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The Path of International Law

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The Path of International Law,
by Anthony D'Amato,* 1 J. Int'l Legal Stud. 1-19 (1995)

Abstract: Is there a need for yet another student-edited international law journal? Practicing attorneys retrieve relevant articles when working on cases with international law issues, although they may be oblivious to the name of the journal or the prestige of the law school that supports it. For student editors, serving on a new international law journal is not just an intellectual experience; it is an empowering one. The more one looks into custom and treaty and the other sources of international law, the more one finds complexity and intellectual challenge.

Tags: Law Reviews, International Law, Student-edited international law journals

[pg1]** A.

Is there a need for yet another student-edited international law journal? At the present time there are approximately seventy student-edited international law journals in the United States. FN1 Those who think the number is too high usually talk about saving the forests. Presumably they would not get agreement from the approximately thirty student-edited environmental law journals. These journals might say that paper can be reprocessed, that increasingly the contents of their journals are being entered into computer retrieval systems, thus cutting down on the number of physical copies that are printed, and that in any event, forests are a renewable resource if cared for and managed properly.

A somewhat more plausible argument for those who think that there are too many law reviews is that there is not enough "law" that can be usefully discussed in all of those journals. If these critics are referring to American law, their position is false for at least two reasons; if they are referring to international law, it is false for a third reason as well.

First, law is a pervasive phenomenon; the closer you look, the more fine-meshed it is. If we consider the huge number of cases that are reported in the various state and federal law reporters (a number that is increasing faster than the increase in student-edited law journals), and if we reflect on the fact that the vast bulk of the written material involved in all of these cases (motions, briefs, interrogatories, discovery transcripts, trial transcripts) does not appear in the published reports, we find that published legal research has barely scratched the surface. There is no danger of law [pg2] "running out" if we just consider all cases, in their full aspect, that have been resolved in court. But additionally, reported cases are only a fraction of all lawsuits; most legal controversies are settled before they ever get to court, and over ninety percent of those that do get to court are settled eventually. Yet all of these settled cases are also "law," awaiting any scholar who wants to probe deeply into any given legal area or issue.

Second, there are vast areas of law that scholars have more or less overlooked. For example, family law is one of the most obvious and most prominent fields in all of law, yet only a couple of decades ago it was the most neglected course in the law-school curriculum. Not only are family law cases numerous in comparison to other litigated areas of the law, but they are also of huge import to the parties. It is hard to imagine a commercial law case being as important to the individuals litigating it as is a child-custody dispute to the contesting parties. If the over 400 student-edited law reviews were to announce that henceforth they would only publish articles and notes on family law, there is enough material to fill all of their pages for years to come.

My third reason applies to international law: there is hardly any danger of exhausting its ever-increasing supply. International law is growing even faster than family law out of sheer necessity. Not only are there more countries in the world than ever before, and not only are these countries increasingly literate and law-minded, but in fact international-law issues are spreading out into domestic cases. The reasons are obvious: world trade is expanding, foreign investors are coming to our shores and starting small and big businesses, many of the products we buy have been built abroad and shipped here (and nearly all of the products we buy have some component that was built abroad), the U.S. economy and stock markets increasingly reflect the state of business abroad, the number of persons coming here seeking U.S. citizenship as well as the number of tourists are rapidly increasing, our citizens are becoming more involved in foreign economies, in addition to other signs of a "shrinking world" too numerous to mention.

We are living in globally revolutionary times. The Cold War has ended abruptly, the Marxist and Socialist alternatives to capitalist economies have been discredited thoroughly, and suddenly everyone wants a share of the material riches that the world has to offer. Rising expectations have swamped political concerns in nation after nation. States that only a few years ago seemed to be captured by intractable political antagonisms, such as South Africa and Northern Ireland, suddenly are awakening to the fact that their citizens would rather spend their energies "getting and spending" than fighting each other.[pg3]

In a way, the Japanese experience has become the role model for the world. After World War II, as a condition of peace, Japan was permanently demilitarized. The vast creative energies that, in decades prior to the mid-thirties, had resulted in a huge Japanese military force (which invaded China in the 1930s and took on the rest of the world in the attack on Pearl Harbor in 1941), now had only one place to be rechanneled—business enterprise. The result: Japan became extremely rich and successful and has lived in peace with its neighbors. It slowly dawned on everyone that the world in which we are now living is not driven by military or even political factors, but by an economic capitalist revolution that gains in momentum daily and appears irreversible.FN2 The rise of capitalism inevitably is accompanied by the rise of litigation as a peaceful means of resolving the issues that capitalism spawns—contract and trade disputes, banking regulation, domestic and foreign taxation, corporate law, bankruptcy, product liability, property transfers, and the like.

Even more important than the discrediting of communism is the global change in attitude toward women. Half of the human race has lived either in varying degrees of servitude or in second-class citizenship in most countries for most of human history. Equal rights for women is still an unattained ideal in many countries, but we are in the midst of revolutionary progress presenting a challenge to international law of unprecedented proportions. In my own view, it is not the content of international human rights norms that need to be drastically changed; rather, our task is to apply these norms to countries which still do not respect them.FN3 The task of [pg4] translating human rights norms so that they can be made directly applicable to women in pervasively patriarchal societies would require at least seventy student-edited international law journals devoted full time to this issue. FN4

B.

So much for a direct response to the question that opened this essay. A more interesting inquiry lies behind the question itself. Who are the people questioning the need for yet another student-edited international law journal, and to what end? The "who" is easily identified: law professors in Ameri-

can law schools. They maintain their skepticism in the face of support for international law journals from all the other relevant constituents in the law school world. Law school administrators, for example, support the new journals by providing money and office space. Students support these journals with their labor and by competing for editorial assignments. Alumni applaud the increase in prestige for the law school. Practicing attorneys retrieve relevant articles when working on cases with international law issues, although they may be oblivious to the name of the journal or the prestige of the law school that supports it. The only skeptics in the crowd are my colleagues—the law professors in American law schools.

Why they question the need for these journals can be broken down into two basic motives:

(1) The first motive, which I partially share, is that law professors are increasingly fearful of lowered standards for publication of legal articles. They believe that there are not enough good scholars writing enough good articles to fill 400-plus student-edited journals four issues a year, including seventy international law journals. They fear that the result is the publication of many substandard articles. In faculty evaluations of colleagues for promotion or tenure, the mere fact that the candidate presents a publication list of law review articles is no longer accepted as a test of merit; it is indeed too easy for an author to find a journal which would publish just about anything as long as it is festooned with footnotes.

Curiously enough, it is not just the large number of law reviews that has contributed to a professorial perception that getting an article published is no longer the accomplishment it was thirty years ago. What has also [pg5] happened is that the elite group of law reviews has largely self-destructed. Rather than distancing themselves in terms of quality from the proliferating number of law reviews, they have embarked on a mission of publishing politically correct and faddish articles. Many of these articles are substandard, even incoherent, excuses for scholarship. The student editors apparently believe that they have a substantive mission: to publish the right kind of articles rather than articles that are well-reasoned.

The leading law reviews are, in my judgment, the worst offenders. They are adrift with the substantive fads of the day. Since their editorial boards change completely over a two-year span, and since the new crop of editors have even more disdain for "classic" legal scholarship than their predecessors, faddism in the choice of articles gains momentum with each passing year.

The net result is that it has now become hard to name the "leading" law journals. A subscriber to what used to be a top law journal has no guarantee of quality in the articles published in that journal. An article of good quality is just as likely to surface in any of the 400 student-edited law reviews. If one were to compile a list of the most influential law-review articles in all of the various fields of law, today's list would include articles from a wide and diverse group of law reviews in contrast to the situation thirty years ago when the leading articles in all the fields of law could be found in a handful of elite journals. Consequently, in considering the credentials of any given professor (who might be a candidate for appointment to the faculty or a candidate for promotion or tenure), discerning law faculties nowadays are no longer likely to be impressed by the names of the journals that have published the candidate's work.

On closer analysis, the situation of which law faculties are really complaining is that they have lost a formerly accessible standard of scholarship—a candidate's publication record. Since it is no longer possible just to look at a candidate's vita and determine whether the candidate is a good scholar, the faculty tenure review committee must actually read and evaluate the candidate's published

work. And this, I submit, is the real reason for faculties rebelling against the proliferation of law reviews. I have found that many law professors are notoriously lazy when it comes to reading articles outside their own professional field. They prefer just to look at a candidate's list of publications. Now that these publication lists are becoming meaningless, law professors must put in the effort to read the candidate's work and reach an independent assessment of its merit. [pg6]

To my way of thinking, this is one of the healthiest developments that could have occurred. I have always been unimpressed by the fact that a candidate for a law teaching job has published one article or ten articles. I have never understood the European mentality that a professor is somebody who writes a book—any book, the narrower and less accessible, the better, as if the book itself is the absolute criterion of a professorship. To the contrary, I have always been in favor of actually reading the candidate's work. FN5 One could never be sure, even thirty years ago, that a leading law review might nevertheless make a mistake in publishing a given article. So even then it was never adequate or fair just to look at the list of a candidate's publications and where they were published, and make a decision on those simple facts alone. By reading and assessing the quality of what the candidate has written, then and especially now, the faculty committee is taking the candidate seriously. It is putting its own effort into the assessment rather than relying on what other people have said about the work or the mere fact that a leading journal has published it.

But the main reason why the proliferation of law reviews is a healthy development has nothing to do with narrow issues of promotion and tenure in law schools. It is that more good articles will be published than ever before. To be sure, so will more bad articles. Still, the bad articles are not causing harm to anyone; no one is required to read them. What is really important is the fact that with an increasing number of publication outlets, the number (not necessarily the percentage) of good and useful articles will increase. In the past, some meritorious manuscripts never saw the light of day because of the shortage of outlets coupled with occasionally bad decisions by editorial boards. Today, those meritorious manuscripts are more likely to find a publication outlet. To put my argument in its strongest terms: even if the rapidly growing number of student-edited journals means that more bad articles are going to be published, and even if it means that there will be a higher percentage of bad articles compared to good ones (but of course this is not a necessary result), nevertheless, all is justified if a larger absolute number of good articles are published than ever before. The world benefits from an increasing quantity of good scholarship even if there is an increasing amount of bad scholarship. We have computer retrieval methods for ferreting out the useful articles, FN6 so there is no substantial [pg7] possibility that the useful articles will be drowned in a sea of poorer articles.

Of course, the foregoing does not imply that a new editorial board, such as the board of this *Journal of International Legal Studies*, has a mandate to publish anything that comes its way without the obligation to exercise editorial selectivity. For although we have an expanding marketplace for law-review articles, it is still a marketplace. Consumers will begin to get an impression of editorial competence over time. If a new journal has a high percentage of useful articles, its own value in this expanding marketplace of ideas will increase and gain momentum, garnering prestige for its home institution.

I would, however, like to give a word of unsolicited advice to future editors of this and other journals that could help them better serve the profession of international law. Word-retrieval computers cannot make qualitative choices. The user gets a kitchen sink of references which has to be scanned and sorted. There is a growing need in our profession for qualitative evaluation of pub-

lished scholarship. Indeed, in other professions, such as the physical and biological sciences, the problem has been addressed and the solution they have arrived at is the one which I, with no originality, suggest here. Appearing in the journals of these other professions, with increasing frequency, are the "review article" and the "bibliographical note." These contributions discuss, summarize, and evaluate all the recent articles (and books) that deal with a particular subject. They serve a useful distributive purpose in the academic marketplace; a kind of "Consumer's Reports" evaluation of the literature. These review articles are best when their author has no personal axe to grind and strives for fairness and comprehensiveness in evaluating the worth of current literature. Student editors of international law journals should take the lead in encouraging review articles of this sort.

The best way to obtain such review articles, I suggest, is to identify a likely assistant professor of international law and agree in advance to publish that person's review article. Such an advance commitment tends to go against the grain of student editorial boards. Student editors prefer to make the publication decision when they can choose among several competing manuscripts in hand. However, I suggest that they will need to realize that a law professor is not going to do all the work required to read a [pg8] substantial portion of the literature and review it without first obtaining a commitment that the resulting manuscript will be published. Such commitments can lead to the publication of worthwhile quantitative guides to the burgeoning literature on international law. And over time, they can form a sort of internal evaluative review of the developing literature.

(2) So far I have only discussed the first motive as to why some law professors view with alarm the proliferating number of student-edited law reviews. The second "why" relates to the specific field of international law. For even as some law professors bemoan the increasing number of student-edited law journals devoted to law in general, we hear a portion of those law professors (professors who teach in fields other than international law) especially decrying the increasing number of student-edited international law journals.

The underlying reason here is likewise one of laziness. But it is laziness of a different order. It is the lassitude that comes from having devoted one's life to a particular subject matter and obtaining, through hard work, an expertise in that subject matter, only to be threatened by a new and strange subject matter. Today, international law tends to be an unwelcome intruder into the law school curriculum. The majority of the faculty has expended its learning curve to embrace the latest theories about contracts, torts, property, antitrust, corporations, criminal law and criminal procedure, tax, constitutional law, securities regulation, administrative law, environmental law, professional responsibility, trial practice, family law and evidence. International law, with its strange language and strange sources, presents a frontal challenge to the learning amassed in all the other curricular subjects. The mainstream professors fear that international law will rob them of students, research support, and prestige within the academy.

Of course, I am painting with a broad brush. I know a number of superb corporations teachers who are introducing multinational corporations into their courses, tax teachers who are introducing world tax problems into their courses and seminars, antitrust teachers who spend time on extraterritorial enforcement, environmental law teachers who are talking about global ecosystems, and so forth. But it is nevertheless true that domestic law courses overwhelmingly dominate current law school curriculums. The current demand for more "practice" and "clinic" courses also tends to crowd out international law courses. FN7 International law, in this company, is more or less a "boutique" or "exotic" course.[pg9]

A similar curricular lethargy has occurred in the past. In the 1950s, criminal law was the unwanted and unloved course in the law school curriculum—what lawyer, after all, wanted to spend a lifetime dealing with criminals? The Warren Court revolution of the 1960s changed everything. There was a huge growth in criminal law courses in the 1970s and 1980s. Consider as well Law and Economics: it progressed from a feared subject in the 1970s, to an embraced subject in the 1980s, to an enough-already subject in the 1990s.

There is always faculty resistance to new courses because the faculty itself is not expert in these fields (since by definition they are new courses), and feels threatened by newcomers bearing new and strange jargon. But the threat to the establishment is even greater in the case of international law, because it threatens the existing expertise not only in substantive areas of U.S. law but in the entirety of U.S. procedural and evidential training. To many professors, international law is alien law, and their reaction is to enact an implicit Proposition 187 against the foreign intruders.

Of course, most law professors would not overtly agree with what I have just said. Law professors are experts in instant rationalization (some people say that is what lawyering is all about). If you charge them with being threatened by international law, they will reply: "Threatened? Not at all. There is nothing to be threatened about. From an intellectual point of view, international law is nothing new. It is just ordinary torts and contracts applied to foreign countries. Would a theoretical mathematician be threatened by someone who teaches applied mathematics?"

This rationalization is not just used for defensive purposes by law professors who are questioned as to why they oppose expanding the international law wing of the law school building. It is also used by professors who actively advise first-year students in course selection. These professors are not necessarily trying to guard their own turf; they include well-meaning colleagues in our profession who just happen to have little or no acquaintance with the study of international law. They tend to tell their advisees that international law is not an intellectually important [pg10] subject. "If you're good at regular law," they are likely to tell their student advisees, "you can do international law."

This rationale bothers me a great deal, not just for the obvious reason that it is a self-serving rationale invented by people who have not themselves acquired expertise in international law and hence are not really in a position to advise others about it, but for a deeper reason. What troubles me is the grain of truth that it contains. Much of what passes for "international law" in law journals is itself ill-informed about its own subject matter. A professor of a domestic law course who reads such an article is likely to be unimpressed by "international law." For we must admit that international law appears to be accessible to any writer without special training in the subject. International law just seems to be too easy. All a writer seems to need to do to write an essay on a topic in international law is to look up any textbook on international law, stick in a few well-chosen words about the sources of international law, and then proceed with "ordinary" legal analysis in the rest of the essay. The resulting article will seem, to perceptive readers who themselves have no grounding in international law, to be a normal, unexceptional law article—nothing but torts and contracts in an exotic setting.

Let me suggest an analogy. Suppose a college instructor teaching an introductory course in French asks his students to write an original poem in French. If the students are already fairly good at writing poems in English, they will simply apply their training in poetry to the new language they are learning and proceed to write "French" poetry. Suppose that the poems are then recited in the classroom and the students praise some of them as being excellent poetry. If that were the end of the

matter, then for all anyone in that class would know, good French poetry had just been created in the classroom. But if someone were to refer this matter to a professor of French literature and ask her to evaluate the students' poems, she might say they were terrible as French poetry (even if she concedes that they are quite good as an exercise for students in an introductory French class). She might say, for example, that the so-called poems are ignorant of the special expertise of French grammar and metric form that comes only from thorough study of the roots of French language and French literature, including poetical sources in classical and even archaic French. In poetry it is not just the thought that matters, it is the way it is expressed. We cannot really expect students who are taking an introductory course in French to be able to write good, nuanced French poetry even if some of those students have poetic talent.

Why then should we expect lawyers who are well-trained in the domestic law of the United States to be able to deal with the quite different [pg11] language of international law? Although the language of international law appears to use the same words as the language of domestic law, those words have a different meaning, a different pedigree, a different set of connotations. The language of international law looks like regular legal language—so much so that non-international lawyers can be completely fooled by it. In fact, the important connotations, the nuances, the specialized expertise that is reflected in the precise choice of the international legal terms can be readily spotted by persons who are expert in international law. The well-trained international lawyer can readily tell whether an article purporting to be about "international law" is part of a linguistic-cultural tradition that contains its own special meanings and references, or whether it is just a surface-plausible, ersatz version of international law. And these "expert international lawyers" I refer to are not just American lawyers. International law is a truly international language. The articles published in our American student-edited international law journals are read—and will increasingly be read—by international lawyers all over the world. Those international practitioners and scholars will be judging whether what we are publishing are genuine contributions to the field or simply knocked-off merchandise.

It is sad but true that most foreign lawyers will have a better grounding in international law than American lawyers. International law is a required subject in the law school curriculum in most countries in the world, but not in the United States. Editors of our international law journals should realize that the most important consumers of their product will have a greater sophistication about international law than most American readers. We should not just apply our own standards to articles on international law that we send out into the world market; to do so is like the students in my hypothetical introductory French class applying their own standards to assess the merits of their classmates' "French poetry."

When ersatz articles are published, they reinforce the view of American law professors that international law is not a field of law at all—just ordinary law applied to transnational events. Accordingly, I will now try to defend the proposition that so far I have only asserted: that the language of international law is special and distinct.

C.

Professors of domestic law could reasonably ask why international law should be considered to be a separate intellectual discipline. How can its language be described as distinctive when the words used are commonly used in domestic legal systems? Consider two simple examples: "cus-

tom" and "treaty." Many writers who know little about international law feel that [pg12] they know the meaning of these words—custom is just a pattern of behavior, and a treaty is just a contract between states.

Although there is a grain of truth in these assertions, here as in many places a little learning is a dangerous thing. If one focuses on these simple assertions, one is more likely to be blinded than assisted in writing about international law. Even if "custom" is a pattern of behavior, the problem is how to identify the relevant patterns of state behavior out of all the things that states do. Why do some state practices constitute "custom" for international law purposes and other similar-looking state practices amount to nothing more than mere comity or courtesy? How and when can a single incident, not even amounting to a pattern of behavior, generate custom? Why is it that certain patterns of behavior create legal expectations that future behavior must conform to those patterns? And how do we account for changes in the norms if all future behavior must legally conform to the previous patterns? These questions all interlock. To be able to argue that a certain pattern of state conduct amounts to "custom" requires grappling with all these questions.

These questions are not easily answered. One cannot simply consult a popular textbook on international law for a "nutshell" answer. Indeed, many of the popular textbooks' discussions of how to find custom are vague, ambiguous, and tautological. "Custom" is a centuries-old process—a complex metarule regarding the ascertainment of primary international rules—and not a one-line definition. And if one needs a thorough grounding in international law to be able to appreciate what is meant by "custom," an almost equal amount of study must be devoted to understanding "treaties."

Although treaties resemble contracts in some respects, they are much more than contracts. For one thing, they are "relational" contracts instead of "discrete" contracts. FN8 The notion of *clausula rebus sic stantibus* [pg13] in treaties is quintessentially a relational notion; it would wreak havoc with ordinary contracts as typically studied by students in American law school introductory contracts courses. Treaties depart radically from contracts in respect to the way reservations to multilateral conventions are validated and interpreted. Consider also that a treaty is a source of law to non-parties—something that does not exist with respect to commercial contracts in American law. FN9

Terms like "custom," "treaty," "general principles," "*jus cogens*," "U.N. resolutions," and so forth, have a special and nuanced meaning in international law that is unavailable to scholars who have not studied international law. Although these are ordinary words that seem to have an ordinary, plain meaning, the appearance is deceptive. It is quite clear to a person who has studied international law whether the author of a given article in an international law journal really knows and uses the international law meaning of these words, or whether, like a parrot, the author is simply repeating the words. One does not write good French poetry by first writing a good poem in English, then translating it word-for-word into French. One cannot write international law scholarship by thinking through a problem in the language of domestic law, then translating it into plausible international law equivalents. Such isomorphisms simply do not exist because the same word may have a different meaning when we change the context from domestic law to international law.

The reason that such isomorphisms do not exist is more than a problem regarding translation. For the language of international law is itself rooted in an entirely different legal system. It is a system that lacks a World Constitution, World Legislature, World Executive, World Administrative Branch, or even an International Court of Compulsory Jurisdiction. FN10 To some observers it seems less "authoritative" than domestic law because it lacks these domestic features. But this "authoritativeness" is rather primitive; it is a hitting-you-over-the-head-if-you-don't-like-it kind of au-

thoritativeness. Domestic law must employ the monopolistic power of the state to force people to comply with its norms.[pg14] Is the picture of sheriffs hitting people over the head what is meant by a mature legal system?

International law proceeds more on the basis of persuasion than force; it appeals more to the intellect than to the desire to avoid physical pain. It is no less "law" for this reason, for as I have tried to argue elsewhere, it has its forceful sanctions which are not always obvious. FN11 The more one looks into custom and treaty and the other sources of international law, the more one finds complexity and intellectual challenge. International law reflects accommodations among states, whereas domestic law (as it becomes more statutory) does not necessarily reflect accommodations among citizens. International law is constantly in a state of flux and refinement, whereas domestic law comes to an abrupt end when the Supreme Court rules. The international legal system is a democracy; domestic legal systems are dictatorships of law. I believe that international law is more intellectually challenging than domestic law because domestic law has final, "authoritative" institutional answers that tend to stifle creative thinking and analysis.

International law has its own language rooted in its own system. As a human, verbal activity, it transforms itself into a way of thinking about itself. To be sure, all of law school training is training in the acquisition and use of a specialized language. A good lawyer is one who has acquired a facility in the specialized language of the law—a facility that often is marked by a sort of disdain for legal gobbledeygook and a striving to say things simply and clearly. But don't be misled by this. A tax expert who advises you in simple, clear language, has in the back of her mind the Internal Revenue Code and all its linguistic complexities. A good article on international law need not use the specialized language of international law. Yet it will be clear to the informed reader that the evidence selected and adduced in the article, the way the article is structured, the kind of reasoning that goes into it, and the ultimate persuasiveness of the author's conclusion, all attest to the author's mastery of the specialized language and reasoning of this field of law.

D.

Understanding the language of a field of study is a prerequisite to contributing to the advancement of a field, but of course it is only a [pg15] prerequisite. A writer also has to "add value" to the subject; FN12 otherwise there would be little point in writing about it. In some cases the value added consists only of a new way of organizing its subject matter or a new set of citations of previous works. But in most cases the writer wishes to add new thoughts and arguments (or in the field of science, new experimental results). These new thoughts and arguments are typically the product of the writer's dissatisfaction with existing work in a particular subject-area of the field coupled with a desire to improve either the quality of the field or the quality of human life or both.

Motivation is the first step. In the field of international law, for example, a writer may simply realize at some point in time that she is very interested in some particular issue in the field. Further thought—and some preliminary reading and conversation—convinces her that there is room for improvement of the existing scholarship on that issue. On further examination, she may find that the existing scholarship is either insufficient when measured in light of the issue's importance, or it is logically or technically flawed. She may also begin to question the values of the authors of the existing scholarship, feeling that they are insufficiently sympathetic to the plight of real people in the

real world. She may feel that international law ought to be reshaped to address and help solve these real world concerns.

I raise the issue of motivation, even though a writer surely has the right to be motivated by anything at all, because at the present stage in international law scholarship there is a tendency for a writer to import her own motivating ideals directly into the content of the international law about which she is writing. To the writer, it may seem to be a short step between saying that international law ought to protect particular rights of real people in the real world, and claiming that, properly interpreted, international law does protect these rights. One can be greatly tempted to take the step. In international legal discourse, as in all legal discourse from time immemorial, the rhetorical leap from "ought" to "is" has been found to be immensely persuasive.^{FN13} For although readers of legal essays, including judges and government officials, may be rather indifferent to a writer's [pg16] claim that the law ought to say this or that, those same readers will pay close attention when a writer claims that the law in fact says this or that. Because of this striking effect upon readers, a writer feels empowered when she utilizes this rhetorical device in the service of changing the minds of readers and thus effecting a real change in the real world.

To the casual observer, international law may appear more susceptible than domestic law to the rhetorical move from "ought" to "is." Domestic law is governed, people think, by the force of authoritative statutes and precedents, thus constraining writers to dissociate their own views of what the law should be from their description of existing law. The professors of domestic law whom I mentioned earlier in this essay are apt to be in the forefront of those who claim that international law is more malleable because it lacks authoritative statutes and precedents. They believe that this malleability simply shows that international law lacks authenticity as a legal field.

Again, there is a grain of truth in these assertions. To the extent that writers on international law fail to respect the constraints of international law scholarship, they cheapen the coinage of the subject. To the extent that it is easy for a writer to import her own ideals about what international law should be into an essay that concludes by claiming that present-day international law in fact embodies those ideals, the effect of her essay may be to contribute to the downgrading of the entire enterprise of international law scholarship.

Despite this grain of truth, I believe that international law is not inherently more malleable and susceptible of incorporating a writer's own views than is domestic law. Writers on domestic law, no less than writers on international law, import into their essays their own ideals by using the rhetorical device of claiming that the law, properly interpreted, supports those ideals. They just do it in a less obtrusive fashion. They do it by carefully selecting the cases and statutes that they marshal in support of their ideals, de-emphasizing cases and statutes that seem to support the opposite position, and engaging in stretched and sometimes far-fetched interpretations of legal materials in order to make them appear to say what the writers want them to say. To be sure, this process of hammering the law into a desired shape is good training for student writers who are preparing for a career in litigation or negotiation. Indeed, the ultimate arena for bending malleable law is the courtroom, where a pair of attorneys appearing on opposite sides of a case each hammer and twist the same underlying [pg17] body of law in order to make it appear to support the position of their clients.

A professor of domestic law might make the following reply to my argument: that even if legal writers engage in the same rhetorical move (from "ought" to "is") in domestic law as they do in international law, nevertheless it is harder to do so in domestic law because of its density of statutes, case precedents, and regulations; international law, in contrast, is thinner in terms of legal materials

and hence easier for the writer to manipulate. My response—not just for the purpose of this argument, but genuinely reflective of my life's work in the field of international law—is that international law is no less "dense" than domestic law, it just seems that way.

International law seems thinner for the simple reason that greater effort is required to find it than is required to find domestic law. Domestic law is found in readily available case reports, statutes, regulations, and so forth—now more available than ever before due to the advent of computer retrieval technology. But the records of international law still remain largely buried in files and archives of foreign offices. These are the records of state diplomatic correspondence, embodying the assertion, counter-assertion, and resolution of millions of international claims. Someday, perhaps these records will be entered and stored on CD-ROMs and made available to scholars all over the world. When they become available, the "density" of international customary law, and the vast range of subjects it covers, will be evident to the most casual observer. In the meantime, one can get a glimpse of the depth of legal materials available in state foreign offices by looking at a representative case brought before the International Court of Justice. In the *Anglo-Norwegian Fisheries Case* of 1951, FN14 for example, both Great Britain and Norway searched their foreign office files and produced a vast amount of documentation concerning Norway's territorial sea claims dating back to the eighteenth century, Great Britain's practices vis-a-vis Norway in reaction to some of these claims, and ensuing diplomatic exchanges between the two countries. The Court looked over this massive evidence in reaching a decision as to the existence of norms of customary law that would resolve the dispute. FN15 No one reading the case can fail to be impressed at the richness of evidence that was brought to bear on the matter. Similar evidentiary density can be found behind most of the thousands of transboundary interactions that occur daily among the 190 [pg18] states in the world today. All that is lacking is the will and financial resources to dig up this archival material. When a disputed issue is sufficiently important, as it tends to be in any contested case before the International Court of Justice, the evidentiary material is quickly produced.

To be sure, the typical author of an article on international law does not have the time or resources to mine the archives of a nation's foreign office, much less the archives of all the foreign offices of all the countries of the world. But the job can be roughly approximated. Newspapers contain accounts of many of the significant international diplomatic claim-conflicts, followed up by stories of how they were resolved. Each day, more of these international newspapers are added to the libraries of computer retrieval systems. To be sure, a newspaper is only a secondary source of customary law. But citing a newspaper story is far better—and much more persuasive—than citing no source other than the writer's own mind.

When some people shrug off customary international law as "that vague stuff," they betray a lack of understanding of what custom is and how it can be found. I hope that with the passage of time, and the increase of scholarly writing on international law, this primitive view of our subject will be replaced by more sophisticated searches into the practices of states.

E.

For student editors, serving on a new international law journal is not just an intellectual experience; it is an empowering one. A writer or an editor is actually engaging in the process of refining international law, of helping to pin it down, of finding patterns of custom that others may have missed. But there is an entrance fee. One must pay the price of hours of study of the sources and constitutive rules of international law. One must study the way these sources and rules play out in at

least a few substantive areas of international law. All this must be accomplished before one starts to write or edit an article. If this preliminary homework is skipped—if a writer believes that all that is necessary is an idea plus a quick look at a textbook on international law to pick up the jargon—then the result will be that readers who know international law (readers from all over the world) will simply exclude that writer's work from the ongoing path of international law dialogue, and have a lesser opinion of the journal that published it.

My final sentence is a summary of the most important point I have tried to make in this essay. I address it to editors and contributors to the *Journal of International Legal Studies* and to all other editors and contributors to student-edited international law journals. It may sound [pg19] paradoxical but here it is anyway. If you take international law seriously, it will take you seriously.

FOOTNOTES

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FN1. See MICHAEL HOFFHEIMER, 1995 DIRECTORY OF LAW REVIEWS AND SCHOLARLY LEGAL PUBLICATIONS. The same directory lists approximately 170 student-edited law reviews devoted to general legal subjects, and the same number of student-edited journals devoted to special legal subjects other than international law. In total, at present count, there are over 400 student-edited law journals in American law schools.

FN2. Along with the capitalist revolution is a symbiotic development in the democratization of countries and an increasing respect for human rights. I discussed these interlocking themes in an article written during the Cold War. See Anthony D'Amato, *Are Human Rights Good for International Business?*, 1 NW. J. INT'L L. & BUS. 22 (1979).

FN3. The norm of "equality," for example, cannot be easily invoked as a criticism of the status of women in Islamic countries, because of the defense that although women are not equal in some matters (relating to law, freedom of movement, divorce), men are unequal in other compensating matters (men must present their wives with a dowry, which may be kept intact because husbands are obligated to provide one hundred percent of the economic support of their wives). Whether this is a truly countervailing inequality may depend upon one's cultural point of view. For further discussion, see Anthony D'Amato, *The Primacy of Individual Freedom*, in INTERNATIONAL LAW ANTHOLOGY 260, 260-67 (Anthony D'Amato ed., 1994); Anna Jenefsky, *Egypt's Reservations to the Convention on the Elimination of Discrimination Against Women*, in INTERNATIONAL LAW ANTHOLOGY, *supra*, at 130, 130-39.

FN4. For a glimpse of the complexities involved in speculating about the application of a few articles of the Convention on the Elimination of Discrimination Against Women to the partially Islamic nation of Egypt, see Jenefsky, *supra* note 3.

FN5. Not necessarily everything that the candidate has written. My own strategy is to ask the candidate to name the very best thing that he or she has ever written, and then to read it. I am more interested in the best the candidate is capable of doing than how much the candidate has done.

FN6. With improved software, it will be possible to tell at a glance how often a given retrieved article or book has been cited. More difficult, but still within the realm of existing technology, a weighting can be given to a given article in terms of how frequently it has been cited by articles which in turn have been frequently cited. This procedure would yield a crude quantitative measure of the scholarly impact of a given article.

FN7. However, in big cities, students should demand of their law-school clinics that they be given opportunities to help immigrants to the United States. The United States Immigration and Naturalization Service (INS) often treats newly-arrived persons quite badly, and the INS also has a low tolerance for lawyers. Most lawyers don't like to do INS work for this reason (and also because immigrants usually have little money). Hence, INS work is precisely the area where law students can do the most good and at the same time obtain practical experience in international law.

FN8. The analytical distinction between relational and discrete contracts has only recently come into American contract law, pioneered by my Northwestern colleague Ian Macneil. I am a great admirer of Professor Macneil's work, but for me his main points were anticipated decades ago by analyses made regarding the interpretation of treaties in international law. Indeed, I would suggest that the reason Professor Macneil's work on contracts has struck American scholars of contract law as so innovative is that they have never studied the way treaties have been analyzed in international law. The "relational" theory of contracts has a lot to learn from treaties. But I would hasten to add that international lawyers may also benefit in their understanding of treaties from Professor Macneil's work on relational contracts.

FN9. However, treaties have a striking analogue to the early formation of the common law of contracts, especially the "law merchant" in the judicial decisions of Lord Mansfield. For further discussion see INTERNATIONAL LAW ANTHOLOGY, *supra* note 3, at 51-84, 89-101, 121-45.

FN10. Personally, I would not want a world government; I enjoy the diversity and freedom that exists in the various nations of the world, a freedom that I think could be stifled if there were one central government telling everyone what to do.

FN11. See Anthony D'Amato, Is International Law "Law"?, in INTERNATIONAL LAW ANTHOLOGY, *supra* note 3, at 37.

FN12. The phrase "add value" is unusual in talking about scholarship, though of course it is a common phrase in European countries which have a "value added tax" or VAT. In those countries, each contributor to the manufacturing process of a product is taxed on the market value of its contribution.

FN13. A move in the opposite direction—from *is* to *ought*—has been called the "naturalistic fallacy." It is a standard rhetorical device of political theorists who are influenced by natural law. Perhaps what I have described in the text—the move from *ought* to *is*—can be called a version of the naturalistic fallacy. However, I hesitate to give it this same label lest it become a source of confusion.

FN14. Fisheries Case (U.K. v. Nor.), 1951 I.C.J. 116 (Dec. 18).

FN15. For an account, see Anthony D'Amato, *Finding Custom in an Incident*, in INTERNATIONAL LAW ANTHOLOGY, *supra* note 3, at 58.