Reviews of Books


The social performance of reviewing a book rests on a collusive illusion that should delude no one. It is a small and rare, but anxious, pleasure for the reviewer to be able to adopt, briefly, an olympian tone of voice in discussing and judging the published work of others. And yet it is, of course, impossible for a reviewer with a strongly developed intellectual worldview—a committed Marxist, say, or a Thomist, Nietzschean nihilist, American Pragmatist or, in the present case, passionately committed Social Idealist—simply to slough off that commitment for a while to dispense a measure of benign objectivity.

Also, there is an illusion in treating a particular book in relative isolation from its cultural background. A particular way of understanding the cultural background in question is a central feature of a particular reviewer’s worldview. Ideology in, ideology out. Defying social convention, therefore, a particular reviewer may think that it is proper to acknowledge, at the outset and as sparsely as possible, the cultural perspective and the intellectual prejudices that will warp his or her judgment.

Those who undertake to write about the philosophy of international law in the twenty-first century take on several seemingly hopeless challenges. Surely twentieth-century philosophy finally demonstrated the impossibility of philosophy in the perennial philosophical tradition, allowing the philosopher Martin Heidegger to announce (1964) ‘the end of philosophy’. What he called ‘thinking’ would remain, until even that is taken over by machines, and the private minds of human individuals become peripherals of a universal cybernetic mind.

Surely the twentieth century finally demonstrated, intellectually and empirically, the impossibility of treating international law as law like any other kind of law, so long as an essential condition for the existence of law is not present, namely, a self-identifying and self-constituting society making and enforcing the law as an integral part of its self-identifying and self-constituting. Pending the improbable emergence of such a society at the global level, ‘international law’ would continue its strangely vigorous existence as a living and breathing contradiction in terms—the law of an anarchical society (to echo Hedley Bull).

Surely it is vain to suppose that anyone professionally involved in the international system—politicians, diplomats, government officials, judges, lawyers—would have any interest in, let alone allow their professional worldview to be radically altered by, the arcane musings of social or legal philosophers. They might see such things not merely as irrelevant but as a potential distraction or impediment in doing their difficult work. Law, like life and love, does not need theory to work effectively.

Those of us who, as social or legal philosophers, wantonly or valiantly take on these seemingly hopeless challenges do not underestimate them. We may see ourselves as
traumatised refugees from the intellectual devastation of the twentieth century, but we know that we have saved at least one thing from the wreckage, something that, whether they know it or not, makes the practitioners of the international system, and of its national extensions, vulnerable to our intervention into their self-absorbed and complacent world. Like life and love, law needs good ideas to make it better.

As the spider spins a web out of its own substance, so the mind makes ideas—to borrow an image from Francis Bacon. We spin webs of ideas in our own minds. And we share ideas, mind to mind. We spin webs of shared ideas. And when the spiders leave, the cobwebs remain. A person, a nation, a state, a government, a religion, a philosophy, a science, a legal system all seem to be part of the furniture of the world—to borrow an image from Ludwig Wittgenstein. But they are all merely products of the infinitely fertile human mind.

Remarkably, we can even think about our own thinking. Francis Bacon called it the radius reflexus—the beam of light that the human mind focuses on its own activity. Such is the nature of philosophy in the perennial tradition. Philosophy is the mind thinking at the most general level about its own activity.

Remarkably also, the human mind can form ideas that are not merely generalisations from experience, not part of the furniture of the world. They are ideas produced in the mind—Locke’s archetypal ideas, Kant’s ideas of reason (Vernunftideen). Matter, mind, time, space, reason, order, law, obligation—and countless others—are structuring elements of our thinking, allowing us to construct an orderly picture of what we think of as reality, allowing us to participate with other minds in the making and re-making of that reality.

Philosophy is a form of life (to echo another of Wittgenstein’s images). Mind is motion (to borrow an idea attributed to Anaxagoras). It is part of the ceaseless activity of the universe. Thinking is a form of energy which makes our being into a becoming (to invoke one of Aristotle’s most fruitful ideas). Through philosophy the human mind may choose how to actualise human potentiality.

Among our universalising ideas are ideal values—justice, truth, beauty, the good, rationality, altruism, sociability, compassion, human dignity, human flourishing, the good life, happiness. They propel our becoming, as individuals and as societies, in a particular direction, towards a goal that is unreachable but which acts on our minds like a magnet. We translate our ideals into our purposes. Impelled by our ideal purposes we can make a better society, a better human world, a better humanity. And we can use law as an instrument for making our potentiality actual in everyday social life.

Law is not an absolute good. It is a contingent good. A knife can be a tool or a weapon. Law can be a maker of the common good, and it can be an instrument of oppression, exploitation, and public evil of all kinds. It is the quality of ideas transcending the law, ideas processed by the law, that determines whether law does good or evil. Good in, good out. Evil in, evil out.

From the ravages of the twentieth-century mind we have rescued the idea (emanating from Plato) that the human mind has a power to take power over all forms of social power, since all forms of social power are products of the human mind. A true believer in the wonderful capacity and necessity of law—its miraculous power to transform the human condition (echoing Rousseau)—could not deny the possibility and the necessity of international law. A true believer in the wonderful capacity and necessity of philosophy—guide of our lives, explorer of all that is good within us (echoing Cicero)—could not deny the possibility and the necessity of a philosophy of international law.

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Facing the cultural situation of the twenty-first century and armed with a predisposing philosophical *a priori*, we approach three books that could not be more different in their response to the challenge of philosophising about international law.

In *Human Dignity and the Foundations of International Law*, Patrick Capps proposes an important and provocative interpretation of the nature of international law. It is important because its complex and sophisticated journey originates at an unusual starting-point, so far as the theoretical study of international law is concerned. The book builds a valuable bridge between well-established thought about the nature of international law and a particularly active field of general legal philosophy. It is provocative because it obliges us to consider carefully the merits of such an approach and, more or less enthusiastically, to respond to it substantively.

The starting-point is something called *legal science* or, something which may or may not be the same thing under another name, *analytical jurisprudence*. The term ‘legal science’ seems to be a distinct usage in the Anglo-American world of legal theory, distinct from its use in a well-established European-Continental, and especially German, tradition. The word ‘analytical’ seems to be used in an Aristotelian or Kantian sense, meaning a study that investigates the inner logic of a mental phenomenon in order to uncover something called its ‘concept’, without reference to its wider social and cultural and historical contexts. There is a latent analogy with Kantian ‘critical’ theory and Kelsenian ‘pure’ theory.

The word ‘seems’ is used in the previous paragraph to show that the enterprise in question is wholly alien to the mind of the present reviewer. The first half of Capps’s study is a painstaking and fascinating examination of the extraordinarily busy world of ‘legal science’. Capps is a good guide, sometimes identifying himself as a legal scientist, sometimes presenting himself as an interested observer. (The way in which the book has been organised means that there are repetitions and dissonances.) One travels with him feeling like a cultural anthropologist visiting a highly intelligent tribe living a vigorous life of the mind in their own sacred wood, surrounded by the dark world made by twentieth-century philosophy, in which words like ‘science’, ‘analytical’, ‘pure’ and ‘theory’ struggle to survive.

Capps structures the first half of his book around a discussion of ‘method’—unfortunately, one might think, given that an obsessive effort to find an analytical (*a priori*) ‘method’ has been the chosen instrument of self-destruction of ‘social science’. The first sentence of Chapter 3 is dramatic and explains a great deal. ‘Hart’s legal positivism, which is mainly set out in his book *The Concept of Law*, is currently the most popular and influential approach to legal philosophy in the Anglo-American tradition.’ If this is empirically true, then it reveals a sad state of affairs. Hart’s approach illuminates nothing and leads nowhere.

With luminous intelligence, Capps disentangles the *querelles de chapelle*, the narcissism of small academic differences in the world of legal science, sorting out ‘us’ from ‘not-us’ (to echo Freud). For an uneasy witness of it all, the unfolding of the laborious story is something of a negative adventure (to borrow a characteristically dispiriting formula from Henry James).

However, the patient social idealist becomes more cheerful when Capps, in the second half of his book, manages to produce from somewhere within the Hartian wasteland something which is unexpected and important. He finds that it is possible to have an analytic concept of law that contains a familiar and substantial ideal value.

A striking feature of pure theorists is that they seem to be haunted by nostalgia for the transcendental. Pure theorists cannot bear too much purity. Pure theorists cannot bear too little morality. Like Weber, whom Capps admires, they have to find a way of inserting
value, in however vestigial and wraith-like a form, into a pure concept of law without destroying its ‘essential’ purity. In the case of legal scientists, this seems to involve an almost unspoken underlying assumption that law properly so called is intrinsically and necessarily a good thing, and that law may even have some intrinsic and necessary connection with something called ‘morality’ which, they also seem to assume, is intrinsically and necessarily a good thing. They seem to believe that Immanuel Kant is on their side in these assumptions. Others of us may think that Kant cannot be used in this way. And we may think that he certainly cannot be invoked uncritically, as if, in the meantime, Hegel and Schopenhauer and Marx and Nietzsche and Freud and Wittgenstein and Heidegger had not spoken about morality.

Capps does not approve of Tony Anghie’s exposing of international law as an instrument of imperialism—and yet Anghie must be right, for the following reason. It is impossible to suppose that the ruling classes who construct general social structures, including law, would construct social structures that threaten their fundamental interests. The international system in its present structural form is the product of the collusive and competitive interaction of governments, some of whom have had to protect vast world-wide interests, using the charismatic and iconic thing called ‘law’ as a form of self-defence in depth.

At least from the point of view of method, Capps also does not approve of Thomas Franck’s sidelining of the supposed theoretical problem of international law, in order to turn his and our attention to the question of how it, whatever it is, can be made to satisfy our highest human and social values.

The best of pure social theory (Hobbes, Locke, Vico, Jefferson-Hamilton-Madison, Bentham, Comte, Weber, Kelsen, Lauterpacht, Lasswell-McDougal—ideologically committed witnesses of some of the great hinge-periods of history) has been significantly impure, with add-ons conjured out of thin air: religion seen as prudential public policy; natural law seen as the ultimate form of self-interest; morality seen as a collective moral sense; human rights seen as practically reasonable, or as cultural universalism; high social values seen as supra-social. But, it should be noted, the best of pure theory has been intensely practical in its aim, designed to help to manage social change at times of dramatic social transformation, by a calculated appeal to something that shares in the spirit of, but is not to be identified with, ancient (and presumptively exploded) transcendentalisms.

The best of pure social theory is a bridge between transcendental theory which postulates the logical necessity of high social values and practical theory which adapts transcendental and pure theory to condition actual social reality. The best of pure social theory is intended to be a way of overcoming the extreme impurity of actual social reality.

Even John Austin, dark star in the Benthamite constellation and progenitor of Hartism, managed to catch the spirit of the age (a phrase then much in vogue) in postulating a legislative idea of law (Province of Jurisprudence Determined, 1832). It was a time when the old governing class and a new kind of middle class made a deal (Reform Act 1832) to prolong the life of the mysterious post-medieval tricephalous parliament (Crown, Lords, Commons) within a new kind of society, industrialising and urbanising itself with fierce energy and at terrible human cost, with workers and the unemployed treated like animals, and with rampant free-market capitalism destroying the very idea of morality.

The appalling ‘condition of England’, as it was called at the time, was of a nation of two nations, the rich and the poor (to echo Benjamin Disraeli, politician and polemical novelist, writing in 1845). Engels, also writing in 1845, approved a contemporary slogan to the effect that the condition of the masses in England amounted to ‘social murder’, with their living conditions destroying their health and shortening their lives. Mr Gradgrind’s
younger children were called Adam Smith and Malthus (Charles Dickens, *Hard Times*, 1853).

In Britain ‘human dignity’ was the great rallying cry of those (Coleridge, Godwin, Kingsley, Carlyle, Ruskin, Morris and others) whose fierce polemics helped to inspire a ‘revolution by process of law’ (*per* the Duke of Wellington, leader of the canny survivors of the old regime) mainly achieved through legislation. Engels said that the nineteenth-century British Parliament was the most revolutionary body in Europe.

It is interesting to find that Austin’s name can still be invoked with respect among legal scientists. For Frederick Pollock, Austin was one of those who, knowing a little political philosophy, were able ‘to impose the shallowest of dogmas upon lawyers who knew none’. Within an analytical concept of international law, Capps finds immanent value in the ideal of human dignity. It is important to note that he is not, in the second part of the book, simply deserting legal science in favour of Lasswellian sociology, although he admires the policy-science school’s (non-analytic) inclusion of high values (including human dignity) in the very structure of international law.

Capps’s argument is that practical reasonableness compels us to see that a pure concept includes an idea of the concept’s *purpose* (the *focal* nature of a concept), and, especially in the case of international law, that purpose cannot possibly be (cannot logically be, as it were) other than the flourishing of all human beings.

He finds that various *a priori* high social and moral values which he assembles under the portmanteau term ‘human dignity’ have been enacted in many international documents and decisions, from the United Nations Charter onwards. For Capps, we may now be able, at last, to regard international law as a conceptually coherent instance of an ameliorative concept of law in general. His book will be welcomed as a deeply serious source of intellectual and moral support for those who believe that what seems to be a recent humanising of the constitutional principles of international law is a fundamental and permanent transformation of the international system. Others of us may, sadly, continue to believe that the new principles are little more than delusional social poetry, an ignoble lie, the self-interested de-transcendentalising of transcendental values by the masters of ultimate social power. The gross public evils flowing from the international system, and its national extensions, continue, and will continue, unabated.

The nineteenth-century ‘condition of England’ has been globalised to become the human condition of the twenty-first century, a human world of two worlds whose inhabitants might be inhabitants of different planets (to borrow the very words that Disraeli used to describe the two nations of England in 1845), with the world’s poorest as victims of the social murder that Engels had diagnosed in the England of 1845. Both worlds are full of gross affronts, material and moral, to human dignity.

Could the ideal of human dignity be a rallying-cry of a new revolution by process of law, including the process of international law? Perhaps Patrick Capps’s difficult and challenging and rewarding book could be used to help to make the masters of ultimate social power become even dimly aware of a strange idea: the idea that the essential purpose of law, including international law, might be seen to be human self-perfecting or, in other words, human happiness. We may catch the masters of ultimate social power in the silken webs of their pseudo-benevolence, our power over their power.

*Philosophically, the United States of America is another country. From a European perspective, it is us and not-us, with small differences that are also large differences. A nation
unlike any other, the United States developed its own national mind, a mind unlike any other. An important aspect of the American mind is its attitude to law. In Aaron Fichtelberg’s *Law at the Vanishing Point: A Philosophical Analysis of International Law* we can witness an American mind at work on what some people have seen as the elusive phenomenon of international law. For Fichtelberg international law is not an elusive phenomenon. It is a fact.

His book is as American in its brisk intellectual certainties as Capps’s book is European in its arduous complexity. Their books seem to be webs of ideas spun by spiders of different mental species. It is a contrast that demands an explanation which will take us far beyond international law and its problems. It is a contrast with profound real-world consequences.

For a non-American reader, Fichtelberg’s book is an event. American Pragmatism meets International Law. Notwithstanding the book’s title, it is better seen as embodying philosophy at the vanishing point. Its theoretical analysis is in the tradition of American Pragmatism, which might be considered as a state of mind rather than a philosophy. The book is designed as an answer to a number of different forms of scepticism about the ‘reality’ of international law. These forms of scepticism are not exclusively American, but it is their American projection and significance that it is the focus of the discussion. In this sense, the book is part of an American-American debate (to echo the useful French term *franco-français* for the corresponding phenomenon).

Fichtelberg identifies and names four forms of scepticism whose substance one might summarise in the following way: descriptive realism (international law does not play a decisive role in international decision-making; national interest is decisive); prescriptive realism (international law should not play a decisive role, given that the overriding duty of governments is to do what is in their country’s national interest); Critical Legal Studies and New Stream theory (a sub-sub-Marxist dissecting of international law as a manipulative conspiracy (sub-sub-Marxist being, one may think, somewhat better than not-Marxist-at-all)); and postmodernism (international law as a collusive fantasy, generating wishful-thinking or cynicism, causing people to expect too much or too little of international law).

Fichtelberg devotes very few pages to the latter two forms of scepticism. His main targets are the two forms of ‘realism’. He also does not devote any significant discussion to the vast mass of writing about the problem of the nature of international law extending over many centuries. He explains this using a delightfully ingenious pragmatist gambit. Writers about that problem are part of the problem, because they are participating in the making of what they are writing about. They are intellectual competitors, not expert witnesses. For those of us who do spend, or waste, a great deal of time on such matters, it would be a glorious release to be able to play this gambit.

However, this approach is part of a wider and important discussion by Fichtelberg about how law, and not merely international law, is made—the following summary being one reader’s understanding of his discussion. Law is not a thing that sits there waiting to be applied. It is not (to echo Oliver Wendell Holmes Jr) a brooding omnipresence in the sky. Law is made *ambulando*, as it were, by the interaction of those who participate in its making. And they include not only the obvious people—legislators, judges, lawyers—but also those who debate the law and write commentaries, learned treatises and op-ed pieces.

But the argument goes further. Law in general, and international law in particular, are not metaphysical entities waiting for us to identify their ‘true’ nature. There are social sub-systems that people regard as legal systems, and there are phenomena within those systems that people refer to as law. But the class of such phenomena is open-ended and
they may take any number of forms, and what people say about them may differ and may
take any number of different forms. Law in general, and international law in particular,
are what people, explicitly or as an inference from their behaviour, think they are. There
is no point in searching for some abstract and universal meaning for ‘the sources of inter-
national law’ or ‘the subjects of international law’ or ‘the binding-force of international
law’ or ‘sovereignty’ or ‘legal personality’. Such things are simply what they are in prac-
tice, what they do in practice.

Fichtelberg suggests that this approach is related to philosophical nominalism. Nominalism, in the Western philosophical tradition, has been a permanent sceptical
counterpoint, suggesting that most of the problems of philosophy are false problems
caused by the tendency of philosophers to suppose that any idea which has a substantive
name (truth, justice, law, evil, duty, matter, spirit, the soul, the self, and so on) can be
discussed using the kind of language that we use to discuss things present in material
(non-mind-made) reality, whereas the apparent substantiality of such ideas is nothing
more than a mind-made linguistic illusion. The problem with nominalism is that such
ideas are treated substantively, not merely by many philosophers, but by everyone else
every minute of every day, as Wittgenstein II recognised.

Fichtelberg’s general approach is, perhaps, better seen as an echo of American Legal
Realism, with its decisive focus on what law does rather than what law is. We remember
Karl Llewellyn, collaborating with the anthropologist Adamson Hoebel and concluding
that law is a social institution doing a number of ‘law-jobs’ that all societies require to be
done, including, above all, dispute settlement. The approach may also seem to echo the
work of the Scandinavian Legal Realists (Hägerström, Olivecrona, Lundstedt, Ross) for
whom it was nonsensical to search for some mystical thing called ‘the binding-force of
law’, other than in the minds of those who feel bound by the law. For Alf Ross, law is a set
of normative ideas interpreting the phenomena of law, ideas that are treated normatively
because they are felt to be socially binding by those who have to apply the law. Karl
Olivecrona said: ‘I do not regard it as necessary to formulate a definition of law.’

However, Fichtelberg’s approach reflects more than American Legal Realism and
requires us to delve more deeply into the nature of the American mind.

Piety and pragmatism are the permanent pillars of American consciousness. The reli-
gious earnestness characteristic of people with a sense of liberation and exile took on a
more rigid form in the mini-theocracies of the founding American settlements. The
revival of religion in the eighteenth century (the Great Awakenings, led by the preaching
of Edwards and Whitefield) brought to the United States something of the return to seri-
ousness of European Pietism, Jansenism, and Methodism. And even the Transcendentalism
of mid-nineteenth-century New England represented, for a narrow social class, a return
to seriousness of a deistic kind. All these things established in American consciousness a
generalised socio-moral spirit transcending or subverting all social thought and behav-
ior. It is a secular ethos of benevolence, generosity, optimism, social duty, and faith in
progress which thoughtful foreign visitors have regularly observed and, if they are
European, have often found puzzling.

In Virgil’s Aeneid, Aeneas is described as pious on seventeen occasions (including twice
by himself). The word seems to be referring not merely to religious piety but to a sense
of respect for higher things, for honour, for established convention. But Aeneas, in his mis-
sion to found Rome, had also to do some less than pious things. American piety, not unlike
that of Aeneas, co-exists with a pragmatism which is concerned with means rather than
ends. A sort of social piety seems to lie behind even the most realist of American legal real-
ists. Llewellyn and the others had in their intellectual background a keen concern with the
social purposes which law should serve. One might even say that they saw themselves as
puritan legal theorists, cleaning out the stables. American sociological jurisprudence was explicitly concerned with the function of law as a means of social transformation. Roscoe Pound saw law in the pragmatic service of what he called social interests, but he also spoke of a *positive natural law* embodying the universal principles that ultimately inspire the everyday activity of the law.

The permanent struggle between the spirit of piety and the spirit of pragmatism has formed the American soul. It is not merely a mental dialectic. It has large practical consequences. Nowhere is the struggle more apparent than in the oscillation of American foreign policy between idealism and realism. It is reflected also in American ambivalence about international law. Americans seem to be frustrated that international law cannot do two things at once—to serve important social ends, such as making a better world, and to act as an efficient means for pursuing essential material interests.

Fichtelberg does not have much time for general philosophy, or social or legal philosophy of the general kind. He refers to the notorious epistemological problem of the social sciences (the so-called problem of ‘method’), but he confidently proposes his own method. In his book Patrick Capps has considered the epistemological problem, and is attracted by Weber’s ingenious, but ultimately unsatisfactory, idea of the ideal-type (*Idealtypus*)—a matrix of generalised ideas in some way derived from observation of actual social and mental phenomena in the human world which is then applied heuristically to actual phenomena of the human world, to allow us to understand them better by measuring how far they conform to the ideal-type. (It is ‘ideal’ only in the sense that it is takes the form of ideas.)

Fichtelberg calls his own method for dealing with the sceptics ‘empirical’. But we may be reminded of David Hume’s claim in the title of the *Treatise on Human Nature* that he will be applying ‘the experimental method’—which turns out to be, in the rest of the book, a method of worldly-wise observation and intelligent introspection. In Fichtelberg’s case, we may see his method as essentially that of the American Pragmatists—a summons to a conversation among interested and well-informed people about puzzling social phenomena with the aim of constructing something that they might regard as the ‘truth’ of the matter.

The leading American Pragmatists (Peirce, W. James, Dewey) were never able to say, still less to agree, precisely what American Pragmatism is. (One commentator has said that the movement is largely James’s misunderstanding of Peirce.) But this confusion should not tempt us to underestimate the movement’s profound importance in the history of human thought. It is a withdrawal from the perennial and universal tradition of philosophy. It is an egalitarian repudiation of an idea of truth associated with an idea of wisdom. For Peirce, the opinion which is ultimately agreed upon by all who investigate something is what Pragmatists mean by truth; and ‘the object represented by this opinion is real.’ This claim sidelines, at a stroke, centuries, millennia even, of thought about truth and reality.

It corresponds well to Fichtelberg’s method here. The intellectual atmosphere of his book is reminiscent of that of William James’s investigation of the phenomena of religion (in his *Varieties of Religious Experience, 1902*), which patiently and calmly, entomologically even (to echo the French historian Hippolyte Taine), surveys the phenomena. In the central part of the book he surveys briefly various crucial instances in which international law seemed to play a significant part, in order to determine what role international law actually played, and how the actors in those cases treated international law (humanitarian intervention, Pinochet, Nicaragua).

William James concludes ironically with what he calls a pragmatist’s view of religion, cool and benevolent. The often bizarre phenomena of human religiosity, taken together and made coherent, might lead us to think that ‘the world of our present consciousness is
only one out of many worlds of consciousness that exist’. One of Fichtelberg’s conclusions (stated as such) is that international law is not as radically distinct from international politics as some theories have led us to believe. It is a force (among many) that influences the outcome of events on the global political landscape. For those whose thinking is determined by perennial philosophy, these uses of the word ‘is’ by James and Fichtelberg seem daring in the extreme.

Fichtelberg’s conclusion contra the prescriptive realists, in their rejection of the normative claim of international law, is that they may have misunderstood the nature and mechanisms of international law. It is not a system containing underlying values. It has no underlying values. It is compatible with any values held by those who operate it. There is no deep normative structure to international law, showing why it ought to be followed. The existence of international law is real because it plays a real role in international affairs, which can be proved empirically, and any further argument is superfluous. International law is legitimate to the extent that the professional communities that use it acknowledge that it is legitimate in both their actions and their words. The search for ‘the foundations of international law’ might possibly be interesting and useful in deepening our understanding of the phenomenon. But it is not necessary. No mere theory will ever convince a committed sceptic of the value of international law. But the reality of international law speaks for itself and should be heard by the sceptic.

We may be tempted to hope that Fichtelberg’s non-theory of international law, even if it seems to us to amount to rather a substantial theory, will be enough to convince a reasonably minded sceptic of the reality and the value of international law. We may want to welcome any affirmation of the potential reality and value of international law. But the method of this particular affirmation may also leave us with serious anxieties, anxieties which will be discussed further below. Pragmatism, in both senses of the word, theoretical and practical, may not be able to provide what piety, in its perennial American form, and self-interest urgently demand of the United States in the chaotic world of the twenty-first century.

To move from Fichtelberg to Carty is to cross more than one kind of ocean. Anthony Carty is one of those who have responded valiantly to the seemingly hopeless challenges of the twentieth-century intellectual inheritance described in the first part of the present review. His theoretical writings are filled with a tragic sense of international law (to echo Miguel de Unamuno). His ruling passion is a sense of loss, the loss of the international law that might have been, and never will be.

There is an undertone of irony, a Brechtian Verfremdung, in all of Carty’s writings about international law, as if he knows that his range of cultural reference is a standing affront to the poverty of international law’s intellectual ethos. It is almost as if his writing is in the tradition of satire, grinding the actual of human folly on the stone of human potentiality. Carty on international law might remind us of Swift on religion (A Tale of a Tub), Pope on the money culture of eighteenth-century England (Epistle to Bathurst), Voltaire on unreason (Candide), or Chekhov on the perversities of the Russian privileged classes (The Cherry Orchard).

Satire makes us smile when we should weep. Carty’s irony goes further—towards the grim premonitions of R.U.R., The Trial, Animal Farm, Brave New World—with an important difference. Carty is describing a world of the imagination that already exists, the inter-state world of diplomacy and war. In his writings, he offers a phenomenology, a symptomology, an ecology of this deranged world, the world of an intensely unsociable
international unsociety, in which a sickly international law is among the strangest of its flora and fauna.

A satirical literary style is not appropriate in writing for the contemporary academy, however. In *Philosophy of International Law*, Carty writes, for the most part, about things that practitioners of international law know and care about, in a form and in a context which may, however, be less familiar to them.

How is it that the intellectual superstructure of international law (the ‘philosophy’ of international law) came to acquire its present miserably feeble state? Carty offers two answers—one large-scale, one small-scale, not mutually exclusive; perhaps mutually dependent. Under real-world pressures, international law came to be seen as the law of and by and for ‘states’. Since 1945, legal practitioners have simply taken over, in an unopposed bid, the enterprise of international law.

Always and everywhere, law has been seen as part of things that transcend it, not least the social institutions that make it possible, and the social values that cause it to have the substance that it has at a particular time and in a particular place. Even the idea of a law between nations at one time shared in the prestige of big ideas—universal law as a particularisation of ancient Greek and Stoic ideas of the rational order of the universe (Cicero); the *ius gentium* as a universalised legal system reflecting the rationality and necessity of natural law (Ulpian); the law of nations as an integral part of the amalgamated natural reason and faith of established religion (Aquinas); a secular natural law constructed inductively from the best of all human experience, real and imagined (Grotius); a law between nations reflecting practical deductions from reason and a sense of justice (Wheaton); rules of conduct that civilised states recognise as binding on them as law-abiding citizens regard law in general as binding on them (Hall); the bare survival of basic ideas of decent behaviour amid the twentieth century’s manifestations of very bad behaviour (Lauterpacht).

The rise of the mindless thing called the ‘state’ in the philosophy of the international system evacuated from international law the active presence of reason, faith, conscience, and personal responsibility, which are attributes of thinking human beings. A legal system whose subjects are not subjective subjects of the system but law-making, law-recognising, law-applying and law-enforcing robots is certainly a legal system unlike any other known in human history. Carty has labelled this ‘the decay of international law’. In 1986 he published *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*.

Carty refers to David Johnson’s admirably perceptive identification, in an article published in the *International and Comparative Law Quarterly* in 1962, of the takeover of international law by legal practitioners, as at last giving international law a tough no-nonsense image to impress specialists in other legal disciplines. The Hoebel-Llewellyn law-job of dispute settlement became the paradigm function of international law, because it became the primary place where the law is found and, more or less blatantly, made. Carty performs yet another biopsy or post-mortem of the *Nicaragua* and *Nuclear Weapons* decisions of the International Court.

For legal practitioners, the post-Vattelian system has the great advantage that it is easy to understand and easy to operate, whist rather than bridge. ‘The American [practising] lawyer need not perplex his head with vexed questions of the law of nature, and the Roman law, as a source of International Law, nor need he worry himself about Mr John Austin and his ways.’ (J. Scott Brown, writing in 1904; elsewhere he treated seriously the jurisprudential aspects of international law.)

Also, by evacuating higher ideas from the system, to the extent that that proved humanly possible, international law could preserve a spurious aura of universalism. It
was even possible to suggest that international law-making is a technocratic activity, with
an International Law Commission, containing government-appointed practitioners and
fellow-travelling academics, somehow producing law out of the conjuror’s hat of their
own value-transcending intelligence. The International Court of Justice, a remarkable
product of American piety, came to be little more than a voice of law rather than the
voice of justice.

Also, by cynically appropriating from national social philosophy the idea of law based
on ‘consent’, it was possible to regard the law-job of treaty-making as a law-making activ-
ity, and even to see customary international law as reflecting somebody’s actual consent.
The crass idea that *opinio iuris* requires a consideration of the actual (and non-existent)
psychological attitudes of ‘states’ has displaced the subtle philosophy of customary law,
familiar from the whole history of human society. Carty is not the first to expose this par-
ticular form of decay. Customary law is best understood as a phenomenon of a Kantian
kind—the extraction of universal principles detectable as patterns of obligation within
repetitive behaviour (see: an argument to this effect by the present reviewer in this
*Yearbook* in 1971). There has been a corresponding decay in the philosophy of the
Common Law, the customary-law system that underlies law in the Anglo-American legal
tradition, if not, strictly speaking, effective legal systems in all legal traditions.

Because of the triumph of the *vita activa* over the *vita contemplativa* in international
law, it has remained bizarrely possible to leave obscure the sense in which governments
can justify their participation in the international system on the ground of some theory of
their representation of the people, when the majority of governments practise no such
type within their own national systems. The crazy excess of international governmental
and administrative institutions, and government-managed international courts and tribu-
nals, is a measure of the absence of an international politics without which justifiable
international law, and justifiable international government and administration, are not
possible. (The European Union suffers from an analogous pathology.)

It may be suggested here that there is an underlying seven-layer schematic structure
in Carty’s phenomenology of the inter-statal world. Using it as a crucial example, he
analyzes at length an incident in 1957–8 when Britain intervened to assist the Sultan of
Muscat and Oman to put down an insurrection in Oman. Carty reviews the internal
Foreign Office documents of the time (made available to the public, under the general
rule, thirty years later), apparently revealing the thinking of a government, but conceal-
ing the personal response of officials. Discussion (in the Office or with outsiders over
lunch) is hidden behind lifeless official memoranda (the first and second layers of phe-
nomena). The records then reveal discussion among officials about what to say in public
to the media and at the United Nations (a third layer). This, in turn, generates comment
and discussion by other governments (a fourth layer), presumably based on similar inter-
nal discussions. The whole thing then is used (a fifth layer) by legal commentators to
discuss the significance of the events for the *law* of intervention and the use of force. All
this then becomes fodder for historians and writers on international relations and inter-
national law (a sixth layer) about questions relating to the nature of the state (was Oman,
or even Muscat and Oman, a state?), the nature of government decision-making, and the
role of law at every level of discussion, with unverifiable and uninnocent speculation
about the ‘real’ intentions of the governments involved, as meaningless a search as the
search for their *opiniones iuris*.

Finally, the whole package gives rise to the broadest questions of social and legal phi-
losophy. It is with this seventh layer that Carty is most concerned. His discussion of the
imagining of the *state* draws attention to a whole spectrum of ideas that have been invoked,
in theory and in practice, from the most Hobbesian to the most constructivist, including
ideas that link the artificial reality of the state to the supposedly real reality of ethnicity. It is remarkable that deeply divergent views can be held by writers from backgrounds that are otherwise culturally so proximate.

The winner in practice is, of course, the wholly pragmatic view of the state purveyed by governments, arbitrarily commandeering this theoretical view or that to deal with colonial entities (not ‘states’, surely) and successor states to colonial entities, states in the process of decomposition, entities within states claiming independence, and so on and on. Carty focuses especially on the way governments find pragmatic resolutions of the impossible contradiction between the imperious need to protect the stability of the state-structure and the perennial appeal made in the name of self-determination.

Most interestingly, Carty shows that ‘recognition’, the term of art which international lawyers treat with puzzled respect, conceals the way in which the existing governments create the inter-statal system itself, using pragmatically, and as some particular occasion demands, all the constructive matrices of international law—customary international law, legal personality, intervention, use of force, state responsibility, state succession—to construct, develop and protect the state-structure of the international system. It is, in this sense, that one can say that the inter-statal system and the current form of international law are facts. An alternative global reality can only be an idea or an ideal. The mind-made ecology of the world of all-humanity, however unfit it may be, however poorly adapted to the human and environmental challenges that humanity has created for itself, nevertheless seems to have within it a paradoxical and tragic evolutionary capacity for survival.

The present reviewer is unable to comment usefully on Carty’s painful chapters (painful for writer and reader) discussing Anglo-American strategic governmental thinking on the use of force, except to the extent that the withholding of comment is itself a comment. To respond to the views attributed to those governments to the effect that present and foreseeable threats to international peace and security render inappropriate or even obsolete existing international law on war (euphemistically referred to as ‘the use of force’) would require one to appear to treat dispassionately what passes for the existing law on the subject, law which is merely the cynical rationalising of monstrous human evil, a phenomenon far beyond the reach of irony or satire.

Thomas Hobbes is a brooding presence throughout Carty’s book. We all owe a debt to Hobbes for being infinitely interpretable—tut homines, tot sententii—or a little more than tot sententii, given that some of us must admit to having had different views of him at different times. Where is the Hobbesian heart—in power or in order? Was he the friend of governments or the friend of the people? John Locke, his successor who, in the Two Treatises, kept rather quiet about his debt to Hobbes for public relations reasons (Hobbes being an unpopular brand in semi-revolutionary times), acquired the reputation of being the friend of the people, not least the American people. But (to echo J.S. Mill) is any corporatist view of society necessarily the friend of the people when it can be used to justify definitively the actual power of actual social institutions, even when that power is used excessively or abusively, even when it justifies a majoritarian tyranny?

Is the international system an exteriorisation of the Hobbesian state—‘state’ in the sense of a total integration of society, self-contained, self-explaining, self-justifying, self-preserving at all costs, with the organisation of social power being enforced through law backed by public violence (on one commonly held reading of Hobbes)? Is this kind of state turned inside out, as it were, in the international sociosphere in which the organisation of violence and law is produced by an upward movement of the ‘sovereign’ power of the states, acting through the peculiar social processes of war and diplomacy, and through the spasmodic and tactical mutual self-limiting known as international law?
Is the international system an anachronistic prolongation of such an idea of the state, long after revolutionary transformations have created a new idea of the state in its internal form, at least in liberal democratic societies? The survival of the anachronism leaves governments acting on the external stage more or less in the same way, and with the same assumptions, as their medieval and post-medieval predecessors behaved. The outcome is a two-realm view of the human world, both realms confusingly signified by the same signifier—‘state’—but with a fundamental dichotomy between the realities of the two realms.

Carty identifies this most commonly held view of the international system, and deplores its consequences. Could there be room for an idea of an international sociosphere in which the organisation of violence and law is derived from a downward delegation to the constituent societies from a constitutional superstructure, as supposed by previous religious and humanist worldviews? Carty has an illuminating discussion of such a view, as postulated by Hans Kelsen and others.

In the last part of his book, Carty expands the contextual focus to consider international law in relation to macro-political perspectives of the twenty-first-century world. He discusses a strange collection of writings which purvey a fierce cultural pessimism, an apocalyptic vision of a world doomed to extrapolate the worst of the present into an even worse future. Some of these writings imagine an hegemony of the United States as a Mephistopheles whose dark arts are in the service of the final triumph of an American ideology of democratic-capitalist imperialism, making the world safe for the United States, its ideas, its values, and its interests. The nightmare is of a world in which an enlightened international law would be more or less unimaginable, and in which force and the absolute sovereignty of uncontrollable global systems would be the ultima ratio of all global social existence. These ideas seem to represent a movement from the End of Philosophy in the twentieth century to an End of Hope in the twenty-first century.

The present reviewer can offer no professional view on such an hysterical farrago of the psychology of decadence (to echo Thomas Mann’s exploration of Nietzsche’s ambivalence). Carty considers some possible theoretical responses, from within the American mind itself, including the approaches of John Rawls and Fernando Tesón, offering a more enlightened vision of the future of a law-governable world. It might be better simply to say that, in human affairs, the future is never simply an extrapolation of the past or of the present. The morphology of the human world changes unceasingly and dramatically. Already, the global configuration of power is not what it was a couple of years ago. We may be reminded of Frederic Maitland’s view that to seek to tell a piece of history is to tear at a seamless web.

We must also remember that seemingly autonomic social systems, even dangerous and destructive social systems, have been made by the human mind, the same human mind that will make the human future. Carty’s own preference is for a re-imagining of law and international law within its total anthropological context, the context of individual human beings and human society in general. Such an approach is one that any Social Idealist would be glad to discuss further.

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All three books under review here may be seen as concerned with the future of international law. For Capps, it is possible to regard international law as truly law and, therefore, containing intrinsic core values. For Fichtelberg, it is possible to accept international law as capable of being and doing what law in general is and does. For Carty, recognising the structural anachronism of international law might allow us to begin to cure its substantive inadequacy.
The attitude of the American mind is of crucial importance. Before 1776, America was part of what this reviewer has elsewhere called a genetic nation—a Britain-in-exile, overseas British subjects sharing a complex cultural inheritance. After 1776, Americans set about turning themselves, with remarkable speed and clarity of purpose, into a generic nation, an invented nation, to use a term that Americans themselves have used, defined by a uniformity of ideas and ideals and way of life. It is the nation which Alexis de Tocqueville wrote about, already in the 1830s, an anthropologist exploring, with amazing clairvoyance, a strange New Atlantis, a nation which, with immigrants from all over the world, was able to turn itself into a Weltstaat, a world-state closely contained within the borders of the United States.

Seen from this city on a hill, transatlantic magic mountain, the rest of the world became an alien place, a place of existential threats and splendid opportunities, and tiresome entanglements. American Pragmatism explained and justified the way in which the United States talks to itself, in its own private conversation, its own community of investigators (Peirce), its own communicative community (Habermas), constructing collectively its own reality and truth and law, in the conscious and unconscious cerebration (to echo William Carpenter) of the unique American mind. But it is worth recalling that John Dewey, a leading American Pragmatist, was deeply troubled by the fact that transient ideas of ‘the true’ and ‘the good’, formed from random social consensus, proved to be cruelly inadequate in the face of the terrible worldwide social realities of the late-nineteenth and early-twentieth centuries.

Philosophyless law is only possible in a United States where law is a central feature of everyday social self-constituting within an intensely cohesive collective consciousness. The United States was separated from the social history of Europe, including the turbulent history of radically reformist socialism and applied Marxism, and from the turbulent philosophical history of Europe, phenomena that have affected the political and cultural development of very many non-European countries.

Philosophyless international law will not be possible in an international society formed from countless different philosophy-filled subordinate societies. It will be difficult to invent a new international law, to imagine a new world order for a globalised world, if the American mind cannot find a way to take part, as a fully committed participant, in a conversation with the not-insignificant minds of non-America, in the making of a true global politics, making possible a true international law. Before the door of the fullest possible expression of an international legal system there stands no gatekeeper, only the self-imposed limits of the human imagination.

PHILIP ALLOTT
UNIVERSITY OF CAMBRIDGE


There has been a tendency in some quarters to suggest that international environmental law scholarship suffers from a number of weaknesses. First, that it has failed to demarcate accurately that which is and that which ought to, or which might, be. Second, that it has