

# BOOK REVIEW

## Law, War, and Four Modes of Conflict

THE INTERNATIONALISTS: HOW A RADICAL PLAN TO OUTLAW WAR REMADE THE WORLD. Oona A. Hathaway and Scott J. Shapiro. New York, NY: Simon & Schuster, 2018. ISBN13: 978-1-50110987-4. Pp. 640. \$20.00

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### ABSTRACT

*The Internationalists argues that the outlawing of war as an instrument of state policy in the Kellogg-Briand Pact of 1928 “was among the most transformative events in human history, one that has, ultimately, made our world far more peaceful.” The authors’ evidence for this provocative thesis is ultimately unpersuasive. First, changes that they attribute to the Pact began before its creation, as illustrated, for example, by the ban on debt collection wars in the second convention of the Hague Conventions of 1907. Second, their own historical data on wars of conquest suggests that the year 1928 was not a turning point between eras, even when viewed in light of the post-World War II reversals of recent conquests. Rather, the evidence is more consistent with the Allies generally reversing the conquests of the Axis powers, and preserving their own conquests, regardless of whether any conquest took place before or after 1928. Third, their interpretation of legal history does not establish that the Kellogg-Briand Pact played a causally significant role in the creation of the postwar legal order.*

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*But The Internationalists offers much more than its central thesis, including a fruitful exploration of the idea of law and war as alternative forms of conflict resolution. In particular, the authors present a theory of “outcasting” as a mechanism for enforcing law even where there is no single, centralized government. This review generalizes from the authors’ argument to propose a four-mode model of conflict and conflict resolution. Against the widespread assumption of a binary opposition between anarchy and the state, the four-mode model draws attention to two legal-institutional options that lie between pure anarchy and the centralized authority of an idealized state.*

*Where the parties to a conflict share a law, but not a judge or executive, the characteristic method of enforcing the law will be tit-for-tat retaliation against violations. Armed conflict in this setting will tend to resemble a feud. Where the parties to a conflict share a law and a judge, but not an executive, community responsibility for enforcing the law, such as through outcasting, becomes more feasible. This review offers brief historical illustrations and considerations of the likely shapes of conflict in each of the four modes.*

#### INTRODUCTION

There are basically two forms of conflict resolution:  
administered rules and fighting. Law and war.

—Paul Bohannon<sup>1</sup>

**W**here should we begin in thinking about the relationship between law and war?

On the one hand, there is a long tradition, stretching from Thucydides’ Melian Dialogue through Hobbes and Clausewitz to Kennan and the realist school of international relations theory, that views law as essentially irrelevant to war making.<sup>2</sup> In this view, states

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<sup>1</sup> Paul Bohannon, *Introduction*, in *LAW AND WARFARE* xi, xiii (Paul Bohannon ed., 1967).

<sup>2</sup> See THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 402 (Rex Warner trans., 1972) (presenting argument by the more powerful Athenians to the less powerful Melians that “the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept”); THOMAS HOBBS, *LEVIATHAN* 86–100 (Richard Tuck ed., 1996) (presenting natural law as ineffectual in the anarchic state of nature, leaving only “Warre of every man against every man”); CARL VON CLAUSEWITZ, *ON WAR* 75 (Michael Howard & Peter Paret eds., 1989) (1832) (“Attached to force are certain self-imposed, imperceptible limitations hardly worth mentioning, known as international law and custom, but they scarcely weaken it.”); GEORGE F. KENNAN, *AMERICAN DIPLOMACY* 95 (expanded ed. 1984) (criticizing “the legalistic-

pursue their self-interest in matters of security, and law can do little to constrain them. The view of war as fundamentally lawless is also echoed in the contemporary pacifist sense that war is “a senseless collective slaughter, a descent into irrational barbarism, a horror.”<sup>3</sup>

On the other hand, many scholars have found, upon closer examination, that wars are often very rule-bound, at least in the sense of being highly culturally regulated on one or both sides. Michael Howard argues that “Rousseau was surely right when he stated, in contradiction to Hobbes, that war without social organization is inconceivable.”<sup>4</sup> John Keegan frames his *A History of Warfare* as an argument against the Clausewitzian notion of war as a product of pure rational calculation and instead, emphasizes the many ways in which war is shaped by culture, especially the culture of warriors.<sup>5</sup> By emphasizing the apparently irrational, passionate, sometimes ritualized aspects of warfare, Keegan shows “how much more persistent culture is than political decision as a military determinant”<sup>6</sup> and thus, how war is often constrained—and aggravated—by cultural norms. More recently, the legal scholar David Kennedy has tried to draw attention to the pervasiveness of law in contemporary war.<sup>7</sup> Against his earlier sense, as a conscientious objector during the Vietnam era, that the military was “all that international law was not—violence and

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moralistic approach to international problems,” for “the belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints”); John J. Mearsheimer, *The False Promise of International Institutions*, 19 INT’L SECURITY 5, 13 (1994) (“For realists, the causes of war and peace are mainly a function of the balance of power, and institutions largely mirror the distribution of power in the system. . . . [I]nstitutions are merely an intervening variable in the process.”). Sometimes the Latin phrase “*inter arma silent leges*” (the law is silent in times of war) is used to gesture toward the perceived irrelevance of law to war. See, e.g., GEOFFREY BEST, WAR & LAW SINCE 1945 3 (1994).

<sup>3</sup> JAMES Q. WHITMAN, THE VERDICT OF BATTLE 1 (2012).

<sup>4</sup> Michael Howard, *Temperamenta Belli: Can War Be Controlled?*, in RESTRAINTS ON WAR 1, 1 (Michael Howard ed., 1979); accord BEST, *supra* note 2, at 4. Howard also notes that despite Clausewitz’s well-known dismissal of international law in ON WAR, Clausewitz’s even more well-known assertion of the continuity between war and politics implies a recognition that war is not “in its essence ‘uncontrollable.’” Howard, *supra* note 2, at 1; see also von Clausewitz, *supra* note 2. Howard elsewhere observes that Clausewitz seems to recognize that “the conduct of war was subject to considerably greater and more perceptible limitations in his own time than it had been in the days of, say, Genghis Khan.” Michael Howard, *Constraints on Warfare*, in THE LAWS OF WAR 1, 2 (Michael Howard ed., 1994).

<sup>5</sup> JOHN KEEGAN, A HISTORY OF WARFARE 3, 5–12, 24 (1993).

<sup>6</sup> *Id.* at 39.

<sup>7</sup> See generally DAVID KENNEDY, OF WAR AND LAW (2006).

aggression in contradiction to our reason and restraint,”<sup>8</sup> he describes the many ways in which “[l]aw has crept into the war machine. The battlespace is as legally regulated as the rest of modern life.”<sup>9</sup> A number of scholars have also argued that international humanitarian law has played a significant legitimizing role in modern war—helping to enable it as much as to constrain it.<sup>10</sup>

Whether or not the initiation of war can be significantly constrained by the international law of *jus ad bellum*, or the conduct of war by the international law of *jus in bello*, there is a separate sense in which we might think about law and war being intimately related. This is the sense suggested by the anthropologist Paul Bohannon in the epigraph above. War and law can be seen as substitutes, as alternative responses to the problem of human conflict. The legal scholar James Q. Whitman has argued that the “probably. . . universal human institution” of the “contained pitched battle”<sup>11</sup> can be understood as a “conflict resolution mechanism,”<sup>12</sup> and one that “was arguably a more valuable means of civilizing war than anything we can offer in our modern law of war.”<sup>13</sup>

Oona Hathaway and Scott Shapiro’s recently published book, *The Internationalists*, offers contributions to both threads of thinking about the relationship of law to war.<sup>14</sup> At the center of their book is the self-consciously provocative argument that the Kellogg-Briand Pact of 1928, which purported to outlaw war as an instrument of state policy, and which has been almost universally maligned since its apparent failure in World War II, was in fact “among the most transformative events in human history, one that has, ultimately, made our world far more peaceful.”<sup>15</sup> Part I of this review will argue that Hathaway and Shapiro, or “H&S” as I will call them, ultimately fail to make a

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<sup>8</sup> David Kennedy, *War and International Law: Distinguishing Military and Humanitarian Professions*, in *THE LAW OF WAR IN THE 21ST CENTURY: WEAPONRY AND THE USE OF FORCE* 1, 1–2 (Anthony M. Helm ed. 2006).

<sup>9</sup> David Kennedy, *Modern War and Modern Law*, 16 *MINN. J. INT’L L.* 471, 472 (2007).

<sup>10</sup> See, e.g., MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* (2006).

<sup>11</sup> WHITMAN, *supra* note 3, at 6.

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *Id.* at 5.

<sup>14</sup> OONA A. HATHAWAY & SCOTT J. SHAPIRO, *THE INTERNATIONALISTS* 9–11 (2017).

<sup>15</sup> *Id.* at xiii. The authors refer to the Pact as “the Peace Pact” rather than as “the Kellogg-Briand Pact,” which is its customary name in the United States. See *id.* at ix, xi–xii. There may be more than cosmopolitanism at work in the choice. One of the book’s arguments is that United States Secretary of State Frank Kellogg, who received the 1929 Nobel Peace Prize for his work on the Pact, unfairly deprived Salmon Levinson of credit for the Pact. See *id.* at 129–30.

convincing case for the efficacy of the Pact. First, they downplay the fact that a significant part of the transformation they describe took place before the signing of the Pact in 1928.<sup>16</sup> Second, their interpretation of historical data unpersuasively minimizes the significance of territorial boundary changes that conflict with their thesis.<sup>17</sup> Third, their interpretation of legal history does not establish that the Kellogg-Briand Pact played a causally significant role in the creation of the postwar legal order, which might be another way of defending the significance of the Pact.<sup>18</sup>

But the book contains much more than its central thesis on the world-historical significance of the Kellogg-Briand Pact. As H&S note, the “book is, at its core, a work of intellectual history,”<sup>19</sup> and this history begins with the figure of the early modern jurist Hugo Grotius. H&S present Grotius, like Bohannon and Whitman above, as perceiving war and law as substitutes: “War is a substitute for courts, Grotius argued, *because courts are the original substitutes for war.*”<sup>20</sup> By embedding an intellectual history of the use of war and law as substitute modes of dispute resolution within a broader history of the attempt to regulate war through law, H&S create a productive conceptual tension. They simultaneously distinguish and blend the enduring human institutions of law and war. Their book could be said to present war as an alternative to law that is itself constrained by law.

This productive tension will be the starting point for the investigation of war and law in Part II of this review. Drawing in particular on H&S’s discussion of “outcasting” as a mechanism for enforcing international law, and their structural analogy between the legal institutions of the post-World War II world and of medieval Iceland, Part II proposes a novel way of thinking about the general relation between war and the law. By disaggregating “the law” as an institution into three primary parts—the substance of the law, a judge to apply the law, and an executive to enforce the law—it becomes

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<sup>16</sup> See *infra* Part II.A.

<sup>17</sup> See *infra* Part II.B.

<sup>18</sup> See *infra* Part II.C.

<sup>19</sup> HATHAWAY & SHAPIRO, *supra* note 14, at xx. The source of many of the problems discussed in Part II may be, at root, that H&S have attempted to graft a causal narrative involving several centuries of global history onto materials that are, as they acknowledge here, for the most part concerned with the thoughts and writings of a relatively small number of practitioners, advocates, and scholars of international law. H&S admirably attempt to make up for this methodological conundrum through the statistical analysis of historical data, as discussed in Part I.

<sup>20</sup> *Id.* at 11; *cf. id.* at 106 (“[w]ar as a legal institution”).

possible to distinguish four legal-institutional settings in which a conflict might unfold. First, the parties might share neither a law, a judge, nor an executive. Second, the parties might share a law, but not a judge or an executive. Third, the parties might share a law and a judge, but not an executive. Fourth, the parties might share a law, a judge, and an executive. Each of these four settings, Part II argues, will tend to involve characteristic mechanisms of enforcement and patterns of violence. Contrary to the traditional assumption in international relations scholarship of a rigid binary distinction between anarchy and the state,<sup>21</sup> the “four modes of conflict” model proposed here suggests that between anarchy and the state there are two fairly discrete and stable conditions of legal order.

The four-mode model of conflict only receives a relatively brief sketch in Part II. To the extent that the model is a generalization of insights from *The Internationalists*, it suggests some of the richness of the legal and historical materials contained in the book, despite what this review argues is the unpersuasiveness of the book’s central claim. No standard-length review could summarize all of H&S’s excursions, which, in addition to subjects addressed below, include: insightful and often entertaining treatments of the transplantation of Grotian international law into Japan;<sup>22</sup> the legal procedures at the Nuremberg tribunals;<sup>23</sup> the conflict between Carl Schmitt and Hans Kelsen;<sup>24</sup> and the rejection of international law in the thought of the Islamic fundamentalist Sayyid Qutb.<sup>25</sup>

A final aspect of the book that this review will not explicitly address is its ideological orientation. *The Internationalists* is a work of liberalism, an expression of Wilsonian optimism in the potentially benevolent power of the law.<sup>26</sup> Its heroes are Western lawyers who believe in the abolition of war through legal rules, and its villains are opponents of liberal tolerance, especially on the Right, such as Schmitt and Qutb. The book presents the United States as generally a force for

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<sup>21</sup> For a critique of the distinction in international relations, see Helen Milner, *The Assumption of Anarchy in International Relations Theory: A Critique*, 17 REV. INT’L STUD. 67 (1991).

<sup>22</sup> See HATHAWAY & SHAPIRO, *supra* note 14, at 131–57.

<sup>23</sup> See *id.* at 276–97.

<sup>24</sup> See *id.* at 215–43.

<sup>25</sup> See *id.* at 396–414.

<sup>26</sup> See, e.g., *id.* at 422 (arguing that “[l]aw creates real power,” that “the New World Order is better than the Old,” and that “[d]espite the many challenges, there is reason for optimism”).

good in the world, especially through its creation and defense of multilateral and international legal institutions.<sup>27</sup> It presents international economic markets as a tool for encouraging peace and punishing aggression.<sup>28</sup> By contrast, it labels some (unspecified, but presumably illiberal) contemporary states as “evil.”<sup>29</sup> The book’s Conclusion is a rhetorically heightened work of policy advocacy that appears intended to persuade Western elites, and especially lawyers and lawmakers in the United States, to stay the course and continue to believe that international law is worth improving and defending.<sup>30</sup>

Much of this will appear bafflingly naive, or even offensive, to critics of liberalism on the Left and the Right. They may be astonished to read claims like the following, about the postwar order: “Compulsion by war was over. The era of global cooperation had begun.”<sup>31</sup> A reader approaching the book from the critical, post-Marxist Left may wish to object that H&S pay inadequate attention to what the Left might perceive as liberalism’s hypocrisies and crimes against subordinated groups, and the global South in general, from the racist origins of international law as a professional movement in the later nineteenth century; through the CIA’s Cold War adventures in Iran, Guatemala, Cuba, and elsewhere; through the human and environmental devastation caused by coercive Washington Consensus policies in the 1990s; to the dismissal of international law concerns in the 1998 Kosovo and 2003 Iraq invasions, and currently in Syria—not to mention the United States’ vacillating hostility to the International Criminal Court or its failure to punish many of those responsible for the use of torture during the Bush administration.<sup>32</sup> When H&S present

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<sup>27</sup> See, e.g., *id.* at 418–19 (arguing that the continued success of the New World Order, including the decline of interstate war and the near disappearance of conquest “depends on the willingness of the United States to continue to play a central role in maintaining the legal order”).

<sup>28</sup> See, e.g., *id.* at 420 (“Free trade not only channels productive activity away from war making, it provides a legal tool for disciplining states who violate the rules.”); *id.* (stating that adherence to the WTO’s free trade rules “creates jobs and raises wages overall”).

<sup>29</sup> *Id.* at 369.

<sup>30</sup> See, e.g., *id.* at 423 (“Those who shape the law are the hydraulic engineers of the political world. . . . Each of us, even those outside the halls of government, has the capacity to make a difference.”).

<sup>31</sup> *Id.* at 305.

<sup>32</sup> H&S mention some of these issues in passing. See, e.g., *id.* at 329–30 (noting the 1953 coup in Iran and the 2003 invasion of Iraq as exceptions to the general picture of state security from foreign interference increasing in the postwar era); see also *id.* at 381 (acknowledging that outcasting “often favors larger, stronger states over smaller, weaker ones”). Even if post-Marxist historical perspectives are set aside, H&S’s account of liberal

the post-World War II decline of interstate wars and especially territorial conquest in a positive light, only partially dimmed by the related rise of intrastate conflict, a reader on the Left will probably object that this largely Whiggish history leaves out the voices of the victims of past and continuing Western economic and military oppression and exploitation.

H&S ultimately offer little engagement with the critical perspective of the Left, and I will not attempt to construct a dialogue here. If anything, *The Internationalists* is more productively read as a liberal response to the critique of liberal international institutions from the Right, such as by realist theorists of international relations.<sup>33</sup> Central to H&S's argument is the claim that law has mattered to the decline of interstate war, and especially wars of conquest, as described in the next section.

## I

### THE INTERNATIONAL LAW OF CAUSATION

One way of approaching *The Internationalists*' treatment of the Kellogg-Briand Pact is to view it as an answer to the question: Why have wars of conquest declined in frequency and size since the middle of the twentieth century?

As H&S note, scholars from a variety of disciplines have proposed explanations for the post-World War II decline of interstate war,<sup>34</sup> a phenomenon that is sometimes described, in a phrase from the historian John Gaddis, as "the Long Peace."<sup>35</sup> The cognitive psychologist Steven

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international law and American power is remarkably less critical than what one finds in, for example, MARK MAZOWER, *GOVERNING THE WORLD* 65–93 (2012) (describing the racist underpinnings of the rise of international law in the later nineteenth century); EREZ MANELA, *THE WILSONIAN MOMENT* 25 (2009) (describing Wilson's racist vision of delayed self-determination for non-European peoples). *See generally* TIM WEINER, *LEGACY OF ASHES: THE HISTORY OF THE CIA* (2007) (recounting various, often violent episodes of CIA interference in other states' sovereignty); and JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* (2002) (drawing attention to the failures of the Washington Consensus).

<sup>33</sup> For one suggestion of the underlying genealogical and conceptual affinities between international relations realism and the Right, *see* William E. Scheuerman, *Carl Schmitt and Hans Morgenthau: Realism and Beyond*, in *REALISM RECONSIDERED: THE LEGACY OF HANS J. MORGENTHAU IN INTERNATIONAL RELATIONS* 62 (Michael C. Williams ed., 2007).

<sup>34</sup> HATHAWAY & SHAPIRO, *supra* note 14, at 334 (noting that political scientists have emphasized the importance of "the invention of nuclear weapons, the spread of democracy, [or] the rise of global trade" as explanations).

<sup>35</sup> STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE* 190 (2011) (citing John Gaddis, *The Long Peace: Elements of Stability in the Postwar International System*, 10 *INT'L SECURITY* 99 (1986)). H&S ally themselves with the "declinist" hypothesis regarding



Pinker summarizes much of the research in his interdisciplinary, and highly contested, 2011 work *The Better Angels of Our Nature*.<sup>36</sup> Pinker notes that attempts to understand the unexpectedly enduring aspects of postwar peace began to appear as early as the 1980s.<sup>37</sup> The main explanations, none of them mutually exclusive, have been: the role of nuclear weapons in deterring war,<sup>38</sup> the rise of democracy and the relative peace between democratic states,<sup>39</sup> the rise of liberalism and the pacific effects of international commerce,<sup>40</sup> and the pacifying growth of intergovernmental organizations.<sup>41</sup>

The extraordinary novelty of *The Internationalists*' contribution to the literature of the Long Peace lies in its argument that international law in general, and the Kellogg-Briand Pact in particular, played a central causal role.<sup>42</sup> No prominent scholarly work before *The Internationalists* has so unapologetically adopted the opposite stance from the realist school of international relations theory, asserting not only that international law generally played some causally significant

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war and violence, favorably citing Nils Petter Gleditsch's claim that "[d]espite the various critiques, there is wide agreement on the decline of war and other forms of violence. . . . However, the reasons for the decline are less clear." Nils Petter Gleditsch, *The Decline of War*, 15 INT'L STUD. REV. 396 (2013), cited in HATHAWAY & SHAPIRO, *supra* note 14, at 533 n.37.

<sup>36</sup> See PINKER, *supra* note 35, at 189–294.

<sup>37</sup> *Id.* at 253–55 (citing works and observations by Werner Levi, John Gaddis, Kalevi Holsti, Evan Luard, John Mueller, Francis Fukuyama, James Lee Ray, Carl Kaysen, Robert Jervis, John Keegan, Michael Howard, and Azar Gat).

<sup>38</sup> *Id.* at 268–78.

<sup>39</sup> *Id.* at 278–84. Related to the thesis of a democratic peace is the idea that American hegemony within the liberal international order ensured peace—first within the United States' sphere of influence during the Cold War, then in the world as a whole after the Cold War. Cf. G. John Ikenberry, *The End of Liberal International Order?*, 94 INT'L AFF. 7, 8 (2018).

<sup>40</sup> See PINKER, *supra* note 35, at 284–88.

<sup>41</sup> See *Id.* at 288–94. To these, Pinker adds his own explanation, which might be described as “constructivist” if it appeared in a work of international relations scholarship: it is grounded in the power of culture to reshape interests and norms. He argues that the Long Peace is

a result of one of those psychological retunings that take place now and again over the course of history and cause violence to decline. In this case it is a change within the mainstream of the developed world (and increasingly, the rest of the world) in the shared cognitive categorization of war.

*Id.* at 251. Pinker suggests that this cultural shift, which has been especially pronounced in Europe, may underlie many of the other variables such as democracy and trade that have been shown to correlate with the decline of interstate war. See *id.* at 290–91.

<sup>42</sup> The authors themselves note the novelty of their central claim. See HATHAWAY & SHAPIRO, *supra* note 14, at xii–xiii.

role in shaping states' decisions regarding the initiation of armed conflict during the twentieth century, but that the Kellogg-Briand Pact specifically played one of *the* causally central roles. One of the authors of *The Internationalists*, in an earlier review, referred to a particularly skeptical work of international law scholarship as a “minimal rationalist theory.”<sup>43</sup> In contrast, *The Internationalists* might be described as a “maximal legalist theory.” It places law at the causal center of international affairs.<sup>44</sup>

To be sure, H&S acknowledge that the adoption of the Kellogg-Briand Pact was not sufficient by itself to cause the decline of wars of conquest.<sup>45</sup> But they go on to state that the Pact was “a *necessary* start.”<sup>46</sup> Although “the Pact was not the *only* factor responsible for the transformation” of the international order, its “outlawry of war was a crucial . . . trigger. It sparked a series of events that would lead to the construction of a new global order.”<sup>47</sup> If the Kellogg-Briand Pact (or, presumably, another legal instrument like it) had not come into existence, H&S seem to argue, the decline of wars of conquest would not—perhaps could not—have taken place.

In fact, the details of H&S's argument suggest that they do not view the Pact as merely a necessary condition for the decline of wars of conquest. They do not view it as one condition among many, perhaps a necessary hurdle to be overcome but not the most significant transformation in the broader history. Rather, their narrative places law in general, and the Pact in particular, at or near the causal center of the history of armed conflict in the postwar era. As already noted, they present the Pact as “among the most transformative events of human

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<sup>43</sup> Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1407 (2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)).

<sup>44</sup> *The Internationalists* could also be seen as “legalist” in the sense of adhering to the traditional ideology of the legal profession, with its liberal aspiration toward the resolution of conflicts through ostensibly neutral, apolitical rule following. See JUDITH SHKLAR, *LEGALISM* 18 (1986); accord MARTHA FINNEMORE, *THE PURPOSE OF INTERVENTION: CHANGING BELIEFS ABOUT THE USE OF FORCE* 38–46 (2003).

<sup>45</sup> “The Pact did not bring about the end of conquest and interstate war on its own; no treaty, no law could have.” HATHAWAY & SHAPIRO, *supra* note 14, at 335.

<sup>46</sup> *Id.* (emphasis added). Elsewhere, H&S again acknowledge that the Pact “was not sufficient by itself” to bring about the decline of wars of conquest, but rather required Allied victory in World War II, the postwar reversal of conquests since 1928, and the development of the U.N. Charter. See *id.* at 331. On another occasion, H&S also make the more modest claim that the interwar changes in international law, and in some state practices, “resulted at least in part from the Pact.” *Id.* at 330.

<sup>47</sup> *Id.* at xviii.

history.”<sup>48</sup> It “marked the beginning of the end” of “war between states,” and “the replacement of one international order with another.”<sup>49</sup> The “cascade of events” made possible by the Pact include the reshaping of the world map in favor of smaller, weaker states; the human rights revolution; “the use of economic sanctions as a tool of law enforcement”; and the “explosion in the number of international organizations.”<sup>50</sup> It would not be an exaggeration to say that the historical narrative presented by *The Internationalists* is one in which international law changes, and in its wake international history, including the history of war and peace, unfolds. The Kellogg-Briand Pact, far from being a largely futile or perhaps perverse gesture of interwar utopian liberalism, becomes an indirectly but profoundly efficacious turning point in world history: a necessary and central, though obviously not sufficient, condition for the existence of the world we live in today.<sup>51</sup>

The overarching outline of H&S’s history is easily summarized. It is the story of a transformation from what they call the “Old World Order” to the “New World Order,” with the Kellogg-Briand Pact acting as the hinge between the two. The Old World Order arose in early modern Europe, and its rules are reflected in the writings of Hugo Grotius and his successors. It was “the legal regime European states adopted in the seventeenth century and spent the next three centuries

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<sup>48</sup> *Id.* at xiii.

<sup>49</sup> *Id.* at xiii; *see also id.* at 334 (“The outlawry of war not only led to the end of conquest. It precipitated the end of international war itself.”); *id.* at 418 (noting that the Pact has “clearly” worked, in the sense that “interstate war has declined precipitously, and conquests have almost completely disappeared.”); *id.* at xiv (“The Pact was aimed at ending war *between states* and, in that, it proved remarkably successful.”).

<sup>50</sup> *Id.* at xv. H&S even present World War II in language that comes close to suggesting it was fought over differences regarding the Kellogg-Briand Pact. The war, they write, “would become a contest between two competing visions of the world: between one that saw the Pact as a piece of paper and one that saw it as a new legal reality.” *Id.* at 182; *see also id.* at 188, 213; *id.* at 193 (“The war was no longer about who would control what territory. It was about what rules would govern when the war was over.”); *id.* at 332 (“[T]he winners had just fought a war in which the rallying cry was the rejection of territorial aggrandizement by force. That rallying cry was rooted in the Pact.”). *But see id.* at 250 (noting that “the Allies were far more concerned with victory than with its legal consequences.”).

<sup>51</sup> Another example of the explicitly causal nature of H&S’s claims regarding the significance of international law arrives in their claim that “[f]rom our bird’s-eye view, it is possible to see what observers on the ground too often miss: that what was once frighteningly common is now thankfully infrequent”—that is, wars of conquest—“because what was once seen as the embodiment of international law is now understood as its repudiation.” *Id.* at 329.

imposing on the rest of the globe.”<sup>52</sup> One of the central rules of the Old World Order was “the right of conquest”: “Any state that claimed it had been wronged by another state, and whose demands for reparations were ignored, could retaliate with force and capture territory as compensation.”<sup>53</sup> In the absence of a shared legal authority to resolve disputes through litigation, states resorted to war, and the rules of the Old World Order effectively declared that “Might was Right,” meaning that “success creates legal rights in war.”<sup>54</sup> When a state succeeded in conquering the territory of another state, “[i]t owned all public property and possessed the legal authority to rule over its subjects.”<sup>55</sup> H&S show how Grotius, after initially attempting to condition the legal rights of the conquering state to some extent on the justice of the state’s cause,<sup>56</sup> eventually came to accept in his most influential work, *The Law of War and Peace*, that under the law of nations, the victorious state’s cause must be treated *as if* it had been just.<sup>57</sup>

H&S emphasize that the rules of the Old World Order were “binding,” “understood to be obligatory,” and that “sovereigns largely obeyed them.”<sup>58</sup> The first part of *The Internationalists* (“Old World Order”) features a number of historical anecdotes illustrating political figures, and not only theoreticians such as Grotius, appealing to and apparently complying with the rules of the Old World Order.<sup>59</sup> The book helpfully draws attention to the once-routine state practice of issuing a war manifesto containing the assertion of a right that the war is intended to uphold.<sup>60</sup> H&S show that as late as the 1840s, United States President James Polk was careful to justify his war against

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<sup>52</sup> *Id.* at xv.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at xv, 23–24. H&S note that “Grotius was not the first to propose the Might is Right Principle.” *See also id.* at 25 (earlier articulations of the principle in the works of Raphael Fulgosius and Balthazar Ayala).

<sup>55</sup> *Id.* at xv.

<sup>56</sup> *See id.* at 11, 23–24.

<sup>57</sup> *Id.* at 23–24, 53–55 (“Winning in war meant winning in law”).

<sup>58</sup> *Id.* at xv.

<sup>59</sup> It should be noted that H&S also gesture occasionally toward alternate explanations for state behavior that do not give a central role to international law. *See id.* at 171 (“Wright would later speculate that the attraction of the new policy stemmed less from an interpretation of international law and more from practical imperatives.”); *id.* at 177 (“Favoring one side in the fight, [Woodring] warned, would lead to war, regardless of what Roosevelt (or international legal scholars) said.”).

<sup>60</sup> *See id.* at 31–55; *id.* at 46 (“The function of manifestos was to explain the legal basis of the war being waged.”). H&S have also created an online compendium of war manifestos, available at [documents.law.yale.edu/manifestos](http://documents.law.yale.edu/manifestos).

Mexico in part as a means of collecting unpaid debts—a perfectly legitimate basis for a war of conquest under the rules of the Old World Order.<sup>61</sup> They also provide examples of diplomats such as Thomas Jefferson, when he was secretary of state during the Washington administration, insisting on the duty of neutral states to maintain strict impartiality between warring parties.<sup>62</sup> As H&S emphasize, the notion that neutrality entailed strict impartiality, and thus prohibited the use of economic aid or sanctions, was another important aspect of the Grotian law of nations for most of the period of the Old World Order.<sup>63</sup>

A skeptic of the efficacy of international law might question some of H&S's phrasing concerning the legal rules of war and peace laid out in treatises by writers such as Grotius and Vattel. H&S state that "each stage" of war in the Old World Order was "carefully regulated."<sup>64</sup> But is it a meaningful "regulation" of the decision to go to war to require that a certain kind of justification be formally articulated, even if the justification can be utterly pretextual? Such "regulation" does not in fact prevent a state from initiating war whenever it chooses to do so, for whatever actual reason. The obligatory formalities at the start of a war under the Old World Order might just as well be categorized as *jus in bello* regulations, and the "Might is Right" principle as a regulation of *jus post bellum* procedures placing no constraint on the decision to go to war, leaving the category of *jus ad bellum* effectively empty.<sup>65</sup>

In other words, to the extent that states were free under the Old World Order to initiate war against any state at any time and on any actual basis, so long as they carried out the proper formalities, it is difficult to see how the substance of Old World Order legal doctrine "regulated" the decision to go to war in any meaningful sense. When H&S state that under the Old World Order, "[w]ars could not be entered for any reason whatsoever" but "had to be made in the name of justice"<sup>66</sup> the second claim may be true, but the first appears to be

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<sup>61</sup> See *id.* at 33–35. But see *infra* Part II.A (prohibition of debt collection wars in 1907 Hague Conventions).

<sup>62</sup> HATHAWAY & SHAPIRO, *supra* note 14, at 85.

<sup>63</sup> See, e.g., *id.* at 90–91.

<sup>64</sup> *Id.* at 35.

<sup>65</sup> The Japanese scholars who responded to the importation of the ideas of Grotius seem to have perceived the unusual nature of an international "law" in which the actions of the stronger party were by definition "lawful." Some objected to the use of the Japanese term "*hō*" (law) for the word "law" in translations of "international law": "Understandably, they saw Western 'international law' as unpredictable and inconsistent, reflecting the value of 'might,' not 'law.'" *Id.* at 145.

<sup>66</sup> *Id.* at 44.

nearly the opposite of the practical reality that *The Internationalists* itself describes. Wars could, in fact, be entered for any reason whatsoever, provided that they were accompanied by a formal declaration facially asserting a just cause. The Old World Order's treatment of the decision to go to war might better be seen as the absence of law than as a legal rule.

The second part of the book, "Transformation," presents an engaging account of how several largely uncelebrated figures helped to transform the international law of *jus ad bellum* after the Grotian order failed to prevent the catastrophe of World War I.<sup>67</sup> These figures are the "Internationalists" of the book's title: Salmon O. Levinson, who formed a social movement in support of outlawing war and shepherded the creation of the Kellogg-Briand Pact; James T. Shotwell, who ghostwrote the Pact and then incorporated it into the first draft of the United Nations Charter; Sumner Welles, who also played a central role in the creation of the United Nations; and Hersch Lauterpacht, a legal scholar who helped to theorize and extend the changes brought about by the Pact.<sup>68</sup>

As H&S present the story, the core of Grotius's rules, including the right of conquest, the "Might is Right" principle, and neutrality as strict impartiality, remained intact until the signing of the Kellogg-Briand Pact in 1928. The signing of the Pact triggered a series of legal transformations that ultimately culminated in the creation of the "New World Order," the subject of the third part of the book. H&S argue that the outlawry of war in the Pact created practical problems in other areas of international law that led some scholars and diplomats in the interwar years to argue for broader changes. If aggressive war was no longer lawful, then how was the law to be enforced? How was a state that initiated an aggressive war—such as Japan in its 1931 invasion of Manchuria—to be punished? Under the Old World Order, economic sanctions against the aggressive state would constitute a violation of neutrality. The Stimson Doctrine, later echoed by the League of Nations, departed from the Grotian law of neutrality by declaring that the United States would not recognize an aggressive state's legal right

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<sup>67</sup> "The 'Great War' was a true Grotian war—launched to right wrongs both real and imagined." *Id.* at 104.

<sup>68</sup> *See id.* at xxi, 106–15, 125–30 (Levinson), 115–21, 194–98 (Shotwell), 183–88, 197–98 (Welles), 238–39, 246–52 (Lauterpacht). Henry Stimson also plays a pivotal role. *See id.* at 163–68, 177–79; *id.* at 169 ("It would be hard to overemphasize the importance of the League's acceptance of the Stimson Doctrine"). H&S are apparently the first scholars to identify Shotwell as the author of the first draft of the U.N. Charter. *See id.* at 196.

to conquered territory. As H&S put it, “The Stimson Doctrine was the first step in dismantling the Old World Order and constructing a new system of law.”<sup>69</sup>

By the end of H&S’s story of transformation, the New World Order in which we currently live had come into being. Under this New World Order, the “rules governing conquest, criminal liability, gunboat diplomacy, and neutrality” are “precisely the opposite” of what they were under the Old World Order:<sup>70</sup>

[A]ggressive wars are illegal. And because aggressive wars are illegal, states no longer have the right to conquer other states; waging an aggressive war is a grave crime; gunboat diplomacy is no longer legitimate; and economic sanctions are not only legal, but the standard way in which international law is enforced.<sup>71</sup>

*The Internationalists* makes a persuasive case that since the end of World War II, we have lived in a radically different world of international law from the one described by Grotius and his successors, and that during the same period, the nature of interstate (and intrastate) conflict has changed dramatically, including through the sharp decline of wars of conquest. But was the Kellogg-Briand Pact in fact a causally significant factor in the establishment of the post-1945 world order?

As noted in the Introduction, there are at least three reasons to doubt H&S’s assertions regarding the historical significance of the Pact. The first concerns transformations before the signing of the Pact in 1928. The second concerns H&S’s statistical evidence for the efficacy of the Pact. The third concerns their evidence from legal history.

#### *A. Transformations Before the Pact*

*The Internationalists* suggests that the Kellogg-Briand Pact was responsible for a normative movement away from the view that the use of military force is an appropriate way of resolving interstate disputes. As an illustration of this change, H&S focus on the use of military force to collect debts. They include a lengthy historical vignette on the Mexican-American War. “President Polk,” H&S write, “celebrated the conquest of Mexican territory and justified it by claiming that the U.S. Army was collecting unpaid debts. After 1928, however, such wars were no longer considered just.”<sup>72</sup> Similarly, they write that “[a]fter

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<sup>69</sup> *Id.* at 169, 163–70.

<sup>70</sup> *Id.* at xvii.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 333.

1928,” war was no longer seen as an “appropriate legal means of resolving disputes.”<sup>73</sup> “Today, war is regarded as a departure from civilized politics. But . . . [b]efore 1928, every state accepted the opposite position.”<sup>74</sup>

But revulsion toward the use of war to collect debts, or more generally toward the view of war as civilized politics, did not begin in 1928. The Kellogg-Briand Pact was not even the first international treaty attempting to ban the use of force to collect debts. As H&S quietly mention in a single footnote, the second convention of the Hague Conventions of 1907 had already prohibited debt collection wars.<sup>75</sup> The convention begins:

The Contracting Powers agree not to have recourse to armed force for the recovery of contract debts claimed from the Government of one country by the Government of another country as being due to its nationals.

This undertaking is, however, not applicable when the debtor State refuses or neglects to reply to an offer of arbitration, or, after accepting the offer, prevents any compromise from being agreed on, or, after the arbitration, fails to submit to the award.<sup>76</sup>

As the political scientist Martha Finnemore makes clear in Chapter Two of her 2003 book *The Purpose of Intervention*, 1907 was the pivotal year in the outlawry of debt collection wars, not 1928.<sup>77</sup> After 1907, “intervention behavior among states changed. European states ceased interventions to collect contract debts from foreign governments.”<sup>78</sup> In fact, the United States already had a policy from at least 1885 against the use of military force to collect debts.<sup>79</sup> Neither the United States’ policy nor the willingness of the state parties to the 1907 Hague Convention to agree to the outlawing of debt collection wars is consistent with H&S’s presentation of 1928 as the year that states stopped viewing debt collection wars as “just,”<sup>80</sup> or war in general as an “appropriate legal means of resolving disputes.”<sup>81</sup>

<sup>73</sup> *Id.* at 335.

<sup>74</sup> *Id.* at xiv.

<sup>75</sup> *See id.* at 445 n.27; *see also* Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts, Oct. 18, 1907, 36 Stat. 2241, 1 Bevans 607 [hereinafter Second Hague Convention of 1907].

<sup>76</sup> Second Hague Convention of 1907, art. I.

<sup>77</sup> *See* FINNEMORE, *supra* note 44, at 24–51.

<sup>78</sup> *Id.* at 46.

<sup>79</sup> *See id.* at 46 n.60.

<sup>80</sup> HATHAWAY & SHAPIRO, *supra* note 14, at 333.

<sup>81</sup> *Id.* at 335.



Moreover, less than a decade after 1907, the Covenant of the League of Nations attempted to establish an even broader prohibition on the use of force to resolve interstate disputes, although one with a larger loophole. As H&S observe, the League Covenant created a “compulsory system of dispute resolution.”<sup>82</sup> If either side was dissatisfied with the judgment, however, “it could resort to war provided it waited three months before doing so.”<sup>83</sup> Thus, the League Covenant created no new categorical ban on the use of military force as an instrument of policy. But it expressed in its preamble a normative commitment reflecting the changes that were already well underway before 1928: the parties’ “acceptance of obligations not to resort to war.”<sup>84</sup> Whatever the lack of practical efficacy of the League Covenant, it is surely evidence that before 1928, there was already a growing sense that war represented “a departure from civilized politics.”<sup>85</sup>

Even if one accepted that the Kellogg-Briand Pact (“the Pact”) represented the beginning of a *legal* movement away from the Grotian acceptance of aggressive war, it would be hard to deny that in *cultural* terms the Pact was more the result of a transformation than the cause of one. H&S suggest that “[l]egal revolutions do not end with the passing of a law. They begin with them.”<sup>86</sup> It might be more accurate to say that legal revolutions usually do not even begin with the passing of a law. Especially in the case of the outlawry of war, surely no legal revolution would have been possible without the gradual cultural shift away from the traditional valorization of war in Western society, especially among the elites most closely involved in shaping the law. It might also be argued that legal transformations cannot be understood in the absence of attention to changes in the distribution of economic and political power.<sup>87</sup>

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<sup>82</sup> *Id.* at 105.

<sup>83</sup> *Id.*; see Covenant of the League of Nations, art. 12, Dec. 1924.

<sup>84</sup> Covenant of the League of Nations, preamble, Dec. 1924.

<sup>85</sup> HATHAWAY & SHAPIRO, *supra* note 14, at xiv.

<sup>86</sup> *Id.* at 331.

<sup>87</sup> On the relative decline of martial culture and the relative rise of abhorrence toward war throughout the West since the later eighteenth century, and especially since World War I, see, for example, IMMANUEL KANT, *Toward Perpetual Peace*, in PRACTICAL PHILOSOPHY 311 (Mary J. Gregor ed., 1996) (1795); BENJAMIN CONSTANT, *The Spirit of Conquest and Usurpation and Their Relation to European Civilization*, in POLITICAL WRITINGS 44 (Biancamaria Fontana ed., 1988) (1815); JAMES J. SHEEHAN, *THE MONOPOLY OF VIOLENCE: WHY EUROPEANS HATE GOING TO WAR* (2007); MARTIN VAN CREVELD, *THE CULTURE OF WAR* 249–332 (2008); PINKER, *supra* note 35, at 23–24, 242–43, 263–67; MAZOWER, *supra* note 32, at 1–38, 66 (noting, among other things, international peace conferences in 1849 and 1851). The historiography of transformations

To suggest that the norm against aggressive war in general, and conquest in particular, likely developed *before* the Pact and helped make it possible to a greater extent than the Pact led to the creation of the norm, is not to say that international law plays no role in shaping and solidifying norms.<sup>88</sup> It is not implausible that the Pact may have focused interwar international attention on the growing taboo against wars of conquest. But did its signing help to solidify the norm more than its failure contributed to the undermining of the norm? Did the norm persist into the postwar era more in spite of the Pact than because of it? Approaching these questions would probably require fine-grained historical attention to how the Pact and the norm against conquest was invoked, or not invoked, not only by legal scholars but by the media, the public, and government officials. This is not something that *The Internationalists* attempts to do.<sup>89</sup>

If H&S's argument simply used the Kellogg-Briand Pact as a kind of synecdoche for the broader cultural transformation of which it was a part, their claims could be more easily defended. But, as presented throughout the remainder of this Part, H&S's claims seem to be less concerned with symbolic associations and more with literal historical causality.

### ***B. Statistical-Historical Evidence for the Pact's Efficacy***

H&S suggest that a simple, counting-based statistical analysis of historical evidence supports their claim that the Pact was a pivotal event in the decline of wars of conquest. Drawing on the Correlates of War

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in cultural attitudes toward war remains highly disputed and unsettled, as is the relation of those transformations to more specific and concrete military, legal, political, and economic developments. *See, e.g.*, LAUREN BENTON & LISA FORD, *RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800–1850* (2016) (arguing that scholars have concentrated too narrowly on the role of intellectual history in the development of international law).

<sup>88</sup> *See, e.g.*, FINNEMORE, *supra* note 44, at 72 (noting that “international law, international regimes, and the mandates of formal international organizations” “[i]ncreasingly since the nineteenth century” have “channel[ed] . . . normative coevolution”).

<sup>89</sup> The historian Gary Bass has noted that while H&S “do a great job” of describing “norm entrepreneurs” like Lauterpacht, the “next step” in evaluating “the observable implications” of their argument would be to study “how the norm cascades outward after 1928 from their norm entrepreneurs into a wider world,” for example by investigating government archives for “the hidden debates and deliberations which result in policy.” Gary Bass, *The Internationalists Mini-Forum: Why Has War Declined?*, JUST SECURITY (Nov. 15, 2017), <https://www.justsecurity.org/47093/internationalists-mini-forum-idea-international-law-decline-war/>.

project, H&S and “eighteen brilliant Yale Law students” built a dataset of 254 instances of territorial change involving militarized conflict between 1816 and 2014.<sup>90</sup> Based on this dataset, H&S conclude that “[c]onquest, once common, has nearly disappeared,” and “the switch point” was 1928, the year of the Pact.<sup>91</sup> After the Pact, H&S write, “[m]ight still produced *military* victories. But it could no longer provide lasting *legal* victories.”<sup>92</sup> They readily acknowledge that the average number of conquests per year between 1929 and 1948 did not change significantly from the average number between 1816 and 1928.<sup>93</sup> This would of course *seem* to suggest, at least at first glance, that the Pact had no effect on the frequency of wars of conquest, as its dismissive critics have always maintained, and that any later change in the frequency of conquest resulted from events at the end of World War II. H&S’s statistical argument for the causal efficacy of the Pact rests on the fact that “in 1931, states began to refuse to recognize conquests,” and “[e]ven more remarkabl[y], with the exception of Taiwan, all the unrecognized transfers of territory between 1928 and 1949 were later reversed.”<sup>94</sup> In other words, “while territory continued to be seized after the Peace Pact went into effect, the Pact meant that transfers of control over territory did not, except in rare cases, translate into legal rights over that territory.”<sup>95</sup> In sum, “few conquests have stuck since the Pact went into effect.”<sup>96</sup>

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<sup>90</sup> HATHAWAY & SHAPIRO, *supra* note 14, at 312–13. The dataset is available at [www.theinternationalistsbook.com](http://www.theinternationalistsbook.com). It excludes certain categories of militarized territorial change, such as “a reversal of an earlier unrecognized seizure of the same territory.” *Id.* at 313. Thus, China’s 1945 seizure of Manchuria from Japan is not one of the 254 instances of possible conquest in the dataset, while Japan’s seizure of Manchuria in 1931 is. *See id.* Also, H&S self-consciously exclude “nonconquests” where a powerful state uses force to cause or prevent a revolution in a weaker state, but does not then annex the weaker state’s territory, such as the CIA’s coup in Iran in 1953, or the USSR’s armed intervention in Hungary in 1956 or Czechoslovakia in 1968. *See id.* at 329–30.

<sup>91</sup> *Id.* at 313.

<sup>92</sup> *Id.* at 316.

<sup>93</sup> *See id.* at 313–14. In fact, the likelihood in any given year that the average state would be the victim of conquest went slightly *up* during the 1929–1948 period as opposed to the 1816–1928 period, from a 1.33 percent chance to a 1.8 percent chance. *See id.* For the use of 1948 as the year of postwar settlement, see HATHAWAY & SHAPIRO, *supra* note 14, at 320 (noting that postwar territorial transfers did not conclude for legal purposes until 1948, the deadline for the completion of various treaty obligations under the Paris Peace Treaties of 1947).

<sup>94</sup> *Id.* at 318.

<sup>95</sup> *Id.* at 319.

<sup>96</sup> *Id.* at 330.

But does H&S's data in fact support the conclusion that the Pact was a causally significant historical turning point in the decline of conquest? We might compare the alternative hypothesis that the Pact made little difference to state behavior at any point, and that the phenomena captured in H&S's statistics would have taken place whether or not the Pact was ever signed. To begin with, the decline in conquests after 1948 can be explained without reference to the Pact, as the many proposed explanations of "the Long Peace" have attempted to do, for example by pointing to some combination of nuclear weapons, the spread of democracy, and changing cultural values regarding colonialism and the use of military force.<sup>97</sup> Even if we seek a purely legalistic explanation, it would seem to make more sense to present the post-1948 decline of conquest as a result of the U.N. Charter rather than of the Kellogg-Briand Pact.<sup>98</sup>

The crucial period for evaluating the causal efficacy of the Pact is thus the period between 1928 and 1948. Were the conquests between 1928 and 1948 later reversed as a result of the Pact—that is, because of their illegality under the Pact—or for some other reason? An alternate explanation might be that the conquests between 1928 and 1948 that were later reversed were reversed because they were carried out by Axis powers that were defeated in World War II, and the victors in that war did not want their defeated enemies to continue to control recently conquered territories. What evidence might be relevant to evaluating the relative plausibility of this theory in comparison to H&S's theory that the reversals took place as a result of the conquests' illegality under the Pact?

First, we might be interested to see whether any post-1928 conquests by the Allied victors of World War II, as opposed to the defeated Axis

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<sup>97</sup> See *supra* text accompanying n. 35–42.

<sup>98</sup> When Pinker, for example, addresses international law as a factor in the Long Peace, he attributes to the U.N. Charter what H&S attribute to the Pact:

One paradoxical contributor to the Long Peace was the freezing of national borders.

The United Nations initiated a norm that existing states and their borders were sacrosanct. By demonizing any attempt to change them by force as "aggression," the new understanding took territorial expansion off the table as a legitimate move in the game of international relations.

PINKER, *supra* note 35, at 258. As suggested above, the norm of respecting state borders had been growing long before either the U.N. Charter or the Pact. But Pinker's association of the United Nations with the norm reflects the basic truth that the U.N. Charter was sufficient by itself to establish the illegality of aggressive cross-border invasions. For reasons discussed at *infra* Part II.C., there is no basis for concluding that the Pact was a necessary or causally important precursor to the Charter.

powers, were reversed. If the Pact was truly the reason for the reversals of conquests between 1928 and 1948, rather than the reversals resulting from victors imposing their preferences on defeated states as they would have done regardless of the Pact, then we might expect to see Allied conquests, to the extent that there were Allied conquests after 1928, among the reversals.

This proposition is difficult to test because, for the most part, it was the Axis powers, not the Allies, who carried out conquests between 1928 and the end of the war. But there are several exceptions. H&S acknowledge that China's claim to Taiwan in 1945 was not recognized as legitimate but remained in place after the war—at least until 1949, when “the fleeing nationalist army declared Taiwan an independent state.”<sup>99</sup> In addition, as H&S note, “[i]n June 1940, the Molotov-Ribbentrop Pact between Nazi Germany and the Soviet Union awarded the Soviet Union control of Estonia, Lithuania, and Latvia.”<sup>100</sup> Although “many states, including the United States, refused to recognize the transfer,”<sup>101</sup> the transfer was not reversed as part of the territorial settlements in the post-World War II treaties, and the Baltic states remained under Soviet control until 1991.<sup>102</sup> Finally, it is noteworthy that France and Great Britain, although not the United States, recognized their World War I ally Italy's conquest of Ethiopia in 1935.<sup>103</sup> The seizure was only reversed after the conclusion of the war in which Italy had joined their Axis enemies.<sup>104</sup> In all of these cases, non-Axis conquests of territory that were illegal under the Kellogg-Briand Pact were not reversed after the war, even as the Axis conquests were reversed. In fact, H&S provide no examples of illegal post-1928 non-Axis conquests being reversed after the war.

Second, we would be interested to see whether the Allies allowed themselves to take new territories at the conclusion of the war, in violation of the Pact. Not every Allied state might want new territory. But to the extent that the Pact was causally significant, it would have presumably made postwar conquests less likely, and any states that did carry out or permit postwar conquests would have been more likely to grapple with their illegality under the Pact. In the event, France seized

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<sup>99</sup> HATHAWAY & SHAPIRO, *supra* note 14, at 316.

<sup>100</sup> *Id.* at 318.

<sup>101</sup> *Id.* at 318–19.

<sup>102</sup> *See id.* at 319.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

a portion of Italy, including the towns of Tenda and Birga, as part of the 1947 Paris Treaty of Peace—a “minor adjustment of the border” in H&S’s words.<sup>105</sup> Greece, Yugoslavia, and Albania also took parts of Italy.<sup>106</sup> Most importantly, the Soviet Union obtained “significant territory” from a number of states including Germany, Poland, Japan, Romania, and Finland.<sup>107</sup>

H&S emphasize that these postwar seizures “did not begin to approach those of previous wars.”<sup>108</sup> But the relative lack of postwar territorial transfers to the Allies may not be evidence of the efficacy of the Pact. It could be attributed to the changing norms, especially among relatively liberal states such as the United States and the United Kingdom, that led those states to sign the Pact in the first place,<sup>109</sup> rather than to a sense of legal obligation to the Pact. More significant is the fact that H&S provide no evidence of postwar officials struggling with the illegality under the Pact of the Allied seizures of Italian territory, or of the Soviet Union’s multiple conquests. This is hardly surprising. After the war, the Allies were developing a new international legal order to replace the failed order of the League of Nations and the Kellogg-Briand Pact. It would be unusual if concerns about strict adherence to the failed, soon-to-be-replaced interwar order had played a significant role in their postwar decision-making.<sup>110</sup>

More generally, there is a notable silence in *The Internationalists* concerning the role of the Kellogg-Briand Pact in the decision-making processes of the postwar officials who were responsible for establishing the territorial lines that H&S treat as evidence of the efficacy of the Pact.<sup>111</sup> This silence is especially noteworthy considering the extensive historical sleuthing that seems to have gone into the book, as reflected, for example, in its discovery of Shotwell’s role in the drafting of the

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<sup>105</sup> *Id.* at 321–22.

<sup>106</sup> *See id.* at 321.

<sup>107</sup> *See id.* at 322.

<sup>108</sup> *Id.* at 321.

<sup>109</sup> *See supra* Part II.A.

<sup>110</sup> It is true that the Kellogg-Briand Pact is still in effect. *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 103 (2009). But its prohibition on the use of war to resolve interstate disputes plays no operative role in the contemporary international humanitarian law of *jus ad bellum*. *See, e.g.*, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW xxviii, 1, 759–70 (2d ed. 2008) (noting that “[t]he modern *ius ad bellum* is of relatively recent origin and is based upon Article 2 (4) and Chap. VII of the UN Charter,” and including no reference to the Kellogg-Briand Pact in its Table of International Instruments or Index).

<sup>111</sup> *See* Bass, *supra* note 89.

U.N. Charter, and as confirmed by the heroic labors described in the book's acknowledgments.<sup>112</sup> If there were evidence of the postwar planners and negotiators viewing the Pact, or even the year 1928, as a crucial dividing line between those conquests that were legal and should legally be upheld and those that were illegal and should legally be reversed, one suspects that H&S's small army of researchers would have uncovered it, and H&S would have included it in the book. The fact that no such evidence appears strengthens the sense that any difference in the postwar treatment of conquests before and after the Pact may simply be a coincidence related to the timing of the Axis as opposed to the Allied powers' conquests, rather than a sign of the Pact making a difference.<sup>113</sup>

Third, we might also be interested to see how territories conquered by the Axis and Allied powers *before* 1928 were treated after World War II. If the Axis conquests were reversed, even though they were legal under the pre-Pact international law of the Old World Order, while the Allied conquests were not, this would be another piece of evidence weighing in favor of the conclusion that the postwar reversals of post-1928 conquests had little to do with the 1928 Pact, and were instead the result of victorious states acting on their interests as they

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<sup>112</sup> See HATHAWAY & SHAPIRO, *supra* note 14, at 425–30.

<sup>113</sup> Indeed, it would be difficult to reconcile H&S's suggestion of a deep Allied commitment to the underlying principles of the Pact with, for example, Churchill's proposal to Stalin in 1944 that various Eastern European countries be divided by arbitrary percentages into British and Soviet spheres of influence. See Geoffrey Roberts, *Stalin's Wartime Vision of the Peace, 1939–1945*, in STALIN AND EUROPE: IMITATION AND DOMINATION, 1928–1953 250 (Timothy Snyder & Ray Brandon eds., 2014).

It is noteworthy that when H&S intimate that World War II was fought not only against the Axis powers but against the Old World Order, their rhetorical evidence comes not from the Allies invoking the Pact, but rather by way of a quote from the Atlantic Charter. See HATHAWAY & SHAPIRO, *supra* note 14, at 213. As H&S acknowledge elsewhere, the Atlantic Charter makes no reference to the Pact. See *id.* at 330–31; see also *id.* at 191 (summarizing drafting of Charter). Nor does the Pact state that the Allies intend to restore the territorial lines existing in 1928. See Atlantic Charter, U.S.–U.K., Aug. 14, 1941, 55 Stat. 1603. If the Pact, or the year 1928, weighed heavily in the minds of wartime officials, one would have expected them to refer to it, at least privately.

Similarly, despite H&S's suggestion that the Pact's causal significance to the New World Order is evident from "what those involved said," the evidence that the officials responsible for creating the postwar order, including the postwar territorial settlements, acted as they did as a conscious result of the existence of the Pact is very thin. *Id.* at 330. Indeed, H&S themselves seem to recognize that the Pact was held in wide disrepute by the end of the war. See, e.g., HATHAWAY & SHAPIRO, *supra* note 14, at 188 ("Writing at the tail end of the Second World War, Welles would look back and—like many who didn't yet recognize its revolutionary implications—blame the Pact for giving 'the delusion of a great body of the American people that the mere formulation of a wish is equivalent to positive action.'").

would have regardless of the Pact. Testing this proposition is made difficult by the fact that the Axis powers had far fewer pre-1928 colonial conquests than the Allies: “The Axis powers had largely missed out on the colonial land grab.”<sup>114</sup> But not entirely. H&S note that as part of the postwar settlement, “Germany, Italy, and Japan did lose some territory they had held before 1928”<sup>115</sup>—including a portion of eastern Germany that the Allies returned to Poland, and the reversal of the Italian conquests of Libya and Somaliland and the Japanese conquest of Korea<sup>116</sup>—while the Allied victors, not surprisingly, did not give up any of their pre-1928 conquests.<sup>117</sup>

H&S acknowledge the evidence in the preceding paragraphs. But they minimize its significance.<sup>118</sup> They give the impression that the failure to reverse post-1928 Allied (but not Axis) conquests after World War II, the new Allied (but not Axis) territorial gains after the war, and the reversal of pre-1928 Axis (but not Allied) conquests after the war, are exceptions to the rule that the Pact was generally efficacious in the long run—examples of the unavoidable difference between the clear logic of legal ideals and the crooked timber of interstate politics.<sup>119</sup> As they note regarding the efficacy of international law in general, the fact that a law is sometimes violated does not mean that the law is not effective, much less that it is not a law.<sup>120</sup>

But it seems more accurate to view these cases not as exceptions to an otherwise well-established general rule, but as some of the only available evidence for evaluating H&S’s thesis that the Kellogg-Briand Pact was highly effective against the contrary thesis that it made little difference. H&S raise the question: “Why did most of the borders after the Second World War snap back to the lines that had existed when the Peace Pact was signed?”<sup>121</sup> But what H&S attribute to the causal force of the Pact could be just as easily, and more consistently, explained as

<sup>114</sup> HATHAWAY & SHAPIRO, *supra* note 14, at 192.

<sup>115</sup> *Id.* at 321.

<sup>116</sup> *See id.* at 321–22 (also noting that Japan “withdrew its claims to a number of islands in the South China Sea”).

<sup>117</sup> It is irrelevant to the current argument that various Allied states began relinquishing pre-1928 colonies of their own accord soon after the war. *See id.* at 322.

<sup>118</sup> *See, e.g., id.* at 321 (noting that the amounts of pre-1928 conquest territory taken away from Axis powers after the war “did not begin to approach those of previous wars”).

<sup>119</sup> *See, e.g., id.* at 322 (“These concessions to Stalin were seen by the other Allied powers as regrettable deviations from accepted law, not precedents to be followed in the future.”).

<sup>120</sup> *Id.* at 418.

<sup>121</sup> *Id.* at 332.



the result of the fact that nearly all territorial conquests between 1928 and the postwar settlement were by the Axis powers. Where the conquests were not Axis-led, they did not snap back. The lines also did not snap back to 1928 in several cases where the Axis powers had conquered territory before 1928.

Did the Pact play a significant causal role in the decline of wars of conquest, as H&S suggest, or was it causally insignificant, as generations of historians and political scientists have assumed? In the few instances where H&S's historical evidence of conquest allows us to test their hypothesis against the contrary hypothesis that states acted as they would have done regardless of the Pact, the evidence seems to support the latter.

### *C. Legal-Historical Evidence for the Pact's Efficacy*

In addition to their cultural and statistical arguments for the Kellogg-Briand Pact's significance, H&S argue that the Pact was indirectly responsible for the transformation of international law that resulted in the "New World Order" of the postwar era:

By prohibiting states from using war to resolve disputes, it began a cascade of events that . . . reshaped the world map, catalyzed the human rights revolution, enabled the use of economic sanctions as a tool of law enforcement, and ignited the explosion in the number of international organizations that regulate so many aspects of our daily lives.<sup>122</sup>

The trouble with this causal argument is that it is not clear that the Pact was a necessary step at all. If anything, it appears to have been a false start. For the same reasons that we do not celebrate the Articles of Confederation as a necessary first step toward the creation of the United States Constitution, it would seem odd to celebrate the Pact as a necessary first step toward the creation of the U.N. Charter and the other legal institutions that actually constituted the postwar global legal order. The Pact was neither sufficient nor necessary to these later developments. It was, if anything, a mistake that the later legal order attempted to correct.

The causal issue can be clarified with a counterfactual thought experiment.<sup>123</sup> Imagine a world in which Levinson failed to persuade Kellogg to push for the Pact, the Pact was never signed, and war was

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<sup>122</sup> *Id.* at xv.

<sup>123</sup> For the relevance of counterfactual thinking to historical explanation, *see generally* Cass R. Sunstein, *Historical Explanations Always Involve Counterfactual History*, 10 J. PHILO. HIST. 433 (2016).

not outlawed in 1928. Assuming World War II would have proceeded largely as it did regardless of the existence of the Pact—an assumption that H&S provide no reason to question—is there any reason to believe that the U.N. Charter and the other postwar legal institutions would have been materially different? It is true that Shotwell’s first draft of the U.N. Charter incorporated the language of the Pact.<sup>124</sup> But the rest of the State Department team that produced the final draft of the Charter rejected the inclusion of this language,<sup>125</sup> and also rejected the proposal to impose automatic membership in the new organization on all states that were parties to the Pact.<sup>126</sup> Was the Pact, and the contested legal developments that followed it in the interwar years, necessary as an inspiration for the underlying ideas in the Charter?

It might be plausible to argue that the Pact played a significant causal role in creating the postwar legal order if it were assumed that the drafters of the U.N. Charter would not, or could not, have arrived at the rules of *jus ad bellum* contained in the Charter in the absence of the Pact. But there is no reason to believe the Pact, and the interwar legal developments that H&S persuasively argue it triggered, were necessary conditions to the final shape of the U.N. Charter, or even that they made its final shape significantly more likely. The underlying goal of the Charter—using an international legal agreement to promote peace and security among states—long predated the Pact and did not require the Pact as inspiration.<sup>127</sup> Based on this goal, it was practically inevitable that the Charter would contain some system for the legal regulation of war, as the League of Nations had before it. Indeed, against H&S’s claim that the United Nations “would be a new and improved Pact,” it seems far more appropriate to think of the United Nations as a new and improved League—a new international organization to replace the failed old one, not merely a new peace treaty.<sup>128</sup> If the Pact had never existed, it seems more likely than not that the U.N. Charter would have been no different. Even the failure of the Pact was arguably an

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<sup>124</sup> See HATHAWAY & SHAPIRO, *supra* note 14, at 195.

<sup>125</sup> See *id.* at 194–97.

<sup>126</sup> See *id.* at 197. In other words, H&S present the presence of the Pact’s language in Shotwell’s first draft of what would become the U.N. Charter as further evidence of the historical significance of the Pact. But the evidence could also be understood as support for the opposite conclusion: that the Pact had failed to make a difference, which was why Shotwell was attempting to repackage its language in a more effective agreement.

<sup>127</sup> See, e.g., KANT, *supra* note 87, at 311.

<sup>128</sup> On the United Nations as a replacement for the League of Nations, see generally MAZOWER, *supra* note 32, at 191–213 (“The League Is Dead, Long Live the United Nations”).

unnecessary lesson, because the failure of the League would have been sufficient to suggest the potential value of a prohibition on the unauthorized use of force (article 2(4)) backed by the threat of sanctions (article 41) and ultimately the threat of force (article 42).<sup>129</sup>

To maintain that the Pact was a necessary or even a causally significant step (that is, a step making a later event more likely, even if the step was not *necessary* to the occurrence of the later event) toward arriving at the postwar international order, it might be argued that the practical logic of the U.N. Charter only appears as an obvious option to us because we live in the world created by the Pact, a world in which the assumptions of the Old World Order, such as the right of conquest and the unfeasibility of sanctions, have been swept away. But such an argument seems to rest on implausible assumptions regarding the practical difficulty of imagining alternatives to the Grotian rules. One need only look at the debates that H&S describe leading up to the Pact in order to appreciate that it was entirely possible to think through U.N.-like practical alternatives to the Old World Order without needing the experience of the Pact and its consequences in the interwar years. Indeed, while Levinson may have held back from supporting sanctions against aggressive states in part based on the Grotian assumption that such sanctions would constitute acts of war,<sup>130</sup> Shotwell experienced no such qualms and advocated for the Permanent Court of International Justice to “hear disputes over aggression” and issue “financial sanctions.”<sup>131</sup> In a counterfactual history with no Pact, we can imagine Shotwell bringing these ideas with him to the State Department subcommittee on international organizations, from which they could easily have ended up shaping the U.N. Charter, just as the article 2(4) outlawing of aggressive war could easily have been drafted without the Pact having ever existed. Imagining practical alternatives to the legal arrangements of the Old World Order hardly requires a Copernican revolution.

As to the distinct question of whether the United Nations and the other international legal institutions of the postwar world have been causally significant in shaping state and non-state behavior—a position that might be defended even if the efficacy of the Pact were rejected—H&S adopt a characteristically maximalist-legalist position. They attribute several features of the postwar Long Peace to the powerful

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<sup>129</sup> See U.N. Charter arts. 2(4), 41, 42.

<sup>130</sup> See HATHAWAY & SHAPIRO, *supra* note 14, at 114.

<sup>131</sup> *Id.* at 117–18.

influence of international law. Why have nuclear weapons never been used as threats to achieve territorial aggrandizement? “The rule against conquest prohibits it.”<sup>132</sup> Against, or at least beside, the view that the spread of international markets played a central role in causing the Long Peace,<sup>133</sup> H&S suggest “the rise of global free trade was at least as much a consequence as a cause of the outlawry of war.”<sup>134</sup> (One might wonder how to explain the rise of global free trade during the “first globalization” before World War I, when war had not yet been legally outlawed.<sup>135</sup>) Why, beginning in the 1940s, did states stop growing as they generally had since the early modern period, and instead start to split apart into smaller units? “The answer, again, starts with the outlawry of war.”<sup>136</sup> Why is there still so much conflict, despite

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<sup>132</sup> *Id.* at 332.

<sup>133</sup> *See, e.g.*, PINKER, *supra* note 35, at 284–88. H&S deserve credit for drawing attention to a point that is often neglected in the liberal case that trade can have a pacifying effect. Against the Leninist idea that capitalism leads naturally to colonialist exploitation and war as states pursue greater profits than their domestic markets can provide, liberalism argues that trade between states can increase the costs of interstate war, to the extent that war disrupts the ordinary functioning of business; and that trade can decrease the benefits of such wars, in the sense that trade allows states to gain access to the resources and markets of other states without having to resort to force. *Compare* VLADIMIR LENIN, *IMPERIALISM, THE HIGHEST STAGE OF CAPITALISM* 91 (Resistance Books 1999) (1917) (presenting imperialism “as the development and direct continuation of the fundamental characteristics of capitalism in general”); WENDY BROWN, *UNDOING THE DEMOS* 47, 50–51, 142–46 (2015) (noting that “critical intellectuals” in the late 1970s and early 1980s saw “neoliberalism” as “something that resecured the South as a source of cheap resources, labor, and production in the aftermath of colonialism”); *see, e.g.*, SHEEHAN, *supra* note 87, at xvii (presenting the liberal argument that post-1945 industrialization in Europe “expanded the connections among peoples and nations, weaving a web of interdependent relationships that required and sustained peaceful exchange.”). H&S add to the standard liberal argument by emphasizing that interstate trade can also contribute to peace by laying the groundwork for outcasting, “a legal tool for disciplining states who violate the rules.” HATHAWAY & SHAPIRO, *supra* note 14, at 420. Once a state is dependent on access to international markets, other states can discipline it for violations of unrelated international legal rules by depriving it of access to those markets.

<sup>134</sup> HATHAWAY & SHAPIRO, *supra* note 14, at 333. *But see* HATHAWAY & SHAPIRO, *supra* note 14, at 344 (acknowledging that technological change and institutions of private international law likely played a role in the rise of global free trade as well).

<sup>135</sup> Although the 6.2% average annual growth in global trade between 1950 and 2007 is higher than the 3.8% growth rate between 1850 and 1913, the earlier period represented a significant departure from prior history. *See* WORLD TRADE ORGANIZATION, *WORLD TRADE REPORT 2008: TRADE IN A GLOBALIZING WORLD* 15 (2008). H&S concede that the transformation of international law in the wake of the Pact “was not the only reason global free trade boomed” between 1945 and the present, but offer no explanation for how it was possible for free trade to boom in the “Old World Order” prior to World War I. *See* HATHAWAY & SHAPIRO, *supra* note 14, at 344.

<sup>136</sup> *Id.* at 338.

the outlawing of war? “The answer is that these conflicts are not prohibited by the Pact.”<sup>137</sup> In each of these cases, alternative explanations could be offered that do not depend on the efficacy of international law or the significance of the Pact. For example, a liberal international relations theory explanation for the United States having not used the threat of nuclear annihilation to conquer nonnuclear states may be that doing so would conflict with the basic normative preferences of American voters and policymakers. An interest-based explanation might involve the high reputational costs of such a gesture, or the likelihood that it would encourage other states to enter alliances in opposition to United States power.

Neither of these plausible, and in fact compatible, explanations necessarily depend on the fact that the New World Order prohibits conquering states from obtaining the legal right to the resources of conquered territories. H&S emphasize this fact as a deeply significant, often overlooked source of changed incentives since World War II that has powerfully altered state behavior, along with the threat of outcasting.<sup>138</sup> A skeptic might question whether H&S exaggerate the importance of legal title. Even without legal title to conquered territory, a conquering state still possesses the conquered resources and can profit from them through internal use or trade on the black market.

## II

### WAR AND LAW AS MODES OF CONFLICT RESOLUTION

Even if *The Internationalists* is unpersuasive regarding the significance of the Kellogg-Briand Pact, it remains a rich resource for thinking about international law and the possible shapes of the relationship between law and war. As already noted, H&S echo their colleague James Whitman by emphasizing how European states of an earlier era perceived and used war as “a legitimate means of righting wrongs.”<sup>139</sup> Against the idea of war as an eruption of lawless rage, H&S draw attention to an earlier tradition, stretching back to Cicero, passing

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<sup>137</sup> *Id.* at 352. It would be tempting, but unfair, to say: “What a shame that no one thought to ban unjust intrastate conflict in the Pact as well!” Even H&S do not suggest that international law is capable of achieving every goal, although they believe it is capable of many things.

<sup>138</sup> See, e.g., *id.* at 315–16; see also Oona Hathaway & Scott J. Shapiro, *What Realists Don't Understand About Law*, FOREIGN POL'Y, Oct. 9, 2017 (arguing that “the interests of powerful states changed around 1928 . . . because the law had changed”).

<sup>139</sup> HATHAWAY & SHAPIRO, *supra* note 14, at xv.

through Aquinas, and reflected in Grotius and his successors, that viewed “war as a substitute for courts.”<sup>140</sup>

H&S emphasize that after the transformation from the Old World Order to the New World Order, states are no longer allowed to use war to settle disputes. But in the absence of a centralized international court with mandatory jurisdiction and an effective means of enforcing its judgments, how are interstate disputes meant to be resolved?

*The Internationalists* focuses on the practice of outcasting as one way in which states can enforce norms in the absence of a centralized global authority.<sup>141</sup> H&S introduce the idea through a description of the medieval Icelandic assemblies known as “Things.”<sup>142</sup> The most important Thing “met each spring . . . to hear lawsuits and resolve administrative issues.”<sup>143</sup> Eventually, a national Thing began to meet, presided over by a Lawspeaker whose “main task was to recite the laws from memory.”<sup>144</sup> Because Iceland had no public prosecutors, and in fact “no executive branch at all,” “[v]ictims seeking justice had to prosecute the accused in a Thing. If the victim was successful, the Thing would declare the defendant guilty and sentence him to one of several penalties,” the most severe of which was “full outlawry,” in which the outlaw could be “killed with impunity.”<sup>145</sup> “Indeed, the prosecutor of the case was often . . . *obliged* to carry out the punishment himself, assuming the outlaw didn’t flee first.”<sup>146</sup> Furthermore, “[a]nyone who helped an outlaw could be punished, even outlawed.”<sup>147</sup>

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<sup>140</sup> *Id.* at 11 (“War is a substitute for courts, Grotius argued, *because courts are the original substitutes for war*”).

<sup>141</sup> As H&S note, outcasting has been “largely ignored by scholars.” *Id.* at 375. H&S introduced the concept of outcasting in an earlier work: Oona A. Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252 (2011). The general conceptual relation of H&S’s typology of outcasting in the earlier article to my typology of modes of conflict here might be summarized by noting that all of their examples of outcasting either take place in Type 2 or Type 3 institutional settings, with the division between Type 2 and 3 mirrored by their distinction between adjudicated and nonadjudicated outcasting. *See generally id.*

<sup>142</sup> *See* HATHAWAY & SHAPIRO, *supra* note 14, at 373–75. In light of the discussion of feuds later in this review, *infra* text accompanying n. 170–72, it might be worth noting, as Hathaway and Shapiro recognize, that feuding existed in medieval Iceland alongside the Thing-system. *See* Hathaway & Shapiro, *supra* note 141, at 289–90.

<sup>143</sup> HATHAWAY & SHAPIRO, *supra* note 14, at 373.

<sup>144</sup> *Id.* at 373.

<sup>145</sup> *Id.* at 374.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

H&S propose that medieval Icelandic outlawry be seen as an example of the general phenomenon of outcasting, which “occurs when a group denies those who break its rules the benefits available to the rest of the group.”<sup>148</sup> Significantly, outcasting does not require a centralized institution of law enforcement. H&S suggest that international law today, lacking any “world police” or “global courts with compulsory jurisdiction,” is often enforced through outcasting.<sup>149</sup> For example, under the rules of the World Trade Organization, “[i]f a state breaks the rules, another state can file a complaint and prosecute its case before a tribunal. If this tribunal rules in its favor, . . . the WTO authorizes the state that filed the complaint to break the rules in return. . . . The WTO is like a global Thing.”<sup>150</sup>

H&S can be taken as suggesting that outcasting is a mechanism of law enforcement that is particularly suited to situations in which the parties to a conflict share a law and a judge but lack a shared executive. This way of presenting their claim raises the possibility of a more general model. Is there, for example, a mechanism of law enforcement that is particularly suited to disputes in which the parties share a law, but not a judge or executive? In fact, it is possible to distinguish four distinct modes of conflict, each with its own characteristic mechanisms of conflict resolution. In practice, of course, actual historical conflicts will rarely fit perfectly within a single idealized mode, and there will be a great deal of variation within any mode along a number of variables. But we can start by specifying the four modes in abstract form.

In what follows, my primary example of conflict will be war between modern states, but I will gesture toward the wider applicability of the modes of conflict. Looking beyond even H&S’s analogy to the premodern Icelandic state, I include passing references to anthropological studies of conflicts between non-state communities. These very brief illustrations are, of course, meant as nothing more than speculative provocations toward further thought. My use of historical and anthropological materials is in the spirit of a very preliminary and tentative gesture toward the kind of abstract structuralist models that appear in the writings of a historical sociologist like Charles Tilly.<sup>151</sup>

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<sup>148</sup> *Id.* at 375.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 379.

<sup>151</sup> See, e.g., CHARLES TILLY, *THE POLITICS OF COLLECTIVE VIOLENCE* 15, Fig. 1.1 (2003) (presenting a transhistorical two-axis typology of interpersonal violence).

I will assume that to recognize a shared executive enforcer of the law ordinarily implies recognizing a shared judge to determine how the law is to be enforced, and that to recognize a shared judge ordinarily implies recognizing a shared law. Thus, I ignore the possibility of a conflict in which the parties perceive themselves as sharing, for example, a judge, but do not perceive themselves as sharing the law that the judge is supposed to apply.<sup>152</sup> Also, to be clear, by treating the law, the judge, and the executive as disaggregable, I am not suggesting that they must be separate entities. It is of course possible for one entity to create, apply, and enforce the law, as with an idealized Leviathan.

Finally, I alternate freely below between discussion of “laws” and “norms.” The extent to which a norm applicable to a conflict is law-like—regardless of how the family resemblance concept of “law” is conceived—will certainly have significant and likely predictable effects on the shape of the conflict and how it might be resolved.<sup>153</sup> But that is not my focus here.

#### *A. Type 1*

In this mode of conflict, the parties share neither a law applicable to the conflict, nor a judge authorized to apply the law, nor an executive authorized to enforce the law. In other words, the conflict takes place in a state of pure anarchy between the parties, at least regarding the subject matter of the conflict.

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<sup>152</sup> It might be objected that there is a common scenario in which two parties recognize themselves as sharing a judge with legal authority to resolve a dispute, but do not recognize themselves as sharing a law capable of resolving the dispute. In this scenario, the parties appear before a tribunal that they both believe has jurisdiction over the dispute, but they disagree entirely about which law governs the dispute. For my purposes, however, the agreement on jurisdictional law is a sufficient basis for saying that the parties share a law capable of resolving the dispute. They agree as a matter of law that they are bound by the judge’s decision, even if they disagree about the substance of the law to be applied. It is of course possible to devise counterexamples in which we might be tempted to say that the parties to a dispute shared a judge but not a law—for example, if the parties disagreed about which substantive law applied, and each recognized the judge’s jurisdiction only on condition that the judge applied that party’s preferred substantive law. But in general, it will be possible to recharacterize these scenarios either as situations in which the parties share a law in some sense, despite appearances to the contrary, or as situations in which the parties do not, in fact, recognize a shared judge, despite each side’s claim to do so.

<sup>153</sup> See, e.g., Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, *The Concept of Legalization*, 54 INT’L ORG. 401 (2000) (defining legalization in terms of three variables and considering the effects of an institution being located at different points along the three variables). Like H&S’s concept of outcasting, the authors note that their “conception of legalization . . . [moves] away from a narrow view of law as requiring enforcement by a coercive sovereign.” *Id.* at 403.



The primary alternative to force, whether we think of it as negotiation, diplomacy, persuasion, or reason, will tend to be effective as an alternative only if the parties share the kinds of norms that have been postulated as absent here. Negotiation usually depends, implicitly or explicitly, on an appeal to some shared standard. Thus, if the conflict is not resolved by one side giving in, and the parties are capable of using force, there will be a tendency for the conflict to escalate to the use of force.

If a conflict in pure anarchy results in the use of force, the force will tend, at least in the long term, not to be constrained by laws or norms of good conduct. The latter laws or norms, such as *jus in bello* rules in warfare, impose a burden by preventing a party to a conflict from taking steps that the party might want to take. Even if a party has its own self-restraining norms, there will often be practical and psychological pressures to set aside the norms in a conflict where the other side is perceived as not sharing them. The norms will often be seen as interfering with the pursuit of victory in the conflict, because the norms will limit the range of permissible action. In warfare, for example, complying with norms may be perceived as putting one's own forces at greater risk of violence, and even as helping the enemy. It will often be easier to rationalize an exception to the norms than to take the steps necessary to enforce them. Why should an enemy that refuses to play by the rules receive the benefit of the rules?

Historical examples that approximate the purely anarchic mode of conflict are not difficult to find. In hunter-gatherer societies, tribes often invaded neighboring territory in raids. Unlike the ritualized, highly symbolic, low-fatality battles sometimes associated with societies without states,<sup>154</sup> these raids appear to have been rationally calculated to achieve a maximum amount of killing and destruction with minimum risk. The military historian Azar Gat summarizes the apparently universal pattern of "primitive warfare": "face-to-face confrontations were usually mostly demonstrative and low in casualties, but a great deal of killing was done by surprise, mostly during unilateral actions."<sup>155</sup> Further, "the most lethal and common form of warfare was the raid."<sup>156</sup> The most killings took place in large-scale raids in which "the camp of the attacked party could be

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<sup>154</sup> See KEEGAN, *supra* note 5, at 29 (describing ritualized Zulu battle); PINKER, *supra* note 35, at 43.

<sup>155</sup> AZAR GAT, WAR IN HUMAN CIVILIZATION 116, 118 (2006).

<sup>156</sup> *Id.* at 117.

surrounded, and its unprepared, often sleeping, dwellers massacred indiscriminately (except for women who could be abducted).<sup>157</sup> In fact, the practice of quasi-genocidal raiding may predate the existence of anatomically modern human beings. It has been observed among chimpanzees, some of our species' genetically closest living relatives.<sup>158</sup>

It is also not difficult to find examples of unconstrained, potentially genocidal warfare between human groups in more recent history. In medieval Europe, writings on war explicitly distinguished between rule-bound *bellum hostile*, "the norm within Western Christendom," and a different mode of warfare for use "against outsiders, infidels, or barbarians."<sup>159</sup> This latter kind of warfare was "a brutal legacy from the Romans which they termed *bellum romanum*, or *guerre mortelle*, a conflict in which no holds were barred and all those designated as enemy, whether bearing arms or not, could be indiscriminately slaughtered."<sup>160</sup>

Especially clear modern European examples of such conflicts can be found in the early modern wars of the English against the Irish,<sup>161</sup> many of the wars of colonial Americans against the indigenous peoples of America,<sup>162</sup> many of the wars of European colonialists against non-white, non-Christian indigenous peoples in general,<sup>163</sup> and the Nazi war against the Soviet Union.<sup>164</sup>

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<sup>157</sup> *Id.*

<sup>158</sup> See PINKER, *supra* note 35, at 37–38; GAT, *supra* note 155, at 8–9. Not all raiding, it should be emphasized, was large scale. See GAT, *supra* note 155, at 117. Raids were also conducted in the course of feuds, as discussed below. See *id.* at 116–17; see also *infra* text accompanying n. 170–72 (feuding as Type 2 conflict).

<sup>159</sup> Michael Howard, *Constraints on Warfare*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 1, 3 (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994).

<sup>160</sup> *Id.*

<sup>161</sup> See Harold E. Selesky, *Colonial America*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 59, 59–61 (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994); Geoffrey Parker, *Early Modern Europe*, in THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD 40, 56 (Michael Howard, George J. Andreopoulos & Mark R. Shulman eds., 1994).

<sup>162</sup> See Selesky, *supra* note 161, at 62–73.

<sup>163</sup> See Parker, *supra* note 161, at 56–57.

<sup>164</sup> See, e.g., *id.*; TIMOTHY SNYDER, BLOODLANDS: EUROPE BETWEEN HITLER AND STALIN 166, 175 (2010). By contrast, the Nazi and Soviet campaigns of extermination against "kulaks," Jews, and other groups living on territory under their control during the 1930s and 1940s fit the model of a Type 4 conflict, as described below, better than they fit the Type 1 model. Generally, these campaigns were state atrocities against individuals who recognized themselves to be under the state's authority rather than acts of warfare against a

**B. Type 2**

In this mode of conflict, the parties recognize themselves as governed by a shared law that at least one side believes is applicable to the conflict, but they do not fall under the compulsory jurisdiction of a shared judge capable of settling how (or if) the law in fact applies, nor do they perceive themselves as falling under a shared executive with authority to enforce the law. A shared law could be as simple as a bilateral agreement, or as wide-ranging as a shared religious tradition with binding moral codes.

In the binary terms of realist international relations theory, parties that share a law but lack a shared judge or enforcer of the law remain in a state of anarchy.<sup>165</sup> But this binary model obscures the potential difference that a shared law, even standing alone, can make to the shape of a conflict. A shared law can serve as a focus of coordination or cooperation, allowing the parties to resolve an actual or potential conflict through negotiated agreement.<sup>166</sup> The shared law can also be enforced through self-help processes. When one side perceives the other side as violating the shared law, the former may punish the violation through reprisals and other tit-for-tat mechanisms.<sup>167</sup>

Of course, in the absence of a shared judge, there will always be a risk that the parties may disagree over whether a violation of the shared law took place, and this disagreement may lead to conflict. As Hobbes recognized more than four centuries ago, in a state of anarchy “when there is a controversy . . . the parties must of their own accord, set up for right Reason, the Reason of some Arbitrator, or Judge, to whose sentence they will both stand, or their controversie must either come to blowes, or be undecided.”<sup>168</sup> But if the rules are clear enough,<sup>169</sup> history

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group engaged in armed conflict against the state based on a rejection of the state’s authority. When viewed in legal-institutional context, the campaigns resemble a genocidal policing more than war.

<sup>165</sup> See, e.g., KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* 79–106 (1979) (defining the relation between states as an anarchic “state of war”). For an analysis of the binary opposition between anarchy and the state in Waltz, see Milner, *supra* note 21.

<sup>166</sup> See GOLDSMITH & POSNER, *supra* note 43, at 12; see generally ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 31–46 (1984).

<sup>167</sup> See HATHAWAY & SHAPIRO, *supra* note 14, at 77–80 (describing the role of reprisals in the early modern enforcement of the laws of war).

<sup>168</sup> HOBBS, *supra* note 2, at 32–33; see also *id.* at 90, 96–101.

<sup>169</sup> Indeed, one of the advantages of creating the legal institution of a shared judge is that the existence of the judge facilitates the use of more complex, flexible, or finely targeted rules.

shows that some degree of law-based coordination is possible even in the absence of a shared judge or enforcer.

One of the classic examples of the Type 2 mode of conflict is the feud, an ancient and apparently universal pattern of violence.<sup>170</sup> In the feud, the parties to the conflict recognize themselves as having different identities in some narrow, strong sense—for example, as belonging to different clans—while at the same time recognizing themselves as having a shared identity in a broader, weaker sense—for example, as belonging to the same religion, or descending from the same mythological ancestors.<sup>171</sup> The latter sense of community will often supply norms that regulate the violence of the feud. The norms can both provide a basis for violence by establishing wrongs that can or must be avenged and constrain that violence by placing limits on acceptable conduct. Feuds do not typically devolve into no-holds-barred exterminatory warfare. At the same time, the judgeless structure of the feud may allow it to continue indefinitely without resolution. The conflict may only be resolved when the parties voluntarily turn to a neutral arbiter in the community, or the community places pressure on the parties to end the conflict.<sup>172</sup>

Another ancient and apparently universal form of conflict made possible by the existence of shared norms is the ritualized, pitched

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<sup>170</sup> One definition of feuding proposes five essential elements:

(1) kinship groups are involved, (2) homicides take place, (3) the killings occur as revenge for injustice (the terms *duty*, *honor*, *righteous*, and *legitimate* appear in discussions of the motivation for the homicides), (4) three or more alternating killings or acts of violence occur, and (5) the acts of violence and killing occur within a political entity, such as a tribe, nation, or country.

Keith F. Otterbein, *Feuding*, in *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* (David Levinson ed., 2002). See also JARED DIAMOND, *GUNS, GERMS, AND STEEL* 286 (1999) (“Each murder in band and tribal societies usually leads to an attempted revenge killing, starting one more unending cycle of murder and countermurder”); Edward L. Queen, *Customs of Wrongs*, in *ENCYCLOPEDIA OF LAW & SOCIETY: AMERICAN AND GLOBAL PERSPECTIVES* 1597 (David S. Clark ed., 2007) (noting “the blood feud has a near universality about it”).

<sup>171</sup> See Otterbein, *supra* note 170; accord Margaret Hasluck, *The Albanian Blood Feud*, in *LAW AND WARFARE*, *supra* note 1, at 381 (noting that the largely self-governing Albanian communities during World War I “consisted in the narrower sense of the family, and in the wider sense of the tribe”).

<sup>172</sup> This is not to say that the broader community surrounding a feud is necessarily a force for peace. The surrounding factions might want the parties to engage in feuding for their own reasons, even when the parties themselves would prefer not to do so. Cf. Oren Falk, *Bystanders and Hearsayers First: Reassessing the Role of the Audience in Dueling, in A GREAT EFFUSION OF BLOOD?: INTERPRETING MEDIEVAL VIOLENCE* 98, 108 (Mark D. Meyerson, Daniel Thiery & Oren Falk eds., 2004).

battle.<sup>173</sup> Gat offers the following sketch of the battle among hunter-gatherers:

[T]he place and time . . . were normally agreed upon in advance. . . . [T]he combatants hardly ever closed in on each other. The two opposing dispersed lines stood at a spear-throwing distance, about 50 feet, hurling spears at one another while dodging the enemy's spears. In some cases, such battles were intended in advance to put an end to a conflict and were thus truly 'ceremonial', with the spear throwing restrained and mixed with ceremonial dances. Once blood was spilt, or even before, the grievances were seen as settled, and the battle was terminated.<sup>174</sup>

In order for such a ritualized form of battle to be carried out, the two sides must of course have at least a generally shared understanding of what the rules are.

Contrary to the contemporary image of the battle as a locus of unrestrained brutality, Whitman emphasizes how pitched battles have often served to contain violence:

[A] pitched battle . . . is a contained and economical way of resolving a dispute between two warring groups or countries. . . . [T]he result of fighting a pitched battle is to limit violence in the community at large: if a conflict can be decided by a day of concentrated killing on the battlefield, then violence can be prevented from spilling over to the rest of society.<sup>175</sup>

In order for a battle to serve its role as a kind of "trial" or proceeding for settling a conflict, the parties must have a shared understanding beforehand of how the battle will serve that role. They must share certain norms regarding how the battle will proceed, how its outcome will be understood, and what will follow it.

Just as *The Internationalists* notes structural similarities between the medieval Icelandic Thing and institutions of the New World Order such as the WTO, so an analogy might be drawn between the feud and European military conflicts from the rise of the modern state onward, at least until the establishment of the Concert of Europe in 1815.<sup>176</sup> As

<sup>173</sup> See WHITMAN, *supra* note 3, at 6 ("In the societies of the past, the contained pitched battle was probably a universal human institution.").

<sup>174</sup> GAT, *supra* note 155, at 117. As Gat also notes, these ritualized battles "could escalate into real battles, in the heat of conflict, by accident, or by treachery," and sometimes "true battles were intended from the start." *Id.*

<sup>175</sup> WHITMAN, *supra* note 3, at 3.

<sup>176</sup> For a comparison of the Concert of Europe to other international institutional orders, see MAZOWER, *supra* note 32, at 3–12; FINNEMORE, *supra* note 44, at 97–98. In the 4-type scheme of conflict I am sketching here, the Concert might be seen as lying ambiguously between a Type 2 and Type 3 institution. It possessed a shared law in the form of various

in a feud, the incessant warring within Europe took place between entities that, in a strong but narrow sense, viewed themselves as having distinct and conflicting identities, but in a broader and looser sense viewed themselves as belonging together in Western Christendom. The Christian just war tradition, and the Grotian laws of war that eventually arose out of it,<sup>177</sup> provided a set of shared norms that shaped and constrained conflict. The result was the pattern of endless but increasingly limited war that reached its purest expression in what military historians sometimes present as the eighteenth-century European “golden age of war . . . the last age of civilized battle warfare before the disasters of modern war took hold.”<sup>178</sup> These wars were

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treaties and implicit agreements existing against the background of the laws of nations. Through the discussions of the major powers at its center, the Concert also offered a kind of shared judge. In the words of the Austrian official Friedrich von Gentz, the major powers of the Concert provided a “high tribunal . . . whose members guarantee to themselves and to all parties concerned, the peaceful enjoyment of their respective rights.” MAZOWER, *supra* note 32, at 4–5. Mazower suggests that the Concert system began to fall apart after the Crimean War, and then especially after the Franco-Prussian War of 1870–71. *See id.* at 11. By 1913, Europe could be seen as having reverted to a Type 2 system of shared law without any shared judge to adjudicate disputes, despite the rise of the international law movement and its dreams of peace through arbitration. *See id.* at 44 (noting the later nineteenth-century shift from Concert to bilateral negotiation in commercial matters); *id.* at 66 (describing the arbitration movement).

<sup>177</sup> *See* HATHAWAY & SHAPIRO, *supra* note 14, at 10; Howard, *supra* note 159, at 2.

<sup>178</sup> WHITMAN, *supra* note 3, at 12; *see also* MAZOWER, *supra* note 32, at 4 (describing modern European war before the Concert of Europe as “endless alliances of states and princes, constantly shifting in order to preserve or disrupt the prevailing balance of power”). *But see* BEST, *supra* note 2, at 21 (offering a reminder that eighteenth-century European warfare was hardly humane).

Another, more recent example of feud-like warfare can be seen in the ongoing civil war in Afghanistan. As the journalist Dexter Filkins writes, the people of Afghanistan in 2001 had been fighting for so long, twenty-three years then, that by the time the Americans arrived the Afghans had developed an elaborate set of rules designed to spare as many fighters as they could. . . . Men fought, men switched sides, men lined up and fought again. War in Afghanistan often seemed like a game of pickup basketball, a contest among friends. . . . Battles were often decided . . . not by actual fighting, but by flipping gangs of soldiers. . . . The fighting began when the bargaining stopped, and the bargaining went right up until the end. . . . Even the fighting, when there was fighting, had a desultory feel.

DEXTER FILKINS, *THE FOREVER WAR* 50–52 (2008); *cf.* KARL MARLANTES, *WHAT IT IS LIKE TO GO TO WAR* 228–30 (2011) (describing how German and British tank commanders developed war constraining rules, including a daily ceasefire at 5:00 p.m., during World War II in North Africa). Once again, we see how war can serve as an alternative to rule-based negotiation and can at the same time be constrained by its own set of rules. But the development of such rules may be more difficult where the opponent is perceived as belonging to a radically different group adhering to radically different moral or legal norms. Filkins notes that in contrast to the Afghans’ almost ritualized Type 2 armed conflicts, “[t]he

relatively rule-bound not only in their focus on battles as a potential mechanism of decision,<sup>179</sup> but also through the gradual development of *jus in bello* regulations concerning, for example, the use of poison, treacherous killing, and the treatment of prisoners.<sup>180</sup>

Yet the states lacked any shared judicial or executive authority for interpreting and enforcing these rules. As a result, H&S note, many of “the familiar laws of war arose from [a] tit-for-tat process.”<sup>181</sup> States entered agreements, and then enforced the agreements through reprisals against violators. For example, the Dutch and the Spanish entered a treaty in 1599, in the midst of the Eighty Years War, to ransom soldiers of different ranks at specified prices rather than hanging them.<sup>182</sup> “This cartel was reissued several times during the war and soon thereafter was copied by other European nations. . . . These agreements were enforced through reprisals: Breach of the cartel by one side led to breach by the other.”<sup>183</sup> States used “self-help” to enforce agreed-upon laws in the absence of a shared judge or executive.

More recently, the conflict between the United States and the Soviet Union in the Cold War could be seen as an instance of a Type 2 conflict. It is true that the conflict nominally took place within the jurisdiction of the U.N. Security Council, which has the authority to play the role of a kind of shared international “judge” under the U.N. Charter. But because both of the main parties in the Cold War conflict were permanent, veto-holding members on the Security Council, they were able to ensure that it never rendered a judgment against either of them.<sup>184</sup> In the absence of an effective judicial entity with compulsory jurisdiction over them, the United States and the Soviet Union nevertheless entered a variety of formal and informal agreements, above all the tacitly developed agreement not to invade each other’s

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one group of people who really took fighting seriously were the foreigners—that is, the Americans and Al-Qaeda. They came to kill.” FILKINS, *supra*, at 53.

<sup>179</sup> See WHITMAN, *supra* note 3, at 20 (arguing that the law of war of pitched battles from the sixteenth through the early nineteenth century involved both sides agreeing “to be bound by the result . . . of a day of combat”).

<sup>180</sup> See HATHAWAY & SHAPIRO, *supra* note 14, at 72, 77–80.

<sup>181</sup> *Id.* at 78.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> In the early years of the Cold War, the Soviet Union was especially dependent on its veto, because the United States “could count on a majority.” DONALD KAGAN, *ON THE ORIGINS OF WAR* 441 (1995).

core spheres of influence.<sup>185</sup> The latter norm developed through a tit-for-tat process during the first decades of the Cold War, as one would expect in a Type 2 conflict.<sup>186</sup>

### C. Type 3

In this mode of conflict, the parties agree that they share a law applicable to their dispute, and both recognize some shared judge with the authority to decide how the law applies,<sup>187</sup> but they do not recognize any shared executive entity with the authority to enforce the law, including the judge's decision in their case. Each party can attempt to enforce the law through self-help measures such as retaliation and reprisal, as in a Type 2 conflict, and the shared law itself may authorize such measures. But the existence of a shared judge increases the feasibility of an alternative, potentially more effective, efficient, and even just mode of enforcement: community punishment of violations.<sup>188</sup> As H&S suggest, depriving violators of the law of the benefits of the community—"outcasting"—can be a particularly effective example of community sanction.<sup>189</sup>

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<sup>185</sup> Arms treaties provide another example. *See, e.g.*, WALTER ISAACSON & EVAN THOMAS, *THE WISE MEN* 630–33 (1986) (describing Averell Harriman's negotiation of a nuclear test ban treaty with the Soviet Union). The Soviets tried to minimize the importance of a sticking point in the negotiations by noting that "[t]he Leninist view of treaties . . . always permitted them to be abrogated if they threatened the self-interest of the Soviet state." *Id.* at 632. At first glance, this position might seem to call into question the purpose of entering any treaty. Yet from another perspective, the "Leninist view" might be said to reflect the reality of any agreement in a Type 2 legal-institutional setting. Each party is free to interpret its agreements however it wishes, or to abandon them, provided it is willing to accept the consequences from other parties.

<sup>186</sup> Many of the familiar episodes of the first years of the Cold War, such as the announcement of the Truman Doctrine, the American provision of military aid to Greece and Turkey, the Soviet rejection of the Marshall Plan, the American refusal to intervene in Czechoslovakia in 1948, the Berlin blockade and airlift, and the establishment of NATO and the Warsaw Pact, can be understood as steps in the formation of the shared United States-Soviet norm against certain interventions in each other's spheres of influence. *See* KAGAN, *supra* note 184, at 437–47. Once the norm was in place, the United States and the USSR enforced it through actual or threatened tit-for-tat retaliation against violations, as illustrated most dangerously during the Cuban Missile Crisis. *See id.* at 447–548. In the Helsinki Accords of 1975, the norm of nonintervention became legally formalized. *See* TONY JUDT, *POSTWAR* 501 (2006).

<sup>187</sup> As the example of the medieval Icelandic Thing illustrates, the shared judge does not need to be an individual person. It can be a group, such as the lay judges we know as juries.

<sup>188</sup> *Cf.* Hathaway & Shapiro, *supra* note 141, at 324 (noting that "outcasting by third parties almost always requires adjudication").

<sup>189</sup> *See generally id.* at 141. I note that sanctions *by* a community are analytically distinct from sanctions *of* a community. On the latter, *see* Daryl J. Levinson, *Collective Sanctions*, 56 *STAN. L. REV.* 345, 348–49 (2003) (presenting the collective sanctioning of groups as a



Why does the existence of a shared judge open the door to new modes of law enforcement? Without a judge (whose authority is recognized by all sides in the conflict) any attempt by those who are not parties to the conflict to determine how the shared law applies, and then to carry out a remedy or punishment as appropriate, will run a very high risk of simply expanding the conflict rather than resolving it. A party to the conflict that perceives itself as disadvantaged by the non-party's decision or subsequent actions will likely view the non-party not as neutrally interpreting and enforcing the law, but as joining the conflict on the side of the disadvantaged party's opponents.<sup>190</sup> Especially if the intervening non-party takes punitive action, the punished party may respond by retaliating. Rather than ending, the conflict may grow in size. In addition, a shared judge's decision can help to coordinate community action by serving as a trigger for it, or even by explicitly ordering it. In the case of outcasting, for example, the judge's decision imposes a duty on all members of the community to exclude the law violator.

There are a variety of reasons why it might be preferable to enforce the law through a shared judge backed by community sanctions rather than through self-help measures. Above all, disputes will be less likely to fall into potentially endless, feud-like patterns. When two parties disagree about the application of the law, and there is no judge, any action taken by one party may be taken as a violation of the law by the opposing party, prompting retaliation, and the disagreement may never be resolved. Once a shared judge has made a decision, however, the costs of rejecting the decision will generally be greater.

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potentially useful, and in fact used, regulatory strategy in which the responsibility for deterrence is delegated to those who are well positioned to monitor and control potential wrongdoers). While sanctions *by* a group are difficult without something like a shared judge to coordinate group behavior, Levinson's examples show that sanctions *of* a group by another entity do not depend on the sanctioning entity sharing a judge with the sanctioned group. A blood feud, for example, is a paradigmatic example both of punishing a group for the wrongs of individuals in the group, and, as argued above, of a Type 2 conflict in which there exists a shared law but no shared judge. See Levinson, *supra* note 189, at 352–53 (describing blood feud as collective punishment); HATHAWAY & SHAPIRO, *supra* note 14, at 74–84 (feud as Type 2 conflict).

<sup>190</sup> The Grotian law of nations rested in part on the premise that “it was uncertain which side waged war rightfully, . . . as there was no common judge above the parties by whom this could be ascertained in terms of civil law.” HATHAWAY & SHAPIRO, *supra* note 14, at 25 (quoting Raphael Fulgosius); see also *infra* note 210–16 (discussing how H&S's logic connecting principles of the Old World Order only applies in the absence of a judge: “they might have presented a central aspect. . .”).

Community sanctions are especially superior to the use of reprisal as a form of self-help law enforcement. As H&S discuss,<sup>191</sup> reprisal—the deliberate violation of the law in retaliation for an opponent’s violation—generally involves behavior that the community believes should be prohibited. In warfare, this may involve inhumane conduct such as torture or the execution of prisoners.

As suggested above, the medieval Icelandic Thing—a historical anomaly in the sense of being a state without a centralized executive—and various international legal institutions of the postwar world are examples of Type 3 modes of conflict resolution. H&S’s use of the World Trade Organization as the central example of a Thing-like postwar institution, however, is problematic. In their discussion of outcasting, H&S suggest that the WTO “is like a global Thing.”<sup>192</sup> “If a state breaks the rules, another state can file a complaint and prosecute its case before a tribunal. If this tribunal rules in its favor, . . . the WTO authorizes the state that filed the complaint to break the rules in return.”<sup>193</sup> In other words, “the WTO agreements entitle the victorious party to suspend the benefits of membership in the community.”<sup>194</sup>

But attention to the legal-institutional structures highlighted by the Type 4 model of conflict suggests an imperfection in the analogy between the Thing and the WTO, and in the notion of the WTO’s enforcement mechanism as an example of outcasting. When a WTO tribunal determines that a state has broken the rules, the tribunal does not authorize all members of the community to sanction the rule-breaking state. The rule-breaking state is not outcast from the benefits of membership in the WTO community as a whole—even in some narrowly targeted way—but only from the benefits of free trade with the complaining state or states. The latter are authorized to *retaliate* against the rule-breaking state through the imposition of tariffs. Self-help measures like retaliation, as we have seen, are the signature mode of law enforcement in a Type 2 conflict.<sup>195</sup> To be fair, H&S’s

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<sup>191</sup> HATHAWAY & SHAPIRO, *supra* note 14, at 79.

<sup>192</sup> *Id.* at 379.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> The fact that the designers of the WTO created a Type 3 institution that relies on self-help rather than community enforcement also illustrates that the Four-Type Model represents a set of claims about institutional potentials and tendencies, not practical necessities. A shared judge makes collective enforcement of the law more feasible, but does not require it. Similarly, it is possible to imagine a law in a Type 2 setting requiring community enforcement of its violation, or a Type 4 institution delegating enforcement of the law to the community or to harmed individuals. These arrangements are less likely than

discussion of the WTO in their earlier article on outcasting recognizes precisely this distinction between the Thing and the WTO, noting that the former relies on third parties for enforcement, while the former permits enforcement only by the victimized first party.<sup>196</sup>

A number of post-1945 international institutions fit the Thing-like Type 3 model better than the WTO. One example is the U.N. Security Council.<sup>197</sup> Although it was originally envisioned that the Security Council would control a military force<sup>198</sup> and thus arguably become

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the ones in the chart summarizing the Four-Type Model because, generally speaking, where policing is feasible, it is preferred to community responsibility for law enforcement, which is in turn preferred to self-help. But variations are possible. *See infra* text accompanying n. 167.

<sup>196</sup> *See* Hathaway & Shapiro, *supra* note 141, at 327. It might be noted that some of H&S's examples of "outcasting" strain the ordinary usage of the term. For example, they present bilateral retaliation, such as through customary countermeasures, as a form of "simple outcasting," a form of law-enforcement that is "permissive, nonadjudicated, in-kind, and proportional, and only first parties are included." *Id.* at 326. But when one party retaliates in this way against another party, we would not ordinarily say that the other party has thereby been outcast from the community.

<sup>197</sup> An example from before 1945 would be the League of Nations, which had a Type 3 structure, with the ability to render judgments and order member states to impose sanctions, but no armed force of its own to compel action by member states if they failed to act. *See* HATHAWAY & SHAPIRO, *supra* note 14, at 105. During the later nineteenth century and through the 1899 and 1907 Hague Conventions negotiations, there was a movement to promote peace through compulsory international arbitration, which would also have fit the Type 3 structure. *See* FINNEMORE, *supra* note 44, at 34–36; *see also* MAZOWER, *supra* note 32, at 66. By contrast, voluntary arbitration, such as through the Permanent Court of Arbitration established by the 1899 Hague Conventions, is probably best seen as a Type 2 rather than a Type 3 institution. It is functionally similar to an agreement between the parties to resolve a conflict through the verdict of battle or by flipping a coin. The parties may delegate a one-off decision to a judge, but the conflict does not take place in an institutional context in which a shared judge already exists.

In practice, whether a judge has mandatory jurisdiction over a conflict, such that a party does not have the option of refusing to submit the conflict to the judge, may not always be clear. One of the earliest scenes of judging in Western literature reflects this ambiguity. The Shield of Achilles passage in Homer's *Iliad* describes a quarrel "over the blood-price for a kinsman just murdered" that is resolved by submitting the dispute to the judgment of the city elders. HOMER, *THE ILIAD* 483–84 (Robert Fagles trans., 1990). But it is unclear whether either party could have refused to submit the conflict to the elders. For a contemporary, nonfictional scene reflecting the same ambiguity, *see* ANAND GOPAL, *NO GOOD MEN AMONG THE LIVING* 79 (2014) (describing tribal elders resolving a conflict in the mountains of Afghanistan). More generally, Gopal's account of the changing forms of conflict resolution in the Pashtun countryside illustrates the practical logic and historical disruptions that could drive a community to submit to shared norms, then increasingly assertive shared judges, and ultimately a shared executive—whether a tribal strongman backed by a colonial power, or a militant movement of religious judges and students. *See generally* ANAND GOPAL, *NO GOOD MEN AMONG THE LIVING* 73–82 (2014).

<sup>198</sup> *See* U.N. Charter art. 43.

something like a Type 4 global Leviathan—authorized to create, apply, and enforce law at least in some contexts—it has instead relied on U.N. member states to enforce its decisions.<sup>199</sup> Just as the Thing makes a collective decision as to whether someone has violated the shared Icelandic law, and then obligates or permits members of the community to take various responsive actions,<sup>200</sup> so the U.N. Security Council makes a collective decision that an entity has violated international law, and then obligates or permits member states to take various acts.<sup>201</sup> Other international institutions in the post-1945 world order could also be described as creating a shared judge and relying on community enforcement of the judge’s decisions, including the European Union.<sup>202</sup>

The increasing use of community enforcement of international norms after World War II, and especially after the end of the Cold War,<sup>203</sup> has gone hand-in-hand with the rise of multilateralism. As

<sup>199</sup> See U.N. Charter ch. VII; HATHAWAY & SHAPIRO, *supra* note 14, at 213, n.62.

<sup>200</sup> See HATHAWAY & SHAPIRO, *supra* note 14, at 373–74.

<sup>201</sup> The Security Council permits rather than obligates U.N. member states to take military action, but other responsive actions such as economic sanctions may be obligatory. To take a recent example, on December 22, 2017, the Security Council adopted Resolution 2397, which declares that “all Member States *shall* prohibit” the transfer to North Korea of all crude oil, unless an exception is made. U.N. Security Council res. 2397 (2017) (emphasis added).

<sup>202</sup> E.U. states have generally complied with judgments of the European Court of Justice (ECJ). See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 276, 290–98 (1997). But the 1992 Treaty of Maastricht also granted the ECJ the authority to impose fines on states that refused to comply. See Press Release, European Union, Financial Penalties for Member States Who Fail To Comply with Judgments of the European Court of Justice: European Commission Clarifies Rules (Dec. 14, 2005). If a member state persistently refused to comply with an ECJ judgment or pay a resulting fine, the ultimate mechanism for enforcing the law would be for the members of the European Council (excluding the accused state) to agree to suspend various rights of the violating member state—that is, to outcast the violator. See Consolidated Version of the Treaty on European Union art. 7, 2010 O.J. C 83/01; see also Maïa De La Baume, *Brussels Puts Warsaw on Path to Sanctions over Rule of Law*, POLITICO.EU, Dec. 21, 2017. Thus, ultimate responsibility for enforcing EU law rests in the hands of the community of member states.

Interestingly, in the early 1950s, the Western European states came close to creating a European Defense Community (EDC) with a European army. See JUDT, *supra* note 186, at 244–45. If the French National Assembly had not rejected the EDC treaty in 1954 (by the relatively close vote of 319 to 264) Western Europe might have become a Type 4 system with regard to internal security conflicts. In any case, the hegemonic security guarantee of the United States arguably created a similar result. See *id.*

<sup>203</sup> As G. John Ikenberry notes, “It is important to recall that the postwar liberal order was originally not a global order. It was built ‘inside’ one half of the bipolar Cold War system. It was part of a larger geopolitical project of waging a global Cold War.” Ikenberry, *supra* note 39, at 9. In terms of the Four-Type Model of conflict resolution, it would be at least as accurate to say that Type 3 institutions of the postwar order, such as the United

Martha Finnemore notes with regard to humanitarian intervention: “To be legitimate in contemporary politics, humanitarian intervention must be multilateral.”<sup>204</sup> In contrast to the unilateral or strategic multilateral interventions of the nineteenth century, most of which “involved protection of Christians from the Ottoman Turks,”<sup>205</sup> humanitarian interventions since 1945 have consistently attempted to present themselves as multilateral actions “in defense of ‘generalized principles’ of international responsibility.”<sup>206</sup> The United States sought U.N. authorization and international participation in its humanitarian interventions in Somalia and Haiti, for example, even though it did not actually need “the involvement of other states for military or strategic reasons.”<sup>207</sup>

The growing international expectation that all legitimate humanitarian interventions must be multilateral fits comfortably with the growing use of Type 3 institutions for the enforcement of international law. As states have become accustomed to the idea that it is sometimes the responsibility of the international community to enforce judgments under international law, rather than just the responsibility of a harmed party, it may have come to seem natural that international norms should be upheld by multilateral state coalitions, rather than unilaterally, even when there has been no decision by a shared judge. The agreement of multiple states may even function as an imperfect proxy for the decision of such a judge.

#### ***D. Type 4***

In this mode of conflict, the parties share an applicable law, a judge with recognized authority to apply the law to their dispute, and an executive with recognized authority to enforce the law. The paradigmatic example of a Type 4 institution of conflict resolution would of course be the centralized government of a state. Whether the parties to a conflict actually engage with the machinery of the state

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Nations, operated against the background of the Type 2 conflict between the United States and the Soviet Union, as to say that the latter operated against the background of the former. Finnemore phrases the characteristic “modes of diplomacy” of the Cold War era in a summary chart using the following terms: “Varied; use of multilateral negotiations becomes common but core security concerns handled bilaterally.” FINNEMORE, *supra* note 44, at 97.

<sup>204</sup> FINNEMORE, *supra* note 44, at 78. On the significance of multilateralism generally, see John Gerard Ruggie, *Multilateralism: The Anatomy of an Institution*, 46 INT’L ORG. 561 (1992).

<sup>205</sup> FINNEMORE, *supra* note 44, at 58.

<sup>206</sup> *Id.* at 81.

<sup>207</sup> *Id.*

through litigation, or merely negotiate in the shadow of the law, their conflict will be shaped by the law of the state.

Just as a typical method of law enforcement in a Type 2 conflict is retaliation, and a typical method in a Type 3 conflict is community sanctioning, a typical method in a Type 4 conflict is policing: the enforcement of the law by agents of the executive power that both parties to the conflict recognize as having authority over them. In an institutional setting where the parties to the conflict recognize a shared law enforcer, the law enforcer will naturally be a likely mechanism for enforcing the law.

But not all Type 4 institutions are states, and not all conflicts within states fit the Type 4 mode. We might consider a religious institution with the authority to create law, render judgments, and enforce those judgments, such as through exclusion;<sup>208</sup> or a family structure in which a matriarch or patriarch lays down the rules, determines when one has been broken, and may administer a punishment; or a criminal organization whose chief plays the role of lawgiver, judge, and executioner; or, perhaps, the International Criminal Court, which applies an international law that is presumed to be universally shared, and has its own security staff and detention center for carrying out sentences. Conflicts take place across a variety of institutional contexts in which the parties share a law, judge, and enforcer of the law that are not the state.

There are many *potential* advantages to a Type 4 institutional setting over the three types above. Just as centralizing the application of the law in a shared judicial authority may both increase the feasibility of administering complex laws and facilitate community coordination, so centralizing the enforcement of the law in a shared executive authority may increase the feasibility of administering complex or otherwise difficult remedies or penalties and free up the community from having to engage in law enforcement. A range of just resolutions that are simply impractical in a Type 3 setting may become feasible in a Type 4 setting.

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<sup>208</sup> Hathaway and Shapiro present the Catholic Church's use of excommunication to enforce canon law as an example of outcasting, emphasizing the ways in which the Church externalized the enforcement of canon law to non-Church actors. *See* Hathaway & Shapiro, *supra* note 141, at 290–99. However, where a religious institution enforces its rules internally, through the actions of its own agents, as in the case of “minor” excommunication, the conflict between the punisher and the punished might be seen as belonging to a Type 4 institutional setting. *See id.* at 296.

Of course, the creation of a centralized law enforcement authority can also open the door to tyrannical forms of violence and oppression that would not be feasible in a Type 1 through Type 3 setting. Only in a Type 4 setting does it become possible for a conflict to develop not between two parties under a shared law, but between a party and the centralized agent of the law, such as the police. As the history of the state from its earliest creation to the present illustrates, a law enforcer may be capable of as much violence against those under its authority as a military force is capable of violence against a foreign enemy. The Holocaust and many other genocides, reigns of terrors, mass enslavements, and other atrocities belong to the Type 4 mode of conflict between the state and those under its authority.

Finally, it might be noted that civil wars and related phenomena such as insurgencies, counterinsurgencies, and revolutionary terrorism present a problem of categorization in the Four-Type Model of conflict. One side tends to view the conflict as Type 4, a violation of the legitimate laws of the state by those who are subject to the laws, while the other (revolutionary) side denies that the state is legitimate and has authority over them. What is at issue in the conflict is precisely whether the two sides exist under a shared state system of law, judges, and law enforcement, or whether they exist under separate state systems that are at war.

It is likely that this legally undecidable structure contributes to the exceptional ferocity and lack of constraint in so many civil wars. The sides are at least implicitly battling over the right to claim a monopoly on force. Because each side views the other's invocations of law as illegitimate and is unwilling to enter agreements under the other's law, it is more difficult to develop agreements to limit the violence, as might be possible in a Type 2 or Type 3 setting based on a shared law. The fighting may thus devolve into Type 1-style, no-holds-barred warfare, even though such warfare is most typical among parties that view each other as entirely alien or inhuman. This should not be the case in a conflict where the parties, prior to the outbreak of war, lived side by side in an ostensibly shared political community.

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The preceding discussion of the four modes of conflict, and accompanying modes of conflict resolution, can be summarized in the following chart. In the chart, "S" stands for "recognized by the parties to the conflict as shared between them," while "NS" stands for "not recognized as shared." "LEG," "JUD," and "EXEC" stand,

respectively, for a law capable of resolving the conflict, a judge with the authority to apply the law, and an executive with the authority to enforce it.<sup>209</sup>

Table 1. *Four Modes of Conflict and Conflict Resolution*

Type	LEG	JUD	EXEC	Characteristic mechanisms of law enforcement	Characteristic forms of violent conflict
1	NS	NS	NS	N/A	raid, genocidal war
2	S	NS	NS	self-help by harmed party (e.g., reprisal)	feud, pitched battle
3	S	S	NS	community responsibility (e.g., outcasting)	multilateral intervention
4	S	S	S	centralized responsibility (e.g., policing)	state violence

While H&S's discussion of outcasting arguably leads the way to this four-mode typology of conflict and conflict resolution, it is unclear whether they would agree with the validity or utility of thinking of conflict in these terms. In fact, if H&S had agreed that the transition from the Grotian legal order to the post-1945 international law of *jus ad bellum*, centered around the United Nations, reflected a shift from a Type 2 mode of military conflict without a shared judge toward a Type 3 mode with a shared judge, they might have presented a central aspect of their historical analysis differently.

<sup>209</sup> The tripartite division of legal institutions into law, judge, and executive obviously echoes the discussion of separated government powers in MONTESQUIEU, *THE SPIRIT OF LAWS* 154–56 (Cambridge 1989) (1748), although the echo is not intentional or intended to signify any conceptual connection between the two very distinct discussions. Montesquieu, in any case, did not invent the tripartite division of government powers. See M.J.C. Vile, *CONSTITUTIONALISM AND THE SEPARATION OF POWERS* 24, 31–32, 36 (1998) (noting that the distinction between the legislative, judicial, and executive powers of government appears first during the English Civil War, and is prefigured as early as the writings of Aristotle).



Throughout Part I of *The Internationalists*, the section of the book dealing with the Old World Order, H&S argue that there is a kind of practical and legal logic connecting on the one hand, “the privilege to use force to enforce their rights,” and, on the other hand, four subsidiary legal rules of the Old World Order, including the rights of conquest (that is, the right to gain legal rights through conquest, regardless of the actual justice of the conquest); the military’s “license to kill” without criminal penalty, and regardless of whether the initiation of the war was just; the principle that neutrality implies strict impartiality between warring parties, regardless of whether the initiator of the war acted justly; and the validity of “gunboat diplomacy” (threats of interstate force used to coerce agreement from weaker states).<sup>210</sup> “Once states have a privilege to use force to enforce their rights,” H&S conclude, these subsidiary legal rules “inevitably follow[.]”<sup>211</sup> That is, “[o]nce war was legal, . . . there was no alternative to a world where Might made Right.”<sup>212</sup>

Interpreted charitably, H&S’s argument about the “logical”<sup>213</sup> relationship between the privilege to use force and the subsidiary legal rules should be understood as an argument about practical tendencies rather than a legal formalist claim about deductive necessities. The specific arguments they present suggest that the adoption of contrary subsidiary rules would result in such serious practical problems that the subsidiary rules would prove unworkable—not that allowing neutral states to use economic sanctions, for example, would necessarily be logically inconsistent with granting states the privilege to use force.<sup>214</sup>

In essence, H&S argue that any legal distinctions that require a neutral determination of whether a war was just are impracticable in the world of independent European states existing during the Old World Order:

Though he insisted that war could only be waged for justice, Grotius also understood that in an international order of sovereign states, there are many versions of justice. The stability of legal rights upon which global commerce and international cooperation depends

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<sup>210</sup> See, e.g., HATHAWAY & SHAPIRO, *supra* note 14, at 97 (presenting “[t]he logical structure” of the Old World Order in chart form).

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> In fact, these two rules reflect the legal arrangement that Genêt apparently assumed to exist when he invited the United States to provide France with what H&S describe as “assistance just short of war” in France’s conflict against the British. See *id.* at 84.

would be undermined by the multiplicity of opinions over the justice of particular conflicts. The only possible way to allow victims to vindicate their rights through war is to allow nonvictims to gain legal rights from war, too. When Might is Right, multiple views on justice no longer matter, and all those who are engaged in war, victims and nonvictims alike, have a license to kill.<sup>215</sup>

As in Hobbes's vision of the anarchic state of nature, so in Grotius's world of sovereign states, each side in a conflict judges its own conduct. The practically inevitable result is that their judgments conflict even when they believe themselves to be bound by the same law—whether it is natural law, divinely revealed law, or the customary law of nations.

Yet once we think in terms of the distinction between a Type 2 and Type 3 mode of conflict and conflict resolution, we might question whether the four subsidiary rules of the Old World Order in fact follow, even as a matter of practical necessity, from the premise of sovereign states with a privilege to use force to enforce their rights. A world of sovereign states could agree—of their own sovereign free wills—to having the justice of their wars decided by an international arbiter, a shared judicial entity. The right of conquest, for example, could be conditioned on the judicial body's decision concerning the justice of the alleged wrong. If a state claimed that it was initiating a war based on a wrong that the judicial body determined did not exist or merit a war or did not justify the extent of the state's conquest, the state could be denied legal title to some or all of its conquered territories. In theory, the state's soldiers or officials might even be denied legal immunity for their killing. A shared judicial body could also be given the authority to determine whether a treaty was coerced through the threat of unjust force, thus undermining any practical need to permit gunboat diplomacy.<sup>216</sup>

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<sup>215</sup> *Id.* at 96.

<sup>216</sup> As for "neutrality as impartiality," it is unclear whether this rule is practically necessary even in the absence of a shared judge. Consider how states might have behaved if a consensus had developed that, contrary to Grotius, it was permissible under international law for a neutral state to provide "assistance short of war" to one side in a conflict—the Genêt rule. Sometimes, it is true, the disadvantaged state would have attacked the neutral state because of its assistance. This would have been an unjust basis for attack under the rules, because the attacked state was neutral. But the justice of an attack *makes no legal difference* under the rules: all interstate attacks, regardless of their justice, are treated alike, with the victor receiving legal title to the spoils. If it was not fatal to the Grotian system that states sometimes attacked one another without just cause, why would it have been fatal to revise the list of just causes so as to exclude "assistance short of war" or economic sanctions? In a world where "Might is Right," the precise location of the legal line between just and

In other words, H&S's discussion of the practical necessity tying together the rules of the Old World Order rests on an unstated premise: the states of the Old World Order, although they possess a shared law, lack a shared judge. The subsidiary rules of the Old World Order do not "inevitably follow[]" simply from the premise of sovereign states having "a privilege to use force to enforce their rights."<sup>217</sup>

It might be objected that the absence of a shared judge is implied by the premise of sovereignty. A state that has agreed to be legally bound by the decisions of an external judge regarding the justice of its wars, it might be argued, is no longer sovereign. Yet there is something arbitrary in defining sovereignty in this way. Why is a state that perceives itself as bound by international law, but only according to its own interpretation of that law, sovereign, while a state that exerts its sovereign will to agree to abide by the decisions of an outside adjudicator, not sovereign? Perhaps this objection will invite some to conclude that a truly sovereign state cannot be bound by international law at all. But if this is the case, then how can a sovereign state bind itself through constitutional law, or public law in general?<sup>218</sup>

Indeed, the four-mode typology described above may offer a starting point for a general alternative to approaching the identity of the state in terms of sovereignty, just as it offers an alternative to approaching international relations in terms of a binary distinction between anarchy and the state.<sup>219</sup>

### CONCLUSION

It is commonplace that the world faces a variety of challenges that would benefit from global coordination, from climate change, pollution, terrorism, and financial regulation, to the management of epidemics and the control of nuclear, biological, and chemical weapons. Viewing the menu of institutional arrangements for interstate coordination in terms of the Four-Type Model of conflict and conflict resolution, if nothing else, offers a reminder that there are choices other

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unjust reasons for interstate attack would seem to be a difference that makes no difference. *See id.*

<sup>217</sup> *Id.* at 97.

<sup>218</sup> Scholars have noted that constitutional law and international law provide similar challenges for certain conceptions of state sovereignty. *See* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009); Christopher A. Whytock, *Thinking Beyond the Domestic-International Divide: Toward a Unified Concept of Public Law*, 36 GEO. J. INT'L L. 155 (2004).

<sup>219</sup> *See* Milner, *supra* note 21.

than pure anarchy and the potential tyranny of a Leviathan-like global state. The most significant practical implication of the model may be one already suggested by the treatment of outcasting in *The Internationalists*: for the enforcement of the law, a state is not required.<sup>220</sup>

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<sup>220</sup> This might seem to be an obvious point to some. But discussions of whether international law is truly “law” often neglect the point, even when it would be highly relevant. See, e.g., BEST, *supra* note 2, at 5–7 (against the critique that international law is not law because it is not enforced, arguing that states nevertheless have reasons to comply with it, and do comply with it—but not noting that mechanisms for enforcing international law do, in fact, already exist).