The Pragmatic Method and International Law in the Fight against Terrorism

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ABSTRACT

The inadequacy of the dominant theory of international law, positivism, presents an impediment to employing this approach to tackle the threat of terrorism. Positivism, which postulates that authoritative, binding law can be deduced from fundamental principles, chiefly State consent, remains wedded to an illusion given the abundance of evidence indicating that the law does not actually function in this manner. Realism, in either its legal or international relations variants, however, does not provide a promising alternative, although it does point the way towards an improvement in emphasizing the need to focus on the contexts in which law actually functions to affect behaviour. Ultimately, though, it is the philosophical school of pragmatism that offers the most promising way forward in thinking about international law. Pragmatism is not a theory. Rather, it is a method, one which emphasizes that social contexts ground all behaviour; that behaviour must be viewed in functional, not formal, terms; and that we can comprehend these contextual and functional phenomena only through a prism of instrumentalism, in other words seeing behaviour as a means towards an end. These tenets apply to international law's role in the struggle against terrorism by emphasizing the need to adopt an interdisciplinary, empirical approach to understanding the ways in which formal and informal norms impact State and private action. In doing so, it makes no judgments regarding the value or efficacy of particular policies, believing that they must be assessed on the basis of factual investigation, and that such assessments must form the basis for evaluations of international legality. The consequences of a pragmatic approach to international law and the war on terror are discussed in examples that include the development of informal norms by

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transgovernmental networks in the practice of extraordinary rendition, the International Court of Justice’s opinion in the Barrier Wall case, and the use of coercive interrogations.

SECTION 1  INTRODUCTION

The campaign against terrorism is being waged at the frontier of experience. While previous challenges and threats prepared policy-makers and enforcement personnel for the current effort, the multifaceted nature of the terror threat is unique. Five years after the attacks of 9/11, the United States and its allies continue to face choices that require balancing both our security and our values, frequently confronting issues that provide few clear policy or legal options. Where the laws of armed conflict, for instance, developed because States found reciprocal military and economic benefit in observing restraints on the use of violence, for the jihadi and their kind, “terrorism is total war: the end justifies all means”. Squared off against an amorphous, death-entranced foe, internationally guaranteed civil rights and humanitarian law appear “obsolete and counterproductive in the face of new realities”, even for defenders of the cosmopolitan spirit such as Thomas Franck. While it is true, he says, that “inconvenience in law enforcement is the price of the rule of law”, updating our understanding of international law must nevertheless form the subject of a wide-ranging discussion between scholars, government lawyers and policy-makers if we are properly to balance the tensions between our security, liberty and morality.

So it is that States have not waited for the formal modes of international law to adjust, but instead have forged ahead in the promulgation of new codes of conduct, or the abandonment of old ones. To some, the way forward has proved wayward, undermining both the letter and character of international law. To others, pushing the envelope on counter-terrorist tactics has been crucial to saving innocent civilian life. Of the specific issues that have come under scrutiny, several stand out: targeted killings; extraordinary renditions; coercive interrogations; attacks on terrorist targets resulting in civilian casualties; transgovernmental counter-terror networks, and the appropriate model by which to try suspected terrorists. Humanistic, moral and policy-based critiques have been frequent, but perhaps the most prominent discursive mode has been one of legality, whereby the practice under attack is seen to violate some apprehensible, established, binding rule of law, such as those contained in treaties and custom. As a result of such tensions, “[n]ot since World War Two has the nature and adequacy of international law provoked such a debate.”

Though it is unclear whether Franck has in mind anything beyond a redrafting of treaties in the positivist-inspired internationalist tradition, he is right to believe that international law’s new mission must be “to make it more responsive to the onerous new circumstances in which it must operate”. He is not alone. Security studies scholars also voice this concern. Audrey Kurth Cronin, for instance, asserts that throughout the policy-making and academic communities, there has been “little creative thinking” about how to undertake a sophisticated, long-term strategy against terrorism. “Instead, the tendency has been to fall back on established bureaucratic mind-sets and prevailing theoretical paradigms ...” This is particularly so in international law, a field where “developments in legal theory ... fail, as a rule, to be reflected.”

Part of the reason for the inertia seems to be that

“terrorism is considered too policy-oriented an area of research in political science, and it operates in an uncomfortable intersection between disciplines unaccustomed to working together, including psychology, sociology, theology, economics, anthropology, history, law, political science, and international relations.”

Consequently, as one observer chides, “academe is no more strategic in its understanding of terrorism than is the U.S. government.”

This paucity of enquiry is disquieting, since given the transnational nature of the terrorist threat, interstate co-operation — and theories to guide it — are more essential than ever. And while theorizing may

1. Elizabeth Chadwick, “It’s War, Jim, But Not As We Know It: A ‘Reality-Check’ for International Law”, Crime, Law & Social Change, April 2003, at pp. 233, 235 (internal citations omitted).
3. Ibid., at 687.
4. We can characterize the first four of these as tactical and the last two as operational or structural, but either way each of these components of the counter-terrorism regime implicates complex issues of security and freedom.
8. Ibid.
10. Cronin, supra footnote 7, at p. 57.
11. Ibid.
seem a luxury given the urgency of the matter. Keohane reminds us that

"theory is inescapable: all empirical or practical analysis rests on it. Pragmatic policymakers might think that they need pay no more heed to theoretical disputes over the nature of world politics than they pay to medieval scholastic disputes over how many angels can dance on the head of a pin. Academic pens, however, leave marks in the minds of statesmen with profound results for policy...practical men who believe themselves to be quite exempt from any intellectual influences [are actually] unconscious captives of conceptions created by 'some academic scribbler of a few years back'."

Such intellectual allegiances permeate the subject of international law in particular, manifesting themselves chiefly in the forms of positivism and realism.

Positivism, the dominant mode of analysis in international law, grounds itself in the view that the law consists of a set of social rules that "is, or should systematically be studied as if it were, a set of standards originated exclusively by conventions, commands, or other social facts", as opposed to metaphysical phenomena rooted in discredited conceptions of a "natural law".

Realism, as described here, comes in two variants. The first is legal realism, which derives from the insights of Justice Oliver Wendell Holmes, "[the great oracle of American legal thought]."

The gist of the legal realist perspective is that

"the point of reference for all things legal...should now be consciously shifted to the area of contact, of interaction, between official regulatory behavior and the behavior of those affected or affected by official regulatory behavior".

In this goal, the realists rejected what they viewed as the deductive formalism that positivist approaches entailed, emphasizing the need for law to be responsive to actual observed social conditions and realities. We see an analogue of this today in the sub-discipline of international relations known as institutionalism, which sees formal intergovernmental structures, including international law, as a way to overcome the various co-operative dilemmas that States face.

The second type of realism is not legal, though it also has serious implications for the study of international law. This type of realism is located in the discipline of international relations (IR realism). IR realism comes in multiple variants, but may be summarized as the view that the world of State interaction is one of anarchy, in which unitary, rational States jockey for security and power. Where IR realism would seem to be a straightforward way to describe the nature of the war on terror, relying on it exclusively as a diagnosis, let alone a prescription, fails to either explain the complexity of State interaction or the way forward to improving it. While there can be no doubt that each type of theory provides useful insights, cabining our approach to counter-terrorism to any one of them will leave us little better off.

The philosophical school of pragmatism offers an antidote to the weaknesses of the above-mentioned approaches. Pragmatism's core is not any particular idea, but rather "an idea about ideas", the central thrust of which is, according to Judge Posner, a "disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities". Such decisions should also contain, where applicable, the insights and predictions of other disciplines, such as psychology, sociology, organizational science, political science and economics. It is here professed that while economics and the rest are invaluable tools, 19. Sands, "Reasons", supra footnote 5.

20. See Koskenniemi, "Introduction", supra footnote 9, at p. xxi.


Believing in the futility of foundationalism\(^\text{29}\), of the sort that remains central to the positivist account\(^\text{30}\), pragmatism holds that we can understand ideas only by tracing their effects. As Charles Peirce famously wrote in 1878, we must

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> "[c]onsider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object."\(^\text{31}\)

Knowledge and insights, in this view, are valuable only in so far as they address themselves to particular issues, so that absent some objective, phenomena are not reasonably comprehensible.

Peirce’s interlocutor, the philosopher William James, relates a tale involving a trip to the woods he once took with some friends. Returning from a walk alone, James found his friends embroiled in debate, split evenly on this question: if a squirrel perches on the side of a tree, not visible to a person on the other side, and if that person circumambulates the tree to catch sight of the critter while the squirrel traverses around the tree remaining hidden from view, does the person upon completing a revolution of the tree “go round” the squirrel? James, called on to break a tie between the “yes” and the “no” camps contradicted and vindicated both parties by explaining that there was no real dispute: it depended only what was practically meant by “going round” the squirrel. If it meant successively occupying each directional pole, in other words being north, east, south and west of the squirrel, then yes, the person went “round” it. But if the term implied that the person had been at the squirrel’s front, sides and back, then the answer was no, he or she could not be said to have “gone around” the squirrel\(^\text{32}\). James related this fictional rodent’s tale to illustrate the larger body of thought to which it led: the pragmatist method of “settling metaphysical disputes that otherwise might be interminable . . . by tracing its respective practical consequences”\(^\text{33}\). As a means to its consequentialism, pragmatist thought also stresses the realities of social life, however they can be ascertainment.

\(^{24}\) Formal policy analysis proceeds in at least five, usually iterated, steps: (1) establishing the context, problem or objectives; (2) laying out options and possibilities, including for gathering more information; (3) predicting the consequences of each option; (4) assessing the likely consequences and balancing competing interests; (5) making a decision. Edith Stokey and Richard Zeckhauser, A Primer for Policy Analysis, pp. 5-6 (1980).

\(^{25}\) This suggestion of course echoes the New Haven School’s “policy-oriented” jurisprudence that sought to employ international law in service of a “human dignity”. Myers S. McDougall, “International Law, Power and Policy: Towards a Policy-Oriented Jurisprudence”, 82 Revue de cours 133 (1953). McDougall and Lasswell’s contributions in this area are, indeed, precisely the type of effort that the pragmatist method would seek to generate. The New Haven School shares pragmatism’s critiques of formalism, as well as its scepticism of the realist school’s obsession with raw power. Ib id., at pp. 143, 157. Positively, McDougall and Lasswell’s contributions serve to both understand the law’s situated nature and its functioning, as a prerequisite to employing it fruitfully towards its end of human dignity. Ib id., at p. 140. While the New Haven School’s approach is thoroughly pragmatic, the pragmatic method is not exhausted by the School’s insights. For one thing, a strictly pragmatic method would not necessarily posit the goal of “human dignity”, for international law, however attractive that goal might be, but could instead be directed at but one of a number of objectives, including more specific programmes such as a just and effective and counter-terrorist policy. But see Richard Rorty, Contingency, Irony, and Solidarity (1989) (explaining that the pragmatist endeavour comprises the “ability to envisage, and desire to prevent, the actual and possible humiliation of others”), quoted in Stanley Fish, “Almost Pragmatism”, 57 U. Chi. L. Rev. 1447, 1465 (1990).

\(^{26}\) See, e.g., Hans Kelsen, Principles of International Law 177 (2nd ed., Robert W. Tucker, ed., 1966). (“The normative order traditionally called international law does not contain norms limiting its spheres of validity, and insofar as this normative order is considered as a supreme legal order which is not under any other legal order, the validity of the international legal order cannot be limited in any direction.”)


\(^{28}\) Ibid., at 45.
This agnosticism is pragmatism's strength. It allows it to draw from the most insightful aspects of opposing theories without committing itself to accompanying, but less convincing aspects. As the philosopher John Dewey recognized, "there are different logics in use" and each utilization of a particular theory or methodology must be judged in light of its asserted aims. A pragmatist approach, as a result, seeks to shift the debate from discussions of what international law does or not purport to "require" to what it does, will and can do in the affairs of the world. Pragmatism thus invites any and all relevant disciplines to contribute in answering the pertinent tactical and moral questions raised by the spectre of terror.

This chapter has several purposes: (1) to suggest that the philosophical school of pragmatism, as of now scarcely recognized as useful to international law, in fact heralds great promise for channelling debate away from positivist justification based on hidden political preferences and towards more empirically based assessments of benefits, costs, risks, and trade-offs that underlie the values the law is intended to promote; (2) to connect the upsurge of literature in international law/international relations to the legal pragmatist movement in American domestic law, as a way to place the IR/IL collaboration in a larger philosophical context that includes not just theories of international law, but also revolutionary innovations in philosophy and legal theory; and (3) to explore how these insights relate to key issues arising in the war on terror in both the substantive and procedural domains, affecting the evaluation of particular substantive counter-terror tactics.

In its effort to do so, this chapter proceeds in the following manner. Section 2 outlines the primary tenets of positivism, tracing the approach from the Utilitarian philosophers Jeremy Bentham and John Austin to its later exponents Hans Kelsen and H. L. A. Hart. It then describes positivism's inadequacy as a theory to understand international law and its impact on State behaviour. Section 3 then turns to the development of legal realism, which emphasizes the contextual and functional aspects of law rather than abstract notions of authoritativeness and bindingness. In doing so it compares the thought of Justice Holmes and the great international relations realist Hans Morgenthau, and suggests why Holmes's pragmatism provides a richer vein for the analysis of terrorism and international law than does Morgenthau's realism. Section 4 then discusses the philosophy of pragmatism more thoroughly, and elaborates on the superiority of pragmatism over both positivism and realism. Section 5 considers pragmatism's interdisciplinary focus, and analyses how this perspective allows us to see that informal norms promulgated by sub-governmental entities can replace, from a functional perspective, the top-down efforts at treaty-making that characterizes so much of international law. This idea is specifically illustrated by the practice of extraordinary rendition. Section 6 then takes a closer look at the hazards of formalism, juxtaposing this method, championed by some prominent scholars, against the more promising insights that pragmatism offers. It takes the Barrier Wall case of the International Court of Justice and the practice of coercive interrogations as examples in this effort. Section 7 concludes.

SECTION 2 POSITIVISM: AN UNCONVINCING DOMINANCE

We can best understand the relevance of legal pragmatism to international law by first locating this school and its variants within the broader constellation of legal philosophy. To understand pragmatism's importance, as well as its co-existence with the still-dominant, positivist mode of legal thought, a closer look at the development of positivist legal thought is in order. Our look at the evolution of positivism begins with the work of the eighteenth-century Utilitarian philosophers Jeremy Bentham and John Austin, and moves on to positivism's more contemporary exponents, Hans Kelsen and H. L. A. Hart.

Paragraph 1 The Utilitarians

The Utilitarian philosophers Jeremy Bentham and John Austin saw three propositions at the heart of the positivist viewpoint: (i) the law consists of the commands of the governing sovereign; (ii) while moral forces both gave rise to and are shaped by law, what the law is should never be confused with what we think it ought to be; and (iii) the law is an "autonomous discipline", and so ought to be distinguished from related ethical, sociological and functional considerations.

These forebears had in mind an ambitious social project. The origins of their ambition stemmed from the post-Enlightenment conceptions of "scientific positivism", which posited that "natural science — facts about how spatio-temporal things worked — was all the Truth there was". 34


Importantly, scientific positivism viewed the law as a programme of social betterment — in Bentham’s view “the use of collective force as a means to human happiness”37. Bentham's distinction between law and norms rested on his view that legal rights and duties consisted of claims backed by sanctions. Mere norms had no such enforcement mechanism, laying claim to little more than sentiment38.

**Paragraph 2  Kelsen**

Kelsen, writing of a “Pure Theory of Law” retained the Utilitarians’ value-neutral *is/ought* distinction, but charted a new course in identifying the origin of positive law as one ultimately stemming from the validity of single master norm. This norm consisted, simply, of the notion of a “legal order”, unto itself39. Functional explanations such as psychological motives and sociopolitical causation were considered irrelevant, as the exclusive validity of the ultimate norm itself was all that was required for the law’s validity. Politics, though determinant of the content and interpretation of the law, was nonetheless a sphere only tangentially related to the law as an objective, posited order40, such that “under certain conditions a certain act of coercion ought to be performed”41. That coercion does or does not occur in a given case is of no legal consequence. Kelsen held, because the specific ‘existence’ of a norm consists entirely in its validity, and the validity of a norm prescribing or permitting a definite conduct is not affected by contrary conduct”42. Consequences remained outside Kelsen’s equation.

**Paragraph 3  Hart**

Kelsen’s contemporary H. L. A. Hart also kept the *is/ought* distinction in the law in the moral sense43, and accepted the Austrian version of law as a means of social control. He rejected, however, Austin’s view that law is no more than “the command of the uncom-

38. Ibid., at p. 829.
40. International law, Kelsen wrote, is a “system of norms which prescribe or permit a certain conduct for states”, Kelsen, *supra* footnote 30, at p. 17.
41. Ibid., at p. 16 (emphasis added).
42. Ibid., at p. 6.
43. Hart did soften the distinction a bit, however, in recognizing that when facing ambiguous applicable law — “problems of the penumbra” — the judge should try to enunciate a “sound” decision, even if it cannot be reached via deduction. Hart, “Separation of Law”, *supra* footnote 35, at p. 605.

manded commanders of society…”44. Such a view of law, Hart believed, provided that the law of the highwayman — an order backed by threat — constituted a legally binding obligation, a conclusion he rejected45. Before Hart, every major figure in the legal positivist tradition backed a sanction-centred theory of law46. But for something to be law, Hart argued, there had to be something more. Hart found his answer in dichotomizing binding law into an intertwined phenomenon of primary and secondary rules. Primary rules are those that govern conduct directly, for example “thou shalt not murder”. Primitive legal systems according to Hart consist only of such laws: rules exist in a set of discrete, stand-alone injunctions rather than derive from a system governing rule-creation and administration. So, for instance, a rule prescribing murder in a primitive society would be a rule unto itself, derived from custom and instrumental factors, without necessarily locating it in another source of authority, such as promulgation by an accepted rule-maker. Such primitive systems suffer from uncertainty, rigidity and inefficiency because there are no standards governing critical issues such as what is recognized as binding, how the substance of that recognition can change, and how the adjudication of the primary rules shall occur47.

These “rules” differ from the “command” of the sovereign in that each of them commands some degree of fealty from its subject above and beyond the potential sanction for breach48. It is the perceived authority of the rule-makers that distinguishes a sophisticated legal system of secondary and primary rules, in Hart’s conception, from the coercive order backed solely by force49.

International law, according to Hart, was a primitive system, as it generally lacked all three types of rules (recognition, change, adjudication). Still, however, it remained “law” because

“what is necessary and sufficient, in order that the words of a promise, agreement, or treaty should give self-binding operations should be generally, though they need not be universally, acknowledged”50.

Hart saw that for both primary and secondary rules, as well as in interna-
national law, social acceptance of the rule at work constituted the guiding test of validity. Obligation, then, arises not from consent alone, the traditional basis for international legality, but from a posited order of law stemming from States’ actual practice.

Stemming from this belief was Hart’s view that when “problems of the penumbra” are encountered in applying readings of practice to facts, and the law as posited provides no reliable grounds for decision, judges must rely on grounds of what “ought” to be the rule. But judges, he believed, can get there only by “stepping outside the law” as if to do something alien to its essence. As discussed below, this perspective creates a stark, artificial dividing line between the law and actual experience, undermining both the functional understandings and normative potential of the law.

Paragraph 4 Positivism’s Poverty

Positivism, as we have seen, directs practitioners — such as judges, diplomats, academics, and advocates — “to state what the rules of international law are, and to do this accurately and objectively without choosing among non-legal values, such as moral, social and political values...”.

According to positivist tenets, even in a world lacking any common experience of such values, the States’ body of subjective ideas and beliefs will be harmonized via the universal structure of a value-neutral and universally accepted system of law, and “be recognized as a valid and applicable law in all countries, whatever their economic, socio-political or religious histories or traditions”.

After all, “from the viewpoint of positivism there is... only the alternative between internationally lawful or internationally unlawful action”.

Rather than viewing the law as a means to political or social ends, positivism’s hallmark modus is to view the law as a set of “judicial relationships... that goes beyond the physical, the positive, the historical, or the sociological”.

Because positivism in this way “assert[s] separ...
data about how the legal system actually operates and with what costs and other consequences”62.

This imbalance results because the method of calculating acceptance is constructed via an arbitrary and opaque deductionism63. In international law, positivism sidesteps the question of the causal or contextual means by which adherence to such a rule comes about, not to mention the rule’s effects, instead resting its ground for validity on yet another, secondary rule, namely the grundsatz of obligation to a rule laid down by treaty or custom arising from prior State consent.

The formulaic tendency in positivism “postulates that law is intelligible as an internally coherent phenomenon”, self-referentially justified without illumination from any external source, from which can be extracted an apolitical, objective truth64. It is “not so much an instrument in the service of foreign ideals as an end in itself constituting, as it were, its own ideal”65. The “positivist judge”, Posner writes, “is apt not to question his premises”66, and so limits his or her enquiry to a small basket of legal considerations pondered without regard to empirically supportable propositions as to the decision’s future consequences67. This treatment of law seeks to retain the field’s autonomy, keeping it free from the influence of interdisciplinary contaminants. As discussed below, the judgments of the ICJ provide preeminent examples of these formalist methodologies68.

When positivists argue on the basis of these traditional sources of international law, not only do the doctrinal arguments tend to reflect personalized preferences, but the choice of legitimating rationale does as well. As Glennon writes, positivism’s rationalist structure “presupposes an a priori obligation to obey the rule requiring compliance, for an infinite regress is created if the rationale for compliance consists only of another positive rule requiring compliance with the antecedent rule”69. Quoting Brierly, he continues, “[a] consistently consensual theory... would have to admit that if consent is withdrawn, the obligation created by it comes to an end”70. For in harkening back to itself as a “pure” legal order or as an ultimate end, it reoccupies the very ground of natural law that it had ostensibly repudiated71.

This unsatisfactory circularity gave rise to the turn towards legal realism, originating with US Supreme Court Justice Oliver Wendell Holmes. The law, the realists held, could not be viewed as some posited, external order operating directly to judge human endeavour. Rather, it was both highly contextual and eminently malleable, both reflective of and responsive to extant and shifting social conditions.

SECTION 3 FROM REALISM TO PRAGMATISM

For so long has the international arena remained dominated by the discourse of positivism that it is almost as true today as it was when Hans Morgenthau wrote in 1940 that no competing theory “has been able to affect the predominance of positivist thought over the science of international law”72. That it is only almost as true is evidence of the developments in legal theory that have impacted the study and practice of law in general, including, if belatedly, international law. One of the most profound innovations in legal thought is the transition towards legal realism inspired by the famed US Supreme Court Justice Oliver Wendell Holmes. Holmes laid the foundation for the legal realists’ response to formalistic positivism in his insight that

“the actual life of the law has not been logic: it has been experience. The felt necessities of the times, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellowman, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.”73

Though “the logical method and form flatter that longing for certainty

63. Hart, Concept of Law, supra footnote 45; Grey, “Holmes and Legal Pragmatism”, supra footnote 17, at p. 822.
64. Weinrib, supra footnote 58, at p. 1001.
65. Ibid.
67. Ibid.
68. Morgenthau, supra footnote 62, at p. 264 (referring to the Permanent Court of International Justice, the current Court’s predecessor); Koskenniemi, “Introduction”, supra footnote 9, at p. xviii.
71. Glennon, “Rules Die”, supra footnote 69, at p. 945. (“A positive rule must therefore rely for its validity upon something more than another positive rule. Legal rules must, in the received understanding, rest upon a naturalist rationale of posited obligation — a seeming contradiction in terms.”)
72. Morgenthau, “Positivism”, supra footnote 62, at p. 264. See also, e.g., Philip Trimble, “International Law, World Order and Critical Legal Studies”, 42 Stan. L. Rev. 811, 813 (“For most of the twentieth century much of the scholarly output has been bound in ‘European doctrinal formalism’”) (internal citations omitted).
and repose which is in every human mind"', he warned, "certainty generally is illusion, and repose is not the destiny of man".74

Morgenthau's experiential conception of the law paved the way for the development of Legal Realism, which emphasized the socially embedded and contextual nature of the law as it actually operated in the life of its subjects, not as it could be extrapolated and deduced from formal authorities.

**Paragraph 1 From Holmes to Morgenthau to Holmes**

Morgenthau, one of the "most influential of [the] refugee intellectuals" in American political theory,75 embraced the legal realist spirit in the international realm, especially its contextualism, its functionalism and its rejection of positive law as an independent determinant of behaviour. Initially a student of international law, Morgenthau soon abandoned that field for international relations, where he became the progenitor, along with E. H. Carr, of the school of international relations realism, finding the law an arid field for understanding how States behave.

Morgenthau propounded the basis for his discontent in his 1940 critique, "Positivism, Functionalism, and International Law".76 In it, Morgenthau savaged positivist theorists in the international sphere along the same lines as discussed above, likening them to "the sorcerers of primitive ages, [who] attempt to exorcise social evils by the indefatigable repetition of magic formulae".77 He accused them of "system worship and dogmatic conceptualism" for believing that disputed questions of international law could ever be free from ethical, sociological and psychological influences via deductive, *a priori* reasoning.78

Morgenthau's critique of positivism in the international sphere provides us with a compelling argument for the necessity of his functionalist perspective, even if his brand of IR realism — postulating an anarchic, innately conflictual world of unitary, rational, cost-sensitive and power-maximizing States — does not, as liberal theories of international relations tell us, capture the full complexity or potential of State interaction and co-operation.79

By precluding sociological facts from consideration, even when they plainly are at odds with or are not intelligible under the rule, Morgenthau believed, the "positivist concept of the normative sphere itself reveals a metaphysical attitude, a kind of negative metaphysics which plainly contradicts the very assumptions of a positive science" based on objective observation.80 To this view of law Morgenthau opposed his "functional" jurisprudence.81

What counted for him was an understanding of the international system and the way States behave within it, in other words a sociological understanding of relationships and normative functions.82 Lacking this knowledge, "the general attitude of the internationalists [is] to take the appropriateness of the devices for granted and to blame the facts for the failure".83 Little, we often see, has changed since Morgenthau's time in this respect.

Morgenthau's functionalism, however, limits itself to description. He denied that international legal theory was as yet adequate to the task of instrumentalism, as its counterpart in legal realism was seen in the domestic sphere. Without first knowing the conditions and mechanisms by which States interoperate, Morgenthau believed, instrumentalist notions would be condemned to "utter futility".84 These views do not result from the cynicism with which Morgenthau is so often charged, but follow from his belief that "international law is in a retarded stage of scientific development".85 While Morgenthau did not completely deny the possibility that international law could independently influence State behaviour, and thus held open the door, one day, for instrumentalism, neither scholars, practitioners nor States ought to delude themselves that international law could be a force for co-operation until a more complete understanding had been achieved.86


78. *Ibid.*, at p. 262. He did, however, recognize certain contributions of positivism: it settled the question of the metaphysicism of law by soundly rejecting it; it proffered that objectivity could be gleaned only from cognizable objects, and was a method aimed not at judgment, but at knowledge; and that it was a valuable technique for normative reification, which was useful so long as norms adequately met the political, ethical and socioeconomic expectations of a given society at a particular moment in history. See *ibid.*

79. States' preoccupation with power and security is frequently said to arise from the "security dilemma" resulting from States' inability to know the intentions and capabilities of other States. See Robert Jervis, "Co-operation under the Security Dilemma", *World Politics*, January 1978, at p. 167.

80. See text accompanying footnotes 152-181.


86. *Ibid.* (condemning "the utter futility of all attempts to reform human conditions on the basis of idealistic assumptions without knowing the laws under which these conditions stand").

Justice Holmes, though barely touching on the subject of international law, would likely have shared Morgenthau’s scepticism of instrumentalism in the international sphere. Yet in true pragmatist fashion, he would not have been so quick to reject international law’s potential. That this is so is suggested by the fact that despite his realism, Holmes did not shut the door to the utility of positivist conceptualization, instead opening his mind to its possible functions and benefits. This, in the end, is what separates Morgenthau’s diagnostic form of legal and IR realism from Holmes’s evolution towards pragmatism. From Holmes’s more expansive vision, we can see that despite its failings as the predominant mode of discourse, the traditional, formal modes of international law — and its potentialities with respect to the war on terror — ought not be summarily dismissed. It is to a closer look at Holmes’s pragmatism that the following section addresses itself.

Paragraph 2  Holmes’s Realistic Pragmatism

Given the starkly different worlds in which they operated, it could well be that Morgenthau would have adopted a more conciliatory view towards instrumentalism had he been, like Holmes, an observer of the domestic sphere where sovereign authority reigns, instead of “the international field [where] the authoritative decision is replaced by the free interplay of political and military forces.” While Morgenthau’s application of realism to the international sphere, both in his legal and IR variants, add much to our understanding, he still, unlike Holmes, unduly discounts the potential of positivist conceptualization of the sort that could be derived from studies of treaties and custom.

Where Morgenthau found the creation and explication of treaties and custom by States and scholars largely detached from the reality of State behaviour, Holmes would not have been so quick to dismiss the value of these sources as informative of state decision-making, whether directly or indirectly. Because of their shared emphasis on functionalism, and even in the end some similarities with respect to instrumentalism, it is this distinction that places Holmes in the pragmatist camp while leaving Morgenthau’s thoughts on international law confined to a descriptive realism. Indeed, Holmes’s pragmatism comes distinctively from his

90. When we consider Morgenthau’s international relations realism, with its stark and limited view of State co-operation, the divide becomes wider still, since pragmatist thought would eschew any such theoretical straitjacketing absent convincing empirical evidence of the sort that IR realism, to this day, has not yet managed to provide. See, e.g., Jeffrey W. Legro and Andrew Moravcsik, “Is Anybody Still a Realist?”, Int’l Security, Fall 1999.
91. Grey, “Holmes and Legal Pragmatism”, supra footnote 17, passim.
92. Ibid., at p. 819.
93. Ibid.
94. Grey, “Holmes on the Logic of the Law”, in The Path of the Law and Its Influence, supra footnote 46, at p. 137; See also Grey, “Holmes and Legal Pragmatism”, supra footnote 17, at p. 806; Grant Gilmore, The Death of Contract, pp. 14-53 (2nd ed., 1995) (quoting Holmes that the goal of his The Common Law was “to make known the content of the law; that is, to work upon it from within, or logically, arranging and distributing it, in order, from its summum genus to its infima species, as far as practicable”, citing Oliver Wendell Holmes, The Common Law, p. 173 (M. Howe, ed., 1963).
he also rejects the utility of conceptual analyses to shed light on State behaviour. By contrast, Holmes's pragmatic inclination instructs us that even international law can reflect far more than Morgenthau's narrow sense of law as reflecting "identical or complementary interests of individual states and the distribution of power among them". Rather, it may in fact be independently effective in generating co-operation where without it — or its functional equivalent — more beneficial behaviours would not occur. At the very least, pragmatism keeps the door open to investigation. And in formulating appropriate responses to the scourge of terror, no investigation ought to be foreclosed. A deeper look at the axioms of this philosophical method, and how the method aids such enquiry, forms the basis of the next section.

SECTION 4  LEGAL PRAGMATISM: A BRIEF OVERVIEW

As we have seen, pragmatism holds that all investigations must be guided by an explicit purpose. Yet pragmatism can say little about ends. Those must be supplied by other sources. Nevertheless, one can hazard the notion that among reasonable observers, there is a general sense that the war on terror cannot be waged with the equivalent of terror, and that our interest in retaining our own lives and limbs must be balanced against our interest in maintaining our commitment to modern, liberal values. Indeed, these interests may often be mutually reinforcing. It is, of course, the precise line-drawing that is the crux of debate.

Pragmatism's anti-essentialist receptivity allows it to assist in reducing this grey area of controversy, paving the way for greater consensus on how to strike the proper balance between competing interests and widening the scope of the "objective" analysis. As Posner explains,

"'objective' does not mean corresponding to the way things really are: no one knows the way things really are. It means capable of commanding agreement among all members of a group subscribing to common principles."

Pragmatism's agnosticism results in a willingness to embrace various theories — backed only by the criterion of practical, contextual effectiveness towards the agreed-upon goal — and allows it to be of use across the range of disciplines.

In addition to its anti-essentialism, pragmatism's fusion of instrumentalism and contextualism comprises another key trait of the method, combining two approaches that traditional philosophical schools held to be incompatible. Pragmatism's instrumentalism extends to precedent, including prior agreement, that it sees as but one input among many.

"[Pragmatist judges always try to do the best they can do for the present and the future, unchecked by any felt duty to secure consistency in principle with what other officials have done in the past."

The grundnorm of international law — State consent itself creating an obligation — cannot justifiably in theory, nor obviously in practice, be exempt. In the absence of an ultimate, foundational norm, no construct, not even the primary positivist sources of international law, can claim a non-arbitrary supremacy. Treaties and custom, indeed the whole notion of State consent giving way to binding obligation, must also prove their worth. As Alexander Wendt observes, "[K]nowing why we acted in the past can teach us valuable lessons, but unless the social universe is deterministic, the past is only contingently related to the future".

For this reason pragmatism speaks of optimality more than it does legality. The formal sources of international law provide an immense body of explicit or possible implicit agreements, reflecting the judgments, expectations, co-ordinates and modalities of State interaction and policy co-ordination. They are, to use Posner's appropriation of Holmes's

98. As Judge Posner has it, "[I]t begins to seem as if the greatest value of pragmatism lies in preventing the premature closure of issues rather than in actually resolving them", Overcoming Law, supra footnote 23, at p. 397.
99. Ibid., at p. 403
100. Ibid., at p. 18 (emphasis in original).
101. Matthew Kramer describes three primary modes of pragmatism. The first is metaphysical or philosophical pragmatism, which rejects essentialist foundations. The second is methodological or intellectual pragmatism, which emphasizes the importance of a marketplace of ideas in all aspects of human endeavor. The third is political pragmatism, which celebrates civil liberties and tolerance, and innovational experimentation in structuring social institutions. None of these modes necessarily entails the other. Matthew H. Kramer, "The Philosopher-Judge: Some Friendly Criticisms of Richard Posner's Jurisprudence", 59 Mod. L. Rev. 465, 475-478 (1996).
102. Grey, "Holmes and Legal Pragmatism", supra footnote 17, at p. 806.
104. Of course, international legal decisions are often said to lack the binding power of stare decisis. Article 59 of the Statute of the ICI, for instance, makes clear that "the decision of the Court has no binding force except between the parties and in respect of that particular case". Statute of the International Court of Justice, Art. 59. See also, e.g., Morgenthau, Politics, supra footnote 96, at pp. 309-310.
from Posner that “for the study of consequences, doctrinal analysis is useless”\(^\text{114}\), a pragmatist approach would employ a policy-oriented, empiricist take towards matters of international law. In “nudging academic law a little closer to social science, and the judicial game a little closer to the scientific game”, the pragmatic method can illuminate more common ground for exploration than can positivism, whose purportedly objective deductionism provides ample ground for virtually any conclusion\(^\text{115}\). While it is true that policy debates may be nearly as contestable as legal ones, empirical data — unlike formalism — can more readily lead to compromise and agreement as the actual trade-offs at hand are identified and explicitly brought into the picture. Absent a vigorous enquiry into “objectively” determinable facts, the debate over the proper scope of international obligation in a given situation is, like in moral theory, “interminable because it is indeterminable”\(^\text{116}\).

In the global struggle against terrorism such dissensus is untenable. When States disagree on who is a terrorist, what constitutes a terrorist act, or what to do with terrorist suspects or related information, serious conflicts result, conflicts that could conceivably cost lives. Where, for instance, the United States sees extraordinary rendition as an appropriate means of incapacitating terror suspects and gathering intelligence, many of its allied Governments in Europe (if not all their sub-components) have adopted a quite different position\(^\text{117}\). The conflict between the European Union’s privacy ombudsman and the United States relating to financial transactions brokered by the Society for Worldwide Information on Financial Transactions (SWIFT), in which the ombudsman accused SWIFT of violating EU privacy regulations, is another case in point\(^\text{118}\).

Such debates are, indeed, a matter of line-drawing, but positivist formalism cannot inform this effort alone. To make progress towards identifying the actual functions of international law, and how it operates to affect behaviour, we must draw from the empirical discoveries of other disciplines. Naturally, the rich vein of work in international relations theory lends itself well to this task\(^\text{119}\). It is to the importance of this joint


\(^{107}\) Ibid. (emphasis added).

\(^{108}\) Morgenthau, \textit{“Positivism”}, supra footnote 62, at p. 269.

\(^{109}\) Schieder, \textit{“Pragmatism”}, supra footnote 14, at p. 686.

\(^{110}\) Andrew C. Wicks and R. Edward Freeman, \textit{“Organizational Science and the New Pragmatism”}, \textit{Org. Science}, March-April 1998, at p. 127. They quote Tolstoy, in words that go beyond any pragmatist’s, but which nonetheless resonate: “Science is meaningless because it gives no answer to our question, the only question important for us: ‘What shall we do and how shall we live?’”

\(^{111}\) Grey, \textit{“Holmes and Legal Pragmatism”}, supra footnote 17, at p. 805.

\(^{112}\) Menand, \textit{Metaphysical Club}, supra footnote 21, at p. xii.

\(^{113}\) Dewey, \textit{“The Logical Method”}, supra footnote 34, at p. 27.


\(^{115}\) Ibid, at p. 53.

\(^{116}\) See, e.g., European Parliament resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners, adopted midway through the work of the Temporary Committee (2006/2027(INI), available at http://www.europarl.europa.eu/comparlltempcom/tdip/default_en.htm, then follow “Activities”.

\(^{117}\) See, e.g., Kenneth Abbott, \textit{“Modern International Relations Theory: A Prospectus for International Lawyers”}, \textit{14 Yale J. Int’l L.} 335 (1989); Anne-Marie Slaughter, “International Law and International Relations”, \textit{92 Am. J.}
discipline to understand the alternative functionality of law and informal norms in the context of transgovernmental relations that we now turn.

SECTION 5 INTERDISCIPLINARITY AND INTERNATIONAL LAW: THE UTILITY OF INTERNATIONAL RELATIONS THEORY

International relations theories that seek to explain State behaviour fall into three primary categories: realism, institutionalism and liberalism. As we have seen, each is useful to a pragmatic account of international law in so far as it helps us to understand the nature of specific problems with the hope that practicable solutions may be devised. For our purposes, international law serves as a means for policy harmonization and co-ordination, and furthering joint ends and co-operation between States to suppress terror-related activities. In this arena, norms and practices are diffused not just by formal international law and institutions attended to by the central political authorities (essentially treaties and to a lesser extent custom) but also by informal norms and practices such as those practised by the agencies responsible for implementing the counter-terrorist regime. These agencies include the intelligence services, the military, certain regulatory entities such as ministries of infrastructure, transportation and finance and law enforcement personnel.

In order to gain a better sense of how these international relations theories may be useful to a pragmatist approach to international law's role in combating terror, it is worth a brief understanding of how these theoretical approaches can illuminate the functioning of interstate interaction.

Given the often conflictual nature of interstate disagreement over terrorism, and the apparent drive for relative power maximization behind it, international relations realism would seem to be an appropriate frame-work for understanding interstate co-operation on counter-terrorism. Though useful to a degree, IR realism's reach is limited because it exalts the idea of the unitary State and explains institutions not as autonomous engines of influence themselves, but as reflections of underlying configurations of State power. Its model of State political unity, inherent conflict, relative gains and rational self-aggrandizement cannot explain the robustness of co-operation, even in the security sphere, nor the reality of sub-State activity. Nor, however useful its descriptive insights, as the discussion above on Holmes and Morgenthau illustrates, can it point the way towards an agenda to improve co-operative efforts.

Institutionalists, or "regime theorists," in the vein of Richard Keohane are more sanguine about the possibility of generating co-operation by creating organizations and agreements. Adopting realism's core assumptions of anarchy, conflict and self-interest, they show using the tools of game theory and rational choice how cunning egoists can improve their lot by using fact-gathering, transparency-enhancing and generally formalized institutions to decrease barriers to collective action and solve complex prisoners' dilemmas. These include strategies such as "increasing iteration, increasing the quality and availability of information [and] linking regimes," so that States can have an

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122. See, e.g., Philippe Sands, "Reasons to Comply", supra footnote 5, at p. 17.
124. See, e.g., Legro and Moravcsik, "Is Anybody Still a Realist?", supra footnote 90.
125. Institutionalism are defined here as "social institutions consisting of agreed-upon and publicly announced principles, norms, rules, procedures and programs that govern the interactions of actors in specific issue areas. As such, regimes contain specific regulations and give rise to recognized social practices in international society." Michael Zurn, "Sovereignty and Law in a Denationalised World", in Rules and Networks: The Legal Culture of Global Business Transactions, p. 50 (Richard P. Appelbaum, William F. Felstiner and Volkmar Gessner, eds., 2002).
126. Institutionalism is often subsumed under liberalism, with which it is often associated. See Legro and Moravcsik, "Is Anybody Still a Realist?", supra footnote 90, at p. 516. Moravcsik seeks to show, however, that institutionalism has more in common with realism than with liberalism. Ibid. Keohane recognized their connection as well, and in fact based his theory on appropriating the realist assumption of rational egoism. Robert Keohane, After Hegemony, supra footnote 97, at p. 67.
127. Ibid., at 66 (1984). Realists respond, however, that what States actually care about is not absolute gains, of the type that an institution could secure, but instead relative gains, i.e. their status vis-a-vis their competitors. Once an institution is seen to result in relative losses for a State, it will depart from it. See Joseph M. Grieco, "A Realist Critique", supra footnote 123.
Paragraph 1

Positivism's Progeny: The Inadequacy of Liberal Internationalism

The limits of liberal internationalism are becoming clearer at the same time as are its functions. As Bassiouni recognizes, echoing Franck, "treaty-based international legal efforts to combat terrorism have suffered from... problems in enforcement and deterrence." The increasing relative unattractiveness of liberal internationalism stems from the unwillingness of States to relinquish power to international organizations, the unaccountability of international bureaucrats, the overly stultified, formalized procedures of international institutions and high bargaining costs. That may be why, as Raustiala proclaims with respect to international law more generally, "[the golden age of the treaty as the central tool of international cooperation is ending]."

Nevertheless, the typical positivist response to a crisis or long-standing problem is to craft, or interpret, a convention. The Ad Hoc Committee on Measures to Eliminate Terrorism, charged by the UN General Assembly, for instance, remains hard at work on creating a comprehensive treaty against terrorism to supplement the 12 more specific treaties now in force. None of these attempts to define terrorism, but instead commit States to deal with particular types of terrorist crimes, such as hijacking and bombing.

If, indeed, a comprehensive treaty against terrorism were to be successfully negotiated, the next question (and what should be the first question) would be why it would be effective given the enormous obstacles

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129. Keohane, After Hegemony, supra footnote 97. Both institutionalists and realists see that international law/relations can be divided into two primary spheres: security and non-security. In security matters, States are obsessed with relative gains vis-à-vis other States. Even if they stand to gain in absolute security, if a State gains more via a co-operative agreement, the less-benefited States will desist from co-operation, concerned with their ultimate safety in an anarchic, competitive environment, an assumption both theories maintain. While institutionalists believe this dynamic does not hold up in the economic sphere, whereas States are more content with absolute advances, realists counter that since economic gains are fungible and easily translatable to military force, relative gains considerations play a role here, also, damping the prospects of international co-operation. See Gricco, "A Realist Critique", supra footnote 123. If the realists are right, we can perhaps better explain institutional co-operation in the economic sphere by reference to liberal theories that emphasize domestic factors. Disparate domestic actors, themselves interested in absolute and not relative economic gains, may pressure States to adopt wealth-enhancing co-operative policies, even if actors in other States are benefiting more. In the security realm, however, much greater deference and responsibility is given to centralized decision-makers, who might adopt a relative gains position on security matters. Such a perspective would, however, probably apply more to a distinct set of issues involving suspected terrorists and unfolding plots, and less to general defensive co-operative efforts in the regulatory arena governing threats to public health and safety. Indeed, agencies traditionally associated with other regulatory concerns have seen their role in anti-terrorism efforts expand, as they generate new airport security standards, put the squeeze on terror-related money laundering, and assess security requirements of civilian economic infrastructures from ships to computer networks to chemical plants. See Eric A. Posner, "Fear and the Regulatory Model", supra footnote 121, at pp. 681-682. These regulatory aspects of counter-terrorism efforts may be more amenable to institutional co-operation because they deal in terms more like the economic than like the security-oriented, where absolute gains — not suffering an attack — are adequate.


131. Ibid., at p. 89.


134. M. Cherif Bassiouni, "Legal Control of International Terrorism: A Policy-Oriented Assessment", 43 Harv. Int'l L J 83, 91-92 (2001). Yet he describes the logic of having a comprehensive convention on terrorism as "compelling, as is the logic against the current piecemeal approach..." Ibid., at 92.


and disagreements that underlie the current contention. If the conclusion of such a treaty signalled a new-found consensus that so-called freedom fighters can or cannot be terrorists, and that consensus resulted from a change in State policy that would be duly executed, then the treaty might be meaningful, or least a symbol of meaning. Whether it performed any work is a question that would depend on such variables as the repercussions for States’ domestic prosecution of terrorists or the consequences for faster or more frequent extraditions.

If, however, a treaty is successfully negotiated and enters into force without the underlying change of heart, then, the pragmatist would ask, what is the point of the treaty? Does it, for instance, simply reflect what game theorists would term a “pooling equilibrium” wherein States have incentives to conform to the plurality/majority view using “cheap talk”138? Will it be as effective as Article 2 (4) of the UN Charter, governing when States may resort to the use of force, a provision that has arguably fallen into desuetude139? Will the treaty resemble the human rights treaties that Oona Hathaway’s empirical work shows to be so unavailing140? What does it mean for these provisions to “apply” from a pragmatist perspective, i.e. in terms of their effects?

If a comprehensive counter-terrorism treaty is signed with the flaws above or is never reached, what would be the consequences for State co-operation in suppressing terrorism? Even formally, reservations to the treaty could well gut key provisions. In this light, the pragmatist would ask, what is not being done as a result of the treaty’s absence? Are suspected terrorists being freed? Are counter-terror efforts actually compromised? Are alternative methods of counter-terrorism inadequate? Are countries that would co-operate in a particular initiative not co-operating for lack of a common definition? Or are informal norms generated among law enforcement and intelligence agencies filling the gap?

Because despite rafts of multilateral treaties and bilateral agreements, co-operation remains suboptimal, it is reasonable, indeed essential, to consider what other means are available. If we are to take a truly functional view of law as a means to co-operation, we must first of all see that the law and norms are not coterminous141. Norms and laws may serve as functional alternatives for one another, and may or may not overlap142. In some areas, where treaties, for instance, are vague, weak or otherwise almost entirely hortatory, such informal norms and co-operation can be far more powerful means of understanding, and tailoring interstate interaction.

We need not lose sight of institutionalism’s insights as we consider how to modify its assumptions to better tailor our law-related counter-terrorist efforts. Yet a key assumption a nimble understanding of international law that ought to change, from a functional perspective, is the realist/institutionalist commitment to the unitary State. Liberal theories (distinct from “liberal internationalism”), by contrast, emphasize domestic politics, bureaucratic competition and transgovernmental relationships of sub-national regulators and law enforcement personnel as the primary forces in international affairs. The arrangements States make to foster these transnational relationships, however, arise not from systemic or personal factors, nor from rational, centralized decision-makers, even if they obviously wield great influence. As Slaughter explains, we must instead envision

“the disaggregation of the State into its component political institutions — courts, legislatures, executives and administrative agencies — and examine the principles governing transnational interactions among these institutions”143.

This insight, as Keohane and Nye observed some time ago, may allow us to consider transgovernmental networks as a means to spur policy harmonization and State co-operation where it might otherwise be ineffective. As Koh sees it,

“[t]he more sophisticated institutionalists are willing to disaggregate the state into its component parts, to introduce international institutions and transnational actors, to incorporate notions of long-term self-interest, and to consider the issue within the context of massively iterated multiparty games”144.

138. See, e.g., Guzman, A General Theory of International Law 18 (forthcoming; draft manuscript on file with author).
141. Robert C. Ellickson, Order without Law: How Neighbors Settle Disputes (2005); Hans Morgenthau, Politics among Nations, supra footnote 96, at p. 276 (“There are rules of international law which are valid, although not enacted in such legal instruments, and there are rules of international law which are not valid, although enacted in such instruments”).
142. Ellickson, supra footnote 141.
143. Anne-Marie Slaughter, “International Law in a World of Liberal States”, 6 Eur. J. Int’l L. 503, 505 (1995). Where Slaughter’s liberalism treads that this chapter does not is to stress the likelihood that liberal democracies are more likely to co-operate with one another through legal means such as treaties and adjudication. This explains the “liberal” label. While its main project is to explain how domestic liberalism, in the form of democracy and free markets, can enhance the potential for co-operation by fostering webs of cross-border activities, in its emphasis on transgovernmental networks, liberal theory “applies to all states”. Ibid. See also Annie-Marie Slaughter, “Government Networks: The Heart of the Liberal Democratic Order”, in Democratic Governance and International Law, p. 199 (Gregory H. Fox and Brad R. Roth, eds., 2000).
Indeed, “norm creators within the international system sometimes have a preference to use informal control mechanisms rather than ‘risky’ legal rules to maintain international order” 145. And as Ellickson warns, “lawmakers who are unappreciative of the social conditions that foster informal cooperation are likely to create a world in which there is both more law and less order” 146. So it is that international relations scholars have begun refocusing their attention on the potential of transgovernmental networks.

**Paragraph 2 Transgovernmental Relations as an Alternative Mode for Counter-terrorist Policy Convergence**

According to Keohane and Nye, transgovernmental networks are “sets of direct interactions among sub-units of different governments that are not controlled or closely guided by the policies of the cabinets or chief executives of those governments” 147. Because our aim here is to examine the generation, modification and observance of international norms affecting issues in the war on terror, this transgovernmental insight goes a long way toward explaining the export, convergence and harmonization of various norms. If the value of all these theories is measurable in light of how they contribute to practical problem solving, then the study of transgovernmentalism holds great promise for injecting the study of international law with functional, contextual and, hopefully, instrumental insights into how best to enhance the overarching counter-terrorist regime.

Transgovernmental law enforcement networks have long worked as semi-autonomous agents to advance a set of national, bureaucratic and policy agendas, in the process relying on, creating, enforcing and adjusting international norms of behavior with respect to both private actors and themselves. Through their co-ordination of state activity, they are said to offer an innovative, effective method for dealing with many of the planet’s most challenging regulatory difficulties, from financial regulation to trade to global organized crime to terrorism 148. In fact, transgovernmental law enforcement relationships have long been a major subject in the field of criminology, though fairly little of this literature seems to have been incorporated into discussions of international law. The pragmatic method’s interdisciplinary nature recommends we incorporate that discipline’s insights into our own understandings of international law 149.

Preliminary evidence suggests that networks may have different impacts depending on the regulatory environment. Raustiala has shown that where global regulatory authority is concentrated, for example in the securities context, networks’ greatest impact may be in promoting harmonization. Where power is diffuse, by contrast, as with global public goods such as the environment, networks’ most significant effect may be in helping States better abide by their treaty obligations 150.

Research into transgovernmental criminal law enforcement networks indicates that networks can also have important harmonizing and policy co-ordinating functions in their own right 151. Informal, transgovernmental regimes can also engage in monitoring others’ performance, so that states can rationally calibrate their expectations about their counterparts’ future motives, intentions and propensities, as well as their current conduct. Though not specifically discussing transgovernmental criminal law enforcement networks dedicated to counter-terrorism, Keohane presciently observes:

“[E]ffective international regimes facilitate informal contact and communication among officials. Indeed, they may lead to transgovernmental networks of acquaintances and friendship: supposedly confidential documents of one government may be seen by officials of another; informal coalitions of like-minded officials develop to achieve common purposes; and critical dis-

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cussions by professionals probe the assumptions and assertions of state policies. These transgovernmental relationships may increase opportunities for cooperation in world politics by providing policymakers with high-quality information about what their counterparts are likely to do.”

This insight is supported in the law enforcement realm. As Heymann writes, “institutional constituencies such as law enforcement officials may find that their interests resemble those of their foreign counterparts more than those of other groups within their own country”.

And security experts such as Anthony Cordesman recognize that trust-building via institutions like Interpol, which remains a transgovernmental project of law enforcement personnel and not constituted under any treaty, is critical. Such institutions, he writes, “have long shown they can foster international cooperation in spite of national and cultural differences”, differences that “terrorists often do a superb job of exploiting”.

History provides a clue to the efficacy of transgovernmental interaction. The turn of the twentieth century also saw its days of terrorism, in that day exemplified by the regicidal anarchist. Yet the

“ideological-political differences among the governmental powers of Europe prevented anti-anarchist legislation from being passed

154. Ibid., at p. 15. He qualifies his faith in this model somewhat by writing that while “police have a greater propensity to share info with their counterparts”, they will not commit violations of their domestic law by sharing certain information. Intelligence, defence and foreign ministry officials see risk in letting even their own colleagues in other ministries in on certain information. Ibid., at p. 14.

The potential for informal, transgovernmental co-operation to overcome these divisions was on display in 1914 at the First Congress of International Criminal Police, held in Monaco. The meeting’s purpose was to promote law enforcement co-operation, but failed “because it was still framed in terms of the provisions of international law rather than the bureaucratic model that police institutions had by then come to adopt”. What was needed to spur co-operation instead was the establishment of the International Criminal Police Commission in 1923, today known as Interpol, built by professionals “oriented toward criminal enforcement duties and ... independently established by the representatives of police institutions rather than their nations’ political authorities.”

Ultimately, co-operative success against anarchism came about in large part by the direct contacts between different police forces, and because the agreements’ conceptual terms were technical and bureaucratic, not legalistic. This, in turn, resulted from “the attained level of expertise and professionalism in police institutions rather than because of any willingness on the part of the governments of national states to legislate ...”.

Ultimately, Deflem finds,

“accomplishments in effective practical police cooperation, even when cooperation was achieved in the wake of formal intergovernmental treaties, was not governed top-down by governments and the treaties they had been able to agree on, but was worked out from the bottom up at the level of a developing cross-national police culture of experts, despite the politically charged nature of anarchism.”

A very similar dynamic has played out in the United States-led war on drugs and other transnational crime. Deploying Drug Enforcement Agency, Federal Bureau of Investigation and other liaison agents, alongside other modes of leverage, the United States worked to harmonize anti-drug policies “by persuading foreign agents and agencies to adopt [US law enforcement] methods and models.” These efforts brought

159. Ibid., at pp. 275, 277.
160. Ibid., at p. 277. See also Malcolm Anderson, “Interpol and the Developing System of International Police Cooperation”, in Crime and Law Enforcement in the Global Village, supra footnote 155. The representatives to Interpol consist only of representatives of police agencies, not State ministries, and the consequent lack of ministerial involvement gives the organization a great degree of independence and freedom from political oversight.
161. Deflem, supra footnote 151, at p. 281.
162. Ibid., at pp. 283-284.
163. Ibid.
about profound and controversial changes in European policing. The tactics the DEA pushed, and which were ultimately incorporated, consisted of "flipping" informants, i.e. negotiating plea bargains or offering leniency in exchange for information about higher-ups. This tactic was previously considered to contravene the "legality principle" or the "rule of compulsory prosecution", requiring prosecutors to charge all crimes for which they had evidence, but eventually gave way to an entire system of informant recruitment.

Extraordinary Renditions: Convergence on a Questionable Norm?

The "Decade of Regicide" has long since passed, and the war on drugs no longer occupies the minds of policy-makers as it once did (except in so far as it relates to terrorism, as in Afghanistan). Unsurprisingly, those charged with waging this new effort in the world of law enforcement and intelligence continue to employ some of the methods of the past leading to similar modes of policy harmonization and co-ordination initiated and maintained via a professional transnational network. These transnational relations, then, clearly serve to initiate and strengthen critical international co-operation where the power of traditional methods of international law is not, for whatever reason, up to the task.

Paragraph 3

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One such method is the practice of rendition, which under the definition employed here occurs when "a state allows removal or assists it with legal processes and outside the parameters of a formal extradition treaty". It is "essentially a cooperative expulsion or deportation".

166. Ibid., at p. 129.
167. Ibid.
168. Ibid.
174. Ibid., at pp. 333-336.
175. Warner, supra footnote 170, at p. 490.
176. France, e.g., in 1977 refused Israel and West Germany's request for the extradition of Muhammad Daud Audeh, the mastermind behind the 1972 Munich Olympics massacre in which Palestinian terrorists kidnapped and killed eleven Israeli athletes. Laflin, supra footnote 171, at p. 318. Italy, similarly, in 1985, assisted Palestinian Liberation Organization operatives suspected of hijacking the passenger cruise ship the Achille Lauro to flee from Italy to Yugoslavia. Ibid.
As discussed above, such fragmentation, even within a single State, is not uncommon, providing opportunities for arms of other States to work with sympathetic agents abroad in the construction of new, extra-legal norms that can either undermine or complement the intended functions — both moral and practical — of the law.

Yet a pragmatic appraisal requires that rendition’s use and its manner must be weighed against its absence if we are to adequately assess the desirability of this tactic, taking into account both our values and our security. Is it “a vital tool in combating transnational terrorism . . . that save[s] lives” or an illustration of abuse law enforcement run amok? If rendition is limited to the international transfer of suspects for non-torturous interrogation, to take advantage of the expertise and knowledge of foreign interrogators, perhaps from the suspect’s home country, then it is hard to see how it differs so much from preventive detention — the widely accepted practice of holding suspects without charge for a limited amount of time. This chapter does not purport to resolve or even fully address these questions. It seeks only to point out that the practice illustrates the possible emergence of a potentially beneficial, co-operative law enforcement norm that depends not on formal law, and not necessarily upon the acquiescence of central governmental authorities, but instead on bureaucratic interests and relationships.

In sum, the pragmatist method tentatively embraces all theories and approaches, sifting through them for their value in solving real-world problems. It rejects nothing out of hand on the basis of theory or speculation. Instead it allows for possibilities and effects, however slight, embracing them all for any contribution they might make towards an ultimate objective. The same cannot be said for Martti Koskenniemi’s prototypical pragmatism, discussed in the following section, which advocates just that sort of rejection. Its target, in fact, is pragmatism itself.

SECTION 6 UTOPIAN DYSTOPIA: THE FAILURES OF FORMALISM

Although the contextual, functional and instrumental approach sketched above would seem to answer Koskenniemi’s call for “a post-realist theory which would articulate for international lawyers the experience of . . . post-modernism,” Koskenniemi does not find the pragmatist method compelling. For he goes on to say, and not because of misapprehension, that such a post-realist theory is actually needed “in order to move beyond an impoverished pragmatism.”

In doing so he condemns pragmatism’s “anti-formalism” as “reductionist,” and warns that

“[i]n seeing law as determined by external objectives, structures or necessities, or making it seem the infinitely flexible instrument of the political decision-maker, it kills the possibility of politics, and of freedom, that lies in the gap between the two.”

Like Kelsen, Hart and their positivist successors, Koskenniemi sees the law as its own autonomous, independent discipline, requiring little in the way of contribution from other areas of social science. Interdisciplinarity, argues Koskenniemi, invites the legal profession to acknowledge as controlling

“the styles of argument and substantive outcome that the international relations academy 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.”

Thus, to Koskenniemi, the

“interdisciplinary agenda itself, together with a deformed concept of law, and enthusiasm about the spread of ‘liberalism’, constitutes an academic project that cannot but buttress the justification of American empire.”

In assailing the stream of international relations/international law scholarship’s “collaboration” he argues that these theories emphasize instrumentalism as if it were a “special kind of sociology or morality of the international.” The danger, he warns, lies in the prospect of instrumentalism’s misuse. “If law is only about what works, and pays no attention to the objectives for which it is used, then it will become only a smokescreen for effective power.” Denouncing the dearth of rhetorical power in a functionalist agnosticism, he warns that “[w]ithout the ability to articulate political visions and critiques, international law

179. Warner, supra footnote 170, at p. 493; Laflin, supra footnote 171.
183. Koskenniemi, Gentle Civilizer, supra footnote 75, at p. 508.
184. Ibid., at p. 494.
185. Ibid., at p. 485.
186. Ibid.
187. Ibid., at p. 487.
becomes pragmatism all the way down . . . "188. Ultimately, the resultant “function-dependent, non-autonomous law” would serve as “an ingenious justification for a world Leviathan” 189.

Given the gravity of these charges, it is tempting to think that Koskenniemi’s critique derives from a miscomprehension of what pragmatic accounts of international law entail. For instance, he describes, international lawyers “stress the pragmatic functions of their profession”, by creating and advocating human rights regimes, writing commentary or critiques, and by “sustain[ing] back-up narratives that link counseling or article-writing to larger visions, grasped by private intuition rather than public discourse” 190. If this is the value-added of international law, then Koskenniemi has little to fear. While these may indeed be practical tasks, they are by no means necessarily pragmatic ones, because they are so often detached from concrete consequence. Indeed, human rights regimes, commentaries and critiques, to say nothing of “article-writing” and “back-up narratives”, cannot be confidently said to regularly impact behaviour.

These tasks in fact frequently entail the formalistic positivism, on its own errand, that sniffs at considering the pragmatist concept of consequences as a guiding light.

Koskenniemi’s condemnation, however, owes nothing to misunderstanding. His critique cuts to the quick of the pragmatist method. He makes this clear in assailing the very core concepts of pragmatism — functionalism, interdisciplinarity, contextualism and instrumentalism — that distinguishes it as a useful tool for thinking about shaping the world. On the grounds that pragmatism is “impoverished” as an apology for power, Koskenniemi rejects pragmatism’s promise because he looks to “pure” law as a means to achieve his view of justice, a power-equalizing, value-neutral, formalism.

This “culture of formalism”, according to Koskenniemi, is one of “resistance to power . . . [that] makes a claim for universality that may be able to resist the pull towards imperialism” 191. International law’s “energy and hope”, he goes on, “lies in its ability to articulate existing transformative commitment in the language of rights and duties, of self-determination and thereby to give voice to those who are otherwise routinely excluded”, namely the victims and subjects of colonial power 192. Such a principle is universal yet “non-imperial” because it is “empty”, justifying itself by articulating the deprivation suffered by the victims of colonialism as a negative example 193. In his utopian exhortation for a progressive international agenda, Koskenniemi’s Platonist, formalist model rests on yet another a priori set of ideals, of “universal emancipation, peace, and social progress” 194.

These are of course comely concepts and at first glance would seem hard to contest as ultimate objectives. But the devil, as ever, is in the details. As Glennon points out, there can be no such things as value-neutral principles, not even ones as attractive as Koskenniemi’s. “[N]eutral (or any other) principles”, he writes, quoting Holmes, are no “‘brooding omnipresence in the sky’ but social constructs, creations of the human mind . . . [t]heir breadth is subjective, elastic, and manipulable, and they can be generalized or particularized at will to support or oppose any conclusion” 195.

And they have been. Which historical villain has not sought some version of these in his mind, some vindication for past wrongs and assurances of future security for “his” people, even when this is but himself and his adherents? To invoke even these noble, seemingly universal concepts is to provide little guidance to those seeking to achieve (our concept of) them, and little to constrain those whose conduct we find repugnant to them. Are those States that justify terrorist acts as unfortunate but understandable acts of “freedom-fighting” expressing the “lack” of self-determination? To judge from the current impasse at the UN Ad Hoc Committee responsible for drafting the comprehensive anti-terror convention, the answer is a resounding yes. Otherwise, a uniform definition of terrorism would have been reached long ago.

And even if these principles do accord with a more widely shared view, to what purpose does their trumpeting go? Who in a position to actually redress or prevent injustice is incentivized by their pronouncement? While there might be times when such rhetoric in the form of international law can be galvanizing or act as a trump card, perhaps in a domestic courtroom, if international law is to be more than a self-congratulatory vocabulary, we might endeavour to explore how it can do more.

The inherent malleability of “neutral” principles of international law is even better illustrated by the International Court of Justice’s decision in the 2004 decision in Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the Barrier Wall case) 196. That

188. Koskenniemi, Gentle Civilizer, supra footnote 75, at p. 516.
189. Ibid.
190. Ibid.
191. Ibid., at p. 500.
192. Ibid.
194. Ibid., at p. 516.
decision, indeed, seems tailor-made for Koskenniemi’s anti-“colonial” formalist methodology. Ironically, it succeeds instead in illustrating the futility of formalism, at the same time that it points the way towards a more satisfying path for the analysis of international law — the pragmatism that Koskenniemi rejects. After a discussion of that case, the same approach is taken to an even more controversial topic, that of physically coercive interrogations of terror suspects.

Paragraph 1  
**The Barrier Wall Case**

The **Barrier Wall** case involved a controversial security fence that Israel began constructing in 2002 to prevent Palestinian suicide bombers from entering Israel proper after a spate of attacks that killed, as of April 2004, just before the Court issued its judgment, some 900 Israeli civilians since the beginning of the “Second Intifada” in late 2000. From its inception the fence came under intense criticism for running through confiscated Palestinian land, cutting off farmers from their crops and curtailing the freedom of movement for thousands of civilians. In response, the UN General Assembly requested the ICJ to issue a non-binding advisory opinion on the legality of the fence under international law.

In its ruling, the ICJ determined that the fence contravened international law as articulated in a variety of instruments, including the UN Charter, numerous General Assembly and Security Council resolutions, the Fourth Hague Convention of 1907, the Fourth Geneva Convention of 1949, the International Covenant on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, customary international humanitarian and human rights law, and its own previous decisions. The Court paid scant attention to Israel’s stated rationale for constructing the wall in the first place, leaving the questions of proportionality and necessity — key concepts that strike a balance between security and humanity — as mere afterthoughts. “The Court”, read the judgment, “is not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel...” It did not, apparently, feel compelled to elaborate.

Such reasoning failed to win the support of the lone dissenter on the Court, Judge Buergenthal. His declaration, in contrast to the Court’s formalism, nicely illustrates the pragmatist approach. Buergenthal duly acknowledged the value of the concepts articulated in the various treaties cited by the majority, but also insisted on a fact-specific analysis that took into account the actual consequences and considerations governing the construction of the fence. In doing so, Judge Buergenthal did not, as Koskenniemi would fear, affirm the legitimacy of Israel’s military superiority. In fact, Judge Buergenthal made clear his belief in the likelihood that Israel had in fact contravened international law.

> “Given the demonstrable great hardship to which the affected Palestinian population is being subjected... I seriously doubt that the wall would here satisfy the proportionality requirement to qualify as a legitimate measure of self defence”, he opined. He wrote further that

> “[i]t may well be, and I am prepared to assume it, that on a thorough analysis of all relevant facts, a finding could well be made that some or even all segments of the wall being constructed by Israel on the Occupied Palestinian Territory violate international law.”

Yet Buergenthal understood that “to reach a conclusion either way, one has to examine the facts bearing on that issue”, a scrutiny that “the Court’s formalistic approach to the right of self-defence enables it to avoid addressing” . He concluded:

> “Lacking is an examination of the facts that might show why the alleged defences of military exigencies, national security or public order are not applicable to the wall as a whole or to the individual segments of its route. The Court says that it ‘is not convinced’ but it fails to demonstrate why it is not convinced, and that is why these conclusions are not convincing.”

As it happened, Israel’s own Supreme Court took the pragmatic

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199. Barrier Wall case, supra footnote 196, at para. 133.
200. Ibid.
201. Ibid., at paras. 140-142.
204. Ibid., at para. 3.
205. Ibid., at para. 5.
206. Ibid., at para. 6.
207. Ibid., at para. 7.
approach — using the doctrines of proportionality and necessity Buergenthal employed — as the centrepiece of its analysis. Only days before the ICI’s opinion, it ordered the Israeli Government to alter the route of the barrier so as not to impose unnecessary hardship on affected Palestinians, a decision with which its Government has since complied. Unlike an ICI advisory opinion, of course, a domestic Supreme Court ruling in Israel is authoritatively binding. Yet the pragmatic methodology the Israeli high court deployed still imposed serious “constraints upon the government’s freedom of action in a most sensitive area of national security policy” and need not have been followed fully. One reason it has been, it may be supposed, beyond the internally binding explanation, is that the Israeli court took pains to recognize the factual scenarios underpinning the fence’s construction. What if the ICI’s ruling had been “binding” and Israel removed the fence to an onslaught of suicide bombers? Then Israel would surely have been justified in practising self-defence, in the process undoubtedly killing scores more Palestinians than if such reprisals had no basis at the outset. Moreover, the fence, though still imposing significant hardship, now does less harm than before, allowing more freedom of movement and increased access to agriculture. One need not stop to wonder which sort of reasoning — Koskenniemi’s or Buergenthal’s — the dispossessed Palestinian farmers and civilians at the heart of these cases would prefer, one that futilely condemned the fence as overreaching, or one that negotiated the tough humanitarian issues to reach, under the circumstances, a reasonable, flexible solution.

Paragraph 2  Coercive Interrogations

One might ask the same questions of victims of coercive interrogations. Would they prefer a legal opinion that, ignoring the real world facts and circumstances of their interrogators’ motives and knowledge, leaves them as vulnerable as before? Or an analysis that uses empirical data to show that torture simply does not work, or not as effectively as less extreme methods, findings that would presumably have much more impact on interrogational tactics?  

The question of a definition of torture is a contentious one and subject to a spectrum of interpretations. At the more expansive end we have views along the strict lines of “as soon as the person is intimidated, it’s torture” to the Bush administration’s previously held view that torture to take place, it “must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death.” Common Article 3 of the Geneva Conventions, for its part, prohibits “violence to life and person” and “outrages upon personal dignity, in particular, humiliating and degrading treatment of any kind.” The Convention against Torture (CAT) differs, viewing it in relevant part as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person...” Interestingly, as Oona Hathaway has found, States that have signed the CAT and related treaties may in fact have a slightly higher chance of committing the ghastly practice. Her statistical work in this area is precisely the sort of functionalist empiricism at the heart of the pragmatist method, looking at the causal power of treaties as a means to alter State behaviour. While widely hailed, its conclusions and methodologies have not gone unchallenged. Thus far, however, her analysis has not been convincingly refuted. If it holds, or even if it is shown that the CAT amounts to nothing but cheap talk, it would do much to call into question the liberal international forms of positivism that continue to dominate discussions of international law.

The question of whether torture itself might be an effective counter-terror tactic has garnered more attention, and is also an appropriate subject for the pragmatic method. Given the widely recognized horror of the practice, mainstream debate recognizes really only the question of whether it should even be used in the most extreme circumstances, when the lives and pain of dozens, hundreds, thousands or more are...
thought to be at stake. Even then, a strict international law analysis insists on torture’s illegality, as it is an ostensibly *jus cogens* norm that is flatly non-derogable, no matter if the trade-off between one person’s severe pain and the lives or severe pain of many took place with 100 per cent certainty.

The policy behind the *jus cogens* standard and the CAT is of course a most admirable one, and a certain vindication for the moral integrity of the formalist standard. Still, it is not obvious what is the particular notion of the legal or policy good holding torture always and forever prohibited, besides the bootstrapped stilts of positivism. The practice simply cannot be condemned on moral utilitarian grounds if the trade-off between the torture of one person and the lives and limbs of many more is certain, or on strict civil liberties grounds if security concerns are indeed urgent. The view might also be held that torture degrades us as a people, while visiting horrific pain on others.

Such ground for opposition to torture in all circumstances is entirely compatible with a pragmatist viewpoint, but the method would also require us to make more explicit the true costs and benefits involved. For is not the pain and suffering of victims of terrorist attacks just as real as the torture of a suspected terrorist? If one is sympathetic to the prospect of torture in a “ticking time bomb” scenario, whether immediate or intermediate, it is there we feel the rub: all such detainees are, and only can be, suspected of knowledge. That is, of course, the context in which torture takes place — where the victim is believed, but not necessarily known, to have actionable intelligence.

Without the utmost assurances, perpetrating such a wrong cannot be justified on the grounds of utilitarianism, nor on pragmatist grounds, which give all due weight to our socially conditioned moral sentiments and notions of fundamental rights, as well as the experiential harm of “witnessing” the pain of torture. On a utilitarian conception of morality and a pragmatist conception of law, however, one could base an absolute prohibition of torture only on finding that our low levels of certainty as to torture’s efficacy prevents us from resorting to it. This reasoning extends to possible justifications for torture under the necessity, self-defense and emergency exceptions as well. Either way, it comes down to the question of probabilities, the science of uncertainty.

One could well stop here, if greater certainty as to the lives “saved” were deemed from the start incommensurable or incalculable. As to the first, in commensurability if human pain and suffering is the bottom line value at stake, then we deal with the same subject matter and the suffering of the tortured and the suffering of the victims is deemed equivalent, pound for pound. As to calculability, we would also be justified in stopping if extrapolations of effects, and consequent line-drawing, are too speculative.

Such conclusions are understandable, but do not go as far as they might to striking the proper balance between physical coercion and life-saving, actionable intelligence, or towards convincing us that we’ve struck the best possible balance as it is — an unconvincing proposition. Pragmatism’s consequentialism would also look to the impact of different definitions in treating the problem it purports to solve, namely preventing torture from occurring, or if exceptions are said to apply, then within certain “bounds”. It would, in short, grapple with the uncertainty at the heart of the issue and undertake an empirical investigation into the costs and consequences of activity deemed to be unacceptable physical coercion, recognizing that different methods might have different effects, and that specific techniques will be more or less effective.

In doing so, we might well find support for the most convincing ground for retaining a flat prohibition on torture: it doesn’t work. That is indeed the position of various experienced interrogators. But a more elaborate survey would be invaluable to making truly sensible decisions on physically coercive interrogations. If the prognosis is decidedly mixed, or in favour of a utilitarian gain using torture, the dilemma arises of balancing the consideration with moral and reputational considerations playing a part in a macro-view cost-benefit analysis that takes into account the imperative of winning hearts and minds in the war on terror. As one observer notes in this regard, even “the coldest cost-benefit calculation, a dead detainee is a disaster: he cannot be a source of ‘actionable intelligence’, only fury”.

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220. For the view that this hypothetical prejudges the outcome and is designed to justify more widespread use of torture, see Bellamy, “No Pain? No Gain?”, *supra* footnote 211, at pp. 145-146.

221. See Menand, *Metaphysical Club*, *supra* footnote 21, at pp. 177-195.

222. Designing an empirical study would be a difficult matter. One consideration is the expansiveness of the definition of torture. If a broad definition applies, then the results of efficacy might well be different than if a narrower one does. There is also the matter of self-selection in both cases, since extreme measures are ex hypothesi more likely where there is reason to believe valuable intelligence really does exist.

223. James Glanz, “Torture Is Often A Temptation; And Almost Never Works”, *NY Times*, 9 May 2004. (“Torture can make people talk — but experienced interrogators know that they usually can’t tell if what the subject says under torture or humiliation is true, because the subject will say what he or she thinks will end the torture. Novice interrogators are seldom aware of how compromised information gained under duress is likely to be . . .”)

As Lieutenant General John (Jeff) Kimmons, the Army deputy chief of staff for intelligence recently explained,

"No good intelligence is going to come from abusive practices. I think history tells us that. I think the empirical evidence of the last five years, hard years, tells us that. And, moreover, any piece of intelligence which is obtained under duress, through the use of abusive techniques, would be of questionable credibility, and additionally it would do more harm than good when it inevitably became known that abusive practices were used. And we can't afford to go there. Some of our most significant successes on the battlefield have been — in fact, I would say all of them, almost categorically all of them, have accrued from expert interrogators using mixtures of authorized humane interrogation practices, in clever ways that you would hope Americans would use them, to push the envelope within the bookends of legal, moral, and ethical, now as further refined by this field manual. So we don't need abusive practices in there."

Lt. Gen. Kimmons’s comments suggest that a significant level of torture results from a lack of professionalism (perhaps a charge that should extend up the chain of command with respect to that issue). Indeed, Israeli interrogators have long levied such criticisms at their American counterparts. The Israelis, of course, have by their own admission long practised harsh methods of interrogation, across the spectrum of definitions of torture. Yet since the Israeli Supreme Court found many of the harshest methods unjustifiable and ordered the Army to revise its policies, disciplinary practices, and training, incidents of torture and their relative severity have decreased, according to both the Israeli human rights organization B’Tselem, as well as the Palestinian Human Rights Monitoring Group.

The comprehensive approach effectively mandated by the Israeli court speaks to another consideration in assessing terrorism’s effectiveness, drawn directly from formal policy analysis, namely the availability of alternatives. Even if torture turns out to be effective, it would not be acceptable if alternative means, such as trickery, bribery or threats not involving physical harm, could achieve the same ends. We cannot achieve an optimal balance between security and human values by reacting to condemning physically coercive interrogations out of hand, even though it is entirely reasonable and most likely desirable to maintain formally a complete prohibition given the uncertainty of its efficacy and the certainty of its horror. Such a conclusion, even if reached via formalism, can still be entirely functionally pragmatic, in so far as it represents a value enhanced in stature by its status as law.

In matters such as the Barrier Wall case and coercive interrogations, the pragmatic approach towards international law would grapple with the uncertainties and countervailing interests at the heart of the tension between security and rights head on. It would allow for a range of empirical studies and policy options, including formal law and positivist analyses where appropriate, to strike an appropriate balance in this morally and mortally critical aspects of counter-terrorism. In doing so it would hold no notion of positive international law as sacred, expanding the discipline’s dimensions to account for analytical and multidisciplinary methodologies that inform the practice of international law in the world as it is, in a tentative yet hopeful step towards making it as we want it to be. While Koskenniemi’s vision may articulate that desire, without providing a meaningful way of achieving it, we will be left comforted by an empty idealism alone, devoid of effect, and thus a betrayal of itself. Pragmatism in its dogged insistence on facts and consequences demands more, and urges observers, practitioners and subjects of international law to do the same.

SECTION 7 CONCLUSION

Given the unprecedented practical and moral issues raised by the struggle against terrorism, and the complex calibrations of values and tactics required thereby, it is natural for the debate on an optimal set of counter-terrorist policies to be highly charged. Issues such as Israel’s barrier fence, extraordinary renditions, torture, targeted killings, the rights due “enemy combatants” elicit passionate defences and attacks from well-meaning individuals across the political spectrum. Actors in the legal community constitute a (prominent) discursive subset in this debate, employing the language of the law to justify preferred positions. As Judge Posner observes,


226. Among other things, they cite outsourcing, high turnover rates and reliance on interpreters. Lelyveld, “Interrogating Ourselves”, supra footnote 219, at pp. 67, 69.


"most lawyers, judges, and law professors still believe that demonstrably correct rather than merely plausible or reasonable answers to most legal questions, even very difficult and contentious ones, can be found — and it is imperative that they be found — by reasoning from authoritative texts, either legislative enactments ... or judicial decisions, and therefore without recourse to the theories, data, insights, or empirical methods of the social sciences ...”

What is peculiar to much of this discourse is the ostensible neutrality of the law; its ostensible objectivity provides a cover for otherwise "mere" political preference. Yet as we have seen, there can be no pure objectivity, not only because of the impossibility of precise deductive reasoning, but because initial premises are themselves arbitrary.

Positivist accounts of international law, as applicable to the war on terror and beyond, fall into this trap. While they do not necessarily forgo policy considerations, these tend to be but a miniscule part of the analysis, and in any event are premised upon the notion that somehow a particular conclusion is or would be meaningful in influencing behaviour. That is not to say that positivistic analysis does not have its place; in the EU system, for instance, *sui generis* though it is, such exercises hold the prospect of influencing supranational courts with real authority over their subjects. Moreover, the universalistic, supposedly objective idea of "the law" may bolster domestic enforcement, either directly or indirectly, or perhaps both. When, for instance, US military lawyers present their case to Congress that policies strictly prohibiting the use of torture ought to be inserted in their field manuals, the language of international law and the attendant considerations encapsulated therein, may be a persuasive tool.

More often, however, the persuasive force is taken for granted, subsumed in layer upon layer of legal reasoning premised on ideas of secondary rules and binding obligation that are autonomous from the real world contexts and functions of international law. The various "tools" of international law — analyses, treaties, resolutions, treaties, exegeses of custom — can really mean anything only in so far as they have an impact, even if remote, on State or private behaviour.

One cannot determine this, however, by relying on the law alone. The formalistic, positivist approach recalls Posner’s critique of “academic moralism”, in “having no prospect of improving human behavior”232. The analytic tools of that field, including casuistry, text and critique “are
too feeble to override either narrow self-interest or moral intuitions”233, while the academic setting of moral philosophy provides few opportunities for real influence234. The analogy to international law is obvious.

A progressive project cannot be reified employing “philosophical” tools such as positivism any more than moral theorizing can change moral behaviours. The tools of formal international rules and institutions may serve important co-operative ends, but their form must follow, not lead, their function. It is the case, of course, that forms indeed have function, and this must never be forgotten as Holmes reminds us, but the lodestar must ever be the former. So it is that the pragmatic method, in international law no less than in science, philosophy and all walks of life, seeks to rebalance the calculus of analysis. As Rorty points out, “values are not defended philosophically; they are defended politically”235. And it is a tenet of pragmatism that in policymaking, legal or otherwise, facts count.

Accordingly, a pragmatist agenda of international law would consist of research into the role law or norms play in transgovernmental, inter-organizational interaction. In doing so, such work would do well to draw on the immense, but largely untapped, literature on police co-operation, specifically, and also on organizational theory, behavioural economics and empirical analyses such as Hathaway’s work on human rights treaties. If it is true, for instance, that personal connections facilitate co-operation and co-ordination, then it would be wise to look at how such connections can be forged, and whether they can, at the margin or otherwise, be an independent causal force in State co-operation. And if for such organizational connections it holds true that law is a substitute for moral sentiment, then attempts to appeal to such sensitivities may prove more effective than a formal, top-down imposition of order or protection of valued rights. It will not do, in other words, to exotil the need for more treaties and for more co-operation without a thoroughgoing look at why such treaties would help and how they might be used in actual practice, and when we might wish our species of co-operation to remain rooted in the informal. A pragmatic concep

234. Ibid.
238. The US Congress wished to know about it whenever it arose, and so passed the Case-Zablocki Act requiring executive agencies to transmit agreements they make to the Congress for review to remain abreast of relationships between intelligence and enforcement communities. 1 USC, § 1126.
tion of international law in the war on terror would be neither apologetic nor dogmatic in its defence or prosecution of various strategies and tactics.

For "pragmatism has no inherent political valence". It does not in itself defend pre-emption, targeted killings, torture etc. Yet neither does it condemn them categorically because even given their repugnance, alternatives may sometimes be even worse. That is why, in the end, the empirical, interdisciplinary and instrumental efforts that the pragmatic method champions are so vital, both as a prerequisite to an effective legal policy and as a means to a safer, fairer world.