

**THE INTERNATIONAL LAW THAT IS AMERICA:
REFLECTIONS ON THE LAST CHAPTER OF *THE GENTLE
CIVILIZER OF NATIONS***

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I. INTRODUCTION

“A history of moralism,” the late intellectual historian Henry May once observed, “would come close to being a history of American thought.”¹ It was a forgivable exaggeration, for his point still stands when it comes to the exceptionalist American self-understanding that May’s comment as much enacted as described. From the beginning, Americans have often been prone not simply to assume an uncomplicated belief in what May called “the first and central article of faith in the national credo . . . : the reality, certainty, and eternity of moral values.”² They have also overwhelmingly tended to infer that, as “perhaps the most often stated corollary of all, the United States, as a special leader in moral progress, had a special responsibility for moral judgment”³

This fact helps explain why, during the era in which their straightforward allegiances to these longstanding truths remained uncontested, Americans signed on with uncommon alacrity and enthusiasm to the mission of European international law to provide moral reform of the world.⁴ Improvement in the name of America’s special insight into the ethical realities of the universe could not, to be sure, remain restricted to the nation’s own borders. One might have predicted that the country’s self-image would not survive the stress of its evolution from self-appointed exemplar for the world to tentative engagement in the world. Yet, in the initial age of American empire, no serious disturbance followed.⁵ For that matter, how fundamentally did America’s self-image ever change under pressure? This question is what seems to be most at stake when reckoning with the powerful

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1. HENRY F. MAY, *THE END OF AMERICAN INNOCENCE: A STUDY OF THE FIRST YEARS OF OUR OWN TIME 1912-1917*, at 10 (1959).

2. *Id.* at 9–10.

3. *Id.*

4. See BENJAMIN COATES, *TRANSATLANTIC ADVOCATES: AMERICAN INTERNATIONAL LAW AND U.S. FOREIGN RELATIONS, 1898-1919*, at 67 (2010) (discussing how Americans maintained a lively discussion with European correspondents, shared similar international legal reform advocacy, and how the exchange shaped how Americans conceived of their own national identity and global role).

5. See IAN R. TYRRELL, *REFORMING THE WORLD: THE CREATION OF AMERICA’S MORAL EMPIRE 74* (2010) (summarizing that America’s initial expansions were marked by the shift of Christian temperance groups, evolving from domestic groups to international organizations).

story told in the last chapter of Martti Koskenniemi's classic masterpiece, *The Gentle Civilizer of Nations*.⁶

At the opposite pole from American nationalists, German nationalists had always been in the lead in viewing morality as a likely mask for self-interest. The insight was not unique to the Germans; from St. Augustine on, the most self-aware moralists have known that there was no sin more potentially appalling—or at least hypocritical—than that of the moralist's prideful righteousness itself. Yet it was reserved for Germans, with their Lutheran consciousness of the lurking omnipresence of sin informing their vision of global order, to argue that open pursuit and defense of national self-interest—including in and through international law—might be the best starting point. At least, all things considered, it was preferable to the laughable fiction that individual states in a persistently violent order obey moral principle and pursue humanity's good. It was not, the Germans insisted (at least sometimes), that they hated morality. Rather, they had learned how duplicitous moral claims were from their hard experiences beset by enemies. Americans, by contrast, were protected by distance and water from foes who claimed to visit morality on them, and so they could subsist on illusions bred of their own self-regard.⁷ Especially after World War I cast them as aggressive enemies of high-minded states to the West, Germans offered the disturbing wisdom that “whoever invokes humanity wants to cheat.”⁸

Koskenniemi cites this famous tagline from Carl Schmitt as a section title in his chapter.⁹ Along with a few others, Koskenniemi helped establish Schmitt's centrality to any account of twentieth century intellectual history—or indeed any attempt to establish the credentials of a universalistic international law today. “[T]he choice between writing another 1,000-page textbook on humanitarian law and trying to deal with Schmitt's critiques of universal moralism,” Koskenniemi mordantly put it, “should not be too difficult.”¹⁰ But Koskenniemi went on to pursue the surprising claim that, in spite of their moralistic adolescence, Americans themselves went Schmittian after World War II, as their once fitful imperialism

6. See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* ch. 6 (2002) [hereinafter KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*].

7. Friedrich Meinecke, to take only one example, knew that the relationship between universal justice and state power, the latter rooted ultimately in animal imperatives starting with basic survival but including the lust for domination, was far from obvious. See FRIEDRICH MEINECKE, *MACHIAVELLISM: THE DOCTRINE OF RAISON D'ÉTAT AND ITS PLACE IN MODERN HISTORY*, at xxvii (Douglas Scott trans., 1957) (“Even at the end of his life he called ‘universal history’ an ‘enigmatic texture of necessity and freedom’.”). He tacked back and forth about how to reconcile them through his long career, but throughout, he thought, the least plausible response was to believe that *raison d'état* was an optional extra—as if morality alone sufficed, especially when offered as the rationale for the acts of great power. See generally Samuel Moyn, *The First Historian of Human Rights*, 116 AM. HIST. REV. 58, 58–79 (Feb. 2011).

8. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 54 (George Schwab et al. trans., expanded ed. 2007).

9. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 432.

10. *Id.* at 424.

became unquestionable hegemony.¹¹

Conquering German armies, Americans allowed themselves to be conquered in turn by the insight of their erstwhile enemies. Far from adhering to the international lawyer's faith in formalism as the key to the progressive moralization of the world, Americans followed imported German sage Hans Morgenthau in turning to the rival and deformalizing science of "international relations."¹² Like Schmitt, they learned to treat the national interest as the main factor in world order, doubting the applicability of transcendent morality or international law, except as smiling rationalizations of self-interest after the fact. In this way, Koskenniemi makes his own the thesis of Leo Strauss, who observed that sudden post-World War II doubts about the eternity and certainty of morality did not mark "the first time that a nation, defeated on the battlefield and, as it were, annihilated as a political being, has deprived its conquerors of the most sublime fruit of victory by imposing on them the yoke of its own thought."¹³

Koskenniemi's story about Schmitt's baleful legacy has been broadly influential—earning various extensions and inviting various reservations.¹⁴ Koskenniemi's thesis with respect to the evolution of the discipline of international law has been less resonant and less examined, with the persisting room for formalism that the field retained.¹⁵ After all, Koskenniemi's case about Morgenthau, that apostate to the field of international law, is only part of his last chapter, which frames that story with a larger one about the trajectory of those who remained within the fold. And while I am in broad agreement with Koskenniemi's

11. See *id.* at 482 (discussing that after World War II, the Americans largely gave up pre-war "utopian" hopes and marginalized law from the center of political decision-making).

12. See *id.* at 437 (stating that the Cold War between the United States and the Soviet Union led to the end of the old state system based on the balance of power between formally sovereign, European, nations).

13. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 2 (1953).

14. See, e.g., THE INVENTION OF INTERNATIONAL RELATIONS THEORY: REALISM, THE ROCKEFELLER FOUNDATION, AND THE 1954 CONFERENCE ON THEORY 215 (Nicholas Guilhot ed., 2011) (referencing the extensive literature on Schmitt's influence on economic, legal, and political thought); Nicolas Guilhot, *American Katechon: When Political Theology Became International Relations Theory*, 17 *CONSTELLATIONS* 224, 224–53 (June 2010) (discussing the inception of American international relations theory). But see WILLIAM E. SCHEUERMAN, *MORGENTHAU: REALISM AND BEYOND* 51 (2009) ("In fact, the final chapters of *Scientific Man*, where Morgenthau developed a sophisticated political ethics, systematically attacked the view that politics operates in distinction from morality."); William E. Scheuerman, *Was Morgenthau a Realist?: Revisiting Scientific Man vs. Power Politics*, 14 *CONSTELLATIONS* 506, 510 (Dec. 2007) (stating that Morgenthau attacked Schmitt's ideas because he believed Schmitt had devised a disturbing model of pure politics where the pursuit of power was unrestrained by even the most minimal normative chains).

15. I am not counting my own engagement with it. See SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* 178 n.3 (2010) ("I adopt the framework of [Koskenniemi's] classics, while departing very substantially from Koskenniemi's reading of American international law in the postwar era."). It may not be saying much on either count, but the book's fifth chapter is both the best researched and most ignored part, so I am taking the liberty of reframing some of its claims in this essay.

account of the guild in the early Cold War, I am ultimately interested in why he left out the all-important events in the decades thereafter. For just as May's aphorism might lead one to expect, it was not long before American moralism and formalism returned with a vengeance, especially in and through the commitment of American international lawyers to universal human rights and "humanity's law."¹⁶

This perspective, which I will try to spell out in what follows, is not of mere historical interest. It bears directly on Koskenniemi's confusing and controversial endorsement of a "culture of formalism" as an alternative to Schmittian realism at the end of the book.¹⁷ If the American case after World War II ultimately illustrates not the fall of international law but its rise—and Koskenniemi left out the ending on which hangs the tale today—then moral norms and formal law could not by themselves become the salvation of the critical spirit. They would remain the continuing targets for critical, though not necessarily Schmittian, skepticism.

II. KOSKENNIEMI ON AMERICAN INTERNATIONAL LAW AFTER 1945

After his path-breaking genealogy of international relations out of Schmitt's criticism of international law, Koskenniemi turns to examine different sectors of the ongoing discipline. The prior romanticism that fused American moralism with the *esprit d'internationalité* of European vintage in the careers of Elihu Root, James Brown Scott, and others was now irretrievable, Koskenniemi says.¹⁸ "Their idealism—whether in a formalist or natural law version—was completely discredited after the war."¹⁹ A few pages later, however, it is clear that it could not have been completely discredited, for then Morgenthau would have had nothing to say. Far from always fighting in terms of an honest realism, a "morally loaded Cold War crusade against communism" prevailed, inviting Morgenthau's contempt on intellectual grounds, and when it came to the Vietnam War, dissent on political grounds.²⁰ Morgenthau's priceless wisdom that, during the Cold War, "what the moral law demanded was by a felicitous coincidence always identical with what the national interest seemed to require" would have gone without saying, absent the general persistence of morally-freighted appeals to layered over ones depending on interest alone.²¹

One obvious particular site of that persistence was within the precincts of the guild of international lawyers itself. Koskenniemi is certainly persuasive that the so-called New Haven school of international law made up of Myres S. McDougal

16. See RUTI G. TEITEL, *HUMANITY'S LAW* 17 (2011) ("The rise of humanity-centered law informs a changing conception of global justice that centers on a principle of human security with formal and substantive dimensions.").

17. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 500–09.

18. *Id.* at 466.

19. *Id.*

20. *Id.* at 469.

21. *Id.* (citing HANS MORGENTHAU, *IN DEFENSE OF THE NATIONAL INTEREST: A CRITICAL EXAMINATION OF AMERICAN FOREIGN POLICY* 19 (1951)).

and his coterie provides excellent evidence for his proposition.²² The deformatizing work of the school's "policy-oriented approach," which drove it into apologetics for every last bit of America's Cold War agenda, graphically illustrates the radiance of roughly Schmittian insights and the plausibility of Koskenniemi's thesis.²³ Yet as Koskenniemi himself registers—without initially incorporating it into his larger argument—the New Haven school's trademark was not simply to export legal realism from domestic to international law.²⁴

Early in the story, in fact, McDougal seems to be Schmitt and his opposite. For, in a strange conjunction, McDougal also drew value orientation from his own blatant appeals to naturalistic premises. "In an ironic turn of the tables, the view of the jurist as legal conscience of the civilized world reappeared," Koskenniemi himself comments of the school.²⁵ "McDougal had . . . little doubt about the ability of his moral sensibility to capture people's law in its authenticity."²⁶ One could add that McDougal made the concept of "human dignity" central to his jurisprudence—every bit as central as policy orientation was in the self-conception of the school—far before anyone else in American international law and when scholarship on international human rights remained practically non-existent.²⁷ One might go so far as to say that, within the history of the American profession, what became the foundational organizing moral principle for humanity's law originated within this school. Later, Koskenniemi admits that in justification of the American incursion in the Dominican Republic in 1965, McDougal's relative deformatization connected not so much with a realist calculus of national interest, but a naïve belief in eternal moral norms that sometimes trumps the irritating formalities of law.²⁸ It was precisely in the face of this view that Morgenthau, Schmitt's true disciple in Koskenniemi's account, dissented from America's moralizing representation of its mission.²⁹

Then there were the Manhattanites, who have an uneasy relationship to Koskenniemi's narrative. Sometimes they seem external: Koskenniemi opens and closes his chapter, for example, with an anecdote about Columbia law professor Wolfgang Friedmann's *cri de coeur* on behalf of formalism during the Dominican crisis.³⁰ Yet given that the preeminence of the Manhattanites in the field of international law within American scholarship has long been plain—even in New Haven itself—they clearly need to exemplify any story about the fate of American

22. *Id.* at 474–80.

23. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 480–82.

24. *Id.* at 475–76.

25. *Id.* at 476.

26. *Id.*

27. MOYN, *supra* note 15, at 195, 301 n.34 (citing Myres S. McDougal, *Perspectives for an International Law of Human Dignity*, 53 *PROC. OF THE AM. SOC'Y OF INT'L L.* 107, 107–36 (1959) (further citations omitted)).

28. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 480–83.

29. *Id.*

30. *Id.* at 413–15.

international law too.³¹ It is not clear that the Manhattanites help Koskenniemi's argument, especially as the clock ran down on the Cold War era. Though nowhere near as blatantly naturalistic as their rivals to the north, they maintained their own sort of faith in the moral role and moral sources of what one of them dubbed the "invisible college."³²

With the rise of international relations in a Cold War in which international law played a negligible role, through the 1950s and 1960s, the Manhattanites played a primarily monitory and defensive role, guarding the flame of moral conscience and legal formalism in the relentless geopolitical storm of the era.³³ When Koskenniemi briefly returns to the school later in the chapter, in fact, he observes that Friedmann and others pursued novel agendas as decolonization exploded and the interdependence of states came to feature global calls for development.³⁴ Indeed, had Oscar Schachter garnered Koskenniemi's attention, he could have taken this emphasis on Manhattanite creativity much further because, after Schachter's career in and out of the United Nations, he stood out even against the background established by his colleagues for his early interest in environmental degradation and global inequality.³⁵

But the combination of defensive formalism and creative experimentation was not ultimately to define the school in the long run. Perhaps it is because Koskenniemi's account peters out in the 1960s—before the explosion of human rights—that he emphasizes deformalization so much to the detriment of moralization. Even when it came to the Manhattanites, he says, "[t]he one theme that connected the different strands of U.S. international law scholarship after the realist challenge was its *deformalized* conception of law."³⁶ Yet this argument stands in tension with Koskenniemi's own invocation of the Manhattanite bridling at McDougalite instrumentalism, during the Dominican crisis and beyond when Friedmann worried that he could not tell the difference between American policy and Schmittian *Großraum*. If the thesis of deformalization is plausible relative to the past, in which Victorian moralism and formalism set the standard, one might still reply that the Victorians set such a high bar for formalists that no one in any field of law will ever meet it again. On inspection, American deformalization is only relative and, in any event, one radically different from the one recommended by Schmitt (or Morgenthau), for it is one undertaken not against the belief in a

31. See Harold Hongju Koh, *The Future of Lou Henkin's Human Rights Movement*, 38 COLUM. HUM. RTS. L. REV. 487, 487 (2007) (reporting that, although never formally a student, Henkin is one of Koh's three heroes, alongside his father and the Supreme Court justice for whom he clerked).

32. Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217, 217 (1977).

33. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 477.

34. *Id.*

35. See generally OSCAR SCHACHTER, *SHARING THE WORLD'S RESOURCES* (1977) (demonstrating how Schachter stood out for his early interest in environmental degradation and global inequality).

36. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 478–79.

universal morality but for the sake of it, and often emotionally so.

While the Manhattanites—Friedmann, heroically, aside—largely remained silent through the Vietnam intervention that McDougal and his minions stooped to justify, their belief in America’s moral mission came into its own soon after.³⁷ In the long run, after the 1960s, both Friedmann and Schachter were easily outlasted in significance by Louis Henkin, who provided a massively influential and much repeated path from American foreign affairs law to international human rights law.³⁸ It was not that Henkin absolutely refused to exhibit occasional anxiety about the sort of American exceptionalism that opens the country to accusations of talking the talk of humanity but walking the walk of the hegemon.³⁹ But ultimately, the Manhattan school’s main significance may not have been to “deformalize” international law, but to shelter it long enough that its morally uplifting promise could participate in America’s post-Vietnam turn to human rights. Henkin played the towering role in this regard. From this point on, in the very different circumstances of the later Cold War, the rise of human rights provided American international lawyers grounds to believe that power could advance “universal moralism” through promotion of international law—precisely the myth Schmitt had attempted to shatter.⁴⁰

Whereas Friedmann had come to the United States in midlife and kept more distance on its nationalism before his awful murder in 1972, and whereas Schachter devoted years to work for the U.N. Relief and Rehabilitation Administration and later to the U.N. hierarchy,⁴¹ Henkin began in American constitutional law and worked for the U.S. Department of State, never showing the broader interests of his elders. Far more than Friedmann or Schachter, Henkin attracted large numbers of young American followers, who entered the profession with his assumptions and often have, like him, done stints down to the present day in the legal departments of the U.S. government. In the lasting outlook of all those he influenced—including many of the current most prominent American professors of international law, sometimes working now more specifically on international criminal or human rights law—Henkin’s school has always preferred to depend on a profound belief in America’s moral significance in world history.

More specifically, Henkin and his followers assume a large zone of overlap between “American values” as embodied in (their interpretation of) the country’s constitutional tradition and the more global mission of international human rights law. Their role, as they have seen it, has been to do their best at home—given what

37. In American international law during the Vietnam crisis, it was a renegade McDougalite, Richard Falk, who stood up to his teacher and associates (and initially the near totality of the international law profession, Friedmann aside). See SAMUEL MOYN, *From Antiwar Politics to Antitorture Politics*, in *LAW AND WAR* (Austin Sarat et al. eds.) (2013) (discussing the engagement of U.S. international lawyers in the Vietnam war debate).

38. Lori Fisler Damrosch, *In Memoriam: Louis Henkin*, 105.2 *Am. J. Int’l L.* 287, 287–300 (describing the significance of Henkin’s career).

39. See *id.* at 290–91 (describing Henkin’s work on arms control).

40. SCHMITT, *supra* note 8, at 54.

41. He only joined the Columbia law faculty at age sixty. Damrosch, *supra* note 38, at 289.

they considered an unbeatable hostility to fuller American participation in international regimes, hostility to which they have generally, therefore, deferred—and, after Vietnam, to make sure America stood for its own deepest values abroad.⁴² If they have generally idolized America, then it is because it incarnates moral principles. In short, the evidence of the persistence of an ingrained American moralism in and through international law is simply too great to brush aside—and, if the evidence mounted further after Koskenniemi's account prematurely closes in the middle of the Cold War years, it became entirely undeniable around the end of the Cold War and in our time.

III. LIBERALISM, INTERNATIONALISM, LEGALISM

I thus wonder if it could possibly be accurate to contend, as Koskenniemi does, that “[a]fter the Second World War, American international lawyers largely gave up the ‘utopian’ hopes of their inter-war predecessors.”⁴³ If they incorporated realism, it was in the service of a new project in which it was subordinate to a progressive morality that they sometimes found—like their Victorian predecessors—to be the implicit code for international law, even if they also knew that morality and law sometimes regrettably diverged.⁴⁴ Although American nationalism, with its inveterate moralizing, occasionally trumped the *esprit d'internationalité*, it nevertheless compelled only a modest and episodic farewell to the formalist premise that the law can and should govern men. After all, according to Henkin's immortal slogan, “*almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*”—and the United States could not count as an exception to this generalization.⁴⁵

In the ten years after Koskenniemi's account closes, American international law underwent a massive transformation. It was one that, equally as much as or more than its Cold War realist inflection, set the stage for its post-Cold War role. I refer, of course, to the sudden and eventually massive turn to international human rights law, non-existent or somnolent before, not least in the career of Henkin himself.⁴⁶ Omitting this seemingly massive and significant development, without which there is no judgment possible of the trajectory of American—or, of course, global—international law, Koskenniemi instead does something different.⁴⁷ In the service of his argument about realist deformalization, he leaves history to turn to

42. *Id.* at 295–96 (detailing Henkin's approach to human rights law).

43. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 482 (coming later in the chapter and describing the era as a whole).

44. *Id.*

45. LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (emphasis added). It is rarely noticed that Henkin began this sentence, “[i]t is probably the case that . . .”

46. Moyn, *supra* note 15, 201–07.

47. In fact, I am grateful for this omission since it provided the impulse for my own minor attempt to remedy it, focusing on Henkin's career, in MOYN, *supra* note 15, ch. 5.

the revealing career of Anne-Marie Slaughter, straddling the end of the Cold War, and especially the project to amalgamate international law and international relations on which she embarked.⁴⁸

On its face, Slaughter's early scholarship seems especially powerful evidence for Koskenniemi's proposal. The official intellectual enterprise that would establish her reputation did indeed open the era of new proximity between international law and international relations—two approaches that, whatever the realist turn of international law itself after World War II had for various reasons failed to converge.⁴⁹ “This is an American crusade,” Koskenniemi observes in a revealing turn of phrase, continuing to a withering verdict on it.⁵⁰

By this, I do not mean . . . that nearly all of the relevant literature comes from North America . . . [T]he interdisciplinary agenda itself, together with a deformed concept of law, and enthusiasm about the spread of ‘liberalism,’ constitutes an academic project that cannot but buttress the justification of American empire, as both Schmitt and McDougal well understood.⁵¹

If this occurred, however, it seems much more a matter of McDougal's subordination of realist calculus to moral certainty of America's universal mission, which Schmitt is so helpful in unmasking, than of Schmitt's own hope for a deformed international law with no universalistic pretense. Koskenniemi, while continuing to voice his anxiety about deformed international law, eventually turns to an unmasking of this “American crusade” as a smokescreen for national might that is much more focused on its self-romanticizing moralism than on its realist antiformalism.⁵²

Koskenniemi knows, after all, that Slaughter and other liberals have built their careers and staked their reputations on *providing an alternative* to realism for the sake of a moralized and legalized conception of the uses of power in world affairs.⁵³ More specifically, she sprang from a self-styled current of “liberal internationalism”—a phrase that exploded only in the 1980s, at first as an internal development within international relations.⁵⁴ This idealist—though, in its own self-

48. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 6, at 483–89.

49. See Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 206–07 (1993) (describing the separate development of international law and international relations as a response to the “Realist Challenge”); see also JEFFREY L. DUNOFF & MARK A. POLLACK, INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART 613 (2013) (describing Slaughter Burley's work “as one of the ‘canonical’ calls for interdisciplinary scholarship”); William Burke-White, *International Law and International Relations Theory: The First Twenty Years and Beyond* (forthcoming) (discussing how international law and international relations began to converge following Slaughter's call).

50. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 6, at 483.

51. *Id.* at 483–84.

52. *Id.* at 489–94.

53. *Id.* at 483–89 (describing how some liberals have striven to provide alternatives to realism).

54. See generally Anne-Marie Slaughter Burley, *Liberal International Relations Theory and*

description, non-utopian—school incorporated international law as a central feature of its approach because it provided both a moral impulse and a theory of multilateral “consent” to a body of thought that had previously marginalized normative content and left no room for legal formality.⁵⁵ Having corrected realism in the acid bath of the Vietnam aftermath, American liberal internationalism saw itself unopposed by any serious ideological alternatives, though the thorny problem of precisely how to bring liberal market democracy to the world remained and many specific debates about its implications lay ahead—the problem of humanitarian intervention, for one. Since its post-Vietnam invention, a liberal internationalism summoning Immanuel Kant for the sake of scrubbing Woodrow Wilson’s original legacy clean has never been uncontroversial.

But my point is historical; beyond question, the crystallization of liberal internationalism in the era straddling the end of the Cold War allowed for a moralistic surge—and centrality of international law—simply without precedent in America’s postwar public life, whether in American politics generally or legal circles specifically.⁵⁶ It remains the crucial development for understanding American international law today and the mission of American international lawyers in the academy—and, when Democrats win, the administration—both to civilize and deploy power through an ultimately moral law.⁵⁷ No wonder that on Koskenniemi’s own account, this renaissance of liberal international law—whatever its continuing accommodation of deformalization for the sake of explaining real outcomes and exercising power—sounds “hardly different from the naturalism of the inter-war lawyers or the arguments from the civilized conscience—consciousness of the men of 1873.”⁵⁸ It is not a break from gentle

International Economic Law, 10 AM. U. J. INT’L L. & POL’Y 717, 727–31 (1995) (explaining that “liberal internationalism” is the most popular form of “liberalism” and comparing and contrasting liberalism with realism and institutionalism); Anne-Marie Slaughter Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907, 1914–23 (1992) (offering a history of “liberal internationalism” from Kantian principles to the modern era and examining its role in transnational relations).

55. Anne-Marie Slaughter Burley, *supra* note 49, at 226–38. The history of international relations theory in the United States, now a cottage industry when it comes to the immediate post-World War II years, remains to be written for the era thereafter, notably the age in which Robert Keohane and Joseph Nye dominated and successors emphasizing liberalism like Michael Doyle, John Ikenberry, Andrew Moravcsik, Beth Simmons, etc. rose. This is the age in which “liberal internationalism” came about.

56. See Anne-Marie Slaughter Burley, *Revolution of the Spirit*, 3 HARV. HUM. RTS J. 1, 1–11 (1990) (describing the moralistic surge in international law after the Cold War); Anne-Marie Slaughter Burley, *Toward an Age of Liberal Nations*, 33 HARV. INT’L L.J. 33, 393–405 (1992) (defending liberal internationalism).

57. In a recent book recounting how Great Britain used international law to free slaves, one scholar concludes: “At a moment when U.S. military and economic power is at a peak . . . the United States should consider projecting that power into the future by creating and supporting stable international legal institutions rather than fostering a world order based on power alone.” JENNY S. MARTINEZ, *THE SLAVE TRADE AND THE ORIGINS OF INTERNATIONAL HUMAN RIGHTS LAW* 171 (2012).

58. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 489.

civilizing; in the self-conception of liberal internationalism, it is that very project.

Deeply non-Schmittian in its fervent moralism though liberal internationalism is, Koskenniemi explains its compatibility with Schmitt's intervening revolution in two ways.⁵⁹ One is that morality is just a smokescreen for the key school of Democratic Party foreign policy after the Vietnam crisis, masking a narrow and brutal commitment of American imperial dominion.⁶⁰ The other is that, unlike the Victorian crusading, which justified faith in rules, this new moralism is post-formalist, profoundly dependent on the prior criticism of formalism:

Once the critique of formalism has freed the lawyer from the constraint of rules . . . the lawyer is encouraged to begin a quest for the fabled moral norms that dictate what are rational choices for everyone, in other words, to re-imagine the law's job as having to do with the resolution of the 3,000-year old enigma about objective morality.⁶¹

In this story, although Schmitt stands as a critic of moralizing, he also inadvertently enabled a more dissimulating kind than ever before, perhaps precisely because it has found a way to avoid professed self-subjugation to the rule of law when push comes to shove. The argument is powerful, yet ultimately American liberal internationalism bears too close a resemblance to the very professional hopes that *The Gentle Civilizer of Nations* chronicles to allow even this sophisticated version of Schmittian conquest to make much sense. If so, it may be the moralism, not the post-formalism, of American international law that remains the main historical and political problem.

To review *The Idea That Is America*, Slaughter's call in 2007 to Americans to keep faith with their values, is to make it rather difficult to credit the premise of a cynically instrumental moralism—there is simply too much moralism in it to do so.⁶² Slaughter transports the reader into the poignant—for some, cloying—ambiance of a true believer in a unique power on earth, founded on and standing for universal moral norms.⁶³ After 9/11-induced error, Slaughter says, Americans are called upon once again to rediscover their birthright of moral principles that, after informing the creation of the country and then the global order of post-World War II international law, now risks being forsaken for the pottage of counterterrorist expediency.⁶⁴ Slaughter reports:

America has never fully accepted the traditional game of the international system. From George Washington to Woodrow Wilson to Ronald Reagan, we have claimed to stand apart from old-world power politics and stand for our values instead. Seeking power as an end in itself—even to balance the power of other states—seems, well, un-

59. *Id.* at 490.

60. *Id.* at 491.

61. *Id.* at 493–94.

62. ANNE-MARIE SLAUGHTER, *THE IDEA THAT IS AMERICA: KEEPING FAITH WITH OUR VALUES IN A DANGEROUS WORLD*, at xi (2007).

63. *Id.*

64. *Id.* at xi–xiii.

American.⁶⁵

Further, Slaughter goes on to assert, “America is a place, a country, a people, but also an idea. It is the idea of a nation founded on a set of universal values—self-evident truths—that come not from blood, or soil, or skin color, or wealth—but from the fact of our common humanity.”⁶⁶ She makes her own the magnificent affirmation of Jimmy Carter’s farewell address: “America did not invent human rights. In a very real sense, . . . [h]uman rights invented America.”⁶⁷ As such, deep down, America simply incarnates morality, except when mistakenly led astray; for this reason, even if America’s moral course—banning torture, for example—happens also to be in its national interest, it is critical first of all because of “*who we are*.”⁶⁸ In turn, the idea that is America “ultimately belongs to all the world’s peoples [P]art of what we think makes us distinctively American is that we hold to a set of values that apply around the world.”⁶⁹ And so on.

It is also rather difficult to credit the premise of a purely situational moralism trumped when the need requires by great power exigencies. After all, the *entire point* of Slaughter’s book, as it was for the post-Vietnam birth of contemporary liberal internationalism in the first place, is to “reclaim American virtue.”⁷⁰ Slaughter encodes a memory of that recent origin. From the nadir of burning children with napalm to the triumph of walls falling down, America’s recovery to global moral leadership was nothing short of extraordinary—so much so that the post-9/11 reversion to Cold War realism is more outrageous still.⁷¹ Put differently, Slaughter’s central goal is to provide a riposte to the most recent era of “realist” neglect of, or offense to, international law. “I want to be able to hold my head high again,” Slaughter explains, “from common moral and political purpose with the vast majority of humankind.”⁷² Accordingly, the charge of American lawlessness has a special sting. Slaughter’s is “a country that accepts constraints in order to be able to constrain others, as the essence of the rule of law.”⁷³ It thus seems difficult to claim that liberal internationalism “*denies the value of the formal as such*,” which is Koskeniemi’s marker beyond which Schmittian realism rules.⁷⁴ Though

65. *Id.* at xii.

66. *Id.* at 1.

67. *Id.* at 9 (citing Jimmy Carter, President of the United States, Farewell Address (Jan. 14, 1981)).

68. SLAUGHTER, *supra* note 62, at 138. In a recent reflection on the relevance of her earlier academic work once she entered government service under Barack Obama as director of policy planning, Slaughter cites the president’s frequent usage of the phrase “who we are” as evidence that he rejected realism, for example in abandoning autocrats during the so-called Arab spring. See Anne-Marie Slaughter, *International Law and International Relations Theory: Twenty Years Later*, in DUNOFF & POLLACK, *supra* note 49, at 618.

69. SLAUGHTER, *supra* note 62, at 215, 224.

70. BARBARA J. KEYS, RECLAIMING AMERICAN VIRTUE: THE HUMAN RIGHTS REVOLUTION OF THE 1970S (2014).

71. SLAUGHTER, *supra* note 62, at x–xi.

72. *Id.* at xvi.

73. *Id.* at xviii.

74. KOSKENIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 6, at 501.

the fashionable anti-Americanism of intellectuals wearing black will never relent, Slaughter concludes, the groundswell of understandable anti-Americanism unleashed by George W. Bush's recklessness is serious and prompts a return to basics.⁷⁵ "Patriotic Americans need to understand these critiques and take them to heart if we want our country to be true to its mission."⁷⁶ Slaughter may be deluded, but the priority and continuity in her thought of the selfsame universal moralism that has informed American international law from the beginning seems hard to deny.

IV. THE USES OF ANTIFORMALISM IN THE AGE OF THE MORAL LAW

Koskenniemi's account of American international law after World War II is as thought-provoking as the proposal to which it leads him of a renewed "culture of formalism" is compelling.⁷⁷ Most distressingly, however, a narrative in which Schmitt and his devious henchmen bring antiformalism to American international law leaves out the rather important fact that antiformalism in American international law produced Koskenniemi himself. The last chapter of *The Gentle Civilizer of Nations* should be read not solely or so much as history; it is a history produced by, rather than leading to, the surprising proposal for progressive jurisprudence to reincorporate some modicum of formalism it had just spent decades attacking, or "trashing," in the vocabulary of the critical legal studies movement that sponsored the attack.⁷⁸ Right or wrong as a matter of legal theory, the trouble is that the history supposed to motivate this proposal obscures too much to be persuasive. It omits not simply the enduring American faith in international law's moral credentials, but also the powerful surge of leftist antiformalism in American international law—including Koskenniemi's own intellectual origins.⁷⁹ It seems a failure of self-reference for a story about post-World War II American international law, especially one focused on antiformalism, to omit the very antiformalistic conditions that led to the story in the first place.

For Schmitt was never the sole realist in Western intellectual history or in legal theory. A contemporary renaissance of realism proceeds from the crucial premise that insight into the historicity of norms and into the politics of forms comes in multiple varieties. Niccolò Machiavelli's children certainly include conservatives—and even fascists—like Meinecke and Schmitt, but the contentious family also comprises liberals like Judith Shklar and Bernard Williams as well as leftists from Karl Marx to those contemporaries valiantly bridling against the

75. SLAUGHTER, *supra* note 62, at xvi.

76. *Id.* at xvi.

77. KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 494–502.

78. *Id.* at 413–509.

79. That Koskenniemi, in spite of his European origins and influences, was profoundly shaped by American critical legal studies—and in particular David Kennedy's export of Duncan Kennedy's structuralist version of it to international law—is sufficiently obvious and uncontroversial that no defense of it is needed here. It will nevertheless someday form a crucial chapter of a much needed history of critical legal studies that remains to be written.

hegemony of liberalism in moral philosophy. At the present time, to be sure, realism is spiking in the moral and political philosophy that international legal theory seems perpetually to trail, but then the history of jurisprudence has its own rich plural traditions of realism to revive and extend at any point.⁸⁰

It is not surprising, therefore, that Koskenniemi's own moral call for a "culture of formalism" has been the single most controversial feature of his book—and perhaps understandably given the implausibility of presenting formalism as the sole alternative to Schmittian realism.⁸¹ And it is not as if Koskenniemi's formalism is unreconstructed anyway. Rather, like that of the Americans he indicts, it is path-dependent, presuming the Cold War experience that he worries led to an especially dangerous return to ethics and rules. "Whatever virtue a culture of formalism might have," Koskenniemi acknowledges, "must be seen in historical terms."⁸² What makes formalism a sophisticated professional option to ponder, rather than a naïve article of faith to presume, is that it is a politically inspired recommendation at a moment when deformalization suddenly seems not to serve the left very well. "The way back to a . . . formalism *sans peur et sans reproche* is no longer open," Koskenniemi rightly says.⁸³ "The critique of rules and principles cannot be undone."⁸⁴ But then, the embrace of legal formality by Koskenniemi's

80. RAYMOND GEUSS, PHILOSOPHY AND REAL POLITICS 23–95 (2008); BERNARD WILLIAMS, IN THE BEGINNING WAS THE DEED: REALISM AND MORALISM IN POLITICAL ARGUMENT 1–17 (2005). See William Galston, *Realism in Political Theory*, in 9(4) EUROPEAN JOURNAL OF POLITICAL THEORY 385, 385–411 (Oct. 2010) (evaluating the increased turn towards realism in the works of scholars of political and philosophical thought and comparing it to idealism); see also POLITICAL PHILOSOPHY VERSUS HISTORY? CONTEXTUALISM AND REAL POLITICS IN CONTEMPORARY POLITICAL THOUGHT 106–07 (Jonathan Floyd & Marc Stears, eds., 2011) (offering a series of realist proposals); Bonnie Honig & Marc Stears, *The New Realism*, in POLITICAL PHILOSOPHY VERSUS HISTORY? CONTEXTUALISM AND REAL POLITICS IN CONTEMPORARY POLITICAL THOUGHT, *supra* at 177–205 (analyzing the works of Raymond Geuss and Bernard Williams on realism). For Judith Shklar as a realist, see Katrina Forrester, *Judith Shklar, Bernard Williams, and Political Realism*, 11(3) EUROPEAN JOURNAL OF POLITICAL THEORY 247, 248 (July 2012) (evaluating the particular bent of Judith Shklar's realist thought, "the liberalism of fear," and comparing it with that of John Rawls and Bernard Williams); Andrew Sabl, *History and Reality: Idealist Pathologies and "Harvard School" Remedies*, in POLITICAL PHILOSOPHY VERSUS HISTORY? CONTEXTUALISM AND REAL POLITICS IN CONTEMPORARY POLITICAL THOUGHT, *supra* at 151–76 (analyzing the Harvard school of political realism and justifying its reliance on history); Samuel Moyn, *Judith Shklar versus the International Criminal Court*, 4(3) HUMANITY 473 (Fall 2013) (examining the consequences of Shklar's realism for thinking about current international criminal law).

81. See KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 6, at 494–509; MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 564–617 (Cambridge Univ. Press 2005) (1989) [hereinafter KOSKENNIEMI, FROM APOLOGY TO UTOPIA]. But see, e.g., Paavo Kotiaho, *A Return to Koskenniemi, or the Disconcerting Co-optation of Rupture*, 13 FINNISH YEARBOOK OF INTERNATIONAL LAW 483, 485 (forthcoming) (criticizing these works of Koskenniemi and analyzing whether they are merely wishful thinking).

82. KOSKENNIEMI, FROM APOLOGY TO UTOPIA, *supra* note 81, at 616.

83. KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS, *supra* note 6, at 495.

84. *Id.* at 495–96.

own lights could only follow from a post-formalist and situational ethics.

The unavoidable conclusion is that everybody claims the universal in a war over its true representation, no less Koskenniemi than American liberals. They differ not in the room they make for norms or forms, but in the content of the former and in the deployment of the latter. If a “non-imperialist universality” is the highest aspiration of the critical international lawyer, then there is no way to avoid acknowledging that the heartfelt orientation to the selfsame polestar guides American liberals to the core. (Slaughter entitles the conclusion to her book “Stars to Steer By,” referring to bedrock universal values).⁸⁵ If a culture of formalism is ultimately a post-formalist tool to rein in America, then it is also one which liberal internationalists see as a post-formalist tool to rein in Republicans and advance universal morality.

Turning to Koskenniemi’s honest and moving struggle over the politics of humanity in his always sparkling essays—which register the significance and ambiguity of the very body of law his history of the field omits by ending too early—we can see the dilemma in which the universal is simultaneously utopian lure and dangerous ideology. If there is one consistent theme in Koskenniemi’s approach to human rights in particular, it is the need to keep them distant from politics and law in order to safeguard their critical potential against standing powers. In his first, surprisingly late, main article on the subject, Koskenniemi argued that their essential value is before they are politicized as part of ordinary governmental and legal processes, after which their fictional absolutism too easily becomes one more move in the game of the powerful.⁸⁶ More recently, Koskenniemi bravely insists on the need to keep “utopian” human rights outside the mainstream of governance to shelter them from instrumentalization.⁸⁷ But the response to this sort of claim has to be unforgiving. If that was ever a plausible option, it is way too late—not least considering the centrality of human rights to American liberal internationalism, not to mention European governance, for decades now.

85. See KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS*, *supra* note 6, at 506; SLAUGHTER, *supra* note 62, at 215–33. *But cf.* Samuel Moyn, *Soft Sells: On Liberal Internationalism*, *THE NATION*, Oct. 3, 2011, at 40; SAMUEL MOYN, *HUMAN RIGHTS AND THE USES OF HISTORY* (forthcoming 2014).

86. Martti Koskenniemi, *The Effect of Rights on Political Culture*, in *THE EU AND HUMAN RIGHTS* 99, 99 (Philip Alston ed. 1999) (“[O]nce rights become institutionalized as a central part of political and administrative culture, they lose their transformative effect and are petrified into a legalistic paradigm that marginalizes values or interests”), *reprinted in* MARTTI KOSKENNIEMI, *THE POLITICS OF INTERNATIONAL LAW* 133–152 (2011); *see also* Martti Koskenniemi, *The Preamble of the Universal Declaration of Human Rights*, in *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMON STANDARD OF ACHIEVEMENT* 27, 36 (Gudmundur Alfredsson & Asbjørn Eide eds. 1999) (“[I]n most situations of social regulation, different groups and individuals are able to invoke rights that are formally equal but nevertheless imply different policies.”).

87. See Martti Koskenniemi, *Human Rights Mainstreaming as a Strategy of Institutional Power*, 1(1) *HUMANITY*, 47, 47–58 (2010) (arguing that certain human rights will be instrumentalized if brought within the mainstream of governance).

But while Koskenniemi is rarely willing to implicate human rights in the syndrome, he is also an exceptionally effective critic of the “turn to ethics” and the “new natural law” that post-1989 global politics have made prominent—and surely not in American liberal internationalism alone.⁸⁸ Nor is Koskenniemi’s skepticism solely focused on the huge ascent—notwithstanding *The Gentle Civilizer of Nations*’ attack—of the proposal to connect international law and international relations, whose liberal and conservative versions he tends to blend together.⁸⁹ Instead, it indicts a much broader moralistic tendency, as if American moralism—whatever its exact relation to formalism—has gone global in the ascent of romantic pictures of the salvation of international law provides in a post-ideological world.

In fact, these days it seems as if Schmitt is now a powerful resource in Koskenniemi’s own critical arsenal when it comes to the common view that universal morality is what existing international law advances. In his recent book review of Ruti Teitel’s important *Humanity’s Law*, which celebrates remarkable strides towards a truly universalistic international law that is based on human rights, Koskenniemi is extremely cutting about the ideology of the universal.⁹⁰ “In the last years of the twentieth century, at least partly as a result of the end of the Cold War, the language of universal humanity spread throughout diplomacy and international institutions,” Koskenniemi observes.⁹¹ Yet Koskenniemi states:

[t]he cost of this has been the abstraction of political discourse, which has made invisible the reality of political choices: the way some will win, others lose. The language of the universal also tends to lift the speaker’s values to an altogether exalted position—as the position of “humanity”—suggesting that the political game was over before it even began Reading acts or statements by international institutions as automatically representative of humanity law overlooks the routine of hegemonic politics that leads to their adoption.⁹²

It does not sound as if Koskenniemi—who even goes on to cite the German’s famous maxim about the duplicity of those who parade under the banner of humanity—thinks Schmitt’s uses are altogether exhausted in the age of human rights.⁹³

88. See Martti Koskenniemi, ‘*The Lady Doth Protest Too Much*’: *Kosovo, and the Turn to Ethics in International Law*, 65 MOD. L. REV. 159, 159–75 (2002).

89. See Martti Koskenniemi, *Law, Teleology and International Relations: An Essay in Counterdisciplinarity*, 26 INT’L REL. 3, 3–34 (2012) (arguing that international law is not a substitute for political thought, but rather a practice of argumentation through which political claims can be attacked or defended).

90. Martti Koskenniemi, *Humanity’s Law by Ruti G. Teitel*, 26 ETHICS & INT’L AFF. 395, 396–97 (2012) (book review) (contending that the spread of the language of universal humanity throughout diplomacy and international institutions has come with numerous costs affecting political choices, and also promotes giving the illusion that statements by international institutions reflect humanity law without revealing the politics that led to the adoption of those statements).

91. *Id.* at 395.

92. *Id.* at 395–96.

93. *Id.* at 397.

V. CONCLUSION

Since the end of the Cold War, international law has played an extraordinary role in and about the United States in political debates—sometimes, famously, for the sake of “rationalizing the unthinkable”—but mostly as a continuing normative standard that matters as figures from presidents to professors meditate on the acceptable constraints on America’s continuing global engagement, which few oppose in itself.⁹⁴ In this sense, international law rose in and through the years straddling the end of the Cold War to such a remarkable public presence that, in itself, occasional nostalgia one sometimes hears for its role long ago—and perhaps even in the closing wistfulness of Koskenniemi’s book—fails to be plausible. I therefore side with the Koskenniemi who, moving beyond pining for a lost age of internationalism, interrogates the unprecedented role of universalist law for its ideological and governmental functions, while also looking to save the universal from its current embroilments.

Henry May argued that it was just prior to World War I that a few American elites, absorbing European modernism, lost their innocence, including their innocence about the eternity and certainty of moral norms.⁹⁵ But this insight never got that far, for unsophisticated moralism seems ever present. It is also probably right that the call to “end our innocence” is likewise old—the trope was central, as Jason Stevens has recently shown, to Cold War arguments about the tragic limits of moralism.⁹⁶ From another perspective, the history of the American field illustrates the tenacity of the belief that liberal international law will somehow and someday hew out an alternative to sinful power rather than remain an ideology of it. As long as this remains true, then realism and deformalization—if not in Schmitt’s rendition then some other—are still relevant. Koskenniemi’s writing shows as much.

Yet it would be wrong to end this essay with any sort of critical sentiment. For historians like myself, Koskenniemi’s *The Gentle Civilizer of Nations* transformed several fields, inaugurating a continuing golden age of interest in the history of international law. Thanks to his methodological turn to the study of lawyers, as well as his masterful and unsurpassed account of their peregrinations, what had been a moribund area of scholarship has become among the most exciting—an achievement due entirely to his vision. And if any parts of that history demand interrogation, then it is only in the spirit that Koskenniemi has enacted, and for the sake of a better future he has evoked.

94. See generally DAVID COLE, *THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE* (2009).

95. See MAY, *supra* note 1, at 333–54 (discussing political and cultural changes that took place shortly prior to World War I as well as the American leaders associated with those changes).

96. JASON W. STEVENS, *GOD-FEARING AND FREE: A SPIRITUAL HISTORY OF AMERICA’S COLD WAR* 299–310 (2010).

