Recent Publications

International Adjudication

The Pinochet Effect: Transnational Justice in the Age of Human Rights. By Naomi Roht-Arriaza. Philadelphia: University of Pennsylvania Press, 2005. Pp. vii, 256. Price: $44 (Hardcover). Reviewed by Stacie Jonas.

Human rights advocates hailed the 1998 arrest of former Chilean dictator Augusto Pinochet in London as a landmark victory in the effort to hold rights violators accountable for their crimes. Nearly seven years later, however, Pinochet has yet to be convicted, and attempts to use universal jurisdiction to bring other dictators to justice have faced significant setbacks. Exactly what are the lessons to be drawn from the legal cases against Pinochet?

Naomi Roht-Arriaza, a professor at Hastings College of Law, addresses this question in *The Pinochet Effect: Transnational Justice in the Age of Human Rights*. This highly readable and dramatic narrative offers important lessons for future attempts to hold human rights violators accountable. Tracing the history of the Pinochet litigation in Spain, the United Kingdom, Chile, and other countries around the world, Roht-Arriaza analyzes the complex dynamics of recent efforts to seek justice for human rights crimes in national courts. Maintaining that the Pinochet case gave "new teeth" to international law and led to greater justice in Chile (p. 66), she concludes that the primary value of transnational cases such as the Pinochet litigation lies in their ability to "prompt investigations and prosecutions at home" (p. 223).

Roht-Arriaza sets the stage with a behind-the-scenes look at the origins of the Pinochet litigation in the Spanish and British courts. While her account begins in the mid-1990s, it also makes clear that these cases had a much longer trajectory and were driven by people with close, long-term ties to Chile and Argentina. "It could not have been done," she stresses, "without preexisting contacts and correspondence among the various lawyers and local human rights groups" (p. 211).

The persistent efforts of these groups and individuals helped keep Pinochet under house arrest in London for nearly sixteen months but were ultimately unsuccessful in securing his extradition to Spain. By the time Pinochet was sent home in 2000 on highly contested medical grounds, however, the Spanish case against the aging general had transformed the legal and political landscape in Chile. Encouraged by the arrest and extradition proceedings, victims had filed more than sixty complaints against Pinochet in Chile; by 2004, the complaints mounted to over three hundred. Shortly after Pinochet's return to his home country, Chilean courts stripped the former dictator of his immunity, and Judge Juan Guzmán indicted Pinochet for his role in crimes committed shortly after the 1973 coup that brought him to power.

After detailing the transformation of Pinochet from "untouchable" to "the most complained-against man in Chile," Roht-Arriaza addresses the question, "how did it happen?" (p. 85). Drawing from interviews with individuals close to the case, she suggests that a combination of domestic judicial reform and the case against Pinochet in Spain served as the catalyst. The extradition proceedings in London prompted the Chilean government to promise that Chilean courts would try Pinochet. Chilean human rights lawyers additionally note that some local judges "realized that there was unfinished business" and "became painfully aware that the judiciary hadn't taken seriously its role during the dictatorship" (pp. 85-86). The international publicity surrounding the Spanish case against Pinochet gave Chilean human rights groups new visibility and showed the right-wing and the military that much of the world saw their hero as a criminal. The case also affected civil-military relations, "convincing the heads of the armed forces that time alone would not make the issue of past human rights abuses go away" (p. 87).

Under "enormous pressure" from a government "looking for a graceful way out" (p. 83), the Chilean courts have repeatedly shut down cases against Pinochet on health grounds and technicalities. Although Pinochet has never been convicted, Roht-Arriaza nevertheless considers the cases against him a success. The "wall of impunity" in Chile has been cracked, and a "rough kind of justice" has been done (p. 96). Pinochet's legacy is now that of an indicted criminal. Hundreds of new human rights cases against lower-level military officials have advanced in Chile, some based on principles of international law. Dozens of new books, television specials, and documentaries about issues surrounding the case have emerged, prompting new discussions and dialogue about human rights and dictatorship. Internationally, the case has "made clear that there are some limits to the immunity of government officials when hauled before national courts accused of international crimes"; furthermore, the affair has "strengthened the idea that proper accountability for such crimes is the business of justice everywhere" (p. 197).

Roht-Arriaza goes on to examine the impact of transnational litigation on efforts to promote truth and justice in other countries, particularly in Argentina regarding the 1976–1983 "dirty war." She also provides a unique and much-needed account of the development of other cases against Argentine and Chilean human rights violators in Europe and the United States, including intricate details about how universal jurisdiction and transnational justice play out in diverse legal settings. This assessment offers a rare glimpse into how judges in Belgium, France, Germany, Italy, Spain, and the United States have collaborated with each other and with their Latin American counterparts, reflecting the ways these investigations have complemented and fed off one another.

Despite Roht-Arriaza's optimism about the impact of the Pinochet affair, her examination of the transnational cases filed in the wake of Pinochet's arrest raises difficult questions about the future of universal jurisdiction prosecutions in domestic courts. Subsequent cases in Spain, Belgium, and Senegal did not fare as well as their Argentine and Chilean equivalents—instead, they led to a tightening and narrowing of universal jurisdiction in

those countries. Although critical of these new restrictions, Roht-Arraiza concludes that they may be the inevitable result of the "natural evolution of a new regime" (p. 197).

Roht-Arriaza recognizes the challenges and difficulties that transnational prosecutions in domestic courts entail. She addresses some of the most common criticisms of universal jurisdiction—including concerns about national amnesty laws and politically motivated cases—and lucidly defends the accomplishments of transnational human rights litigation to date. She also raises important questions about the need for a more balanced, globalized system of justice that targets human rights violators from strong as well as weak countries. While transnational prosecutions will "never be the only mechanism for achieving justice," she acknowledges, "they are one piece of the emerging architecture" (p. 198).

Another pillar of this new architecture is the International Criminal Court (ICC). According to Roht-Arriaza, the advent of the ICC does not make transnational human rights cases in domestic courts unnecessary. Instead, she proposes that the two systems can and should work in tandem. Noting limitations on the ICC's jurisdiction and resources, she asserts that "transnational prosecutions have the potential to fill the gap . . . and to act as an adjunct and multiplier of the emerging international criminal jurisprudence" (p. 201).

Roht-Arriaza also argues that the ICC must learn from transnational cases the importance of engaging and empowering victims. By contrast, she suggests that the ad hoc tribunals for the former Yugoslavia and Rwanda suffered from a "lack of grounding" in local realities and had a "mixed impact on victims and local justice processes" (pp. 203-04).

Although several books and articles have surveyed aspects of the Pinochet litigation, Roht-Arriaza's account stands out as both sufficiently sophisticated to engage law students and legal scholars and highly accessible to a broader audience. The text occasionally warrants an additional footnote and at times challenges the reader to keep track of myriad people, places, and dates. Overall, though, Roht-Arriaza's book is a remarkable testament to the countless "ordinary and extraordinary people" who have spent much of their lives in the struggle for truth and justice (p. xiii), and it is a valuable resource for anyone who might pursue transnational human rights litigation in the future.

Compliance with the Decisions of the International Court of Justice. By Constanze Schulte. New York: Oxford University Press, 2004. Pp. xxxiii, 485. Price: $150.00 (Hardcover). Reviewed by Adam Strait.

Constanze Schulte's new book, *Compliance with the Decisions of the International Court of Justice*, offers a detailed survey of the jurisprudence of the International Court of Justice (ICJ) and a careful assessment of the degree to which its decisions have been implemented. Unfortunately, Schulte, an attorney who practices in Spain, never quite reaches the more interesting underlying question of the court's legitimacy as an enunciator of international

legal norms. Moreover, as recent events show, her focus on formal compliance alone is too sterile to serve as a good proxy for such a complex inquiry. By simultaneously authorizing post-conviction hearings for Mexican nationals, as ordered in *Avena and Other Mexican Nationals (Mexico v. United States)*, and withdrawing from the Optional Protocol of the Vienna Convention for Consular Relations, for example, the George W. Bush administration demonstrated how a country might formally obey and yet practically undermine the ICJ.

Schulte's predominant model of the court is as an independent, extranational judicial body interested in preserving its own authority. Consider Shulte's emphasis in her analysis of the ICJ's decision in *LaGrand (Germany v. United States)*, where the court upheld the binding power of its own provisional measures and ordered the United States to allow for some form of review and reconsideration of cases in which aliens were not informed of their right to contact their consulate before being convicted of a crime, a right conferred by the Vienna Convention on Consular Relations (Vienna Convention). Schulte writes that the judgment "shifted the focus . . . [to] observance of a legal obligation, not mere respect for recommendations" (p. 12). For Schulte, then, the ICJ does more than assert a normative claim; it creates a positive rule of law. Indeed, the ICJ in *LaGrand* arrogates to itself both types of power. After acknowledging that it does not control the sword or purse, the court noted that "[t]he lack of means of execution and the lack of binding force are two different matters."[1] This view, however, arguably lacks sensitivity toward the sovereignty of individual nations that go before the ICJ. The United States, in particular, has always been leery of allowing the court's normative and positive functions to overlap, since acknowledging the court's positive rule-making authority might give the ICJ the power to oversee U.S. domestic affairs. Schulte seems to assume that the sum of various state interests determines both whether to bring a case and whether to comply with a judgment (regardless of its legal obligation). For example, she writes that "[n]on-compliance might give rise to new political tensions, and the efficacy of the post-adjudicative phase will . . . be determined . . . by immediate political action" (p. 19). Her view, however, fails adequately to consider the fact that the legitimacy of the court is based on the complying country's perception of the court's process. If a state perceives the ICJ as acting ultra vires, it has an incentive not only to fail to comply with any judgment rendered on a particular matter but also to attack the ICJ's underlying legitimacy as a promulgator of international norms.

The recent U.S. decision to comply with *Avena*, coupled with its withdrawal from the Optional Protocol, provides a timely example of such an attack. It also illuminates the limitations of Schulte's focus on compliance. The Bush administration believes it is "for the President, not the courts, to determine whether the United States should comply with the [ICJ's *Avena*] decision, and, if so, how."[2] In agreeing to comply, the administration only

1. LaGrand (Ger. v. U.S.), 2001 I.C.J. 3, para. 107 (June 27).

2. Brief for the United States as Amicus Curiae Supporting Respondent at 9, Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 686 (No. 04-5928.

invoked the principle of comity, thereby skirting the question of whether the judgment had created a legal obligation for the United States. This decision was not, as Schulte would have it, a calculation of international political forces, nor was it a bow to the normative authority of the ICJ. Instead, it was probably a tactical choice based on domestic institutions: granting the *Avena* hearings was probably intended to render moot the issue before the U.S. Supreme Court in *Medellin v. Dretke*, a case in which a Mexican defendant sought to enforce the provisions of the Vienna Convention against Texas. The grant of hearings forestalls the chance that the justices in Washington would expand the normative authority of ICJ decisions in U.S. courts—not an unthinkable jurisprudential shift given the density of international law citations in *Roper v. Simmons*, the recent case forbidding capital punishment of juveniles.

The difficulty of analyzing *Avena* under Schulte's bare compliance framework is compounded by the U.S. withdrawal from the Optional Protocol. Even if the post-conviction hearings of Avena and the other convicted Mexican nationals are smoothly implemented, it will be impossible to test whether these measures in fact constitute adequate compliance under the *Avena* standard, since the ICJ no longer has power to examine them. On a similar note, the U.S. State Department framed the decision to give hearings in terms of international commitments rather than legal obligations, perhaps emphasizing that the U.S. concern was for bilateral relations and not for the court's legitimacy.

This piecemeal delegitimation of the ICJ will have repercussions beyond the instant case. Rational state actors who consider it in their best interests to engage the United States in multilateral institutions may hesitate to bring another suit for fear it will cause Washington to disavow another formal commitment. The U.S. decision to withdraw from the Optional Protocol goes beyond mere jurisdiction-stripping: it clearly demonstrates that a suit against the United States can result in fewer international legal constraints on the world's superpower, not more. This observation suggests that the role of the court in the future will be more arbitral and less adjudicative. Such a change will not necessarily hurt its overall prestige, but it will certainly affect its ability to constrain superpowers.

The closest analogy to *Avena* is the 1986 case *Military and Paramilitary Activities (Nicaragua v. United States)*, which also sits uneasily in Schulte's framework. In that case, too, the United States publicly refused to comply with an adverse ICJ decision and withdrew from the court's compulsory jurisdiction. It is still unclear what effect that decision had on the court's legitimacy. Since *Nicaragua*, in terms of pure activity, the court has been as healthy as ever. It has shown, too, through the Vienna Convention cases of *LaGrand* and *Avena*, that it will still call the United States to account where it has compulsory jurisdiction. Schulte even suggests that the court's health is attributable to the *Nicaragua* judgment, which "enhanced [the court's] legitimacy with developing states" by showing them that all nations are equal before the ICJ (p. 211). There is a simpler explanation that fits the facts just as well. Since June 1986, when the *Nicaragua* judgment was handed down,

global commerce and interaction have grown explosively. It seems only natural that a greater number of interactions between countries would lead to a greater number of suits before the court. Increased volume does not indicate, however, whether the court will be taking a more expansive role in interpreting positive international law, or whether it will simply act as a mediator. Furthermore, the only times the United States has appeared as a party before the ICJ since *Nicaragua* have been as a defendant in the Vienna Convention cases. With the ICJ stripped of jurisdiction in that type of case since Washington's withdrawal from the Optional Protocol, the circumstances under which it will be necessary for the United States to go before the court again are not immediately clear. It seems most likely that it will go at times of its own choosing; therefore, bare compliance is not a useful yardstick when examining the degree to which the ICJ can constrain U.S. activities.

Despite its narrow analysis, Schulte's book remains a valuable contribution to the field because of the depth and breadth of her research. By assembling primary source documents and providing clear, concise capsule summaries of the cases before the ICJ and their implementation, she has supplied an excellent starting point for inquiries into ICJ jurisprudence. The analysis in *Compliance with the Decisions of the International Court of Justice* delivers precisely what the title promises. Unfortunately, when compliance is no longer an adequate measure of the power of the court, that promise is not quite enough.

Historical and Comparative Foundations

The American Tradition of International Law: Great Expectations 1789–1914. By Mark Weston Janis. Oxford: Oxford University Press, 2004. Pp. vii, 156. Price: $46.92 (Hardcover). Reviewed by Yuval Miller.

Mark Weston Janis's *The American Tradition of International Law: Great Expectations 1789–1914*, the first of a two-volume intellectual history, assembles seemingly unrelated pieces of historical evidence into a surprisingly cohesive story. The book recounts an ardent nineteenth-century debate in the United States about the new country's proper legal relationship to other nations and about the usefulness of international law for American jurists.

The approach taken by Janis, the William F. Starr Professor of Law at the University of Connecticut School of Law, is refreshingly human. He lets his subjects' lives and work guide the historical account, avoiding overbroad argumentation. Richly portrayed, the characters even dictate the organization of the book, as chapters are grouped by profession: *Jurists, Lawyers and Judges, Utopians, Scientists, and Dreamers and Diplomats*. Beginning in 1789, when Jeremy Bentham coined the term "international law" to distinguish it from William Blackstone's "law of nations," the chapters loosely track a chronological crescendo of voices calling for increased

recognition of international law—a crescendo ever challenged by two factors, positivism and American exceptionalism.

The book's chief weakness is that while the author provides considerable factual detail, he fails to give sufficient explanation of the historical conditions he describes. For example, Janis suggests that Americans have a theoretical aversion to the traditional natural law approach to international law expounded by early theorists such as Grotius and Blackstone, but he never explains why this is so. Similarly, he discusses American exceptionalism at some length but never explains why Americans were skeptical that the country's unique institutions could mesh effectively with the European law of nations. The book is intellectual history, not sociology; still, a critical reader will yearn for more in-depth analysis and explanation.

The American Tradition of International Law also falls somewhat short as a historical text because Janis' story is obscured by the book's organization according to professions. For instance, Janis could usefully have distinguished what seem from his book to be two distinct historical periods. In the early nineteenth century, Janis' characters fervently debated the proper place of international law in America, its proponents emphasizing the discipline's potential to boost U.S. stature in the world and its opponents arguing that international law should not be considered law at all. After the Civil War, however, his characters take a different tack; international law proponents push not for domestic recognition of international law but for its employment in maintaining world peace. Many such chronological trends are insufficiently explored and so must be inferred by the reader.

Janis makes one remarkable historical relationship crystal clear: Early American jurists played an unexpectedly vital role in stirring a debate that led directly to the establishment of international modes of peaceful dispute settlement. Early nineteenth-century jurists influenced mid-nineteenth-century Utopians, whose peace movements in turn influenced late-nineteenth-century positivist jurists (i.e., scientists) and diplomats, who then set the intellectual foundations for and precipitated the creation of such notable institutions as the Permanent Court of Arbitration. Janis's book is unique in recognizing the strength of these century-long connections and in its character-led depiction of their significance.

Janis's depiction of early American debates among jurists is carefully detailed and well presented. He describes how the jurists James Kent and Henry Wheaton managed to trump their positivist critics by inventing a unique limiting principle for the law of nations—what Wheaton called "the international law of Christendom" (quoted on p. 25). Influential critics such as John Austin had claimed that international law could not be real law because it depended upon "moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns" (quoted on p. 15). Kent and Wheaton avoided this problem by demonstrating that moral sanctions can be effective so long as they are limited to a circle of "civilized Christian state[s]" (p. 38).

Janis successfully argues that while some nineteenth-century Americans were hostile to international law, "it was assumed by lawyers and judges at the

outset of the American legal system that, when propounding the law of nations, they were referring to an objectively identifiable body of law; they made use of the standard treatises and other authorities for explicating the doctrine" (p. 61). Janis adduces substantial evidence to support this assessment, including Alexander Hamilton's observation that it was "indubitable that the customary law of European nations is a part of the common law, and, by adoption, that of the United States" (quoted on p. 56).

Janis makes clear that natural law was accepted in the early republic, but he fails to make explicit why its popularity declined. The reader must strain to deduce an explanation from the text. One possible account focuses specifically on American skepticism about the compatibility of U.S. institutions with those of the rest of the world—American exceptionalism. Janis's only thoroughgoing exploration of exceptionalism, however, is his analysis of the infamous *Dred Scott* case.

Janis depicts *Dred Scott* as a significant break from prior Supreme Court decisions, exemplifying the court's reluctance to allow international law to interfere with U.S. federalism. In the majority opinion, "[Justice] Taney, in language echoed by more modern American judges, explicitly rejected applying international legal rules because 'the law of nations [could not stand] between the people of the United States and their Government'" (p. 93).

Janis convincingly argues that *Dred Scott*, and the Civil War that followed it, dealt a dire blow to natural law conceptions of the law of nations in U.S. courts and inspired Utopians and scientists to make international law palatable to the positivist mainstream. He also correctly recognizes that the decision "foreshadowed modern legal expressions of American exceptionalism" (p. 94). As one example, last year, in reaction to several Supreme Court cases citing international decisions, two Republican House members, Tom Feeney and Bob Goodlatte, joined by over fifty co-sponsors, proposed a resolution to express Congress' "sense" that judicial decisions should not be based on foreign laws or court decisions.[3] Upon introducing the resolution, Congressman Feeney warned that reference to such sources would subject judges to "the 'ultimate remedy' of impeachment."[4]

In a hearing before the House Judiciary Committee, Congressman Feeney stressed that the resolution "doesn't prohibit any court from ever looking at foreign laws as long as those laws 'inform an understanding of the original meaning'" of American law.[5] The irony in the statement is laid bare in Janis' book, which poignantly shows that this "original meaning" did include courts' use of international and foreign decisions. As Justice Marshall wrote, "[t]he decisions of the Courts of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with respect" (quoted on p. 64).

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3. H.R. Res. 568, 108th Cong. (2d Sess. 2004).

4. *See* Linda Greenhouse, *Rehnquist Resumes His Call for Judicial Independence*, N.Y. TIMES, Jan. 1, 2005, at A10.

5. *Appropriate Role of Foreign Judgments in the Interpretation of American Law: Hearing on H.R. 568 Before the House Comm. on the Judiciary*, 108th Cong. (2004) (statement of Tom Feeney, Member, House Comm. on the Judiciary) (quoting H.R. Res. 568, 108th Cong. (2d Sess. 2004)).

The first volume of *The American Tradition of International Law* ends with the onset of World War I. Janis provides a gripping account of how the war confronted the proponents of international law—largely members of the peace movement—with a significant challenge. The focus on character development here, as throughout the book, makes it hard to put down despite its lack of extensive critical commentary. Readers will eagerly await Janis's second volume to learn what twentieth-century actors have taken from the individuals encountered in the first volume, and what new ideas they have brought to the debate over the proper role of international law in U.S. courts.

Mexican Law. By Stephen Zamora, José Cossío, Leonel Pereznieto, José Roldán-Xopa, and David Lopez. Oxford: Oxford University Press, 2004. Pp. xxviii, 699. Price: $116.82 (Hardcover). Reviewed by Carlos R. Soltero.

If a U.S.-trained lawyer needed a one-volume work on the Mexican legal system, *Mexican Law* would be that work. While comprehensive, the book is written primarily from the perspective of such a lawyer and principally concerns how and why Mexican law differs from law in the United States. This book is not just for lawyers, however. *Mexican Law* offers more than a translation of laws; it provides thorough and original yet succinct historical explanations of legal and political differences between the two countries.

Describing the entire legal system of a country such as Mexico, with over 100 million inhabitants and a federal government, is an enormous undertaking. Consequently, *Mexican Law*—whose authors range from a Mexican supreme court justice, to practitioners from both sides of the border, to academics with substantial experience teaching Mexican law to U.S. lawyers and law students—has twenty-two chapters spanning seven hundred pages. The first eight chapters provide background information, followed by one chapter on administrative law and a couple on civil and criminal procedure. The bulk of the second half of the book deals with specific civil law subject matters, as well as covering just about every general subject area that would constitute a course at a U.S. law school (e.g., contracts, property, family law, constitutional law, intellectual property, commercial law). The final chapter is devoted to conflict of laws.

Apart from providing a description of how the Mexican legal system is structured and has functioned in the past, *Mexican Law* elucidates the big picture legal reforms that have occurred since the watershed election of President Vincente Fox in 2000, the first president not a member of the Partido Revolucionario Institucional (PRI) since the Mexican Revolution of 1910. Published in 2004, ten years after the enactment of the North American Free Trade Agreement (NAFTA), *Mexican Law* also describes how that agreement and the corresponding liberalization of economic regulations in Mexico have changed Mexico's legal system. For instance, several chapters address legal changes in areas of antitrust, the environment, and finance. *Mexican Law* observes, however, that notwithstanding numerous legal

reforms aimed at harmonizing Mexican law with U.S. laws, fundamental differences remain on the books and in application.

Mexican Law also discusses uniquely Mexican institutions such as communal farms (*ejidos*). Recent modifications to laws governing *ejidos* allow their owners more of the benefits traditionally associated with private property, such as the right of alienation or the right to use the property as collateral. Another example is the discussion of the constitutional limitations on direct foreign ownership of real estate or land in Mexico (limitations applicable to all land fifty kilometers from each coast and one hundred kilometers from the borders) as well as the trusts created to circumvent those strict rules. *Mexican Law* also provides an accessible explanation of the *notario*, a Mexican attorney specializing in certifying the authenticity of facts and serving as custodian of official public records. Of particular interest to people doing business or representing clients in Mexico is the discussion of the public commercial broker (*corredor público*), a newly created variant of the *notario* who not only authenticates legal documents but may also serve as mediator, arbitrator, or expert appraiser.

The authors reflect upon the various institutions that affect Mexico's legal system and legal culture, including law schools, the legal profession, the political system, and the economy. They also add practical insight, avoiding the shortcoming of some civil law works that focus on legal theory or doctrine to the exclusion of real-world problems. The authors state as much: "Studying Mexican law without taking into account the political system would be an exercise in unreality" (p. 132). They note further that Mexican law, particularly the Mexican Constitution of 1917 (which has been amended "hundreds of times"), is more aspirational than actual, and the reality of Mexican life does not frequently correspond with constitutional pronouncements. Apart from being an important read for anyone trying to understand legal issues in Mexico, moreover, *Mexican Law* is of historical interest. The background provided in Chapter 1 links the promulgated laws and changes to the codes of the past two centuries with political, historical, and economic events in Mexico's history.

Mexican Law uses Spanish words in the text together with an English translation, which facilitates understanding of Mexican legal terminology. For instance, Chapter 8 focuses on a Mexican judicial procedure of great importance to the legal system known as *amparo*, by which individuals seek protection from governmental abuses of authority and which is frequently used as collaterally to attack state and federal judgments. The book also notes the formalities of the *amparo* procedure and its limitations.

The authors dispel the view commonly held by U.S.-trained lawyers that *stare decisis* has no place in Mexico, a civil law jurisdiction. Although Mexico's *jurisprudencia* is historically less important as a source of law than case law in the United States, it is increasing in relative importance. Unlike the United States, with its historical appreciation for a strong judiciary as a separate and co-equal branch of government, Mexico has historically featured a generalized distrust of the judiciary. *Mexican Law* explains why the judicial power in Mexico has been limited in the name of democratic principles.

According to the authors, until 1994, the Mexican Supreme Court lacked the power to declare executive or legislative acts unconstitutional, a power the U.S. Supreme Court has enjoyed since at least *Marbury v. Madison*.

Relatedly, although Mexico has a federal system like that of the United States, Mexico's colonial and authoritarian history of centralized power has rendered it substantially different—most notably, Mexico's federal government is far stronger than the state governments and the executive branch has far more power than the other branches (legislative and judicial). A particularly interesting example of this power cited in *Mexican Law* is the provision involving *desaparecion de poderes* (disappearance of powers) that allows Mexico's federal senate to remove any state's governor. Correspondingly, Mexico's federal laws are particularly dominant. Commercial law (*derecho mercantil*) is exclusively federal. Mexican federal law also governs labor law and education.

Mexican Law is notable for the breadth of its coverage. The authors highlight procedural differences between the Mexican and U.S. legal systems; Mexico's system is characterized by the absence of juries, and a corresponding role for judges as fact-finders and examiners, the lack of a concentrated public trial (involving instead a primarily pleading-dominated practice), and the classification of various types of dispute resolution. One chapter discusses the economic reality of wealth concentration in Mexico, the government's preeminent role in the economy, and significant differences in commercial litigation including the tactical use of parallel criminal proceedings. The criminal law chapter describes types of crimes, the sequence of proceedings, and the general recognition "of the relationship between criminal justice and the endemic corruption that has plagued Mexican life for generations" (p. 345).

Mexican Law's approach, both academic and practical, general and specific, reflects the broad experience of its authors. This book makes a significant contribution to understanding Mexican law and an important contribution to the fields of comparative law and Mexican history.

Theory of the Cosmopolitan

The Democracy Deficit: Taming Globalization through Law Reform. By Alfred C. Aman, Jr. New York: New York University Press, 2004. Pp. xii, 252. Price: $45.00 (Hardcover). Reviewed by Brandon Birdwell.

If globalization is the proverbial bull rampaging unchecked through the china shop of the twenty-first century, Alfred Aman, Jr., director of the Indiana University Institute for Advanced Study and a professor at the Indiana University School of Law, believes he has a deceptively simple harness: to extend the principles that have traditionally animated domestic administrative law to the new internationally inspired administrative structures that have grown up in globalization's wake. The challenge he takes up in *The Democracy Deficit: Taming Globalization through Law Reform* is to

determine just what is meant by "administrative structures" in the global context.

Aman does an admirable job of explaining the administrative entities that have emerged during the era of globalization, focusing primarily on their emergence in the United States. He argues persuasively that these entities and the strain they put on the democratic process should lead to a rethinking of common notions of public and private for the purposes of regulation and control. As a result of the increasing tendency to outsource government functions and import obligations on governmental action via treaties and the decisions of international bodies, Aman asserts that national societies face a growing set of "democracy deficits" in the form of governmental operations removed from public oversight and direction (pp. 3-5). In the face of these expanding gaps between the people and the policies of their governments, Aman argues that globalization should be analyzed from a domestic point of view, examining how globalization influences the operation of government and how domestic law can control that influence. The suggestions Aman comes up with revolve around leveraging administrative law to facilitate democratic participation in the arenas in which such participation is being threatened: first, to expand the reach of administrative law to include those private entities that perform governmental functions; second, to extend the principles of administrative law to those international bodies such as the World Trade Organization (WTO) whose decisions impose restrictions on governmental operations; and third, to reduce the courts' tendency to lock domestic bodies (primarily the state and federal legislatures) out of decisions by constitutionalizing an aggregation of power in the executive branch.

The primacy of the executive in the United States contributes to both of the democracy deficits that Aman spends most of *The Democracy Deficit* examining. In the case of the deficits arising from the influence of international bodies, the executive's foreign affairs power is the principal culprit; by contrast, the executive's contribution to the deficits arising out of the privatization phenomenon derives from a more recent evolution of its "take care" power under Article 2, Section 3 of the U.S. Constitution. Since the New Deal, the courts have facilitated a steady flow of authority over administrative agencies from the legislative to the executive branch, and Aman is disturbed by the specter of Congress standing on the sidelines while the executive—and more importantly, the unelected heads of administrative agencies—takes it upon itself to deregulate and privatize public institutions. While Aman is less troubled by the deregulation of purely economic industries (such as the deregulation of the airline industry under the Jimmy Carter administration), privatization of what he sees as basic state operations such as the maintenance of prisons, the servicing of the military, or the determination of welfare eligibility draws his ire. In Aman's view, it is a pale imitation of democracy that allows private entities to decide how and when to provide public services with only periodic review by public officials and no direct engagement on the part of the populace.

Aman's complaint about the democratic deficit arising from the influence of international bodies on domestic government operations also

centers on the removal of fora for democratic participation. In this case, his principal target is the fast track administrative procedures for harmonizing domestic practices with obligations under the WTO and other treaty regimes. Here, Congress essentially rubber stamps rulings by international bodies. Since the executive negotiates the treaties, and international bodies operate without the constraints of domestic administrative entities, the body politic is again largely cut out of these decisions.

Aman's point about the wavering lines between public and private, national and international is well taken and certainly relevant in the era of globalization. The roving protests that accompany the meetings of any large international financial institution (e.g., the WTO or the World Bank) are clear evidence of a public desire for greater transparency and accountability on the part of powerful international organizations, while debacles such as the privatization scheme in California's energy market demonstrate the significance of the public/private debate. It is difficult to argue with Aman's advocacy of greater transparency and accountability for administrative bodies, and particularly hard to imagine an objection to the extension of these values to international bodies that have traditionally been worryingly opaque. His suggestion for the judiciary—that the courts ought to be attentive to the necessity of legislative flexibility in the rapidly changing world of the globalization era—is quite sensible as well.

Expanding the purview of administrative law beyond what have traditionally been considered public entities, however, seems to be a trickier proposition. To begin with, it is not entirely clear how subjecting nominally private entities to public demands such as submission to Freedom of Information Act requests will really further Aman's goal of greater democratic participation in the shaping of public operations. Although it is certainly commendable to open channels through which citizens may inform themselves, Aman does not say why such opportunities will inspire action by the citizenry in the relatively obscure arena of public administration. Indeed, Yale Law School Professor Bruce Ackerman has argued that such behavior is rarely undertaken by the populace.

More importantly, *The Democracy Deficit* does not clearly address how one is to decide what organizations or private entities ought to be subjected to higher demands of democracy than the market provides. Although Aman goes so far as to suggest that there may even be a case for redefining certain large companies as pseudo-government bodies because of the scale of their economic influence, he fails to offer a normative argument as to why the operations of such companies—or any others—should be considered public. History is replete with private entities whose operations were of a national scale (e.g., the companies controlled by the American industrial barons of the turn of the twentieth century), and it is unclear why globalization changes the calculus of their regulation. Moreover, even services that may generally be regarded as public often owe their status as much to their history as to substantive normative arguments. The suggestion that a privatized welfare system should be subjected to more stringent transparency and accountability than any other private company may come naturally today (though there are

certainly those who would debate it), but it surely would have been much more contentious at the outset of the New Deal.

In the end, the normative question remains largely unanswered. While Aman views globalization as a force that opens holes in the fabric of democracy by shifting the loci of public activities, advocates of privatization and the pure market are likely to offer the retort that the privatization movement is simply a return to a traditional conception of the public.

Politics and Passion: Toward a More Egalitarian Liberalism. By Michael Walzer. New Haven: Yale University Press, 2005. Pp. xiv, 184. Price: $25.00 (Hardcover). Reviewed by Eric Tam.

In *Politics and Passion*, Michael Walzer, a permanent member of the faculty at the Institute for Advanced Study at Princeton, attempts to renew and extend the contribution he made to the now well-worn liberal-communitarian debate with his 1989 essay "The Communitarian Critique of Liberalism" (helpfully reprinted as the Appendix to *Politics and Passion*). In that piece, Walzer managed to find favor with *both* sides of the debate. He argued that communitarians were right to worry about liberals' tendency to overemphasize the ideal of the autonomous individual, but wrong in thinking that communitarian theory could *replace*—rather than merely correct—the liberal theory underpinning contemporary democracy. Like much of Walzer's work throughout his long career, his essay succeeded because it reframed a set of commonsense theoretical ideas in an engaging and novel manner. Walzer mostly sticks to this formula in *Politics and Passion*, but the product is less successful. Walzer's style of judicious restatement is not as compelling now that the field has become saturated with younger theorists working at the intersection of theories of liberalism, multiculturalism, gender, and identity. Although Walzer has never pretended that his method of persuasion through sociological and literary anecdotes is meant to meet any standard of formal rigor, in *Politics and Passion* the lack of support he marshals for his most novel claims is frustratingly clear.

Walzer now thinks communitarianism has been more than adequately chastened, and his main project is to ensure that liberal theory's current imbalances are not neglected. The first liberal imbalance Walzer tackles is the one illuminated by the familiar communitarian complaint about liberalism's tendency to undervalue the crucial role of involuntary association and obligation, while the second touches on liberal theory's bias in favor of reason over passion. Walzer attempts to ground his arguments concerning these imbalances in a commonsense, pluralist theory of liberal democracy. In his view, liberals will arrive at such a pluralist theory once they adopt a sociologically accurate perspective on the place of involuntary social groups—for example, ethnic, racial, and religious groups—in contemporary democracy. This perspective derives from the communitarian acknowledgment that every individual in liberal society is born into a culture and socialized by a family he or she did not choose, and that culture and family give rise to both crucial social resources and deeply felt constraints.

The first set of multiculturalist arguments Walzer erects on these pluralist foundations is not new, but it is well constructed. He argues that once liberalism adopts this understanding of involuntary group ties, it should also recognize that redressing society's most persistent inequalities may require a remedy different from the classical liberal prescription of granting group members equal formal rights and the opportunity to assimilate. Instead, achieving equality in many cases requires a solution Walzer calls "meat and potatoes" or "empowerment" multiculturalism: the liberal state must provide stigmatized groups with resources that enable these groups' "core" activist members to organize "periphery" members and maintain group-oriented social welfare institutions (pp. 38-39). As Walzer readily admits, theorists such as Will Kymlicka, Seyla Benhabib, and Nancy Rosenbaum have covered similar territory. Walzer's treatment is worthwhile, however, because it reframes these somewhat familiar ideas under a cleaner conceptual structure and supports them with compelling examples drawn from the history of American social movements.

Walzer's attempts to deal with some of the thornier derivative problems that flow from his theory of multiculturalism are less successful: he raises the right questions, but his attempts to answer them tend to be indeterminate or poorly supported. For example, Walzer establishes a neat initial frame for conceptualizing the problem of the relationship between liberal democracy and illiberal groups, describing it as a conflict between basic liberal democratic obligations of citizenship and the obligations imposed by "greedy" communities. Inspired by sociologist Lewis Coser's *Greedy Institutions*, Walzer describes greedy communities as those that require total commitment to their ideals and therefore exclude the possibility of fulfilling external obligations. From this promising start, Walzer moves far too quickly, and he provides only a paragraph's worth of justification for the crucial assertion that liberalism has some obligation to tolerate communities whose goals explicitly reject liberal democracy's basic obligations. A charitable reader might excuse Walzer because he uses these thin foundations to support highly indeterminate normative conclusions. His most resolute prescription is that liberals should "tilt decisively against totalizing groups" if further concessions to them would endanger liberal democracy's survival. Otherwise, Walzer effectively throws his hands up in the air, stating that "there is no theoretical solution . . . only a long and unstable series of compromises" (p. 65). It is hard to see why any liberal theory would view this conclusion to be a persuasive "corrective" (p. x).

The second set of multiculturalist arguments are directed at the general relationship between rationality and passion in democratic politics. Here, Walzer continues in the indeterminate mode. For example, he appears set to launch into a controversial argument when he states that reason and passion are merely different modes of thought and expression lacking any necessary relationship to the good or bad nature of social means or ends. Yet Walzer declines to argue for a non-rational basis of normative judgment. Instead, he states that such judgments involve "both conviction and passion, reason and enthusiasm, always in unstable combination" (p. 120). So it turns out that

Walzer wants only to issue a vague caution to liberals not to get carried away with rationality. This warning may be a judicious position, but it is hard to disagree with Walzer when he suggests that it says nothing "excitingly new or even mildly provocative" (pp. 129-30).

The looseness of Walzer's theory is especially apparent in his broad attack on deliberative democratic theory. Walzer argues that deliberation—understood as rational constructive discussion between equals aimed at the common good—is not a significant independent political activity. Deliberation cannot be such an activity because politics for Walzer consists primarily of pluralist conflict between groups with irreconcilable ends. Reasoned reflection on the common good has little purchase in such a political context, except as a helpful component of its political culture. This last conclusion about "how deliberation fits into a democratic political process that is . . . pervasively nondeliberative" would be quite interesting if Walzer had done more to support his argument that democratic politics is essentially non-deliberative than just provide a list of non-deliberative political activities (p. 92). As it stands, deliberative democrats could easily object that a major part of their theoretical project is *changing* core democratic activities and institutions so that they become more deliberative.

The concluding reflections on global equality provide a good example of the book's overall difficulties. Walzer briefly attempts to extend his "meat and potatoes" multiculturalism to international relations (p. 136). Like disadvantaged social groups in domestic society, disadvantaged peoples in international society may require not just individual emancipation from abusive states but also group empowerment in the form of access to strong state institutions. As much potential as this argument might have, Walzer can hardly begin to support it in ten pages. Like much of this short book's other ideas, Walzer presents the concept in an engaging and suggestive manner, but he fails to substantiate the aspects of the claim that are original.

Rules for the World: International Organizations in Global Politics. By Michael Barnett and Martha Finnemore. Ithaca: Cornell University Press, 2004. Pp. xi, 226. Price: $45.00 (Cloth) (Paper, $17.95). Reviewed by Ben Billa.

Responding to international relations theory's long-standing state-centered bias, in *Rules for the World: International Organizations in Global Politics*, Michael Barnett and Martha Finnemore effectively argue for an approach that acknowledges international organizations (IOs) as autonomous actors operating on their own authority. Admittedly, international relations theorists have modified the early theoretical focus exclusively on state action by taking account of IOs. These later amendments, however, have persisted in giving short shrift to IOs, treating them first as mere byproducts of state action and later as regimes through which states may act.

Barnett and Finnemore, professors of political science at the University of Minnesota and George Washington University, respectively, argue that IOs are endowed with an authority that derives from delegation, morality,

expertise, and rationality, and that this authority provides a basis for autonomous action. At its most basic level, IO authority is conferred by states, which put IOs in charge of certain tasks and confer upon them at least a sufficient amount of autonomy for them to accomplish those tasks. IOs derive an additional source of authority from the principles behind the missions they pursue, which are generally widely shared and premised on a sense of moral duty. Technical expertise related to their assigned missions provides added authority. A fourth source, which the authors term "rational-legal authority," flows from the first three (p. 20). By virtue of their creation by multiple states to employ technical expertise in pursuit of widely shared values, IOs are imbued with an air of impartiality and depoliticization that purifies their action in the eyes of observers and confirms their status as rational-legal actors.

The authors employ a sociological theory of bureaucracy in the Weberian tradition, and they analyze three detailed case studies to support their argument. Yet both the account of bureaucracy theory and the case studies are largely distractions from the central and most interesting points of the book. The case studies—on the International Monetary Fund, the U.N. High Commission for Refugees, and the U.N. Secretariat and Department of Peacekeeping Operations—are at times interesting, but are more often overly detailed and poorly framed within the book's argument. Even if the empirical portion had been better integrated with the argument, however, the principles of bureaucratic behavior as described by the authors are so many and so broad, and are meant to apply to such a vast array of organizations in such a complex international environment, that they seem capable of explaining nearly anything in retrospect and of predicting next to nothing.

This is not to say that Barnett and Finnemore's book is ineffective. The central thrust of their argument—that IOs merit recognition and study as autonomous actors with particular cultures, agendas, and histories that influence their action and therefore the world—is immediately plausible and is well argued in the introductory chapter. By calling attention to a significant and long-ignored area of action, Barnett and Finnemore make an important contribution to international relations scholarship. The task of demonstrating general applicability of a complex set of principles across all international organizations (numbering at least 238) that vary along multiple axes not only in their internal structure but also in their external environments is likely an impossible one. Yet the authors' call to international relations theorists to pay attention to particular institutions operating in the international arena is entirely reasonable. Indeed, it is likely to produce a substantially enhanced vision of the world system.

In addition to effectively arguing for the recognition of IOs as autonomous and influential actors, the authors successfully track important trends in IO behavior—a propensity for expansion and a proclivity for dysfunction. All three case studies provide strong evidence for the expansionist tendency, and a comparison of the broad moral and aspirational claims of IOs with their often narrow mandates provides a persuasive theoretical explanation for this propensity. Furthermore, the scope of IO

action often expands in response to failure, as IOs acknowledge additional variables and realms of possible action. As the authors discuss, IOs also broaden their reach through the application of legitimating principles to new situations outside of the original mandate. Likewise, ample evidence for pervasive dysfunction is provided in both the empirical and theoretical discussions.

Of course, anyone who has looked at a recent flow chart of U.N. offices already suspects tendencies toward expansion and dysfunction to be innate characteristics of IOs. More interesting are two questions raised by the existence of these traits, which Barnett and Finnemore treat only briefly in the last section of the book. First, given the prevalence of dysfunction, what are the effects of IOs' expansion? The authors point out that this expansion has implications not only for the international system but for domestic systems as well, and that IOs exert a substantial amount of power over each. IOs classify problems, define new interests and tasks, legitimate actors to carry out those tasks, and create new preferences and values. They use this power to promote a liberal, moral vision of the world. "IO expansion, in short, entails creating particular kinds of states with particular kinds of interests" (p. 165). "Bureaucratizing world politics" (p. 1), the alternative phrase employed by the authors to refer to IO expansion, places substantial authority in the hands of global bureaucrats; for citizens of states subjected to this authority, it can at times mean "emancipation, at other times domination" (p. 166). Whether the pathologies exhibited by IOs outweigh the positive contributions they make is left open to debate.

The second question the authors should have treated in greater depth is whether expanded IO action is legitimate, especially in terms of its implications for accountability and democracy. Here the authors point to certain efforts made by IOs to achieve greater legitimacy but conclude that critics and reasons to criticize will remain for the foreseeable future. They anticipate that nongovernmental organizations and other groups will increasingly have interests in holding IOs accountable, and they warn against the possible pitfalls of pushing undemocratic liberalism. Barnett and Finnemore point to what they see as a great irony of IOs—that they are undemocratic institutions pursuing liberal goals—and worry that in chasing liberal goals, liberals will ignore the interests of the states and citizens who are supposed to benefit from that liberalism. Looking to the future, Barnett and Finnemore conclude that "[m]anaging our global bureaucracy and learning to exploit its strengths while moderating its failings will be an essential task" (p. 173).

While the authors present a convincing argument for the revision of international relations theory to consider IOs in a new light, their discussion of the two big picture questions their observations raise is disappointing to the international lawyer. Efforts to describe IO successes or what the world would look like without them are sorely lacking. Also missing are suggestions as to enhancing IO legitimacy and effectiveness. Indeed, for the international legal expert, likely already familiar with the quirks and consequences of IO bureaucratic culture, the book, rather than offering concrete guidance for

improving IOs, may do little more than put into words some of the frustrations of dealing with them.

War and State-Building

What We Owe Iraq: War and the Ethics of Nation Building. By Noah Feldman. Princeton: Princeton University Press, 2004. Pp. 154. Price: $19.95 (Hardcover). Reviewed by Adil Ahmad Haque.

Noah Feldman's engaging and surprisingly personal second book disappoints in at least three respects. Feldman, a law professor at New York University and former constitutional adviser to the Coalition Provisional Authority in Baghdad, declines to evaluate the legality and morality of the titular war. He similarly neglects to discuss the titular project of nation-building—the formation of an autonomous collective moral agent—writing instead only of state-building—the formation of stable political institutions. Finally, although Feldman makes a great number of ethical claims, they do not amount to a complete or convincing theory of what we owe Iraq, of the affirmative obligations of the United States to aid in reconstruction. When pressed to defend his strongest ethical claims Feldman makes no reference to his theory, drawing instead on more familiar and compelling moral grounds.

The third disappointment runs deepest, for Feldman's title promises an advance over the acute moral solipsism of his first book, *After Jihad: America and the Struggle for Islamic Democracy* (2003). There Feldman supported his policy proposals through appeals to the self-interest and moral purity of the United States. Scattered references in the introduction and conclusion to Muslims deserving democracy amount to little more than window dressing. But to speak of what the United States owes Iraq, of duties and obligations to the Iraqi people, is necessarily to speak of Iraqis as holders of rights and sources of moral claims against the United States, as persons rather than opportunities for profit or the display of virtue.

Feldman's efforts at self-improvement get off to a bad start. In the first chapter of *What We Owe Iraq*, he argues that "the objective of nation building ought to be the creation of reasonably legitimate, reasonably liberal democracies" (p. 8). This objective in turn serves the "primary objective" of national defense: strong democracies create fewer anti-American terrorists (p. 11). Feldman does not articulate a moral obligation to engage in nation-building and then show that this obligation does not conflict with national self-interest. Rather, he argues that self-interest alone is sufficient to justify nation-building projects so long as its pursuit does not set back the interests of other nations. Even this constraint is qualified: Feldman acknowledges that one may sometimes act contrary to the interests of others. It is highly convenient, then, that "living under a democratically legitimate government that respects basic rights coincides with a people's interests" (p. 25).

Feldman's constrained self-interest principle cannot generate affirmative duties toward Iraqis because it is permissive, not mandatory: it says that the

United States may pursue its self-interested goals "so long as [our] goals coincide with or at least do not conflict with the interests of other people" (p. 22). The United States may choose to contribute to reconstruction, though if it does it must obey certain constraints. But it has no affirmative obligation to start the project, so even these negative obligations arise and fall away at its choosing. Yet to speak of what we owe Iraq is to speak not of preference but of moral necessity, for the power to waive a duty lies not with its bearer but with its recipient.

The second chapter argues that the United States holds the authority to govern Iraq in trust for the Iraqi people, to be relinquished following democratic elections. Since authority was not entrusted to the United States but was seized by force, the model of trusteeship generates not a right to govern but merely a familiar constraint: "the nation builder may pursue its own interests in security so long as these coincide with the interests of the occupied people" (p. 65). Feldman argues that this constraint is best enforced by the occupied through broad freedoms of speech and assembly, as well as representation by officials whose future in politics depends on their responsiveness to popular will.

Both the duty not to limit expression and assembly and the duty to create representative bodies are derivative obligations to take necessary steps to comply with the constrained self-interest principle. As such, the United States chooses to undertake these duties as burdens on the pursuit of its self-interest, and it can cast them aside should self-interest favor a different set of goals. Feldman states that the United States has a moral duty to produce order in Iraq and preside over the formation of democratic institutions. But in his view the goal of creating functioning democracies is the goal of nation-building, a goal he defends on the basis of national self-interest, not moral obligation.

For these derivative duties to have any bite, Feldman must show that the United States cannot abandon reconstruction without violating its obligations to Iraqis. The obligation to remain cannot be drawn from the constrained self-interest principle like gold from lead, yet if that principle does not explain what we owe Iraq then the first and longest chapter of the book may as well be filled with blank pages. Feldman insists on the unity and coherence of his view, referring to a single hypothesis developed throughout the book's three chapters, and describing trusteeship obligations as derivations from his general account of nation-building. Yet when it comes time to explain why the United States may not leave Iraq at its pleasure, Feldman gives two rationales that rely in no way on what has come before.

The first rationale is forward-looking: An Iraq without a stable, democratic government would be "much worse than Afghanistan as a breeding ground for terror—but far more important it would spell disaster for the lives of ordinary Iraqis . . . . And it would sit on 10 percent of the world's proven oil reserves" (p. 50). That the sentence fragment referring to the interests of Iraqis lies between considerations of national defense and finance is perhaps enough to show that Feldman cannot rest a decisive piece of his argument on this passage or others like it.

The second rationale is backward-looking: "We got ourselves—and the Iraqis—into a serious fix: and we must see it through" (p. 91). On this view, the duty to oversee reconstruction is a remedial one, a duty to make whole those whose rights the United States has infringed. Feldman's first problem is that he wishes to avoid judgment of the invasion itself; yet one cannot call for a remedy without first declaring a wrong. Feldman must therefore address the ethics of the war before determining what we owe Iraq. His second problem is that principles of corrective justice likely demand extensive monetary reparation to Iraqi war victims. Such reparations place morality firmly ahead of self-interest, a familiar ordering that Feldman nonetheless remains hesitant to advocate.

A final concern: Feldman's exclusive focus on state-building contributes to a growing misperception that U.S. control over Iraq will end with the emergence of stable domestic political institutions. Today, however, the foreign domination of nations and peoples that Feldman abhors is primarily effected through economic coercion rather than military force. If Americans are seduced by the magic of elections and distracted by the homecoming of U.S. soldiers, U.S. influence in Iraq will take a form all too familiar to the developing world.

Just War Against Terror: The Burden of American Power in a Violent World. By Jean Bethke Elshtain. New York: Basic Books, 2003. Pp. xi, 251. Price: $14.00 (Paperback). Reviewed By Richard Owen Morgan.

The foundations of just war theory may be traced to St. Augustine who, writing during the turbulent years of the early fifth century, sought to reconcile the traditional pacifism of Christianity to the military necessities of the post-Constantine Roman Empire. Over the centuries, as the theory has been adapted, secularized, and incorporated into international law to accommodate political developments, the purposes to which it has been put have expanded beyond the range of the Augustinian moral compass, which was designed for combatants and their commanders as they made decisions about how and when to go to war. Today, just war theory is also used by national leaders to justify their action or inaction on the international scene; as Michael Walzer has noted, the just war concepts of proportionality and discrimination have become the *lingua franca* of U.S. commanders with respect to the conduct of military operations in the wake of Vietnam. Additionally, these same concepts form the basis of international agreements that seek reciprocal recognition by combatants of those laws of war beneficial to all parties. For example, prohibitions against the use of biological or chemical agents and other weapons of mass destruction are derived from their disproportionate and indiscriminate nature.

It is in light of these aims of just war theory—providing guidelines for the conduct of combatants, justification for war, and reciprocity between warring states—that readers must judge *Just War Against Terror* by Jean Bethke Elshtain, a professor of social and political ethics at the University of Chicago Divinity School. The original edition of the work was published in

the interim between the toppling of the Taliban regime and the commencement of hostilities in Iraq, and therefore the bulk of Elshtain's argument focuses on U.S. action with respect to Afghanistan.

Elshtain was "a principal author and signatory" of a February 2002 statement of human rights principles ("What We're Fighting For") signed by 60 U.S. intellectuals (discussed on pp. 64-65, 74-76, and included in an appendix). Along with Christian theology, she draws on this piece to make the argument that U.S. actions in Afghanistan conform to the tradition of just war theory. Elshtain claims that the Taliban regime's disrespect for the fundamental rights of the individual (and women in particular) satisfies the *casus belli* requirement of the theory, and that the rules of engagement employed in the prosecution of the war meet the dictates of proportionality and discrimination. "The United States," she writes, "must do everything it can to minimize civilian deaths—and it is doing so" (p. 69).

The justice of U.S. action in Afghanistan (as well as in Iraq, discussed briefly in a 2003 epilogue) aside, however, Elshtain's defense of the Afghanistan campaign is problematic. Elshtain ignores just war theory's strong secular tradition and instead anchors her argument primarily in Christian theology, drawing on the writings of H. Richard Niebuhr and Paul Tillich (as well as very loosely upon the works of the late Pope John Paul II), which argue that evil is a fundamental reality that threatens the existence of civic peace. Christians therefore have a duty as adherents to a religion of both peace and justice to confront such evil, incarnate in groups such as al-Qaida and the Taliban. Such a religious line of argument would be appropriate were Elshtain's intended audience fellow theologians or the Christian laity; however, her appeals throughout the book are global in scope. Whereas Elshtain acknowledges the separation of church and state, her frequent theoretic conflation of the United States and Christianity is unlikely to play well with a heterogeneous domestic audience, much less with the United States' increasingly secular allies. Of greater concern, however, is the effect such justification may have on moderate Muslims, who might view Elshtain's work as evidence that the United States sees what the Bush administration terms the Global War on Terror as a religious crusade.

If *Just War Against Terror* provides a flawed justification for war, it fails completely to guide combatants in the conduct of the current campaign against terrorism. Elshtain accepts the traditional criteria for a just war and then seeks to apply them to the present state of world events. However, Elshtain fails to acknowledge sufficiently that a Global War on Terror—of which the wars in Afghanistan and Iraq are regrettably but inevitably only a part—poses serious challenges to a theory that for the past five hundred years has been developed within the Westphalian framework of the sovereign state. Modern terrorist organizations such as al-Qaida simultaneously embrace and reject the concept of state sovereignty, benefiting from the shelter and infrastructure that sovereignty provides while seeking to undermine states on behalf of a transnational movement they claim to represent. Terrorists work to neutralize the asymmetry of resources existing between them and the states they seek to attack through decentralization, and by obscuring the line

between combatant and noncombatant, between home front and the front lines. Elshtain does not address the problems that this blurring of lines creates for state actors who seek to abide by the *jus in bello* rules of discrimination and proportionality. The Global War on Terror upon which Elshtain focuses has been primarily waged on sovereign states that are or are alleged to be associated with transnational terrorist organizations. This correlation is unlikely to hold consistently in future conflicts in the Global War on Terror.

The problems for just war theory, and Elshtain's discussion of it, do not stop there. The rejection of the system of sovereignty by transnational terrorist organizations is an implicit rejection of the laws of war and rules of engagement. A theory of justice in war that transcends cultural lines—derived from a reconciliation of the just war doctrines of the world's great religions—could perhaps form a basis for mutual restraint in this new age of combat. However, Elshtain's discussion of non-Christian just war theory is too cursory and at times dismissive to contribute to that debate. Furthermore, it has been a staple of *jus ad bellum* literature that there must be a reasonable hope of success for a war to be just. But what is the definition of success in the Global War on Terror? With a decentralized opponent that chooses when, where, how, and why to attack, and that may be dormant for years, how can anyone know whether victory has been achieved? Does the nature of terrorism necessitate preemption and clandestine action on the part of states, and does it excuse the *jus ad bellum* requirements of last resort to, and open declaration of, war?

Elshtain addresses none of these important questions. Instead, by focusing on the human rights abuses of the Taliban and Saddam Hussein regimes, she has produced a work that explores the justification for states to engage in war against other states that undermine their own sovereignty by abusing their citizens and subjects. This just war theory question is as old as the system of nation states itself; the mistitled *Just War Against Terror* adds nothing to this debate.

Elshtain's work is likely to appeal to those who have already formed their opinions about the justice of the Afghan and Iraqi wars. For the undecided, her often anecdotal evidence and categorical acceptance and rejection of various controversial issues may seem unconvincing at best, and partisan at worst. In such uncertain and transitional times, a thoughtful exploration of the ethical and moral dimensions of the current war on terrorism is greatly needed. Unfortunately, *Just War Against Terror* is not that work.

Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order. By Gerry Simpson. Cambridge: Cambridge University Press, 2004. Pp. xix, 391. Price: $95.00 (Hardcover). Reviewed by George Stephanov Georgiev.

Presidential rhetoric about an "axis of evil" in January 2002, and the U.S.-led invasion of Iraq only a year later, reenergized the debates among political scientists and legal theorists about sovereign equality and the power

structure of the international system. How are some states relegated to the status of pariahs, what special rights do great powers have, and how can the egalitarian nature of the nation-state system be reconciled with substantive inequalities in state power? Gerry Simpson, a senior lecturer in law at the London School of Economics, approaches these questions from historical and theoretical perspectives and makes a meaningful contribution to the common understanding of the construction and limits of state sovereignty.

The book's key insight is that respect for the principle of sovereign equality has not been static over time, but has risen and fallen based on the goals of the great powers and in response to institutional projects in international diplomacy. More fundamentally, sovereign equality is not applied similarly to all members of the international community. Powerful states have guarded their own sovereignty tenaciously, but they have not been squeamish about subjugating the sovereignty of lesser states using the language of humanitarian intervention and self-defense.

From this point of departure, Simpson introduces a theory of a different version of sovereignty, what he terms "juridical sovereignty," which is constructed by the interplay between classical sovereign equality on the one hand and two forms of inequality, "legalized hegemony" and "anti-pluralism," on the other (p. 6). Grasping these new concepts is at times a challenge because the book simultaneously uses detailed historical case studies to define the terms and to apply them in search of a deeper understanding of sovereignty. The 1815 Congress of Vienna is interpreted as a moment of conscious regime construction that codifies the inequality between great powers and lesser states and creates a system of legalized hegemony. This system is then continually modified, first by an expansion of state equality at the 1907 Hague Peace Conference and then at the 1945 San Francisco Conference that created the United Nations, and by a reversal, toward legalized hegemony, during and after the Cold War.

If legalized hegemony is a manifestation of the special status of great powers, then the ideological and moral anti-pluralism of these powers is what creates outlaw states. Simpson carefully traces the construction of outlaws in philosophical thought and in real world diplomacy. He argues that the pluralism of the early U.N. years has been replaced by a staunch anti-pluralism in which Western powers challenge or even disregard the sovereignty of states that allegedly behave criminally or that do not match a certain favored political order. The military interventions in Kosovo in 1999 and Afghanistan in 2001, as well as the creation of the International Criminal Court, are to Simpson proof of this renewed erosion of sovereignty motivated by anti-pluralism.

In the book's penultimate and perhaps most interesting chapter, Simpson examines the U.S.-led military campaign in Afghanistan through the prism of juridical sovereignty. He posits a debate between those who believe that the U.S. intervention was justified under the universal principle of self-defense (pragmatists) and those who look at the semantics of the two U.N. Security Council resolutions and refuse to find a legal basis for the intervention (formalists). Without stopping to evaluate the merits of the latter position, the

book suggests that both the pragmatists and the formalists are mired in a view of international law that requires them to apply their version of self-defense norms *equally* to all states. According to Simpson, such equal application is wrong. The international juridical order is composed of unequal sovereigns with unequal sovereignties and what is legal for great powers is not legal for other states. The United States thus acted legally against terrorists based in Afghanistan by invading the entire country, but a similar action on the part of India against Pakistan, for example, would be squarely illegal. In the end, the concepts of anti-pluralism and legalized hegemony discussed earlier are used to illustrate—convincingly—that great powers and outlaw states enjoy different rights derived from different sovereignties. These distinctions are grounded in an international legal order constructed by the great powers themselves and are not merely a function of power politics.

Simpson's other historical case studies are rich in detail and helpful in understanding the unstable nature of the interaction between the ideal of sovereign equality and the reality of power inequalities. The book will therefore be of great use for those less familiar with the history of international regime construction and the frequent renegotiations of state sovereignty.

For all its sophistication, however, the bulk of the study leaves the advanced reader somewhat unsatisfied. More a historian than a social scientist, Simpson uses a new vocabulary to retell an old story. The tale is interesting and the concepts defined here might well become a standard part of the discourse on sovereign equality. It is disappointing, however, that the book lacks a comprehensive conclusion about the future of sovereignty, the survival prospects of outlaws, or the competing pressures of anti-pluralism and legalized hegemony.

If it seems that not much in the book is groundbreaking, it is not due to a dearth of ideas. Simpson himself hints at many intriguing questions as he goes along but seems reluctant to pursue them. After Simpson's discussion of how legalized hegemony has encroached upon sovereignty historically, the reader is left wondering about the implications of different versions of juridical sovereignty for peace within the international system. Examining the relationship among legal configurations of sovereignty, hegemony, and regime stability would have enabled Simpson to make a strong contribution to focal debates within the field of international relations. Realists such as Henry Kissinger and Stephen Krasner have long theorized about hegemony and regime stability but their work treats state sovereignty as a uni-dimensional variable and lacks the kind of nuanced, law-based understanding on offer here. One can only hope that Simpson will use the theories developed in this work to engage in a normative study of the relationship between different sovereignties and international peace.

Another example of the book's limited scope is that it discusses only sovereigns and makes little or no mention of nongovernmental organizations (NGOs), international courts, or transnational networks. Each of these entities, however, is crucial to the redefinition of sovereign equality. The recent International Court of Justice decision in *Avena and Other Mexican Nationals*

(Mexico v. United States) and President Bush's subsequent executive order mandating domestic compliance with the ruling are a case in point. Anti–death penalty NGOs helped Mexico, certainly not a great power, to challenge the sovereignty of the United States successfully, all within the system of legalized hegemony.

Ultimately, *Great Powers and Outlaw States* reminds readers that sovereignty has a long history and is a complex concept with many constitutive elements. By working at the intersection of several disciplines, Simpson offers one systematic way to account for law in the study of international relations and for power in the study of international law. Books of this sort are especially useful at a time when the shadows of state power in the world legal order are as visible as ever. The ultimate test for the success of Simpson's work will be whether his re-conceptualization of sovereignty is embraced by other scholars writing about these questions.

Corporate Warriors: The Rise of the Privatized Military Industry. By P.W. Singer. Ithaca: Cornell University Press, 2003. Pp. 330. Price $19.95 (Paperback). Reviewed by Nick Caton.

Privatization has become virtually a way of life in the United States. Telephone service was opened for competition long ago, and an increasing number of governmental operations—including water, electricity, and garbage collection—are being assigned to the market. For many in the United States, however, the gruesome photographs of the mutilated and burnt bodies of four U.S. defense contractors in Iraq published on March 31, 2004, served as a startling revelation of the extent of privatization of the nation's defense.

In fact, subcontracting martial functions to private military firms (PMFs) has become quite common in recent years. Halliburton, one of many corporations providing logistical support in Iraq, has performed services valued at $9.6 billion as of February 25, 2005, and this number is projected to increase by $6 billion per year, according to the U.S. Army. With estimates of force strength above 20,000, PMFs easily outnumber British soldiers, who at 5,000 represent the largest state presence in Iraq after the United States. Opening certain military functions to competition ostensibly makes the military more efficient, but it introduces a perverse incentive previously alien to warfare: corporate profit. The ultimate goal of a state in warfare is usually quick and decisive victory, whereas PMFs prize profits—a metric often maximized by a prolonged conflict. Peter W. Singer, a scholar at the Brookings Institution, seeks to highlight this tension, as well as the history and breadth of the PMF industry generally, in *Corporate Warriors: The Rise of the Privatized Military Industry*.

Singer provides a comprehensive survey of PMF activity throughout the world. He touches briefly on conflicts in scores of countries, and he examines the industry's origins in both the broad twentieth-century trend toward privatization and the cheap arms markets that developed following the Cold War. Singer presents such disparate examples as firms that provide only logistical services and those that have engaged in battle in countries such as

Angola, Colombia, and the Democratic Republic of the Congo. The myriad incarnations of PMFs, the services they provide, and the clientele they work with present significant challenges in classifying firms, and even in understanding the types of firms that should properly be considered PMFs. Unfortunately, Singer does not attempt an organized classification of the industry until well into his work, and even then it remains unclear whether his generalizations and warnings regarding the PMF industry apply across the board or only to its most unsavory members. This confusion is a regrettable flaw in a compelling work otherwise clearly written and extensively researched.

The success of *Corporate Warriors* comes in highlighting the extensive use of PMFs, and in calling for examination of the danger inherent in turning over a quintessentially government action to a profit-driven entity. The prevalence of PMFs in U.S. operations is astounding; as Singer notes, "[e]very major American military operation in the post-Cold War era has involved considerable levels of support and activity by private firms offering services that the U.S. military used to perform on its own" (p. 16). Every function turned over by the government to the private sector involves a shifting of incentives; the state's desire for victory becomes colored by the corporation's desire for profits. Theoretically, the market constrains PMFs in their actions: they can maximize long-run profits by aligning their interests with those of their clients. This theory, however, assumes a level of market sophistication that is not present with PMFs, as contracts are often shrouded in secrecy and competition is constrained by political handouts.

When subcontracting to PMFs, the government depends on the market to discourage behavior—from refusing orders to working with the enemy—that is so inimical to good order and discipline in the military that such disloyalty by soldiers has generally resulted in confinement, court martial, or even execution in war. In contrast, PMFs are able to make decisions based on their immediate financial interests with little fear of long-term reputational, much less personal, cost. Accordingly, the decisions made in the execution of a contract do not necessarily conform to those that the government or military personnel would have made in the same situation. For example, Singer notes that some PMFs contracted by the United States strategically breached contracts after local conditions made performance unprofitable. In this situation, the government had the option of terminating the contract or refusing future dealings, but such ex post regulatory mechanisms are effective only if the PMFs consider long-run reputational harm in ex ante decision making. Cost and profit may dictate a firm's methods and even non-performance, rather than more costly yet nationally beneficial solutions. Militaries usually want to win at all costs, whereas a private firm will do so only as long as it is profitable.

Additionally, U.S. civilians, even those performing military roles, do not fall under the Uniform Code of Military Justice, allowing PMFs the choice to breach contracts strategically rather than perform. PMFs' immunity from the code also clouds the question of whether and how the companies will be held accountable, and who would hold them so, for human rights violations or

other crimes. As Iraq's legal system struggles to get off the ground, for example, it is unlikely that its first prosecutorial targets after Saddam's regime will be the PMF personnel who provide the security it depends on, even though there have been suggested links between PMFs and the Abu Ghraib scandal. This cloaking of the activities of PMFs threatens the transparency in military activities that is essential for accountability. Indeed, there is a risk that a state may decide it can hire a PMF to perform functions it cannot perform itself for political or even legal reasons, for PMFs promise a cover of secrecy and plausible deniability that official forces often do not enjoy.

Ironically, a related danger is that PMFs may work against the political interests of their clients or home countries. As Singer explains, considering its close political ties, a surprising issue with Halliburton and its Brown & Root holding has been concerns with contravention of U.S. foreign policy goals. A number of the firm's subsidiaries are based outside the United States and operate in countries that have not always been U.S. allies, including Angola, Libya, and Algeria, in some cases, in violation of U.S. government sanctions.

Halliburton answers ultimately to its shareholders based on its financial performance, not its conformity to U.S. policy initiatives; as a profit-maximizing firm, it need only consider the interests of the U.S. government to the extent that failing to do so may damage it in the long run.

Most significantly, Singer's work raises questions about the sustainability of the idea of the state as the primary actor in international relations. As Max Weber explained in *Theory of Social and Economic Organization*, one of the defining characteristics of the modern state is that it holds a monopoly on the legitimate use of physical force for the maintenance of social order. The proliferation of PMFs, however, removes force from the monopoly control of the state and places it in the hands of the highest bidder. As Singer notes, "nonstate groups that were previously at a severe disadvantage in a state-dominated system, now have new force mobilization options and new paths to power" (p. 180). The military support and combat services that PMFs supply to the global market demand a reconsideration of global power dynamics. Current international law speaks only to the role of individual mercenaries and has been found inapplicable to the actions of the PMF industry. This vacuum in the law needs to be addressed, as decentralized non-state groups can increasingly easily purchase and wield great power. In this context, Singer's *Corporate Warriors* represents an important first step in framing the importance of such reform.