

# IS INTERNATIONAL RELATIONS CORROSIVE OF INTERNATIONAL LAW?

## A REPLY TO MARTTI KOSKENNIEMI

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It is widely agreed among observers of all stripes that despite substantial common interests, international law and international relations, and their parent disciplines of law and political science, diverged and became largely estranged after the shock of World War II. For most observers, this estrangement has been regrettable, inhibiting dialogue and mutual learning among political scientists and legal scholars, and the recent explosion of so-called international law (IL) and international relations (IR) scholarship has sought in part to bring about a partial reconciliation of, and dialogue between, the two disciplines.<sup>1</sup>

Amidst this disciplinary *détente*, however, some prominent international legal scholars have resisted any effort at rapprochement, arguing that interdisciplinary reconciliation of IL and IR can be, and indeed has already been, corrosive of the soul of the international legal enterprise and the autonomy of law. The center of this resistance has been Helsinki, Finland, and its primary champion has been Martti Koskenniemi, who for decades has warned legal scholars about the potentially corrosive effects of exposure to IR. In his writings, and especially in his landmark intellectual history, *The Gentle Civilizer of Nations*, Koskenniemi paints a picture of an IR field dominated by realism, in thrall to American imperialist policy-makers, and firmly committed to an antiformalism that is corrosive to international law and to the international legal profession, whose American practitioners in particular have become so corrupted as to be unable to distinguish

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1. See generally Kenneth W. Abbott et al., *The Concept of Legalization*, 54 INT’L ORG. 401 (2000) [hereinafter Abbott et al., *The Concept of Legalization*], Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT’L L. 335 (1989) [hereinafter Abbott, *Modern International Relations Theory*], and Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT’L L. 205 (1993) [hereinafter Slaughter Burley, *A Dual Agenda*] for important landmarks in the development of IL/IR literature. See INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013) [hereinafter THE STATE OF THE ART] and Emilie M. Hafner-Burton et al., *Political Science Research on International Law: The State of the Field*, 106 AM. J. INT’L L. 47, 51 (2012) for recent assessments and analyses of the resulting literature.

the law from the interests of American imperial power.<sup>2</sup>

Koskenniemi's concerns about IR are not without foundation. It is unquestionably true that post-World War II realists such as Hans Morgenthau alternately ignored and disparaged international law, and that the "I-word" was largely banished from the leading IR scholarship for much of the next half-century. Furthermore, as I shall argue below, the recent rediscovery of international law by IR scholars has often been characterized by disciplinary narrowness, blind spots, and substantial lacunae. The field of international relations<sup>3</sup> therefore, deserves its fair share of analysis and criticism. Nevertheless, I shall argue in this paper that Koskenniemi's critique of IR represents at best an anachronism, describing the early Cold War IR of our grandfathers rather than the contemporary field, and at worst a distortion of IR scholars' attitudes, aims, and influence on the legal profession. IR scholarship is guilty of multiple sins, which can and should be corrected in dialogue with international legal scholars, but these sins are quite different from the anachronistic or imagined flaws depicted by Koskenniemi in his otherwise brilliant polemic.

This paper is organized in three parts. In the first part, I will briefly summarize Koskenniemi's impassioned indictment of IR, beginning with his excellent intellectual history of Hans Morgenthau, proceeding through his depiction of postwar American IR, and concluding with his provocative claim that IR has fundamentally corrupted the American international law community, whose practitioners have been reduced to mere servants of the American empire. This argument, I will contend, is flawed by a series of distortions of the views of international relations and legal scholars alike, and I therefore devote the rest of the paper to presenting an alternative and, I believe, more balanced and accurate

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2. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2002) [hereinafter KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*] for the strongest and most extensive version of this argument. See Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT'L REL. 3 (2012) [hereinafter Koskenniemi, *Law, Teleology and International Relations*], Martti Koskenniemi, *Miserable Comforters: International Relations as New Natural Law*, 15 EUR. J. INT'L REL. 395 (2009), and Martti Koskenniemi, *The Politics of International Law – 20 Years Later*, 20 EUR. J. INT'L L. 7 (2009) for shorter, more recent versions of the argument. See Jan Klabbers, *The Bridge Crack'd: A Critical Look at Interdisciplinary Relations*, 23 INT'L REL. 119 (2009) [hereinafter Klabbers, *Bridge Crack'd*], and Jan Klabbers, *The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity*, 1 J. INT'L L. & INT'L REL. 35 (2005) [hereinafter Klabbers, *Relative Autonomy*] for an overlapping, but not identical, indictment of political science from one of Koskenniemi's colleagues at the University of Helsinki.

3. For the purposes of this paper, I consider scholarly IR as it is widely considered in the United States, as a field of study within the discipline of political science. Hence, unless otherwise specified, I will compare law and political science as disciplines, and IL and IR as fields of study within those disciplines. As Koskenniemi observes, KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 472–73, IR takes on different forms in different national contexts, such as in the United Kingdom and France, where it appears as an interdisciplinary study combining elements of political science, law, history, and sociology, among others. However, since the primary focus of Koskenniemi's critique is on American IR, I follow his lead in focusing on the IR field within political science in the United States.

account of the genuine strengths and weaknesses of IR scholarship as an approach to international law.

In the second part of the paper, I take issue with Koskenniemi's general characterization of the IR field as an essentially realist policy science, drawing on recent data to depict a field that is far more theoretically diverse and far less in thrall to American policy-makers than Koskenniemi suggests. This is not to say, however, that IR scholarship is without fault as an approach to the study of international law.

In the third and final section, therefore, I consider the *real* problems with IR scholarship specifically in relation to international law. By contrast with Koskenniemi, who sees IR's relentless antiformalism and commitment to interdisciplinarity as the field's original sins, I argue that contemporary IR is characterized by precisely the opposite problems, namely a naïve and unwitting formalism in its treatment of law, and a disciplinary insularity that has prevented IR scholars from learning some basic lessons that are familiar to international legal scholars. These weaknesses, together with a growing reliance on quantitative methods, have produced an IR scholarship that has taught us much about some aspects of international law, while remaining blind to many others. These weaknesses of contemporary IR scholarship are real, but they are remediable through more, not less, interdisciplinary collaboration.

### I. KOSKENNIEMI'S INDICTMENT

Koskenniemi's central indictment of IR, and its baleful influence on international law, can be found in Chapter Six of *The Gentle Civilizer of Nations*, in which he begins with the legal philosophy of the German scholar Carl Schmitt, proceeds to a superb intellectual history of the views of Hans Morgenthau about international law, and culminates in a frankly disputable presentation of the American field of IR and an equally tendentious argument about the ways in which American IR has corrupted the practice of international law.<sup>4</sup> The argument is unquestionably an intellectual and polemical *tour de force*, yet it is one that I will argue is inaccurate and unfair in several of its particulars toward both IR and American international legal scholars.

Before proceeding to this critique of Koskenniemi—or, conversely, to a defense of American IR—it is important to give a fair and precise airing to Koskenniemi's account. I cannot, of course, do justice in this short space to the subtleties of his intellectual history, but we can at least review three key elements of that account, namely the recreation of Morgenthau's foundational views about international politics and international law; the subsequent depiction a resolutely anti-formalist and policy-oriented IR field as it developed in the post-war era in the United States; and finally the presentation of an American international legal

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4. See generally KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 411–509.

profession ineluctably corrupted by the influence of IR scholarship.<sup>5</sup> While I applaud the first of these three points, I shall have reason in this paper to question Koskenniemi's second and third points.

#### ***A. Morgenthau and the Emergence of an Anti-formalist IR***

Koskenniemi's sprawling intellectual history of IR and its interaction with international law begins in Weimar, Germany, where a young scholar named Hans Morgenthau was engaged in the study of law.<sup>6</sup> Perhaps not surprisingly, given what we know about his subsequent development as an IR scholar and the father of post-war American realism, the young Morgenthau was no ordinary, doctrinal, formalist legal scholar. Instead, we are told, Morgenthau from a young age felt driven "to understand the world in its naked reality, and not through the superficial (religious, ethical, political) ideas through which it publicly justified itself."<sup>7</sup> In doing so, he fell under the intellectual influence of thinkers such as Max Weber, from whom he derived ideas about the importance of power; Sigmund Freud, from whom he derived an interest in psychology and the irrational impulses that drive human action; and Carl Schmitt, whose post-World War I disenchantment with a changing international law provides the opening narrative of the chapter.<sup>8</sup>

The postwar settlement of the Treaty of Versailles, according to Schmitt, represented the death of the previous European "*nomos*," a particular conception of law and of war as occurring among "just enemies,"<sup>9</sup> and its replacement by a new, moralistic approach to war, which banished war as a *concept* while allowing, and even encouraging, violence in the name of law enforcement.<sup>10</sup> This new approach to war, like the championing of free trade and the imposition of a new League of Nations system even on non-members such as Germany, all constituted an assertion of American imperial power, Schmitt argued, noting the "remarkable coincidence between universalism and the interests of American foreign policy."<sup>11</sup> Disenchanted by what he called the false universalism of the Versailles settlement, Schmitt became a critic of formalism as an approach to international law, and in Koskenniemi's account this torch of antiformalism was passed to the young Morgenthau, whose later work "analyzed the world situation in terms that were strikingly similar to those expressed by Schmitt."<sup>12</sup>

In the pages that follow, Koskenniemi brilliantly unearths the seeds of what would become Morgenthau's postwar realist thinking. At the heart of his emerging worldview, Morgenthau posited a psychological drive to self-assertion, the most

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5. *Id.*

6. *Id.* at 436.

7. *Id.* at 446–47.

8. *Id.* at 415–35.

9. *Id.* at 418 (citing CARL SCHMITT, DER NOMOS DER ERDE IM VOLKERRECHT DES JUS PUBLICUM EUROPAEUM 242 (1997)).

10. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 426.

11. *Id.* at 419.

12. *Id.* at 437.

“sublime form” of which was “psychological superiority, as manifested in one’s ability to be the cause of the behavior of another person. Often this could not be attained without resistance. In social life, the drives of individuals collided against each other; hence the permanent condition of struggle.”<sup>13</sup> From this primordial struggle, Morgenthau would derive his conception of politics, and especially international politics, as an unremitting contest for power, and, in turn, it was this reality of power politics that shaped his increasingly critical views of international law.<sup>14</sup> In an anarchical world in which the balance of power was the ultimate consideration, Morgenthau argued in his thesis, states were reluctant to bring their grievances to third-party legal settlement, particularly where these implicated their “vital interests.”<sup>15</sup> For Morgenthau, the root of this reluctance lay in the fundamentally *political* nature of IR, which attached itself to any and every potential dispute between states.<sup>16</sup> In Koskenniemi’s summary:

[T]he political had no fixed substance. Instead, it was better thought of as a quality that could be attached to *any* object, and no object was *essentially* free from being political in this sense. . . . Anything might be, and nothing was necessarily political, including any question over which a court might possess jurisdiction. The “political” and “legal” were not symmetrically related to each other. . . . Absence of symmetry meant that the political always loomed large over any legal substance, prepared to overtake it in case the state started to feel intensely enough about it.<sup>17</sup>

These views about the inherently political nature of IR, and the powerlessness of law to constrain states in the absence of sanctions, led to two positions that would become characteristic of Morgenthau’s later writings, and, according to Koskenniemi, of the emerging field of IR more broadly: interdisciplinarity and antiformalism.<sup>18</sup>

With respect to the first of these, Koskenniemi rightly points out, Morgenthau counseled an interdisciplinary approach to lawyers, who could no longer remain blind to the “sociological context of economic interests, social tensions, and aspirations of power, which are the motivating forces in the international field.”<sup>19</sup> Linked to this belief that international law could only be understood through an interdisciplinary study was what Koskenniemi describes as Morgenthau’s fervent

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13. *Id.* at 449.

14. *Id.* at 454.

15. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 441 (discussing HANS MORGENTHAU, DIE INTERNATIONALE RECHTSPFLEGE, IHR WESEN UND IHRE GRENZEN 56–57 (1929)).

16. *Id.*

17. *Id.* at 441–42.

18. *Id.* at 445 (summarizing Morgenthau’s pivotal ideas regarding interdisciplinarity and antiformalism).

19. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 459 (quoting Hans Morgenthau, *Positivism, Functionalism and International Law*, 34 AM. J. INT’L L. 261, 269 (1940)).

antiformalism.<sup>20</sup> As Koskenniemi tells the story:

Morgenthau wrote his legal swan song from his position as lecturer at the University of Kansas City – the famous 1940 article that criticized the way international law was “paying almost no attention to the psychological and sociological laws governing the actions of men in the international sphere.” From the safety of across the Atlantic, he described inter-war formalism as an “attempt to exorcise social evils by the indefatigable repetition of magic formulae.” . . . Formalism’s error lay in its dogmatic reliance on a notion of “validity” that qualified as law rules that were not actually applied, and failed to include all rules that were . . . .<sup>21</sup>

But, Koskenniemi continues:

Morgenthau never developed such anti-formalist jurisprudence. Instead, he stopped writing about international law and became the theorist of power with idiosyncratic views about responsible statesmanship who is now known as the father of “Realism” in international relations. . . . Morgenthau depicted the principal aspects of the post-war order as a realm of (pure) power, and of politics, but not of law.<sup>22</sup>

The break between a formalist international legal profession, on the one hand, and the new, interdisciplinary and antiformalist field of IR, on the other hand, had begun.

### ***B. From Morgenthau to a Realist, Antiformalist IR***

At this point in the narrative, Koskenniemi follows Morgenthau across the Atlantic, where he becomes, in Stanley Hoffmann’s estimation, “the founder of the discipline.”<sup>23</sup> During these early years of the Cold War, the new field of IR was dominated by European immigrants, including John Herz, Karl Deutsch, and others, who brought with them

an image of international law as Weimar law writ large, formalistic, moralistic, and unable to influence the realities of international life. “The real relationship between international law and the actual behavior of states,” John Herz wrote, “has been that between utopian ideology and reality.” . . . The dangerous and unpredictable conditions of international politics made it imperative that decision-makers be freed from formal rules or dogmatic moral principles that tied their hands when prudence and innovation – Morgenthau’s “wisdom” – were called for. They were in full agreement with Kennan’s 1951 critique of US inter-war foreign policy as having failed to understand that the “function of a system of international relationships is not to inhibit the process of change by

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20. *Id.*

21. *Id.*

22. *Id.* at 460.

23. *Id.* at 465 (quoting STANLEY HOFFMANN, *An American Social Science: International Relations*, in JANUS AND MINERVA: ESSAYS IN THE THEORY AND PRACTICE OF INTERNATIONAL POLITICS 6 (1987)).

imposing a legal straight jacket upon it.”<sup>24</sup>

This post-war rupture between international relations and international law was not inevitable, according to Koskenniemi, who rightly points out that international law remained an integral part of the study of international relations in other countries, including in the *Grandes Écoles* of post-war France, and in the English School scholarship of Hedley Bull and Martin Wight.<sup>25</sup> However:

Where European students of international relations have largely accepted the presence of different vocabularies within their discipline – and a rather quaint formalism in their writings about international law, *Americans had internalized Morgenthau’s anti-formalism as a foundational part of their discipline. Even if it might have been possible to unlearn Realism as a set of academic propositions, the interests of United States policy-makers and the outlook of a Great Power guaranteed that the critiques of legal formalism would remain an ineradicable part of the profession.*<sup>26</sup>

I shall return to, and question, the ineradicable nature of IR’s purported anti-formalism below.

As a final element in the emerging cocktail of postwar American IR scholarship, Koskenniemi emphasizes the strong policy orientation of the new field, which witnessed, again in the words of Stanley Hoffmann, “a remarkable convergence between [the needs of policy-makers in Washington] and the scholars’ performances.”<sup>27</sup> Realist ideas about international politics, Koskenniemi continues,

could not have been planted in more fertile soil. After all, who else but the United States could think of itself as the “guardian” of the international political order – and thus find a justification to bring its force to bear if that seemed needed. This must have strengthened Morgenthau’s resolve never to shun from normative statements – and thus helped to inaugurate the *instrumentalist approach to international relations that still today sees scientific work justified primarily if it ends up in policy proposals.*<sup>28</sup>

Not everything in postwar IR went Morgenthau’s way, Koskenniemi concedes. In particular, Morgenthau remained opposed to the rising behavioralism that increasingly influenced IR scholarship from the 1960s, in favor of what Koskenniemi lucidly describes as Morgenthau’s “existential-decisionist understanding of politics in terms of the decisions taken by the statesman under a

24. *Id.* at 471.

25. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 472–73.

26. *Id.* at 473–74 (emphasis added). This antiformalism, he continued, was not limited to realists like Morgenthau: “Realists or liberal institutionalists, structuralists, postmodernists, or advocates of a new normativism, IR scholars have dismissed IL on the basis of critiques they received from Weimar but which originated in a critique of German and French public law positivism in the last two decades of the nineteenth century.” *Id.* at 474. I shall return to this point in Part III below.

27. *Id.* at 469–70 (quoting HOFFMANN, *supra* note 23, at 10).

28. *Id.* at 470 (emphasis added).

prudential, situational ethics.”<sup>29</sup> Within a decade, Morgenthau’s traditionalist, antiscientific, and overtly normative stance would come to seem obsolete in an increasingly positivist political science discipline.<sup>30</sup> Furthermore, the strong dominance of realism—either Morgenthau’s traditionalist version or Waltz’s later and more self-consciously scientific neorealism—would later be broken by the rise of other theoretical perspectives, discussed below. But for Koskenniemi, American IR remained not only dominated by realism, but also ineradicably antiformalist in its views towards international law, and instrumentalist in its subordination of its aims to the exigencies of American imperialist foreign policy.<sup>31</sup> And, in the final step of Koskenniemi’s three-part story, IR would promptly infect the American international law profession with the same disease.<sup>32</sup>

### *C. International Law at the Service of the American Imperium*

In Koskenniemi’s view, the influence of IR realism, together with the prior development of American legal realism, bestowed upon the postwar American international legal profession two of its defining characteristics: antiformalism or rule-skepticism, and a commitment to interdisciplinarity. On the first point, Koskenniemi writes vividly of

a pervasive rule-skepticism that turned the attention of academic lawyers from exegetic work with treaties, cases, and formal diplomacy to broader aspects of international cooperation and conflict. The legal profession reimagined itself as a participant in international policy as advisers and decision-makers in governments, international organizations, and businesses, pursuing a variety of interests and agendas. Public international lawyers increasingly conceived international law from the perspective of a world power, whose leaders have “options” and routinely choose among alternative “strategies” in an ultimately hostile world.<sup>33</sup>

This rule skepticism, in turn, fostered the development of new schools of thought in the legal academy, such as the New Haven and International Legal Process (ILP) schools, that recast the law in terms of *processes*, formal and informal, and recast the lawyers themselves as “anticommunist policy advisors.”<sup>34</sup>

Closely allied to the antiformalism of American international law in the post-war era, the second contribution of realism was the emphasis on interdisciplinarity as a crucial aspect of academic work, accommodation of insights from sociology and ethics, as Morgenthau and McDougal had suggested, but also from economics, international relations, policy analysis, political theory, anthropology, and so on – an almost

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29. *Id.* at 468.

30. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 471.

31. *See id.* at 475.

32. *See id.*

33. *Id.*

34. *Id.* at 474 (characterizing the views of New Haven School theorist Myres S. McDougal).



interminable list of more or less exotic specializations.<sup>35</sup>

Surveying the landscape of post-war American international law, Koskenniemi rightly argues that no single school of thought came to dominate the discipline, with the New Haven and ILP schools sharing leadership with Columbia-based scholars such as Louis Henkin and Oscar Schachter, among others.<sup>36</sup> Nevertheless, he insists that, despite their diversity of opinion on some issues, these Cold War-era scholars were united by a pervasive antiformalism, an openness to interdisciplinary influences, and, in most cases, a willingness to reconceive the content of international law to justify the foreign policy activities of the American empire.<sup>37</sup>

Koskenniemi's review of Cold War-era American international legal scholarship is highly selective, effectively ignoring the many legal positivist scholars who rejected antiformalism and rule skepticism in the same way that Koskenniemi himself has, as well as the many critical theorists who rejected formalism but could hardly have been said to have thrown in their lot with the American imperial project. Nevertheless, as a shorthand account of a particular era, Koskenniemi's story rings at least partly true to the spirit of American academe during the height of the Cold War.

Koskenniemi does not, however, limit his critique of either IR or American international law to the Cold War era. Indeed, his most ambitious, far-reaching, and pointed arguments are reserved for the post-Cold War American international legal scholars, such as Kenneth W. Abbott and Anne-Marie Slaughter, who have advocated, and continue to advocate, interdisciplinary cooperation with the IR field.<sup>38</sup> In Koskenniemi's telling:

Today, many international lawyers in the United States persist in calling for an integration of international law and international relations theory under a "common agenda." This is an American crusade. By this, I do not mean only that some of the crusaders haven chosen to argue for an increasing recourse to US principles of domestic legitimacy in the justification of external behavior, nor that nearly all of the relevant literature comes from North America . . . . *What I want to say, instead, is that the interdisciplinary agenda itself, together with a deformalized concept of law, and enthusiasm about the spread of "liberalism,"*

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35. *Id.* at 476.

36. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 476–77.

37. Koskenniemi further explains that:

The one theme that connected the different strands of US international law scholarship after the realist challenge was its deformalized concept of law. Whatever political differences there were between McDougal and the Columbia scholars, they agreed that international law was not merely formal diplomacy or cases from the International Court of Justice but that – if it were to be relevant – it had to be conceived in terms of broader political processes or techniques that aimed towards policy "objectives." A relevant law would be enmeshed in the social context and studied through the best techniques of neighboring disciplines . . . .

See *id.* at 478–79.

38. See *id.* at 483–94 ("Such an argument about 'collaboration' implies a thoroughly deformalized image of international law.").

*constitutes an American project that cannot but buttress the justification of American empire*, as both Schmitt and McDougal well understood. This is not because of bad faith or conspiracy on anybody's part. It is the logic of an argument – the Weimar argument – that hopes to salvage the law by making it an instrument for the values (or better, “decisions”) of the powerful that compels the conclusion.<sup>39</sup>

This is not only an historical argument about the past, but one that speaks to, and condemns in not just intellectual but also moral terms, one of the central developments in contemporary American international law; as such, it merits our careful attention and analysis here.

Koskenniemi begins his discussion of the contemporary IL/IR literature, rightly, by pointing to work by Abbott, who offered a primer on regime theoretic insights to his legal colleagues in 1989,<sup>40</sup> and by Anne-Marie Slaughter, who in a series of articles put forward a “dual agenda” for the interdisciplinary study of international law incorporating both institutionalist theory of inter-state cooperation,<sup>41</sup> as well as liberal theory that disaggregated states and considered how international law could permeate the domestic legal order and how different regime types—liberal versus illiberal—might behave in systematically different ways with respect to international law.<sup>42</sup> Koskenniemi also cites Robert O. Keohane's 1997 article, in which the author outlined two “optics” for understanding international law: an instrumentalist or rational-choice optic in which law appears as a means to the ends of self-interested rational actors, and a “normative” or constructivist agenda that acknowledges the non-rational or even constitutive pull of legal norms.<sup>43</sup>

By contrast with these authors, however, Koskenniemi considers the influence of this new interdisciplinary IL/IR literature to be inherently perverse.<sup>44</sup> For one thing, he argues:

Such an argument about “collaboration” implies a thoroughly deformed image of international law. The relevant literature is obsessed with questions such as how and why States use international institutions “to manage interstate cooperation or conflict” and when it might be useful for States to choose formal and when informal

39. *Id.* at 483–84 (emphasis added).

40. See Abbott, *Modern International Relations Theory*, *supra* note 1, at 342 (“The article introduces the major elements of modern IR theory and the work of its leading contributors, and suggests their relevance to the study of international law.”).

41. See generally Slaughter Burley, *A Dual Agenda*, *supra* note 1 (framing a “dual agenda” that bridges institutionalism and liberalism in interdisciplinary scholarship).

42. See generally Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995) [hereinafter Slaughter, *International Law in a World of Liberal States*] (introducing the analytical framework of liberalism and reimagining IL based on the behavioral distinction between liberal democracies and non-liberal States).

43. See generally Robert O. Keohane, *International Relations and International Law: Two Optics*, 38 HARV. INT'L L. J. 487 (1997) (finding IL can be understood through two “optics”: instrumentalist and normative).

44. See KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 484–85.

agreements to realize their purposes. An international relations scholar [Keohane] has outlined two “optics” for examining international law that could be used by lawyers and international relations theorists alike, instrumentalism and normativism. *This was Morgenthau’s appeal for sociology and ethics, in today’s language.* Few of these writings sustain a concept of international law that would be other than an idiosyncratic technique for studying either what works (instrumentalism) or what would be good if it should work (normativism), in other words, a special kind of sociology or morality of the international. Two aspects of the argument are indissociable: *under the dual agenda instrumentalism and normativism complement each other in a necessary, yet profoundly ambivalent way.*<sup>45</sup>

Note the claim here, which is that the “dual agenda” comprises, not institutional and liberal theory, as Slaughter used the term, but rather an instrumentalist or rational choice component, matched to a normative component, with the latter understood not as a theory of norms, such as constructivism, but rather as a normative theory.<sup>46</sup> Furthermore, in misleadingly projecting Slaughter’s language of a “dual agenda” on Keohane’s “two optics,”<sup>47</sup> he also distorts the latter’s argument: Keohane’s distinction was between two positivist theories of international law, one rational-choice and one constructivist, *not* between sociology and ethics.

Nevertheless, it is this distorted two-part conception of interdisciplinary IL/IR scholarship that Koskeniemi carries forward into the subsequent argument. With respect to the first of his two components, instrumentalism, he continues:

Instrumentalism proposes a law that is relevant for policy-makers by indicating the technical avenues through which they can reach their objectives. It speaks about functions and effectiveness, or, in the words of a recent study by the American Society of International Law, of “commitment and compliance.” For instrumentalism, law is a functional technique and legal problems are technical problems. If formal law shows itself inflexible or empty, it can be replaced by a wider standard policy guideline, informal mechanism of compliance control, soft law, or indeed the values of liberal democracy. For a decision process to be called “law,” it would suffice that it be “authoritative” and “controlling” in McDougal’s language: *if it works let it be law, and let it be law as long as and to the extent that it does work.*<sup>48</sup>

Again, note the implication here: somehow, an instrumentalist or rational-choice approach leads ineluctably to an inherently antiformalist and infinitely plastic definition of “law,” which is now defined as virtually anything that is consistent with hegemonic interests or values. Koskeniemi provides no citations to any IR scholar who actually argues this untenable position, and I shall argue below that

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45. *Id.* (emphasis added).

46. Slaughter Burley, *A Dual Agenda*, *supra* note 41, at 205–39.

47. Keohane, *supra* note 43, at 487–502.

48. KOSKENIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 485 (emphasis added).

contemporary IR scholars do not, in fact, generally hold such views.

Nevertheless, Koskenniemi again plunges forward, suggesting that even interdisciplinary scholars recognize the insufficiency of an exclusively instrumentalist definition of law, and that, at this stage, IL/IR scholars therefore introduce a particular normative conception to their analysis:

[I]f the “dual agenda” were only about what works, it would achieve a thoroughly function-dependent, non-autonomous law, an ingenious justification for a world Leviathan. Aside from sociology, ethics is needed. This was precisely what McDougal and his associates tried to attain by reference to their “goal values” and “human dignity.” . . . But that kind of naturalism could not sustain the critique of ethics that had become part of the agnostic modernity of the profession. The lawyers on the left fared no better. Institutionalism and legal process relied on assumptions about interdependence and rational behavior that had effectively been discarded by Realists.<sup>49</sup>

...

Today, interdisciplinary scholars in academia hope to control the dangers of instrumentalization by accompanying it by a normative optic received from “democracy” and “liberalism.” The argument still starts with a sociological point about the emergence of a new world order in which formal sovereignty, diplomacy, and law are being replaced by more fluid actors and processes such as “transgovernmental networks” . . . . The argument draws inspiration from a sociology that sees sovereign equality as a formalistic obstacle against the dynamic of a “real life” that leads automatically (albeit invisibly) from a “dual agenda” to a “liberal agenda.” That this sociology is normatively tinged is an absolutely central part of it: “The most distinctive aspect of Liberal international relations theory is that it permits, indeed mandates, a distinction among different types of States, based on their domestic political structure and ideology.” As sovereignty breaks down and globalization becomes the order of the day, the dynamic of a politically oriented law will no longer tolerate formalism: “The resulting behavioral distinctions between liberal democracies and other kinds of States, or more generally between liberal and non-liberal States, cannot be accommodated within the framework of classic international law.” In other words, the interdisciplinarity call cannot be divorced from the *kinds* of sociology and ethics that are being advocated. The suggested sociology is always normatively loaded, and loaded so as to underwrite the constellation already produced through power.<sup>50</sup>

Note Koskenniemi’s use—or misuse—of the quotes in this passage, which are drawn from a 1995 article by Slaughter.<sup>51</sup> Koskenniemi’s selective quotation of the original passage from Slaughter gives the implication that Slaughter is advocating a *normative* liberal theory, one in which the difference between liberal and non-

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49. *Id.* at 487.

50. *Id.* at 488–89.

51. Slaughter, *International Law in a World of Liberal States*, *supra* note 42, at 504.

liberal states is ethical, with liberal states elevated to a superior moral status. (Indeed, as we shall see presently, this is precisely the implication that Koskenniemi draws from this passage and runs with in the rest of the chapter.)<sup>52</sup> Interestingly, however, Koskenniemi omits one sentence that appears between the two quoted passages. In the original, Slaughter's passage reads as follows:

The most distinctive aspect of Liberal international relations theory is that it permits, indeed mandates, a distinction among different types of States, based on their domestic political structure and ideology. In particular, a growing body of evidence highlights the distinctive quality of relations among liberal democracies, evidence collected in an effort to explain the documented empirical phenomenon that liberal democracies very rarely go to war with each other. The resulting behavioral distinctions between liberal democracies and other kinds of States, or more generally between liberal and non-liberal States, cannot be accommodated within the framework of classic international law.<sup>53</sup>

The addition of the missing sentence makes clear that the distinctions being offered between liberal and non-liberal states are *behavioral*, not ethical.<sup>54</sup> Ignoring this, Koskenniemi proceeds as if this ethical distinction was precisely Slaughter's point, and follows the implications of this imagined argument through to its inevitable imperialist end, in a passage worth quoting at length:

In Morgenthau as well as in today's liberal deformed jurisprudence interdisciplinarity comes with two sides: an argument about sociology and an argument about ethics. The sociological argument makes law indistinguishable from the preferences of the persons whom fate and power have put in decision-making positions. The ethical argument seeks to avoid the critique that this makes the law *simply* a collection of the prejudices of the decision-makers . . . [by seeking] refuge in positions often associated with a moral doctrine adopted from Immanuel Kant. It is the particular configuration of interdisciplinarity, deformatization, and Kantian morality that inevitably comes to support a liberal Empire. Why?

Initially, the call for a new morality to constrain the international decision-maker hardly seems different from the naturalism of the inter-

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52. See KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 489–94 (“It is the particular configuration of interdisciplinary, deformatization, and Kantian morality that inevitably comes to support a liberal Empire.”).

53. Slaughter, *International Law in a World of Liberal States*, *supra* note 42, at 504.

54. Indeed, Slaughter notes later on the same page that “[t]he model developed is advanced as a hypothetical positive model.” *Id.* at 505. Slaughter does note that the model, to the extent that it holds, “poses a set of normative challenges for international lawyers,” which she explores in the final section of her paper. *Id.* This discussion, however, focuses primarily on the question of sovereignty in a world of transnational networks, seeking to protect national sovereignty as well as checks and balances among branches of government in the context of transgovernmental cooperation. See *id.* at 534–37 (describing the attributes of a world of liberal states and the redefined norm of sovereignty within that system). To be clear, Slaughter's argument bears essentially no resemblance to the normative nightmare extrapolated from her article by Koskenniemi.

war lawyers, or the arguments from the civilized conscience-consciousness of the men of 1873. . . . But the advocates of deformatization now claim that their moral norms enjoy a special character that enables them to transgress the preference of single individuals, clans, or nations. The force of their norms, they maintain, in the peculiar universality of those norms that results from their having been derived through a purely formal system of reasoning, or perhaps more accurately, from our ability to reason about them, or from reason *tout court*. . . . This is what it means to say, these lawyers claim, that they constitute a rational choice for all, an effective and legitimate constraint over otherwise deformatized decision-making, as well as an objective (and legal) guide for foreign policy.

It follows that a person, group, or State that does not share them is not only of another opinion (or preference) but has made a mistake about something that that person, group, or State should think rational for itself, too. Universalization in theory leads automatically to expansion as practice. If my principle is valid because it is universal, then I not only may but perhaps must try to make others accept it as well. . . . I need not be open to their preferences because I already know that mine are universally valid for me as well as for them, too. . . .

But this is, as many critics have argued, an impossible position. . . . [T]he temptation emerges to interpret actual decision-making in this light. That temptation becomes particularly strong if one is oneself the decision-maker. In such a case, one casts one's own views and preferences with the quality that this theory demands. But if no particular decision can claim the kind of validity that this theory regards as the only justifiable norm, then the result is imperialism in either of two alternative forms.

First case is the one where the decision-maker (State, legal adviser) believes that his preferences fulfill the criteria postulated by the theory about universal (rational) norms. In such a case, every deviating position will appear as irrational, or at least partial, subjective, historically conditioned, political bias. It may be taken into account, of course. . . . But it enjoys no independent normative validity *vis-à-vis* the decision-maker. It may be treated as an atavistic residue from political, religious, ethnic, or other such particular moralities. In due course, with increasing enlightenment (defined as a gradual acceptance of the non-contextual position), it would be given up or at least loosen its obsessive hold on those who still cling to it. . . . These positions might be called *rational imperialism*.

In the second alternative, the decision-maker shares the view that the only legitimate norm is the one that enjoys non-contextual validity but does not think that he (or anyone else) is now in possession of it. . . . Nonetheless, the decision-maker persists in making justifications that refer back to the non-contextual assumption. This will produce the same outcome as the former alternative, with the significant twist, however, that the decision-maker is now acting in bad faith. He does not think that his policy enjoys the non-contextual validity that his theory of legitimate decision-making requires. But he still overrules deviating preferences,

and does this by claiming that it does. This leads to what could be called *cynical imperialism*.<sup>55</sup>

The reader will forgive the long block quote, but this is the central passage linking IR theory to imperialism, and it seems only fair to quote the author in his own words. Doing so, moreover, has the advantage of laying bare the deeply problematic distortions of IR scholarship as well as the logical leaps that lead Koskeniemi to his bizarre conclusions. Somehow, Koskeniemi has taken a few basic assumptions of IR theory—working assumptions about actor preferences in rational-choice theories, behavioral distinctions between liberal and non-liberal states, a “dual agenda”<sup>56</sup>—and twisted them into a normative theory in which unnamed (American) decision-makers claim non-contextual validity for their own values and policies, and ride roughshod over the interests and the physical existence of other sovereign states. To be clear, the argument at this point has become entirely unmoored from either IR scholarship or from American IL scholars like Slaughter, none of whom are cited at any point in this long passage.<sup>57</sup>

In any event, we are now only one step away from the tragic conclusion of Koskeniemi’s inquiry into, and indictment of, interdisciplinary, American IL/IR scholarship. In the face of this imperialist onslaught, today’s international lawyer is placed in a quandary, forced to choose between a “quest for the fabled moral norms that dictate what are rational choices for everyone,”<sup>58</sup> on the one hand, or falling back on pure intuition, on the other:

To escape the megalomania of the first path, and the cynicism awaiting at the end of the second, the tempting alternative is to turn back to the interdisciplinary scholars, and to accept as correct and controlling, not only their critique of formalism but also the policies and preferences they suggest to replace it. Do not their complex moral ponderings, multi-factor calculations, dependent and independent variables, graphs, or quixotic discourses suggest an altogether deeper mode of understanding than do the lawyer’s banal antics? *In this way, the anti-formalist technique, and the interdisciplinary call, in fact lead to an invitation for the lawyer to accept as authoritative the styles of argument and substantive outcome that the international relations academia has been able to scavenge from the moral battlefield. Behind the call for “collaboration” is a strategy to use the international lawyer’s “Weimarian” insecurity in order to tempt him or her to accept the self-image as an underlaborer to the policy agendas of (the American) international relations orthodoxy.*<sup>59</sup>

At long last, Koskeniemi had led the reader through a teleological

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55. KOSKENIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 489–92.

56. See generally Slaughter Burley, *A Dual Agenda*, *supra* note 1.

57. See KOSKENIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 489–92. The footnotes on these pages, it will be noted, provide citations to John Rawls, Michael Sandel, Michael Walzer, Jürgen Habermas, and other historians and normative theorists, but not to any IR or IL scholars.

58. *Id.* at 493.

59. *Id.* at 494 (emphasis added).

intellectual history that begins with Morgenthau's interwar disillusionment with international law, and proceeds through the subsequent domination of American IR by antiformalist realists and American imperialist policy-makers, to the ineluctable corruption of an American international legal profession to the point where its practitioners/underlaborers no longer recognize the law at all, but prostitute themselves to American imperialists. The reader gets the sense of having been engaged in a Socratic dialogue, in which Koskenniemi, as Socrates, begins with simple first principles and then moves rapidly from what he presents as one logical corollary to another, before reaching a result that the bewildered interlocutor considers entirely absurd, but which the Socratic figure claims to have "proven" through careful argumentation.

With a bit of hindsight and distance, however, it becomes clear that Koskenniemi has reached this imperialistic nightmare outcome only through a series of distortions of other authors' core arguments and assumptions: Morgenthau's realism, policy orientation, and anti-formalism is projected onto IR scholars who do not share them; Slaughter's dual agenda and Keohane's two optics are twisted into an extreme antiformalism that asserts the infinite malleability of law which neither author asserts; and Slaughter's positive liberal theory is twisted into a totalitarian ideology which asserts the infallibility of American foreign policy-makers. The resulting totalitarian dystopia is grotesque, not because it is the tragic, logical conclusion of arguments by American international relations and international legal scholars, but because it represents a distortion of those arguments.

## II. TOWARDS A MORE "REALISTIC" PICTURE OF A NON-REALIST IR

By the end of Koskenniemi's indictment, one realizes that his most fundamental argument is not primarily with international relations scholars, but rather with the modern American international lawyer who has reconceived law in purely instrumental terms at the service of American imperialism—"the political decision-maker's little helper."<sup>60</sup> The political science field of international relations, in this context, plays a walk-on part, as the Eve who corrupts the lawyerly Adam with the apple of antiformalism. Protesting that Koskenniemi is unfair to IR therefore risks being seen as having missed the point, or the target, of his analysis.

Nevertheless, to the extent that IR as such is condemned for much of what is wrong with American international law, and associated inextricably with realism, antiformalism, and the solicitous service of American imperial ambitions, it is surely worth pausing to ask if contemporary IR, understood as a subfield of American political science, is truly guilty of the crimes that Koskenniemi lays at its feet, including, but not limited to, the corruption of American international lawyers.<sup>61</sup> It is to this narrower question of IR's crimes and misdemeanors that the

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60. *Id.* at 495.

61. *Id.* at 494–95.



rest of this paper is devoted.

The first and most obvious rejoinder to Koskeniemi's critique is that his vision of the IR field is hopelessly outdated. Koskeniemi depicts an IR field that is dominated by realism.<sup>62</sup> At a few points in *The Gentle Civilizer of Nations*, Koskeniemi acknowledges the existence of subsequent, non-realist theoretical movements in IR, but generally in a suspicious or dismissive tone that suggests that these nominally new and anti-realist theories have not changed anything fundamental.<sup>63</sup> Koskeniemi is aware, for example, that regime theorists and neoliberal institutionalists like Robert Keohane broke self-consciously with neorealist theory from the early 1980s, yet his treatment of regime theory in *The Gentle Civilizer of Nations* acknowledges barely any difference between the theories, which are seen as being equally supine in the service of the American hegemon:

Realist insights have been used to project an interdependent world of cooperation beyond the nation-State. As a consequence, an intellectual alliance has been proposed between international lawyers and international relations scholars advocating regime theory – that is, a theory about the effects of informal norms in constructing collaborative “regimes.” It is no wonder that such approaches have become popular in the United States. The language of “governance” (in contrast to government), of the management of “regimes,” of ensuring “compliance,” that has become rooted in much American writing about international law, is the language of a powerful actor with an enviable amount of resources to back up its policies.<sup>64</sup>

We have already seen the liberties that Koskeniemi takes in distorting the views of liberal IR theorists, above.

Nor do Koskeniemi's views of either America or IR appear to have changed in the decade since the publication of *The Gentle Civilizer of Nations*. In 2004, for example, Koskeniemi opened an article about “International Law and Hegemony” with a stark contrast between an IL-hostile America and an IL-loving Europe.<sup>65</sup> On the American side, he cites only two representatives, the neoconservatives John Bolton and Robert Kagan, whose disdain for international law is painfully obvious.<sup>66</sup> Against this view, Koskeniemi cites Bruno Simma, Andreas Paulus,

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62. *Id.* at 413–509.

63. See KOSKENIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, 474–80.

64. *Id.* at 479–80. It is unclear why Koskeniemi, in this passage, associates regime theory with the study of only informal norms, since Krasner's canonical definition of regimes clearly refers to both formal and informal, implicit and explicit norms. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT'L ORG. 185, 186 (1982).

65. Martti Koskeniemi, *International Law and Hegemony: A Reconfiguration*, 17 CAMBRIDGE REV. INT'L AFF. 197, 197–98 (2004).

66. *Id.* Although Koskeniemi did not mention it, Morgenthau would have been appalled by the ideological crusading of both of these neoconservative scholars; nevertheless, Koskeniemi draws a line back from Thucydides and Machiavelli to these modern neocons, with the common thread being a fundamental objection to having fundamental national interests tied down by

Antonio Cassese, and Jürgen Habermas for a European perspective, summarizing the contrast with a vigorous, “How differently Europeans see the world!”<sup>67</sup> The notion that Bolton and Kagan might not constitute a representative sample of American political or scholarly opinion, or that some American scholars from either law or political science might see the world in a similarly “European” perspective, does not appear in Koskeniemi’s text.

Most recently, in an otherwise brilliant 2012 article on teleology and “counterdisciplinarity,” Koskeniemi briefly returns to IR theory and considers several recent developments, only to dismiss these out of hand.<sup>68</sup> Surveying what he refers to as “offers of assistance . . . from United States political science departments,”<sup>69</sup> Koskeniemi briefly recaps the core story of *The Gentle Civilizer of Nations*, from the New Haven School through Slaughter’s contribution, before asserting that, in any event, “[t]he ‘dual agenda’ was espoused by a liberal elite and they collapsed together in September 2001.”<sup>70</sup> While the purported death of the dual agenda is explored and explained in no further detail, Koskeniemi does admit that IR has produced additional scholarship since September 11th, and he briefly considers recent developments in constructivist and game theoretic scholarship.<sup>71</sup>

Koskeniemi devotes only a single paragraph to constructivism, citing only six works and excluding any discussion of leading scholars such as Alexander Wendt, Martha Finnemore, Christian Reus-Smit, Jutta Brunnée, and Stephen Toope, all of whom have explicitly explored international law through a constructivist lens.<sup>72</sup> After the briefest of discussions, Koskeniemi argues that constructivism “separated itself from its postmodern home and geared itself towards instrumental effect and managerial control,” before dismissively concluding that “international relations constructivism believes in homogeneous ideas and undistorted communication,” and hence is unable to grapple with the polemical and contested nature of international law.<sup>73</sup> Needless to say, this is a significant distortion of constructivist theory, the sophistication and diversity of

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“doctrines of international law.” *Id.* at 198.

67. *Id.*

68. See Koskeniemi, *Law, Teleology and International Relations*, *supra* note 2, at 14–18.

69. *Id.* at 14.

70. *Id.* at 16.

71. *Id.*

72. *Id.* See generally ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* 1–8 (1999) (viewing IL through a constructivist perspective); Martha Finnemore, *Are Legal Norms Distinctive?*, 32 N.Y.U.J. INT’L L. & POL. 699, 699–705 (2000) (examining whether there is anything distinctive about legal norms under a constructivist framework); Martha Finnemore & Stephen J. Toope, *Alternatives to “Legalization”: Richer Views of Law and Politics*, 55 INT’L ORG. 743, 750–51 (2001) (exploring the world’s move towards international law through a constructivist lens); THE POLITICS OF INTERNATIONAL LAW 21–24 (Christian Reus-Smit ed., 2004) (looking at the institution of IL under the framework of constructivism); and JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* 5–9 (2010) (discussing IL through a constructivist lens).

73. Koskeniemi, *Law, Teleology and International Relations*, *supra* note 2, at 16.

which has been convincingly demonstrated by Brunnée and Toope.<sup>74</sup>

Continuing his survey, Koskenniemi identifies “the turn to law and economics, rational choice and game theory” as the most recent development in IR theory.<sup>75</sup> After a brief mention of the work of Andrew Guzman and Joel Trachtmann, Koskenniemi argues that this approach is “ideologically conservative, statist, and closely allied with the preferences of US academic institutions,”<sup>76</sup> and hence suspect. Not surprisingly, given this superficial and slanted presentation of recent IR scholarship, he concludes, yet again, that, “it has been difficult to find powerful alternatives to realism.”<sup>77</sup>

In Koskenniemi’s world, then, the rise of regime theory, liberal theory, and even constructivism do not represent a significant break with IR’s realist roots, nor with the IR scholar’s enthusiastic service of American imperial ambitions.<sup>78</sup> While new “isms” may spring up here and there, he suggests, nothing fundamental has changed in American IR.<sup>79</sup> But is Koskenniemi’s image of a realist, policy-oriented IR accurate?

The best available evidence suggests that it is not.<sup>80</sup> Consider, for example, the most systematic, far-reaching analyses of the IR field undertaken so far, by a team of scholars at the College of William and Mary.<sup>81</sup> These scholars have, over the course of the past decade, collected valuable and systematic information about the state and the development of the IR field in the United States,<sup>82</sup> which is the epicenter of the epidemic identified by Koskenniemi.<sup>83</sup> More specifically, their project, entitled the Teaching, Research, and International Policy (TRIP) project,

74. See generally Jutta Brunnée & Stephen J. Toope, *Constructivism and International Law*, in THE STATE OF THE ART, *supra* note 1, at 119–40.

75. Koskenniemi, *Law, Teleology and International Relations*, *supra* note 2, at 16.

76. *Id.* This charge, which seems odd when leveled against a scholar like Guzman, seems more appropriate with respect to ERIC POSNER & JACK GOLDSMITH, *THE LIMITS OF INTERNATIONAL LAW* (2005), which combines simple game-theoretic models with an ideologically conservative normative argument against the morally binding force of international law. Even here, however, Oona Hathaway and Ariel Lavinbuk have argued forcefully that Goldsmith and Posner’s “revisionism” (their normative opposition to the binding force of international law) does not in fact derive from their commitment to “rationalism,” but is logically distinct from it. See Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404, 1426–28 (2006).

77. Koskenniemi, *Law, Teleology and International Relations*, *supra* note 2, at 18. In this regard, it is striking that Koskenniemi’s earlier charges against realist IR theory are now directed at all interdisciplinary approaches: “Interdisciplinary approaches are blind to the difference between the objectives of particular, especially dominant, actors and the point of law.” *Id.* at 17.

78. *Id.* at 14–18.

79. *Id.*

80. RICHARD JORDAN ET AL., ONE DISCIPLINE OR MANY? TRIP SURVEY OF INTERNATIONAL RELATIONS FACULTY IN TEN COUNTRIES 1–3 (2009).

81. See generally *id.*

82. *Id.* at 5–7.

83. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 413–509.

compiled two major sources of data.<sup>84</sup>

First, the authors created a new database consisting of every journal article published in the field's twelve leading journals from 1980 to 2007, coding each article for twenty-nine variables, such as theoretical orientation, policy orientation, and epistemological and methodological approach, which speak directly to Koskeniemi's claims about the field.<sup>85</sup> Second, the authors also administered and analyzed three surveys of American IR faculty conducted in 2004, 2006, and 2008, which provide a vivid picture of those practitioners' perceptions of the field and of their own work.<sup>86</sup> The findings from these two sources, together with other studies of the field, provide the best available evidence about the role of theory, epistemology and methodology, and policy in contemporary IR scholarship. They also show that nearly all of Koskeniemi's perceptions of the field, if they were ever accurate, are simply wrong as a depiction of contemporary IR.

### ***A. Theory: Decreasingly Realist, Increasingly Diverse and Non-Paradigmatic***

First, with respect to theory, Koskeniemi depicts an IR that is dominated by realism.<sup>87</sup> While this may be an accurate description of the IR field of the 1950s depicted in *The Gentle Civilizer of Nations*, it does not describe IR today, or indeed anytime in the past several decades. Realist theory, going back to Thucydides and Machiavelli and up through Morgenthau and Waltz, is indeed considered to be an important and even dominant part of the intellectual history of the field,<sup>88</sup> but it no longer takes pride of place in IR teaching, research, or publications. Rather, IR as a field has diversified theoretically, with a variety of theoretical perspectives thriving alongside realism, and indeed with a growing body of empirically oriented IR scholars failing to associate their research with any single theory at all.

If realist theory is to reproduce itself at the heart of the American IR field, we might expect that reproduction to take place largely in the teaching of the next generation, and clearly Koskeniemi believes that realism in general, and

84. JORDAN ET AL., *supra* note 80, at 5–7.

85. *Id.* at 2–3.

86. *Id.* at 3–5. The TRIP project has produced multiple publications, analyzing the 2004, 2006, and 2008 surveys and exploring specific issues within the field. See *TRIP Publications*, WILLIAM & MARY INST. FOR THE THEORY AND PRACTICE OF INT'L RELATIONS, <http://www.wm.edu/offices/itpir/trip/publications/index.php> (last visited Oct. 23, 2013) (compiling the work of the Institute for the Theory and Practice of International Relations). The text below draws primarily on three reports: JORDAN ET AL., *supra* note 80; DANIEL MALINIAK, AMY OAKES, SUSAN PETERSON, & MICHAEL J. TIERNEY, THE INTERNATIONAL RELATIONS DISCIPLINE, 1980–2006 (2007) [hereinafter MALINIAK ET AL., THE INTERNATIONAL RELATIONS DISCIPLINE]; and Daniel Maliniak, Amy Oakes, Susan Peterson, & Michael J. Tierney, *International Relations in the US Academy*, 55 INT'L STUD. Q. 1 (2011).

87. Koskeniemi, *Law, Teleology and International Relations*, *supra* note 2, at 18.

88. See KOSKENIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 413–80 (explaining the history and evolution of American IR, including the influence of realist theory); Koskeniemi, *Law, Teleology and International Relations*, *supra* note 2, at 9–14 (examining realism in politics and law).

Morgenthau in particular, constitute the bread-and-butter of IR teaching.<sup>89</sup> While it is certainly the case that Morgenthau is widely cited as one of the founding fathers of the IR field, neither Morgenthau nor his famous text, *Politics Among Nations*,<sup>90</sup> constitute the backbone of contemporary IR scholarship or teaching. In my own introduction to IR, I assign Morgenthau's twelve-page introduction to *Politics Among Nations*, alongside a much longer reading from Thucydides and a snippet of Machiavelli, as exemplars of classical realism, but after this initial mention we never return to Morgenthau, and when we do return to realism, it is in its later neorealist and post-neorealist variants. I also contextualize realism as one of just five mainstream IR theories, alongside liberalism and neoliberalism, constructivism, Marxism, and feminist IR theory. More importantly, according to the TRIP data, my approach represents the norm, not the exception, in American IR teaching. In a 2008 survey, for example, respondents were asked what percentage of their IR introduction class was devoted to each of several IR paradigms: in the United States, respondents reported that 21% of their course material was realist, narrowly edging out liberalism with 18%, constructivism with 10%, Marxism with 7%, and "non-paradigmatic" approaches with 10%.<sup>91</sup> Hence, while realism arguably enjoys pride of place in IR teaching, it is generally taught as one theoretical perspective among many.

Realism's fall from dominance is seen even more clearly in data on IR research, i.e., in practitioners' reporting of their own theoretical orientations, and in the publications of the field's leading journals. When surveyed, only about one-fourth of IR scholars called themselves realists, and that percentage declined from 25% in the 2004 survey to 21% in 2008.<sup>92</sup> During that same period, the number of IR scholars identifying with other traditions has come to rival those in the realist camp, with the percentage of liberals in particular outstripping realists by 33% to 25% in the 2004 survey.<sup>93</sup> Four years later, in the 2008 survey, respondents again depicted a diverse theoretical terrain in the field, with 21% reporting their work to be primarily realist, 20% liberal, and 17% constructivist.<sup>94</sup> In a new development, however, the largest percentage response to the question ("Which of the following best describes your approach to the study of IR?"), was, "I do not use paradigmatic

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89. In *The Gentle Civilizer of Nations*, Koskenniemi refers to a now-obscure statement of the lust for power in Morgenthau's work, which he refers to as "today the stuff of introductory courses at international relations departments." KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 454.

90. See generally HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (1st ed. 1948).

91. JORDAN ET AL., *supra* note 80, at 18.

92. *Id.* at 6.

93. *Id.* In response to a slightly different question, which asks respondents about the percentage of the IR literature devoted to each of various theoretical paradigms, realism beats liberalism by two percentage points, 28% to 26%, but even here respondents estimate that realism constitutes less than one-third of all IR scholarship. *Id.* at 41.

94. *Id.* at 9.

analysis,” with 26%.<sup>95</sup> Indeed, reflecting a recent literature decrying the “isms” as “evil” and constraining to empirical scholarship, a growing number of IR scholars identify with no single theory, but rather take a problem-driven, eclectic, or “tool-kit” approach to IR theory, drawing analytic concepts and testable hypotheses from multiple theoretical traditions.<sup>96</sup>

This declining influence of realism is also seen in other TRIP measures, including a closely watched question that asks respondents to identify the four scholars whose work has had the greatest influence on the field of IR over the previous twenty years.<sup>97</sup> On this metric, realist scholars take a backseat to other theoretical orientations: the top answer here is the neoliberal Robert Keohane, mentioned by 49% of respondents, followed by the constructivist Alexander Wendt with 41%.<sup>98</sup> Realist scholars are not entirely without influence, of course, with Kenneth Waltz and John Mearsheimer coming in third and fourth place with 33% and 21%, respectively, but a clear majority of the top twenty-five scholars cited are non-realists, and Hans Morgenthau, the star of Koskenniemi’s account, is far back in the pack, mentioned by only 5% of U.S. respondents.<sup>99</sup>

Interestingly, when the authors of the TRIP study compare these subjective responses of IR scholars to the hard data on published IR scholarship between 1980 and 2007, the decline of realism, and the rise of theoretical diversity and non-paradigmatic research, becomes even more evident. Indeed, the authors describe the relatively small percentage of realist scholarship in the leading journals as “the single greatest shock” to emerge from their study:

[I]n the 1980s when conventional wisdom suggests it was dominant, realism was always a distant second compared to liberalism. Realism actually peaks at 15 percent in the mid-1990s, a full 9 percentage points behind liberalism. In fact, over the past 27 years realism has never been the most popular paradigm for journal authors, and in 1999 it fell to third behind constructivism. In 2006, realist authors accounted for only 6 percent of all the IR articles published. . . . ***There are not many realist arguments being advanced in the top 12 journals and their number has been declining over the past ten years.***<sup>100</sup>

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95. *Id.* at 31.

96. See, e.g. James Fearon & Alexander Wendt, *Rationalism v. Constructivism: A Skeptical View*, in HANDBOOK OF INTERNATIONAL RELATIONS 52, 52–72 (Walter Carlsnaes et al. eds., 2003) (concluding the differences between relativism and constructivism do not warrant a war of paradigms); Peter Katzenstein & Rudra Sil, *Eclectic Theorizing in the Study and Practice of International Relations*, in THE OXFORD HANDBOOK OF INTERNATIONAL RELATIONS 109, 109–30 (Christian Reus-Smit & Duncan Snidal eds., 2008) (calling for accommodation of eclectic modes of scholarship which cross-cut traditional research traditions); David A. Lake, *Why “isms” Are Evil: Theory, Epistemology, and Academic Sects as Impediments to Understanding and Progress*, 55 INT’L STUD. Q. 465, 465–80 (2011) (asserting that academic sectarianism produces less understanding rather than more).

97. JORDAN ET AL., *supra* note 80, at 43–44.

98. *Id.*

99. *Id.*

100. DANIEL MALINIAK ET AL., THE INTERNATIONAL RELATIONS DISCIPLINE, *supra* note

Just as strikingly, the authors find that articles taking a liberal theoretical perspective substantially outnumber realist articles during the entire period, and they find that, starting in the mid-1980s, “non-paradigmatic” articles that espouse no single theoretical perspective constitute the largest single group of published IR scholarship, rising above 50% of the entire sample in the early 2000s.<sup>101</sup> With respect to Koskeniemi’s depiction of the field, the results are clear: while the legacy of realism remains important in teaching in particular, contemporary IR is not, nor has for decades been, dominated by realist theory.

***B. Epistemology and Methodology: Solidly Positivist and Increasingly Quantitative***

In contrast with the theoretical diversity of the American IR field, the TRIP surveys find considerably less diversity when it comes to epistemology and methodology. With respect to epistemology, it is common wisdom that a majority of American IR scholars are positivists, in the social scientific rather than legal sense of that term, and the data strongly supports this view.<sup>102</sup> In their surveys, the TRIP scholars asked respondents to characterize their own approach as positivist, non-positivist, or post-positivist: 64% described themselves as positivist in the 2004 survey, and by 2006 that number had risen to 70%; the number among younger scholars, i.e., those who had received their degrees in 2000 or after, was even higher at 77%.<sup>103</sup> If we look at the published scholarship in the leading IR journals, the rise and the current dominance of positivist epistemology is even more evident: in 1980, a majority, 58%, of all articles in the top journals were coded as positivist, and by 2006 this number had risen to almost 90%.<sup>104</sup>

Turning from epistemology to methodology, the TRIP survey, like other recent studies of the IR field, finds strong evidence of the increasing “quantification” of the field, i.e., the growth of quantitative methods at the expense of qualitative methodology, particularly in the leading journals in the field. In 2006, for example, 69% of IR scholars reported that their primary methodology is qualitative,<sup>105</sup> yet the TRIP study of IR journal articles tells a clear story about the relentless rise of quantitative methods over the period from 1980 to 2008.<sup>106</sup> From

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86, at 12.

101. *Id.* at 9–11. The top five IR journals in the survey included *International Organization*, *International Security*, *International Studies Quarterly*, *World Politics*, and the *American Political Science Review*. *Id.* at 9 n.12.

102. *Id.* at 16.

103. *Id.* These numbers are even more striking in contrast to findings from other countries. In their 2008 study, the TRIP scholars compared responses to their U.S. survey with responses from IR scholars in nine other countries, finding that a majority of scholars in all of the other nine countries described their work as non-positivist or post-positivist. *See* JORDAN ET AL., *supra* note 80, at 10 (noting in comparison, only 35% of U.S. respondents described their research in this way).

104. MALINIAK ET AL., THE INTERNATIONAL RELATIONS DISCIPLINE, *supra* note 86, at 16.

105. JORDAN ET AL., *supra* note 80, at 6.

106. *See id.* at 39.

the early 1980s through 2002, qualitative empirical studies constituted the largest single group among the articles published in the twelve leading journals.<sup>107</sup> During the same period, however, the percentage of quantitative studies increased dramatically, overtaking qualitative articles in 2002 and dominating the sample since then.<sup>108</sup> In the five top-rated IR journals, 49% of all articles published in 2006 employed quantitative methods,<sup>109</sup> and there is little reason to believe that this trend will reverse itself in the years to come.

While Koskeniemi's critique of IR does not emphasize epistemological and methodological positions such as these, they do figure prominently in an overlapping critique of IR by Koskeniemi's University of Helsinki colleague Jan Klabbers, who sees both the IR field and interdisciplinarity as an existential threat to the international legal profession. In Klabbers' view:

[I]nterdisciplinary scholarship is always, and inevitably, about subjection. Interdisciplinary scholarship is, more often than not, about imposing the vocabulary, methods, theories and idiosyncracies of discipline A on the work of discipline B. Interdisciplinary scholarship, in a word, is about power, and when it comes to links between international legal scholarship and international relations scholarship, the balance of power tilts strongly in favour of the latter.<sup>110</sup>

While the general attitude of the two Finnish scholars towards IR are similar, Klabbers departs from the views of his colleague in emphasizing not only the theoretical differences but also, and especially, the epistemological and methodological differences between the large positivist majority in IR, and the substantial non-positivist majority in the legal profession.<sup>111</sup> These differences in what Klabbers calls "background sensibilities," he argues, constitute a significant impediment to collaborative, interdisciplinary research, "because only those background sensibilities (the methodological and epistemological assumptions) facilitate communications between people trained and well versed in different disciplines."<sup>112</sup> If Klabbers is right, then the dominance of positivist epistemology and quantitative methods in American IR constitutes both a barrier to interdisciplinary cooperation and a threat to the legal profession, which runs the risk of having alien epistemological and methodological standards imposed on it at the expense of its traditional normative project and its formalist and doctrinal

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107. See MALINIAK ET AL., THE INTERNATIONAL RELATIONS DISCIPLINE, *supra* note 86, at 18 (stating by 1983, qualitative research methods dominated every year until 2002 with the exception of 1999).

108. *Id.*

109. *Id.* at 21.

110. Klabbers, *Bridge Crack'd*, *supra* note 2, at 120; see also Klabbers, *Relative Autonomy*, *supra* note 2, at 36 (arguing that international lawyers should guard the autonomy of their discipline because interdisciplinarity will not automatically give them a better understanding of IL).

111. See Klabbers, *Bridge Crack'd*, *supra* note 2, at 124 (arguing that interdisciplinary work owes more to background sensibilities than to common objects of study).

112. *Id.*



methodology. I shall return to these concerns, with which I have some sympathy, in Part III, below.

**C. Policy: “The Political Decision-Maker’s Little Helper?”**

Finally, the TRIP project sought to characterize the relationship of political science scholars and scholarship to policy. Recall that, in Koskenniemi’s view, American IR is fundamentally a policy science—its development and content shaped by the demands of a hegemonic American foreign policy establishment, and its practitioners constituting essentially counselors to the prince.<sup>113</sup>

Here again, the TRIP data presents a far more nuanced picture of a discipline whose practitioners perceive their work as possessing policy relevance, but whose actual scholarship falls more clearly under the rubric of basic research, and seldom offers explicit advice to policy-makers. In support of Koskenniemi’s image of IR as a policy science, most American IR scholars believe that IR scholars should contribute in some way to the policy-making process.<sup>114</sup> More specifically, substantial pluralities of American IR scholars believe that they should contribute to policy as creators of new knowledge (72%), as informal advisors (49%), as trainers of policy-makers (29%), or as formal participants in the policy process (24%), while only 3% believed that IR scholars should not be involved in the policy-making process.<sup>115</sup> Moreover, 23% of U.S. respondents indicated that they had consulted or worked in a paid capacity for the U.S. government, while smaller numbers indicate that they had consulted for think tanks (15%), NGOs (13%), the private sector (10%), and international organizations (8%); more than half of respondents, however, indicated that they had not engaged in paid consultations of any kind over the previous two years.<sup>116</sup>

Arguing against the view of an instrumentalist American IR, there is considerable evidence that American IR scholars’ work is less policy-oriented than Koskenniemi would have us believe. In the 2008 survey, respondents were asked to characterize their research as “basic,” “applied,” or some combination of the two, and the results show a combination of motives, skewed toward basic research: 20% of respondents described their research as primarily basic and 33% said their work was a combination of basic and applied, “but more basic than applied.”<sup>117</sup> By contrast, only 11% said that their research was “primarily applied,” with another 22% saying that their research was “more applied than basic.”<sup>118</sup> Analysis of IR articles in the twelve leading IR journals from 1980 to 2007 shows an even more

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113. See KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 419.

114. See JORDAN ET AL., *supra* note 80, at 60.

115. *Id.*

116. See *id.* at 61 (showing that a similar, but not identical, pattern emerges when respondents are asked about unpaid consultation or work, with the number of consultants to the U.S. government declining to just 14%, and the number of consultants to NGOs rising to 27%, the largest single category except for “none,” which continued to lead with 56%).

117. *Id.* at 40.

118. *Id.*

striking prevalence of basic academic research over policy-oriented scholarship. As the TRIP authors summarize their findings:

[O]nly a very small percentage of published IR articles actually include policy recommendations. Over the period included in this study, at no time did the percentage of articles that include specific advice for policymakers exceed 20 percent of the sample, and for the entire time period only 12 percent of articles offered a policy recommendation.<sup>119</sup>

Reflecting this fundamental finding, American IR scholars have in the past two decades engaged in deep soul-searching about the policy relevance of their field, with a growing number of scholars worrying, not about the prostituting of IR scholars to the American hegemon, but rather about the irrelevance of increasingly academic IR scholarship to the needs and concerns of policy-makers.<sup>120</sup>

A final finding relevant to Koskenniemi's image of IR as a policy science has to do with IR scholars' support for U.S. foreign policy. In Koskenniemi's view, both legal as well as IR policy advisors serve primarily to provide academic respectability and justification for U.S. foreign policy.<sup>121</sup> Yet, in the 2008 survey of American IR scholars, 23% opposed, and 53% strongly opposed, the United States' decision to go to war with Iraq in 2003, while only 4% strongly supported, and only 14% supported, that decision;<sup>122</sup> similarly, in the same survey, a staggering 78% of all U.S. respondents indicated that the United States' presence in Iraq would *decrease* international security somewhat (40%) or strongly (38%).<sup>123</sup>

None of this is to say that a small cohort of American IR scholars is not indeed involved in advising the American foreign policy establishment and helping to justify U.S. policies, as Koskenniemi suggests. What the data does show, however, is that Koskenniemi's image of IR as a policy science, devoted primarily or even largely to the making and the justification of U.S. imperial policies, is no longer, if indeed it ever was, an accurate depiction of the field.

In sum, the field of international relations today, both generally and in the United States in particular, bears almost no resemblance to the caricature drawn by Koskenniemi in *The Gentle Civilizer of Nations*. IR scholarship today is theoretically diverse, with realism playing an increasingly minor role, and it is focused far more on a positivist mission of basic research than with offering policy

119. MALINIAK ET AL., THE INTERNATIONAL RELATIONS DISCIPLINE, *supra* note 86, at 24.

120. See, e.g., ALEXANDER L. GEORGE, BRIDGING THE GAP: THEORY AND PRACTICE IN FOREIGN POLICY 3 (1993) (explaining the gap between the theories developed on IR by academic scholars and the use of these theories by practitioners); JOSEPH LEPGOLD & MIROSLAV NINCIC, BEYOND THE IVORY TOWER: IR THEORY AND THE ISSUE OF PUBLIC POLICY RELEVANCE 1 (2001) (arguing that contemporary scholarship in IR is of little use to policymakers); Stephen M. Walt, *The Relationship Between Theory and Policy in International Relations*, 8 ANN. REV. POL. SCI. 23, 24 (2005) (explaining that policymakers have generally been dissatisfied with contributions of IR theorists).

121. See KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 2, at 494–95.

122. JORDAN ET AL., *supra* note 80, at 73.

123. *Id.* at 74.

advice to the prince. Furthermore, nearly all of these trends were abundantly clear when Koskenniemi wrote *The Gentle Civilizer of Nations* at the turn of the century, yet his account of the IR field dismisses these later developments almost as an afterthought, and even his more recent writings demonstrate little sense that IR has moved on from Morgenthau's field of the 1950s.

### III. WHAT'S *REALLY* WRONG WITH IR AS AN APPROACH TO INTERNATIONAL LAW?

I have argued in the previous section that Koskenniemi's depiction of the IR field is at best outdated, at worse wildly inaccurate. Yet my argument here is not that IR is blameless, but, rather, that Koskenniemi's analysis fails to identify the *real* problems with IR scholarship, in particular with respect to IR scholars' thinking about international law. Indeed, I want to suggest that Koskenniemi's critique gets the fundamental problems with contemporary IR scholarship about international law almost entirely wrong.

In Koskenniemi's account, the paramount flaws—among many—of IR scholarship as an approach to international law are its antiformalism and its embrace of interdisciplinarity, both of which subsequently infected American international legal scholarship. In a recent paper, however, Jeffrey Dunoff and I have argued essentially the opposite of both of these claims: namely that much contemporary IR scholarship takes a naively *formalist* approach to international law, and that it engages in *too little* interdisciplinarity, relying too heavily on off-the-shelf concepts from IR theories and not enough on legal scholarship.<sup>124</sup>

To this pair of weaknesses I add a third—neglected by Koskenniemi but highlighted by Klabbers—namely the increasing dominance of not only positivism but also, and especially, quantitative methods in IR scholarship which has served to illuminate many aspects of international law, but which has arguably obscured many others. In this section, therefore, I engage briefly with each of these three problems—formalism, lack of interdisciplinarity, and epistemology and methodology—arguing that *these* issues, not the ones identified by Koskenniemi, represent the real, but remediable, weaknesses of American IR scholarship about international law.

#### A. *IR Scholars as Naïve Formalists*

In *The Gentle Civilizer of Nations*, Morgenthau's resolute antiformalism serves as a sort of original sin, corrupting first the IR field, and later the American international lawyers who ate from the apple of that tree. Once again, the core argument is that, having rejected the formalist view of international law as a set of

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124. See Jeffrey L. Dunoff & Mark A. Pollack, *What Can International Relations Learn from International Law?* 1–3 (Feb. 25, 2013) (on file with authors) [hereinafter Jeffrey L. Dunoff & Mark A. Pollack, *What Can International Relations Learn from International Law?*] (“As a result, IR scholars often present a skewed picture of IL, which necessarily produces a partial and misleading understanding of law and its effects on states and the international order.”).

rules, American international lawyers in particular reinvented or redefined law, first in terms of legal *processes*, but ultimately, and tragically, as anything that served the interests of a hegemonic United States. In fact, however, this story about legal antiformalism in IR is inaccurate, both as a depiction of the realist IR of the 1950s through the 1970s, and especially as a description of contemporary IR scholars, whose rediscovery of international law over the past several decades has taken the form of an almost entirely *formalist* approach to law-making, interpretation, and compliance.

Regarding the earlier period, Koskenniemi himself concedes that Morgenthau, having cultivated a strong antiformalist approach to international law, never developed any theory of jurisprudence, opting instead to essentially ignore law as irrelevant to the realities of international politics.<sup>125</sup> Later, when Kenneth Waltz reformulated realism as an abstract scientific theory, he and his neorealist colleagues ignored international law almost entirely.<sup>126</sup> As a result, we find few if any references in mainstream IR scholarship of the period to the process-based theories, like the New Haven and ILP schools, that were rising to prominence among international legal scholars. Although IR scholars might be said to be implicitly antiformalist during this period, in the sense that they considered formal international rules to be ineffective in restraining state behavior in the face of contrary national interests, IR scholars developed no alternative, process-based conception of international law to replace formalism. Hence, in the international legal battle between formalists and doctrinalists on the one hand, and process-based approaches on the other hand, IR scholars simply had no dog in the race.

Koskenniemi is correct in identifying an implicit antiformalist approach in the original formulation of regime theory, the canonical definition of which depicted regimes as “sets of implicit or explicit principles, norms, rules and decision-making procedures around which actors’ expectations converge in a given area of international relations.”<sup>127</sup> The new regime theorists, although clearly overlapping in research interests with international legal scholars, avoided using the “I-word” in much of their research, and opted at least initially for a theoretical framework that did not distinguish sharply between formal rules and informal norms and principles.

From this early beginning, however, Robert Keohane, the leading scholar of the neoliberal institutionalist approach, moved towards a definition of institutions in terms of formal rules. In Keohane’s reformulation, “[r]egimes are institutions with explicit rules, agreed upon by governments, that pertain to particular sets of issues in international relations.”<sup>128</sup> The advantage of such a formal conception, IR scholars argued, was its more effective operationalization and measurement, as well as an enhanced ability to distinguish between the substance of the regime, on

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125. See KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 2, at 460.

126. See generally KENNETH N. WALTZ, *THEORY OF INTERNATIONAL POLITICS* (1979).

127. Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, 36 INT’L ORG. 185, 186 (1982).

128. ANDREAS HASENCLEVER ET AL., *THEORIES OF INTERNATIONAL REGIMES* 12 (1997).

the one hand, and its cognitive and behavioral effects on the other.<sup>129</sup> Despite this move towards formal rules, Keohane's work in the 1980s and 1990s, like that of most of his followers, eschewed any explicit discussion of law.

In the standard account of IL/IR scholarship, the pivotal moment came in the early 2000s, when a growing number of IR scholars "rediscovered" international law. In doing so, however, IR scholars generally adopted an approach to the study of international law that was strikingly, and naively, formalist—not, of course, in the specific sense put forward by Koskenniemi in *The Gentle Civilizer of Nations*, but in the broader and more traditional sense of placing crucial importance on the black-letter text of international legal pronouncements. If, for example, we examine the famous "legalization" volume of *International Organization*, published in 2000, we find a definition that emphasizes a number of formal features, including binding rules and precision, as essential features of law:

"Legalization" refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions: obligation, precision, and delegation. *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.<sup>130</sup>

To be sure, the editors of the legalization volume pointed out that each of these dimensions could vary in value from low to high, with the result that international law itself could be characterized on a continuum from "soft" to "hard," and there were occasional references to legal processes.<sup>131</sup> Yet, the fundamental conception here is one of law in terms of *rules* rather than process, and this formalist approach has been enthusiastically embraced by the majority of IR scholars who have since taken up the study of international law.

More specifically, Dunoff and I have argued, IR scholars have taken a surprisingly formalist approach across the board, from the making and design of international law, to international legal interpretation and adjudication, to issues of compliance, enforcement, and effectiveness.<sup>132</sup> If we look at international law-making, or sources of law, for example, it is striking that the leading political science approach—rational design—focuses on analyzing and coding the explicit features of international treaties. Law, in this view, is equated explicitly with the

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129. *Id.* at 12–14. In addition, a formalization of the concept of regimes or institutions had the secondary effect of facilitating measurement, and later quantification, of these concepts.

130. Abbott et al., *The Concept of Legalization*, *supra* note 1, at 401.

131. *Id.* at 401–02.

132. Jeffrey L. Dunoff & Mark A. Pollack, *What Can International Relations Learn from International Law?*, *supra* note 124, at 2.

black-letter law of treaties.<sup>133</sup>

By contrast, the push and shove of customary international law-making, which New Haven School scholars had acknowledged to be an inherently political process infused with power and therefore a natural object of study for political scientists, has been almost entirely ignored by IR scholars. Similarly, IR studies of state “commitment” to international law have focused almost entirely on the formal act of state ratification of treaties, reflecting a formal, legal positivist view towards international law as binding only states that explicitly consent to it.<sup>134</sup>

If we turn from international law-making to interpretation and adjudication, it might at first seem surprising to refer to IR scholars as formalists, since such scholars have by and large focused on measuring and explaining international judicial behavior and judicial independence, with far less attention to matters of doctrine. Nevertheless, such IR studies are arguably formalist in their nearly exclusive focus on international courts as the primary loci of international legal interpretation, misleadingly overlooking the numerous other sites where interpretation and application occurs, including committees, councils, and other subsidiary treaty bodies.<sup>135</sup> In many cases, international legal interpretation takes place largely within political bodies of member-state representatives, which would presumably be amenable to analysis using the tools of political science, yet until now such bodies have been studied almost exclusively by legal scholars.

Finally, IR studies of *compliance* often assume implicitly that international law consists of a series of unambiguous legal rules embedded in international agreements, and that international law’s effects are most relevantly measured in terms of state behavior that is (or is not) consistent with the terms of these rules. But this formalist view of international law fails to account for the wide variety of ways in which law is indeterminate; the ways in which various actors use that indeterminacy; and the diverse mechanisms through which international law influences both states and non-state actors.<sup>136</sup>

In short, the often-unwitting formalism of much contemporary IR scholarship—the focus on treaties and courts, and the implicit treatment of

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133. See Barbara Koremenos, Charles Lipson, and Duncan Snidal, *The Rational Design of International Institutions*, 55 INT’L ORG. 761 (2001) (introducing the rational design approach); and Barbara Koremenos & Timm Betz, *The Design of Dispute Settlement Procedures in International Agreements*, in THE STATE OF THE ART, *supra* note 1, at 371, 376–80 (analyzing the design of explicit dispute resolution procedures in international agreements).

134. See, e.g., BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 12–17 (2009) (outlining the factors that affect commitment and finding that the ratification of human rights treaties can have positive effects on state practice).

135. See Cesare P. R. Romano, *A Taxonomy of International Rule of Law Institutions*, 2 J. INT’L DISPUTE SETTLEMENT 241 (2011) (providing a typology of the many varieties of international actors that engage in international legal interpretation).

136. See Jana von Stein, *The Engines of Compliance*, in THE STATE OF THE ART, *supra* note 1, at 477, 493–96 (critiquing IR scholarship for focusing on international agreements and largely ignoring unwritten law). See generally Robert Howse & Ruti Teitel, *Beyond Compliance: Rethinking Why International Law Really Matters*, 1 GLOBAL POL’Y 127 (2010) (discussing how studies of compliance fail to capture the normative effects of IL).

international legal rules as unambiguous and determinate—creates a skewed research agenda with areas of real strength, but also with significant blind spots and lacunae. And ironically, these blind spots and lacunae correspond almost perfectly with the core insights and strengths of process-based and legal realist approaches to international law. Far from constituting an axis of antiformalism, rules-based IR approaches and process-based IL approaches are pursuing very different research agendas. For this reason, Dunoff and I argue, IR scholars would do well to step back from their often unintentional formalism and take a page from their IL counterparts, opening their analyses to informal legal processes as well as formal treaties and judicial decisions.

***B. Ignorance of the Law is No Excuse: How IR Relies Too Heavily on Off-the-Shelf Political Concepts, and Ignores the Legal Aspects of International Law***

This brings us to Koskenniemi's second major charge against international relations, namely its interdisciplinarity. As we have already seen, Koskenniemi, and even more so Klabbers, see interdisciplinarity as a fundamental threat to the international legal profession, and to the autonomy of law. Dunoff and I agree with Koskenniemi's argument that international legal scholars have been extraordinarily interdisciplinary, engaging in "law and" collaborations with economics, anthropology, sociology, and other disciplines. Indeed, one of the striking features of the legal discipline is its porous borders and its openness to influences from a variety of fields. By contrast, however, we argue that IR scholarship has been far more insular, more likely to draw theoretical concepts "off the shelf" from political science theories, and less likely to incorporate insights from international legal scholarship. Indeed, we have suggested, much IL/IR scholarship is not, in fact, truly interdisciplinary. Instead, it consists essentially of the application of IR as a *discipline* to the study of international law as a *subject*.<sup>137</sup>

This insularity of IR scholarship comes at a price, we argue, in that IR scholars often overuse relatively blunt theoretical concepts from IR theory that fail to account for the specifically *legal* features of international norms, rules and institutions, and they underutilize concepts from international legal scholarship—both formal/doctrinal and process-based—that could substantially enrich existing work and pave the way for IR scholars to ask new questions as well. With respect to the making of international law, for example, we argue that the rational design approach, which seeks to explain specific design features of international institutions in terms of the characteristics of the cooperation problem, has taught us a great deal about issues of deep interest to lawyers, such as the choice and design of flexibility mechanisms and dispute settlement mechanisms in international treaties.<sup>138</sup>

Despite these advances, we argue, the specific design features highlighted in

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137. Jeffrey L. Dunoff & Mark A. Pollack, *International Law and Internal Relations: Introducing an Interdisciplinary Dialogue*, in *THE STATE OF THE ART*, *supra* note 1, at 3, 10.

138. Jeffrey L. Dunoff & Mark A. Pollack, *Reviewing Two Decades of IL/IR Scholarship: What We've Learned, What's Next*, in *THE STATE OF THE ART*, *supra* note 1, at 626, 628.

this literature have been rather blunt in nature, and could easily be refined and informed with insights from legal scholarship which disaggregates general design elements like “dispute settlement” into a number of more fine-grained features, such as the design of remedies in the event of breach.<sup>139</sup> More generally, we conclude, IR scholarship is failing to live up to its full potential, in large part because of its failure to engage in fully interdisciplinary work that takes seriously the *legal* aspects of international norms, rules, and processes.<sup>140</sup>

### C. *Epistemology, Methodology, and the Dangers of Externalism*

A third potential failing of IR scholarship, or at least a tension between IR and international legal scholars, arises from differences in epistemology and methodology. Here, the primary culprit, emphasized in Klabbers’ work although less so in Koskeniemi’s, is the scientific positivism that dominates IR scholarship in American political science. While it is true that there remains, even in U.S.-based IR, a small percentage of non-positivist and post-positivist scholars and scholarship, the TRIP data cited above make clear that positivism is overwhelmingly dominant among American IR scholars, and even more so among published articles in its leading journals.

Here, I would agree with Klabbers that epistemological differences between positivist IR scholars and non-positivist legal scholars can and do pose a practical obstacle to interdisciplinary cooperation: it is indeed difficult for scholars from different disciplines to collaborate across fundamental epistemological and methodological divides. Nevertheless, I would defend the widespread adoption of scientific positivism in American IR as being consistent with international legal scholars’ aim of a peaceful, non-hegemonic, law-based international order. Indeed, I identify two potential defenses of positivism in this context.

The first, more obvious and less controversial defense is a simple division-of-labor argument, which states that positivist scholars pursue a project aimed at causal explanation and prediction of behavior, while non-positivist or normative scholars pursue different doctrinal, interpretive, or normative aims. In this view, neither group of authors should be held to the standards of the other, but the two can co-exist, asking different questions, employing different methods, and offering fundamentally different *kinds* of arguments and evidence.<sup>141</sup>

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139. *Id.* at 629.

140. See *id.* at 626–53 for an extended treatment of this argument with multiple examples.

141. This is the view, for example, put forward by Jack Goldsmith and Adrian Vermeule in response to criticisms of international legal scholarship by positivist political scientists. Jack Goldsmith & Adrian Vermeule, *Empirical Methodology and Legal Scholarship*, 69 U. CHI. L. REV. 153, 153–54 (2002). Such criticisms, they argue, “overlook that legal scholarship frequently pursues doctrinal, interpretive, and normative purposes rather than empirical ones. Legal scholars often are just playing a different game than the empiricists play, which means that no amount of insistence on the empiricists’ rules can indict legal scholarship – any more than strict adherence to the rules of baseball supports an indictment of cricket.” *Id.* The argument here is not about the illegitimacy of empirical legal studies scholarship, only about the legitimacy of a separate scholarly project aimed at different, primarily normative, purposes.



The second and more contentious defense of positivism consists of going on the offensive, arguing that a purely normative, non-positivist or post-positivist project, such as that proposed by critical theorists and by some legal scholars, is inherently incomplete and potentially harmful without accompanying positivist analysis. Perhaps the best statement of this second position comes from Alexander Wendt, the constructivist IR theorist who has sought to defend his embrace of scientific positivism against critics who argue against positivist, hegemonic, “problem-solving” theories in favor of critical theories seeking human emancipation:

There is much [Wendt writes] to recommend this framing of the positivist-critical debate, but the distinction between problem-solving and emancipatory theory can also get quite blurry, since both are ultimately about making the world a better place. Few positivists in IR are committed to reproducing the existing international order for its own sake. A vocal minority – realists – have a principled belief that it is impossible to transform the character of anarchic systems and that trying to do so can therefore be dangerous. But a majority – including both liberal cosmopolitans and rational choice institutionalists – are committed to the reform of the international system. To be sure, reform implies preservation of at least some features of the status quo and to that extent can be discounted as problem solving within the existing order. But that interpretation doesn’t do justice to the depth of reform sought by many positivists – protection of human rights, abolition of war, collective security, global distributive justice, environmental cooperation, an international rule of law, and so on.<sup>142</sup>

Critical theorists, Wendt argues, pursue the admirable aim of human emancipation, yet their scholarship is characterized by

a tendency toward utopian thinking, toward idealism in the pejorative sense. Constrained – or liberated, as the case may be – from talking scientifically about how structures work or how we can be emancipated from them, we are relieved of the mental discipline that reality imposes. Idealism frees theory to speculate about normatively desirable outcomes but can also make for a certain lack of realism . . . . And irrationalism, in turn, can be a poor guide to action. . . .<sup>143</sup>

Although most international legal scholars pursue somewhat different aims than critical theorists, I was reminded recently of Wendt’s critique when Dunoff and I presented our arguments about the usefulness of international law scholarship to an audience of political science scholars. As a prelude to our discussion, Dunoff and I pointed out that legal scholars do not always (or even often) pursue the same positivist, explanatory, hypothesis-testing aims as political scientists, and that doctrinal and normative aims are much more common among mainstream IL scholars. Upon making this, to us, uncontroversial point, however, we were

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142. Alexander Wendt, *What is International Relations For? Notes Towards a Postcritical View*, in *CRITICAL THEORY AND WORLD POLITICS* 205, 206 (Richard Wyn Jones, ed., 2000).

143. *Id.* at 221–22.

interrupted with a question, in which Yale University political scientist Jason Lyall asked how it was that international legal scholars could offer normative prescriptions about the law without a positive, causal understanding of the law's effects. How could, for example, international lawyers argue that states should negotiate and ratify international human rights treaties, without a clear causal understanding of the effects of such treaties (positive, negative, or nonexistent) on actual state respect for human rights? How could lawyers urge upon states signature of arms control treaties, without a clear understanding of the conditions under which states do or do not comply with the provisions of those treaties? How could international legal scholars advocate the strengthening of remedies under international trade law, without a scientific understanding of whether and how those remedies influence the behavior of states within that system?

Lyall's question poses a challenge to those who claim that international legal scholars can engage in the business of normative prescription while eschewing causal analysis and hypothesis testing. Implicit in the question, to be sure, is a commitment to a consequentialist theory of morality, one in which the moral evaluation of a given action is determined by its consequences, or what Koskeniemi might associate with Weber's conception of the ethics of responsibility. One could, therefore, defend a purely normative conception of the legal enterprise that eschewed any positivist aims by embracing a deontological world-view in which allegiance to the law serves as an inherent good, to be followed independent of consequences, "though the skies may fall." But this represents a rather extreme view, and one that I suspect would garner few adherents among contemporary legal scholars.

Regardless of where one stands on this second, more controversial defense of scientific positivism, it seems clear to me that *the core social-scientific aim of understanding how international law is made, how it is interpreted and applied, and whether and when states comply with it, is not in itself incompatible with or hostile to legal scholars' normative, teleological aim of a world governed by law.* Indeed, to suggest that the goal of a world ruled by law is somehow undermined by the social-scientific effort to *understand* how the law is made and how it works seems, frankly, bizarre.

Nevertheless, while a broad epistemological positivism seems to be compatible with or even essential to the aim of an international rule of law, contemporary IR scholarship is prone to two features, one epistemological, the other methodological, which I concede may limit and arguably have limited the contributions of IR to the understanding of international law.

The first of these is what Dunoff and I have called the "externalist" view of law dominant in IR scholarship, in contrast to the "internalist" view taken by most international legal scholars. The internalist view, to be found in doctrinal, formalist, or "black-letter" legal approaches

views law largely from the interior, within which the aim is to analyse and to explain in a coherent and logical manner a legal text or court decision and, continuing in this same methodological mode, to guide the reader towards future outcomes with respect to the positive law under

consideration.<sup>144</sup>

By contrast, most social scientists generally pursue what comparative legal scholar Geoffrey Samuel calls an “enquiry paradigm,” which judges the validity of scientific claims against “external” sources of evidence.<sup>145</sup> In such an externalist approach, mastery of doctrine is not sufficient for the study of international law, because hypotheses about the causes and effects of international law must be tested with respect to variables—such as state power and interest—external to the law itself.<sup>146</sup>

With respect to the study of international courts in particular, political science scholarship is externalist in a second sense as well. Like the legal realist movement among legal scholars, most political scientists would argue that international legal doctrine is not fully constraining of international judges, who can and do exercise significant discretion when they interpret and apply international law to specific disputes. As a result, most political scientists would argue that international judicial decisions are likely to reflect not only accumulated legal doctrine, but also *extra-legal* factors including judges’ personal ideologies, partisan allegiances, and pressures from state institutions and public opinion.<sup>147</sup> Like legal realists, I see no principled objection to the attempt to determine whether external, extra-legal factors may be influencing the behavior of international jurists, and indeed it seems to me that anyone interested in the rule of law should favor such efforts, if only to design international judicial institutions that will limit the influence of such extra-legal factors. However, externalism can become a vice if and insofar as IR scholars become interested *only* in the project of demonstrating extra-legal influences on the law, and thereby ignore the inner logic of the law, legal doctrine, and legal reasoning. The best defense against such a possibility, of course, is interdisciplinary scholarship that is sensitive to these legal issues.

The second and final *potential* flaw of IR scholarship that I wish to highlight is the dramatic move, already referred to above, toward quantitative methods in IR scholarship. The rise of quantitative methods in IL/IR scholarship, I would argue, has contributed to some of its most substantial insights into international law: students of institutional design, for example, have been able to quantify the conditions under which states design and use particular design features such as dispute settlement and flexibility mechanisms;<sup>148</sup> students of judicial politics have been able to assess the variable independence of international courts;<sup>149</sup> and

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144. Geoffrey Samuel, *Interdisciplinarity and the Authority Paradigm: Should Law Be Taken Seriously by Scientists and Social Scientists?*, 36 BRIT. J.L. & SOC’Y 431, 435 (2009).

145. *Id.* at 450.

146. *Id.*

147. See Erik Voeten, *International Judicial Independence*, in THE STATE OF THE ART, *supra* note 1, at 421, 438–39 (exploring the various possible extra-legal influences on judicial behavior).

148. See Koremenos & Betz, *supra* note 133, at 390 (using a quantitative analysis to find that dispute settlement provisions are affected by specific cooperation problems).

149. See Voeten, *supra* note 147, at 430–39 (providing an excellent survey of IL/IR scholarship on the determinants of judicial independence).

students of compliance have been able to chart and begin to explain variation in state compliance with a wide range of international legal agreements.<sup>150</sup> However, while the quantification of international legal phenomena has allowed IR (and empirical legal studies) scholars to establish broad patterns in the behavior of both state and non-state actors, the quantitative imperative to reduce legal phenomena such as court judgments to one or a few dimensions that can easily be coded, quantified, and manipulated is not without its dangers. An *exclusively* quantitative IR scholarship would miss much that is fundamental about the international legal project, including formal legal doctrine and argumentation as well as informal legal processes such as the push-and-pull of customary law creation and the internalization of international law into domestic political and legal orders. The IR study of international law should therefore remain, as it has been in the past, a multi-method enterprise.

#### IV. CONCLUSION

Martti Koskenniemi's engagement with and critique of IR, and of interdisciplinary IL/IR scholarship, arguably constitutes a minor theme in his much broader body of work. Yet its intellectual force and provocative nature have prompted a response here that I confess is far longer, and far more pointed, than I had intended at the outset of this symposium. Koskenniemi has arguably done the discipline of law a service by warning of the potential dangers of interdisciplinary scholarship—both generally and with IR in particular—and I have tried in the same spirit to be candid in this essay about the genuine weaknesses or potential weaknesses in contemporary IR scholarship as applied to the study of international law.

Nevertheless, I find that I cannot agree with, and indeed strongly object to, the specifics of Koskenniemi's denunciation of IR scholarship and its deleterious effect on the American international legal profession. Put simply, Koskenniemi's depiction of the IR literature is at best an anachronism—an overgeneralization from the work of Hans Morgenthau, a very particular scholar from a particular age, to an entire field of study six decades later. And his effort to lead us, through a Socratic dialogue, from this conception of IR scholarship to the corruption of the American international legal community, is marred by flawed starting assumptions, unjustified logical leaps, and ultimately by multiple distortions of the work of both international relations and international law scholars.

In the end, I find that the saddest feature of Koskenniemi's project is his effort to discourage interdisciplinary cooperation between IR and IL scholars, by presenting the former as an existential threat to the professional and moral integrity of the latter. Like Kenneth Abbott, Anne-Marie Slaughter, and others, I agree that political scientists may have useful theories and methods to offer international lawyers, to enrich their studies of the law. Like Koskenniemi, I believe that IR

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150. See von Stein, *supra* note 136, at 477–78 (identifying both instrumentalist and normative factors in state compliance to international treaty).

scholarship suffers from genuine flaws, including its tendency to formalism, its insularity vis-à-vis other disciplines, and its tendency toward excessive externalism and quantification. Unlike Koskenniemi, however, I see the problems of international relations scholars and scholarship as real but remediable, and the key to their remediation is more, not less, interdisciplinary cooperation with lawyers.