. Since many of the rights Nagel termed as being self-evident do not derive their legitimacy from a dialogue among philosophy, real-world situations, and politics, Williams would not term them universal. Williams's argument,
however, does not embrace cultural relativism: He articulates a universal paradigm of injustice—the coercive and abusive use of power. What he finds problematic is identifying when this paradigm is at work, and identifying the conditions necessary to term a fundamental right as universal in a specific theoretical and real world context.

The third section—"Nation-Building, Constitutionalism, and Democracy"—includes engaging contributions from Ronald Dworkin, Stephen Holmes, Alberto Calsamiglia, and Ian Shapiro. Their inquiries contemplate a constitution's positive role in a democratic society concerned with preserving (or establishing) "basic" human rights. Legal theorist Ronald Dworkin's essay was particularly compelling here. Unlike many of the other essays in the book, Dworkin's piece, titled "The Moral Reading and the Majoritarian Premise," analyzes constitutionalism in the United States, rather than in newly-emerging democratic regimes. In so doing, Dworkin has two aims: (1) to articulate a normative model of constitutional interpretation that calls on judges to incorporate explicitly moral principles—termed the "moral reading"; and (2) to re-conceptualize the "defining aim of democracy" as being a system in which "collective decisions [are] made by political institutions whose structure, composition, and practices treat all members of the community, as individuals, with equal concern and respect" (p. 96). For Dworkin, this alternate understanding of democracy—labeled the "constitutional conception of democracy" (p. 96)—abandons the majoritarian premise. It further implicates the existence of certain "democratic conditions"—i.e., those conditions that provide for the equal status of all citizens—that must necessarily be fulfilled in order to establish and maintain legitimate governmental control. When majoritarian institutions, he argues, honor the inviolability of those conditions, their decisions and authority are then legitimate, whether or not they comport with the statistical representation of the will of the majority.

In Part IV, "Democracy and Deliberation," Irvin P. Stotzky, Jaime Malamud Goti, Jeremy Waldron, Amy Gutmann, Carlos F. Rosenkrantz, and Paul W. Kahn wrestle with theories of deliberation and voting and so-called "epistemic" theories of democracy. Carlos Nino's assertions that "there is an intrinsic relationship between democratic politics, the law which results from it, and morality" (p. 159), and that the development of deliberative democracy is necessary in transitional democracies because it helps foster an educated and involved citizenry, are scrutinized in two real world contexts—Haiti and Argentina—by Stotzky and Goti, respectively. University of Miami School of Law Professor Stotzky concludes that a necessary condition of deliberative democracy is a level of economic and political development that does not presently exist in Haiti. He also questions the completeness of the theoretical foundation of Nino's theory. Argentine professor and scholar Goti addresses the same questions in a different context—an economically stable society under an oppressive totalitarian regime, namely the 1976–1983 military dictatorship in Argentina. Legal philosopher Jeremy Waldron, however,
focuses abstractly on one particular aspect of Nino’s expansive theory: the relationship between deliberation and voting. For Nino, a majority vote coming after a process of substantive dialogue not only represents more accurately what is good for society, but also is cloaked in morality. Central to that claim is the premise that deliberation has the power to transform individual preferences. For Waldron, however, the process of deliberation usually crystallizes, but does not transform, individual preferences, and does not necessarily represent what is good for society. While he illustrates, vis-à-vis the Supreme Court, that voting is the natural upshot of deliberation, Waldron also contends that “a theory of democracy cannot flourish without an account of what to do—and why—when deliberation fails to resolve or eliminate disagreement” (p. 224).

“Confronting Radical Evil,” Part V, attempts to articulate theories of accountability for violations of human rights. T.M. Scanlon, Ruti Teitel, Ernesto Garzon Valdes, and John Shattuck confront in particular the issue of successor regimes: What are the theoretical and practical options for bringing prior illegitimate regimes to justice? Like Nino, most of the contributors in this section explicitly reject retributivist theories of justice. New York University School of Law Professor Ruti Teitel’s piece exemplifies the anti-retributivist attitude. After analyzing a variety of Latin and Eastern European “narratives” of oppression, Teitel proposes a theory of historical accountability based on “poetic justice”—one that finds reconciliation in the communication of truth and the subsequent transformation of tragic narratives into optimistic tomes. However, political scientist Ernesto Valdes worries that, absent a system of punishment, propositions such as Teitel’s, may in fact provide for a double harm—an initial human rights violation and then a subsequent lack of punishment of its perpetrators. Valdes quotes the Spanish poet Juan Ramon Jimenez to illustrate his point on a personal level: “There is no irreconcilable hatred; there are only invincible revulsions” (p. 299). For Valdes, “one of these ‘invincible revulsions’ is the one produced by having to see those who attempted to destroy Argentine democracy in positions of public responsibility, as if nothing had happened” (p. 299).

Though dense and difficult, Deliberative Democracy & Human Rights is well worth the work required to read it. The vast majority of contributions are provocative and principled, and much of the writing is precise and eloquent. While the essays in this collection seem to engender more philosophical controversy than they tend to resolve, the work embodies a significant milestone in the development of a principled political philosophy of human rights: It sharpens the inquiry. Further, as evidenced by Stotzky, Teitel, et al., the contributors do not abandon the real world for the theoretical—in fact, they often embrace real world contexts as evincing the most compelling proof for their theoretical foundations. For the interested student, practitioner, or academic, Deliberative Democracy & Human Rights is sure to engage. However, there is one sad and glaring omission: a response from Carlos Nino.

The fiftieth anniversary of the Universal Declaration of Human Rights has prompted a rash of publications on both the theory and various practices of the current human rights regime. The Dutch author Peter Baehr makes his contribution to this literature with Human Rights: Universality in Practice. Baehr, Emeritus Professor of Human Rights at Utrecht and Leiden Universities in the Netherlands, provides a useful thumbnail sketch of the modern human rights regime. The first half of the book presents a theoretical discussion of human rights, while the later chapters offer an overview of the administrative web of national, international, and nongovernmental institutions that deal with human rights issues. Readers of Baehr's previous work should note that about half of this new work consists of chapters adapted from his earlier book The Role of Human Rights in Foreign Policy (1996).

In his preface, Baehr claims that questioning "to what extent human rights are universal" (p. viii) constitutes the underlying theme of this book. In truth, the question of universality is dealt with directly only in the Introduction and in the chapter titled "Universalism versus Cultural Relativism." Nevertheless, Baehr's discussion of universalism is smart and reasonable. Though he does not offer a novel philosophical argument, Baehr presents a useful distinction between universalism in standard-setting and universalism in implementation. While universal implementation remains a distant dream, universal standards have come to play an increasingly important role in international politics. Baehr reminds us that slavery and torture were once fully accepted practices; today, they are universally prohibited, at least in theory. In short, Baehr makes a powerful argument for the importance of an "emerging consensus" regarding human rights standards, even where standards do not translate into implementation.

In the theoretical chapters, Baehr divides his discussion into three parts. First, he considers civil and political rights, or "classic human rights." Second, he deals with economic, social, and cultural rights. Finally, he discusses collective rights, such as the right to development, environmental rights, and, most notably, the right to self-determination. The author addresses civil and political rights only in a cursory fashion, as he makes clear his own view that disproportionate attention to violations of civil and political rights reflects a wrongheaded approach to human rights problems. In his mind, the right to life, which is a classic civil right, should not be separated from economic rights to food, housing, and health care. Beyond arguing for an increased emphasis on economic and social rights, the author also presents some concrete proposals to help advance the economic and social rights agenda. One such measure would be to add to the Covenant on Economic, Social, and Cultural Rights a right for states or individuals to complain to U.N. bodies such as the Human Rights Committee when violations of these rights are
observed. Currently, the Covenant on Civil and Political Rights provides such a right for civil and political rights violations. The Covenant obliges the Human Rights Committee to review complaints by a state alleging violations by another state, though this procedure is limited to the forty-five states recognizing the competence of the Committee. Furthermore, some states have adhered to an optional provision allowing their own citizens to submit individual complaints to the Committee when they feel that their rights under the Covenant have been violated by their state governments. The author also urges the creation of prominent human rights organizations to bring attention to economic and social rights, as Human Rights Watch and Amnesty International have done for civil and political rights.

The chapter on collective rights is particularly noteworthy for its careful analysis of the concept of group rights. Baehr first defines the term collective or group rights as rights that can “only be enjoyed by collectivities and cannot be reduced to individual rights” (p. 44). These rights include, according to the author, the right to self determination, freedom from genocide, and the right of peoples to development and to access to natural resources. There are two interesting sets of questions the author addresses in relation to collective rights. First, what should be the relationship between collective rights and individual rights? In a conflict between collective rights and individual rights, which should be allowed to prevail? Second, who are the bearers of collective rights? What groupings of peoples should bear collective rights? Ethnic groups? Territorial groups? States? Minorities? How should the representative of a collectivity be chosen? Unfortunately for the reader, the author is more concerned with raising these thought-provoking questions than answering them. Still, Baehr’s discussion of one of the most controversial group rights, the right to self determination, deserves careful reading for its rigorous analysis of the potential scope of the right as well as its political and legal limitations.

The second section of this book provides a good overview of the various institutional human rights players, with an emphasis on the political perspective. The subjects covered here are the United Nations, regional supervisory mechanisms, national foreign policy and diplomacy, truth commissions and international tribunals, and nongovernmental organizations (NGOs). This discussion will be most useful for the newcomer to the field of human rights. Those with some experience may want to skip right to Chapter Eight on foreign policy, which provides an interesting case study on possible tensions between human rights policy and economic development objectives. Baehr focuses here on the difficult choice the Netherlands faced with regard to its former colony Indonesia following the rise of Suharto in 1965. Dutch policy up to that point had been to extend aid for the economic development of its former colony. When confronted with the human rights violations of the Suharto regime, however, the Netherlands had to choose between terminating its aid program or continuing it while violating its traditionally strong human rights policy. In the end, the Dutch government decided to suspend aid to
Indonesia in 1992. This case study is effectively used to highlight the difficult policy choices that confront a government with a strong human rights policy.

_Human Rights: Universality in Practice_ provides a solid, if not impassioned, introduction to the field of human rights for students and budding human rights activists. While those more familiar with human rights literature may be tempted to pass over this book about the basics, Baehr's fresh perspective on questions of universalism and his intriguing case studies deserve attention from all interested students. For American readers in particular, Baehr's distinctly European perspective and his attention to economic and group rights set this book apart from the standard textbook introduction to the field.


By its own admission and intent, _Chile Under Pinochet: Recovering the Truth_ is not a specifically legal text. Mark Ensalaco is not a lawyer by training. He is rather a scholar of international relations and human rights, and he states quite clearly in his preface that "the struggle for human rights is essentially political. Human rights activism, which someone once described as the 'mobilization of shame,' is intended to influence the political calculations of policy-makers" (p. xi). However, any serious discussion of the Pinochet years must include an examination of the role of domestic and international law, as well as an understanding of the judiciary and legal profession of Chile, and Ensalaco complies with this premise. The author asserts that international law constitutes a coercive force that must be taken into account by state policymakers. This assertion has been vividly borne out in the recent events surrounding Augusto Pinochet's arrest in the United Kingdom. Moreover, the notorious failure of the Chilean judiciary to address the extra-legal acts of Pinochet and his ruling cabal has continued to be a major theme of domestic politics. Finally, Ensalaco assesses the potential efficacy of legal trials and legalistic truth commissions in the Chilean process of "mobilization of shame." Thus, the topic of this book is of grave interest to the legal scholar or practitioner working domestically or internationally.

_Chile Under Pinochet_ offers a thorough and apparently objective chronological overview of the circumstances leading up to the 1973 military coup that brought then-General Pinochet to power, the human rights violations perpetrated by the military coup leaders, and the attempts to safeguard human rights both during the regime and in its aftermath. Ensalaco's work is most valuable in offering the reader a broad base of general historical knowledge from which to explore specific legal questions in more detail.

The text anchors itself in the pre-coup turmoil of President Salvador Allende's Chile. Ensalaco describes a politically weak president trying to
impose radical reforms with only a plurality of the popular vote. The author acknowledges the existence of a revolutionary left operating at the margins of Allende's government, and he also traces the widespread public and political discontent with the increasingly radical government in the months leading up to the coup. Ensalaco concedes that the military junta was at first welcomed by the progressive political class that would later come to form the regime's opposition. But Ensalaco denies that there was an effective and militarized opposition to the coup or to the military regime it installed, and he thus refutes the military's claim that its violent actions were legitimate acts of war rather than the violent liquidation of its more radical political opposition.

The military regime consistently claimed that its acts of violence were acts of justice, and it is here that the legal scholar will see his or her chosen profession implicated in the carnage. A veneer of justice enhances popular legitimacy, and that is what the Chilean Supreme Court granted Pinochet. The junta chose not to constrict or eliminate the courts, but rather to count on their self-restraint. The courts continued to exist but used procedural formalisms as substitutes for moral action. Ensalaco states that the Supreme Court prior to 1984 expressed "disregard and even disdain for human rights. . . . The common practice of Chilean judges, following the lead of the high court, was to accept the police and security forces at their word at a moment in the country's history when they should have scrutinized official claims with the utmost care" (p. 52). The result of this judicial restraint was an appearance of legality in a period of extra-legal violence and detention. Ensalaco's text drives home the point that a national legal profession that abdicates its responsibility to justice and the rule of law cannot escape moral culpability for the misdeeds of the nation's rulers.

Ensalaco also explores the legal culpability of Chile's military rulers to international war crimes adjudication. He equates the tactics of the Chilean secret police with those of the Gestapo, citing German Field Marshal Wilhelm Keitel's statement that "intimidation can only be achieved either by capital punishment, or through measures by which relatives of the prisoner or the population cannot learn the fate of the criminal" (p. 84). Ensalaco writes that Keitel was sentenced to death at the post-War Nuremberg International Military Tribunal; whereas, his Chilean imitators granted themselves immunity in 1978. The Chilean political opposition acquiesced to this ban on the prosecution of human rights crimes as a condition of gaining civilian control and democratization in Chile. Although Ensalaco wrote this book prior to Pinochet's arrest in the United Kingdom, his text seems to call for such an approach, and one imagines that he might have welcomed an actual trial of the ex-dictator.

*Chile Under Pinochet* documents not only the past failure of the Chilean judiciary, but also the continuing refusal of the Chilean Supreme Court to acknowledge the human rights violations that occurred under the military regime (and under its watch). The final two chapters of Ensalaco's work concern the continuing efforts to deal with the aftermath of the Pinochet era—
efforts that include "recovering the truth" via the National Commission on Truth and Reconciliation and getting the Chilean armed forces and judiciary to accept responsibility for their well-documented crimes and inaction. The Pinochet epic is still debated in Chile on factual and ideological levels. Ensalaco writes that, depending on which side of the socio-political cognitive divide it is viewed from, "the period of military rule was either a glorious period of national renewal following the military's decisive effort to save Chile from Marxist-Leninism or an unprecedented and unjustifiable breach of Chile's constitutional heritage that produced a human rights calamity" (p. 181).

The post-Pinochet civilian government has tried to resolve some of these issues with the creation of the National Commission on Truth and Reconciliation. This solution has proven unsatisfactory, argues Ensalaco, because "[t]o avoid legal challenges and to placate the military, [President Patricio] Aylwin placed three debilitating limitations on the commission: he denied it the power to subpoena witnesses, he enjoined it from naming the culpable, and he limited the duration of its existence to one year" (p. 188). All of these limitations stemmed from the constitution inherited by the civilian government as a precondition of Pinochet leaving the presidency. The fact that the truth commission was not itself a court was seen as an obstacle to granting it court-like powers to adjudicate—the argument being that granting it such powers would infringe on the courts themselves. The acts of compelling, naming, and punishing constitute the semiotics of punitive shaming. These powers, however, are those of a court and are lacking in the forceless discourse of a truth commission. Consequently, the National Commission on Reconciliation and Truth has served as yet another legalistic barrier to recovering the truth. The existence of its inconclusive report offered the courts and the military one more procedural hiding place. Ensalaco quotes Pinochet's response: "The army certainly sees no reason to seek pardon for having taken part in a patriotic labor. . . . The Army of Chile declares solemnly that it will not accept being placed on the dock of the accused for having saved the freedom and sovereignty of the Fatherland" (p. 217). Pinochet's words make it apparent that at least prior to cooling his heels in English custody he had not quite internalized the "mobilization of shame."

The truth commission episode exemplifies why a book on human rights is important to lawyers and why lawyers are important to human rights. It suggests that effective shaming is achieved only through the judicial process. As Pinochet's insolent reaction to the commission report bespeaks, perhaps the act of being placed "on the dock of the accused" is precisely the act a society uses to place shame on a criminal. If we see the judicial system as a necessary part of the shaming process, then we will also be able to say that the victims of the Pinochet regime—those who were denied access to the courts—did not die in shame as criminals, for they were never indicted by the judicial system. What's more, Pinochet's arrest in England—his time "on the dock of
the accused"—can be seen as profoundly shaming to the former dictator and his political cronies.

Ensalaco's judicious account of Chile under Pinochet offers the human rights scholar a fine primer on recent Chilean politics, while offering the legal scholar a real-life case study. Those interested in the intersection of international human rights law, domestic legal systems, and the responsibility of the legal profession would do well to read this book.


When horrifying images of Tiananmen Square were broadcast around the globe in June of 1989, the world turned a critical eye on human rights abuses in China. The attention continues today, as one rarely hears a human rights discussion that does not mention China or a discussion of China that does not mention human rights.

In *China, the United Nations, and Human Rights*, Australian legal scholar Ann Kent points out that the rights of 1.2 billion people to live free from fear and hunger need not be debated; it should be taken as a given. What ought and needs to be debated, according to Kent, is how China can best achieve a comprehensive regime of respect for human rights. While numerous studies of China's human rights conditions have been published since 1989, almost all of them present descriptive accounts of China's domestic human rights policies. Kent argues that a rigorous study of the processes by which China interacts with various facets of the international human rights regime is a necessary addition to the current literature. Specifically, Kent is interested in the impact of the different aspects of the U.N. human rights regime on Chinese behavior and conversely the impact of Chinese behavior on the U.N. regime.

Kent begins by explaining that a "regime" comprises the principles, norms, and decision-making procedures around which expectations form in a given area of international relations. In the case of the United Nations, the regime comprises the bodies that make and execute decisions, the procedures through which they make decisions, and the modes by which they implement those decisions. Kent's clearest explanation of the U.N. regime comes in her conclusion that the regime has been successful in affecting China's behavior not through specific devices or organizations but by the gradual process of China's participation in each of the U.N. human rights bodies. Through such participation, China has gradually begun to indicate an acceptance of basic international human rights norms and procedures in multilateral fora.

Kent qualifies her use of regime theory by admitting that the concept may have more of a heuristic and descriptive value than a deep explanatory power. Regime theory asks the "what" questions, she says, such as "what are
the norms governing cooperation and conflict, what decision making procedures bolster interdependence, to what degrees do states comply with a regime’s norms, and what is the effect when they do not?” (p. 5). In examining “why” questions, Kent argues, one must rely on alternate tools such as socialization and learning theory. These theories look at the incentives that motivate states to change their behavior and at how much they internalize the new modes of behavior.

After laying the theoretical groundwork of regime theory, Kent outlines three chronological phases of the development of China’s relationship with the United Nations. The first phase began when the People’s Republic of China replaced Taiwan as China’s representative in the United Nations in 1971. For the subsequent nine years, China barely conceded international human rights obligations and avoided involvement in U.N. General Assembly human rights resolutions. However, Kent points out that China’s membership in the United Nations did expose it to a routine human rights regime and thus may have had an effect in habituating China to certain norms and procedures.

The second phase began in 1979 when China began participating in the U.N. Human Rights Commission and continued until June of 1989. In this period, China’s government opened up domestically and internationally. It began voluntary and active involvement in the U.N. human rights regime and abandoned its earlier policy of avoiding human rights matters. Significantly, China maintained the initiative in the timing and intensity of its participation in the U.N. regime. It was thus able to avoid what it considered potential threats to its sovereignty that would have arisen from full participation in an international regime. In sum, the China of this second phase was subject to the routine, if weak, socializing pressures of the U.N. regime.

Before detailing the third phase, Kent turns to three case studies that describe China’s interaction with specific U.N. bodies—the U.N. Commission and Sub-commission on Human Rights, the Treaty Bodies and Special Rapporteurs on Torture, and the International Labor Organization (ILO). She feels that these case studies provide a platform for better understanding the final phase of China-U.N. interaction. Kent concludes that in the Human Rights Commission and Sub-commission, China has played an active role in adopting, breaking, and shaping norms. In contrast, China has not reshaped the norms and procedures in less political bodies, such as the Commission against Torture and the ILO governing body. In these areas, its participation and acceptance of political interdependence have been incomplete and conditional, premised on a refusal to lose ultimate control over the monitoring process.

The third and final phase was, of course, precipitated by the Chinese government’s crackdown in Tiananmen Square in June 1989. It is characterized throughout by strong pressure from all aspects of the U.N. regime, but by varying Chinese responses to that pressure. From 1989 to 1990, the strong and sudden application of the multilateral regime through tough international economic sanctions did not mitigate China’s repressive
internal measures. China rejected the U.N. regime’s norms and denied their applicability. By 1990 however, most protests of state sovereignty and interference were redirected toward bilateral monitoring, and a second sub-phase began. Between 1990 and 1992, a continuing strong application of the U.N. regime combined with weak Chinese international bargaining power and led to selective Chinese compliance, including the release of many political prisoners. Following this period, from 1993 to 1996, the general de-linkage in the United States Congress of Most Favored Nation trading status for China and human rights issues combined with China’s strong economic bargaining position to create a slightly weaker application of the overall regime. China reiterated principles of political sovereignty and showed weaker compliance. Then, from 1996 to 1998, the heightened social instability that followed the Asian economic crisis led to a mixed bag of heightened cooperation in foreign affairs—where some international human rights concessions were made—but weakening domestic compliance and a reiteration of the principle of absolute sovereignty.

Turning to the questions of why China has responded to the U.N. regime in the ways that it has, Kent relies on socialization theory to conclude that China has experienced what she calls organizational learning in the human rights regime in an instrumental sense. In other words, China has found that it is easier to comply with U.N. and ILO reporting obligations than to seek to avoid them. Unlike cognitive learning, however, the tactics and strategy behind instrumental learning are dynamic and may change rapidly in response to new circumstances. This explains the hiatus in regime learning between 1993 and 1994, a break that had serious impacts on relations between U.N. organizations and China.

Kent concludes that, although China’s policies are more sensitive to its domestic situation than to external pressures, the U.N. human rights regime has made a difference to both China and the international community. She explains that

over a period of convulsive international change, and in the case of severe political challenge, it [the U.N. human rights regime] has maintained its basic standards, its authority and its capacity to absorb constructive change and its resistance to the erosion of values. It has thus formed part of the complex web of interdependence opposing the centrifugal forces of global change, ethnic tribalism and political atomization in today’s world (p. 250).

Kent herself points out the book’s major difficulty. Because China’s domestic situation is still the primary impetus behind policies on human rights, it is not possible to assign direct causal influence between any aspect of the U.N. regime and any change in China’s human rights situation. Kent explains that for China, “the human rights regime represents an intervening causal variable and not an autonomous one,” (p. 247). In so admitting, Kent accepts a somewhat unsatisfying and self-evident conclusion—that the U.N. regime has, in fact, made some difference, but the question of exactly how much, and what kind, of a difference is left unanswered. We might say then that the
book's conclusion is somewhat self-defeating—that is, that further analysis of China's internal considerations is the best path to understanding its human rights situation. Yet Kent's work still stands as a thorough, worthwhile, and valuable investigation of the potential and limits of the U.N. human rights regime as it confronts an emerging world power.

**International Legal Theory and Constitutionalism**


The international system faces an uncertain future at the dawn of a new millennium. The Cold War has ended, and the global balance-of-power is shifting. Recognizing the unsettled role of international legal rules in this changing system, Anthony Clark Arend, Associate Professor of Government and Adjunct Professor of Law at Georgetown University, sets forth to comprehensively examine international law and explain its place in contemporary world public order.

*Legal Rules and International Society* offers a distinct counterpoint to the view of many political scientists and international relations scholars who neglect the role of international law in international political affairs. Contrary to most scholars, Arend argues methodically that international law does have an important and independent position in world politics and that our understanding of international political affairs would benefit from a better understanding of the distinctive power of international law. In its substance, the book presents Arend's own conceptual analysis of international law and his views on its legitimacy and potential future. But his book may also be taken as a proposed research program for the academic disciplines that study international law. On the one hand, it constitutes a plea to his fellow political scientists and international relations scholars to delve deeper into the analysis of international legal rules and, on the other hand, it urges international legal scholars to adopt more of the empirical methodology of the social sciences in their research. Arend's aim, it would be fair to say, is to create a new methodology for the study of international law, and his book's success as a scholarly endeavor will ultimately rest on the fruitfulness of his proposed research agenda.

Still, Arend has much of value to say substantively about international legal rules, and he begins with a useful discussion of the differences among moral rules, legal rules, and "other rules" (p. 22). Moral rules oblige people to act in a particular way. Moral rules are not produced through the political process, nor can political authorities enforce moral rules. In contrast to moral rules, legal rules are the product of political processes. These obligatory rules are enforced through the political body. Both the creators and recipients of
legal rules consider them to be distinctly “legal.” In addition to legal and moral rules, Arend notes that there are “other rules” operating in the social system, such as rules of etiquette, “rules of the game” (p. 23), and descriptive rules.

No surprise, Arend’s taxonomy of rules leads him to conclude that international law—which he defines as “a set of legal rules that seek to regulate the behavior of international actors” (p. 26)—is indeed a legitimate form of law. He explains the opposing view that international law is not truly law since it lacks enforcement, written laws, and a central legislative body; but Arend contends that the rules of international law fit neatly into his classification as legal rules because (1) a political process creates international rules; (2) international rules are, in fact, enforced; and (3) international actors regard these rules to be law.

In exploring the roots of international legal rules, Arend looks to various agents who create legal rules, traditional sources of law, other possible sources of international legal rules, and the relationships among these sources. Though states are the traditional agents involved in the creation of international law, both states and nongovernmental organizations (NGOs) are currently active in the production of international legal regimes. Likewise, international conventions, international custom, and general principles of law represent the long-established sources of international legal rules. Arend also suggests that international lawyers today may turn to the proceedings of international organizations as well as unilateral declarations in identifying the law. And where some scholars argue that these various sources ought to be treated with equal weight and others claim that treaties should be given priority, Arend proposes yet a third relationship among these sources. He argues for giving priority to “general principles about the nature of international law” (p. 60) and then treating sources beyond these general principles with equal (and lower) weight.

Arend then proposes a methodology for determining when an international legal rule actually exists. He first explains and critiques the methodologies that legal positivism and the so-called New Haven School use to determine the existence of international legal rules. To assess whether a law is authoritative, traditional legal positivists look to the perceptions of the state; whereas, the New Haven School looks to the expectations of the people constituting a community. In contrast to both of these, Arend proposes his own methodology, which he labels a “basic authority-control test” (p. 87). He claims that for a law to exist it must be regarded as “law” by the decision-making elite, and the rule must be reflected in the practice of states. Arend even creates an index to determine the level of control and authority for each legal rule. To measure control, Arend inquires about violations of the rule, the number of such violations, and their seriousness. In measuring authority (i.e., how strongly state elites perceive the rule as law), Arend addresses the manifestations of authority, their universality and significance, and the existence of contrary manifestations of authority.
Following the construction of this detailed methodology for assessing the existence of international legal rules, Arend finally arrives at the central issue of the book: What is the distinctive role of international rules in international politics? He examines three general approaches to the question: structural realism, rational institutionalism, and constructivism. Structural realists view the international realm as an anarchic system, lacking a common power. International legal rules, say the realists, have little to no effect on limiting the behavior of powerful states, nor do the rules empower insecure states in the chaotic system. Although rational institutionalists agree that the international system is anarchic, they hold that institutions and regimes can influence state behavior. The institutionalists argue that it is often cost-efficient for states to cooperate through institutions and regimes because these arrangements reduce transaction costs, enhance the predictability of state behavior, and promote a decentralized enforcement of rules through reciprocal situations. For example, if France refuses to allow U.S. citizens to enter France, the United States will reciprocate and bar French citizens from entering the United States. Although it is beneficial for states to cooperate, rational institutionalists maintain that state interests—especially in the areas of security, politics, and economics—drives the creation of, and thus ultimately takes precedence over, rules of cooperation.

Constructivism is the third approach to the role of legal rules in international politics. Constructivists view the international realm as socially constructed. Therefore the interests and identities of states, which are created through state interaction, can be changed through this interaction. Arend argues that constructivism offers the best approach to international relations and legal rules. Applying this theory to law, he asserts that international legal rules are social constructions, have intersubjective meaning, constitute the structure of the international realm, and can create changes in states' interests and identities. The manifold changes that have resulted from the integration of European nation-states into the European Union exemplify how legal agreements can themselves alter the identities and interests of state actors, as well as create whole new international structures. Constructivism stresses the fact that it is ultimately individuals (usually acting on behalf of states) who are the decision makers in international politics, so the perceptions that individuals have of the international structure is important. Shared, intersubjective understandings of international legal rules arise through human interaction, and these rules in turn provide criteria for participation in the international system. For example, international law grants legitimacy to states by determining the criteria for statehood. Moreover, international law constitutes the language of international actors in their diplomacy and provides normative legitimacy to their actions. All of this leads Arend to conclude that international legal rules are indeed quite important in international politics.

Having argued that international rules are distinct from other rules and that international laws are created through state consent and play an important
role in international politics, Arend examines two possible outcomes for the future of the international system and the implications of those alternatives on legal rules. The first potential outcome Arend considers is a greater centralization of the international system culminating in an international legislative body. The alternate outcome envisioned by the author is a neo-medievalist system characterized by “overlapping authority and multiple loyalty” (p. 171). According to this scenario, individuals would owe loyalty to a variety of authorities, in addition to their territorial state. Interestingly, Arend contends that the world is moving more toward neo-medievalism than toward centralization. In this neo-medieval system, the creation of legal rules will be fundamentally altered. There could be multiple levels of international customary law, in which some rules apply to some international actors, but not to others. In addition, the process of finding general principles common to domestic legal systems would be more complex, as some of the legal principles applied to domestic systems could also be applicable to the international arena.

Arend concludes his book by again calling for a greater collaboration between international legal scholars and international relations scholars. In addition, he predicts that the changing nature of the international realm could lead to both an international law and an interstate law—the former denoting a body of law common to all members of the international community, and the latter being the law governing interstate relations.

Arend’s book is well written and is accessible to readers of all levels of knowledge of international law. At all times the reader is aware of Arend’s argument and where it is headed. He begins each chapter with a concise summary of the preceding argument and then explains the general argument he will address in the chapter. When discussing theories of international law and international relations, he clearly lays out the foundation of each argument, critiques it (and at times critiques the critique), and then proposes his own theory. Arend pays great attention to detail and thoroughly defines contested terms, although his discussion of international society is unfortunately left until the end of the book. Arend provides a clear, informative work on the role of legal rules in international society, and one hopes that his ideas will indeed spark the kind of useful interdisciplinary scholarship that he imagines.

"A more liberal world needs a more liberal theory of international law" (p. 1). Beginning with this premise, Fernando Téson, professor of law at Arizona State University, sets out to show that international human rights currently form part of an indisputable liberal and moral consensus among states. This does not mean that all states are liberal states, but it does mean that they should be, argues Téson. He identifies and strongly resists the communitarian view that "[h]uman beings are not . . . separate, rational entities capable of individual choice but rather beings that to an important degree are defined and determined by their social . . . relationships" (p. 158). Adopting the communitarian view would, Téson warns, open the door to acceptance of the "antiquated, authoritarian doctrine" of absolute state sovereignty that Téson seeks to replace—and argues has been replaced—with "the aspirations of human rights and democratic legitimacy" (p. 162). We should not, Téson argues, let communitarian concerns about the importance of group identity-formation and cultural survival camouflage the fundamental difference between liberal and illiberal theories of human autonomy and individual entitlements.

Téson divides his argument into six chapters that are nothing if not comprehensive: The Kantian Thesis; Sovereignty and Intervention; International Law, Game Theory, and Morality; The Rawlsian Theory of International Law; Self-Determination, Group Rights and Secession; and Radical Challenges: Feminism and International Law. His array of sources is impressive, although the body of the argument fails to engage many of them on a deeper level. This may be partly a result of space limitations, but it also seems connected to the author's indomitable conviction in the accuracy and supremacy of the liberal worldview—the idea that human beings are defined first, foremost, and for all relevant purposes as rational and autonomous.

In Téson's view, the only legitimate members of international society are liberal democracies. Liberal democracies, he writes, should not necessarily overthrow illiberal governments through the use of force (although he does call for other forms of "persuasion"), but they should certainly refrain from recognizing illiberal governments as legitimate representatives of their respective states. What would happen in this scenario to the conduct of everyday international relations remains unclear, but Téson is not intimidated by such pragmatic concerns.

Téson's argument is driven by two fundamental premises. The first is the idea that majoritarian rule in liberal democracies is inherently respectful of individual rights and dignity, while anything short of this is illiberal and unjust. Téson is especially critical of the idea that self-government means "rule by one's own people" rather than rule by a majority of the people in a given polity. Téson's second basic premise is the proposition—originally
found in the work of Immanuel Kant and currently propagated by Princeton political scientist Michael Doyle—that democracies do not fight wars with each other and are significantly less prone than illiberal states to fight wars with anyone else. Both of these propositions continue to be debated by respected and intelligent political theorists and international relations scholars, yet both are treated as self-evident in Téson’s account. The critical reader seeking to be convinced by these propositions craves more.

The promise and the problems of Téson’s argument are crystallized in his discussion of the sources of obligation in international law. According to his perspective, the binding quality of treaties (pacta sunt servanda) cannot be derived from, and thus should not rely upon, a view of states as rational, self-interested actors. As he explains, a game-theoretic model of international obligations predicts that there will always come a point at which compliance with treaty obligations will involve an unsustainable cost to a signatory government. States may pay lip service to the rule of pacta sunt servanda, writes Téson, but international practice in fact shows “an abundance of opportunistic breaches” (p. 89). International lawyers are therefore misguided in labeling pacta sunt servanda a customary norm. Instead, Téson insists that states “must” honor their treaties even against their interests because “pacta sunt servanda is a moral rule, not a customary rule” (p. 89). This notion of obligation as grounded in a “moral norm” is tantalizing but incomplete. Téson fails to explore where this sense of moral obligation would come from and how it would be internalized by states to generate actual compliance with international legal rules rather than merely rhetorical acknowledgement of them.

In a similarly anti-positivist vein, Téson attacks the International Court of Justice for its hypocrisy in professing positivist sources of the obligations it articulates while refusing to examine actual state practice. “[T]he Court,” he writes, “just picks a rule (perhaps the one that it thinks fairest or most efficient, perhaps one that is the middle ground between the parties’ claims) and then proclaims that the rule is supported by ‘general practice’” (p. 91). For Téson, attempts to ground theories of international obligation in accounts of state interest are ultimately doomed to failure. The only way to explain obligation is to posit the existence of a moral norm. What Téson frustratingly leaves unclear is what good the notion of a moral norm will do: Does he think that nation-states will be less likely to disregard “moral norms” than they are to ignore generally accepted law?

The impulse to provide a thicker account of international obligation by grounding it in something beyond state consent is a noble one, but it requires a more probative foundation than Téson offers in this book. He is, in fact, susceptible to his own criticism of the International Court of Justice—that is, he “just picks” a moral theory and then “proclaims” that the theory is supported by ineluctable Kantian universalism. The proposition is tempting, but it is unlikely to persuade anyone beyond those already sympathetic to the absolutist human rights agenda. Téson has provided the outlines of a heroic
defense of universal reason against the sophistry of communitarianism masquerading as liberal principle. Kantians will applaud him, but it will take significantly more to convince the masqueraders.


As a result of decolonization, membership in the United Nations tripled between the end of World War II and the collapse of the Berlin Wall. This era, dubbed the period of postcolonialism by scholars in a variety of disciplines, witnessed the decline of imperialist holdings around the globe and the creation of dozens of new “postcolonial” states. In their dealings with these new states—often called the Third World—the industrialized nations of the West purport to have discarded imperialism, constructing in its stead a new rhetoric stressing the universality and desirability of norms such as modernization, egalitarianism, democracy, and individualism. In *Laws of the Postcolonial*, editors Eve Darian-Smith and Peter Fitzpatrick have brought together an impressive series of essays that trace and critically assess this new paradigm as well as the legal concepts that both undergird and follow from it. Influenced by the different scholarly vantage points of its editors—Darian-Smith is an assistant professor of anthropology at the University of California, Santa Barbara, and Fitzpatrick is a professor of law at Queen Mary and Westfield College at the University of London—the collection profits from a profoundly multidisciplinary approach that infuses its subject matter with everything from modern linguistic theory to spiritual mythology.

Based in large part on articles comprising a special issue of the journal *Social and Legal Studies* (also edited by Darian-Smith and Fitzpatrick), *Laws of the Postcolonial* seeks to situate the role of the law in creating and sustaining a dichotomy of an Occidental “Us” and a foreign “Them” in academic as well as international discourse. The project of addressing the complex interplay between law and postcolonialism is a somewhat revolutionary endeavor, claim the editors, because it necessarily disrupts “not just the persistent orthodoxy of law and development, but also the newly settled consensus around two frequent concerns of this collection—legal globalization and international human rights discourse” (p. 4). Far from hailing modernization and the increasingly powerful notion of universal human rights as instruments of emancipation, the essays contained in this volume demonstrate, through an assortment of analytic devices including historiography and critical theory, the problematic nature of these ideologies and the degree to which they reinstate the very same imperialistic and Eurocentric agendas they endeavor to replace.

The book is composed of four sections, each tracking the relationship between postcolonialism and law in a different manner. Part I,
“Postcolonialism in Theory,” acts as an ad hoc introduction to the major themes and theories of postcolonial studies. In the first essay, Colin Perrin of the University of New South Wales, elaborates on the work of Edward Said and Homi Bhabha to draw out latent paradoxes contained in the U.N. Declaration on the Rights of Indigenous Peoples. In its attempt to empower indigenous peoples politically by defining them as distinctive groups, the Declaration reveals, according to Perrin, an inability to describe indigenous peoples in anything other than stereotypical terms and articulates an Occidental uneasiness with the idea of peoples who exist outside or apart from nations but still within the bounds of modernity. The subsequent essay by co-editor Fitzpatrick takes as its subject the writings of the French encyclopedist Denis Diderot, particularly Diderot’s notion of the incommensurability of the (Eurocentric) Self and the savage Other. Fitzpatrick concludes that Diderot’s writing reveals how heavily Western identity as well as concepts of a civilized legal order rely on the projection of repressed elements of the Self onto a fantastic, monstrous Other. Paul A. Passavant, a professor at Hobart and William Smith Colleges and the author of the final essay in this section, charts the genealogy of the right to free speech from its imperialist origins in the work of John Stuart Mill, through its adoption in U.S. constitutionalism, and to its ultimate inclusion in a Western politic of exclusion based on a “moral geography” (p. 81) of liberty. Drawing on everything from classic common-law court rulings to deconstructionalist notions of language, Passavant deftly demonstrates the extent to which freedom of speech has acted as a separatist, and often racialized, password for progress and political legitimacy under Western world dominion.

The second section of *Laws of the Postcolonial* delves into “The Persistence of the Colonial” within contemporary national and transnational legal ideologies. Antony Anghie of the University of Utah College of Law contributes a thorough and revealing account of the work of the sixteenth-century Spanish theologian and jurist Francisco de Vitoria. Anghie recounts and dissects the ways in which Vitoria developed many of the central tenets of contemporary international law through his impassioned, if self-contradictory, discussion of the rights, obligations, and slippery sovereignty of the Indians of the Americas. In another essay noting the perverse colonial underpinnings of contemporary legal institutions, John Strawson of the University of East London ably examines how British legal Orientalism reduced and rewrote much of Islamic law, immobilizing it in time and fixing it as an emblem of legal and moral conservatism and corruption that continues to hold persuasive sway today. The final contributor to this section, Annelise Riles of Northwestern University’s School of Law, underscores the importance of scale as she outlines the relationships between the international plane and local and national legal strata in the context of a late nineteenth-century dispute between the United Kingdom and the United States over land claims in Fiji. Tracking the strategic shifts of scope used by the British and American officials and the ways in which these shifts caused different concerns to be
systematically eclipsed or brought to the fore, Riles delivers a thoughtful, if ultimately somewhat anticlimactic, meditation on perspective.

Taking their cue from Riles's project, the final two sections reflect similar fascinations with perspective. Part III, titled "The Postcolonial Without," looks to manifestations of the postcolonial outside Europe and North America. Dianne Otto of the University of Melbourne constructs a provocative, parallel analysis of two anti-colonial movements, looking first at the classic Indian national struggle against the British Raj and then at the more recent challenge posed by the Group of 77 (G-77) nations to the developed countries' continued domination of the world economy. Noting that both of these seemingly subversive movements in fact adopted many of the modernist, Occidental standards that they fought to overcome, Otto provides a convincing illustration of how "nationalism, secularism, and self-determination became the modernizing or civilizing ideologies par excellence" (p. 164). In the end, she suggests that the emerging field of Subaltern Studies might produce a better understanding of these hegemonic ideologies as well as possible strategies of resistance. Roshan de Silva of the United Kingdom's University of Kent presents an altogether different perspective on the creation of postcolonial nations, tracing the exclusionary and contingent politics of the 1972 Sri Lankan constitution not to a history of Western domination, but to the hierarchical dynamics of the Sinhalese Buddhist cosmos. His essay is notable in this collection for its focus on the indigenous ideology of a once-colonized nation rather than on colonialism's role in perverting traditional modes of thought. Commentator Jeannine Purdy's essay concludes the section with a persuasive argument that the concept of postcolonialism does little more than mask and enable the continued presence of ancient, colonialist oppression, obscuring economic and political exploitation with ideological and cultural theory. Although Purdy's evidentiary support—in the form of two abbreviated case studies of imprisonment among aboriginal Australians and the people of Trinidad and Tobago—is rather cursory and unconvincing, her point that law is not mere discourse, but the perpetrator of a very real violence, is quite compelling.

Part IV, "The Postcolonial Within," focuses on the impact of postcolonialism in the industrialized nations of the West. This final section begins with a very lucid account by Rolando Gaete of the tensions imposed on international human rights discourse by the struggle to avoid two dangers: "the absolutism of certain appeals to culture and the absolutism of a humanist secular fundamentalism" (p. 235). Gaete, a member of the faculty at London's South Bank University, carefully considers these two poles of cultural relativism and cultural absolutism before concluding with an outline for an alternative human rights framework based on a combination of relativism and universalism. In the section's second essay, Alan Norrie of England's Kings College takes up the theme of transcultural relativism in his intriguing, though dense, look at the established dualism of "Law" as Western, modern, and orderly, and "Justice" as non-Western, primitive, and irregular. By
deconstructing the distinction between formal and informal justice, Norrie challenges the idea that informal, community-based justice somehow denies individuals their rights. Co-editor Darian-Smith delivers the final essay of *Laws of the Postcolonial*: a quirky and compelling description of the ways in which the opening of the Channel Tunnel and the resulting popular anxiety about a rabies epidemic reflect the fragility of the U.K.'s national and legal identity as it contemplates increased interaction with the rest of Europe.

While somewhat uneven in its scope and the analytical depth of its pieces, and plagued at times by overly opaque language, *Laws of the Postcolonial* presents an important body of criticism, both for the scholar already familiar with postcolonial studies and for the legally-trained reader interested in looking at international law through a new lens. Whether or not one agrees with the text's overriding insistence that we are living not in a postcolonial era, but in neocolonial times—where the civilization of the so-called savages occurs not by the sword but by the coercive power of legal concepts—there is much to admire and contemplate in this analytical and, at times, polemical work.


The protests surrounding the Seattle meeting of the World Trade Organization in November 1999 served as the culmination of a series of debates, academic and otherwise, about the proper extent and nature of globalization. Professor Ian Shapiro, chairman of the department of political science at Yale University, and Lea Brilmayer, professor of law at Yale Law School, have edited a collection of essays that address issues surrounding globalization in search of new ways of understanding the desirability and possibility of global justice. Their book usefully brings together pieces from a wide range of scholars and a number of different academic disciplines in contributing to the emerging field of "international political theory," a field which attempts to discuss traditional questions of justice and equality in the context of the international system.

Professor Brian Barry of Columbia Law School opens the book with a defense of the classical liberal view that individuals should be the central focus for any discussion, national or international, about promoting justice. Barry defends this individualized/cosmopolitan conception of justice against other international political theorists, such as Will Kymlicka and Charles Taylor, who argue for the inclusion of state sovereignty into any calculus attempting to maximize justice. Barry, by contrast, argues that state sovereignty matters only insofar as it can promote individualized well-being. On his view, the particular communities represented by nation-state borders have no claim to consideration in the calculus of justice. And yet, despite this
abstract advocacy of cosmopolitan justice, Barry still accepts as a practical matter the need for a limited nationalism that would justify some forms of parochial commitment as a means of realizing individual justice.

Debra Satz, professor of philosophy at Stanford University, takes issue with Barry's advocacy of limited nationalism in the volume's next essay. Satz objects to the extent to which Barry attempts to retain concerns for localism and state sovereignty in his vision of justice. Satz also accepts the unavoidable claims of parochialism and local concerns, but she insists that they do not subvert basic concerns such as social insurance and freedom from domination. National identity and state sovereignty can matter, Satz argues, but only to the extent that they do not interfere with the pursuit of distributive equality in regards to basic aspects of human existence.

The following pair of essays—by philosophy professor Samuel Scheffler and political scientist John Kane—further examine the inevitable conflict between the pursuit of global justice and the pull of group identity. Scheffler, of the University of California at Berkeley, argues that traditional discussions of global justice pose the dichotomy between general responsibilities to citizens of the world and special responsibilities to local kin. Viewing the situation that way, these responsibilities pull in opposite and mutually exclusive directions. The usual response has been to allow special responsibilities to trump global responsibilities. This leads to what Scheffler terms the "distributive objection": Special responsibilities give members of wealthy elites around the world a legitimate excuse "to lavish resources on one another while largely ignoring the suffering and deprivation of people in much poorer societies" (p. 91). The traditional conceptualization of the problems faced by one pursuing global justice thus achieves no resolution. Scheffler argues that the problem needs to be viewed in a different way than the overly simplistic, binary division articulated above. Rather, Scheffler contends that the game of global justice is not all-or-nothing—one set of responsibilities need not completely swallow up another set of felt obligations.

John Kane, of Griffith University, argues in Chapter Four that Scheffler does not acknowledge the full force of the pull of special responsibilities. Kane argues that Scheffler neglects to discuss the reality that special responsibilities developed prior to, and in greater depth than, general responsibilities, and that any scheme of global justice must take into account the entrenched mentality of special responsibilities. People might not be as willing to compromise their special and general duties as Scheffler suggests (if they even have any sense of general duty, which Kane does not believe to be as obvious as Scheffler). Many situations will make these two duties directly conflictual and incommensurable. The reality of human existence, argues Kane, is that people inevitably form communities of some size smaller than all humanity, and every community necessarily leads to some detriment for outsiders. The mere division of people into communities creates an immutable and significant barrier to fulfilling responsibilities to other citizens.
of the world. The conflict between special and general responsibilities may be
simply irreconcilable, Kane concludes.

In Chapter Five, Professor Liam Murphy of New York University Law
School introduces a different analysis of Scheffler’s views. Murphy argues
that there are distinctive types of special responsibilities, only some of which
present true threats to global justice. While the increasingly strident claims of
national identity politics do pose a genuine threat to realizing universal justice,
according to Murphy, relationships with one’s family or neighbors create only
limited responsibilities that are not inimical to general responsibilities.
Murphy suggests that Scheffler unduly exaggerates the power of nationalism,
noting that pervasive nationalism is a recent and historically contingent
phenomenon. On Murphy’s more optimistic account, there is no reason to
believe that felt responsibilities to co-nationals will forever win out over a
robust form of global responsibility.

Charles Jones, professor of political science at the University of Western
Ontario, responds to Murphy’s essay by presenting a powerful attack on the
special claims of in-group morality, what he calls “compatriot favoritism.”
The mere existence of compatriot favoritism—whether strongly felt (as Kane
suggests) or historically contingent (as Murphy suggests)—will always
present problems for achieving justice because compatriot favoritism clearly
contradicts the ideals of neutrality and impartiality that have traditionally been
associated with justice. Moreover, according to Jones, compatriot favoritism
does not even serve as a means of promoting a morally desirable world of
shared basic values and moral communities. Jones argues that we can
structure a system where differing loyalties are accommodated and moral
communities exist without the partiality of compatriot favoritism, thereby
contradicting philosophers such as George Fletcher, Alasdair MacIntyre, and
Richard Rorty—all of whom tend to argue that global justice is impossible in
a world of divided loyalties.

In Chapter Seven, Professor Hillel Steiner of the University of
Manchester attempts to fashion a paradigm of international justice based on
Lockean political theory. On Steiner’s account, those who appropriate global
resources should be bound to pay taxes reflecting the value of those resources,
and all individuals, rich or poor, should have a right to a portion of the
proceeds of these global commons. This proposal is essentially Steiner’s way
of realizing on an international level the Lockean notion that individuals or
corporations can take ownership of property only as long as resources of the
same quantity and quality remain easily accessible to other members of the
“community” (a community conceived, in this case, in global terms).

Brilmayer concludes the book with a helpful discussion of several
strands of realism: neorealism, “national interest” classical realism, and
“classical realist morality.” Neorealism attempts to apply the principles of
scientific analysis to the operation of the international system. Rather than
analyzing the decisions of states, neorealism attempts to deduce basic
principles of operation of the structure of the international system. By
contrast, classical realism—the paradigm of E.H. Carr, Hans Morgenthau, Reinhold Niebuhr, and George Kennan—attempts to provide a more prescriptive analysis of state behavior, rather than the simple study and observation methodology of neorealism. Classical realism, according to Brilmayer, has two divergent strands. On one hand, “national interest” classical realism holds that states should act amorally (i.e., only in pursuit of national interest) in deciding what ends they want to pursue and what means they want to use to maximize those ends. By contrast, the “realist morality” strand of classical realism essentially advocates “morality later, realism now.” States ought to pursue morally attractive ends, but realist morality suggests that nations may sometimes have to use morally unattractive means in pursuit of those morally desirable ends.

As a work in the increasingly popular area of international political theory, Global Justice provides numerous first-rate examples of the ways in which traditional political theory can be expanded to analyze questions of morality and justice in the international system. This collection of essays goes to the even more fundamental questions of the definition of justice in a global system and the best means of realizing this definition. If this rich collection of essays has any weakness, it is the general reluctance of the authors (other than Brilmayer) to respond to the classically realist question: If global justice is practically impossible even to approximate in the contemporary international system, why even discuss it? The best works in international political theory, such as those by Michael Walzer, have grappled with the ideals of global justice only after recognizing the reality of an international system that rewards narrow national self-interest. Global Justice would have constituted a stronger collection of articles had it dealt more forthrightly with the world-as-it-is before jumping into the realm of the world-as-it-ought-to-be. One also wishes to hear more about the classic questions of statecraft: Do realists of all varieties have it right or wrong when they argue that the international system makes it impossible for states to act with moral concerns in mind? Or, is traditional realism an anachronism in a post-Cold War international system that may now allow Kantian idealism to enter into considerations of state behavior? All in all, this illuminating and original collection of pieces could have been made even more compelling by considering these traditional questions of international relations alongside the more novel discussions of international political theory.


Conventional wisdom generally has explained the chaotic and tragic aftermath of the 1989 collapse of communist Yugoslavia as the product of
ancient hatreds among the region’s residents, a diverse collection of discrete ethnic groups whose only similarity is a cultural incapacity for peaceful coexistence outside of dictatorship. In this regard, the Balkans, it is said, are fundamentally different from (and inferior to) the rest of modern Europe. In Blueprints for a House Divided, Robert M. Hayden, Associate Professor of Anthropology and Associate Professor of Law at the University of Pittsburgh, has written a thorough and convincing critique of this crude form of cultural determinism while usefully refocusing attention on the political and, more specifically, the constitutional genesis of Yugoslavia’s collapse into ethnic warfare.

The problem with the culturalist explanation, claims Hayden, is that the ethnic stereotypes upon which it rests ignore what Max Weber called the “inconvenient facts” that contradict them. First of all, the main ethnic groups of Yugoslavia were never as isolated and as mutually hostile as the conventional wisdom holds. Intermarriage rates among these supposed bitter enemies reached thirty percent or higher in some regions; the Serbo-Croatian language, even with its many dialects, provided a perfectly workable lingua franca; the Yugoslav economy was highly interconnected; and, as late as 1990, the federal Prime Minister, Ante Markovic, was uniformly popular throughout the country.

Instead, Hayden argues that the collapse of Yugoslavia and the conflicts that followed were the logical and inevitable result of the “constitutional nationalism” adopted by the leaders of the various factions within it. He defines constitutional nationalism as “a constitutional and legal structure that privileges the members of one (ethnic) nation over those of any other resident in a particular state” (p. 68). By institutionalizing discrimination against minorities within a territory, this practice predictably leads to resentment and hostilities. The ethnic majority, in turn, interprets the dissension as a threat not only to its own power, but indeed to the state itself.

Hayden thus rejects the view that constitutions are merely symbolic or serve only to distract from political reality. At their best, they can act as effective mechanisms for preventing conflicts among competing interests. An ambiguous provision adopted as a compromise between two factions, for example, can allow both sides to claim what are essentially mutually inconsistent victories. So long as subsequent governmental policies contrary to one group’s views are regarded as misguided, perhaps, but still fundamentally legitimate, further hostilities or violence can be avoided.

Constitutions, however, can also structure conflicts in such a way as to bring them to a head. The constitutional nationalism implemented by the various de facto states within Yugoslavia had precisely this effect. According to Hayden, the new constitutions:

in institutionalize[d] social conflict by defining part of the population to be political and social aliens even if formally citizens, while at the same time providing the tools of political rhetoric and symbolism to brand criticisms of the ruling party as attacks on the state, thus as betrayal of the nation (p. 16).
In Part One of his book, Hayden chronicles the disintegration of the Socialist Federal Republic of Yugoslavia. Beginning with Slovenia in 1989, the various republics and provinces used ambiguities in the 1974 Yugoslav constitution to redefine themselves as independent members of a confederation rather than integral units of a federation. This seemingly subtle semantic shift had enormous consequences: A "federation is composed of federal units and a federal government that itself has some acknowledged powers to which the units are subordinated, while in a confederation, the units are each fully sovereign states, under no obligation to respect any federal power" (p. 31).

The trend continued in 1990 as voters in Serbia, Montenegro, Macedonia, and Bosnia-Herzegovina joined Slovenia and Croatia by electing nationalistic parties to office. Asserting a right to "self-determination," the ethnic majority in each region (other than Montenegro) declared its independence and implemented a regime of constitutional nationalism. By 1991, the transition from federal units to sovereign republics was complete. As the new republics and the various ethnic groups vied for power in a brutal zero-sum game with no means to resolve inter-republic and inter-ethnic disputes, armed conflict was inevitable.

Part Two of Blueprints for a House Divided focuses on the subsequent deterioration of Bosnia and Herzegovina. Once again, says Hayden, constitutional nationalism is to blame as Muslims, Serbs, and Croats each abandoned unity in favor of autonomy and ultimately war. The international community, however, has ignored this reality and has sought to preserve the fiction of a single Bosnian state. Europe and the United States have elided this inconvenient fact in the only way they could, argues Hayden—by offering peace proposals that, "from 1992 through Dayton, amounted to proclaiming a house divided to be a condominium" (p. 101).

Indeed, in the chapter "Zen and the Art of Constitutional Legerdemain," Hayden notes that the cost of maintaining a "unified" Bosnia and Herzegovina has been a de facto partitioning of the territory:

[The Dayton constitution purports to create a "state" composed of two unrelated parts, armed against each other, each allied with neighboring states, and with no functional central government. This is a constitution worthy of a zen master, the concept of a single "state" so divided being comparable in its subtlety to the sound of one hand clapping (p. 124).]

The primary danger of this legal fiction is that it can legitimate the use of force against those who choose to reject it.

Hayden concludes much as he began, arguing that contrary to the popular conceit of a dichotomy between Balkan barbarism and continental enlightenment, the political ideology that led to the Yugoslav conflicts is actually central to Western European political thought. "The simplicity of the logic manifested in structures of constitutional nationalism is classical in Europe for at least the last two centuries: each nation [ethnically defined]
deserves its own state” (p. 146). Thus, the West has no claim that it is more civilized or better able to achieve peaceful solutions to its problems. The only difference, says Hayden, is one of timing: By the end of World War II, most Western European conflicts involving concentrations of minority populations had already been resolved—often through brutal population transfers and, in some cases, outright slaughter. Nor is constitutional nationalism limited to the eastern side of the Atlantic Ocean. Recall that for most of American history, the United States systematically and constitutionally discriminated against minority groups living within its borders.

Because he focuses on constitutional structures and non-Serb actors while offering few criticisms of Serbia or Slobodan Milosevic, Hayden himself admits he has been characterized as presenting the Serbian perspective on the collapse of Yugoslavia. This criticism begins to ring true when one considers, for example, his epilogue about Kosovo, which largely ignores the actions of Serb forces in the region. Instead, Hayden concentrates his effort upon making the case that NATO’s intervention in Kosovo was “clearly contrary to international law” and amounted to “textbook war crimes” (p. 175).

Despite this troubling blind spot, Hayden’s work should not be dismissed out of hand because Blueprints for a House Divided has much to offer. First, using Federal Yugoslavia and Bosnia-Herzegovina as case studies, it persuasively demonstrates the tremendous power of constitutions and the structures of government they create, both for good and for ill. Second, the book clearly dispels the notion that the chaos and bloodshed experienced by the Balkans were the predictable results of ancient hatreds. Finally, it serves as a reminder to readers in Western Europe and in North America that they have no right to be smug, as the constitutional ideology bedeviling the Balkans is endemic in their societies as well. Hayden, therefore, ultimately deserves credit for revealing the unfortunate truth that the disastrous breakup of Yugoslavia represents only the latest chapter in the long, tragic, and essentially Western history of ethnic violence.

**Intellectual Property in International Law**


Worldwide trademark counterfeiting and product piracy account for a $200 billion loss to the U.S. economy each year. Cheap, unlicensed software, music, and books are copied and distributed en masse, both in the United States and in a host of developing countries whose enforcement of copyright and trademark law is more relaxed. Knockoff clothing, drugs, and even
automobile and airplane parts, of unpredictable degrees of quality, are
manufactured and sold in bulk under the trademarks of reliable, well-known
brand names. Paul Paradise's new book, *Trademark Counterfeiting, Product
Piracy, and the Billion Dollar Threat to the U.S. Economy*, documents the
history and current state of counterfeiting and piracy, the struggle to identify
and punish the makers and sellers of counterfeit and pirated goods, and the
international trade disputes that have resulted from the U.S. government's
attempt to curb these practices around the world.

Paradise, a journalist, concentrates on categorically documenting past
and present developments in international trademark and copyright
infringement law and enforcement, rather than on setting out policy arguments
and recommendations of his own. He begins by documenting the history of
the war against counterfeiting, including President Ronald Reagan's 1984
Trademark Counterfeiting Act, which imposed criminal penalties on
trademark counterfeiters for the first time ($100,000 fines, treble attorney’s
fees, and up to five years in prison). The Anticounterfeiting Consumer
Protection Act of 1996, signed into law by President Bill Clinton, upped the
ante by providing for even tougher enforcement tools: Any counterfeit goods
discovered may be immediately confiscated, federal officers can conduct ex
parte seizures, vehicles used to transport the goods can be seized, and
offenders are hit with even heavier criminal penalties (up to $2 million fines
and ten years in federal prison).

On a national level, Section 301 of the Trade Act of 1974 authorizes the
office of the U.S. Trade Representative (U.S.T.R.) to impose trade sanctions
against countries not enforcing U.S. trademarks. The U.S.T.R. now conducts
such "Special 301" trade investigations all over the world. In practice, China
has been the country most affected by this policy. Special 301 Investigations
in 1991 and 1994 turned up an annual production in China of over seventy
five million pirated CDs, among other products. Pirated versions of
copyrighted material such as music, software, and books were so widespread
and well organized in China that they would often be released before their
counterpart Western originals. These discoveries led to heavy sanctions,
straining the already tense relations between the United States and China. The
existing difficulties between the United States and China over Taiwan and
human rights were exacerbated by the $1.5 billion in sanctions imposed by
President Clinton in 1994.

China agreed to investigate and shut down the counterfeiting operations
in an agreement negotiated by John Bliss of the International Anti-
Counterfeiting Coalition (IACC) and U.S.T.R. and later Ambassador Mickey
Kantor. Ultimately, however, the Chinese government strayed from the terms
of the deal, imposing only weak fines and allowing the few pirate-CD plants
that had been shut down to reopen shortly afterward. As a result, $2 billion in
sanctions were re-imposed against China after another Special 301
investigation in 1996, leading to a near trade war between China and the
United States. Only after Chinese president Jiang Zemin and Clinton signed
an agreement requiring strict and vigilant trademark enforcement by the Chinese government was an all-out trade war averted. It remains to be seen whether the new measures will be any more effective than the fruitless 1995 agreement.

China is certainly not the only country in which U.S. intellectual property is illegally copied and distributed. Developing nations in general tend to have weak intellectual property laws and little to no enforcement of those laws. In countries like Mexico, the former Soviet Union, Egypt, and Indonesia, the market for recorded music and video tapes is fifty to ninety-nine percent counterfeit. With extremely cheap CD-recordable technology and Internet distribution now available, software is perhaps the hardest product to protect; the U.S. software industry alone is said to have lost $15 billion to piracy in 1995, and the number surely grows each year. Paradise refers to China and Russia as "one-copy" countries, meaning that copying operations are so swift and organized that one copy of a music CD, videotape, or software program crossing the border could soon meet demand for the entire country. How are the operations so well networked? Paradise ties counterfeiting and piracy to a number of organized crime syndicates, connecting the operations with the Russian mafia, Chinese crime organizations called triads, international arms traffickers, and even the bombers of the World Trade Center in New York.

Large-scale trade sanctions aside, counterfeiting and piracy are difficult crimes to detect. Customs inspectors can only examine a miniscule percentage of goods entering a country, so most counterfeit merchandise cannot be caught in this way. Furthermore, trademarks and patents are not governed by any internationally consistent body of law. The Madrid Agreement and Paris Convention, both signed in the 1800s, govern the international registration of trademarks and patents, but no standard of criminal penalties has ever been agreed upon. The United States has tried a number of intervention methods without much success. The 1994 General Agreement on Tariffs and Trade (GATT) required signatories to adhere to a specific standard of copyright laws. Adherence on paper does not imply enforcement, though, as the negotiations with China proved.

The sorts of products that are counterfeited run the gamut. Knockoff designer jeans, with easy-to-duplicate labels, constitute a $1 billion industry. In North America, signal theft of cable and satellite television stations is a widespread problem. Signals for pay channels such as HBO and Cinemax, as well as basic cable service, can be stolen fairly easily using a descrambler. The 1984 and 1992 Cable Acts imposed penalties for the sale of illegal cable decoders, yet they are still advertised widely and easy to obtain by mail order. Video games are also widely pirated, though that problem has slowed in recent years with the development of home systems. And even airplane parts are counterfeited. Low-quality knockoff seal spacers, a part of the widely used Pratt & Whitney JT8D jet engine, were installed in a number of airplanes before being discovered. Airline safety, a chief concern of the American
public, is compromised by the use of counterfeit parts whose quality is uncertain.

Paradise's book also includes narrative accounts, written in a journalistic style, of the day-to-day operations of street peddlers, counterfeiters at flea markets, and bandits on the Mexican border. He documents a day in the life of David Woods, a private investigator hired by companies like Cartier and Polo to locate counterfeit versions of their product in order to sue and prosecute the counterfeiters and distributors, and to destroy the counterfeit items. Cartier even staged a public "watch crushing" on the streets of New York, in which thousands of Cartier knockoff watches were shredded to pieces under a huge metal roller.

Paradise devotes one chapter to piracy in cyberspace, briefly discussing trademark infringement and the distribution of copyrighted material online. "Cyber-squatters" are private individuals who register the trademarks of prominent companies as Internet domain names (.coms) and then try to sell the domain names to those companies at a large profit. Network Solutions, Inc., which is under contract from the National Science Foundation to assign domain names, has lately withdrawn itself from domain name disputes and elected to let the courts resolve such matters through private lawsuits. Another piracy problem is the availability of copyrighted computer software through online bulletin boards (BBSs), FTP servers, and Web pages. The U.S. government has responded with the 1998 No Electronic Theft (NET) Act, which imposes stiff criminal penalties on anyone distributing multiple copies of copyrighted material on-line, even if not for profit.

A more recent development in online piracy, discussed briefly by Paradise, is the distribution of music on the Internet in the MP3 format (a recently developed data-compression technology). Paradise only devotes a few words to the landmark 1998 Digital Millenium Copyright Act (DMCA), which makes it illegal to circumvent antipiracy measures in computer software. With immediate worldwide access and distribution costs approaching zero, the Internet will likely be the main playing field for copyright pirates of software, books, music, and video for decades to come. Paradise's coverage of these issues is cursory, and those interested in investigating the cutting edge of the debate over copyright infringement and piracy on the Internet would be well advised to look elsewhere.

Paradise also leaves some of the many problems with international trademark enforcement and product piracy to the reader's imagination; the solution is not as simple as his analysis implies. For example, Chinese individuals and businesses can now purchase CD software compilations including Microsoft Office, Microsoft Windows, and other essential business software tools for as little as one dollar. This price may be a small fraction of the $10,000 retail value of the pirated software, but it seems reasonable to most Chinese consumers. If the United States were able to categorically shut down all counterfeiting and piracy operations in China and other developing countries without making heavily discounted, even below-cost, legitimate
goods available, the immediate result will be that small businesses in such countries will no longer be able to afford the software necessary for them to be competitive in the global marketplace. This could also have detrimental effects on the U.S. economy, as some of those businesses are the same ones that supply U.S. consumers with cheap goods and that purchase other U.S. inputs. Similarly, the $15 price of a U.S.-made compact disc is prohibitive for all but the richest Chinese citizens, and yet the popularity of U.S. pop culture abroad—one of the United States's most prized international assets—is maintained, in part, by the availability of one-dollar Britney Spears CDs in developing countries. The retail price of a pirated software compilation would be more than five times the yearly per capita income in China. In all but a few cases, therefore, it simply could not be bought otherwise. This problem is too complex to be solved by a simple law-enforcement crackdown, and although crude, software and music piracy are rough-and-ready antidotes to economic inequality. China's reluctance to crack down on the practice is understandable; the economic effects of stripping businesses of their software might be grave, both to Chinese and American interests.

Furthermore, the main justification for intellectual property laws—motivation for producers to create instead of free-riding—is not so compelling an interest in the case of counterfeiting and piracy in developing nations. Arguably, Microsoft, Disney, Merck, and Cartier will not be discouraged from innovating so long as their rewards are still guarded in the lucrative and better-protected Western markets for software, entertainment, pharmaceuticals, and luxury goods. The profits those companies would have reaped from the few counterfeit- or pirate-buyers in developing countries who would actually have been able to afford the legitimate product are miniscule—thus, the billion-dollar loss calculations cited by Paradise are quite misleading.

Nevertheless, Trademark Counterfeiting, Product Piracy, and the Billion Dollar Threat to the U.S. Economy offers comprehensive, blow-by-blow coverage of the war against counterfeiting. Perhaps its straightforward stories and data will inspire readers to delve more deeply into the more profound problems that lie beneath.

International Environmental Law


A perennial concern among environmentalists in all parts of the world is the ethical dilemma of imposing the environmental standards of the developed word on countries still struggling to achieve basic social welfare goals. In this new study, Equality Among Unequals in International Environmental Law,
Anita Halvorssen, a Norwegian lawyer now residing in the United States, offers environmentalists, policy makers, and scholars a valuable tool in sorting out how best to protect the stability and progress of fragile developing regimes while preserving conservationist ideals. Her work reviews and critiques the underlying forms of international environmental law, environmental issues unique to the developing world, and the organizational and treaty responses to the intersection of the two. While theory plays a part in the analysis, the text is easy to read and relies to a refreshing extent on examples drawn from real treaty implementation and the experiences of international governmental and nongovernmental organizations (NGOs). Also included is a helpful list of major environmental treaties and agreements up through the Kyoto Protocol of 1997.

Halvorssen focuses on how international governmental organizations can empower and include developing nations in the complex decision making and implementation processes required to create effective international environmental law. Her discussion begins with the origins and guiding principles of international environmental law, emphasizing the strong ethic of respect for individual nations and their unique circumstances. This perspective guides her analysis of policy alternatives. Common to every model is the idea that sovereign nations are best situated to make decisions about the use of their land and the health and safety of their citizens. The environmentalist community worldwide can best achieve its goals by acting as a resource and supporter of developing nations, Halvorssen argues, rather than by attempting to implement a more traditional command and control model.

After reviewing the origins and principles of international environmental law, Halvorssen puts forth a detailed model of sustainable development that consciously attempts to integrate respect for the sovereignty and localized expertise of developing nations with the deeper resources of the industrialized world. The text analyzes the delicate balance of "socio-economic or developmental dimensions with environmental issues" that is the basis for sustainable development (p. 44). Particularly interesting in this chapter is a section on "intra-generational and inter-generational--equity" that draws on ancient and very modern thinking about societies' duty to future generations (p. 53). Such a long-term view of environmental justice helps to counter the prevailing short-term interests in immediate and (perhaps) environmentally indifferent or undesirable development. In this analysis Halvorssen relies heavily on Edith Brown Weiss's principles of inter-generational equity, drawing especially from Weiss's 1989 book In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity.

Halvorssen readily acknowledges that inspiring ideals do not constitute the whole of international environmental law, however. Chapter Four addresses "sources of conflict regarding treatment of developing countries in the international regulatory process" (p. v). She asks rhetorically why industrialized countries should offer incentives to developing nations to care
for their own environments. The answer she provides is couched in the economics of self-interest: Industrialized societies benefit from reduced aggregate pollution, new markets for environmentally sound technologies, and the proper management of resources that ultimately have great value to all of human society. The risk of negative externalities from developing countries will become greater the longer those countries lack assistance in the challenge of protecting their ecological capital, Halvorssen contends. The argument remains strong in terms of economics as well as morality.

On the question of how to make environmental protection initiatives attractive to target countries, Halvorssen discusses the choice between two models. The first accepts differential norms as a response to the wide variety of local problems that different nations and regions confront. The Montreal Protocol on Substances that Deplete the Ozone Layer, for instance, represents the differential norms model, as developing countries are offered both financial support and are held to slightly different standards therein. With differential norms, the initial burden of treaty membership appears less onerous to developing nations and incentives to sign are therefore greater. The second model calls for imposing uniform norms to hold every regime to the same standard. The eventual goal of uniform international compliance would be a strong regulatory standard that would not require constant modification, although developing countries could be compensated for lost opportunity costs in auxiliary arrangements that would assist nations with particular difficulties in meeting treaty standards. Organizations external to the treaties might also participate in providing incentives and other forms of assistance to ensure uniform cooperation. Both models are examined for the possibilities they offer to the larger goals of global environmental compliance.

Chapter Five deals with one of the central challenges of devising and enforcing a universally acceptable treaty regime: “Promoting the Participation of Developing States: Incentives and Disincentives in Some International Environmental Agreements.” Here Halvorssen examines both carrots (e.g., financial assistance) and sticks (e.g., trade sanctions) that have been used in various treaties to lure or bully developing nations into the fold. She lays out various models in use and, where possible, discusses their effectiveness. The result is a helpful perspective on what works and doesn’t work as an environmental treaty incentive.

This evaluation leads neatly into a discussion of international institutional structures in Chapter Six, where Halvorssen analyzes the organizational means to monitor enactment of environmental agreements and support their implementation. In light of the acknowledged need for improved organizational supervision of environmental and development issues, this chapter sketches the scene of major institutional players in this area. Refreshingly, Halvorssen also touches on the increasingly widespread protest movement against the World Bank and proposes some possible improvements.
A chapter on special funding mechanisms details the creative possibilities for making environmental reform feasible in cash-strapped nations. Because treaty parties do not always have the resources to support the ideals expressed by the agreements they sign, other funding sources have come into being to support global environmentalist efforts. A few such bodies are the Global Environment Facility, "widely considered the main financial mechanism" supporting international environmental agreements, and the Multilateral Fund of the Montreal Protocol, which exists exclusively to support the Montreal Protocol (p. 149). Other funding prospects described include debt-for-nature swaps, other forms of swapping diverse resources, tradable permits based on the 1990 Amendments to the Clean Air Act in the United States, and an international carbon tax. While most of these prospects are just that, prospects, they represent some of the best options for global environmental funding in the near future.

In a final chapter on the role of NGOs and other major groups in promoting universal participation, Halvorssen opens the door to the infinite possibilities represented by the private sector. NGOs, for example, are not limited by the restrictions of treaty language and can move more nimbly to address arising environmental concerns and thereby lead nations to reach necessary agreements more efficiently. One major concern about the influence of undefined non-governmental "major groups" is that their motives and goals may be contrary to those of the citizens of nations affected by their activities. A section on business and industry groups addresses this problem and suggests that bringing such interests openly to global bargaining tables will both increase corporate accountability and provide access to greater funding for sustainable development.

Halvorssen’s analysis functions as a guide to both developed and developing nations in their efforts to create and enforce environmental treaties. Halvorssen demonstrates that, in order to be effective, international environmental treaties must fulfill a number of difficult-to-reconcile goals, including the preservation of environmental integrity for future generations and for the underrepresented of this generation, acknowledging the superior capacity of a nation’s own people and government to make choices for that nation’s future, and creating appropriate incentives and disincentives for developing and industrialized nations and their citizens to work productively together. For this difficult task Halvorssen marshals clear precedent, clarifying analysis, and convincing argument. For the student or scholar looking for a good summation of the issues and controversies facing international environmental law today, Equality Among Unequals is a worthwhile read.