The Hidden Theology of International Legal Positivism

Akbar Rasulov*

Introduction

This essay is a study in the critical deconstruction of one of the most popular theoretical paradigms in modern international law and its basic ideological impact on international law as a discipline.[1] The paradigm in question is *voluntarist positivism*, and the general thrust of its ideological impact on the discipline of international law, I am going to argue, has been to encourage within it the rise and spread of what one might call a theoretical culture of bad faith – a mix of false consciousness, self-censorship, and a 'crooked attitude[] towards truth and knowledge'[2] – particularly, in what concerns international law's relationship with natural law and Christian theology.

* The argument set out in this essay has spent a long time in gestation. Its development has benefited from numerous conversations I have had over the years with John Haskell, who has finally convinced me to write it down. I am grateful to him for his encouragement and support, without which this work would have never been completed. As usual, the responsibility for all mistakes and errors is mine alone.

[1] A note on influences: I think of this essay as a continuation – adaptation, imitation – of the first-wave critical legal studies tradition as exemplified in Roberto Mangabeira Unger, *Knowledge and Politics* (New York: Free Press, 1975); Duncan Kennedy, "Form and Substance in Private Law Adjudication," *Harvard Law Review* 89 (1976): 1685-1778; Karl Klare, "Contracts Jurisprudence and the First-Year Casebook," *NYU Law Review* 54 (1979) 876-99; and Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform," *Harvard Law Review* 96 (1983): 1497-1578. I have also drawn inspiration from Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (New Haven: Harvard University Press, 1997) and Pierre Schlag, "Law as the Continuation of God by Other Means," *California Law Review* 85 (1997): 427-40.

[2] Peter Sloterdijk, *Critique of Cynical Reason* (Minneapolis: University of Minnesota Press, 1987), 296.

The last two sentences use a lot of notoriously ambivalent concepts. For the prevention of doubt, let me explain briefly how I understand them in these pages.

International law is a discipline of legal studies that focuses on the study of rules, processes, institutions, and actors conventionally associated with the phenomenon of the international legal order. A *discipline* is a more or less established field of theoretical inquiry that has its own distinct object of study, history, set of orientating questions, and knowledge archive. *Theory* is that body of thought which relates to the interpretation of abstract concepts. It is a term that describes those protocols of reasoning and working assumptions about ontology, proof, causality, etc., which we use to make sense of whatever objects, phenomena, or ideas we are reflecting on. A different way of thinking about theory is to think of it as a framework for the production of meaning. Marxism, psychoanalysis, empiricism are all textbook examples of theories. So are neoclassical economics and second-wave feminism.

A *paradigm* is a synonym for a relatively well-established theoretical tradition or 'school of thought'. To be a school of thought in any given discipline or field, is to have a relatively determinate, coherent, and stable position on those questions which are recognized within that discipline or field as among its central theoretical problems.[3] Hegelian Marxism is a distinct school of thought within Marxism. Lacanian psychoanalysis is a distinct school of thought within psychoanalysis. Constructivism is a relatively distinct school of thought within international relations.

Natural law is a school of thought that assumes the existence of an authoritative, non-human-defined 'standard of justice … against which [all] existing laws can be measured',[4]

[3] David Kennedy, "When Renewal Repeats: Thinking against the Box," *NYU Journal of International Law & Politics* 32, (2000): 335-500, 373.

[4] Paul Sieghart, *The International Law of Human Rights* (Oxford: Oxford University Press, 1983), 7.

and which can thus serve as an objective criterion of legal truth in reference to which the positive legal order can be judged and evaluated. The specific strand of the natural law tradition that interests me in this essay is the quasi-Providential theory which assumes that the positive legal order in a more or less spontaneous fashion will always gravitate towards the natural standard justice, i.e. that, like Hegel's Reason or Richard Posner's allocative efficiency, natural justice is bound inevitably to surface from within the murky depths of the positive legal order, as if propelled by some unstoppable force. The thesis that I want to put forward in these pages, in a nutshell, states that (a) this is precisely the kind of theoretical orientation that the vast majority of international lawyers who otherwise believe themselves to be positivists take for granted; and (b) they may not always be conscious of this fact – and that is precisely why the question of bad faith is such an important question to raise – but that does not matter: their theoretical culture and analytical reflexes are still dominated by this kind of quasi-Providential outlook, and the consequences of that, on the whole, are not insignificant.

Positivism is the great historical other of the natural law tradition. Its main starting premise is the idea that all laws and legal systems are manmade social artefacts and that somewhere behind these artefacts, if one only looks hard enough, one is always going to find the institutional apparatuses of the modern State. Or, as Georges Gurvitch puts it, 'all law is … established in a given social milieu', and it so obtains because 'of a superior and dominant will, generally of the State'.[5] What distinguishes the different strands of the positivist tradition from one another is which particular species of socially embedded processes (forms

[5] Georges Gurvitch, *Sociology of Law* (New York: Philosophical Library and Alliance Book Corporation, 1942), 4.

of social life) they assume to be constitutive of the 'legal reality', i.e. legally relevant and how one should be able, in practice, to determine 'what is going on' within these processes.

Voluntarist positivism (VP) is the 'classical' face of the positivist tradition in international law.[6] I will say a lot more about VP's underlying theory in a few pages. For now, let me just note that VP's single most important defining feature is that it aims, ultimately, to ground all international legal processes – lawmaking, law-ascertainment, law-enforcement – as well as all the different varieties of conceptual materials that are used in these processes – rules, principles, doctrines – in State consent. This does not mean that VP does not recognize the fact that many international law mechanisms today operate on a non-consensual basis or that States are not the only relevant actors in the contemporary international legal system. But the reason why these mechanisms exist, and why non-state actors can partake in the workings of international law in the first place, is because the community of States, expressly or tacitly, have willed it to be so. Everything that is a part of international law, in the final analysis is 'an emanation of State will'.[7] Conversely, 'only that is … international law which has received the general assent of States'[8] and 'nothing can be law unless [States] have consented to it.'[9]

---

[6] Jean d'Aspremont and Jörg Kammerhofer, "Introduction: The Future of International Legal Positivism," in *International Legal Positivism in a Post-Modern World*, ed. Jörg Kammerhofer and Jean d'Aspremont (Cambridge: Cambridge University Press, 2014), 1-20, 4-7.

[7] Bruno Simma and Andreas Paulus, "The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View," *American Journal of International Law* 93(2) (1999): 302-16, 303.

[8] Percy Ellwood Corbett, "The Consent of States and the Sources of the Law of Nations," *British Yearbook of International Law* 6 (1925): 20-30, 21-23.

[9] Andrew Clapham, *Brierly's Law of Nations*, 7th ed. Oxford: Oxford University Press, 2012), 49-50.

Theology is that field of inquiry which deals with the study of religious topics, or, as Richard Hooker put it, 'the science of things divine'.[10] For the purposes of this essay, I will ignore the usual distinctions between natural and dogmatic theology and between negative and positive theology[11] – not because they are wrong or unwarranted, but because they are not immediately relevant. In a similar fashion, the concept of *ideology* will not be given any special connotations, but will be used instead in its most general, sociological sense, which is that changing people's perceptions of what is right, good, and true often pushes them to mobilize against or in support of certain political causes, agendas, and projects, the result of which may be to make the pursuit of these causes, agendas, and projects more or less politically costly.

Last but not least, the concept of *bad faith* comes from the French philosopher Jean-Paul Sartre. Here is how he defines it:

> [B]ad faith is a lie to oneself [but it is different] from lying in general. … The essence of the lie implies in fact that the liar actually is in complete possession of the truth which he is hiding. … The ideal description of the liar would be a cynical consciousness, affirming truth within himself, denying it in his words, and denying that negation as such. … The liar intends to deceive and he does not hide that intention from himself. …
>
> By the lie the consciousness affirms that it exists by nature as hidden from the Other; it utilizes for its own profit the ontological duality of myself and myself in the eyes of the Other. …

[10] Richard Hooker, *The Works of That Learned and Judicious Divine, Mr. Richard Hooker, in Eight Books of the Laws of Ecclesiastical Polity* (London: R. White, 1723), 69.

[11] See Anthony Kenny, *Medieval Philosophy* (Oxford: Oxford University Press, 2005), 41, 285.

> The situation cannot be the same for bad faith … Bad faith … has in appearance the structure of falsehood. Only what changes everything is the fact that *in bad faith it is from myself that I am hiding the truth*. Thus the duality of the deceiver and the deceived does not exist here[,] which means that I must know in my capacity as deceiver the truth which is hidden from me in my capacity as the one deceived. Better yet *I must know the truth very exactly in order to conceal it more carefully*.[12]

Note the two passages set off in italics. In bad faith, it is from ourselves that we seek to hide the truth. To hide it well, however, we must always already know the truth we are trying to hide.

What is that truth then which the VP tradition – by encouraging a culture of bad faith – has pushed the discipline of international law to learn to hide from itself even though deep inside the discipline still remains secretly aware of it? The answer to this question begins with what I call the *problem of international law's absent center*.

At the root of the VP paradigm lies a *fundamental paradox*, that is to say a formally unresolvable logical contradiction.[13] As a matter of its 'official theory', VP persistently seeks to portray international law as an essentially horizontal, i.e. decentralized, legal order. A systematic examination of the standard reasoning patterns that sustain the vast majority of its discursive output, however, indicates that 'in reality' the VP theoretical framework actually tends to presume quite the contrary. Even though the international legal process is supposed to be decentralized, in practice the VP discourse typically tends to proceed *as though*

[12] Jean-Paul Sartre, *Being and Nothingness* (London: Routledge, 2006), 71-72 (italics added).

[13] 'Paradoxes are questions … that suspend us between too many good answers.' Roy Sorensen, *A Brief History of the Paradox. Philosophy and the Labyrinths of the Mind* (Oxford: Oxford University Press, 2003), xii.

international law were somehow permeated with the kind of internal dynamics that are normally associated with institutionally centralized systems. It is as if international law both had a structuring center and was free of any centralizing structures at the same time.

How can this paradox be made sense of? Note an important detail: the argument here is not that the VP tradition openly contradicts itself by saying one thing at one time and another thing at another time. The contradiction we have here is a performative one: the VP tradition states one thing at the level of its *official narrative*, but signals something completely different through its *actual theoretical practice*. Which of these two 'messages' ought we to believe, the official narrative or the apparent theoretical practice? The answer that I propose to give in this essay can be thought of as an extension of what legal realists called the functionalist method:[14] the real theoretical identity of any given paradigm is revealed by how its discourse actually operates in practice, not by what that paradigm officially claims about itself; and the actual operative framework on the basis of which the VP discourse functions clearly seems to suggest that the international legal system is structured in a fundamentally centralized fashion.

The framework I am drawing on here in large part echoes the Derridean concept of 'structurality', which can be defined as that abstract quality which characterizes any given field which, regardless of its official self-presentation, reveals itself in practice to be infused with the kind of *immanent organizing force* whose primary function is to bring to it a certain sense of order and balance and to ensure its basic stability throughout whatever changes may take place within or outside of it.[15] One of the central claims that I put forward in this essay is that, despite what VP's official narrative states, the actual VP understanding of international

[14] Felix S. Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review* 35, (1935): 809-49.

[15] Jacques Derrida, *Writing and Difference* (Chicago: University of Chicago Press, 1978), 278-79.

law presumes international law to be a system thoroughly infused by precisely this kind of immanent organizing force: a hidden presence whose principal function is to balance it, integrate it, and ensure that it retains its basic coherence, stability, and predictability irrespective of whatever changes may take place within or outside its horizon.

The last three paragraphs may not be the easiest piece of text to wade through. If it helps, just think of what I am going to do here as a form of 'logical reverse-engineering', or what Louis Althusser called an exercise in symptomatic reading.[16] By looking at how the VP tradition approaches a certain issue in practice, we can reconstruct, symptomatically, its actual operative theory about that issue. Basing on that, we can then compare what the VP tradition really 'thinks' with what it says it thinks and explore what may be the reason for any divergences between the two.

The argument that is developed below follows a relatively simple template. Analytically, it consists of three main parts. The *first* part (Section II) states that a fundamental discrepancy appears to exist between the actual operative theory that underpins the VP tradition and its officially declared theoretical account. The *third* part (Section IV) aims to show that this discrepancy is neither accidental nor logically inevitable, but is instead thoroughly ideological, that is to say, (i) its initial emergence and continuing persistence are ideologically motivated; and (ii) its consequences for the discipline of international law are not ideologically trivial. The *second* part (Section III) serves as a bridge that connects the first and the third parts in that it offers a critical exploration of VP's broader theoretical genealogy. The main objective behind this exercise is to show, firstly, that the same basic theoretical conundrum that underlies the paradox of international law's absent center can also be found, structurally, in numerous other, broadly comparable theoretical contexts; and that,

[16] Louis Althusser, "From *Capital* to Marx's Philosophy," in *Reading Capital*, ed. Louis Althusser and Etienne Balibar (London: New Left Books, 1970), 11-70, 28-34.

secondly, by reviewing what sort of solutions have been proposed to this conundrum in those other contexts, it may be possible to deduce what kind of conceptual content may in fact be 'hiding' behind that apparent theoretical gap which in VP's theoretical structure corresponds to the problem of international law's absent center.

A brief disclaimer: the chain of theoretical parallels that I explore in this essay is not meant to be anything other than illustrative. I do not pretend to have worked out the entire genealogical tree behind the VP paradigm. Nor does my argument require me to claim that. There are two main stages in the particular genealogical sequence that I outline in Section III. In the first stage, I trace VP's problem of international law's absent center to two Enlightenment-period traditions: Kant's moral theory and Adam Smith's theory of economics. During the second stage, extending the critical exercise a step further, I show how both the Kantian argument about personal autonomy and the Smithian concept of competitive markets reproduce the exact same theoretical structure and conceptual strategies that had been used previously to 'resolve' the analytical paradox raised by the problem of free will in medieval Christian theology. For the purposes of the present study, I focus my discussion in this part of the essay on the particular structures and strategies developed by the Franciscan scholar John Duns Scotus. For the avoidance of doubt, let me note, however, that one could as easily use in this context Aquinas, Erasmus, Luther, or Calvin, all of whom essentially made use of the same *basic analytical framework*. The reason I went for Scotus is that, to my mind, he simply articulated things more elegantly and insightfully.

Voluntarist Positivism as a Paradigm

The importance of VP

An intellectual tradition that first emerged at the end of the nineteenth century, VP occupies a rather peculiar place in international law's theoretical ecosystem. For starters, it is not just *a* theory or *a* school of thought – at least not in the same sense in which the Marxist theory of international law is a 'theory' or the New Haven school of international law was a 'school'. The impact VP's theoretical culture has had on the basic structures of international law's disciplinary consciousness has been enduring, pervasive, and totally without precedent. From the moment of its inception, one might say, VP has served, to borrow another famous concept from Sartre, as the discipline's ultimate unsurpassable theoretical horizon.[17] Fads and fashions came and went. But, like pigskin in Hans Christian Andersen's tale, VP has remained that simple irreducible core which survived long after all the gilding faded away. Every generation of international lawyers since the start of the 20th century has declared its intention to bury VP and end its theoretical hegemony.[18] And yet, even as they attempted to do so at the level of their 'official legal theory', they also at the same time continued to reproduce its broader theoretical framework, preserving and entrenching it at the level of their actual analytical practices, discursive conventions, and reasoning protocols.

From Gerald Fitzmaurice to Alain Pellet, from J. G. Starke to Andrew Clapham, from Rosalyn Higgins to Charles de Visscher, countless spokesmen of the disciplinary mainstream over the course of the last century have sought to denounce and repudiate the VP tradition, openly decrying its philosophical unsoundness,[19] its propensity for reductionism, and its lack

[17] Jean-Paul Sartre, *Search for a Method* (New York: Alfred A. Knopf, 1963), 7.

[18] See David Kennedy, "A New World Order: Yesterday, Today, and Tomorrow," *Transnational Law Contemporary Problems* 4, no. 2 (1994): 329-76.

[19] Clapham, *Brierly's Law of Nations*, 50.

of realism.[20] And yet, whatever one hand took, the other gave back. Even today, the vast majority of the disciplinary debate within international law, as Richard Collins observes, still continues to 'move within [VP's] inherited frame'.[21] The sun has risen and set over New Havenite policy jurisprudence, Tunkinian Marxist pandectism, Bedjaoui's *droit de finalité*, and countless other schools and traditions. But more than a century after Heinrich Triepel,[22] Dionisio Anzilotti,[23] and Lassa Oppenheim[24] had first outlined its main theoretic parameters, international lawyers still comfortably inhabit the world of VP thought, debate classical VP topics, rehearse standard VP tropes, and measure one another's professional competence, above and before everything else, in terms of how well one has mastered the art of VP rhetoric and argument.

What are the principal defining features of VP? What does it believe as a school of thought? From the outside, the logical structure of the VP paradigm does not seem very sophisticated. In its standard formulation, it boils down to four general propositions:
(i) international law is a body of rules created by States;

[20] Alain Pellet, "The Normative Dilemma: Will and Consent in International Law-Making," *Australian Year Book of International Law* 12, (1989): 22-53, 23.

[21] Richard Collins, "Classical Legal Positivism in International Law Revisited," in *International Legal Positivism in a Post-Modern World*, ed. Jörg Kammerhofer and Jean d'Aspremont (Cambridge: Cambridge University Press, 2014), 23-49, 48.

[22] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: C. L. Hirschfeld, 1899).

[23] See, in particular, "Teoria generale della responsibilità dello Stato nel diritto internazionale," as reprinted in Dionisio Anzilotti, *Scritti di Diritto Internazionale Pubblico* 1 (Padova: Cedam, 1956).

[24] Lassa Oppenheim, *International Law: A Treatise, Vol. I (Peace)* (London and New York: Longmans, Green, and co., 1905).

(ii) every State is free and sovereign in the sense that there exists no higher authority above it and it may determine its own future and pursue whichever course of political, economic, and social development it desires;
(iii) all rules, processes, and institutions that make up the international legal system are a product of inter-State agreement; and
(iv) the international legal order thus constituted is both *effective* as a mechanism of international governance and fully *sufficient* to bring the realization of the international community's overarching 'first values' such as international peace, security, sustainable development, etc.

At first glance, the picture does not seem very complex: international law is a law by, for, and between, not above, sovereign States, and everything that is international law is derived from agreements between States. So far, so good. But note now a curious logical jump that takes place between proposition (iii) – the international legal system is a product of agreement among sovereign States – and proposition (iv) – as a mechanism of international governance international law is not only effective but also sufficient when it comes to the protection and promotion of international stability, security, prosperity, etc. How can a system of decision-making which is devoid of hierarchy, and in which every participating agent is free to choose what rules they will follow, give rise to a stable normative order that can meet the needs and demands of a decidedly communal character? Or, to put it in slightly different terms, how should harmony be expected to arise out of cacophony and, moreover, do so as a matter of course?

The basic theoretical structure of VP: a general outline

As most commentators agree,[25] the *locus classicus* for the statement of the VP creed in modern international law is the *Lotus* case:

> International law governs relations between independent States. The rules of law binding upon States, therefore, emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot, therefore, be presumed.[26]

Add to this statement the slightly more extended summary provided in the mid-1950s by the Italian jurist Roberto Ago and what emerges is commonly understood to be a basic outline of VP in its classical configuration:

> Positive law is … law which is laid down (*gesetzt*), and the character of positivity is always conferred on the legal norm by its being derived from some creative act which [is] historically perceptible. [A]ll those acts which are not direct or indirect manifestations of the will of the state are excluded …, for only the state has the power to lay down legal norms. … 'Positive law' thus [is] a term applicable to all existing law, to any form of law which has been so created in history, as opposed to … ideal law, or law created only by thought. … Internally law is that which the state has willed, internationally it is that which several states have willed and established collectively.[27]

---

[25] See, e.g., Collins, "Classical Legal Positivism," 26; Simma and Paulus, "Responsibility of Individuals," 304.

[26] *SS Lotus* (1927), PCIJ Series A, No. 10, at 18.

[27] Roberto Ago, "Positive Law and International Law," *The American Journal of International Law* 51, no. 4, (1957): 691-733, 697-701.

In more recent times, Bruno Simma and Andreas Paulus have sought to update the classical definition as follows:

> The main characteristic of [this paradigm] is the association of law with an emanation of state will (voluntarism). Voluntarism requires the deduction of all norms from acts of state will: states create international norms by reaching consent on the content of a rule. … This system of rules is an 'objective' reality and needs to be distinguished from law 'as it should be'. Classic positivism demands rigorous tests for legal validity. Extralegal arguments … are deemed irrelevant to legal analysis; there is only hard law, no soft law. …
>
> For international law, this implies that all norms derive their pedigree from one of the traditional sources of international law, custom and treaty. Treaties embody the express consent of states, custom nothing but their tacit consent. The only relevant conduct is that of states seen as unitary actors. Treaties, including so-called lawmaking treaties – e.g., those creating new rules or changing old ones – are binding upon the contracting parties only. Whether habitual conduct of states amounts to legally binding custom is a question of objective determination of fact.[28]

A few years before that Louis Henkin captured the same sentiment from a slightly different angle:

> International law is made by the States themselves, not by a legislative body representing them. …

[28] Simma and Paulus, "Responsibility of Individuals," 303-5.

> States make law by consent, by agreement. Inter-State law is made, or recognized, or accepted, by the 'will' of States. Nothing becomes law for the international system from any other source. …
>
> The principle that law is binding on a State only by its consent remains an axiom of the political system, an implication of State autonomy. …
>
> International law is comprised of … custom and treaty. … Treaty law is made; customary law results. Treaties are made by an act of will, purposefully; custom grows. [B]oth are rooted in State consent.[29]

Note the main themes that run through each of these passages: international law is a body of rules each of which exists as an objective fact; it is a body of rules that have been 'laid down' by States as opposed to being 'created only by thought'; all States are sovereign, and international law is created solely on the basis of State consent; consent can be granted either expressly, through formal agreements (treaties), or tacitly, through regularly repeated common usages (customs); unless a given rule can be traced to an objectively verifiable treaty provision or custom to which the State in question has consented, it will not bind that State, and the laudability or importance of whatever values and purposes it may otherwise seek to serve will be, in this context, entirely irrelevant. Even the most important ethical and political concerns, in the end, can only 'constitute the inspirational basis for' but will never be 'sufficient in themselves to generate' a binding rule of international law.[30]

---

[29] Louis Henkin, *International Law: Politics, Values and Functions* (The Hague: The Hague Academy of International Law, 1989), 45-47.

[30] *South West Africa (Second Phase)*, ICJ Reports (1966), 6, 34.

Note also the persistent imagery of unmediated democratism: the international legal order, as depicted in the VP tradition, is essentially a system of 'direct self-government'.[31] Every State gets to have a say in what legal rules ultimately will bind it. 'The international system is horizontal, consisting of over 190 independent States, all equal ... and recognizing no one in authority over them.'[32] Every 'governmental function' – legislation, interpretation, implementation, adjudication, and enforcement – in the international arena, thus, is reserved to the States themselves,[33] who exercise it collectively, all together, all at the same time:

> It is for each State, acting together with other States …, to set new legal standards or to change them … It is for each of them to decide how to settle disputes or to impel compliance with law [which means] that each State [also] has the power of 'auto-interpretation' of legal rules, a power that necessarily follows from the absence of courts endowed with general and compulsory jurisdiction. [34]

And while some exceptions to the logic of unmediated democratism do exist, it is still a 'true statement … of the law' that the consent of 'the weakest and the smallest State has … as much weight as [that] of the largest and most powerful,'[35] and, however imperfect it may be,

[31] Henkin, *International Law*, 45.

[32] Malcolm Shaw, *International Law*, 8th ed. (Cambridge: Cambridge University Press, 2017), 4-5.

[33] Karl Zemanek, *The Legal Foundations of the International System* (The Hague: The Hague Academy of International Law, 1997), 9, 40.

[34] Antonio Cassese, *International Law*, 2nd ed. (Oxford: Oxford University Press, 2005), 6.

[35] Clapham, *Brierly's Law of Nations*, 147.

thus constituted, international law is, most certainly, 'a system, not just a random collection of rules.'[36]

Of course, in modern practice many rules that make up the body of international law appear to be generated not through the traditional mechanism of inter-State diplomacy but in a top-down fashion by various international organs or through the build-up of different bodies of international jurisprudence, often generated at the behest of non-State actors.[37] But let there be no mistake about it: all of this is possible, according to the VP tradition, only because the community of States has so willed, i.e. because States have agreed to allow this state of affairs to take place.[38] It is the practice of this community that, in the final analysis, 'rounds off the process' of rule-creation and provides these normative developments with the necessary degree of legal force.[39] When all is said and done, in short, it is still the 'States [that] are the sole source of authority and law in the international system.'[40]

Horizontality, democratism, decentralization – each of these themes has long been recognized in the literature as a defining feature of the VP sensibility. What has not enjoyed

[36] James Crawford, *Chance, Order, Change: The Course of International Law* (Boston and Leiden: Brill, 2014), 191.

[37] See further, e.g., Robert Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary," *European Journal of International Law* 27, no. 1, (2016): 9-77; Nico Krisch, "The Decay of Consent: International Law in the Age of Global Public Goods," *American Journal of International Law* 108, no. 1, (2014): 1-40; Alan Boyle and Christine Chinkin, *The Making of International Law* (Oxford: Oxford University Press, 2007); Jose Alvarez, *International Organizations as Law-Makers* (Oxford and New York: Oxford University Press, 2005).

[38] Henkin, *International Law*, 35.

[39] Bing Bing Jia, *International Case Law in the Development of International Law* (The Hague: The Hague Academy of International Law, 2015), 175, 209.

[40] Henkin, *International Law*, 34.

the same degree of recognition, however, is VP's underlying conception of regulatory sufficiency – proposition (iv) from our earlier summary – the idea that a positive legal order created as a result of a decentralized lawmaking process can turn out to be both effective and sufficient in terms of meeting those regulatory goals which international law is supposed to perform.

Let us go back briefly to the *Lotus* passage. Consider the sequence of the argument: right off the bat, before we get to any other issue we are immediately presented with the claim that the process of international relations cannot simply be left to take its natural course, i.e. that some form of *governance* and purposeful ordering is structurally essential.[41] This is then quickly followed by the presumption that this process of *international ordering* should obviously involve the creation of *binding legal rules*[42]and the accompanying belief that there exists, in fact, no pre-existing code of such rules that could be simply copied and pasted,[43] i.e. that the international legal regime has to be *purpose-built* and cannot be just

[41] 'In the long march of mankind from the cave to the computer a central role has always been played by … the idea that order is necessary and chaos inimical to a just and stable existence.' Shaw, *International Law*, 1.

[42] 'It has been assumed in the literature … that order in the relations of States … is a matter of law. The law believed necessary is a body of rules, a collection of models, in accordance with which all questions concerning the rights and duties of States vis-à-vis other States should be answered, all disputes … settled, and all the conduct of government in international matters governed.' Percy Ellwood Corbett, *The Study of International Law* (New York: Doubleday, 1955), 45. 'The world needs international law … International co-operation is necessary; and international law is the framework within which international co-operation takes place.' Vaughan Lowe, *International Law* (Oxford: Oxford University Press, 2007), 1.

[43] Even in the case of the so-called domestic law analogies, the long-established position among the adherents of VP has been to resist the view that any segment of any domestic legal system could be transposed into international law 'lock, stock, and barrel'. See, e.g., Arnold McNair, "So-Called State Servitudes," *British*

extrapolated from some external source.[44] The best way to build this regime, it is then proposed, is to have sovereign States legislate it by concluding a series of *voluntary agreements* inter se that take place 'as if between equals'. A normative order thus built, follows the conclusion, would then be able to meet the needs not only of *ensuring the coexistence* of 'these … independent communities', but also *enabling* 'the achievement of common aims'.

Note the last two points: (i) the best way to build international law is to have States create it through a series of discrete voluntary transactions inter se; and (ii) international law's 'job' is to ensure stability (coexistence) and progressive development (cooperation with the view to the realization of common goals) of the international community. Each of these propositions on its own seems perfectly straight and unexceptional. But put the two of them together into a single logical sequence and what emerges is a narrative whose underlying assumptions seem anything but self-evident.

The problem of the absent center: the hidden 'immanent force' at the core of the VP model

Positivism, explains Joseph Starke in one of the most popular and influential textbooks on international law, is a theory that defines international law 'as a system of rules depending for their validity only on the fact that States have consented to them,' i.e. 'rules which [they]

Yearbook of International Law 6, (1925): 111-27; Albert-Geouffre de Lapradelle, *Les Principes Généraux du Droit International* (Paris: Centre Européen de la Dotation Carnegie, 1932), 6-8.

[44] 'International law is different [f]rom all other systems of law, which means in effect national systems of law.' Hugh Thirlway, *Concepts, Principles, Rules and Analogies: International and Municipal Legal Reasoning* (The Hague: The Hague Academy of International Law, 2002), 265, 273.

have accepted by a process of voluntary self-restriction'.[45] Why would States want to accept this kind of process of self-restriction? The answer given by the VP tradition is a combination of Parsonian functionalism – 'it is not simply that where society is found, law is found, but that it must be so found'[46] – and Georg Jellinek's concept of *Selbstverpflichtungslehre* (auto-limitation):[47] 'an accurate statement of the reason why a system of [such] binding rules is necessary and actually exists', writes Percy Corbett, is 'the desire of states to have their necessary mutual relations regulated with the *greatest possible rationality and uniformity*.'[48] There are many issues 'which States cannot [address] efficiently unless they act together.' [49]

But would not the causes of rationality and uniformity be better served by some other rule-generation procedure? Not at all, says VP: the only thing which keeps the international legal system working 'is the consent of states ... It is the *sine qua non* of every rule in the system', the 'sole' source of its 'legal authority'.[50] Could the international legal system be made more effective if it did not have to depend on this kind of decentralized consensualist dynamic? Highly unlikely, argues Eelco van Kleffens: 'probability is against it'.[51] Not a chance, confirms Ian Brownlie: even to put things in such terms would be to miss the point entirely – 'international law is essentially a law *between* States'; the existing model of the

[45] J. G. Starke, *Introduction to International Law*, 8th ed. (London: Butterworths, 1977), 26.

[46] G. G. Fitzmaurice, T*he General Principles of International Law Considered from the Standpoint of the Rule of Law* (The Hague: The Hague Academy of International Law, 1957), 38.

[47] For background, see Collins, "Classical Legal Positivism," 39-41.

[48] Corbett, "Consent of States," 22 (italics added).

[49] Clapham, *Brierly's Law of Nations*, 108-9.

[50] Corbett, "Consent of States," 23.

[51] E. N. van Kleffens, *Sovereignty in International Law: Five Lectures* (The Hague: The Hague Academy of International Law, 1953), 1, 129.

international legal system categorically rejects the possibility of a 'world State', any advancement towards which would, indeed, signal its termination.[52] At the same time, Brownlie adds immediately, the practical efficacy of this system continues to remain high and is 'not to be questioned'.[53] Why? Because, firstly, '[a]ll normal Governments' 'routinely use rules [of] international law' and 'define their relations with other States in terms of international law'.[54] And, secondly, 'both in the routine stewardship of State affairs and also in more strenuous political circumstances', even 'on empirical grounds, … a good case can be made out for saying that public international law is more efficacious than public law within States.'[55]

So far, so good. But note the hidden tension at the core of VP's concept of international lawmaking. From the VP standpoint, international law, as Vaughan Lowe puts it, cannot be understood as 'a unified, manufactured system' that has been somehow 'imposed upon the world of international … relations' from the outside.[56] Nor can it be understood as a construct that has been logically derived from some initial core concept. Neither its substance, nor its form is preordained:

> its scope is [not] determined a priori. The rules of international law cover *whatever topics happen to have been regarded as appropriate for legal solution on the international plane*. It is simply a formalized account of practices and principles which spring spontaneously and

[52] Ian Brownlie, *International Law at the Fiftieth Anniversary of the United Nations* (The Hague: The Hague Academy of International Law, 1995), 9, 33 (italics in the original).

[53] Brownlie, *International Law*, 32.

[54] Brownlie, *International Law*, 32.

[55] Brownlie, *International Law*, 32-35.

[56] Lowe, *International Law*, 8.

> inevitably from the coexistence … or from conscious efforts of States to cooperate in dealing with certain problems.[57]

Put differently, there exists no pre-determined content or any essentialized substance behind the term 'international law'. Like metaphysical universals in Ockham's philosophy, international law is just a useful epistemological tool, a formal abstraction that captures all that which the community of States has decided to designate as deserving of 'legal solution on the international plane'.

An interesting turn to nominalism, to be sure, but really there is nothing surprising about any of this. Exponents of the VP tradition have been rehearsing this line for more than a century. Oppenheim: international law is but a 'name given to the body of such rules as' 'are considered legally binding by civilized States in their intercourse with each other'.[58] The International Court of Justice: 'in international law there are no rules, other than such rules as may be accepted by the State concerned.'[59] Tourme-Jouannet: 'international law consists of rules, practices, and discourses that emanate from [its] subjects', 'it is [thus] defined principally by its international origin, not its [purported] object.'[60] There is nothing particularly original or unusual about Lowe's formulation. This is an archetypal positivist statement, however one looks at it. Except, of course, that only a few short paragraphs *before* he makes this statement, Lowe also addresses the question of international law's systemic role and function. And what he says there is highly curious indeed.

---

[57] Lowe, *International Law*, 8 (emphasis added).

[58] Oppenheim, *International Law*, 3.

[59] *Nicaragua v. United States (merits)*, ICJ Reports (1986) 14, 135.

[60] Emmanuelle Tourme-Jouannet, *Le Droit International*, 2nd ed. (Paris: PUF, 2016), 31.

International law, Lowe argues, is a mechanism that has two primary functions: 'to secure the conditions that allow sovereign States to co-exist and to enable each State to choose what kind of society will exist within its borders'.[61] A few pages later he expands on this formula: international law's 'job' includes also the protection and realization of universal human rights, the promotion of trade, and the preservation of environment.[62] Neither of these characterizations – let us add immediately – is unique to Lowe's account: the same themes can be found all over the mainstream international law literature.[63] But put them alongside the nominalist-positivist argument Lowe rehearses above, and what emerges certainly seems thought-provoking.

For starters, notice how there are two rather different narratives unfolding within the same analytical space. On the one hand, international law is said to be a mechanism whose main function is to ensure the advancement of peace, security, human rights, trade, and

[61] Lowe, *International Law*, 7.

[62] Lowe, *International Law*, 15-18.

[63] Corbett speaks of international law in terms of a structure ideally meant to 'prevent[] World War III' (Corbett, *Study of International Law*, 47). Shaw starts with a slightly less ambitious but similar set of objectives – 'states need [international] law in order to … attain … economic well-being, survival and security' – but quickly expands the list to add 'the specialised problems of contemporary society', such as 'environmental despoliation … and the exploration of the resources of the oceans and the deep seabed[,] health regulations and communications control' (Shaw, *International Law*, 34-35). Henkin goes further, positing an equivalence between international law and its domestic cousins: 'The purposes of international law, like those of domestic law, are to establish and maintain order and enhance reliable expectations, to protect "persons", their property and other interests, to further other values [such as 'justice, the good life, the good society'].' (Henkin, *International Law*, 22.) It is just that, alongside the more traditional 'State values', such as territorial integrity and State 'impermeability', international law has now also come to promote and protect 'human values' and the 'common good of mankind' (Henkin, *International Law*, 127-29) and 'world environment' (Henkin, *International Law*, 341).

environmental protection. On the other hand, it is also said to be a legal order that has no pre-determined content and is entirely a product of what sovereign States decide to make of it. On its own, neither of these propositions seems particularly problematic: international law is a system that performs a certain function; the content and form of international law are determined by inter-state agreement. Both of these claims are relatively straightforward, and neither of these narratives seems convoluted. But notice now what happens when we combine these narratives into a single whole. Consider the questions that immediately start popping up: in the absence of any central planning, how does the international lawmaking process manage to produce exactly those positive legal rules that are required to ensure the realization of the international community's first values? States are free to agree on whatever rules they want. What if the particular set of rules they agree on turns out not to be conducive to the achievement of peace, sustainable development, or the protection of human rights? If international law is supposed to be the royal road to international stability, justice, and prosperity, but the positive international legal order does not have any pre-determined content or structure, since both of these are decided by States, what makes us think that States are actually going to do a good enough job in figuring out what the best structure and content of international law ought to be? What if they turn out not to be patient enough, impartial enough, or well-tempered enough? Even if we could assume that States will always come to the proverbial negotiating table in good faith, what makes us think they would *actually know* what positive legal rules they ought to create to help the international legal system meet the demands of global governance? If we cannot know what those rules ought to be *ex ante*, what makes us think States would ever be able to figure it out *in media res*?

Note the point we are moving towards: the argument here is not that Lowe – or any other VP scholar for that matter – has never noticed these possibilities or thought of any of these questions. Anyone familiar with his work will know just how deeply aware Lowe has

been throughout his career of the fact that sovereign States – and the people who act on their behalf far more often than not –tend to act in crudely cynical, self-serving, and myopic ways, motivated as much by folly and ill-will as by greed and ignorance.[64] Neither he nor Corbett, Starke, or Brownlie could be legitimately characterized as a naïve idealist, let alone a lazy thinker. And so the fact that, despite this, each of them nevertheless has somehow *ended up skipping over this entire body of questions*, when setting out the *theory* of how, according to the VP approach, the international legal system is supposed to work, certainly seems more than a little remarkable. At the very least, it appears to suggest that, from their point of view, none of these questions can be considered *theoretically relevant*. States being selfish, thinking myopically, and acting disruptively are all very real scenarios for Lowe, Brownlie, et al. But none of these bleak realities would appear to have any bearing on how one ought to understand the *concept of the international legal system*. Pause a second here because this is important: the real logical jump that is taking place in Lowe's argument is not that his theory of the international lawmaking process is utopian and fails to recognize the true reality of State behavior. The twist here, rather, lies in the implicit suggestion that all of those questions listed above are not theoretically relevant – and thus, do not deserve to be explored in the formal account of the international legal system – *because there is something within this system that cancels out their importance*.

It is a given truth, declares the VP tradition, that the decentralized process of international lawmaking can sustain a perfectly suitable mechanism for the production of normative output that will enable the international community to preserve peace, security, free trade, human dignity, sustainable development, and any number of equally ambitious

[64] See, e.g., Vaughan Lowe, "The Iraq Crisis: What Now?," *International and Comparative Law Quarterly* 52, (2003): 859-71.

goals. It is a given truth also that a plurality of self-determining sovereignties will do exactly what needs to be done to ensure the production of that kind of output.

Consider once more Brownlie and Kleffens's explanations and the broader logic behind the *Lotus* passage. The VP tradition does not say that we have no choice, in the end, but to use the decentralized lawmaking Westphalian process because it is the only one that is presently available and operative. If it had said that, its theoretical setup would have had a very different complexion. But it hadn't, and so it doesn't. What the VP tradition says instead follows a very different analytical track: *the decentralized character of the international legal system is precisely what makes it so well suited to the performance of its task and purpose*. If the system had been built differently, it would not have worked nearly as well as it does. Consensualism and horizontalism are exactly what makes the system legitimate and rational (Corbett) as well as practical and efficacious (Brownlie). Put differently, knowing everything that we know about sovereign States and about how decentralized decision-making processes tend to work, the VP tradition essentially tells us that we should not worry about the threat of anarchy and that a stable, efficient, and just order will ultimately – inevitably – emerge in the international plane, harmony will arise out of cacophony, and the lion will lie down with the lamb.

The Theoretical Genealogy of the VP Paradigm: The Hidden Theology behind the Problem of the Absent Centre

The fundamental paradox restated: Kant's moral philosophy and the Categorical Imperative

The belief in the capacity of hierarchically decentralized social structures to generate fully coherent and thematically integrated normative orders has a long and illustrious pedigree in

the history of Western philosophy. To a large extent, indeed, it can be considered one of the most important defining features of the entire tradition of Classical Liberal thought. In the field of political theory, some of its most well-known examples and illustrations can be found in Jean Jacques Rousseau's theory of the social contract and John Locke's writings on constitutionalism. Analytically, however, the basic model that underpins this way of thinking finds its most consistent expression in the moral philosophy of Immanuel Kant.

An essay on the hidden genealogy of international legal positivism may not be the best place to attempt a general overview of Kant's broader philosophical legacy. The one defining theme, however, which passes like a red thread through his entire corpus of writings in the field of moral theory was his enduring preoccupation with the question of moral autonomy. For Kant, the central overarching aim of all human existence, from the moral standpoint, was the attainment of the state of personal autonomy.[65] Autonomy, in its Kantian understanding, constituted that kind of ethical condition which embodied simultaneously a relationship of freedom and responsibility, a state of being which Kant additionally defines as the 'submission to laws which one has made for oneself.'[66] To achieve full self-realization as a moral subject, a human being, on this view of things, would have to become the author of their own moral code. Only at that point when one comes to abide exclusively by those rules which originate in one's own ethical choices does one become truly autonomous and thus achieve the state of ethical self-fulfillment.

[65] Further on Kant's theory of autonomy, see Immanuel Kant, *Groundwork of the Metaphysics of Morals* (New York: Harper Torchbooks, 1964). See also Andrews Reath, "Autonomy, Ethical," in *Routledge Encyclopedia of Philosophy*, Vol. 1, ed. Edward Craig (London: Routledge, 1998), 586.

[66] Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper, 1970), 14. See also Anthony Kenny, *The Rise of Modern Philosophy* (Oxford: Oxford University Press, 2006), 107.

So far, so good, but, taken to its logical conclusion, one is immediately tempted to ask, how is this all this different from outright anarchy? How is it possible for a community in which everyone follows their own moral code not to descend immediately into complete chaos? Kant's answer is: because of something called the Categorical Imperative.

Contrary to the conventional reason, when we achieve the state of full moral autonomy, argues Kant, we do not automatically turn into rampant anarchic monads randomly drifting across the ethical space without any structure or direction. On the contrary, precisely because of our autonomy – which, once again, is a state where freedom combines with responsibility – we inevitably develop a certain tendency so that all of our ethical choices that we would be willing to turn into general norms of behavior applicable to others, from that point onwards, even though they remain entirely self-determined, *somehow* end up reflecting and channeling universal, eternally valid moral principles.[67] The name which Kant gives to the mysterious mechanism that guarantees this outcome is the Categorical Imperative.

'This [C]ategorical [I]mperative is present in every man without exception, even when it operates against him.'[68] Like the laws of physics and chemistry, it 'is impossible for us' to ignore it: it works on our ethical choices even when it is not invited, since when it does not do so, then by definition it can only mean that we are not at that point (yet) truly free. When we are free, it simply becomes impossible for us to make any ethical choices that we

[67] Why this should happen is not at all self-evident. Its paradoxical and opaque character is the first thing many commentators observe about Kant's theory of moral autonomy. See, e.g., Thomas E. Hill, "The Kantian Conception of Autonomy," in *The Inner Citadel: Essays on Individual Autonomy*, ed. John Christman (New York: Oxford University Press, 1989), 91-151; Robert Paul Wolff, *The Autonomy of Reason: A Commentary on Kant's Groundwork of the Metaphysics of Morals* (New York: Harper & Row, 1986), 178.

[68] Lucien Goldmann, *Immanuel Kant* (New York: Verso, 2011), 166.

expect may turn into norms of general application and not at the same time channel the Categorical Imperative. And thus

> the [C]ategorical [I]mperative unites all men in a formal whole. By it each man is bound, consciously or unconsciously, to other men in each of his own actions, as in the judgements he makes upon the actions of others.[69]

Expanded into a constitutional theory, Kant's moral philosophy thus turns, essentially, into a blueprint for fundamentalist libertarianism. In a society comprised of fully autonomous subjects, there will be no need for any institutions of formal control or any centralization of the lawmaking or law-ascertainment processes, since every subject, so long as their autonomy is not tampered with, will always choose to postulate the same laws for themselves as everyone else because all of their moral and normative decisions are always-already going to be expressions of some higher universal justice as mediated through the mechanics of the Categorical Imperative. [70]

Notice the strongly pronounced natural-legalist accent. Stripped to its basics, Kant's moral philosophy essentially comes down to a series of four claims: (i) when a subject becomes fully autonomous, it starts producing its own rules and moral values; (ii) the rules and values that will be produced under these conditions will be in consonance with some kind of universally valid morality thanks to the intervention of the Categorical Imperative; (iii) thus even though the subject purports to act in a self-guided fashion, its actions and choices

---

[69] Goldmann, *Immanuel Kant*, 166.

[70] 'Kantian autonomy… requires acknowledging the principles not only as "self-imposed", …but also as unconditional requirements of *reason*' (Hill, "Kantian Conception of Autonomy," 93). '[E]very minimally rational agent, in [autonomous] deliberating and acting, is actually committed to [the Categorical Imperative], as an overriding rational constraint.' (Hill, "Kantian Conception of Autonomy," 99).

will channel the contents of some transcendental standard of justice; (iv) the shortest route to achieving a system of just and lasting social order is to ensure the attainment of the state of full personal autonomy by as many subjects as possible. So long as this prescription is followed, there is going to be no need for anything like the Hobbesian Leviathan or the Austinian commanding superior. Through the magic procedure of the automatic synchronization ensured by the Categorical Imperative, all ethical choices will come to embody the one true universal law.

The parallels between Kantian moral philosophy and the VP tradition are striking and uncanny. In both cases, the internal coherence and substantive rationality of the projected normative order are ensured not by the action of some hegemonic force but a decentralized institutional structure designed to secure a state of full moral autonomy for each member of the respective community of actors. To the extent to which each of these actors retains its moral autonomy, whatever normative choices they end up then making in the exercise of their normative self-determination are somehow all magically imagined to become the conduit for the one true universal code, the repository of eternally valid transcendental wisdom capable of providing answer to every conceivable normative problem or question of social ordering.

Smith's invisible hand: markets, competition, self-interest, and the alchemy of market adjustment

The idea that a state of spontaneous order will arise so long as each subject is left freely to decide for themselves what values and goals they ought to pursue was not, of course, the sole provenance of Liberal moral philosophers. In the history of modern social thought, the figure that is most commonly associated with this line of argument, indeed, is known more for his achievements as an economist. A complex and prolific thinker, Adam Smith over the course

of his career had shown an interest in a wide variety of subjects. But it is primarily for his writings on what came to be known as political economy that he is most commonly remembered today.

At the center of Smith's vision lies a series of concepts that at first glance seems worlds away from anything used in Kant's moral philosophy: profit, competition, demand, supply, market adjustment. Scratch the surface, however, and what you find below this apparently specialist vocabulary is, in fact, a very familiar set of questions and problems: how can order and prosperity ensue from the naked pursuit of self-interest? How can social harmony and public virtue arise out of greed and private vice? Taking the sphere of trade and commerce as the microcosm of the larger society, Smith, confronted with the newly forming realities of capitalist production and exchange, unerringly zeroed in on the central conundrum of economic organization. The baffling combination of the apparent non-coerciveness of capitalist markets – merchants were free to trade with whomever they pleased – and their sheer impersonality – unlike in the earlier times, because of its tremendous scale, everyone in the market could now be assumed to be a complete stranger – raised the inevitable question: how can all of this hang together? In the absence of any central intelligence or coercive power, how can an ever-expanding group of completely disparate agents end up co-existing in a state of order rather than chaos?

The answer to this question, Smith quickly surmised, did not just have considerable theoretical value. It also had obvious normative and policy implications, since it pointed the way to one of the most valuable prizes in the science of government. It promised to reveal the clue to 'society's orderly provisioning':

> the mechanism by which society hangs together. How is it possible for a community in which everyone is busily following his self-interest not to fly apart from sheer centrifugal force? What is it that guides

> each individual's private business so that it conforms to the needs of the group? With no central planning … how does society manage to get those tasks done which are necessary for its survival?[71]

The explanation Smith proposed drew on two closely-related theoretical hypotheses – the concept of *market competition* and the idea of *market adjustment* – which combined together to show how, in principle, a decentralized social structure lacking any apparatus of 'coercion or centralized direction'[72] could cause 'people to produce what other members of society want, even when [as] individuals [they would] have no intention to do anything for anyone else'.[73] The end-goal was to demonstrate the existence, within such structures, of something akin to a *spontaneous gravitational field*,[74] one that worked, like clockwork, independently of any one's consciousness of it, and the effects of which were such as to make it possible that 'the private interests and passions of men were led in the direction … most agreeable to the interests of the whole society.'[75]

The essence of this gravitational dynamics, Smith explained, lay in the close correlation between Man's inherent drive for self-interest and his equally inherent responsiveness to the promise or loss of profits, or what in the modern vocabulary is called 'incentives'. Conceived as a quasi-mechanical automatons manipulable like so many levers, human subjects, on this view of things, were thus not only easy governable: if a correct

---

[71] Robert Heilbroner, *The Worldly Philosophers: The Lives, Times And Ideas Of The Great Economic Thinkers* (New York: Simon & Schuster, 2000), 53-54.

[72] Paul Samuelson, *Economics* (New York, McGraw-Hill, 1976), 42.

[73] Roger Backhouse, *The Ordinary Business of Life* (Princeton: Princeton University Press, 2002), 126.

[74] The gravitational analogy was, indeed, so central to Smith's theory he returned to it more than once. See Alessandro Roncaglia, *A Brief History of Economic Thought* (Cambridge: Cambridge University Press, 2017), 72.

[75] Heilbroner, *Worldly Philosophers*, 54.

system of arrangements was put in place, it was entirely conceivable that they would not actually need to be governed at all but could be left entirely to themselves, allowed to do whatever naturally came to their mind. The reason for this, Smith argued, lay in the magical effects of market competition. The concept of self-interest, the argument went, offered an important starting point in elucidating the logic of social gravitation. But it only captured half the picture. The other half came from the phenomenon of competitive pressures. '[E]ach man out to do his best for himself with no thought of social consequences is faced with a flock of similarly motivated individuals what are engaged in exactly the same pursuit'.[76] As conflicting interests clash, each individual, while still trying to secure the greatest benefit for themselves, will attempt simultaneously to undercut their rivals by, inter alia, accepting a partial reduction of their profit margins, which potentially will continue up to that point beyond which their enterprise no longer appears profitable enough for them to persist with. Once that point is reached the individual in question, Smith postulated, responding to the negative incentives raised by the imminent loss of profits, would exit the given line of business in favor of another one – stop teaching language lessons, for example, and start growing apples or cleaning stables.

Note the latent assumptions about 'behavioral physics' running through this account: what makes subjective behavior predictable, for Smith, is our inherent propensity towards profit-maximization and the culture of reasoning this inspires in us. Note also the quasi-alchemical powers assigned to the phenomenon of market competition: it is not just our inherent propensity towards selfishness but our *encounter* with other equally selfish subjects that magically transmutes us from simple profit-seeking monads into complex, aptitudinally

[76] Heilbroner, *Worldly Philosophers*, 55.

nuanced economic entrepreneurs, so supremely adept at self-reinvention and structural (re-)integration into the different sectors of the economy.

Pause for a second: this last point is important – and indeed has often been so acknowledged in the literature – but it has been rarely unpacked in terms of its radical theoretical implications. Unlike Kant, Smith is not just a student of the individual: his interest in 'personal physics' here is but an opening chapter in his exploration of the 'physics of the social'. The key to the logic of his argument, in other words, lies not so much in what he has to say about Man's basically acquisitive nature, but in the bold shift from what starts out as a *fundamentally psychological hypothesis* – all men pursue self-interest – to a *confident socio-political inference* – free markets ensure the best allocation of resources. As Thomas Sowell observes, Smith did not simply conflate the laws of individual behavior with societal regularities, but rather argued that, under very specific institutional conditions, the grasp of the former can be used to master the latter.[77] Global prosperity – the optimum state of economic affairs – was not just a product of a mechanical adding-up of all individual-level profits and benefits. The whole was much greater than the sum of its parts – 'the selfish motives of men are transmuted [into economic harmony] by [the fact of their] interaction' with one another[78] – and at the root of this alchemical-style transmutation lay the idea of market competition.

The rest of the theoretical sequence was quite predictable. Taking as his starting point this unyielding belief in the possibility of social physics, Smith in due course went on to postulate alongside the classical liberal concept of governance without a government – what after the French Physiocrats came to be known as *laissez-faire* – a new theoretical construct that, structurally, assumed within his economic theory a role essentially equivalent to Kant's

[77] Thomas Sowell, *On Classical Economics* (New Haven and London: Yale University Press, 2006), 11.

[78] Heilbroner, *Worldly Philosophers*, 56.

Categorical Imperative. What this new construct represented, in essence, was the idea of a spontaneously existing principle or regularity that, like the Categorical Imperative, took the form of a *formal mediating mechanism* that on the one hand transmitted the impetus received from all the myriads of individual agents' choices and decisions to the global level of 'the system' and, on the other hand, channeled the response issuing from that global system into all the countless individual choices and decisions made by individual agents. The name that liberal economic theory gave to this process was *market adjustment*.

The basic structure behind the concept is rather familiar. Like the VP paradigm and Kant's moral theory, Smith's theory of market adjustment uses a conceptual framework that is built, fundamentally, around three basic ideas: a decentralized decisional process; something that looks very similar to Kant's personal autonomy; and what is essentially a version of the idea of natural justice. The only distinct feature here is that what gets 'naturalized' in this case is given a decidedly commercial appearance: prices, rents, profit, and wages.[79] As Alessandro Roncaglia explains, Smith's theory of the market adjustment mechanism is based, ultimately, on a presupposition of an inherent relationship between markets and natural prices: for every commodity there exists a natural level of demand, if production levels exceed it, competition will drive the market price down, producers will be unable to obtain the 'natural' profits they need and will have to move from that sector elsewhere, production levels will then decrease, excess supply will cease. Every market inclines towards equilibrium and so too do prices: '[t]he natural price [is the price to which] the prices of all commodities are continually gravitating.[80]

[79] 'The natural price of a commodity is thus defined as the price at which labour, capital and land are all receiving their natural prices.' Backhouse, *Ordinary Business of Life*, 125.

[80] Roncaglia, *A Brief History of Economic Thought*, 72.

Note the metaphysical nuance: the natural price is never postulated or declared ex ante – like the laws of physics it can only be discovered and measured. And like the laws of physics too, its demands are inexorable and brook no appeal. 'Traders who inflate their prices' beyond the level of the natural price 'will lose their customers to others … and so will go out of business. … Anyone charging more can always be undercut by their competitors.'[81] And that, Smith concluded, was precisely the reason why competitive markets could succeed in 'link[ing] up the productive units operating in the different sectors of the economy',[82] 'without [any] central direction or master plan … pooling the knowledge and actions of millions of diverse individuals' into a seamless system.[83]

By guaranteeing that all the relevant resources would end up 'moved into those activities where they were most needed,'[84] Smith's market adjustment hypothesis thus explained not only how 'every individual, in pursuing only his own selfish good', could still wind up working 'to achieve the best good for all',[85] but also how 'the provision of [exactly] those goods that society wants, in the quantities [it] desires, and at the prices [it] is prepared to pay' could become possible.[86] Like the Categorical Imperative in Kant's moral theory, the concept of market adjustment thus assumed, within the Smithian tradition, the role of that all-explaining, loose-ends-tying mediating category, the Derridean immanent organizing concept whose principal function, ultimately, was to ensure every outstanding claim could be tidied up and every logical contradiction resolved.

---

[81] Philip Ball, *Critical Mass* (New York: Farrar, Straus and Giroux, 2006), 222.

[82] Roncaglia, *A Brief History of Economic Thought*, 71.

[83] Samuelson, *Economics*, 42.

[84] Backhouse, *Ordinary Business of Life*, 128.

[85] Samuelson, *Economics*, 42.

[86] Heilbroner, *Worldly Philosophers*, 55.

In time, Smith's ideas about the alchemy of market competition received further development, nowhere so important for our purposes, perhaps, as in the work of the so-called Austrian school economists, two of whom in particular deserve mention at this point: Carl Menger and Friedrich Hayek. A proponent of the so-called subjective theory of value, Menger, taking Smith's ideas about the beneficence of allowing every producer and trader an unrestrained freedom of choice with regard to their economic decision-making, laid the foundations for what later became known as the doctrine of *consumer sovereignty*.[87] Hayek, the far more widely-known 'Austrian scholar', gave the traditional Smithian belief in the allocative superiority of decentralized market structures over centrally integrated economic systems a new philosophico-ideological grounding by contriving to show that not only did the market provide a far superior epistemological apparatus for determining what the society at large really needs and desires than any form of centralized planning, but that, in doing so, it also preserved the ideals of *democracy* and *freedom and equality* of consumer choice.[88]

The importance of these two contributions for our purposes should not be hard to spot. Even more so than the original Smithian concept of market freedom, the concept of consumer sovereignty drives home the fact of the fundamental homology between the Smithian version of economic liberalism and the VP tradition. Every State, explains VP, pursues its national interests which it understands entirely subjectively – what is valuable to one State may not necessarily be so to another – and that, at the end of the day, is not only perfectly fine from the international law point of view, but it is, in fact, the only correct way of doing things. The more subjective their choices are, the more logical it is, in fact, to insist

[87] See for further discussion Roncaglia, *A Brief History of Economic Thought*, 154-155.

[88] See Friedrich A. Hayek, "The Use of Knowledge in Society," *American Economic Review* 35, (1945): 519-30. See also, more generally, Friedrich A. Hayek, *The Road to Serfdom* (London: Routledge, 1944).

that States, as international actors, are ascribed with the quality of sovereignty. For, the moment we establish that value is always subjective is also the moment we inevitably discover that the subject of these values constitutes that system's *primum movens*.[89] Thus, to be able to justify viewing States as the prime movers of international law – for what, in a positivist universe, does the concept of sovereignty describe if not being the prime mover? – it is logically indispensable that whatever interests one imagines States pursue in the international arena invariably have to be understood as *essentially subjective*. And the more subjective they turn out to be in practice, the better it is, from the standpoint of theory. For then it all adds up and comes together neatly: the more a State is moved by nothing more than its own sense of what is beneficial for it, the more assured becomes his ability to contribute to what, in fact, is good for the international community. And since it is precisely their lack of pre-established assumptions as to what is good and valuable and the fundamental decentralization of their decisional structures that makes markets so good at figuring out and responding to the society's all short-term and long-term needs, the more decentralized and content-wise unprejudiced the international legal process becomes, the more likely it is that a legal system set up along VP lines will be able to supply the international community precisely with the kind of normative structures and regimes that it needs and in the precise forms and quantities that it needs. Put differently, they may not have been necessarily aware of this, but the argument the likes of Lowe and Brownlie make for and about international law is really, at its most basic level deeply Hayekian both in terms of its intellectual aesthetics and presumed metaphysics.

VP and Classical Liberalism: a comparative structure

[89] Roncaglia, *A Brief History of Economic Thought*, 155.

That the discipline of international law owes a rather large theoretical debt to both Kant and Smith – and Classical Liberalism more generally – is a fact well-established among the students of international law.[90] What is less broadly appreciated, however, is how deeply this inheritance goes. It is not just a general predilection for a politics of individualism, consent, and non-intervention that the discipline, as it evolved within the framework of its dominant theoretical paradigm, has absorbed from its liberal source code. The entire ontological and epistemological apparatus around which it developed its basic analytical habits and reasoning protocols – its general theory of agency, causality, and capacity – has been copied from the founding figures of the classical liberal tradition as well.

The usefulness of the mapping exercises undertaken above in explaining the deeper parallels between the VP paradigm and the Kantian and Smithian traditions can be summarized in the form of the following table. Note the slightly different insights highlighted in each case. While the exploration of the Kantian parallels helped lay bare the presence within VP's broader theory of rather suspiciously placed blank spots corresponding, structurally, to the mechanism of the Categorical Imperative and universal morality which this mechanism helps channel and express, the foray into the Smithian tradition helped bring forward the idea that not only does it look as though the VP paradigm functionally presumes a certain model of behavioral physics on a par with Smith's idea of the inexorable drive for self-interest, but that its faith in the quasi-alchemical powers of a decentralized institutional

[90] For further discussion, see, generally, Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester and Dover: Manchester University Press, 1986); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki: Finnish Lawyers' Pub. Co., 1989); Philip Allott, *The Health of Nations* (Cambridge: Cambridge University Press, 2002); Emmanuelle Jouannet, *Vattel and the Emergence of Classical International Law* (Oxford: Hart Publishing, 2017).

structure to transform the selfish interests of every individual State into the public good of the international community must also be fundamentally premised on some underlying belief in *supra-systemic adjustment* and a corresponding notion of *natural justice* to which, like all positively charged market prices in Smith's theory of natural prices, all positively undertaken attempts to articulate international law are inevitably supposed to gravitate.

	Kantian moral theory	**Smithian economics**	**VP**
Units (constituent subjects)	Men as ethical actors	Men as economic actors	States
Optimal position for each subject at the individual level	Moral autonomy	Business freedom/ consumer sovereignty	State sovereignty
The iron law of individual behavior	Every subject, when making decisions they know may become laws applicable also to others, channels the Categorical Imperative	Every subject when making any decisions inevitably pursues naked self-interest (profit)	Every State always pursues its national interest

Optimal institutional policy (ground rule)	Political (moral) liberalism	*Laissez-faire*	Decentralization
Mediating mechanism that prevents anarchy	Categorical Imperative	Market adjustment	? [International law's absent center]
What the mediating mechanism channels	Universal morality	Natural prices	?

The closer one looks at this table, the more evident become two points. Firstly, in all three of these traditions, the 'system' – what the mediating mechanism allows the subjects to embody and give voice to – is understood to be both superior to and unaffected by the subjects' sovereign capacity for autonomous choice in the sense that it does not matter what the subjects may end up choosing, the 'system' will realize itself anyway. And, secondly, what we are looking at in each of these cases is, essentially, a theory of Natural Law. The only difference is that in the case of the VP tradition this fact appears to be systematically suppressed and covered up – hence the empty spaces and questions marks in the bottom-right corner.

And yet, it does not take very much effort – even if one ignores the parallels indicated by the structural homologies outlined above – to uncover this fact. The 'naturalism' of VP's theory of law is indeed rather glaring.

How can a decision-making process that lacks any formal hierarchy ensure that peace, justice, and sustainable development, rather than anarchy, violence, and the tragedy of the commons, should become the logical course of events in international relations? Sovereignty plus consensualism plus horizontality is a recipe for guaranteed fragmentation. How can anyone expect that instead of complete cacophony it will lead to harmony, yielding a normative framework capable of inducing a dynamic of cooperation as well as coexistence? Even the briefest scrutiny of the VP theory is enough to discover that things do not quite add up. The structure of the international lawmaking process is supposed to be decentralized. And yet the positive international legal regime that is meant to be created on its basis is still expected to turn out fundamentally non-self-contradictory and sufficiently devoid of gaps and blind-spots to be able to meet the demands imposed on the international legal system by its first values. How can this happen? It is as if despite being decentralized at the surface, the international legal process was also at the same time permeated, deep within, by some invisible force-field that somehow enabled it to resolve all of the countless conflicts and contradictions that are guaranteed to arise under the conditions of legislative cacophony. But where would that sort of force-field come from? What would be its source?

In the history of modern legal thought, the answer that would have been most commonly given to this question is Natural Law. In the broader philosophical discourse, by comparison the more typical rubric would be ‘God’. The two constructs, to be sure, are not entirely identical: the natural law tradition has many strands, not all of them are expressly theistic in their presentation. Still, the essential theoretical premise that underpins every species of the natural-legal argument is the assumption that somewhere out there an objective, non-human-made standard of justice exists whose normative validity does not depend on its formal endorsement by any socially embedded institution because it derives

from some 'higher source'.[91] And that assumption, however one looks at it, is a product of a *fundamentally theological belief structure*.

Natural law, the Categorical Imperative, the natural order of things, the market adjustment mechanism – the labels change, but the basic theoretical function performed by the concept remains the same. In the Lacanian tradition, the heading under which it is known is the Name-of-the-Father; in deconstruction, the transcendental signified – that immanent organizing force that we noted earlier Derrida talked about. The universal morality which every autonomous moral agent inevitably ends up channeling, the natural price to which all real-world market prices inevitably tend to gravitate – the answer to the question of international law's absent center in the VP tradition, in the final analysis, has nothing particularly voluntarist or positivist about it. The requirements of the official decorum may prevent it from admitting this in the open, but, in the end, it is God's grace and God's grace alone that, in the VP universe, holds the international legal system together. And the God in question here, very clearly, is the God of Christian theology.

VP's first debt to Christian theology: sovereignty and consent as the problematic of free will – from the 'blessed in heaven' to *firmitas* and predestination

The structural parallels between the VP worldview and classical Christian theology are undeniable. What is less clear is their exact contours. For the purposes of our present argument, the debt – if one can talk of it in such terms – owed by the former to the latter can be said to have two different dimensions.

[91] See Michael D. A. Freeman, ed., *Lloyd's Introduction to Jurisprudence*, 6th ed. (London: Sweet & Maxwell, 1994), 79-86; Peter Malanczuk, ed., *Akehurst's Modern Introduction to International Law*, 7th rev. ed. (London: Routledge, 1997), 15.

The first can be perceived most readily if we extend the excavation exercise that we started earlier with our forays into Kantian and Smithian traditions by tracing the genealogical influences behind *their* theoretical structures. Where did their models of ontology, agency, causality, and capacity come from?

Both Kant and Smith, it is no secret, were profoundly theologically-minded thinkers.[92] Though neither of them was particularly orthodox in their religious practices, the degree to which the Christian theological worldview had pervaded their theoretical sensibilities is undeniable. Both the one and the other devoted significant energies and mental resources to the exploration of classical theological topics (Kant perhaps more visibly so than Smith). Even more importantly, both of them had also absorbed and actively repurposed Christian theology's basic operative framework, categories, and master-plots.

One of these master-plots, as Alex Callinicos notes, was the narrative of *miraculous unintended consequences* – the logical end-product of combining the concepts of divine ineffability, omnipotence, benevolence, and predetermination, first worked out by medieval logicians and theological historians, that assumed in Kant and Smith's writings the form of that paradoxical argument which purports to see the act of private self-ordering as the best conceivable source of public legislation and the naked pursuit of profit as the foundation of social harmony.[93] Indeed, it was Smith, notes Callinicos, who developed one of the first clearly recognizable adaptations of this narrative in modern social thought, by developing a theoretical framework expressly constructed around the idea 'that social structures [constitute] the unintended consequences of individual actions':

[92] For general background, see Kenny, *The Rise of Modern Philosophy*, 100-8; Goldmann, *Immanuel Kant*, 193-205; Heilbroner, *Worldly Philosophers*, 42-74.

[93] Alex Callinicos, *Social Theory*, 2nd ed, (Cambridge: Polity, 2007), 17.

> Kant would later express the same idea more generally when he argued that the mechanism through which historical progress takes place is men's 'unsocial sociability'. [In doing so, he] more explicitly than Smith … reveals the theological roots of [this hypothesis, since it was originally] Christian thinkers such as St Augustine [who] had developed a philosophy of history in which the selfish actions of individual humans unwittingly serve the purposes of God's secret plan for the world.[94]

Both Kant and Smith, of course, were openly Protestant – not just in terms of their religious upbringing but also their general ideological leanings. Smith, in particular, was notoriously anti-Catholic in his outlook, characterizing the Catholic church and religion at one point as the enemy of liberty and reason and openly detrimental to all social and economic progress.[95] And yet the conventional division between Protestants and Catholics, though certainly not insignificant in other contexts, should not be allowed to obscure here the fact that, for all their opposition to the Catholic church and the Catholic doctrine of their time, an overwhelmingly large part of the deeper theoretical structure on which Kant and Smith erected the edifice of their respective philosophies belonged, in fact, to that basic stratum of ideas and preconceptions that is shared equally by Protestant and Catholic thinkers. And like the narrative of miraculous unintended consequences, many of these ideas and preconceptions received their first full elaboration in the writings of pre-Reformation thinkers and scholars.

---

[94] Callinicos, *Social Theory*.

[95] See further Barry Weingast, "Adam Smith's Industrial Organization of Religion: Explaining the Medieval Church's Monopoly and Its Breakdown in the Reformation," SSRN, 17 October 2015 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2675590).

One of these thinkers who exerted a particularly lasting influence was the late 13th-century Franciscan theologian, the *Doctor Subtilis,* John Duns Scotus. A rich and famously complex writer, Scotus in many ways, as Anthony Kenny puts it, can be considered 'a philosopher's philosopher':[96] though he did not as such found any distinct movement or school of thought,

> many of his philosophical innovations came to be accepted as unquestioned principles by thinkers in later generations who had never read a word of his works. The Reformation debates between Luther and Calvin and their Catholic adversaries took place against a backcloth of fundamentally Scotist assumptions. The framework within which Descartes laid out the foundations of modern philosophy was in all its essentials a construction created in Oxford around the year 1300 [when Scotus was there].[97]

Moreover, just as it is commonly recognized now that it is with Scotus that the entire modern conception of modality – the theory of the relationship between necessity, actuality, and contingency – first began to emerge,[98] so too, notes Kenny, '[i]t is arguable that epistemology, as understood in modern times, [also made] its first appearance in [Scotus's] writings'.[99]

---

[96] Kenny, *Medieval Philosophy*, 89.

[97] Kenny, *Medieval Philosophy*, 89.

[98] See Simo Knuuttila, "Duns Scotus and the Foundations of Logical Modalities," in *John Duns Scotus: Metaphysics and Ethics*, ed. Ludger Honnefelder, Rega Wood and Mechthild Dreyer (New York: Oxford University Press, 1996), 127-43, 129-30; Stephen Marrone, "Revisiting Duns Scotus and Henry of Ghent on Modality," in *John Duns Scotus: Metaphysics and Ethics*, ed. Ludger Honnefelder, Rega Wood and Mechthild Dreyer (New York: Oxford University Press, 1996), 175-89.

[99] Kenny, *Medieval Philosophy*, 171.

What was the basic core of Scotus's legacy that found its way several centuries later into the shared theoretical structures of liberal social theory? The answer, as is so often the case in medieval Christian theology, begins with the question of death and salvation.

Like with most theological systems that incorporate the concept of afterlife, one of the fundamental issues at the heart of Christian philosophy, traditionally, has been the question of reward and punishment: on what grounds, following what criteria, are we to be rewarded and punished for what we do in this life, after we die? The official solution proposed by the Christian dogma was given its formal articulation under the heading of the doctrine of *free will*: people are judged in their afterlife inasmuch as and because they possess a freedom of the will, that is to say, the power to choose what course of action to take in any given situation. Because of this freedom – which, as Bernardine Bonansea correctly notes, is essentially a form of 'the power of self-determination'[100] – human beings enjoy a privilege unavailable to any other class of creatures such as, say, angels or animals.

A large part of what the concept of free will covers is the ability to choose between sin and virtue. Precisely because 'man in his earthly existence' has the power to turn away or towards sin, i.e. reject or follow God's prescriptions about what is right and wrong, he earns whatever reward or punishment he may receive in the afterlife. 'For nothing is imputed to anyone as deserving reward or punishment', remarks Scotus, 'and hence as praiseworthy or blameworthy, unless it lies in his power'; 'nothing is accepted as meritorious unless it be freely in the power of the agent.'[101]

[100] Bernardine Bonansea, "Duns Scotus' Voluntarism," in *John Duns Scotus, 1265-1965*, ed. John Ryan and Bernardine Bonansea (Washington: Catholic University of America Press, 1965), 83-121, 94.

[101] John Duns Scotus, *God and Creatures: The Quodlibetal Questions* (Princeton and London: Princeton University Press, 1975), 390.

The problem that arises at this point is, of course, the issue of God's axiomatic omnipotence and omniscience and, by extension, the question of the relationship between human will and God's will. Since God is the first cause of all that is, was, and will be, and since he is also, by definition, omnipotent and nothing happens without his knowledge of it, it follows logically that every action or choice a person makes happens because God has so willed, which seems to suggest that none of us can be held responsible for any sins we commit since (i) all of these sins were, in fact, a part of God's plan, and so in committing them we were actually realizing God's design, so how can we be punished for doing God's work; and (ii) it was God who made us do what we did, and we ourselves did not have any say in it, since if it were actually possible for us not to sin in those situations where He wanted us to sin, He is either not really omnipotent (since we managed to resist His will), or not really omniscient (since He did not know we would object to His plans), both of which are blasphemous concepts.

However one looks at it, it seems we are falling now into an irresolvable paradox: either God is omnipotent and omniscient, in which case all our actions and choices, including whether or not to sin, are already predetermined, which logically destroys all justification for posthumous reward and punishment since none of us really any free will. Or we do have a freedom of will, which means we do get to make our own choices and God cannot change them or pre-determine them for us, in which case God is not really God, or at least not in the way He is supposed to be.

In the hands of a less talented theologian, the answer to this paradox would probably have taken the route of invoking God's ineffability – it is a blasphemy to believe that the principle of free will can contradict divine determinism, for that would be precisely the kind of thing one would conclude as a matter of human logic, and who said that God's design is susceptible to human logic or understanding? An equally tempting solution would also be to

allude to the idea of divine perfection – the nuclear bomb of all theological arguments – what is said to be a contradiction seems so only to our feeble human minds, to God, who has an infinitely more perfect mind, there is no real contradiction between freedom and determinism, a fact of which we can be reassured not least by the knowledge that His design is always perfect and He has evidently created this world exactly the way He designed it. Scotus, the consummate logician that he was resisted both of these cheap moves.

Every will, begins Scotus's argument is fundamentally a self-moving cause, and human will is not, in this regard, an exception. 'When we do act rather than not, or act in one way rather than another, there is no cause of such a choice other than that [which] is [our] will.'[102] It follows thus that to blame our bad decisions on the rigidity of God's plan or to abdicate any responsibility for them on grounds of His omnipotence is, everything else aside, analytically indefensible. The power to choose sin comes to us from God – 'i.e. God is the source of that nature which enables its possessor to commit sin'[103] – but God himself does not ordain how exactly we exercise that power. Indeed, that is precisely what His divine will consists in: that each of us freely chooses where we stand vis-à-vis good and evil at any given point and what actions we take in that regard. Thus,

> the will is not acted upon, strictly speaking, by anything else [even though] the human will is, after all, a creature of … God as a higher-order cause. [But] higher-order … causes are typically not causes of the effects [but] are, rather, causes of the causing of those effects ...

[102] Calvin G. Normore, "Duns Scotus's Modal Theory," in *The Cambridge Companion to Duns Scotus*, ed. Thomas Williams (Cambridge: Cambridge University Press, 2003), 129-60, 144.

[103] William Frank, ed., *Duns Scotus on the Will & Morality* (Washington, D.C.: The Catholic University of America Press, 1997), 294.

> Hence while God causes any given human will, God does not cause the willing of that will. Instead God causes it to be the case that the willing of that will is a production of what it does produce.[104]

Put differently, God is not our personal co-author – and thus a moral co-owner of every bad decision we make – even if He is, ultimately, the author of our very ability to author and to decide.

So far, so good, but notice now that so far Scotus has only addressed the problem of free will in the case of *homo viator*, 'man in his earthly existence'. The power of free will, according to the Christian dogma, does not cease at the point of one's death. Indeed, if anything it becomes greater. But as the souls of those who, because of their virtuousness, receive the reward of heaven enter their heavenly existence – as they become the 'blessed in heaven' – a new paradox quickly emerges. Being in heaven, the blessed still retain their capacity for free will. 'Essentially, the will of the blessed remains the same as the will of the *homo viator*, for the attainment of the end does not change the nature of the faculty attaining it.'[105] And yet at the same time 'the blessed cannot possibly turn away from the supreme good' and choose sin 'because of a positive decree of the divine will.'[106] How can this make sense?

Scotus's reasoning, as he himself acknowledges, comes at this point from St. Augustine:

> that text of Augustine from the Enchiridion [states]: "It was fitting that men should be made in the first place with the power to will both good

[104] Normore, "Duns Scotus's Modal Theory," 144.

[105] Bonansea, "Duns Scotus' Voluntarism," 94-5.

[106] Bonansea, "Duns Scotus' Voluntarism," 94.

> and evil – if good, not without reward; if evil, not without impunity." … And he continues: "In the afterlife he will not be able to will evil and yet he will not be deprived of his free will. In fact, his will will be much more free in that it will in no way be subject to sin."[107]

To say that the blessed in heaven still have the freedom of the will is to suggest that they retain the power to choose between good and evil. Because, however, they are now in heaven, it follows, logically, that though they have this power, they necessarily will not exercise it, which, predictably enough, raises the question: how can one be said to have a certain freedom (choose or reject sin) and at the same time also be restricted always to act in a certain fashion (reject sin)?

The detour into Scotus's argument has been long – much longer than anything that was attempted with Smith or Kant – but hopefully by now it should become clear why it was necessary. The irresolvable paradox at the center of VP's theory of international law – the idea that States, though they are free to choose whatever rules and principles they want, will somehow necessarily end up choosing what is objectively best for the international community – is essentially nothing more than a latter-day adaptation of the concept of the blessed in heaven. Like the blessed in heaven, States, in the VP account, are presumed to possess an untrammeled freedom of the will – the sovereign power to determine one's duties and obligations. Like the blessed in heaven, this means, ultimately, that they are able to choose both what is 'good', i.e. conducive for the preservation of international peace, stability, human dignity, and sustainable development, and what is 'evil', i.e. detrimental to the achievement of these goals. Like the blessed in heaven, too, they are, however, also guaranteed, in the end, always to choose what is 'good', which fact, however, not only does

[107] Scotus, *God and Creatures*, 377.

not diminish their sovereign status but, on the contrary, enhances and reinforces it. How can this state of affairs make any sense?

Scotus's answer to the paradox of the blessed's freedom was to introduce the following theoretical formula:

> the blessed in heaven feel such an attraction towards God … that they love him by what may be called moral necessity or necessity *secundum quid*. This becomes for them like a second nature and is similar to the natural tendency by which stones and metals tend to the centre of the earth.[108]

Note that the moral necessity Scotus has in mind here is itself the product of the 'positive decree of the divine will', not an actual intrinsic feature of the blessed in heaven, i.e. it arises in them as a result of God's intervention and not spontaneously by itself. But what exactly is the nature of this new element God adds to the blessed's psychological make-up? Scotus's answer is: *firmitas,* a concept that can be most closely translated into English as 'steadfastness.' What happens, according to Scotus, essentially, is that God, through his wisdom, awards the blessed in heaven with a new additional power: He 'ensures *firmitas* to [them], and so while they retain the power to refrain from loving God and so can [in fact] refrain [from doing so], they steadfastly (and in that sense necessarily) exercise their power to love God.'[109]

What exactly does all of this mean concretely? What is this thing called *firmitas*, in what does it manifest itself, why is it only imposed or made available to the blessed in heaven but not to the *homo viator*? The answer to that, alas, nobody seems to know. 'How does God

[108] Bonansea, "Duns Scotus' Voluntarism," 95.

[109] Normore, "Duns Scotus's Modal Theory," 144-45.

ensure *firmitas* to the blessed?' asks Calvin Normore in his study of Scotus's theory of necessity and freedom, before immediately adding: 'Scotus does not say.'[110]

'If you ask, how does freedom coexist with necessity', observes Scotus enigmatically in his *Quodlibet,* 'I answer with [Aristotle]: "Do not seek a reason for things for which no reason can be given: for there is no demonstration of the starting point of demonstration." And so I say here.'[111] Even the *Doctor Subtilis*, it turns out, could not refrain, in the end, from a 'nuclear solution'.

Scotus's treatment of the problem of freedom for the blessed in heaven did not, in the end, produce a conceptual vocabulary that survived the historically specific context of medieval scholasticism. But it provided the blueprint for all subsequent forays into this theoretical territory: both Kant's Categorical Imperative and Smith's mechanism of market adjustment can be counted among the direct intellectual descendants of Scotus's *firmitas*.

In the tradition of later Christian theologians, many of the nuances of Scotus's theoretical solution, including the distinction between effective causes and higher-order causes, were either flattened out or abandoned. The Augustinian dialectic of freedom and necessity in its Protestant rendition turned into the dialectic of personal and universal God. The 'nuclear solution' in this context increasingly received the form of God's grace – a concept designed to perform the same structural role as *firmitas* (but being somehow also applicable to the living) and to shift the main theoretical accent further away towards the ineffability end of the 'nuclear' spectrum. Far less committed to the belief in Man's innate goodness, Luther and Calvin chose to assign the category of grace the function of an all-organizing force with a much broader range of powers than Scotian *firmitas*, until, taken to its

[110] Normore, "Duns Scotus's Modal Theory," 145.

[111] Scotus, *God and Creatures*, 379.

logical conclusion, it became a direct stand-in for the idea of divine intervention itself and the whole question of how a necessitated outcome can arise in a context of apparently free and uncoerced action was dissolved in the acid of compulsory faith. [112]

VP's second debt to Christian theology: the State as Christ

The second dimension of VP's debt to Christian theology has a slightly different theoretical complexion. It reveals itself most clearly when one considers the curious parallelism between VP's basic concept of States as international lawmakers and one of the oldest theological controversies in Christianity: the debate about Christ's 'natures' and 'essences'. The idea that Christ, being the son of God – the Word (*Logos*) made Flesh – is one with God and thus is equally as divine as God-the-Father, forms one of the central tenets of the Christian religion. But how exactly should one understand this idea in terms of what it says about Christ's 'other' side? Was being human a part of Christ's essential nature or was it something more or less incidental? Was Christ, in other words, both a man and a God or was he, for theological purposes, 'only' a God? Should Christ, as a matter of official dogma, be considered to have only one or two different natures?

Here is how Philip Jenkins summarizes the terms of this debate as it first took form in the early centuries of Christian history:

> At one extreme, a One Nature believer like [the fourth century Alexandrian bishop] Appolinarius presented Christ as a kind of automaton controlled by a Logos from above, so that he could not in any real sense face temptation: he could not wrestle with moral dilemmas or overcome the seductions of evil. [At the other extreme]

[112] For further discussion, see Erich Fromm, *The Fear of Freedom* (London: Routledge, 2001), 66-74.

> Two Nature adherents, like the third-century Christian Paul of Samosata, … taught that the man Jesus became Christ when the Spirit of God descended on him, so that the purity and sanctity of his life was a major factor in letting him become divine.[113]

It can be noticed immediately how closely the structure of this 'one versus two natures' controversy maps onto the basic model of international law presumed under the VP paradigm. All that one needs to do is substitute 'States' for 'Christ' to see the parallels.

International law, argues the VP tradition, is essentially a product of States' choices. At the same time, international law is also a mechanism that delivers peace, justice, and developmental sustainability to international life. Bring these two claims together and the question arises: when States get down to the business of producing international law do they automatically channel this universalist function or is there something else going on here? Put differently, can States do no wrong when it comes to choosing what norms to elevate into international law's *corpus juris* – because no matter what they do in this context, their actions at this point inevitably express some higher universal reason that acts through them as if they were 'a kind of automaton'? A large part of what goes into the traditional theory of customary international law indicates a strong predisposition toward this quasi-Appolinarian view: inasmuch as every violation of a pre-existing customary rule, in principle, can become the founding act of a new custom, on a long enough timeline States indeed can do no wrong.[114] Or is it the case, rather, that not every act performed by States automatically

---

[113] Philip Jenkins, *Jesus Wars: How Four Patriarchs, Three Queens, and Two Emperors Decided What Christians Would Believe for the Next 1,500 years* (New York: HarperOne, 2011), 7-8.

[114] For a rather insightful discussion, see Anthony D'Amato, "The Theory of Customary International Law," *Proceedings of the Annual Meeting (American Society of International Law)* 82, (1988): 242-60, 246-47.

channels the universal reason, so that – to borrow the language of Paul of Samosata – only under a very particular set of circumstances will the 'spirit' descend on their conduct? The formula commonly used to explain how *jus cogens* norms are created[115] as well as the *Nicaragua* theory of how to tell violations of customary law from new-custom-forming conduct indicate a certain predisposition towards this view.[116]

Despite at first sight coming across as hopelessly abstract and metaphysical, the 'one or two natures' debate carried extremely significant stakes from the standpoint of the official Christian doctrine. In the first place, it touched directly on the question of salvation. On the one hand, the general consensus accepted that '[i]n order for redemptive doctrine to make any sense, Christ would have to be fully human', since it is the fact that 'Christ shared humanity [that] allowed him to redeem humanity through his sacrificial death,'[117] or, as 'Gregory Nazianus wrote, "[T]hat which Christ has not assumed, He has not healed."'[118] On the other hand, the argument went, '[u]nless Christ were fully divine, … his death could not save us.'[119] Depending on where one stood on the question of one versus two natures of Christ, humanity, thus, was presented with two fundamentally different routes to salvation: if Christ was nothing but wholly divine, one could only worship him and ask for redemption; if he was both human and divine, one was well-advised to study and emulate his good works.

[115] See Article 53 of the Vienna Convention on the Law of Treaties (1969): 'a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted.'

[116] *Nicaragua v. United States (merits)*, ICJ Reports (1986), 98.

[117] Jenkins, *Jesus Wars*, 7.

[118] Jenkins, *Jesus Wars*, 7.

[119] Jenkins, *Jesus Wars*, 7.

In the second place, there was also the question of textual sources and their 'ethical' reliability. As Jenkins puts is:

> how do we know how much weight to attach to the words of Christ recorded in the New Testament? Just who do we hear speaking? Assuming for the sake of argument that the scriptural text accurately records Jesus' sayings … When Jesus tells a parable of utters a pronouncement, do those words come directly and literally from the mind of God, or are they the thoughts of an individual bound by the constraints of his time and place?[120]

Again, the parallels with the VP context are obvious and undeniable. When States 'speak' through treaties and State practice, who exactly do we hear speaking? Is it States as the legislators of that law which will ensure the preservation and strengthening of international peace, security, sustainable development, and human dignity, or States as political entities that are themselves supposed to be the subjects of this law, bound and constrained by it? When States agree on, interpret, or enforce positive legal rules, how much weight are we meant to attach to these acts? Should we 'worship' these acts and trust the norms they project to deliver us the 'redemption' we hope for, or should we only study them with a view to extracting out of them a possible reflection of that redemptive truth? However one answers these questions, the fundamental paradox is clear: it is not just the case that for the VP theory to make sense, States must be simultaneously assumed to be both one-natured and two-natured, it is also the case that *in either event* States will consistently be expected to be *more than just themselves*, more than just States, more than just governments acting in their own national interest. The 'one versus two natures' debate in Christian theology, lest we forget,

[120] Jenkins, *Jesus Wars*, 9.

was born out of a desire to establish that Jesus was either 'fully divine' or 'divine and human at the same time', not that he was only human.

There is another important lesson that we can learn from this early theological episode. As history shows, in the end, the philosophical tensions raised by the 'one versus two natures' paradox did not present too much of an obstacle for Christian dogma. Again, the 'nuclear solution' ultimately came to the rescue: God, by definition, was an ineffable being, his ways were mysterious, inscrutable, and beyond human reason. Whatever contradictions one might observe in Christ's ontological position, thus, could as easily be dismissed on the grounds that God, being omniscient and omnipotent, can always will them away whenever he wants, as they could be explained away as ultimately non-problematic on the grounds that God, being the first cause of everything, was not bound by the laws of logic anymore that he was bound by the laws of physics.

A neat argument strategy by any measure, but not one – let us note – that could ever be made available in the context of the VP tradition.

The Origins of International Law's Bad Faith

Let us recap our findings so far. There exists a massive paradox at the heart of the VP tradition. The only logical way to solve this paradox would be to introduce into the VP theoretical framework something along the lines of a Natural Law construct or the idea of divine wisdom, *firmitas*, or God's grace. Any of these theoretical elements could immediately resolve the problem of international law's absent centre. The problem with this strategy, however, is that it would also result in giving the VP tradition an immediately recognizable theological flavor. As even the first-year law students know, however, the entire *raison d'etre* of legal positivism as a theoretical project, historically, has been its promise of secularism and its categorical rejection of every form of natural-legalist sensibility. Recall Simma and

Paulus's argument: the foundation of the positivist tradition lies in the 'strict separation of the law in force … from non-legal factors such as natural reason [and] moral principles.' It is precisely because of this separation that positivism has been able to promise the discipline of international law a far more 'rigorous [understanding of] legal validity' and a more 'objective determination of fact[s]' than it could find elsewhere.[121]

Right from its very inception, the basic bargain offered by the VP tradition to the discipline of international law has hinged on this exact point: from the rejection of theology and natural law comes the promise of greater rigor and objectivity. The more the discipline of international law embraced the positivist outlook, the more it could liberate itself from the debilitating influences of theological superstition and natural-legalism, the more its thinking about law, consequently, would become rigorous and objective. The only problem, however, as it turned out, was that the particular species of the positivist theory which the VP tradition sold to international law was not actually all that positivist to begin with. Once this realization had sunk in, the dilemma it gave rise to at first glance must have seemed rather stark. Either one or the other thing needed to go: theoretical honesty with oneself or the highly desirable secular status.

Which of the two ambitions should the discipline of international law give up on? Should it accept that VP's theoretical premises are, in fact, logically unsustainable on their own terms or that they are, rather, deeply theological? Anyone familiar with the actual course of disciplinary history will know which of these options prevailed in the end. The discipline never found within itself the power to terminate its union with the VP tradition. The precise reasons for this are anyone's guess, but the argument that I want to put forward here is that they were, ultimately, a function of intra-disciplinary politics, ideology, and labor conditions.

[121] Simma and Paulus, "Responsibility of Individuals," 304-5.

An open acknowledgment of the fact that the VP paradigm could only make sense if it were given a distinctly theological foundation offered the discipline prospects that seemed unacceptable not (so much) because making such kind of acknowledgement would have hurt the discipline's intellectual pride or undermined its formal status as an aspiring social science, but because it also risked exposing a dangerously large proportion of the international law profession to potential accusations of charlatanry and intellectual fraud, while at the same time threatening to blow an enormous hole through the entire division of labor established within the discipline's internal and adjacent social spaces over the course of the last 120 years.

Changing a discipline's governing paradigm, as Pierre Schlag notes, is an expensive luxury.[122] Theoretical frameworks are not a free resource: they take time, effort, training, access to specialist instruction, and the commitment of various other expensive factors to learn, internalize, and master. The replacement of a dominant paradigm by a new theoretical framework is not a costless process, and its costs can never be spread evenly. The discipline of international law, at the end of the day, is a part of the capitalist economy. Knowledge products generated within it – be it policy proposals (knowledge how to resolve a particular problem from a legal standpoint) or normative interpretations (knowledge what the law means) – are configured as marketable commodities. The analytical skills one learns as a follower of a particular school or tradition are the capital assets with which these goods can be produced. It takes time to hone these skills, and the decision to do so, ultimately, is not dissimilar to an investment decision. Every economic community in which capital investment

[122] Pierre Schlag, "The Brilliant, the Curious, and the Wrong," *Stanford Law Review* 39 (1987): 917-27.

decisions are made without strict centralized coordination is vulnerable to the problem of capital over-accumulation.[123]

Like with every type of investment, decreasing the value of a theoretical framework by debunking its sales-pitch hurts most those who have invested in it most heavily, which, in this case, raises the question of unequal exposure and distributional impact not only across different sub-disciplinary communities but also across different generations. Put differently, it may be all well and good for us to speak in the abstract of the need for the followers of the VP tradition to face up to the implications of its logical incoherence, but, seen from their end, the effects of such an adjustment would be equivalent to an act of expropriation, and many of those who would suffer from this expropriation the most are also, in relative terms, older and thus will have had more time to take over positions of academic power that would allow them to block any such expropriatory actions. The more wide-ranging, notes Schlag, a programme of theoretical reforms proposed to a disciplinary community is expected to be, the more expensive it will be to implement at the individual level, and the readiness of the vested interests to defend their position with grim determination and rage should never be underestimated.[124]

One of the ways in which the culture of bad faith begins is when the ethics of *parrhesia* is forced to give way to economic expedience. The endurance of the problem of international law's absent centre in mainstream international law theory is a product of a fundamentally ideological dynamics. There is nothing inevitable at the level of logic or critical reasoning that prevents the discipline from accepting that under the basic institutional conditions presumed by the VP paradigm the only factor that could prevent the positive

[123] Further on the problem of capital over-accumulation in capitalist economies, see David Harvey, *The Limits to Capital* (London: Verso, 2006), 190-203.

[124] Harvey, *The Limits to Capital*, 925.

international law regime from descending into anarchy and cacophony is God's grace or direct divine intervention. Doing so, however, would almost certainly destroy the discipline's ideological image in the wider outside world.

And then there is also the question of the discipline's 'external commitments'. A hundred or so years ago the hassle of having to rewire the entire disciplinary field around a new theoretical blueprint might have been the main politico-economic concern limiting the ability of international law to part ways with the VP paradigm. But a lot of water has flown since then. The discipline has become a lot more embedded into the formal machineries of global governance. The pressures that come from having to keep its 'side of the deal' are a lot greater, and the room it has left for any intellectual-identity-changing manoeuvres is a lot smaller. If the international law profession were to admit today that for the last 120 years the entire foundation of its purported claim to scientificity (international law as knowledge of positive social facts) and worldly expertise (international law as a technology of power) was, in fact, to a very large extent grounded in the assumption that (a) God is an active player in international affairs and (b) if things go wrong, God will always step in to clean up the mess, the damage it would suffer in the world outside its own social and theoretical planes would be lethal and irreversible. There would be no forgiveness, no coming back, no second chances. The fate that befell phrenology and other debunked pseudo-sciences would pale in comparison.

Has the discipline become too big to fail? It is hard to say for sure, but it certainly seems so. The absent structural centre that is missing in VP's officially declared theoretical account is absent from it for a reason that definitely goes beyond what can be fixed by simple 'theoretical honesty'.

Conclusion

Scotus's posing of the problem of free will, I argue in this essay, resembles in terms of its basic structure the same theoretical paradox which confronts the VP tradition. VP's question 'how can a decentralized international legal process be expected to give rise to a regulatory dynamic that is both sufficient and suitable for the promotion of international peace, security, sustainable development, and other universal values?' is essentially homologous to Scotus's 'why cannot the "blessed in heaven" commit sin?' The theoretical solution that Duns Scotus proposes to this problem – God gave the 'blessed in heaven' an additional measure of steadfastness (*firmitas*) – historically laid the blueprint for a narrative strategy that in various forms would be replayed over the next few centuries in many different contexts ranging from the Protestant debates about predestination to Kant's theory of morality to classical liberal arguments in favor of *laissez-faire* economics. Notably, however, the context which matters most for our purposes – the VP tradition – is the one in which it was not directly replicated, and it is precisely by reconstructing the logic of this failure that we can start to map out and decipher the basic extent and configuration of that regime of Sartrean bad faith that I alluded to at the beginning of this essay.

The refusal to replicate within the international law context the model offered by Scotus, Kant, and Smith was not without good reasons, if within the category of good reasons one is generally prepared to include reasons of ideological self-aggrandizement and disciplinary rent-seeking. One way or another, however, this refusal or failure has not passed without consequences.

In describing the general meaning of bad faith, Sartre notes at some point that the practice of bad faith generally entails 'a certain art of forming contradictory concepts which unite in themselves both an idea and the negation of that idea'.[125] The twist here, however, he

[125] Sartre, *Being and Nothingness*, 79.

immediately adds, is that the same theoretical practice also tends to be characteristic of the act of critical self-reflection, or what Sartre calls the culture of sincerity and candor with oneself. The only thing that appears to be different is the surface motivation. The underlying mindset is exactly the same. The quest for sincerity presupposes, ultimately, the same form of self-transcendence or self-alienation as bad faith: 'Total, constant sincerity as a constant effort to adhere to oneself is by nature a constant effort to dissociate oneself from oneself.'[126] To be able to acknowledge and evaluate 'what one is', one must distance oneself from oneself: to separate the judging and critiquing part of one's self from that which is being judged and critiqued. But '[w]hat then is sincerity except precisely a phenomenon of bad faith'?[127] The punchline does not come immediately – the argument drags on for another page or so – but when it does, it is as ruthless as it can be: 'Bad faith is possible only because sincerity is conscious of missing its goal inevitably, due to its very nature.'[128] The project of self-critique – the quest for sincerity, including sincerity in the sense of (finding) the courage to know oneself – sooner or later always fails, whether because of its hubris or sheer metaphysic unsustainability, and when that happens, inevitably, a culture of bad faith gradually arises.

The discipline's failure to debunk the theoretical unsustainability of the VP tradition was not, ultimately, a function of some kind of inherent intellectual limitation or its lack of ability for critical introspection. Quite on the contrary: to a large extent it was precisely its uncompromising commitment to the latter that eventually drove it to develop that falsely naive culture of theoretical cover-up which we see with the likes of Lowe, Corbett, and Brownlie.

---

[126] Sartre, *Being and Nothingness*, 88-89.

[127] Sartre, *Being and Nothingness*, 86.

[128] Sartre, *Being and Nothingness*, 89.

Looking back at the last 120 or so years, every generation of international lawyers since Triepel and Anzilotti has sought to launch a project of 'candor and sincerity', debunking the discipline's unholy union with the VP paradigm. Alejandro Alvarez, Eugene Korovin, Alf Ross, Myres McDougal, Charles Chaumont, Mohammed Bedajoui, David Kennedy, Karen Knop, Anne Orford, BS Chimni – the list runs on and on. For a brief fleeting moment, each of these critical interventions seemed to succeed: the project of critique broke the surface – the 'truth' momentarily came into view, the incoherence of the positivist dogma became undeniable – but the wave inevitably crested, dissipated, and ran into the sand.

It is a moot point to ask what could have been done differently. Paradigm displacement is neither a science one can codify, nor an art one can learn through practice. It is a function, rather, of fundamental politico-economic reforms that take place within the respective social planes. Inasmuch as no such reforms have (yet) taken place within international law's social base, it would be pointless to expect VP's reign to end.

In the meantime, the continuing stability of this reign seems to have induced within the broader theoretical landscape of international law a situation not dissimilar to that described by Friedrich Nietzsche in his commentary on Victorian-era liberal humanism:

> They have got rid of the Christian God [but they] feel obliged to cling all the more firmly to Christian morality. … When one gives up Christian belief one thereby deprives oneself of the right to Christian morality. For the latter is absolutely not self-evident: one must make this point clear again and again … Christianity is a system ... If one breaks out of it a fundamental idea, the belief in God, one thereby breaks the whole thing to pieces: one has nothing of any

> consequence left in one's hands. ... Christian morality ... stands or falls with the belief in God.[129]

Like Victorian liberalism, the VP paradigm endures as an artefact of a revolution arrested: an experiment in theoretical secularism that collapsed precisely at that point where it was meant to take the kind of leap of courage which the underlying politico-economic conditions could not allow.

The essential contours of the deal which the VP tradition offered the discipline of international law have not really changed since the days of Triepel and Anzilotti. What lies at the root of its sales-pitch – embrace the proposed method so as to be able to acquire a more reliable grasp of *international law as a real-world process* and to develop a more effective understanding of its potential *as a political mechanism* – is the same classical bargain Nietzsche detected with Victorian humanists: to master the world, turn to science and equip yourself with its tools and you will never need to worry about where you will find then your source of direction or guidance. But the particular version of science it brought with it, in the end, turned out to be nothing more than a crudely repackaged mixture of Kantian moral theory and Smithian economics, and the secularist bargain it advertised came out to be nothing more than a fraud.

[129] Friedrich Nietzsche, *Twilight of the Idols and the Anti-Christ* (New York: Penguin Books, 2003), 80-81.