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**REVIEW OF *Law at the Vanishing Point: A
Philosophical Analysis of International Law*, BY
AARON FICHTELBERG**

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Law at the Vanishing Point: A Philosophical Analysis of International Law. By Aaron Fichtelberg. Aldershot, England; Burlington, VT: Ashgate Publishing, 2008. Pp. xv, 206. Index. £60.

Law at the Vanishing Point, by Aaron Fichtelberg of the Department of Sociology and Criminal Justice at the University of Delaware, has a dual agenda: first, to discredit certain commonplace skeptical claims about international law; and second, to defend a “non-reductionist” (p. 29) definition of international law,¹ one that seeks to disarm these forms of skepticism, avoid reference to international law’s functions, and “show that there is a limited need for ‘theoretical foundations’ for international law” (p. xiii). The two parts of this agenda, of course, interrelate. Yet the latter, I think, proves deficient in several respects, while the former partially succeeds but owes its force more to relatively familiar replies to international legal skepticism than to the nonreductionist definition, which, in practice, proves difficult to distinguish from a form of legal positivism.² The author’s replies to international legal skepticism, in contrast, strike me as strongly redolent of constructivism³ in international relations scholarship and the views of Louis Henkin⁴ and Harold Koh⁵ in international legal scholarship.

Skepticism about international law—its existence, nature, efficacy, explanatory value, predictive power, and normative force, all distinct issues despite their frequent conflation into a confused indictment of the entire field—is a perennial albatross for international lawyers. A student

¹ By non-reductionist, the author means that his proposed definition “refuses to interpret the actions or norms of one particular type of agent, such as states, as definitive of international law in its entirety” (pp. 29-30). He contrasts this with, for example, the “sovereignty thesis,” which *reduces* international law to the “set of rules that hold between sovereign political bodies, usually states” (p. 56). See also Brian Bix, *Legal Positivism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 34 (Martin P. Golding & William A. Edmundson eds., 2005) (describing Austin’s reduction of all law to commands of the sovereign and Kelsen’s reduction of law to “an authorization to an official to impose sanctions”).

² Legal positivism subsumes a broad variety of theories about law, see Bix, *supra* note 1, at 29-35, but in international law, it has been described in part as the idea that law is “a unified system of rules” in which “all norms derive their pedigree from one of the traditional sources of international law, custom and treaty.” Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, in THE METHODS OF INTERNATIONAL LAW 26-27 (Steven R. Ratner & Anne-Marie Slaughter eds., 2006).

³ Constructivism posits that “ideas . . . construct the social environment which, in turn, constitutes the identities and interests of states.” OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 111 (2005).

⁴ Of special relevance here is LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1979).

⁵ See, in particular, Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997); Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

treatise aptly informs those new to the field that “[n]o other area of law is compelled to justify its very existence, and yet, international law seems condemned to perpetually do so.”⁶ It is not, of course, an anthropomorphic international law that is saddled with the Sisyphean task of replying to these oft recycled and superficially repackaged skeptical critiques; it is international lawyers and, almost always, academics. It is telling that few practitioners of international law suffer from an existential professional crisis—for this particular reason at any rate.⁷ From one perspective, the author may therefore be right to say that for “most functioning legal systems, theory is a sideshow, separate from the practical activity of actual lawyers” (p. xiii).⁸

There is something to be said, for example, about who should bear the burden of proof as to most forms of international law skepticism; the simple fact is that thousands of people, in diverse sociopolitical contexts, legal systems, and professional settings, practice international law daily—and get paid, often handsomely, for it. The U.S. State Department, too (and hardly alone among foreign ministries), sees fit to employ hundreds of international lawyers to advise it on how to create, influence, apply, and interpret international law or obligations. These facts about the world would seem to require a compelling alternative explanation if it were true, as a strong version of descriptive realism maintains, that international law is only “epiphenomenal” (p. 9).

In the second term of President George W. Bush’s tenure, for example, within an administration often criticized for its dismissive attitude toward international law, John Bellinger III, legal adviser to the State Department, and William Haynes II, general counsel to the Defense Department, chose to invest government resources in producing a joint letter-brief to the International Committee of the Red Cross (ICRC),⁹ a sui generis international nongovernmental organization (NGO). They did this in part to record the administration’s disagreement with the ICRC’s proffered evidence of, and methodology for discerning, customary international humanitarian law (IHL).

⁶ DAVID BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* 6 (2d ed. 2006).

⁷ See HENKIN, *supra* note 3, at 39.

⁸ From another and, I think, deeper perspective, however, this statement is misguided. Theory is not antithetical, but essential, to effective practice. Harold Hongju Koh, presently legal adviser to the U.S. State Department and a longtime practitioner and scholar of international law, often remarks, in a felicitous maxim that he attributes to his father, “Theory without practice is a lifeless as practice without theory is thoughtless.” Harold Hongju Koh, *A United States Human Rights Policy for the 21st Century*, 46 ST. LOUIS U. L.J. 293, 330 (2002).

⁹ Letter from John Bellinger III, Legal Adviser, U.S. Dep’t of State, and William J. Haynes, General Counsel, U.S. Dep’t of Defense, to Jakob Kellenberger, President, International Committee of the Red Cross, Regarding Customary International Law Study (Nov. 3, 2006), 46 ILM 514 (2007).

Now, the United States remains by far the most dominant military power in the world today. Bellinger and Haynes nonetheless evidently believed that the ICRC's study might adversely affect the ability of the United States to exercise that power—and therefore that it would promote the national self-interest, even narrowly conceived in realist terms, *not* to disregard the legal views of an unarmed NGO opining on IHL. Objecting overtly to the ICRC arguably strengthened the ability of the United States legally to exempt itself in future conflicts from certain purported new rules of customary IHL.¹⁰ Here again, this effort would represent an odd investment of time and resources were international law epiphenomenal. It suggests that the Bush administration saw international law not as irrelevant or epiphenomenal, but as potentially dangerous and causally efficacious. In the lexicon of international relations theory, the administration acted as a prescriptive, not a descriptive, realist. Descriptive realists might find this example particularly troubling: international law's effort to regulate war is often "Exhibit A" in the realist's evidentiary case that law does not merit inclusion in the best social-scientific explanation of international affairs.¹¹

According to *Law at the Vanishing Point*, a chief virtue of the nonreductionist definition that it propounds is that it places empirical observations of this sort at the core of its reply to skepticism about international law. The nonreductionist view defines international law as "the set of norms (or rules) that have a characteristically legal quality and extend beyond the boundaries of internationally recognized entities in terms of both their jurisdiction and their grounds of legitimacy" (p. 29, emphasis deleted). As the book's subtitle suggests, the author augments his avowedly empiricist (p. 142) and, at times, overtly antitheoretical (pp. xii–xiii) approach to the definition and application of international law with philosophical excursions. *Law at the Vanishing Point* delves into the work of, among others, Terry Nardin, Hugo Grotius, and Immanuel Kant, and it seeks to integrate John Rawls's influential idea of "reflective equilibrium" into its approach to the definition and defense of international law.

Insofar as the author deploys the philosopher's toolkit in the service of defending the reality and efficacy of international law, he persuasively—and, to my mind, unobjectionably—argues that any sound philosophical analysis of international law must be empirically grounded (pp. 142–43,

¹⁰ See generally Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L.J. 457 (1985); Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law*, 1985 BRIT. Y.B. INT'L L. 1.

¹¹ Hersch Lauterpacht said, in words with clear resonance here, that "if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." Hersch Lauterpacht, *The Problem of the Revision of the Law of War*, 1952 BRIT. Y.B. INT'L L. 360, 382.

202-203). It is careful observation and commensurate analysis, rather than the kind of abstract theory divorced from observation that characterizes some scholarship, that belies commonplace skeptical claims, including that: (1) international law is epiphenomenal; (2) it is not, in John Austin's phrase, law "properly so called"; (3) it does not (descriptive realism) or should not (prescriptive realism) influence international politics; and (4) it safely may be ignored in the best social-scientific account of international affairs. The author also, to his credit, recognizes the challenges of interdisciplinary scholarship: he takes pains to render the more abstruse philosophical arguments accessible to lawyers and the more technical legal arguments accessible to philosophers.

The juxtaposition of philosophical argument with the author's avowed dedication to an empirical methodology may, at first blush, strike some as ironic. But that would be to equate philosophy rather crudely with armchair theorizing. Some readers of *Law at the Vanishing Point* may nonetheless see the author's arguments as pejoratively theoretical. There would regrettably be some truth to this perception. It is not, of course, that philosophy is inherently inconsistent with an empirical methodology; quite the contrary, there is a robust and venerable empirical tradition in the history of philosophy that stretches back to ancient Greece. The real problem, in the reviewer's judgment, is that it is often difficult to see what, exactly, the author's periodic philosophical excursions add to arguments that have, by and large, been advanced before by scholars who either lacked graduate training in philosophy or perhaps just found it needless to repair to (sometimes esoteric) philosophical arguments to make strikingly similar points.

In chapter 6, for example, the author concludes that the "separation between law and politics as it is traditionally understood is a false dichotomy: law is an element of politics" (p. 142). I agree that this point is vital in understanding the international legal system. But it is not a new observation in the relevant international law or international relations literature. Nor is it especially controversial. It characterizes the jurisprudential position of many international legal scholars who otherwise maintain very different views about the essential nature of their field or law generally.¹²

Many arguments in *Law at the Vanishing Point* also bear little apparent relation to, and at times even seem to be in some tension with, the nonreductionist definition. The author argues that the nonreductionist definition has virtues that its competitors presumably lack. But many of

¹² See, e.g., HENKIN, *supra* note 3, at 90; LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 3 (1995); W. Michael Reisman, *Law from the Policy Perspective*, in INTERNATIONAL LAW ESSAYS 1, 6-7 (Myres S. McDougal & W. Michael Reisman eds., 1981). See generally MORTON A. KAPLAN & NICHOLAS D. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW (1961).

these virtues seem inconsistent or problematic upon a close read of the text. For example, the author says that the nonreductionist definition “is neutral as to the ultimate sources of international law (more on that later)” (p. 30). Were that true, perhaps it might, with further development, be a definitional virtue. The Statute of the International Court of Justice (ICJ) notwithstanding, international law in the twenty-first century, even more than in the postwar era of the twentieth century, surely cannot be understood simply in terms of what some admittedly still regard as the exhaustive enumeration of its sources in Article 38 of the ICJ Statute.

But *Law at the Vanishing Point* does not, in fact, remain “neutral as to the ultimate sources of international law” (p. 30). Ten pages later, it says that the nonreductionist definition “does not understand the ‘sources’ of law as extending beyond the formal sources set out by international lawyers,” meaning those “spelled out in Article 28 [sic] of the International Court of Justice Statute” (p. 40). Much of the substantive analysis of concrete international issues that follows is therefore, for obvious reasons, difficult to distinguish from the legal positivist approach that the author apparently critiques at the outset. To analyze concrete questions about, or issues in, contemporary international law, the author methodically examines treaties, conventional evidence of state practice and *opinio juris*, judicial decisions, and so forth.

Chapter 4 applies the nonreductionist definition to the topic of international legal personality. It is a thoroughly positivist account. It analyzes international legal personality by, as the author writes, resort to the “modern sources consulted by international lawyers to determine whether a state actually exists” (p. 77), beginning, unsurprisingly, with Article 1 of the Montevideo Convention on the Rights and Duties of States. It also refers to the criteria for UN membership in Article 4 of the Charter and the ICJ’s *Reparation for Injuries Suffered in the Service of the United Nations* advisory opinion before reaching the conclusion that international legal personality is no longer limited to states (p. 87). I do not disagree. But neither, to my knowledge, does anyone familiar with the subject, whether a critic or a proponent of international law. There is something of a straw-man problem here.

Insofar as the author recognizably applies the nonreductionist definition, it is because the positive sources upon which the author relies comport with, to quote his explanation of that definition, “a social practice carried on by an epistemic community (in this case international lawyers), a type of structured human endeavor that is defined by the set of rules constituting it” (p. 30). Preliminarily, note that this account of the “conception of law” (*id.*) that underwrites the nonreductionist definition is not obviously either the same as, or implicit in, the definition set out in italics a few sentences earlier: “the set of norms (or rules) that have a characteristically legal quality and extend beyond the boundaries of

internationally recognized entities in terms of both their jurisdiction and their grounds of legitimacy” (p. 29). Perhaps the two formulations stress different aspects of the conception of law embodied in the nonreductionist definition of international law. It is not clear.

At any rate, international law, according to the first formulation above, denotes the social practices of those “in the know,”¹³ the rules that these cognoscenti accept and by which they “play.” The author analogizes international law in this regard to chess, which “exists as a social practice with a clearly defined, well-understood set of rules (with scarce variation in different places),” although he concedes that international law is not “so clearly or easily grasped as the rules of a board game” (p. 33). That is surely a colossal understatement. But however it may be characterized, the nonreductionist definition, as noted, emerges in application as a rough international version of H. L. A. Hart’s well-known reformulation of legal positivism.¹⁴

Hart’s magnum opus continues to animate debates and to generate sundry schools of legal positivism among contemporary theorists writing about internal legal systems.¹⁵ Whatever their differences, these writers share the assumption that it makes sense to speak, in that context, of primary rules, secondary rules, and a “fairly stable master rule”¹⁶ of recognition, which is based on the convergent social practices of officials within particular internal legal systems. Given the major differences that divide modern legal positivists writing about the nature of internal law – based on, *inter alia*, the role of morality and authority – the same will doubtless be true, *a fortiori*, of international law, for it operates in a global, multinational context in which no single, readily identifiable, and stable epistemic community exists. Yet the nonreductionist definition refers to international lawyers as a singular epistemic community, eliding the plurality of diverse social and legal practices that exist in the various epistemic communities that participate in the contemporary international

¹³ Those “in the know” include “practicing international lawyers, judges, and other international legal experts,” but not “international legal theorists such as Grotius, Vattel, and so on”; the latter do not engage “in the social practice” that, in the author’s view, defines international law today (p. 37) (presumably they once did?). The author appears to have in mind something like Oscar Schachter’s “invisible college.” Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U.L. REV. 217 (1977).

¹⁴ H. L. A. HART, *THE CONCEPT OF LAW* 231–37 (1961). Hart argued that international law, while replete with primary legal rules and therefore not properly described as mere “positive morality,” JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED AND THE USES OF THE STUDY OF JURISPRUDENCE* 142 (1954) (1832), lacks the reliable criteria of legal validity and authoritative change that characterize mature legal systems.

¹⁵ See, e.g., HART’S POSTSCRIPT: *ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* (Jules Coleman ed., 2001); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2003).

¹⁶ RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 40 (1977) (citation omitted).

legal process.

Especially in light of his avowed empirical methodology, it is unclear on what principled basis the author limits the relevant epistemic community, for purposes of the nonreductionist definition, to “practicing international lawyers, judges, and other international legal experts” (p. 37). This excludes a large and diverse variety of participants in the international legal process whose views and actions indeed contribute to what international law “is” today. These participants include not only states and global intergovernmental organizations like the United Nations, the two types of entities with international legal personality that the author acknowledges unequivocally,¹⁷ but also nongovernmental organizations, individuals, gangs, corporations, terrorist networks, de facto state or quasi-state entities, such as Transdniestria, Kosovo, and Gaza, and the alphabet soup of regional organizations and institutions with equally diverse missions and constituencies (ASEAN, ECOWAS, ICSID, NATO, OAS, OSCE, NATO, and so on).

Furthermore, to analogize international law to a “social practice with a clearly defined, well-understood set of rules (with scarce variation in different places),” even while conceding the obvious—that international law is far more complex than chess—is a breathtaking simplification. Perhaps the nonreductionist definition may capture the subset of international law’s rules and principles that would be known to, and accepted by, one of the hundreds or even thousands of diverse epistemic communities that participate in the contemporary international legal process. The chess analogy may, for example, describe the coterie of practitioners of international commercial arbitration who customarily represent clients in disputes arbitrated under the auspices of the London Court of International Arbitration or the International Chamber of Commerce. But applying the author’s own empirical methodology should make clear that there simply *is* no monolithic epistemic community of “international lawyers, judges, and other international legal experts,” particularly today, in what many scholars describe as a fragmented international legal system.

For all of the above reasons, readers may wonder what, precisely, the

¹⁷ Oddly, the author excludes NGOs from the class of entities with international legal personality for “one central (and good) reason: these organizations, however noble they may be, are not democratic and do not represent the will of a particular group of people (save those who support its ideology)” (p. 86). This exclusion is odd because the nonreductionist definition, as explained in most of the book, has nothing to do with democratic legitimacy. The author writes that the “basis of authority for international law is *not* the consent of the people that a legitimate domestic government is obliged to represent, but rather comes from other international bodies with which the government relates” (p. 197). Even more generally, *Law at the Vanishing Point* says that it offers a purely descriptive, not normative, definition of international law (p. 45) (positing that “there is no deep normative structure to international law”).

nonreductionist definition of international law contributes – how, that is, it might help to reinforce or augment certain familiar defenses of international law. For after setting out the nonreductionist definition in the first part of the book, the author returns to it comparatively seldom and seemingly at random, in some chapters but not others. I suspect that the reason is that the nonreductionist definition does not offer much help or guidance in answering the difficult questions about, for example, international legal personality, which is the subject of Chapter 4, or the legality or propriety of humanitarian intervention, which is the subject of Chapter 5.

It is, in fact, difficult to see the relevance of these two substantive issues to *Law at the Vanishing Point's* thesis. The author selects them to test the nonreductionist definition by applying it to concrete debates in contemporary international law (pp. 70, 95). But in the first place, the definition does not fare well as to either topic, yielding largely unsurprising or even, to my mind, misguided conclusions; and in the second, the author at any rate largely disregards it. Instead, he engages in what looks like a positivist analysis of these issues. Chapters 4 and 5 could stand alone as fair positivist accounts of, respectively, international legal personality and humanitarian intervention. The author certainly takes positions on these issues, and readers may or may not agree with what he has to say. But it is unclear in what respect he relies on the nonreductionist definition to analyze either. It is equally unclear that the nonreductionist definition helps to resolve the more contentious issues raised by international legal personality and humanitarian intervention. In short, the nonreductionist definition that is built up with such deliberate and philosophical caution in the first three chapters largely vanishes in the fourth and fifth. It is, in the reviewer's judgment, neither supported nor refuted by these chapters, which look more like freestanding positivist analyses than clear applications of the nonreductionist definition.

How, then, might this definition help, either to explain what international law "is" or to capture its distinctive nature, explanatory value, predictive power, or normative force? Could it, for example, help international tribunals to get international law right in particular cases? It is difficult to see how. The epistemic community of international lawyers and others "in the know," whose views, according to the nonreductionist definition, define international law, perforce includes both parties to disputes before international tribunals. Does it disclose the extent to which international law "matters" in particular instances (leaving aside the question – which, I think, invites serious philosophical attention – what it means for international law to "matter")? Perhaps the nonreductionist definition contributes to that inquiry in the sense explored in chapter 7, that is, understanding *how* international law, albeit conceived somewhat narrowly, as a positivist body of rules, "can be made to fit within an overall

explanation of a set of events that one wants to understand” (p. 145). But it does so only by excluding from its purview many phenomena that the reviewer, among others, regards as part of international law, not as extraneous or subsidiary “extralegal” factors, as the book’s tacitly positivist perspective suggests. Does the nonreductionist definition aid international lawyers seeking to promote certain substantive outcomes or policies? It cannot, for it expressly eschews normative foundations (p. 45).

In sum, then, even when the nonreductionist definition is, as the author says it must be, “evaluated only at the end of this work” (p. 30), the definition offers a largely empty and circular or, at best, a quite limited account of international law. It does not offer an ideal definition of international law, one that captures the concept of international law as Hart sought to capture the concept of law generally. Nor does it offer a pragmatic definition, one that might be helpful to practitioners. It would presumably tell international lawyers to discern international law by determining what an illusory, monolithic epistemic community of international lawyers believes the appropriate international rule to be—provided that the rule has “a characteristically legal quality” and a transnational nature (p. 29, emphasis deleted). That *Law at the Vanishing Point* defines international law by reference to “grounds of legitimacy” (*id.*) but fails to define legitimacy—except to say that it requires legal rules to “be valid in more than one legal system” (p. 44) and that “the professional communities that use it acknowledge that it is legitimate in both their actions and their words” (p. 205)—is also troubling. Legitimacy in international law is surely more than an ipse dixit.¹⁸

To a certain extent, the comparative force of the book’s critical agenda compensates for the deficiencies of its affirmative one; it is just that there is little that is new in these arguments. *Law at the Vanishing Point* takes its title from T. E. Holland’s famous remark that international law “is the vanishing point of Jurisprudence.”¹⁹ If so, the author argues that it remains jurisprudence nonetheless. Beginning in chapter 6, *Law at the Vanishing Point* shifts focus. Much of the balance of the book critiques misguided, but resilient, forms of international legal skepticism.

The author unpacks, for example, what it means to say of a natural or juridical entity that it “follows the law” in a particular instance. This phrase is a mischievous one that skeptics seldom take the time to define. In short, and with some qualifications, the author argues that international law “need not be the essential reason for an agent’s behavior in a particular case, but it must be a reason for the agent’s actions” (p. 136). That

¹⁸ There is, of course, a rich literature on the subject, with which the author surprisingly does not engage. See, e.g., THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AJIL 596 (1999).

¹⁹ THOMAS ERSKINE HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 392 (13th ed. 1924)

international law is a reason for an agent's conduct is, in other words, a necessary, but not sufficient, condition for the truth of the proposition that the agent has "followed" international law. To insist that international law be *the* reason, or even the *predominant* reason, that an agent conforms its conduct to international law would be to demand that "following the law" – and, perhaps, by extension, the idea of law "properly so called" – be a social phenomenon comparable to acting morally in roughly the imperious sense in which Kant regarded genuine moral conduct. To paraphrase the author (paraphrasing Kant), it would be to say "that behavior is not truly [evidence that an agent has followed international law] unless the *exclusive* motivation for [that agent's] action [is] respect for the rule itself" and not "[e]xtraneous factors," meaning contingent, instrumental incentives rather than a categorical imperative to respect international law itself (p. 133, emphasis added).

Seldom, the author stresses, does an entity's conduct insofar as it "follows the law," whether in an international or national legal context, involve exclusively (or even primarily) this sort of Kantian respect for law itself or a comparably "pure" motivation.²⁰ To dismiss international law as not real on this basis, as some skeptics continue to do, is indeed a weak argument. The author offers the following simple example:

It is a law that all drivers on two-way streets must drive on the right side of the road at all times, and its violation would merit (somewhat) severe legal punishment. But would this be the reason why, when I get in my car I drive on the right side of the road? In fact, I behave in this way for a variety of reasons, any of which (or none of which) may be in my head at a given moment. I may drive on the right because I don't want to die in a horrible car wreck, I may drive this way because I don't wish to get a ticket, or (as is probably most often the case) I drive on the right simply out of habit, an unreflective act that I've performed thousands of times before. Regardless of what is going through my mind as I pull out of a parking lot and hug the right curb with my car, it would not in any way be incorrect to assert that I am "following the law" here. (p. 133)²¹

Equally, he suggests, if a rank-and-file soldier follows superior orders

²⁰ The argument here again echoes Henkin, who, in a similar critique of the demand that international law meet a Kantian conception of law observance, wrote that "[t]oo much is made of the fact that nations act not out of 'respect for law' but from fear of the consequences of breaking it." HENKIN, *supra* note 3, at 92.

²¹ Compare Harold Hongju Koh, *How is International Human Rights Law Enforced?* 74 IND. L.J. 1397, 1406–07 (1999) (making a similar point using the example of how regular compliance with seatbelt laws evolved).

to treat a prisoner of war as required by customary IHL or a treaty, it would not be wrong to say that her conduct “may be explained, genetically at least, by referring to the law” (p. 134). That holds true even if she remains unaware of the law, provided that her reasons may “*be traced back to the law*” (*id.*). In fact, “A vast number of motivations for rational actions, motivations that would presumably fit into a rationalizing explanation of why a particular agent did a particular act, can be legitimately considered to be ‘following the law’ ” (*id.*), even if (or perhaps because) those motivations include, among others, fear of sanctions, conscious or subconscious belief in the norm’s legitimacy, habit, reputation, reciprocity, and so forth. As the author remarks,

none [of these explanations] assume that somehow we are following the law for its own sake or out of respect for the law itself [E]xplanations of political behavior that appeal to legal norms are not incompatible with complex psychological motivations or notions of self-interest but in fact are simply a part of a legalist explanation that may vindicate the role of law in a particular case. (p. 134)

Chapter 7, which describes the *Pinochet* affair and part of the ICJ’s judgment in *Military and Paramilitary Activities in and Against Nicaragua*, seeks to show how and in what manner international law, conceived in a positivist vein, played a role in or influenced, to a greater or lesser extent, those international affairs. It illustrates, though not in these terms, what should be obvious to international lawyers: in international affairs, international law is almost always a variable. The strength and role of that variable varies. Sometimes (for example, in the context of an international arbitration governed by the New York Convention) international rules and norms matter a lot. Other times (for example, in the context of a proxy war fought in a small Central American state during the Cold War) those rules and norms matter less—and, at the extreme, perhaps not at all. But that need not impugn their status as law. In the overwhelming majority of international incidents and disputes, international law supplies a degree of guidance, predictive power, and explanatory force. It also provides an indispensable measure of stability, continuity, and structure to international relations, diplomacy, and politics. These are points well worth making and perhaps even reiterating. But they have little if any apparent relationship—and certainly no necessary one—to the nonreductionist definition.

Jeremy Waldron, almost alone among contemporary legal philosophers, has sought to call attention to—and in his own scholarship,²²

²² See, e.g., Jeremy Waldron, *The Rule of International Law*, 30 HARV. J.L. & PUB. POL’Y 15

in part to remedy—the remarkable absence of work by contemporary analytic philosophers of law on the nature of international law:

The neglect of international law in modern analytical jurisprudence is nothing short of scandalous. Theoretically it is the issue of the hour; there is an intense debate going on in the legal academy about the nature and character of customary international law, for example. This is one area where the skills of analytical legal philosophers might actually have a contribution to make. Yet all the important philosophical work on it is being done by people other than those in the core of modern positivist legal philosophy.²³

Now, that may be in part because modern positivist legal philosophy (so far, at any rate) lacks the conceptual resources adequately to explain the international legal system. I believe, as I wrote recently in a brief tribute essay, that it “should stand as an objection to any theory of law writ large that it cannot comprehend the international legal system or offer international lawyers practical guidance.”²⁴ But Waldron’s general point is well taken. Fichtelberg’s effort to bring the professional philosopher’s toolkit to bear on the perennial questions about international law’s reality and efficacy merits commendation. But without intending to denigrate the author’s clear philosophical aptitude and sophistication, I doubt that readers will see *Law at the Vanishing Point* as an adequate response to Waldron’s hortatory call for a careful philosophical analysis of international law.

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(2006).

²³ Quoted in PATRICK CAPPS, HUMAN DIGNITY AND THE FOUNDATIONS OF INTERNATIONAL LAW (2009) (citation omitted).

²⁴ Robert D. Sloane, *More Than What Courts Do: Jurisprudence, Decision, and Dignity*—In *Brief Encounters and Global Affairs*, 34 YALE J. INT’L L. 517 (2009).