Recent Publications

Dignity Rights: Courts, Constitutions, and the Worth of the Human Person. By Erin Daly. Philadelphia: University of Pennsylvania Press, 2013. Pp. ix, 229. Price: $62.96 (Hardcover). Reviewed by Allison Day.

The Universal Declaration of Human Rights (UDHR) affirms the belief that the "recognition of the inherent dignity . . . of all members of the human family is the foundation of freedom, justice and peace in the world."[1] Since the adoption of the UDHR by the United Nations in 1948, many newly established countries have incorporated human dignity into their constitutions. For example, South Sudan, the world's youngest country, refers to dignity fourteen times in its constitution.[2] That document treats dignity as an aspiration,[3] a core value,[4] and a justiciable right;[5] it acknowledges dignity in every individual,[6] including women,[7] children,[8] people with special needs, and the elderly.[9]

But what do these promises of dignity mean? What rights does dignity protect that are not already secured by other constitutional assurances such as liberty and equality? Questions like these have sparked a debate over the meaning of dignity. Leading the debate, Christopher McCrudden claims that there are no "detailed universal interpretation[s], nor even particularly coherent national interpretations" of dignity.[10] As a result, dignity is of little substantive value, evidenced by the "very different outcomes . . . derived from the application of dignity arguments."[11] In response, a rising tide of scholars argues that, while there is no single, universally accepted understanding of dignity, there is a universally accepted set of understandings of dignity, composed of various understandings that can be invoked in constitutional decisions.[12] These

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1. Universal Declaration of Human Rights pmbl., G.A. Res. 217(111)A, U.N. Doc. A/RES/217(111), Dec. 10, 1948.

2. *The Transitional Constitution of the Republic of South Sudan*, REFWORLD (July 9, 2011), http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4e269a3e2.

3. *Id.* pmbl. ("Committed . . . to upholding values of human dignity and equal rights . . . .").

4. *Id.* ¶ 1(5) ("South Sudan is founded on justice, equality, respect for human dignity and advancement of human rights and fundamental freedoms.").

5. *Id.* ¶ 11 ("Every person has the inherent right to life, dignity, and the integrity of his or her person which shall be protected by law . . . .").

6. *Id.*

7. *Id.* ¶ 16(1) ("Women shall be accorded full and equal dignity with men."); *id.* ¶ 16(4) ("All levels of government shall . . . enact laws to combat harmful customs and traditions which undermine the dignity and status of women.").

8. *Id.* ¶ 17(1) ("Every child has the right . . . not to be subjected to negative and harmful cultural practices which affect his or her health, welfare or dignity . . . .").

9. *Id.* ¶ 30(2) ("The elderly and persons with disabilities or special needs shall have the right to the respect of their dignity.").

10. Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 724 (2008).

11. *Id.* at 698.

12. *See, e.g.*, Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169

responses focus primarily on American jurisprudence, leaving McCrudden's claim that there is no universal interpretation and no cross-cultural substantive value to dignity largely unchallenged.

Erin Daly's *Dignity Rights: Courts, Constitutions, and the Worth of the Human Person* takes up this challenge by painting a sweeping portrait of dignity jurisprudence around the world. Daly argues that dignity has "evolved[] over the last half century, from an inchoate idea to an enforceable right variously recognized throughout the world" (p. 2). She then proceeds to show that the "right to dignity has content and boundaries" consistent across borders, using the language of constitutional courts from each continent to articulate these common meanings (p. 5). In the final chapters of the book, Daly goes on to say that not only does the right to dignity have a consistent meaning, it also has a consistent impact: dignity discourse changes the way in which individuals view themselves and relate to the state.

Daly's initial claim is that dignity has transformed from a constitutional value, which informs and supports other rights, to an independent, enforceable constitutional right. According to Daly, individuals can cite this right to "assert claims against the state" that "courts will enforce and that governments are bound to respect" (p. 25). According to Daly, constitutional courts enforce a right to dignity regardless of whether dignity is explicitly written into a constitutional text (as in Germany, South Africa, Colombia, Israel, and India) or merely inferred (as in Canada and the United States) (p. 2). She supports this assertion with language pulled from a vast array of decisions from constitutional courts around the globe.

Daly's argument is most convincing when the case language she cites is supported by descriptions of the case's outcome. Sadly, Daly does not often engage in an analysis of case outcomes and, when she does, it is often for relatively limited impact cases. For example, Daly describes the outcomes of the French and German "dwarf-throwing" cases, in which courts banned dwarf-throwing "as a violation of the dwarf's human dignity" (p. 52). Similarly, she details the outcome of the Hungarian court's cases involving names, which held that individuals have a right to use their own names because "the uniqueness of each individual person . . . is ensured by his or her innate dignity," but they do not have a "right to choose, change, or amend a name" (p. 32). By presenting the outcomes that result from invoking dignity, Daly convinces the reader that dignity is acting as an enforceable right, protecting individuals from certain government actions.

However, the reader is often uncertain of how courts' discussion of dignity changes the result of many important cases. Daly neglects to explain the consequences of invoking dignity in cases involving national security, affirmative action, and privacy and in doing so, she misses an opportunity to convince the reader of the value of a right to dignity in these high-profile cases. This weakness is most striking in Daly's treatment of dignity discourse in

(2011); Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 187 (2011).

abortion cases. Daly spends only three pages discussing abortion cases, and in those pages addresses only the language cited by the constitutional courts. Daly notes that dignity as personal autonomy "is most vivid in the [United States] Supreme Court's privacy jurisprudence," (p. 39) and that "dignity is implicated in both decisional autonomy and the right to life" in German abortion cases (p. 42). Yet she neglects to discuss the difference in holdings between American cases, which prohibit the criminalization of abortion, and German cases, which allow criminalization with certain exceptions.[13] By remaining silent about the outcomes of such cases, Daly loses ground to critics who assert that dignity is a value, susceptible to use by either side of a conflict, rather than an enforceable right with specific content.

Daly further claims that not only is dignity a right, it is also a right with specific content. Daly outlines three modern conceptions of dignity: (1) dignity as autonomy or individuation, protecting personal choice, equality, and anti-objectification; (2) dignity as a minimal quality of life, protecting socio-economic rights; and (3) dignity as a limit on state control, protecting the rights of those in state custody. The sheer scope of case law presented is likely to convince the reader that there are, in fact, agreed upon meanings of dignity. Despite the diversity of Daly's examples and the strength of her analysis, however, her categories are subject to potential critiques.

For example, Daly does not account for the unique aspects of American dignity jurisprudence she discusses in Chapter Four of *Dignity Rights*. She argues that "uniquely in the world, the U.S. Supreme Court has always been much more comfortable attaching dignity to inanimate things, such as states and courts and contracts, than to human beings" (p. 71). Rather than analyzing American case law through her categories, she presents a new distinction between institutional and individual dignity that applies only to American jurisprudence. The stark break between her international and American analysis derails the flow of her argument and undermines the universality of her claims.

Daly's argument similarly fails to address McCrudden's claim that, though there are common global trends in how dignity is defined, each country selectively utilizes conceptions of dignity that are suited to their "ideological, religious, and cultural" beliefs.[14] For example, McCrudden highlights the divide between courts that treat dignity as a "communitarian" value, such as Germany, and courts that treat dignity as an "individual" value, such as the United States, Canada, and Hungary.[15] By not acknowledging and accounting for these differences between countries' uses of dignity, Daly misses an opportunity to defend her claim that there are universal understandings of dignity.

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13. *See* Reva Siegel, *The Constitutionalization of Abortion*, *in* THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 1057, 1064-71 (Michel Rosenfeld & Andras Sajo eds., 2012). Though both countries' abortion jurisprudence has shifted to a more central position, in the original 1970s cases, "the US case struck down legislation criminalizing abortion in order to protect decisional autonomy, while the West German case struck down legislation legalizing access to abortion in order to protect unborn life." *Id.* at 1064-65.

14. McCrudden, *supra* note 10, at 710.

15. *Id.* at 699.

Daly's final claim is that constitutional courts invoke dignity for two reasons: (1) to "tell us about what it is to be human," and (2) to "define the outer limits of public power" (p. 104). Dignity, she claims, is therefore "doing the work of demarcating the line between individual and state sovereignty" (p. 130). Dignity provides a route for individuals to bring claims against the government and allows courts to act as "the constitutions' avatars, ensuring that the politics and policies of the day stay within the bounds of constitutional limits and further constitutional values" (p. 147). These claims indicate that a right to dignity, enshrined in a constitution or in a judge's decision, functions as a promise—a promise to value all citizens and facilitate their voice in government. Given this explanation of the work dignity is doing, the value of dignity to newly established democracies such as South Sudan becomes clear.

However, is this promise to value and protect individual rights the only work dignity is doing? In early chapters of *Dignity Rights*, Daly discusses the right to dignity within the area of economic rights. This is an area where dignity has created rights that would not have been protected by liberty or equality. While India protects a right to a minimum standard of living (pp. 55-56) and South Africa protects a right to adequate housing projects (p. 59) under the auspices of a right to dignity, the United States fails to recognize similar rights. American cases such as *San Antonio Independent School District v. Rodriguez*,[16] rejecting a challenge to a public education funding scheme, and *Danbridge v. William*,[17] rejecting a challenge to a maximum limit on welfare funds, make no mention of dignity. Would a more explicit discussion of dignity in these cases lead the court to protect minimal standards for education or welfare? A discussion of the absence of dignity discourse in United States' socioeconomic rights cases could provide a clearer answer to McCrudden's challenge and provide a concrete example of the work dignity is doing.

In the end, Daly presents a clear vision of the right to dignity's theoretical or rhetorical value, but leaves unclear its practical value in constitutional decisionmaking. She therefore cannot fully answer McCrudden's challenge or predict the outcome of future cases in the newly formed South Sudan. By limiting her discussion to the language of constitutional cases, rather than an analysis of outcomes, she is unable to find a "substantive value" to dignity that may shape those outcomes. Despite this shortcoming, the impressive scope of Daly's *Dignity Rights* provides a valuable contribution to the debate over the meaning of dignity and will hopefully prompt further comparative research regarding the role of dignity in constitutional law.

16. 411 U.S. 1 (1973).
17. 397 U.S. 471 (1970).

Cyber Warfare and the Laws of War. By Heather Harrison Dinniss. Cambridge: Cambridge University Press, 2012. Pp. vii, 331. Price: $110.00 (Hardcover). Reviewed by Robert Nightingale.

Reading the first chapter of *Cyber Warfare and the Laws of War*, one might think that Heather Harrison Dinniss has set out to write a manifesto. Her subject is the law of warfare in the strange new world built around the Internet, and her prose at times recalls Filippo Marinetti's *Futurist Manifesto*[18] in its grand descriptions of technology's transformative power: "The entire structure of society, governmental leadership, national identity, production values, organizational structure, and even domestic attributes such as family and religion have all been affected [by advances in information technology] with a speed and global impact on a scale never seen before" (pp. 11-12). The Internet will soon link to "every aspect of personal, business and public life" (pp. 12-13). The world is becoming globalized, militaries decentralized and civilianized, property and knowledge digitized (pp. 17-27). The information explosion is "changing the nature of governments and sovereignty," affecting "the distribution of power within society," "social evolution as a whole," and society's "values and beliefs" (p. 14).

It is this last transformation that leads Dinniss to her boldest claim. So that the general principles and "dictates of humanity" encoded in the traditional laws of war may persist in the wired world, the laws of war must be adapted not only to the new technologies, but also to the new values of the Internet age. In intellectual property law, for example, "[f]ormulations and interpretations" of law bound to "attributes of physical property" and the "tangible world" must change to reflect society's metamorphosis (p. 29). So, too, in the laws of war, because "the information revolution has fundamentally transformed society on multiple levels," when discussing the "general principles of the laws of armed conflict, this shift in values must be taken into account and the reasoning behind the statements of principle explored" (p. 29).

In the meat of her work, however, Dinniss does not do much to elucidate how information technology has caused values to shift in the contemporary world. Protections for civilians, civilian property, and the environment; prohibitions on unprovoked armed conflict; and limitations on the right of self-defense seem to be good candidates for the values Dinniss has in mind. Dinniss does not, however, point to any evidence that these values have changed. At most, she provides scattered statements made by governments addressing how they plan to respond to computer network attacks (p. 56). These reactions do not reveal any fundamental shifts in values, and Dinniss never claims that they do.

Instead, Dinniss spends the rest of her work analyzing the practical problems that arise from trying to reconcile the analog laws of war with the digital age. Her analysis focuses on the usual suspects—considerations of *jus ad bellum* (when computer network attacks might qualify as uses of force and

18. FILIPPO TOMMASO MARINETTI, THE FUTURIST MANIFESTO (1909).

armed attacks) and *jus in bello* (how military participants and civilians are treated in the context of cyber warfare). While discussing the latter, Dinniss reaches aspects of *jus in bello* that would usually fly under the radar, for example, what cyber warfare means for digitally stored cultural property and for hospitals and other medical units (pp. 227-39, 244-47).

The book is undoubtedly a meaningful contribution to the literature on cyber warfare. Dinniss makes concrete propositions for how to interpret international agreements in the context of computer network attacks, and she provides a comprehensive introduction to the laws of war and the nature of cyber warfare for anyone not well versed in either subject. Her analysis is clear and thoughtful, with arguments grounded firmly in the text and jurisprudence of international conventions and agreements. She also engages fruitfully with the cyber warfare scholarship that sprang up during the period she was composing the book, most notably the work of Michael Schmitt.

Yet, Dinniss's bold claims about shifting values in her first chapter prime the reader to ask questions never answered: How relevant will these international agreements really be in the Internet age? If anyone with a computer can strike at any target throughout the world, often through untraceable means, and inflict real damage on those targets, and if states have no means to prevent those attacks, why do *jus ad bellum* and *jus in bello* matter? Are computer network attacks not a fundamentally different animal from traditional warfare centered around the post-Westphalian state, one that will require new legal regimes and forms of control?

Finding the answers to these questions in Dinniss's analysis is not a straightforward task. She provides plenty of examples of how computer network attacks fit awkwardly into the framework of conventional warfare, but fails to probe the fundamental reasons why this is the case.

A good explanation, one not considered by Dinniss, is that warfare is antithetical to the purposes of the Internet. The weaponization of cyberspace may not be an inevitable historical truth but rather an avoidable outcome. A host of sensitive information and systems are vulnerable to attack at present, but this is not necessarily a function of changing values. It could rather result from the Internet's *ad hoc* development. The current Internet is the product of the haphazard agglutination of an enormous amount of data and users onto an architecture designed for only a small number of users within tightly knit research and defense communities.[19] The Internet's designers did not anticipate the number of networks or the diversity of users and applications that their technology would eventually accumulate.[20] They did not foresee that a need would one day arise for robust mechanisms to limit the Internet's porous membranes.[21]

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19. Barry M. Leiner et al., *Brief History of the Internet*, INTERNET SOC'Y 12-15, http://www.internetsociety.org/sites/default/files/Brief_History_of_the_Internet.pdf.

20. Richard Bennett, *Remaking the Internet: Taking Network Architecture to the Next Level*, TIME WARNER CABLE RES. PROGRAM ON DIGITAL COMM. 5-6 (Summer 2011), http://www.twcresearchprogram.com/pdf/TWC_Bennett_v3.pdf.

21. *Id.* at 6.

Efforts currently exist to redesign the Internet to fix the flaws in this architecture, especially its security vulnerabilities.[22] Such a redesign could render the Internet an inhospitable locus for attacks. For example, allowing network operators the flexibility to limit cross-domain network operations could potentially thwart distributed denial of service attacks like the ones launched against Estonia in 2007 (p. 38).[23]

Even if a wholesale restructuring of the Internet's architecture never comes to pass, states will likely craft effective means of warding off computer network attacks. Computer network attacks differ from conventional attacks because they tend to involve one-off exploitations of security flaws. Once they occur, states and private actors figure out ways to counter them by deploying software patches.[24] As complex as computers and the Internet are, in theory these vulnerabilities are not limitless, and there is hope that states will develop the capacity to fully guard against attacks.[25]

As Dinniss points out, computer network attacks are not weapons in the conventional sense, like magazines of guns and ammunition or ICBMs. They are indirect, intangible, and diffuse (pp. 65-72). States have no monopoly on their use. There will not come a time when Russia is said to have 32,000 computer network attacks on hand and the United States 50,000. They will either remain intangible and diffuse or be wiped out by effective security measures. There is no middle ground where they exist as a threat but are defined enough as weapons to fit comfortably into the laws of conventional warfare.

Dinniss assumes a porous Internet and paraplegic state responses to security vulnerabilities as givens. From this standpoint, amorphous, poorly targeted attacks causing widespread collateral damage will be an inevitable, growing problem, and the laws of war will have to adapt. But this would be the result of states' technological failure to preserve their sovereignty and protect their citizens' lives and property. It would not represent a fundamental change in society's values. States' inability to defend their citizens from computer network attacks might make those citizens skeptical that their governments are truly sovereign, but it would not make them devalue that elusive sovereignty. This is likely the reason why Dinniss never really discusses how society's

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22. Multiple routes have been suggested for accomplishing such a redesign. Practitioners in the telecommunications industry have laid out steps that Internet service providers could take to change Internet architecture from top to bottom. *See, e.g.*, *id.* Others have suggested that the government should spearhead efforts to develop and adopt secure alternatives to the three most important Internet protocols. *See, e.g.*, Robert K. Knake, *Internet Governance in an Age of Cyber Insecurity*, COUNCIL ON FOREIGN REL. 25-27 (Sept. 2010), http://www.cfr.org/terrorism-and-technology/internet-governance-age-cyber-insecurity/p22832. Still others have called for reducing the homogeneity in the Internet's architecture, *see, e.g.*, Wesley K. Clark & Peter L. Levin, *Securing the Information Highway*, FOREIGN AFFS., Nov./Dec. 2009, at 8-10, or for putting technology in place to protect government and essential civilian cyber infrastructure in the event of computer network attacks, *see, e.g.*, Eric Talbot Jensen, *Cyber Warfare and Precautions Against the Effects of Attacks*, 88 TEX. L. REV. 1533, 1566-67 (2010).

23. Bennett, *supra* note 20, at 9.

24. Clark & Levin, *supra* note 22, at 5; *see* Sheng Li, Note, *When Does Internet Denial Trigger the Right of Armed Self-Defense?*, 38 YALE J. INT'L L. 179 (2013).

25. *But cf.* Clark & Levin, *supra* note 22, at 5 (arguing that the manipulation of network hardware for cyber attacks threatens to derail the effectiveness of software patches).

values have changed in the Internet age or why those unspecified value changes should affect the interpretation of the laws of war.

The manifesto lurking in the introduction to *Cyber Warfare and the Laws of War* ultimately does not prevent Dinniss from providing an excellent account of why computer network attacks are hard to square with the laws of war. But it does prevent her from approaching the problem of cyber warfare as a military general might: examining computer network attacks as threats to peace and security to be dealt with like any other—rationally and soberly, with an eye toward minimal disturbance of preexisting legal frameworks. Instead, Dinniss frames cyber warfare against the backdrop of futurist hyperbole: the Internet has changed us, and now it will change the laws of war. But Dinniss does not demonstrate how.

Putting the manifesto aside, Dinniss's provides a path for how the laws of war might serve if the technology for defending against computer network attacks persists in its present state. It is a useful contribution but not a satisfying one. It fails to address how states are currently responding to the threat of computer network attacks and what measures might be taken to eliminate such attacks. And it fails to show convincingly that the laws of war, rather than the technology that makes computer network attacks possible, are the thing in need of a redesign.

Armed Conflict and Displacement: The Protection of Refugees and Displaced Persons Under International Humanitarian Law. By Mélanie Jacques. New York, NY: Cambridge Univ. Press, 2012. Pp vii, 277. Price: $93.23 (hardcover). Review by Leslie Esbrook.

In *Armed Conflict and Displacement*, Mélanie Jacques undertakes an ambitious and comprehensive study of the treatment of internally displaced persons and refugees, a group she labels "war migrants" (p. 4). She frames her argument in two parts. First, she lays out the legal framework for the protection of war migrants pre-, post-, and during conflict. Second, she identifies shortcomings of the current legal regime. She argues that while international humanitarian law (IHL) currently contains the necessary rules to regulate internal armed conflicts, these rules are simultaneously not followed in practice, and are much too focused on distinctions based on nationhood to provide adequate security to war migrants. While the title suggests that Jacques will tackle the complete corpus of IHL as it relates to displacement, the book treats displacement writ large, incorporating the various branches of international law and addressing their overlaps and gaps (p. 14). Jacques gives the reader pages chock-full of the contemporary legal framework for understanding war migrants' legal rights, so much so that it leaves one wishing for a more fully developed analysis of the regime's assets, shortcomings, and possibilities for the near future. The original theories presented grow bolder and more fleshed out as the chapters progress; for example, by Chapter Four we see an outlined set of guidelines used to assert that the criminality of forced deportation or transfer should be covered by Common Article 3 of the Geneva Conventions or the customary rules of Protocol II. It is because of Jacques'

keen conceptual ability to imagine reformulated provisions of the Geneva Conventions and Protocols that the reader asks for more in earlier chapters, such as the explanation of the re-definition of nationality given changing state boundaries during internal armed conflicts in Chapter 1.

The book divides into chapters as follows: application of law based on the conflict defined as international or internal (Chapters 1 and 2), a case study of Israeli settlements which deals with the definitional of the word "forcible" in "forcible transfer" (Chapter 3), application of law based on type of crime, touching on the timing of applicable laws pre- versus post-occupation in international armed conflicts (Chapter 5), and finally application of law based on the classification of victims as refugees or internationally displaced persons (IDPs) (Chapters 6 and 7). Jacques first analyzes the ways in which the Fourth Geneva Convention's existing language on the protection of states' civilian populations fails to grant equal rights to non-citizen civilians. Optimistically, in Jacques's view, international scholars and courts have redefined 'protected persons' and border-based nationality under Article 75 of the First Protocol and Article 4 of the Fourth Geneva Convention to account for a "more comprehensive protection of victims in armed conflicts" (p. 45). Her argument that such redefinition is necessary, but not yet sufficient, to protect state civilian populations sounds quite rational but lacks novelty; the build-up to the thesis recaps the major ICTY decision that expounded the redefinition[26] but gives no additional examples or analysis for future implications. The reader leaves with a prospect of a fluid and expansive concept of "nationhood." Without any idea of the standards of application the ICTY used, could its decision be but an anomaly?

A similar tension between the expansion of civilian rights and practical implementation afflicts Jacques's second argument in favor of expanding the protection of civilians in non-international armed conflicts through states' voluntary recognition of Common Article 3's applicability to "internal disturbances."[27] Again, while a novel idea, one wonders what incentives exist for states currently evading humanitarian law guarantees to conform with a more stringent protection of civilians. Given the argument that the semantic boundary between internal armed conflict and internal disturbance is so porous, it seems a more direct solution to attempt a better distinction between the two. An avalanche of facts supports the historical precedent of the inadequacies of current law, but the discussion on future changes pales in comparison. Veering towards a different section of the Geneva Convention, Jacques uses the case study of Israeli settlements to demonstrate states' relative ease of evading current statutory constructions in order to claim conformity with IHL

26. Prosecutor v. Tadić, Case No. IT-94-1-T, Appeal Chamber Judgment, (Int'l Crim. Trib. for the Former Yugoslavia Jul. 15, 1999).

27. Common Article 3 lists prohibitions to acts committed by High Contracting Parties in non-international armed conflicts towards persons taking no active part in the hostilities, including prohibitions on taking of hostages (3(1)(b)), requirements to treat the sick and wounded (3(2)), and prohibitions on "humiliating and degrading treatment" (3(1)(c)). *See* Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 75 U.N.T.S. 287.

principles. This discussion evidences the scholarly field in which this book is best received; Jacques's interpretation of Article 49(6) (distinguishing illegitimate "forcible transfer" from the acceptable "voluntary movement of a population into occupied territory") appears well accepted in the field but lacks a detailed explanation for a lay reader (p. 86). The first half of the book's tangle in the weeds of statutory interpretation affirms this intended readership. Without some, or rather a significant amount of background familiarity with the Geneva Convention and the Optional Protocols, a reader quickly becomes lost trying to keep the article numbers straight rather than focusing on the more important ideological propositions Jacques advances.

To the extent that the book feels rather disjointed in the first half, the second half's analysis of certain ICJ and ICTY rulings regarding internal armed conflicts presents a rare opportunity to merge the various provisions of IHL and customary international law (CIL) assessed in the first three chapters and apply them in turn. Here Jacques begins to shine, theorizing additional arguments the Courts may have entertained to strengthen their rulings and extrapolating the framework outlined in the ICTY ruling to the yet-undecided issue of whether forced deportation may be considered a war crime in a non-international armed conflict. Her style is clear and the overlay of IHL with CIL when applied becomes much easier to follow. This section gives the reader that which she sought in preceding chapters; namely, a discussion of the practical realities of why such charges are not being brought in cases like Kosovo and Darfur (pp. 150-54).

The final three chapters continue to lament the antiquated distinction of war-migrant status based on nationality as applied to refugees. Jacques argues that non-refoulement, the principle that no refugee shall be returned to any country where she is likely to face persecution, ill treatment, or torture, should be "clearly established" to apply equally in all armed conflict situations under Common Article 3 and Article 4(2) of Protocol II (p. 184). In the larger picture of providing equal rights to war migrants in international armed conflicts as in non-international ones, this cry for equal protection seems only natural. Yet there is something about covering each and every current refugee law and its deficiency in non-international armed conflicts that feels like a broken record. The reader is not given a hierarchy of which of these major overhauls of current doctrine should take precedence, nor a proposed path for how clearly to establish these principles. Once returned to this level of general legal theory absent a case study, the disjointed nature of the book's claims resurfaces.

Jacques' main contention seems to be that IHL has sufficient consideration for "war migrants'" rights that have continually expanded in scope and understanding as the nature of conflict has morphed. Given greater enforcement and implementation of IHL rights and a push to redefine "protected persons" by some type of allegiance rather than nationality, the international community is embracing the protections of IHL and the rights of displaced persons. Most of Jacques' specific proposals engage with various articles of the Geneva Convention that protect civilian populations in international armed conflicts but have yet to be formally revised to include the

necessary civilians in non-international conflicts. As a catalogue of articles in need of reform, the book succeeds. In addition to taking note of current inequality in the laws, though, the reader continually wishes for a deeper analysis of what the statutory changes would bring in terms of means of implementation, standards of application, use in current internal armed conflicts, and timeline for changes ranked by provisional necessity. The conclusion itself presents various ideas to combat the problem of IHL circumvention and ambiguity that are given no more than a few sentences of treatment but tempt the reader with promise and potential.[28] In an area of highly evolving law, Jacques has given us the background necessary to understand and interpret future considerations for war migrants' rights under IHL. Still, our interest in the matter from the meticulously catalogued history presented here invites a call for greater engagement with the doctrine's future potential, which did not hold as much prominence as desired in this work.

The Law of Non-International Armed Conflict. By Sandesh Sivakumaran. Oxford: Oxford University Press, 2012. Pp. xix, 657. Price: $175.00 (Hardcover). Reviewed by Reema Shah.

In recent years the vast majority of armed conflicts have been non-international, with at least one party a non-state actor. Despite this, the law governing such conflicts remains largely misunderstood, with many positing that the only norms regulating these conflicts are common Article 3 of the Geneva Conventions and the 1977 Additional Protocol II.[29] In *The Law of Non-International Armed Conflict*, Sandesh Sivakumaran seeks to refute these impressions by demonstrating that a rich body of international law has developed to govern non-international armed conflicts (NIACs). In doing so, he draws upon a wide array of sources, from international criminal law to human rights law, to show how these norms have shaped the behavior of both armed groups and states.

Sivakumaran's detailed research on the methodology by which law is created—and his commitment to drawing attention to the behavior of both parties, states, and armed groups with respect to the law—make this book a valuable examination of an under-studied subject. Furthermore, the breadth of the book allows it to address the full spectrum of issues involved, from the standards used to identity such conflicts to the substantive protections offered to how these laws are enforced. Yet, its ambitious scope often prevents it from grappling with many of the complexities that distinguish NIACs and, as a result, many of the substantive portions of the book are analogous to other

28. For example, Jacques argues for the increased use of regional human rights bodies to enforce rights of war migrants so that the case law of IHL may expand, the establishing of a non binding instrument to reconsider existing principles of IHL or the creation of an impartial body to define violations of IHL concretely and encourage states' rule compliance (pp. 247-255).

29. *See, e.g.*, YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2d ed. 2010); LAURA PERNA, THE FORMATION OF THE TREATY LAW OF NON-INTERNATIONAL ARMED CONFLICTS (2006).

works on the law of international armed conflict.[30] Moreover, much of the analysis is based on case studies of individual declartions or actions by various armed groups. While these examples are generally insightful, there is little systematic analysis conducted to make more general conclusions on the adherence to certain norms. The reader is thereby left to extrapolate from what may or may not be representative behavior.

In Part I, the author surveys the different ways in which international law has regulated non-international armed conflict. He begins with a historical approach, arguing that until recently, "situations of internal violence were considered to be within the *domaine reservé* of states" (p. 9). Legal regulation of NIACs was therefore limited to ad hoc bilateral agreements or recognitions of belligerency. This system was erratic in its application, however, because of a lack of clear guidelines on the standards that constituted belligerency. Given these deficiencies, Sivakumaran provides a historical account of the development of international humanitarian law, beginning with the work of the International Committee for the Red Cross and culminating in the passage of common Article 3 of the Geneva Conventions and Additional Protocol II. While indicating that the divergent opinions of states during the Protocol-drafting process significantly diluted the protections offered, the author refrains from delving into what different types of countries sought to establish through the Protocol. The absence of these details is perhaps necessary given the book's substantial scope. Yet it leaves the reader wondering what may have been underlying these diverging views of the role of international law, whether it be differing notions of sovereignty, a history checkered with civil wars, or other factors—a debate that continues to the present day.

The limitations of the book's ambitious scope again become apparent in the author's discussion of more recent developments in the field. He argues that "[t]he period since the mid-1990s has witnessed a wholesale transformation in the regulation of non-international armed conflict" because of the incorporation of international criminal law and human rights laws (p. 99). In discussing the contributions of these respective fields, however, little attention is given to their potential drawbacks. For instance, criminal law is directed at individual conduct and operates through post-hoc judicial bodies. This structure is very different from that of IHL, which is directed at a broader group and aims to shape behavior before violations occur. This raises the question of whether the translation of criminal law into IHL norms distorts their content.

In Part II, Sivakumaran addresses the substance of the law of non-international armed conflict, first by identifying the conditions under which a NIAC can be said to exist. For years, the international community was unable to agree on any set definition for NIACs, despite the problematic consequences of leaving such a determination to the states involved. Finally, in 1995, the ICTY Appeals Chamber defined such conflict as "protracted armed violence

30. *See, e.g.*, LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT (3d ed. 2008); GARY D. SOLIS, THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR (2010).

between governmental authorities and organized armed groups or between such groups within a State," which came to be widely accepted (p. 164). In assessing whether a conflict falls into this category, the author focuses exclusively on the intensity of violence and the organization of the armed group, maintaining that the motives of the armed group or the existence of occupied territory is irrelevant. But missing from this discussion is an appreciation for the degree to which these factors are often intertwined. The political goals of the group are likely to shape the form it takes, which complicates analyses of whether a group's organization adheres closely enough to horizontal or vertical command chains to qualify as a NIAC. For example, groups seeking to defeat the government and establish a new state, such as the al-Nusra Front in Syria, would be inclined to cooperate with other rebel groups so as to increase popular support and expand horizontally, whereas separatist groups may seek to consolidate their control over a narrower area. Moreover, factors such as the existence of occupied territory play a crucial role in distinguishing the conduct of NIACs from international armed conflict; Sivakumaran's dismissal of their significance prevents him from later grappling with their potential implications for the substance of governing law.

Sivakumaran also fails to address what body should make these kinds of determinations, which inherently involve significant discretion. As Sivakumaran rightly points out, "[s]tates are invariably concerned with not affording non-state armed groups any legitimacy or legal status, including legitimacy or status that may attach through the application of international humanitarian law" (p. 205). Given that it is a decision fraught with political consequences, which institution is best equipped to apply the flexible standards delineated in the ICTY definition and determine whether IHL applies? On this, the book is silent. The author then argues that transnational conflicts, which have grown increasingly prominent because of the U.S. fight against al-Qaeda, can be classified as NIACs, despite the fact that they spill across international borders. He points to the Colombia/FARC and Uganda/LRA struggles to demonstrate that other conflicts straddling international borders have been treated as NIACs. While his conclusion is correct, Sivakumaran's analogy fails to address the unique aspects of the conflict with al-Qaeda, which distinguish it from the FARC/LRA examples—for instance, al-Qaeda's exceptionally decentralized structure, its transnational political goals and, consequently, its distinctive methods of perpetrating violence (p. 230).

Sivakumaran's subsequent analysis of the rules governing the treatment of civilians and the conduct of hostilities offers a wealth of information, but is weakened by his use of specific examples as evidentiary support without any kind of systematic analysis. Drawing from Common Article 3, Additional Protocol II, customary international law, and other sources, he divides the civilian protection laws into three categories—those pertaining to humane treatment (i.e., banning torture, p. 261), those protecting specific types of persons such as the wounded or journalists (p. 273), and those governing humanitarian assistance by outside groups (p. 329)—and then delves into the relevant rules for each. In discussing the law on the conduct of hostilities,

Sivakumaran uses a similar approach, dividing the rules into categories depending on whether they pertain to targeting, means of combat, or method of combat. The analysis provides much valuable information for the reader, but is at times problematic. He uses an array of sources to inform his description of the law of non-international armed conflict, including the declarations and behavior of individual armed groups. But at times this approach blurs the established law on an issue with one particular armed group's behavior or understanding of the law, which may or may not be universally accepted. For instance, with respect to the displacement of the civilian population during such conflicts, "Common Article 3 does not contain an explicit prohibition on point" (p. 285). Nonetheless, Sivakumaran infers a customary law that such deportation is always illegal from the reaction to the conflicts in the former Yugoslavia, in which the forced "displacement was considered 'the essence' of the ethnic cleansing" (p. 286). While this one example is illuminating, it belies the myriad of instances in which such displacement has occurred during non-international armed conflicts and been legally justified as falling within the "imperative military reasons" exception to the prohibition (p. 287). Despite the frequency of such incidents,[31] the author remains wedded to an understanding of displacement law based largely on international armed conflict, in which such exceptions are far more limited due to the different nature of the conflict.

This is symptomatic of this section's two limitations—a lack of consideration for the nuances that distinguish non-international armed conflict from international armed conflict and their subsequent implications for the applicability of certain laws, and the use of specific examples to illustrate the acceptance of laws, without systematic analysis to demonstrate that they are representative. The latter issue afflicts the book's next section as well, which focuses on the implementation and enforcement of these laws. In this section, Sivakumaran provides a thorough examination of the mechanisms by which armed groups and states obtain compliance with the laws, from belligerent reprisals to external fact-finding missions. In so doing, he makes a compelling argument that "a potentially useful form of implementation and enforcement has been overlooked, namely that of codes of conduct of armed groups, and their unilateral declarations and bilateral agreements" (p. 474). While provocative, this argument is again based on a series of examples, with instances in which such declarations have failed to bring about compliance (i.e., repeated statements by the Sri Lankan Tamil Tigers) largely ignored. The book then goes on to describe the role of judicial enforcement in the regulation of these conflicts, through international and domestic courts, while pointing out the limitations of such post hoc mechanisms.

It is only in Part III that the author at last provides some of the creativity and vision that is missing in earlier sections of the book. He offers specific proposals to advance the law governing NIACs, with respect to both

31. Recent instances of this include armed conflicts in the Democratic Republic of Congo and Somalia. *International Displacement in Armed Conflict: Facing Up to the Challenges*, INT'L COMM. OF THE RED CROSS (Nov. 2009), http://www.icrc.org/eng/assets/files/other/icrc_002_4014.pdf.

substantive norms and the implementation/enforcement process. To further the substantive regulations, Sivakumaran proposes developing laws to establish combatant immunity and protect the natural environment. To bolster compliance with these laws, he advocates engaging vigorously with non-state armed groups through multilateral forums such as the United Nations, using creative tactics such as targeted sanctions and including armed groups in the norm-creation process so as to promote a sense of ownership. But some of these proposals seem a bit far-fetched. For instance, the creation of laws that go beyond protecting "aspects of the environment that impact upon humans" to protecting the environment in and of itself seems difficult given the limited resources available to armed groups engaged in such conflicts (p. 526). On the other hand, Sivakumaran insightfully points out a crucial distinction between non-international and international conflicts, which impedes adherence to the laws of the former; namely, that "immunity from prosecution for taking part in hostilities is a crucial incentive for compliance with the law of non-international armed conflict" (p. 514). For fighters engaged in these conflicts, there is little incentive to comply with the law, because they face domestic prosecution for taking up arms regardless of their behavior. He makes a compelling argument that this asymmetry highlights the need for combatant immunity in NIACs.

Overall, this book provides a detailed and useful account of the relevant law of non-international armed conflict. While its breadth prevents the author from delving into many of the distinguishing factors of non-international armed conflict, which necessitate nuances in the law, his treatment of armed groups as potential sources of law and mechanisms of compliance expands the perspectives on this topic. It also gives rise to creative proposals, such as leveraging peer-influence in persuading armed groups to comply with norms (p. 545). Sivakumaran's vision at the end for a new treaty that corrects for the deficiencies in the current law and incorporates the views of armed groups is inspiring, but is unlikely to be actionable because of the basic fact he articulates throughout the book—the unwillingness of states to confer recognition or legitimacy upon armed groups that challenge them.

US International Lawyers in the Interwar Years: A Forgotten Crusade. By Hatsue Shinohara. Cambridge: Cambridge University Press, 2012. Pp. 1, 248. Price: $99.00 (Hardcover). Reviewed by Charles Dameron.

In 1940, a young Hans Morgenthau—then just an assistant professor at the University of Kansas City—threw down the gauntlet in the pages of the *American Journal of International Law*. With the world at arms, he had quite a few things to say about a discipline that only recently had purported to offer up the promise of solving the problem of war. "If an event in the physical world contradicts all scientific forecasts, and thus challenges the assumptions on which the forecasts have been based, it is the natural reaction of scientific inquiry to reexamine the foundations of the specific science and attempt to reconcile scientific findings and empirical facts," he wrote. "The social sciences . . . have an inveterate tendency to stick to their assumptions and to

suffer constant defeat from experience rather than to change their assumptions in the light of contradicting facts. This resistance to change is uppermost in the history of international law."[32]

Morgenthau aimed his critique at the very heart of the international legal order established after World War I, which was founded upon the Covenant of the League of Nations, the Permanent Court of International Justice, and the Kellogg-Briand Peace Pact. Morgenthau's Article was a frontal assault on the orthodoxies of a small group of scholars who had been influential in shaping that order, which sought to orient international law around the principle of collective security. The events of the years preceding Morgenthau's article—including the Japanese invasion first of Manchuria, and then of the rest of China; the Italian invasion of Ethiopia; and the German annexation of Central Europe and Poland—seemed to make a mockery of this idea.

Yet, as Hatsue Shinohara notes in her new work, *US International Lawyers in the Interwar Years: A Forgotten Crusade*, "[n]o major change can be found in the writings or discussions [of leading American international lawyers] before and after the outbreak of the European war" (p. 165). Their remarkable silence spurred Morgenthau and other young dissidents to search for new theories of the laws between states, and today the Briand Pact continues to linger in the popular consciousness as the symbol of a bygone age's hopeless naïveté.

It is against this difficult backdrop that Shinohara, a professor of international relations at Waseda University, sets out to revive and rehabilitate the early years of modern international law and to pay tribute to the leading progressive thinkers of that time: Qunicy Wright, Manley Hudson, Charles Fenwick, and others who "formed a vocal and active group that believed the study of international law can and should contribute to building a more peaceful world" (p. 11). In recounting their efforts, Shinohara provides a robust portrait of the fierce and fundamental debate that took place within the discipline during the interwar years over the scope and objective of international law. Her work demonstrates that in spite of the interwar legal order's many shortcomings, international law today rests on a purposive foundation provided by these idealist-activists. Yet for all its success as a narrative account, the book delivers a tepid response to Morgenthau's blistering challenge, offering only a qualified vindication of Wright and his allies.

Shinohara's story revolves around the proceedings of the American Society of International Law (ASIL). Its starting point is therefore appropriately set at the ASIL's founding in 1906. Chapter 1 briefly lays out American international law's origins as a largely positivist enterprise, focused upon the gradual accretion of rules among nations as a matter of custom.[33] Accordingly, the ASIL's early leaders—Secretary of State Elihu Root and

32. Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260, 260 (1940).

33. For an example of the traditionalist viewpoint, see James Brown Scott, *The Legal Nature of International Law*, 1 AM. J. INT'L L. 831, 846 (1907), which argues that "international law is, if it be law, a growth of usage and custom."

Professor James Brown Scott—were concerned not at all with the development of international lawmaking organizations, but with the voluntary adjudication of international disputes through the Permanent Court of Arbitration, established at the First Hague Conference in 1899. Even in these early years, however, Shinohara identifies the faint stirrings of a new school that "compared the individual in domestic society to the sovereign state in international relations" and stressed the need for international organizations that would restrain sovereign states through law in the same fashion as the state restrained individuals (p. 17).

The First World War, of course, acted as a major catalyst for the U.S. international law community, as internationalists saw their ideas embodied in the Covenant of the League of Nations. Shinohara skips over the formation of the League to Enforce Peace and the actual drafting of the Covenant to concentrate on the sharp academic disagreement in the United States over ratification of the Versailles agreement. Though the Senate turned down Wilson's League, internationalists were ascendant within the ASIL: Shinohara points to 1923 as a decisive turning point, when Root resigned the presidency of the organization and the reformers took control of the agenda at international law conferences. Their program advocated the steady "enlargement" of international law, which Shinohara identifies as having three components: first, the acceptance in principle of "law-making treaties" that, having been ratified by a preponderance of states, bound both signatories and non-signatories; second, the observance of the Covenant of the League of Nations as "the constitution of international society, . . . which not only prescribed concrete legal rules but also contained a code of morality"; and third, the questioning "of whether a distinction between political and legal issues, between policies and international law, was necessary or even possible" (pp. 62-63).

The steady articulation of these principles in the face of realist skepticism occupies the remainder of the book, with particular attention given to a few signature interwar policy fights including: the adoption of the Kellogg-Briand Pact; Japan's invasion of Manchuria and the U.S. government's reaction thereto in the form of the Stimson Doctrine of non-recognition; and the Neutrality Act of 1935, passed by Congress over the loud objections of internationalists. Shinohara carefully illustrates the reformer/traditionalist divide on these questions through the writings and remarks of U.S. international law scholars. Shinohara's narrative and her analysis make for a pleasant read, though her treatment of the Kellogg-Briand Pact feels strained. In spite of initial claims that "[it] would be possible to assume that if it had not been for the Pact there would have been more wars, because the waging of war would have remained legal," (p. 3) and that adoption of the Pact was a sign that "international lawyers can function as social agents," (p. 5) Shinohara later concedes that supporters of the Pact "did not go beyond the realm of analysis, nor did they pay much attention to actual policy," (p. 67) and that "[t]he Pact was not the ideal legal device that lawyers had hoped for, . . . lacking precise legal definitions and means for enforcement" (p. 83).

Disappointingly, although Shinohara promises in her introduction to "take a comparative perspective that contrasts American, European and Japanese discussions, and . . . examine whether the differences in academic discussions among countries had an impact on diplomatic relations," (p. 4) her account only fleetingly touches upon contemporary European views. Meanwhile, her treatment of Japanese international legal discourse is mainly limited to the work of Thomas Baty, a British lawyer and advisor to the Japanese Foreign Ministry.

Baty, a scholar in the field of prize law who crafted legal apologetics for Japanese militarism, functions as something of traditionalist foil for Shinohara. Of special interest to Shinohara is correspondence between Baty and Yale professor Edwin Borchard, whom Shinohara classifies as the dean of American traditionalists in the interwar period. The author goes to some lengths to associate Borchard with Japan's legal posturing in the 1930s, noting, "Even before [Japan's invasion of Manchuria], a pattern of Japansese dissent had emerged . . . . Japan found endorsement for its position in the traditional view of international law, in particular as enunciated by Baty. Baty's arguments found supporters, such as Borchard, in the United States" (p. 98). Shinohara's focus on Japan is not so much a comparative treatment of international law discourses as it is a devised critique of American traditionalists.

Shinohara finds surer footing in the World War II years, as plans for the postwar world settled upon a collective security scheme that met the hopes of American international law theorists. Here, *US International Lawyers* documents the important roles played by Manley Hudson, whose proposals on international organizations were used as a benchmark by the State Department and Quincy Wright, who provided feedback on the Dumbarton Oaks Proposals. Wright also served as a technical advisor to the U.S. delegation at Nuremberg, where he liberally dispensed copies of the *American Journal of International Law* to help "enlighten the work of this Tribunal" (p. 197). Shinohara briefly tracks the importance of the scholarly writings of Wright, James W. Garner, Borchard, and others in resolving within the U.S. government the question of whether German and Japanese political and military leaders could be criminally prosecuted for conducting wars of aggression. Important as their ideas were, however, Shinohara acknowledges that they shared a place with power politics: "Officials in Washington and London who were perhaps more politically motivated to establish the notion of war as an international crime found it valuable and expedient to coat their claims with legal reasoning from the reformers' arguments" (p. 198).

Indeed, although Shinohara declares victory for the reformers at the close of her work, she leaves only ambiguously answered the question of whether or not the reformers' efforts were a driving force of international politics or something closer to an epiphenomenon. Revisiting the 1947 ASIL convention, she notes the emergence of critiques from a new generation, most notably legal realist Myres McDougal, who challenged Wright and the other dons of the discipline by offering up the idea that "'the canonized doctrines of international

law' . . . [were used by] 'people at certain foci of power to get certain consequences'" (p. 201 (quoting Myres McDougal)).

Although it does not satisfactorily resolve the tension introduced by legal realists like McDougal or political realists like Morgenthau, *US International Lawyers* shines as an adroit social history of a community whose normative principles stand at the center of modern international law. "'Our task,'" Wright told the ASIL's fiftieth anniversary meeting, "'is not to discover the principles by which we can organize our friends in opposition to our enemies, but to discover the principles which all nations share, and which if maintained will constitute them a community'" (p. 215 (quoting Quincy Wright)). Shinohara's work is a meticulous and enjoyable homage to those who, along with Wright, dared to dream of a law-governed world.

"Partly Laws Common to All Mankind": Foreign Law in American Courts. By Jeremy Waldron. New Haven, CT: Yale University Press, 2012. Pp. ix, 288. Price: $58.50 (Hardcover). Reviewed by Cameron A. VanSant.

In *"Partly Laws Common to All Mankind": Foreign Law in American Courts*, Jeremy Waldron challenges his readers to add an international definition to a term generally used to denote something much more provincial: the "common law." For Waldron, the term need not simply refer to the system emerging from the law "common" to the English monarch's courts in the Middle Ages—now the set of laws promulgated by judicial opinions rather than by written rules—but, under this different definition, can also point to the possibility of a kind of law *common to the entire world.* As Waldron acknowledges, the latter concept is not a new one. The title of the book echoes a second-century Roman text "All people, who are ruled by laws and customs use partly their own laws and partly laws common to all mankind to govern themselves[]" (p. 33). Waldron's project is to show what these "laws common to all mankind" are, and make the philosophical case for invoking them in American courts.[34]

The book is organized simply. Waldron, who is currently teaching at the New York University School of Law and at the University of Oxford, opens with a case study of *Roper v. Simmons*,[35] the 2005 decision in which the U.S. Supreme Court forbade the execution of adults for crimes committed when they were under the age of eighteen. The opinion of the Court, authored by Justice Kennedy, made reference to the fact that no other countries permitted these sorts of executions (at least by law).[36] The dissenting opinion, penned by

34. Waldron makes clear that the law he discusses is different from the *ius commune* invoked in other circumstances (pp. 43-46).

35. 543 U.S. 551 (2005).

36. *See id.* at 578 ("It is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty . . . ."). Justice O'Connor, though arguing that there was not a sufficient "American consensus" against such executions to justify declaring them unconstitutional, also remarked on the relevance of foreign law in American cases. *Id.* at 605 (O'Connor, J., dissenting) ("At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.").

Justice Scalia, excoriated the majority for its emphasis on "the views of other countries and the so-called international community."[37] The result of the decision was a political firestorm: "there were ferocious newspaper editorials, death threats against some of the justices, and ugly talk of impeachment, and legislation was introduced in the Congress which would prohibit any reliance by a federal court on foreign legal materials" (p. 10, citations omitted).

Originally trained in New Zealand, where judges regularly refer to foreign law (p. 17), Waldron finds all of this outrage rather surprising, and sets out to construct a philosophical foundation for foreign-law references in U.S. courts. As he mentions from the outset, and elaborates later in the book, Waldron's position is wisely "modest" (p. 223). He does not suggest that this new kind of common law should serve as binding precedent in the United States—only that it deserves thoughtful consideration on the part of judges. He writes that "[The jus gentium is not] supposed to be authoritative in the sense of simply and peremptorily settling legal problems (in the way a legislated rule settles problems)," but rather is "expected only to have a *bearing* on our decision, along the lines of what lawyers have called 'persuasive authority' or along the lines of Dworkinian principle" (p. 188).

Waldron begins his philosophical case by refining readers' perception of "foreign law." In Waldron's view, Americans need not understand all invocations of foreign law as impositions of the legal and political systems of *individual* foreign countries, but rather as references to something like the "laws common to all mankind" mentioned in the Roman text. Following Justinian tradition, he calls this law *ius gentium* (the law of nations) (see p. 33). In contrast to many commentators, who associate similar concepts of world law with natural law,[38] Waldron defines *ius gentium* as "a body of *positive* law regulating relations *within* states as particularly between citizen and government but also sometimes between private individuals. . . . [T]he law of nations," he continues, "represents a sort of overlap between the positive laws of particular states" (p. 28, emphasis added).

Having defined *ius gentium*, Waldron proceeds to investigate the merits of its use. He begins by exploring its impact on the education of judges. His thoughts on the subject are both reasonable and topical, particularly given the ever-increasing number of opportunities for judges from different jurisdictions to discuss legal issues in an academic context.[39] Analogizing legal and scientific inquiry—a comparison that the author readily admits has its limits—Waldron explains that "ius gentium is available to lawmakers and judges in every country . . . , reminding them that their particular problem has been confronted before and that they, like scientists, should try to think it through in

37. *Id.* at 622 (Scalia, J., dissenting).

38. *See, e.g.*, Richard A. Posner, *Foreword: A Political Court*, 199 HARV. L. REV. 31, 85 (2005) (associating the *Roper* references with natural law, "universal principles of law that inform—and constrain—positive law"). As Waldron argues, this "ancient entanglement of ius gentium and ius naturale" extends back to Roman law (p. 36), and is also found in the work of Thomas Aquinas, among others (p. 38).

39. Examples include Yale Law School's annual Global Constitutionalism Seminar and the Duke Law Center for Judicial Studies.

the company of those who have already had to deal with it" (p. 101). American judges, Waldron suggests, can learn a lot from the analysis of foreign judges addressing similar issues, and it does not make sense to deny them this resource altogether (or, perhaps more realistically, to prevent them from acknowledging it). His second set of arguments relates to transnational consistency.

For Waldron, recognition of *ius gentium* may be not only practical, leading to more efficient extradition processes, for example (pp. 116-17), but also principled, promoting a sort of fairness, rendering it more likely that cases involving fundamental rights are resolved similarly throughout the world (p. 135). Waldron continues by taking on democratic, textualist, and practical critiques of his theory, concluding with a discussion of "[l]egal [c]ivilizations" (p. 187). The final section considers *ius gentium* in situations where the world does not speak with one voice, and suggests that even more limited, regional varieties of *ius gentium* could bring benefits (p. 208). Although the chapter is likely to frustrate readers who desire a scientific solution to the question of what constitutes *ius gentium*—what if eighty percent of countries follow a particular rule? what about 70?—Waldron's treatment of these questions, as he cleverly points out in italics at the close of the book, is satisfyingly consistent with the original Latin phrase, whose author likewise resisted quantification: "All peoples ruled by law use partly their own laws and also, and most definitely, *partly* laws common to all mankind" (p. 223).

Waldron is a careful writer, quick to acknowledge the limitations and exceptions to his arguments. Despite his qualifications, Waldron's is nevertheless a supremely lively work of legal philosophy—a text accessible to lawyers who are not philosophers, and philosophers who are not lawyers. For those who are familiar with Waldron's long engagement with the issue of foreign law, however, there is not much here that is especially surprising. Still, there is value in following along with Waldron as he forges his path, listening in while he responds to critics of previous work who meet him at different points along the way, and showing them how their own legal methodologies might lead to common ground. Indeed, the passages and chapters in which Waldron addresses counterarguments are among the most illuminating in the book.

Consider, for example, his treatment of textualism. Although textualism, with its focus on the language of a particular national statute or provision, might seem to run counter to the broader inquiries that characterize the search for *ius gentium*, Waldron shows that an investigation of how judges in other countries read the words of an identical or similar provision—such as the often-copied "cruel and unusual punishment" clause that originated in the English Bill of Rights—is ultimately consistent with American textualism (pp. 155-67).[40] In Waldron's view, for the very reason that "[l]egal systems copy each

40. Of course, Waldron takes textualism very seriously in his other writings, as well, even if he sometimes resists Justice Scalia's particular presentation. *See, e.g.*, JEREMY WALDRON, LAW AND DISAGREEMENT 82 (1999) ("[W]hether we are talking about a small-scale meeting or a large-scale legislative process, the positing of a formulated text as *the resolution under discussion* provides a focus for the ordering of deliberation at every stage.").

other and they learn from each other," and textualism—when divorced from certain forms of originalism—can help "relate one phenomenon to the other and justify the learning by judges' attention to the significance of the copying" (p. 167). His engagement with the question of which countries "count" for consensus purposes is equally thoughtful. In the collaborative spirit of *ius gentium*-style legal education, Waldron views Justice Scalia and others as struggling along with him, rather than against him, in seeking out proper principles of legal interpretation.

Given his support for the people (and their representatives') views in other contexts,[41] it is surprising that Waldron does not confront the popular, expressive arguments against invoking foreign-law invocations in U.S. courts. No matter the force of philosophy, many Americans simply do not want to see foreign law in their Supreme Court's opinions. Waldron points out this issue when he writes of an encounter between Justice Breyer and a congressman who opposed references to foreign law, in which the congressman informed Justice Breyer that he can read foreign law as long as he does not cite it (p. 83). Rather than simply dismissing scholars' rather haphazard and imprecise invocations of the Declaration of Independence's famous phrase as "platitudes," Waldron might have conducted a more systematic investigation of the use of what Thomas Jefferson called "the opinions of mankind" in American law, noting that foreign law had a place not only in the development of our founding documents, but also in their interpretation during much of U.S. history (p. 22).[42] But Waldron is ultimately a philosopher, not an advocate, so perhaps we need ultimately judge the strength of his arguments on their coherence (both logical and legal), more than on their potential for popular acceptance. And, by the standards its author sets—Waldron explains that his goal is a work of practical philosophy, "a sort of jurisprudence meets *Roper v. Simmons*"—*Partly Laws* is a success (p. 23).

The Sovereign Citizen: Denaturalizaiton and the Origins of the American Republic. By Patrick Weil. Philadelphia: University of Pennsylvania Press, 2012. Pp. 1, 285. Price: $34.95 (Paperback). Reviewed by John Wei.

In the United States today, citizenship is a right that can be renounced, but not taken away. Citizens can voluntarily give up their citizenship by word or deed, for instance, by serving in the armed forces of a foreign state at war with the United States.[43] However, the government cannot unilaterally revoke

41. *See, e.g.*, Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2006) (outlining democratic arguments against judicial review).

42. David J. Seipp, for example, provides a useful history of citations to foreign law. *See* David J. Seipp, *Our Law, Their Law, History, and the Citation of Foreign Law*, 86 B.U. L. REV. 1417, 1428-35 (2006).

43. 8 U.S.C. § 1481(a) (2006) ("A person who is a national of the United States whether by birth or naturalization, shall lose his nationality by voluntarily performing any one of the following acts with the intention of relinquishing United States nationality . . . (3) entering, or serving in, the armed forces of a foreign state if (A) such armed forces are engaged in hostilities against the United States . . . .").

the citizenship of persons unwilling to relinquish it, for, according to the Supreme Court's jurisprudence, the people have never conferred this power on the government and such a power would be inconsistent with the Fourteenth Amendment.[44] In some countries, the state can revoke a person's citizenship for the sake of the public good.[45] But in the United States, a different principle rules: "the people are sovereign and the Government cannot sever its relationship to the people by taking away their citizenship."[46]

The Sovereign Citizen attempts to understand the genesis of this novel conception of the *legal*[47] dimension of American citizenship. How and why did American jurisprudence come to reconceptualize sovereignty—originally an attribute of the state—as "something like a shared quality attributed to all citizens, with each benefiting from its character of inalienability and permanency" (p. 159)? Weil approaches this question through a microhistory of denationalization, i.e., the governmental act of terminating citizenship, devoting particular attention to the institutional structure and procedures that developed for the denationalization of naturalized—as opposed to native-born—citizens.[48] The subtitle, *Denaturalization and the Origins of the American Republic*, gives a more or less accurate picture of the book's scope. Despite their close relationship, the institutional structures and procedures for denationalizing naturalized citizens fall outside the book's purview.

The three main parts of *The Sovereign Citizen* highlight the significance of denaturalization to three broader social phenomena: the federalization of naturalization proceedings, the redirection of denaturalization to political ends, and the transformation of the American legal understanding of sovereignty. Chapters One through Three demonstrate the centrality of denaturalization to the federalization of naturalization proceedings. At the beginning of the twentieth century, the power to naturalize lay primarily in the hands of state courts, and naturalization fraud was a frequent occurrence. Congress responded to this state of affairs by gradually restricting naturalization proceedings to an increasingly smaller number of state and federal courts and eventually to just the Naturalization Service, as well as by granting federal officials the power to

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44. *See* Afroyim v. Rusk, 387 U.S. 253, 257 (1967) ("Our Constitution governs us and we must never forget that our Constitution limits the Government to those powers specifically granted or those that are necessary and proper to carry out the specifically granted ones. The Constitution . . . grants Congress no express power to strip people of their citizenship, whether in the exercise of the implied power to regulate foreign affairs or in the exercise of any specifically granted power."); *id.* at 268 ("We hold that the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, color, or race.").

45. The United Kingdom is one example. *See* The Immigration, Asylum, and Nationality Act, 2006, c. 13, § 56(1) (U.K.).

46. *Afroyim*, 387 U.S. at 257.

47. The book specifically refrains from exploring the affective, political, and civic dimensions of citizenship in the United States.

48. Following other scholars rather than the convoluted case law, I use the term "denationalization" to refer to the government's act of terminating citizenship and "expatriation" to refer to a citizen's renunciation of citizenship. *See* Richard R. Gray, *Expatriation—A Concept in Need of Clarification*, 8 U.C. DAVIS L. REV. 375, 388-389 (1975). Weil employs these terms in a different sense. He uses "denationalization" to refer to loss of citizenship by a native-born American and "expatriation" to refer to loss of citizenship by native-born and naturalized citizens, whether voluntary or involuntary.

initiate denaturalization proceedings against those who had obtained their citizenship through fraud.

Government officials, however, soon redirected denaturalization proceedings to other ends. Chapters Four through Seven detail how, right after its institution in 1906, the government began to transform denaturalization into a tool to discriminate against the "un-American." Naturalized anarchists, socialists, communists, Asians, and Americans residing abroad all became targets for denaturalization, as did naturalized Germans and Nazis during the World Wars. Unfortunately, Weil provides little comparative data on the severity of discrimination against naturalized citizens as compared to similarly situated native-born citizens, e.g., native-born anarchists, socialists. Various statements throughout the book suggest that the native-born were less vulnerable to denationalization than the naturalized (e.g., p. 56). But the only empirical data which Weil provides appear to suggest otherwise. The book's appendices, which provide figures on the denationalization of both naturalized and native-born citizens for 1945 through 1977, indicate that the government denationalized far more native-born citizens than naturalized ones during these years (pp. 198-99).[49]

The final chapters, Chapters Eight through Twelve, explore what happened once the government's aggressive denationalization program came to the attention of the Supreme Court. In a series of cases beginning in the 1940s, the Supreme Court extended ever more protections to citizens in danger of losing their citizenship, until the Court finally recognized the citizen's sovereignty in *Afroyim v. Rusk*.[50] For Weil, the key to understanding this development lies in the personal beliefs and convictions of the justices, particularly Chief Justice Earl Warren and Justice Hugo Black. Weil investigates in careful detail the evolution of both these justices' ideas, devoting especial attention to the genesis of Warren's dissenting opinion in *Perez v. Brownell*,[51] the first to elaborate the idea of the sovereign citizen (pp. 146-60). This new concept, Weil emphasizes, provided the necessary intellectual foundation for explaining not only why the government is forbidden from unilaterally denationalizing those with a single nationality, but also why it cannot unilaterally denationalize those with multiple nationalities: "The right to have rights . . . requires governments both to take care of the stateless and to prevent the creation of additional stateless people. But citizen sovereignty goes further than this by protecting citizens from unwilling expatriation even if they also possess another nationality" (p. 183).

As recounted by Weil, the story of denaturalization practices in the United States and the transformation of citizenship that they effected was primarily an insular one. Immigration patterns and foreign affairs affected the politics of denaturalization, but not the jurisprudence. Yet as Weil himself

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49. Unfortunately, the data provided in the appendices for the years before 1945 deal solely with naturalized citizens (p. 197).

50. 387 U.S. at 257.

51. 356 U.S. 44, 65 (1958).

notes towards the end of his conclusion (pp. 183-84), the American experience took place against a larger, international background and arguably fits into a broader, global narrative on the development of nationality into a human right. Two of the main motive forces in this larger narrative appear to have been sex equality and the increased concern with statelessness occasioned by World War II and the Holocaust.[52] Article 15 of the 1948 Universal Declaration of Human Rights, which predates both Chief Justice Warren's tenure on the Supreme Court and most of the major Supreme Court cases on denationalization, declares nationality to be a fundamental right.[53] And later international conventions elaborate more specific protections. The 1957 Convention on the Nationality of Married Women, for instance, forbids signatory states from automatically terminating the citizenship of women upon a change in marital status or a change in the citizenship status of their husbands.[54] And the 1961 Convention on the Reduction of Statelessness stipulates that "renunciation [of nationality] shall not result in loss of nationality unless the person concerned possesses or acquires another nationality."[55]

What should we make of these parallels? Are they, for instance, signs that the international community influenced the Supreme Court's jurisprudence or vice versa? Might they testify to a broader shift in global attitudes towards citizenship, one that went far beyond the confines of the Supreme Court? These questions go to the heart of an issue which Weil seems to regard as settled, perhaps prematurely: namely, the commitment of the United States to Warren's concept of the sovereign citizen and its corollary that citizenship can be voluntarily renounced, but not involuntarily taken away. If the sovereign citizen is just the product of a battle of ideas that took place in the Supreme Court and is unrelated to a larger sea change in American or international values, then it rests on a shaky foundation indeed. Absent broader societal support, a new Supreme Court majority might well decide to scrap this not unproblematic concept. After all, does it make sense to claim that the citizen's sovereignty protects him or her from denationalization, but not even harsher punishments like death? How comforting is it that, even with due process, "the Government cannot sever its relationship to the people by taking away their citizenship"[56]

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52. *Cf.* Peter J. Spiro, *A New International Law of Citizenship*, 105 AM. J. INT'L L. 694, 703, 707-714 (2011).

53. *See* Universal Declaration of Human Rights arts. 15(1)-(2), G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) ("(1) Everyone has the right to a nationality. (2) No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality."). Both of those provisions in Article 15 made their way nearly verbatim into Article 20 of the 1969 American Convention on Human Rights. Organization of American States, American Convention on Human Rights, art. 20, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

54. Convention on the Nationality of Married Women, art. 1, Feb. 1, 1957, 309 U.N.T.S. 65 ("Each Contracting State agrees that neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by husband during marriage, shall automatically affect the nationality of the wife.").

55. Convention on the Reduction of Statelessness, art. 7.1(a), Aug. 30, 1961, 989 U.N.T.S. 175.

56. Afroyim v. Rusk, 387 U.S. 253, 257 (1967).

but that with due process the government can sever this relationship by extinguishing a citizen's life?

Yet, however questionable it might be that Warren's concept of the sovereign citizen will withstand the test of time, we can safely put aside such doubts for *The Sovereign Citizen*. Weil has written an extremely learned and carefully researched book. It will surely remain of interest to historians, political theorists, and lawyers for years to come.

The Verdict of Battle. By James Q. Whitman. Cambridge, MA: Harvard University Press, 2012. Pp. 1, 323. Price: $29.95 (Hardcover). Reviewed by Jennifer Skene.

Warfare prior the development of the modern law of war is often portrayed as barbaric and inhumane. After all, thousands were killed for the personal interests of their monarchs, pillaging the dead was a common practice, and there was nothing resembling humanitarian restraints on savagery. With no written law of war to channel their brutality, battles prior to the twentieth century appear today to have been chaotic, unregulated, devastating free-for-alls.

Yet, as Professor James Whitman compellingly argues in *The Verdict of Battle*, battles before the 1860s were, compared to today's wars, "a blessing" (p. 4). In the modern day, it is all too common to hear about tens, hundreds, or thousands of civilians being killed in an armed attack. Wars rage on for years with no apparent victor. In the eighteenth century, by contrast, pitched battles were strikingly self-contained affairs. They usually began at sunrise and were decided by sunset on that same day. In addition, they were restricted within a single field of combat. Civilians did not have to fear for their lives, even when battles raged only miles away. Farmers, Whitman writes, could safely continue to work in their fields as soldiers slaughtered one another the next field over.

How is it that today's humanitarian-focused law of war is unable to accomplish what eighteenth-century warfare achieved, namely limited, decisive battles? How were conflicts so contained in the eighteenth century in a way that seems unthinkable today?

The answer, Whitman explains, lies in the rule of law. Whitman's central argument is that the battles of the eighteenth century were "not a plague on mankind but a legitimate means of settling disputes and resolving legal questions though violence" (p. 10). A pitched battle, he writes, was "a ritualized means of focusing, and therefore containing, the violence of war" (p. 5). Battles were a form of trial—essentially large-scale trials by combat. The two sides were litigants disputing claims to property and power.

If the battle itself was the trial, then the determination of a victor was the verdict. Whitman introduces the term "jus victoriae," or "law of victory," to describe the law governing pre-nineteenth-century battles. Under the jus victoriae, success in warfare was not contingent upon which side suffered the greatest loss of life. This meant that sovereigns did not have to annihilate the other side in order to claim victory. Instead, victory was based on which party

was able to drive the other from the field of battle. Whitman refers to this form of victory as the "verdict of battle."

The eighteenth century was the apex of contained pitched battles and the jus victoriae. Starting in the late-seventeenth century, monarchs consolidated their power and obtained a "monopoly on legitimate military violence" (p. 138). This meant that nobles, who had previously waged their own campaigns for their own benefits, no longer had the right to conduct war. Battles became a form of legitimate property litigation between monarchs. Furthermore, as a reaction against the recent devastating wars of religion, monarchs did not tend to wage war for ideological purposes.

The concept of battles as a legitimate form of litigation is entirely foreign to us today. To illustrate just how different the conception of warfare was in the eighteenth century, Whitman provides the example of Frederick the Great's invasion of Silesia from 1740 to1742. Our modern sensibilities view his actions as indefensible and blatantly illegal. Yet, at the time, rulers and jurists saw the invasion as a perfectly legal means for Frederick to assert against Maria Teresa his right to succeed as the ruler of Silesia.

The pitched battle, according to Whitman, began to decline with the rise of republics. In contrast to the eighteenth-century monarchs, republics did not wage wars based on property rights; they waged wars over "republican legitimacy" (p. 236). With the decline of monarchies also came the decline of accepted legitimacy. Wars were no longer between sovereigns who disputed claims to land and succession but overall recognized each other's legitimacy. Instead, countries that fight today often do so in order to assert their sovereignty or to disavow the sovereignty of another. Whitman argues, "Every move we make that seems to question the sovereignty of other states creates a bit more incentive for those states to prove their sovereignty through violence." (p. 255).

The major difference between wars then and now, Whitman argues, is that in the eighteenth century, monarchs were not fighting for "regime change." As John Witt writes in his recent book *Lincoln's Code*, Francis Lieber developed the beginnings of the modern law of war while the United States was fighting for a regime change.[57] President Lincoln declared war on the Confederacy not for property or succession, but for principles of morality. Since then, humanitarian interests and challenges to other states' sovereignty have become the central causes of warfare.

Whitman's book transforms the understanding of today's law of war. The transformation to morality-based war would seem to be progressive and ideal. It would seem obvious to us that wars to protect the rights of individuals would be the most justified and humane. Indeed, one of the leading scholars of the history of the law of war, Stephen Neff, has decried the non-ideological, calculating nature of wars in the eighteenth century as "depressingly

57. JOHN FABIAN WITT, LINCOLN'S CODE: THE LAWS OF WAR IN AMERICAN HISTORY (2012).

materialistic."[58] In the same vein, many people criticized the United States for pursuing a war against Iraq for possession of oil rather than ideology (p. 256).

Yet, Whitman turns this criticism around and instead proposes that the materialist purposes of war that we reject today were what made warfare so contained and restrained in the past. When wars are driven by property claims, as they were in the eighteenth century, parties have a concrete objective over which they can negotiate with their opponents. Instead, Whitman says, it is morality- and ideology-driven wars, seeking to remake the world, that are the most devastating. Wars waged under moral pretenses "must be unlimited wars" (p. 253). When countries like the United States attempt to bring democracy to the Middle East, he argues, there is no room for negotiation and no conception of partial victory. This leads him to assert that the Iraq War might have been less devastating had the acquisition of oil, not the promotion of democracy, been the primary aim. This is a startling claim to our modern-day sensibilities, but Whitman argues his point convincingly.

The jus victoriae broke down because the combatants began to view their enemies as unjustified in their causes. As a result, annihilation became an acceptable tactic. Whitman does not discuss the fact that, under today's *jus in bello*, all combatants are supposed to be morally equal.[59] However, Whitman's argument still stands even with this provision. All combatants remain legitimate targets,[60] and, in a war for morality, one side would not feel compelled to refrain from annihilating the side that is promoting "evil." Thus, as Paul Kahn writes, wars have become much more like police actions. One result of this is the rise of riskless warfare. When there is no sense of moral equivalency, war becomes "the application of force to the morally guilty,"[61] and drones and cyberwarfare become acceptable. Lives of soldiers on the "good" side are seen as more valuable. They do not need to face danger in order to inflict harm on enemy combatants.

Whitman reiterates the argument of critics of America's wars waged on the basis of morals, justice, and the spread of democracy. However, he delves even deeper into the issue to critique the *jus in bello* and *jus ad bellum* that form the foundation of international humanitarian law. The problem with *jus in bello* is that it focuses on the wrong aspect of war. It is the purpose of the war that determines just how contained it is. Wars, he writes, "enter their most dangerous territory when they aim to remake the world . . . ." (p. 262).

The eighteenth century's unique characteristics enabled contained battles to an extent that was unprecedented and unrepeated. The decline of the jus victoriae, Whitman notes, was inevitable with the changing political and diplomatic alignments, the decline of monarchical power, and the rise of humanitarian principles. Whitman's book does not offer any concrete solutions to the problems of today's warfare. Indeed, he asserts that we cannot go back to

58. STEPHEN C. NEFF, WAR AND THE LAW OF NATIONS: A GENERAL HISTORY 91 (2005).

59. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 3 (2010).

60. *Id.* at 33.

61. Paul W. Kahn, *The Paradox of Riskless Warfare*, 22 PHIL. & PUB. POL'Y Q. 2 (2002).

the jus victoriae of the past. However, it does allow us to consider our current legalism from a new perspective and reevaluate our emphasis on *jus in bello* and *jus ad bellum*. Causes for the brutal character of today's wars run the gamut from the legal framework itself and an emphasis on moral campaigns, to the growth of democracy, and our tendency to ascribe historical destiny to the outcome of war. With all of these causes, it is difficult to know just how to begin to reconsider today's warfare. Yet, it does offer a comprehensive perspective on why pitched battles are a relic of the past.

Whitman's work could have been enhanced by a more thorough comparison between today and the wars of religion prior to the eighteenth century might prove instructive. As he notes, the wars of religion, whether between Christians and Muslims or Catholics and Protestants, were, like the wars of today, fought over ideologies. The concept of the jus victoriae existed at that time, according to Whitman. But it was not enough to contain warfare since there were fundamental questions of legitimacy at stake. Whitman writes that the warfare of the eighteenth century was in part a reaction against this unrestrained ideological warfare. If Europe was able to react against this wave of religious warfare and fight more contained battles, perhaps the world is capable of doing the same again. Or perhaps we are too far gone to achieve the same feat. Whitman writes that we cannot go back to the structure of eighteenth century warfare. This was a unique moment in history. But he leaves open the possibility for once again achieving a more restrained form of warfare.

Whitman draws on an impressive array of sources. He adeptly maneuvers through history, legal philosophy, and even anthropology. He discusses novels, artwork, and writings from lawyers, philosophers, and monarchs from across Europe and across history to richly illustrate the eighteenth-century world. Whitman's mastery of many different academic subjects is reflected on every page. Whitman relies perhaps a bit too heavily on the work of legal philosophers to articulate attitudes towards war throughout history. The voices of monarchs, nobles, and legal institutions are minimal and may have added a richer perspective on previous views of war.

Professor Whitman's book is a fascinating, eye-opening glimpse into the laws, power structures, and philosophies surrounding warfare prior to the nineteenth century. Authors such as Stephen Neff have discussed codes of conduct within wars, similar to today's *jus in bello*.[62] Whitman, however, moves outside the framework of today's law to examine eighteenth-century warfare on its own terms. He looks not at the *jus in bello* or *jus ad bellum*, but rather at the jus victoriae and the treatment of war as a trial. By doing this, he denaturalizes today's law of war and makes the eighteenth-century worldview accessible, allowing for a true critique of how modern nations conduct their wars. Whitman's book is compelling because it calls into question the values our society takes for granted as definitively moral and correct. It even challenges our conception of what is the rule of law (p. 204).

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62. NEFF, *supra* note 58, at 114.

Ultimately, Whitman's latest book is valuable both as a historical work and as a reflection on modern warfare. It poses the question of whether our humanitarian-centered system of law is truly superior to law of previous centuries. Whitman acknowledges that with today's technology and ideology-driven wars, there is no hope to going back to the contained warfare of the eighteenth century. Yet, by providing such a detailed picture of what eighteenth-century warfare was like, Whitman allows the reader to reflect on the contemporary approach to combat and consider what the world lost when we lost the supremacy of the verdict of battle.