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J.L. Brierly and The Modernization of International Law

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ABSTRACT

In this Article, the author provides an analysis of a classic of international law, The Law of Nations, *by J.L. Brierly. The author describes Brierly as an international legal scholar whose modernization of international law involves an emphasis on fact and complexity, an emphasis that is ultimately little more than a gesture. The author then examines the narrative structure of* The Law of Nations *and indicates the normative messages disclosed in Brierly's telling of the story of international law. Finally, the author describes Brierly's effort to describe international law as occupying a political realm while Brierly's evolutionary optimism made him anything but a political realist. In short, the author sees in Brierly's promises of complexity and realism a thinly veiled simplicity that would be subsumed into the orthodoxies of international legal thought.*

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I. INTRODUCTION: *THE LAW OF NATIONS*—THE PRIMER AS CLASSIC

"Any intelligent study of the problem of international relations must raise the question of the role, if any, to be assigned in them to law."[1] J.L. Brierly's parenthetical "if any" seems little more than an empty gesture to the possibility that law had no place in international relations. Indeed, Brierly had a strong commitment to the need for law in international affairs, and ended his short volume with the hope he had vested in the League of Nations: "With all its imperfections it offers the best and perhaps the only hope of the eventual triumph of law and reason in international relations."[2]

Although Brierly's book had a message to impart, he clearly wrote it as a primer of international law, and to a large extent it remains a primer. That fact did not condemn it to lowliness, for even Lassa Oppenheim began his two-volume treatise by describing his own work as "an elementary book for those who are beginning to study International Law."[3] Indeed, when Brierly listed the marks of Grotius's success, he began with the fact that "within a few years of [Grotius's] death his book had become a university text-book."[4] As a textbook, then, *The Law of Nations* could be found in the company of *De jure belli ac pacis.* Over the years, Brierly's *The Law of Nations* became a classic in its own right, with multiple editions and translations. In 1955, the year of Brierly's death, C.M.H. Waldock told us that Brierly wrote this book "as an outline of the law of peace for students beginning their law studies and for laymen anxious to learn something of the part played by law in the relations between states."[5] He also asserted that Brierly's book "has a strong claim to be considered the most masterly introduction to the study of the law of peace in any language."[6] The obligatory exaggerations of obituaries aside, *The Law of Nations* is clearly more than a textbook. The literature of international law constantly refers to Brierly's name. Henkin, Pugh, Schachter, and Smit, for example, use

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1. J.L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE at v (1928) [hereinafter BRIERLY, LAW OF NATIONS].

2. *Id.* at 222.

3. 1 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE at vi (1905).

4. BRIERLY, LAW OF NATIONS, *supra* note 1, at 25.

5. C.M.H. Waldock, *James Leslie Brierly (1881-1955)—A Biographical Note, reprinted in* J.L. BRIERLY, THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS at ix, x (Sir Hersch Lauterpacht & C.H.M. Waldock eds., 1958) [hereinafter BRIERLY, BASIS OF OBLIGATION].

6. *Id.*

Brierly to present relatively old-fashioned corners of their casebook coverage, such as the "good offices" of a state[7] and the acquisition of territory by prescription.[8]

Despite *The Law of Nations*'s later status as a classic, the book as it appeared in 1928 had all the indicia of a primer, if not to the extent of Schwarzenberger's *A Manual of International Law* with its array of bibliographic "Study Outlines."[9] Brierly, for example, tends to begin his chapters with definitions. Sometimes the definitions suggest complexity, such as the first sentence in Brierly's chapter on states.[10] But even where they suggest complexity, the opening sentences of Brierly's chapters suggest even more strongly that he is beginning with the rudiments of the international legal structure, defining its elements for the novice.

To begin this process, Brierly must define international law itself, hardly a novel approach for opening the main text of a volume on international law. In fact, the first sentence of Brierly's main text seemed to follow the lead of other texts. He begins: "The Law of Nations, or International Law, may be defined as the body of rules and principles of action which are binding upon civilized states in their relations with one another."[11] Oppenheim similarly began his treatise: "Law of Nations or International Law (*Droit des gens, Völkerrecht*) is the name for the body of customary and conventional rules which are considered legally binding by civilised States in their intercourse with each other."[12] In a popular text initially written as volume in the Dent Primer Series, Sir Frederick Smith opened: "By international law is meant the rules acknowledged by the general body of civilised independent states to be binding upon them in their mutual relations."[13]

Indeed, as if cribbing Smith's next move,[14] Brierly moves from his definition of international law to a claim that rules of international law may be found in the ancient and medieval past—"for ever since men

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7. *See, e.g.*, LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 573-74 (2d ed. 1987).

8. *Id.* at 307-09.

9. GEORG SCHWARZENBERGER, A MANUAL OF INTERNATIONAL LAW (1947).

10. "A state is an *institution*, that is to say, it is a relationship which men establish among themselves as a means of securing certain objects, of which the most fundamental is a system of order within which their activities can be carried on." BRIERLY, LAW OF NATIONS, *supra* note 1, at 56.

11. *Id.* at 1.

12. 1 OPPENHEIM, *supra* note 3, at 3.

13. FREDERICK SMITH, INTERNATIONAL LAW 25 (Phillipson 5th ed. 1918).

14. Smith suggested that "[i]n a form more or less rudimentary we may suppose such rules to have existed almost from the infancy of society." *Id.*

began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations."[15] Textbooks in international law should be more authoritative than original and less innovative than educational. To that effect, every subchapter of Oppenheim's treatise begins with a list of pages in which authors such as Hall, Westlake, Phillimore, and Wheaton address the same subject, as if Oppenheim's work primarily provided a concordance of all previous international legal scholarship.

Brierly opens his short book with a familiar one-sentence definition of international law and he then launches into an unoriginal prehistory of international law, in accordance with the genre. Similarly, Brierly takes few liberties with the standard organization of textbooks in international law. By following his definition of international law with a history of the field, a treatment of the "sources" of international law, and an examination of states as the "personalities" of international law in close succession, Brierly has replicated a well-established pattern. Whatever innovations others credit him with, his introductory text is as much a primer to the structure of the international legal textbook as it is to international law. Brierly's rendition of international law may have been quite a bit shorter than the various treatises on international law that populated the field. Moreover, his style makes his slim blue volume seem more like one of the volumes of the Oxford University Press's World Classics than a contribution to international legal discourse. Nevertheless, in its structure and in the material it addresses, *The Law of Nations* fully represents the traditions of international legal writing.

Despite the traditionalism in structure, *The Law of Nations* struggles against many of the traditions of international legal theory. In essence, Brierly attempts to modernize this theory. However, Brierly ultimately does not fulfill his modernizing promise. Despite all of his rhetoric about reality and complexity central to his modernization, he offers little more than gestures towards realism and complexity.

II. INTERNATIONAL LAW AS SOCIAL SCIENCE

In his memorial essay to Brierly in the *British Year Book of International Law*, Hersch Lauterpacht painted Brierly as a rebellious figure, although he acknowledged that "what in 1924 was iconoclastic has become almost orthodox."[16] In Lauterpacht's estimate, "Brierly's most sig-

15. BRIERLY, LAW OF NATIONS, *supra* note 1, at 1.

16. Sir Hersh Lauterpacht, *Brierly's Contribution to International Law*, 1955-56 BRIT. Y.B. INT'L L. 1, 2, *reprinted in* BRIERLY, THE BASIS OF OBLIGATION, *supra* note 5, at xv, xvi.

nificant—and perhaps most lasting—contribution to international law lies in the fact that during a period of transition and reassessment of values he threw the weight of his writing and teaching in the scales of what may properly be regarded as a progressive conception of international law."[17] For Lauterpacht, this translated into five basic contributions: "the rejection of positivism, the affirmation of the moral foundation of international law, the recognition of the individual as a subject of international law, the vindication of the unity of international and municipal law, and his criticism of the notion of the international sovereignty of the state."[18] To varying degrees, each of these elements appear in Brierly's writing. But Lauterpacht's list partly reflects his need to emphasize the kindred spirit and intellectual ally he found in Brierly, for it seems to overlook one of the most visible features of Brierly's work noted by the reviewers of *The Law of Nations*: the weight Brierly seemed to place on "facts."

The reviewer for the *American Journal of International Law* observed Brierly's emphasis on facts: "If the theory of equality, therefore, is interpreted to mean that all states have equal rights in law, it is contradicted by the facts."[19] The reviewer for the *British Year Book of International Law* commended the book for its "refreshingly commonsense spirit," which the reviewer found to be "a corrective to works of a more theoretical character."[20] Brierly's readers realized that he emphasized the factual world in writing his *Law of Nations*.

Indeed, Brierly used the word "facts" as an incantation throughout his international legal writings. The word appears frequently in his lectures on the subject of sovereignty at the Hague Academy of International Law in 1928,[21] and in his writing in 1949.[22] Similarly, Brierly's little textbook contains multiple references to fact and reality.[23]

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17. *Id.* at xv.

18. *Id.* at xvi.

19. The reviewer noted: "Throughout is evidenced [Brierly's] tendency to respect realities rather than theories; thus he insists that 'the law in the interests of general international order must recognize facts.' " Robert R. Wilson, Book Review, 23 AM. J. INT'L L. 478, 479 (1929)(reviewing J.L. BRIERLY, THE LAW OF NATIONS (1928)).

20. Book Review, 1929 BRIT. Y.B. INT'L L. 263, 264.

21. *See* J.L. Brierly, *The Basis of Obligation in International Law*, 23 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 463 (1928) [hereinafter Brierly, *Basis of Obligation*], *reprinted in English in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 1, 2, 7, 14, 40, 52, 55.

22. J.L. Brierly, *The Sovereign State Today* (1949), *reprinted in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 348, 350, 351 [hereinafter Brierly, *Sovereign State Today*].

23. BRIERLY, LAW OF NATIONS, *supra* note 1, at 9, 33, 35, 36, 65, 66, 77, 83.

Brierly's intellectual style in *The Law of Nations* described a theory as "contradicted by obvious facts," as in the first paragraph of his discussion of the doctrine of the equality of states.[24] To make sure that his reader had grasped the point, Brierly almost exactly repeated the formula on the next page: "If the theory of equality, therefore, is interpreted to mean that all states have equal rights in law, it is contradicted by the facts."[25] Similarly, Brierly opened "The Basis of Obligation in International Law" by declaring that most international lawyers have discovered the lack of facts to support international legal theory.[26]

In the opening sentence of his Hague lecture, Brierly clearly placed himself among those suspicious of the doctrinal formalisms of international law. He set himself firmly against the "dominance of false theories about international relations."[27] If he quoted Oppenheim on the "tyranny of phrases" in international law,[28] he produced many of his own locutions about the "myths" and "unrealities" of orthodox international legal theory. Referring to the analogy of states to persons, Brierly criticized the "mysticism" produced by Hegel and Rousseau, and insisted that such analogies are "only metaphors."[29] He spoke of other international legal concepts as little more than illusion.

Legal realists, especially those in the legal realist movement of the 1920s and 1930s in the United States, often accused others of mythological thinking.[30] Much like the United States legal realists, Brierly ex-

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24. *Id.* at 65.

25. *Id.* at 66.

26. BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 1.

27. *Id.*

28. *Id.* Referring to Cardozo in *The Sovereign State Today*, Brierly described sovereignty as "one of those concepts of which an eminent American judge has written that they become our tyrants rather than our servants when they are treated as real existences and developed with disregard of their consequences to the limit of their logic." Brierly, *Sovereign State Today*, *supra* note 22, at 349.

29. BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 29.

30. The most dramatic example was Jerome Frank's *Law and the Modern Mind*, in which Frank essentially psychoanalyzed the pathology of legal "scholasticism" and opened with a chapter entitled "The Basic Myth." *See* JEROME FRANK, LAW AND THE MODERN MIND (1930). The mythographic critique of legal realists, whether by Brierly or Frank, derives from the critical tradition of the Enlightenment. *See* 1 PETER GAY, THE ENLIGHTENMENT: AN INTERPRETATION 127-203 (1966).

In his suggestive essay *Modernism, Nationalism, and the Rhetoric of Reconstruction*, Nataniel Berman defines as part of modernism in international law an investment in the primitive as embodied by nationalism; although paralleling Brierly's commitment to the particular, Berman's modernists seem somewhat at odds with Brierly's Enlightenment program of demystification despite their adoption of scientific technique. Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J. L. &

pressed an interest in social reality. He felt that the doctrines of international law should reflect the social realities of those political entities called states.[31] Consequently, Brierly insists that law must continually adapt to social development, as he does in his essay, "The Legislative Function in International Relations."[32]

Brierly's writing expresses a strong belief that the static and overly formalistic elements of international legal doctrine ignore the realities of the world. He reminds his reader in *The Draft Code of American International Law* that states "are not logical constructions, but the products of an historical process, of which we can trace the main outlines; and like all historical conceptions, the conception of the state is always changing."[33] With this understanding, Brierly showed impatience with philosophical ideas that come more from thought experiment than reality. Criticizing the individualism of Lockean liberalism in *The Law of Nations*, Brierly asserted that "the only individuals we know are individuals-in-society."[34] He criticized both positivist and naturalist conceptions of the state for inadequately reflecting reality.[35] For Brierly, the international lawyer must attend to the actual world as an evolving social system.

In essence, Brierly engaged in a sort of sociological jurisprudence. Whether or not Brierly initiated a sociological school of international law, as Lauterpacht obliquely suggested in his memorial, it should not be surprising to find Brierly quoting from Roscoe Pound, the major United States exponent of sociological jurisprudence.[36] An unmistakable

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HUMANITIES 351 (1992).

31. "For after all, law is not an isolated phenomenon, but only a part of the general texture of society; you cannot take it out of its social context, thinking to improve it, without destroying its vitality; you can develop it only as one of the functions of a growing society." J.L. Brierly, *The Judicial Settlement of International Disputes* (1925), *reprinted in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 93, 107.

32. He begins the article by stating: "Law develops and is made responsive to changing social conditions by three instrumentalities—custom, interpretation (particularly by judges in the form of judicial precedent), and legislation." Brierly, *The Legislative Function in International Relations* (1931), *reprinted in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 212, 212.

33. Brierly, *The Draft Code of American International Law*, 1926 BRIT. Y.B. INT'L L. 14, *reprinted in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 122.

34. BRIERLY, LAW OF NATIONS, *supra* note 1, at 36.

35. "[N]either affords an adequate explanation of the fact from which it professes to account, namely, international law as it may be observed in actual operation in the intercourse of states." *Id.* at 34-35.

36. This oblique suggestion appears in Lauterpacht, *Brierly's Contribution to International Law*, *supra* note 16, at xv. Brierly quoted Pound's *Interpretations of Legal*

social-scientific sensibility emerges from Brierly's writings on international law. Not only did he insist on the significance of social and political reality, but he wrote in a style that showed the influence of social science. As mentioned above, he opened his discussion of states in *The Law of Nations* by defining the state as an "institution" and further observed that "it is only one among a multitude of other institutions."[37] He also called social scientists to his aid, as he did in his attack on the theory of fundamental rights, by asserting that "hardly any political scientist to-day would regard it as a true philosophy of political relations."[38]

In *The Outlook for International Law*, Brierly observed that the "intractability of facts prevents the practice of law from ever becoming a science; it is and always will be an art."[39] The very particularity of the factual world made it impossible for general legal principles to be applied without modification. But if Brierly disclaimed science as a model for law, one of the central arguments of all his work continued to be that international law reflected the social and political conditions of international reality. In the same book as his disclaimer of science, then, Brierly could explain that the "rise of international law was in fact one of the consequences of that great political change which marks the dividing line between the medieval and the modern eras."[40] With his understanding of international law as conditioned by political and social development, Brierly wrote international law largely as a social scientist.

When Brierly ventured into the discourse on sovereignty and the sources of legal obligation, as in his lecture at the Hague Academy of International Law, he entered an area of study long shared by international lawyers and political scientists.[41] Brierly began his lecture, "The Basis of Obligation in International Law," with reference to the "recent

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History in the *British Year Book of International Law* in 1924. J.L. Brierly, *The Shortcomings of International Law*, 1924 BRIT. Y.B. INT'L L. 4, *reprinted in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 68, 72. And he used a quotation from Pound's book as an epigraph to begin the final chapter of *The Outlook for International Law*. J.L. BRIERLY, THE OUTLOOK FOR INTERNATIONAL LAW 118 (1944) [hereinafter BRIERLY, OUTLOOK]. For a broad discussion of sociological jurisprudence in European and American contexts, see W. FRIEDMANN, LEGAL THEORY 187-210 (3d ed. 1953).

37. BRIERLY, LAW OF NATIONS, *supra* note 1, at 56.

38. *Id.* at 35.

39. BRIERLY, OUTLOOK, *supra* note 36, at 16.

40. *Id.* at 3.

41. *See* BRIERLY, BASIS OF OBLIGATION, *supra* note 21. The English version of Brierly's lecture was his original draft, but the lecture was first published as J.L. Brierly, *Le Fondement du caractère obligatoire du droit international*, 23 R.C.A.D.I. 463 (1928).

literature of international law," but he did so in order to point to the "unrealities" that made up so much of international legal doctrine, and he suggested that international law "be kept in touch with the facts of international life."[42] That project, he thought, would be to the "credit of international law as a subject of scientific study."[43] Whatever his scientific pretensions, Brierly's decision to examine a cluster of notions involving sovereignty, the base for the authority of legal regimes, and the force of international law, lent itself naturally to interdisciplinary exploration. Appropriately, Brierly turned in his lectures to *The Modern State* by the University of Toronto's Robert MacIver,[44] one of the preeminent social scientists of Anglo-American academia, to the British philosopher T.H. Green,[45] and to a book by the progressive historian Carl Becker.[46] Brierly did not restrict himself to the traditional reference points of the international lawyer, that is, to other international lawyers and the political philosophers of past eras, such as Hobbes, Locke, and Rousseau.

Despite the interdisciplinary nature of Brierly's project, the opening of his lecture gave the Hague Academy audience little notice that he would range beyond the standard international legal materials. Indeed, the only writer he mentioned in the first page of his address was Lassa Oppenheim. Despite the fact that Brierly's examination of sovereignty was fully interdisciplinary, he did not make an explicit statement about the importance of interdisciplinary study in the lecture, as he did in a lecture to the Society of Public Teachers of Law in 1925.[47] In that address, he noted the utility of an interest "in philosophy, in history, and in the art of legislation" for the international lawyer, asserting that "if he attempts to dissociate his subject today from these connected studies he will merely condemn himself to certain sterility."[48] Nevertheless, the Hague Academy audience in 1928 clearly observed as Brierly began his lecture that

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42. BRIERLY, BASIS OF OBLIGATION, SUPRA note 21, at 1.

43. *Id.*

44. *Id.* at 47, 66. MacIver, who was extremely significant to the development of both political science and sociology, devoted most of his study to community groupings, whether social or political.

45. Thomas Hill Green, an important idealist philosopher, taught moral philosophy at Oxford. *See* BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 3 (citing T.H. GREEN, PRINCIPLES OF POLITICAL OBLIGATION (1895)).

46. Historians often associate Becker with Charles A. Beard and Frederick Jackson Turner. *See, e.g.*, RICHARD HOFSTADTER, THE PROGRESSIVE HISTORIANS at xi-xii (1968). Brierly refers to Becker's 1922 work *The Declaration of Independence* in BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 30.

47. J.L. Brierly, *International Law as a Subject of Education*, 1926 J. SOC'Y PUB. TCHRS. L. 1, *reprinted in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 127-33.

48. *Id.* at 130.

he was launching an attack on the state of his discipline.

The introductory pages of Brierly's lecture intoned the Enlightenment theme of the struggle of *logos* against myths and championed progress beyond the received mythology of international legal doctrine. If anything, Brierly was too insistent in his symptomology of international law. After referring to the "unrealities" that "traditionally pass for international law," he quoted Oppenheim on the need to free international law from the "tyranny of phrases."[49] In his second paragraph, he speaks of the "dominance of false theories" and of "imaginary difficult[ies]."[50] His third paragraph hits the same notes, referring to "superstition" and "false or outworn theories," and even suggests that the actors on the international stage "may easily be unconscious of theoretical prepossessions which, nevertheless, powerfully influence their whole attitude towards practical affairs."[51] International law, as Brierly described it, seemed to have more affinity with the world of James Frazer's *The Golden Bough* than with the world of modernity.

On the other side of the science-against-myth rhetoric Brierly depicted his own enterprise as scientific. Brierly thus talks of "scientific study" and twice uses the term "inquiry" before asserting that his "subject-matter is simply the existence of certain social facts, and that the value of any theory must be tested according as it contributes to a proper understanding of those facts as a whole."[52] Clearly, Brierly envisioned his discipline as a science of the inductive, Baconian model.

Having established the science/mythology dichotomy, Brierly used it to attack the two traditional theories of obligation in international law: the theory that based obligation on natural rights and the theory that based obligation on consent. Starting with the doctrine of natural rights, Brierly intones familiar themes: he talks of "pure gospel," "legal metaphysics," and the fact that the theory "misrepresents human nature."[53] After situating the theory historically in the world of the "post-Renaissance prince,"[54] Brierly criticized an account of international legal obligation founded on a theory of natural rights because it "violates the historical sense," falsely envisioning the "state as something static, instead of being . . . the product of a historical process."[55] Evidently, anyone

49. BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 1.
50. *Id.* at 1-2.
51. *Id.* at 2.
52. *Id.* at 1-3.
53. *Id.* at 4-7.
54. *Id.* at 4-5.
55. *Id.* at 5.

advocating a natural-rights justification for international law had missed the historical lessons of the nineteenth century.

Before leaving the subject of natural rights, Brierly made an unexpected stop, distinguishing between the fundamental-rights theory he had just criticized and the doctrine of natural law.[56] Although his gesture toward natural law may seem at odds with his modern scientific rhetoric, Brierly envisioned natural law as a "creative element in all law at all times."[57] As opposed to its "immutable" sibling, natural-rights theory, natural law "is the indispensable element of growth in law."[58] Thus, Brierly attacked the static vision of natural-rights theorists, but he favored natural law with a place in his dynamic political universe.

In his discussion of the second of the two traditional theories for obligation in international law—that international legal obligations are based on consent—Brierly again relied on his usual rhetoric, calling it a "fiction," an "inadmissible fiction," and a "survival."[59] Brierly even indulged himself in a swipe at that favorite target of the English commonsense tradition, Hegel,[60] who had heavily influenced other German theorists such as Jellinek, and who based his ideas about an international law on the self-limitation—*Selbstbeschränkung*—of states.[61]

For Brierly, the two traditional theories for obligation in international law shared a single misperception—their vision of state as analogous to an individual, "capable of being the subject of rights and having *a single will*, much after the manner of an individual human being."[62] At that point, Brierly turned specifically to the history of the theory of sovereignty and condemned a whole range of political philosophers from Bodin and Hobbes through Rousseau and Hegel. Brierly claimed that these philosophers were in error because they persistently assumed "that the

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56. Brierly asserted: "Natural law, or some principle like natural law by whatever name it may be called, never is excluded in fact, and never can be excluded in principle, either from the theory or the administration of law, however resolutely the jurist may banish it from his formal creed." *Id.* at 8. Here Brierly cited an address by Morris R. Cohen, *Positivism and the Limits of Idealism in the Law*, *in* PROCEEDINGS OF THE 6TH INTERNATIONAL CONGRESS OF PHILOSOPHY (1926).

57. BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 8.

58. *Id.*

59. *Id.* at 12, 13, 16.

60. As proof that Hegel had become a punch line, one need go no farther than the first sentence of Harold Laski's *Studies in the Problem of Sovereignty*: "Hegelianwise, we can not avoid the temptation that bids us make our State a unity." HAROLD J. LASKI, STUDIES IN THE PROBLEM OF SOVEREIGNTY 1 (1917).

61. BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 13-14.

62. *Id.* at 19 (emphasis in original).

state can be understood by a process of deductive reasoning."[63] He stated that their theories were "about as misleading as the conclusions of astronomers before the discoveries of Copernicus."[64]

In this context, Brierly introduced his belief that "we live in a world of a plurality of states."[65] Not only have the two traditions produced mythologies instead of realities, but they have also missed the central fact of international life—complexity and variety. Having attacked the twin poles of the established sovereignty discourse, Brierly suggested that something real existed in the notion of sovereignty. Amidst all the mythology, a reality exists that is "no myth."[66] This presaged Brierly's three-part argument that, after all, the individuals that make up a state remain a reality parallel to the state itself; the state itself is not a mere fiction; and the individuals within a state have a range of other attachments beside their state association.[67] More than anything else, Brierly created complexity by positing ironic oppositions, such as that between sovereignty as a myth and sovereignty as reality. The same incentive operated in Brierly's opposition between natural rights and natural law—the suggestion of complexity through the creation of proximate opposites.

Brierly's strategy of positing proximate opposites was accompanied by a more familiar modernist strategy of fusing categories traditionally placed in sharp opposition,[68] such as the opposition of international and municipal law. "The sphere of international law," he wrote, "is different from that of internal law because it is international and not internal, and its manner of application is different because its organization is rudimentary and its ambit narrowly circumscribed."[69] Nevertheless, he continued, "that does not mean that the relations which [international law] regulates are either non-political or non-juridical in character."[70] He admitted that "power in the international sphere is still largely unregulated

63. *Id.* at 30.
64. *Id.*
65. *Id.*
66. *Id.* at 36.
67. *Id.* at 50.
68. On the modernist "antipathy for, or rejection of, absolute polarities," see NORMAN F. CANTOR, TWENTIETH-CENTURY CULTURE: MODERNISM TO DECONSTRUCTION 38 (1988). As part of his definition of modernism, Nataniel Berman refers to "the juxtaposition, in a single work, of elements considered irreconcilable under traditional criteria of coherence." Berman, *supra* note 30, at 354.
69. BRIERLY, BASIS OF OBLIGATION, supra note 21, at 55.
70. *Id.*

by law."[71] But he countered that the law does not wholly regulate power even within a state, and that power is "regulated with differing degrees of efficiency in different states."[72] This suggestion allowed Brierly to declare that the regulation of power "is always and everywhere a matter of degree."[73] In essence, Brierly's lecture revealed his modern commitment to gradation and continuity as opposed to the sharply defined categories of the received tradition.

Despite Brierly's fully modern gradualism, the Hague lecture evidenced the revival of natural law, as Lauterpacht observed in his memorial to Brierly. In his last sentence, Brierly told his audience: "This no doubt is to believe in natural law, but I confess that to me the modern resurgence of natural law theories seems to open a vista full of hope for legal science."[74] This blend of natural law and legal science invokes eighteenth-century moral science rather than a modern intellectual style.

One must view the final section of Brierly's talk, his discussion of the moral foundation of international law, in the context of the last pages of his talk. Before he made his final points on the moral basis of international law, Brierly addressed the theories of Léon Duguit and Hugo Krabbe, which involved an essentialist foundation for law. Duguit found the source of the obligation to law in an innate human sense of "solidarity," while Krabbe posited a universal "sense of right"[75] at the core of legal obligation. Both theories, for Brierly, displayed more myth than fact. Mustering his English common sense, Brierly wrote of Krabbe's thesis, "For my own part I can only say that my own 'sense of right' rejects entirely this version of *vox populi vox dei*," and he derided Krabbe's overly formalistic belief that "a constitutional provision requiring more than a bare majority for a constitutional change has no legal value."[76] Rather than answering the basic question of why law of any type works, Krabbe's theories seemed mostly to provide a source of amusement.

Brierly did, however, make a transition from these two unfortunately metaphysical and overly idealistic theories of the source of legal obligation to his own founding of legal obligation in morality. In the end, Brierly himself felt that "the obligation to obey the law cannot be any-

71. *Id.*

72. *Id.*

73. *Id.* at 56.

74. *Id.* at 67.

75. *See id.* at 56-64. The central text Brierly uses to examine Krabbe is H. Krabbe, *L'idée moderne de l'état*, 13 R.C.A.D.I. 509 (1926).

76. BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 61.

thing but moral."[77] After deriding the metaphysical in other foundational theories, he admitted: "Ultimately, I suppose, we must fall back on metaphysics."[78] Despite the defensiveness of the "I suppose," Brierly's final sentences seem alien to the modern sensibility. But by prefacing his moral-based legality with a critique of Duguit and Krabbe, Brierly introduced a modern element: in essence, he reproduced the two theorists as proximate opposites of his own version of the foundation of legal obligation. Moreover, the short discussion of morality seems rather open-ended, merely posed suggestively at the close of Brierly's lecture. Rather than the clear-sighted champion of natural law depicted by Lauterpacht, we witness an ambivalent spokesman, who "supposes" and "confesses" his message.

Putting aside the vague disclaimers of supposing and confessing, the slight embarrassment Brierly expressed at the end of his lecture, and his movement between science and morality, Brierly characterized a modern, largely progressive intellectual positioning between science and religion. The modern suspicion of polar oppositions often blended with an effort to navigate between scientific and religious value, or rather, draw from both.[79]

Brierly simultaneously set law off from ethics and brought ethics into law. What he was arguing, he told his audience, "does not mean that a legal and a moral obligation are of the same character."[80] This sentence immediately followed his assertion that at the core of obligation one finds

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77. *Id.* at 65.

78. *Id.* at 67.

79. In reference to this pattern among intellectuals between 1870 and 1920, James Kloppenberg has written: "Discarding accepted distinctions between idealism and empiricism in epistemology, between intuitionism and utilitarianism in ethics, and between revolutionary socialism and laissez-faire liberalism in politics, they converged toward a *via media* in philosophy and toward the political theories of social democracy and progressivism." JAMES T. KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT 1870-1920, at 3 (1986). In depicting this intellectual mode, Kloppenberg focuses particularly on Wilhelm Dilthey, Thomas Hill Green, Henry Sidgwick, Alfred Fouillée, William James, and John Dewey. Although most of these figures were at least a generation older than Brierly, many of Brierly's exact contemporaries appear in Kloppenberg's study.

Perhaps one of the best expressions of this sort of combining of science and religion occurs in the last pages of Dewey's *Reconstruction in Philosophy*. "When philosophy shall have co-operated with the course of events and made clear and coherent the meaning of the daily detail, science and emotion will interpenetrate, practice and imagination will embrace. Poetry and religious feeling will be the unforced flowers of life." JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY 212-13 (2d ed. 1948).

80. Brierly, BASIS OF OBLIGATION, *supra* note 21, at 65.

ethics. In simultaneously merging and distinguishing law and ethics, Brierly adopted a modern strategy. Amidst his historicization and breaking down of ontological categories, he took a position much like Dewey's towards ethics. Just as Dewey rejected the tradition traceable to Aristotle of distinguishing ethical from political obligation, Brierly insisted on the ethical foundations of legal obligation.[81]

Brierly's fusing of law and ethics depicted his general style of recognizing the social, the political, and even the emotive[82] contexts of law; he would distinguish them from law only to assert their connection to the legal realm. Brierly's understanding of humanity approximated that of other modern students of human nature, including Léon Bourgeois, whose *Solidarité* was widely read among British liberals and progressives.[83] Brierly's Hague lecture of 1928 did not contradict Bourgeois's assertion that modern empirical study should undertake an examination of the human being as "a being of passion, reason, and conscience . . . born from the historical process and living in a social milieu to which he stands in a reciprocal relation."[84] Although observers often gauge the modernism of the social sciences by its objectivism, scientism, and professionalization,[85] the blending of realms characterizes an important strain in the social and human sciences. Against a backdrop of an increased effort to define borders between disciplines, the social and human sciences experienced an important trend toward integrative and interdisciplinary study.[86]

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81. Dewey articulated this long-term commitment particularly clearly in JOHN DEWEY, THE STUDY OF ETHICS (1894). For a description of this strain in Dewey's thought, see KLOPPENBERG, *supra* note 79, at 351.

82. Brierly, for example, suggests that Krabbe's "theory has the merit of restoring the emotional side of our nature to its proper place in this question." BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 63.

83. *See* KLOPPENBERG, *supra* note 79, at 304.

84. LEON BOURGEOIS, SOLIDARITÉ 14-15 (7th ed. 1912), *cited in* KLOPPENBERG, *supra* note 79, at 303. Kloppenberg used Bourgeois's observation to summarize the central views of the modern strain he was examining in *Uncertain Victory*.

85. *See, e.g.*, EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE (1973). In the history of the social sciences, much is made of Max Weber's methodological essays on the neutrality of the social sciences. *See, e.g.*, J.H. ABRAHAM, ORIGINS AND GROWTH OF SOCIOLOGY 109-10 (2d ed. 1977).

86. In an important sense, Brierly's international law fits this mode, drawing broadly from outside the literature of his discipline. For a subject like sovereignty and the obligation of law, which occupies a liminal position between law and political science, one would expect lawyers and social scientists to cite each other. The bibliography of political scientist Charles Merriam's book on sovereignty, for example, contains not only the names of Henry Sidgwick, Heinrich von Treitschke, and Alexis de Tocqueville, but also

In this integrative spirit, Brierly's lecture corresponds to one of Brierly's sources, Robert MacIver's book of two years earlier, *The Modern State*.[87] One of the important innovators of twentieth-century political science, MacIver was predictably more precise in definitions of social forms than Brierly, distinguishing, for example, between associations and institutions.[88] In the end, however, many of MacIver's clearly drawn distinctions dissolve. MacIver created what seems a sharper divide between law and ethics than Brierly,[89] but he quoted Roscoe Pound to the effect that law includes "a body of philosophical, political and ethical precepts."[90] While distinguishing legal from other forms of social rules, MacIver recognized law as one of many regimes, and, much like Brierly, contextualized law in an evolutionary pattern.[91] And law, whether municipal or international, was multiform.[92]

Particularly instructive on Brierly's critique of the unified state, or the unified locus of power called sovereignty, were his references to Walter Lippmann's *The Phantom Public*.[93] Published three years after *Public Opinion*, Lippmann's book described the indirect and imperfect control the public exercises on its government[94] and the fact that the public itself hardly possesses the coherence assumed in any political theory based on

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those of R.J. Phillimore, W.E. Hall, and Henry Wheaton. CHARLES E. MERRIAM, HISTORY OF THE THEORY OF SOVEREIGNTY SINCE ROUSSEAU 228-32 (1900). It should not be surprising to find the "Sovereignty" entry in the *Encyclopaedia of the Social Sciences* refer to figures who appear in Brierly's lecture, from Austin and Jellinek to Duguit and Krabbe. 14 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 265-69 (1934). Nevertheless, the interdisciplinary enterprise could easily have been passed over, as in Oppenheim's treatise and Schwarzenberger's manual.

87. R.M. MACIVER, THE MODERN STATE (1926). In his history of sociology, J.H. Abraham lists MacIver among those practicing sociology as "a wide-ranging cultural endeavour." ABRAHAM, *supra* note 85, at 623.

88. *See* MACIVER, *supra* note 87, at 5-7.

89. *Id.* at 260-61.

90. *Id.* at 268 (citing Roscoe Pound, *Theory of Judicial Decisions*, 36 HARV. L. REV. 641 (1923)).

91. MacIver wrote, "The law remains a framework of social order, an organic framework if we care to call it so, since it grows and changes, but only one agency of control among the great forces which express the nature of society." *Id.*

92. "There is no question here of the establishment of a dead level of uniformity, such as many people foolishly envisage when they think of a universal reign of law. Law creates no such level within the state, and is still less likely to create it between states." *Id.* at 289.

93. WALTER LIPPMANN, THE PHANTOM PUBLIC (1925).

94. "For did justice, truth, goodness and beauty depend on the spasmodic and crude interventions of public opinion," Lippman wrote, "there would be little hope for them in this world." *Id.* at 67.

the "will of the people." As the title suggested, only a "phantom public" exists. If Brierly did not entirely share the cultural pessimism of Lippmann's writing on the modern public, he shared Lippmann's broader iconoclasm about the public as the unified locus of the sovereign power of the democratic state. Brierly shared this iconoclasm as well with other writers of the progressive tradition, including John Dewey, who spoke of the democratic public as "still largely inchoate and unorganized,"[95] and Harold Laski, who severely criticized the standard notions of sovereignty in *Studies in the Problem of Sovereignty*.[96] Along with MacIver, Lippmann, Dewey, and Laski, Brierly saw a world of complexity and particularity. Ultimately, the myth of sovereign unity had little correspondence to the realities of political organization and the character of legal obligation.

Brierly flattened out the arguments and the style of his lecture in *The Law of Nations*. Some of the same themes emerge: the critique of the consensual and natural-law theories of international legal obligation,[97] the rejection of sovereignty in the form of popular sovereignty as an accurate description of legal relations within states,[98] the continuity between obligation in municipal and international law,[99] and even a suggestion that law has a closer relation to "right" than generally assumed.[100] Nevertheless, Brierly separates his discussion of obligation in international law and his discussion of sovereignty. He discusses the obligatory nature of international law in his opening chapter, "The Origin and Character of International Law," while placing his discussion of the sovereignty in his second chapter, "States." In essence, Brierly chose to adopt the orthodox organization of international law and start with the history of international law, its general character, and its sources, before turning to his discussion of states as the traditional subjects of international law.

Because *The Law of Nations* was published in the same year that Brierly gave his Hague lecture, it presents many of the same intellectual commitments. Against the myths of the traditional theories of international law and obligation, Brierly presents a world of change and complexity. But the standard organization of international legal texts subsumes the clear movement of the Hague lecture, and thus the lecture's

95. JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS 109 (1927).
96. LASKI, *supra* note 60, at 16-17.
97. BRIERLY, LAW OF NATIONS, *supra* note 1, at 34-39.
98. *Id.* at 59-63.
99. *See, e.g., id.* at 65-67.
100. *Id.* at 43.

argument loses continuity. Some of Brierly's lecture points appear in his narrative of the history of international legal theory, others appear in the opening pages, while still others appear in his doctrinal discussion of states.

Despite their different structural models, the lecture and the book both ended in a cautiously redemptive tone; both end with the articulation of a hope for the future of international law. Brierly ended his Hague lecture on the following note: "This no doubt is to believe in natural law, but I confess that to me the modern resurgence of natural law theories seems to open a vista full of hope for legal science."[101] With the invocation of a series of religiously colored words—hope, belief, resurrection, and confession—Brierly's lecture ended in a redemptive moment, placing its future in the hands of natural law. By comparison, Brierly's little textbook ended with the League of Nations: "With all its imperfections it offers the best and perhaps the only hope of the eventual triumph of law and reason in international relations."[102] One word in the sentence, "reason," offered a thin connection with the hope registered in the Hague lecture. But for the book's reader, the essence of Brierly's hope was an institutional solution to problems of international relations; the last sentence of *The Law of Nations* exemplified the "move to institutions."[103]

Instead of coming at the end of the textbook, the trust Brierly put in natural-law solutions to international problems appears mostly in the history. It is embedded ironically in Brierly's discussion of the *ius naturale*, as distinguished from *ius gentum*, of medieval legal writers and the "right reason" that still appeared in Grotius's *De jure belli ac pacis*.[104] Not only did Brierly give natural law a less prominent place in his text than in his lecture, but he also seemed to bypass the important tension of the lecture between faith and science, which was at the core of Brierly's modernist *via media*.

Like the lecture, *The Law of Nations* pronounced Brierly's commitment to the variety of the factual world and the specificity of historical

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101. BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 67. The French version of the lecture ends: "Ceci est sans doute croire au droit naturel, mais, je le confesse, la résurrection moderne des théories d'un droit naturel réformé me semble ouvrir une perspective pleine d'espoir à la science juridique." Brierly, *Le Fondement du caractère obligatoire du droit international*, *supra* note 41, at 549.

102. BRIERLY, LAW OF NATIONS, *supra* note 1, at 222.

103. On the move after World War I to an institutional emphasis for international law, see David Kennedy, *The Move to Institutions*, 8 CARDOZO L. REV. 841, 841-951 (1987).

104. BRIERLY, LAW OF NATIONS, *supra* note 1, at 11, 22.

development. Ultimately, complexity and contingency characterized the world of Brierly's book, like the world of his lecture. Although some of the intellectual tensions of the lecture are discernible in the textbook, they seem to play only a minor part. Brierly forced much of the philosophical and epistemological dialectic of the lecture to the background of the text, despite the priority the text seems to give to the idea of complexity. That, however, is one of the central traits of the book. As a brief for complexity, *The Law of Nations* offers easily digestible complication; it suggests a manifold that is never too difficult. Despite the constant invocation of facts, Brierly's book presents precious few facts. Evidently, the reader may not witness the complexities of a world of multiplicity directly but must register them in an abstract sense. In essence, Brierly's classic text gives its reader facile complexity. In this respect, the book's message is not so much complication as simplicity, helping thereby to confirm the institutional promise of the League of Nations. Perhaps the primer aspect of *The Law of Nations*, the offer of complexity without content or difficulty, made it a classic in the literature of international law.

III. INTERNATIONAL LAW AS HISTORY

In 1923 Roscoe Pound observed in his essay published in the *Bibliotheca Visseriana* that "two significant differences exist between the classical international law of the seventeenth and eighteenth centuries and the international law of the immediate past."[105] Essentially, an historical foundation replaced the seventeenth-century philosophical foundation "and [set] off of international law as a separate subject, apart from jurisprudence and political science with which it had been associated through a common philosophical foundation."[106]

Pound's depiction of the simultaneous historicization and professionalization of international law is a familiar story of disciplinary development, one replicated in many of the humanities and social sciences. The historicization of Anglo-American international law largely stems from the powerful influence of Henry Sumner Maine's *Ancient Law*.[107] Following its publication in 1861, this book broadly influenced an entire

105. Roscoe Pound, *Philosophical Theory and International Law*, *in* 1 BIBLIOTHECA VISSERIANA 71, 73 (1923).

106. *Id.*

107. HENRY S. MAINE, ANCIENT LAW (1888). For an example of the significance of Maine's study on the understanding by international lawyers of the development of their discipline, see HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 4-5 (George G. Wilson ed., 1936).

range of English and United States jurisprudence.[108] In their own historicization, international legal scholars have tended to dwell less on the ancient foundations of international law along the lines of Maine than on the doctrinal development of international law in the centuries following the Treaty of Westphalia. After an abbreviated discussion of the various ancient anticipations of international law, commentators in the international legal field traditionally explain the history of their discipline by tracing a thinker-by-thinker progression.[109] The largest narrative section of Brierly's *The Law of Nations* keeps pace with this tradition.

In narrating the development of international law, Brierly could have adopted a number of alternative strategies. The telling of the story of the narrator's own profession is necessarily overladen with significance about the narrator's identity and the relation of the narrator to his or her predecessors. Such genealogy cannot avoid becoming family genealogy and is often combined with the anxieties of influence[110] and elaborate efforts at self-fashioning.[111]

Before examining the various elements of Brierly's narrative and interpreting its iconographic elements, one must determine whether the story is indeed coherent and whether the narrator has produced a plot that displays "the principle of interconnectedness and intention."[112] An author may surrender all hope of establishing a cognizable pattern, as Freud did in narrating the history of the science of dreams in *The Interpretation of Dreams*.[113] An author may also choose to allow a descrip-

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108. Oliver Wendell Holmes's *The Common Law* (1881), for example, would be difficult to imagine without the model of Maine's *Ancient Law*.

109. *See, e.g.*, OPPENHEIM, *supra* note 3, at 44-87; JOHN WESTLAKE, CHAPTERS IN THE PRINCIPLES OF INTERNATIONAL LAW 15-77 (1894). Often the series of intellectual figures comes under the heading "science." *See, e.g.*, OPPENHEIM, *supra* note 3, at 76; SCHWARZENBERGER, *supra* note 9, at 3. In recent decades the historical sketch of international legal theory has atrophied, as suggested in David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988). Significantly, Ian Brownlie's treatise has no historical discussion at all. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW (4th ed. 1990).

110. *See* HAROLD BLOOM, THE ANXIETY OF INFLUENCE (1973). In addition to the anxiety of influence described by Bloom, there may be attempts at what Freud called "family romance," essentially reinventing one's own parentage.

111. *See* STEPHEN GREENBLATT, RENAISSANCE SELF-FASHIONING (1980).

112. PETER BROOKS, READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE 5 (1984); *cf.* HAYDEN WHITE, THE CONTENT OF FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION 9 (1987).

113. "It is difficult to write a history of the scientific study of the problems of dreams because, however valuable that study may have been at a few points, no line of advance in any particular direction can be traced." SIGMUND FRUED, THE INTERPRETATION OF DREAMS 39 (James Strachey trans., 1955). Evidently, one of Freud's messages was that

tion of history to set out a series of ideal types, and, therefore, establish a basic repertory of possible intellectual positions. Westlake used this method in his *International Law* by breaking off his history of international legal development with Vattel in the eighteenth century and asserting, "It is not necessary to pursue our historical sketch further. Indeed, if carried further, [it] could only display the operation, with regard to particular questions, of those general tendencies and principles of which we have seen the origin."[114] Westlake had described Grotius, Wolff, and Vattel to establish a set of stock characters who could represent the standard positions along the international legal spectrum. With Vattel, Westlake reached the end of history, for all future theorists will merely be replicative of past theorists.

Brierly neither despairs of telling a coherent story as did Freud, nor does he simply set out a typology of stock intellectual positions as did Westlake. Rather, Brierly traces the history of international law from the antique world to the present. His story may end its chronological movement with Vattel, but the narrative ellipsis between Vattel and Brierly's discussion of the modern world is not a sharp break. In the last paragraph on Vattel, Brierly talks of Vattel's influence, suggesting a sort of intellectual afterlife, and Brierly's first paragraph on modern theory begins with a reminder that the "traditional division between the naturalist and the positivist schools above referred to is maintained in the current literature of international law."[115] Brierly's narrative threatens to become flattened typology by reiterating the positivist/naturalist split that he established earlier. Brierly's treating of characters, however, does not necessarily imply the dissolution of the plot into static representation. Indeed, the short history of international law at the beginning of Brierly's book is not without direction and movement.

Brierly's short history of international law is, however, but one narrative structure among many in *The Law of Nations*. One can read the text as a narrative composed of sub-narratives, some more strictly chronological than others. In fact, Brierly ordered the book into alternating sections of chronological movement and structural analysis and sections of a synchronic and a diachronic nature. The first few pages after Brierly's opening definition of international law explain the development of the state from some abstract prehistorical moment to the early-modern European establishment of the state system and the simultaneous recognition of a unity beyond the sovereign state. Having established the state

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he was not standing on the shoulders of giants.

114. WESTLAKE, *supra* note 109, at 77.

115. BRIERLY, LAW OF NATIONS, *supra* note 1, at 33.

and the "rise of international law,"[116] Brierly's text arrives at a point of stasis. At this point the world has reached a moment of accomplishment: "Thus [the rise of international law] reasserted the medieval conception of unity, but in a form which took account of the new political structure of Europe."[117]

Brierly's text then turns backward chronologically and continues in the narrative mode, tracing international legal theory from the Greeks to Vattel. Brierly drops the temporality of narrative movement upon reaching Vattel and outlines several doctrinal areas within international law. His voice changes from that of the story teller to the informational voice of the anonymous author of legal manuals.

Most of Brierly's doctrinal discussion is not as value-laden as his narrative discussions. Only when he suggests the limits of arbitral solutions to international problems do Brierly's value judgments have the force of those in the diachronic sections of *The Law of Nations*.[118] Brierly's criticism of arbitration, located a few pages before his final chapter on international organization, introduces his brief for the League of Nations. The first several pages of Brierly's final chapter on international institutions are again chronological. Brierly provides a history of the anticipatory moments that led to the League, all the while stressing that the League's creation was not the result of a catastrophic history but a natural evolution.

In his book on historical representation and narrative, Hayden White ends a chapter by asking: "Could we ever narrativize without moralizing?"[119] Ultimately, however, storytelling is closely tied to valuation. If this fact is most obvious in sacred history,[120] it forms a constant of studies in folklore and analyses of the novel. Consequently, the narrative sections of Brierly's text carrying the most normative weight. His narrative often approaches the character of a morality play. This aspect is clearest when he tells, in somewhat obligatory fashion, the evolutionary story of international legal theory.

As mentioned above, Brierly began his book not in a narrative mode

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116. *Id.* at 8-9.

117. *Id.* at 9.

118. "It is," he insisted, "a delusion to think of a judicial decision as though it possessed some magical quality rendering its acceptance certain by the parties whose interests it affects." *Id.* at 188.

119. WHITE, *supra* note 112, at 25.

120. Northrop Frye, for example, suggested the close tie between morality and Biblical religions. NORTHROP FRYE, THE GREAT CODE: THE BIBLE AND LITERATURE 105 (1982).

but with a dictionary definition of the "Law of Nations."[121] He began in this manner despite the fact that the titles of both the chapter and the subchapter preceding his first sentence imply historical movement.[122] The second sentence of his book, however, casts us chronologically backwards.

> Rules which may be described as rules of international law are to be found in the history both of the ancient and medieval worlds; for ever since men began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations.[123]

In this sentence, Brierly announced the antiquity of international law in such a way as to claim for it the status of a natural condition. His statement "for ever since men began to organize" evokes all the state-of-nature thought experiments of Hobbes, Locke, and Rousseau. Brierly carefully identified actual historical periods, both ancient and medieval, and thereby distinguished his assertion from the mythologies of the philosophers. Nevertheless, the second sentence of *The Law of Nations* suggests a fabled past.[124]

Despite Brierly's particular historical labelling, the essence of the second sentence served to posit the a temporal aspect of international law, creating the impression of a somewhat international imperative. Brierly quickly differentiated the underlying impulse in its undeveloped form from international law as "a definite branch of jurisprudence," which he explained was "essentially modern, dating only from the sixteenth and seventeenth centuries."[125] Following the standard story, Brierly linked the birth of international law with the arrival of the modern state system. He proceeded to provide several pages of narrative, telling the story of the emergence of the modern state and its counterpart, the doctrine of sovereignty. Brierly, however, had already established the major *dramatis personae* of his story on the first page of *The Law of Nations*.[126]

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121. BRIERLY, LAW OF NATIONS, *supra* note 1, at 1.

122. The chapter is entitled, "The Origin and Character of International Law," and the subchapter is entitled, "The Rise of Modern States and of the Doctrine of Sovereignty."

123. BRIERLY, LAW OF NATIONS, *supra* note 1, at 1.

124. As I have already suggested, Brierly's second sentence echoes the second sentence of Sir Frederick Smith's *International Law* with its assertion that "[i]n a form more or less rudimentary we may suppose such rules to have existed almost from the infancy of society." SMITH, *supra* note 13, at 25.

125. BRIERLY, LAW OF NATIONS, *supra* note 1, at 1.

126. The term *dramatis personae* is used here in the same sense that it was used by Vladímir Propp. *See* V. PROPP, MORPHOLOGY OF THE FOLKTALE 25-65 (Laurence

The narrative segment beginning at the bottom of the first page depicts internationalism as it arose out of its apparent opposite system, the modern state system with its basis in the doctrine of sovereignty. In a classic replication of the standard plot formation, Brierly moved his protagonist through an indirect path, leading away from its final destination before being led back in a final return. Basically, Brierly's initial pages follow the common plot formation described by Tzvetan Todorov, who observed that the "minimal complete plot consists in the passage from one equilibrium to another."[127] Brierly moved through a history of state formation after establishing a preexisting pressure towards internationalism and ended finally with the revival of internationalism: "Thus it reasserted the medieval conception of unity, but in a form which took account of the new political structure of Europe."[128]

Brierly's tale, therefore, suggests an indirect journey, and in its very indirection, it possesses the same characteristics as the archetypical plot.[129] Brierly's first few pages track a course full of the obstacles generally so central to narrative development.[130] More significantly, however, these pages tell a tale of transformation based on a dialectic of difference and sameness.[131] In describing the emergence of the modern state from the feudal order, Brierly wrote that the "perfectly feudal condition of society would be not merely a weak state, but the negation of the state altogether."[132] However, Brierly made a distinction, observing that "[o]n the other hand there were elements in the feudal conception of society capable of being pressed into the service of the unified national states."[133] For example, Brierly described how the "duty of personal loyalty" could be "transmuted into the duty of unquestioning allegiance of subject to monarch in the national state."[134] Then, upon turning to the new state, Brierly clearly stated that no monarch ever completed the rise of sovereignty: "It was not the whole truth because even in the age of

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Scott trans., 2d ed. 1968).

127. TZVETAN TODOROV, THE POETICS OF PROSE 111 (Richard Howard trans., Cornell University Press 1977) (1971).

128. BRIERLY, LAW OF NATIONS, *supra* note 1, at 9.

129. For a discussion of this basic structure of plot formation, see BROOKS, *supra* note 112, at 104.

130. Brierly, in fact, talks of the "obstacles" impeding the growth of centralized governments in medieval Europe. BRIERLY, LAW OF NATIONS, *supra* note 1, at 2.

131. On the narrative move through difference and sameness, see BROOKS, *supra* note 112, at 91.

132. BRIERLY, LAW OF NATIONS, *supra* note 1, at 3.

133. *Id.*

134. *Id.* at 4.

European absolutism which followed in the seventeenth and eighteenth centuries, no monarch's power was ever wholly without limitations."[135] This rise in sovereignty, however, also involved a transmutation "at the very time when European political development seemed about to justify the whole theory of sovereignty, other causes were at work which were to make it impossible for the world to accept the absence of any bonds between state and state which was its logical consequence."[136] Brierly's narrative continues to discuss its incomplete oppositions until arriving at a moment of completion. Therefore, as the narratologists have told us, this movement of arrival is strengthened by the very indirect route of Brierly's plot.[137]

When Brierly's text arrives at the creation of international law, it becomes, as the title of his first chapter suggests, only a story of "origins." After Brierly locates the birth of the law of nations in the moment of the emergence of the modern state, he still must tell the story of the development of international legal theory. At that point, he picks up the narrative mode again. Brierly's story again shifts backward in an analepsis to a medieval setting and then shifts even further back to classical Greece.[138]

Some of Brierly's prehistory of international legal theory is little more than an obligatory gesture. For example, Brierly simply skips over the Greek contribution to the development of international law by saying that "[a] long and continuous history, extending at least as far back as the political thought of the Greeks lies behind the conception; but its influence on international law is so closely interwoven with that of Roman law that the two may here be discussed together."[139] Brierly's single mention of the "Stoics in Greece" is his only mention of Greece in a short discussion of the ancient world entirely dominated by Rome.[140] Af-

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135. *Id.* at 7.

136. *Id.* at 8.

137. *See, e.g.*, BROOKS, *supra* note 112, at 111.

138. On narrative "anachronies," including analepses—that is, chronologically turning backward—see GERARD GENETTE, NARRATIVE DISCOURSE 35-47 (Jane E. Lewin trans., Cornell University Press 1980) (1972); STEVEN COHAN & LINDA M. SHIRES, TELLING STORIES: A THEORETICAL ANALYSIS OF NARRATIVE FICTION 84-89 (1988).

139. BRIERLY, LAW OF NATIONS, *supra* note 1, at 10.

140. *Id.* With the traditional discussion of the Roman *ius gentium*, that Brierly devoted most of his story of antiquity to Rome is not surprising. Nevertheless, other historical treatments did pay attention to the Greek and Middle Eastern background of international law. *See, e.g.*, Paul Vinogradoff, *Historical Types of International Law*, *in* 1 BIBLIOTHECA VISSERIANA 1, 1-70 (1923); Baron S. Korff, *Introduction à l'histoire du droit international*, 1923 R.C.A.D.I. 1, 1-23 (1925).

ter mentioning Greece, describing Roman law, and discussing the impact of Rome, Brierly dwells for a moment on the observation that "to see how the belief in an ideal system of law inherently and universally binding on the one hand, and the actual existence of a cosmopolitan system of law everywhere revered on the other, should have led to the founding of international law on the law of nature."[141] In returning to the present, and the moment of the narration, Brierly states that "[w]e have to inquire further, however, whether this foundation is valid for us today."[142]

The reader only realizes this interruption of the narrative during Brierly's discussion of medieval natural law. This discussion allows Brierly to signal his own commitment to a form of natural law that might, however, deal with a complicated world. Although Brierly does not explicitly state how much help medieval legal concepts can offer to the foundation of natural law, he does unambiguously paint later naturalists as pale reflections of their medieval predecessors. Brierly states that during the seventeenth and eighteenth centuries "the medieval tradition began to be distorted by later writers, whose use of the old terminology in senses of their own went far to justify the obloquy which has been poured on the whole conception in modern times."[143] The story of naturalism is, therefore, obviously a story of declension and apostasy.

At this point, Brierly halts his chronological movement and states that, before discussing the "unfortunate effect" of natural law on international law, "it will be convenient to say something of the men whose writings first gave naturalism its systematic form."[144] Brierly, therefore, is suggesting that his next few pages discussing the likes of Gentili, Grotius, and Vattel, are not an essential part of his tale but are simply a matter of "convenience."[145] Brierly seems to give little suggestion that the discussion introduced by that laconic statement will tell a coherent tale. Indeed, Brierly's discussion of the early figures of international legal theory does not develop from theorist to theorist, but seems to oscillate between thinkers he identifies as naturalists and those he identifies as positivists. Gentili, Zouche, and Bynkershoek are Brierly's representative positivists, while Pufendorf, Vattel, and a complicated and idiosyncratic Grotius provide their naturalist counterparts.[146]

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141. BRIERLY, LAW OF NATIONS, *supra* note 1, at 13.
142. *Id.*
143. *Id.* at 17-18.
144. *Id.* at 18.
145. *Id.* at 18-33.
146. *Id.*

In discussing Grotius, Brierly spends several pages establishing a figure more enigmatic than emblematic. Although Brierly is willing to assert that Grotius is "rightly regarded as the founder of international law,"[147] he seems to deny Grotius his customary formative stature, and even describes him as a total failure when judged in terms of influence.[148] As opposed to Oppenheim, who entitled one subchapter of his treatise, "Development of the Law of Nations Before Grotius" and another, "Development of the Law of Nations After Grotius," Brierly did not grant Grotius his normal place in the history of international law. In fact, when dealing with Grotius, Brierly adopts several strategies of diminishment. Brierly, for example, casually identifies Grotius as "above all a theologian,"[149] immediately after crediting Gentili with having been the first to draw a line between international law and theology.[150] Yet despite the series of minor slights, Brierly also paints Grotius as a theorist interested in the "true social nature of man,"[151] and as a model of an exemplary seventeenth-century Dutch culture that was proud of its liberty and tolerance. Brierly also suggests that Grotius' thought had in certain respects prefigured the League of Nations.[152]

Brierly's passage on Grotius seems to be an example of reluctant heroizing. Significantly, only after Brierly speaks on Grotius does he begin to separate Grotius clearly from the other figures in his story. Thus, in attacking those who would later call themselves the members of a "Grotian school," Brierly states that "the claim of this school to carry on the Grotian tradition cannot be sustained, because it is not to the Grotian law of nature, but to Pufendorf's and Vattel's debased version of it that the school generally appeals."[153]

Although it seems as though Brierly waited for Grotius to leave the room before praising him, he is actually playing with his reader's memory of the text of his book. Because Brierly's treatment of Grotius was never explicitly positive, the reader experiences the anxiety about forgetting as described by Gillian Beer in *Arguing with the Past*[154] and then

147. *Id.* at 19.

148. *Id.* at 25 ("But if by success it is meant that the doctrines of Grotius as a whole were accepted by states and became part of the law which has since his time regulated their relations, then his work was an almost complete failure.")

149. *Id.* at 19.

150. *Id.* at 18.

151. *Id.* at 23.

152. *Id.* at 26.

153. *Id.* at 33-34.

154. *See generally* GILLIAN BEER, ARGUING WITH THE PAST: ESSAYS IN NARRATIVE FROM WOOLF TO SIDNEY (1989).

experiences a feeling of recovery all in one sentence. Since the Grotius discussion was rather slippery, even ambiguous, this sentence, with its more and less genuine versions of natural law, supplants our experience of the pages on Grotius. This sentence, however, is also a repetition of the strategy Brierly used when he claimed that the medieval tradition had been "distorted" by the theorists of the seventeenth and eighteenth centuries.[155] Having previously shown only muted admiration for the medieval and Grotian contributions to international legal thought, Brierly at this point suddenly displays these contributions as models demonstrating the debased state of seventeenth and eighteenth-century theory. Brierly's strategy places an emphasis on the story of declension without confusing it with occasional hagiography.

Brierly links his observations on the faults of naturalists and positivists to crystallize the fact that, despite the oscillations between naturalists and positivists, the general course of this story was one of the decline. Both schools suffer from the same essential flaw by envisioning what Brierly calls "state-persons."[156] And both versions of the "state-person" displayed ignorance of the factual web in which nations actually exist by making false analogies to the already flawed Lockean image of individuals.

After Brierly describes this debased condition as the present condition of theory, he makes an awkward transition to his review of the doctrines of international law as practiced among the states. Brierly states that "we shall consider from what sources the rules and principles of law which states actually observe towards one another in their intercourse are derived."[157] In essence, Brierly's story makes no transition. Rather, the story of decline stops, and the reader is suddenly immersed in a synchronic discussion of international legal doctrine starting with sources doctrine.

As mentioned earlier, Brierly returns to his prolonged diachronic narrative in the final chapter on institutional organization. In this narrative segment, Brierly argues that the League of Nations should be viewed in the context of a growing development of international organizations, whether evidenced by the Suez Canal Commission, the Copyright Union in Bern, Switzerland, or the Universal Postal Union. Although the League is distinguishable by its general scope, its creation "was not the introduction of a wholly new principle into international life, but the logical outcome of a movement which had been gathering force for many

155. BRIERLY, LAW OF NATIONS, *supra* note 1, at 17-18.
156. *Id.* at 34.
157. *Id.* at 39.

years."[158] Brierly's final chapter does not serve to contextualize the League of Nations. Rather, the chapter achieves the classic status of narrative return, or the moment of redemption. The long passage of *The Law of Nations* has traversed through a series of diachronic and synchronic sections. In fact, until the final chapter, all the diachronic sections of the book signify a tale of decline. Brierly only completes the circular voyage of the romantic narrative.[159]

In his book on narrative, Peter Brooks describes narratives as books based on desire. Brooks states that "[n]arratives portray the motors of desire that drive and consume their plots . . . ."[160] One may easily translate that statement by saying that narratives possess an energy moving them towards their desired end. Indeed, Brierly's narrative energetically pursues the human need for the social structuring of their interrelations. Brierly foreshadowed his book's goal on the first page by suggesting that "ever since men began to organize their common life in political communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations."[161] Importantly, however, Brierly's emphasis on the formative role of international society in the production of the international legal regime suggests the social forces that push the narrative of Brierly's book towards its end.

The redemptive moment of Brierly's lecture at the Hague, the revival of natural law, and the redemptive moment of *The Law of Nations*, the creation of international institutions, seem to suggest different vehicles of redemption. Ultimately, however, both suggest the importance of justice to the "true social nature of man."[162]

The circular passage negotiated by Brierly's narrative is more Romantic than modern. While Romantic narratives tend to follow the pattern of sacred history by ending back at the beginning of time in an enhanced form,[163] modernist narratives often fail to return to the point of depar-

158. *Id.* at 202.

159. For a discussion of the circular voyages, see BEER, *supra* note 154, at 167. For a discussion of the cyclical voyage of Romantic narratives, see generally M.H. ABRAMS, NATURAL SUPERNATURALISM: TRADITION AND REVOLUTION IN ROMANTIC LITERATURE (1971). Abrams describes the Romantic narrative as a spiral returning to the same point of its beginning, only at a higher plane.

160. BROOKS, *supra* note 112, at 61.

161. BRIERLY, LAW OF NATIONS, *supra* note 1, at 1.

162. Significantly, this suggestion of justice as linked to the "true social nature of man" appears in Brierly's discussion of Grotius. *Id.* at 23.

163. *See generally* ABRAMS, *supra* note 159. A perfect example of this is the narrative of Georg W. Hegel's *Phenomenology of Spirit.*

ture. In other words, there is no return home.[164] Despite the complications and oscillations of Brierly's narrative story and the alteration of diachronic and synchronic segments, Brierly's book ends with the conclusion prefigured in the very first paragraph. Rather than telling a story determined by unpredictable historical contingencies, Brierly instead formulates a history conditioned by his initial understanding of the nature of human society.

IV. INTERNATIONAL LAW AS POLITICS

The first section of the final chapter of *The Law of Nations* begins with a footnote explaining that "[i]n this section I am much indebted to Mr. L.S. Woolf's admirable book on *International Government*."[165] The mere mention of Leonard Woolf's name may conjure up images of Bloomsbury drawing rooms full of the sparkling presences of Lytton Strachey, Roger Frye, and Virginia Woolf. L.S. Woolf's book, however, on which Brierly seemed to rely so heavily, is laden with its own historical significance. The title page of *International Government* announces that Woolf wrote the book "for the Fabian Research Department," and begins with a lengthy introduction by that most famous of Fabians, George Bernard Shaw.[166]

Woolf's book, written at the height of the First World War in 1916, understandably focused on the prevention of armed conflict. Despite the obvious violence and trauma of war, however, Woolf's message was hardly dramatic. In fact, he cautioned that "we must build not a Utopia upon the air or clouds of our own imaginations, but a duller and heavier structure placed logically upon the foundations of the existing system."[167] Woolf continues later on the same page with less than inspiring imagery, explaining that "in history there are really no culminations and no cataclysms; there is only a feeble dribble of progress, sagging first to one side and then to the other, but always dribbling a little in one direction."[168] To imagine a more phlegmatic rendition of Fabian gradualism is very difficult indeed.

If Brierly could not compete with Woolf's bog-like version of human progress, he similarly made clear that international organization offered

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164. *See* BEER, *supra* note 154, at 167.

165. BRIERLY, LAW OF NATIONS, *supra* note 1, at 197 n.1. This section is devoted to the organizational anticipations of the League of Nations and is entitled "Development of Methods of International Co-operation."

166. LEONARD S. WOOLF, INTERNATIONAL GOVERNMENT (1916).

167. *Id.* at 5.

168. *Id.* at 5-6.

no utopia. In the preface to *The Law of Nations*, Brierly described his "belief that the law of nations is neither a chimera nor a panacea."[169] Although the international legal order offered no utopia, it did embody a progressive dynamic that derived from a social imperative. Ultimately, the progress of international law was a creature of that imperative.

Brierly shared this vision of a slow forward movement to human society with large numbers of progressive social theorists among the Fabians like Woolf and among the New Liberals like L.T. Hobhouse.[170] An evolutionary understanding of social, political, and legal development had long since lost its automatic association with the conservative tradition of Edmund Burke and its later association with Herbert Spencer's laissez-faire liberalism. By the time Brierly wrote *The Law of Nations*, an evolutionary image of human progress was orthodox among political progressives. This statement does not, however, identify Brierly's particular brand of evolution. Exactly how much teleology informed Brierly's story of the evolution of human institutions and how the evoluntiary machinery worked Brierly does not make clear.

Brierly's story of the progress of the law of nations resists precise characterization. The story is complicated in part by the fact that Brierly wanted to analogize the growth of international law to the growth of municipal law at the same time that he distinguished them. The fact that Brierly tried to relate legal development with moral development while simultaneously underlining their differences added to the complication. And Brierly provides a confusing picture of the voluntaristic element in legal development throughout the story. Although describing a clear trajectory for the growth of international law, Brierly announced in the preface that the law of nations was "just one institution among others which we have at our disposal for the building up of a saner international order."[171] Apparently, international law was little more than an optional tool.

These tensions and discrepancies were not enough, however, to persuade Alfred Zimmern, a professor of international relations at Oxford

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169. BRIERLY, LAW OF NATIONS, *supra* note 1, at vi.

170. At Fabianism's very core was an organic conception of progress. On the place of organic gradualism in the *Fabian Essays*, see, e.g., MARGARET COLE, THE STORY OF FABIAN SOCIALISM 29 (1961). On the belief in evolutionary progress in the "Rainbow Circle," a group that included J.A. Hobson, Ramsay MacDonald, Herbert Burrows, and William Clarke, see PETER CLARKE, LIBERALS AND SOCIAL DEMOCRATS 58 (1978). On the evolutionary aspect of L.T. Hobhouse's New Liberalism, see STEFAN COLLINI, LIBERALISM AND SOCIOLOGY: L.T. HOBHOUSE AND POLITICAL ARGUMENT IN ENGLAND 1880-1914, at 121-46 (1979).

171. BRIERLY, LAW OF NATIONS, *supra* note 1, at vi.

while Brierly filled the international law chair, to zero in on his perception of the central theme of Brierly's theory of the growth of international law. In his lecture to the Grotius Society, entitled "International Law and Social Consciousness,"[172] Zimmern used Brierly as a representative of international legal theorists who believed that the growth of international law followed in the wake of the evolution of society in general. To emphasize his point, Zimmern twice quoted Brierly's statement that international society had emerged beyond its primitive stage "except in the matter of its law."[173] Zimmern perceived Brierly to have espoused an evolutionary faith in international law and a belief that the law would develop as a result of the general development of an international society. By contrast, Zimmern believed that "[t]he old maxim declares *ubi societas ibi ius*—where there is a social consciousness there are the makings of true law. But is not the converse equally true? *Ubi ius ibi societas*—where there is a common sense of law there are the makings of a common society."[174] Society's establishment of the rule of law on the international plane was, for Zimmern, an essential prerequisite for the development of international society.

Despite Brierly's occasional employment of instrumental language, he suggested that international law was just one of any number of available tools. Brierly's *The Law of Nations* exhibits an overwhelming post-Darwinian evolutionary faith. Like many other international legal theorists, Brierly was deeply impressed by Maine's *Ancient Law*.[175] Indeed, Maine's understanding of ancient law and its relation to modern law became an important part of Brierly's mental furniture. Thus, Brierly turned to notions of primitive and modern law to answer the Austinian questions that long plagued international lawyers about the legitimacy of international law as actual law. Attempting to answer the Austinian objections that international law was not true law because of its lack of sanctions, Brierly observed that the international law community has "not yet, like the state, developed regular machinery for enforcement of its law . . . . But this contrast only means that national law in modern times is generally a strong, whereas international law is still a weak form of law; it does not justify us in denying the fundamental similarity of the two."[176] For several pages, Brierly then establishes a primitive/

172. Alfred Zimmern, *International Law and Social Consciousness*, 20 TRANSACTIONS OF THE GROTIUS SOCIETY 25-44 (1935).

173. *Id.* at 40, 41 (citing BRIERLY, LAW OF NATIONS, *supra* note 1, at 52).

174. Zimmern, *supra* note 172, at 43.

175. *See supra* note 107 and accompanying text.

176. BRIERLY, LAW OF NATIONS, *supra* note 1, at 50.

modern dichotomy to explain the growth of international law and predict its future trajectory.[177] Brierly was convinced that international law would experience the same growth as national law. The clues to the development of international law were thus visible in the development of municipal law.[178]

Although Brierly especially distinguished the state in international society from individuals within the nation-state, thereby thoroughly rejecting any notions of states as state-persons, he remained deeply wedded to the idea of an international society and its relation to international law. This idea bore some relation to the social organization of the nation. In 1944, in *The Outlook for International Law*, Brierly declared that "[t]he existence of some kind of international law is simply one of the inevitable consequences of this coexistence in the world of a plurality of states necessarily brought into relations one with another."[179] At that point Brierly insisted that "[i]t is one illustration of a truth . . . . to which there are no exceptions, that when there is a society there is necessarily law, and when there is law there we can be sure a society will exist."[180] Although this formulation appeared in Brierly's later book, it sums up the central conviction of *The Law of Nations*: that social organization presages the development of law and, therefore, the future sophistication of the law of nations may safely be anticipated.

As previously suggested, Brierly's faith did not stop him from downplaying suggestions of evolutionary inevitability in favor of a straightforward prescriptive language. Brierly stated, for example, that international law should not be thought of merely as a "convenient device" to be summoned only in a dispute. He argued that law "is useful as a means of settlement only when, and so far as, a society has accepted the rule of law as its normal way of life."[181] In essence, he believed the society of

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177. Significantly, Zimmern drew the quotation that provided the centerpiece for his attack on Brierly from exactly these pages.

178. Brierly tells us that although municipal systems had begun to interfere both judicially and legislatively with freedom of contract as a result of the increasing complexity of social relation, "no such process has yet been possible in international law." BRIERLY, LAW OF NATIONS, *supra* note 1, at 170. Brierly's "yet" conforms to his belief that international legal evolution will follow that of municipal law. *Id.* at 169-70.

179. BRIERLY, OUTLOOK, *supra* note 36, at 4.

180. *Id.* This statement did not mean, however, that Brierly dropped his instrumentalist vocabulary with regard to international law. For example, the first sentence of *The Outlook for International Law* begins: "When the international order is rebuilt after the present war, international law will be one of the instruments that the architects will use." *Id.* at 1.

181. BRIERLY, LAW OF NATIONS, *supra* note 1, at 190.

states should adopt the international rule of law as its "normal way of life," and clearly, the international community had the opportunity to follow Brierly's advice. Although Brierly's advocacy to action is hardly surprising, his prescriptions were painted against a backdrop of evolutionary movement. In an essay published in 1936, Brierly closely tied legal reform to the structure of international society. He stated that "in the special characteristics of international society lie the conditions which govern the whole problem of the international legal reformer, and no scheme for establishing the international rule of law will lead us far unless it is firmly based on an understanding of them."[182]

Another discrepancy from the evolutionary framework of Brierly's story of the law of nations was his occasional expression of an apparently unalloyed relativism. He argued that law was based on what seemingly were the mere contingencies of time and place. I have already quoted his statement that "[w]hen a modern lawyer asks what is reasonable, he looks only for an answer that is valid now and here, and not for one that is finally true."[183] The modern lawyer, Brierly assumed, had learned to go beyond the natural law of the medieval lawyer. "Some modern writers," he asserted, "have expressed this difference by saying that what we have a right to believe in to-day is a law of nature *with a variable content.*"[184] Again, when Brierly seems to paint a picture of historical contingency with no clear evolutionary pattern, his portrait nevertheless remains within the broad evolutionary sweep of his general narrative.

As mentioned above, Brierly maintains that international legal theorists should attend to the "facts" of international life. The repetitive invocation of fact and reality suggests not only Brierly the empiricist but also Brierly the realist. Throughout *The Law of Nations*, Brierly assures his reader that he can be relied upon to observe the actual behavior of nations and how political maneuvers of the real world bear upon the realistic expectations for an international legal order. Ultimately, however, Brierly hardly fits the mold of the modern realist and seems odd company for the E.H. Carrs and the Hans Morgenthauses of the world.[185] Michael Joseph Smith, in his recent study of the modern realist tradition in international studies, chose Alfred Zimmern as one of his

182. J.L. Brierly, *The Rule of Law in International Society* (1936), *reprinted in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 250, 250.

183. BRIERLY, LAW OF NATIONS, *supra* note 1, at 15.

184. *Id.* (emphasis in original).

185. For a study of the modern realist tradition in international studies, see generally MICHAEL J. SMITH, REALIST THOUGHT FROM WEBER TO KISSINGER (1986).

three prototypes for the optimistic idealists against whom the realists reacted. Therefore, for Smith, Zimmern's optimism for international relations contrasts with the political sobriety of the realist tradition.[186] Ironically in our context, Zimmern had chosen Brierly as the representative of those international legal theorists who optimistically believed that advances in international law would naturally follow the advances of international society.

Brierly, of course, disavowed any utopianism, for he had opened *The Law of Nations* with an attempt simultaneously to dispel both utopianism and fatalism with regard to the prospects of international law.[187] Eventually, in the context of World War II, Brierly expressed more realism and modesty about the possibilities of international law than he had in his works of the 1920s. Significantly, in 1946 he referred approvingly to E.H. Carr's *Twenty Years' Crisis*, which was one of the set pieces of international realism, and also to Hobbes, the most significant source of the British realist tradition.[188] Brierly's *Outlook for International Law* of 1944 was far more modest about the prospects of international law than *The Law of Nations* had been. Indeed, Brierly ended his "outlook" with the sober realization that any perception of international law as an easy device to end international conflict "is to imagine that international affairs are more malleable than national, whereas in fact they are unfortunately far less so."[189]

Brierly's later realistic gestures aside, the Brierly of the first edition of

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186. *See id.* at 54-67.

187. BRIERLY, LAW OF NATIONS, *supra* note 1, at v-vi.

188. J.L. Brierly, *International Law: Some Conditions of its Progress* (1946), *in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 327, 331-33. Smith discusses the significance of Carr's *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations* (1946) in SMITH, *supra* note 185, at 69-87, and describes the importance of Hobbes to modern realism at 12-15. Against Brierly's later appreciation of Hobbes, we should compare his words of 1928, when he said, "It is to Thomas Hobbes that we must look as the chief source of the long domination of the doctrine of sovereignty in political thought." BRIERLY, BASIS OF OBLIGATION, *supra* note 21, at 23.

189. BRIERLY, OUTLOOK, *supra* note 36, at 142. Brierly's fifth edition of *The Law of Nations* does not end with the upswing of the first edition and it seems to tell a less than optimistic tale of the United Nations. For Brierly's criticism of the structure of the United Nations, see J.L. BRIERLY, LAW OF NATIONS 306-07 (5th ed. 1955). In a lecture delivered at Newnham College, Cambridge, in 1946, Brierly ended on a foreboding note: "The only realist today is the man who knows that somehow we have got to use [the United Nations] to create a more civilized international order, and that probably we may not have very long in which to do it." J.L. Brierly, *The Covenant and the Charter* (1946), *reprinted in* BRIERLY, BASIS OF OBLIGATION, *supra* note 5, at 314, 326.

The Law of Nations expressed a deep belief in international legal progress while asserting his own attention to political reality. Brierly not only asserted the political nature of the recognition of states,[190] which by itself was not very dramatic, but he based his critique of the doctrine of the equality of states on political fact. He found the doctrine unjustifiable because "in its natural meaning it is contradicted by obvious facts."[191] Brierly argued that states are "unequal, by whatever test, civilization, size, population, wealth, or strength, they are measured."[192] This statement seems to attest to Brierly's political realism, for certainly he was convinced that international law could hardly ignore political reality. His next clause, however, seems more normative than realist. Brierly stated that if "international law persisted in treating states as equal in spite of their obvious inequalities, such a rule would be as unjust as a rule which would give equal voting power to every shareholder in a company irrespective of the number of his shares."[193] Thus, even in Brierly's most politically realist passage he reveals himself to be a champion of natural law and an advocate of justice.

In Brierly's *Law of Nations*, the precise facts of international society necessarily include the political conditions of international relations. Brierly's progressivism and his underlying evolutionary vision tend to transform political facts into the indicia of social progress. Indeed, the great absence around which Brierly writes his book is power. When Austin criticized international law for its lack of sanctions, he was really stating an understanding that law is in a sense power. Brierly feverishly attempts to avoid this understanding in his textbook on the law of nations. In the context of Brierly's evasion of the place of power in international law, he significantly chose to pursue only one of the two volumes of Oppenheim's treatise, for the subtitle of Brierly's book was "An Introduction to the Law of Peace," leaving only a residue of war as a presence in his chapter on "Disputes Between States."[194]

V. CONCLUSION

In the author of *The Law of Nations*, we have then a self-proclaimed realist who seemed to avoid the realities of war, which is finally the

190. BRIERLY, LAW OF NATIONS, *supra* note 1, at 83.
191. *Id.* at 65.
192. *Id.*
193. *Id.*
194. In this light, the fifth edition of *The Law of Nations* (the last edition entirely written by Brierly) ends not with a chapter on international organization but with a chapter entitled "International Law and Force."

central concern of international law in the twentieth century. The writer, who was self-congratulatory about his attention to fact, seemed to pay little attention to power relations. He showed an understanding of the potency of economics when arguing that international law needs to concern itself with economic relations. "Law," Brierly wrote, "will never play a really effective part in international relations until it can annex to its own sphere some of the matters which at present lie within the 'domestic jurisdictions' of the several states."[195] And in his discussion of the Mandate system, Brierly addressed the problem of colonialism: "The mandatory system is an attempt to deal with one of the most difficult of world problems, the relations of the civilized and the backward races."[196] This economic point, however, was nothing more than a passing gesture. His treatment of colonialism was also quite brief considering the continuing importance of Britain's colonial empire in 1928[197] and the nascence of pressures for decolonization. On the whole, Brierly's realism was thin, just as the modernist who promised complexity offered simplicity. Along with Lauterpacht and others, Brierly worked for the modernization of international law. However, part of the appeal of Brierly's *The Law of Nations* comes from the fact that it seemed to offer complexity and subtlety at every corner while finally serving something quite digestible; a familiar narrative. Perhaps, Brierly's test attained classic status because it was a primer, and all of its suggestions of challenge were no more than mere suggestions.

In 1964 Wolfgang Friedmann, then teaching at Columbia, published a volume entitled *The Changing Structure of International Law.*[198] Remarkably, Friedman's concluding chapter reproduces a large amount of the rhetoric of *The Law of Nations,* often in almost identical formulations. This acceptance suggests that perhaps the easily digestible promises of Brierly's textbook, all the facile suggestions of challenge and complexity, retained their allure and were persuasive enough to be repeated a generation later.

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195. BRIERLY, LAW OF NATIONS, *supra* note 1, at 54.

196. *Id.* at 100.

197. *See, e.g.*, Paul Kennedy's chapter, "Why Did the British Empire Last So Long?" *in* PAUL KENNEDY, STRATEGY AND DIPLOMACY 1870-1945, at 199-218 (1983).

198. WOLFGANG FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1964).