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Working Paper Title: The Scandal of Disenchantment in the Rhetoric of Modern International Law by John Haskell

Series #: 2013/#1

INSTITUTE FOR GLOBAL LAW AND POLICY AT HARVARD LAW SCHOOL

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The Scandal of Disenchantment in the Rhetoric of Modern International Law[1]

But certainly for the present age, which prefers the sign to the thing signified, the copy to the original, representation to reality, the appearance to the essence... illusion only is sacred, truth profane. Nay, sacredness is held to be enhanced in proportion as truth decreases and illusion increases, so that the highest degree of illusion comes to be the highest degree of sacredness… - Feuerbach, Preface to the second edition of The Essence of Christianity[2]

The sociologist who chooses to study his own world in its nearest and most familiar aspects should not, as the ethnologist would, domesticate the exotic, but, if I may venture the expression, exoticize the domestic… – Pierre Bourdieu[3]

ABSTRACT

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I. Introduction: The Scandal of Disenchantment

The authority of contemporary international law is grounded on the claim that the discipline is guided by a sentiment of disenchantment, which is closely tied to the self-assurance in its

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[2] Note that quoted in Guy Debord, Society of the Spectacle, 1967

[3] Pierre Bourdeiu

secular agnostic orientation. "[International law] has become undisguisedly a pragmatic human process," writes the late international legal theorist, Thomas Franck, "It is made by men, and it lays no claim to divine origin or eternal validity."[4] This sentiment is said to be the result of two interrelated movements. On the one hand, the mainstream account of this orientation is posited to derive out of a historical process of disenchantment – what often is described under the rubric of the 'secularization thesis' or the various narratives attached to the idea of the 'death of God'. In this account, governance becomes increasingly tied to the material needs and betterment of populations:

> The idea is that once religious and metaphysical beliefs fall away, we are left with ordinary human desires, and these are the basis of our modern humanism. This is the residuum, once the false mythologies are subtracted. In the most radical version of the story, ordinary desire undergoes a reversal in value … Ordinary self-love is no longer sin, but the very basis of healthy human life. The core of the subtraction story consists in this, that we only need to get these perverse and illusory condemnations off our back, and the value of ordinary human desire shines out, in its true nature, as it has always been.[5]

On the other hand, the turn to a secular ideal of governance is claimed to instill a pathos of tolerance, what is often equated with liberal cosmopolitanism and idealizes the conceptual framework of formally equal sovereign nations and individual actors under the rule of law:

> Secularism has played a creative and profound role in achieving a relatively smooth transition from the realities of medieval Europe to

[4] *See* Thomas M. Franck, THE STRUCTURE OF IMPARTIALITY EXAMINING THE RIDDLE OF ONE LAW IN A FRAGMENTED WORLD 62, 68-69 (1968). Here, we can already see implicit characterizations emerging that we will take up in more detail later: international law is not eternal but contingent, and oriented to human needs rather than any divine prerogative. Prof. Franck, who only recently passed away in 2009, was a key figure of the Manhattan sect of international law, and a leading inspiration voice among many more liberal camps in global governance since the 1960s. *See* David Kennedy, *Tom Franck and the Manhattan School*, 35 New York University Journal of International Law and Politics 2, 397-435 (Winter 2003); *see also*, David Kennedy, *The Mystery of Global Governance*, 34 Ohio Northern University Law Review 827-860 (2008); Martti Koskenniemi, *Legal Cosmopolitanism: Tom Franck's Messianic World*, 35 N.Y.U. J. INT'L. & POL. 471 (2003).

[5] *See* Charles Taylor, A SECULAR AGE 253 (2007).

> modern Europe. Its most notable contribution was to promote and institutionalize an ethos of tolerance that greatly pacified the struggle within Christianity between Protestant and Catholic rulers and that opened the way for the rapid growth of science and industry. This secularist record of success was tied to the identity and primacy of the sovereign state as the dominant political actor on a global level.[6]

This secular agnostic orientation is thereby held out as a prerequisite of entrance into the participation of international law on the state level, and legitimacy within the management of global governance:

> [L]iberal ecumenicalism stands guard at the door of law's empire, insisting on a penitent and persistent pluralism. All who pass murmur, Yes, we have no religion. Once inside, secular cosmopolitans recognize one another in declarations of faith, in progress, in the international, in the pragmatic, and worship together in the routines of bureaucratic power… Everywhere there is ideology, politics, passion, but not here, among the reasonable men and women of the enlightenment, graced with infinite time, reason and the modesty of the truly powerful.[7]

In the last few decades, however, this formula has met increasing skepticism within and outside the discipline in at least two important respects. First, in terms of historical accuracy, historians and sociologists since the 1970s have become wary about both the accuracy and viability of the secularization thesis.[8] In contrast to the orthodox narrative of Western disenchantment, research by social historians of religion has increasingly brought to light the Christian tradition's

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[6] *See* Richard Falk, RELIGION AND HUMANE GLOBAL GOVERNANCE 35-36, 55 (2001).

[7] *See* David Kennedy, *Losing Faith in the Secular: Law, Religion, and the Culture of International Governance*, in RELIGION AND INTERNATIONAL LAW (eds. Mark Janis and Carolyn Evans)(1999)(hereafter RELIGION AND INTERNATIONAL LAW). For a brief, but interesting treatment of the term 'secularism' by academics, *see* Hugh McLeod, SECULARISATION IN WESTERN EUROPE, 1848-1914 1-12 (2000); *see also* Talal Asad, FORMATIONS OF THE SECULAR: CHRISTIANITY, ISLAM, MODERNITY 25-65 (2003)(looking at the history of the scholarly interaction with the word 'myth' in understanding the notion of 'secular modernity', especially in relation to Western perspectives concerning Arab populations).

[8] *See e.g.,* McLeod, *supra* note 4 (2000)(putting forward, in my mind, one of the more thorough and persuasive studies on the 'secularization' thesis that blends a self-conscious assessment and organization of the current discipline with historical-sociological explanations that look at England, France and Germany through the lens of culture, beliefs, institutions, notions of identity, popular movements and charismatic reformers).

resilience and mutability to reoccurring social, political and intellectual upheavals.[9] In other words, Christianity may be best understood composed of cyclical patterns of decline and renewal rather than any stable set of essential creeds or rituals.[10] Overly preoccupied with readily quantifiable forms of religion (e.g., church attendance), scholars have too easily missed the continuities with our Christian heritage and thereby set up dichotomies between the forces of secular liberalism and religious fanaticism that are not only inaccurate nowadays, but would be alien to early generations of European philosophers and international jurists alike. Indeed, many of the 'innovations' that are commonly said to mark out the novelty of the early modern era, were in fact self-consciously understood at their time to speak within much older religious traditions of thought.[11] What is perhaps surprisingly, however, is that despite these intellectual discoveries, contemporary international legal scholars have continued by and large to remain obstinately faithful to the traditional storyline.

Second, in addition to challenging the religious agnosticism of the discipline, legal historians and theoreticians have increasingly questioned the neutral political foundations of international legal norms.[12] In a theoretical register, legal scholars such as Susan Marks have demonstrated that

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[9] *See* McLeod, *supra* note 4, at 4-12 (discussing and providing citations to a diversity of approaches that engage the 'secularization' thesis, both its robust and weaker versions, and noting that these versions are often "quite different, and sometimes incompatible").

[10] *See e.g.,* David Hall, *Religion and Secularization in America: A Cultural Approach*, in Sakularisierung (ed. Lehmann); *see also* Lucian Holscher, *Secularization and Urbanization in the 19th century: An Interpretative Model*, in EUROPEAN RELIGION IN THE AGE OF GREAT CITIES 263-288 (ed. McLeod)(1995).

[11] For a useful overview of medieval legal historians dealing with this issue, *see* Harold Berman, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION, Vol. 1, 1-43 (1983); *see also* Wilhelm Grewe, THE EPOCHS OF INTERNATIONAL LAW XII-14, 37-124 **(??).** For more specific studies, see Brian Tierney, THE CRISIS OF CHURCH AND STATE 1050-1300 (1964); Walter Ullmann, A SHORT HISTORY OF THE PAPACY IN THE MIDDLE AGES (1972); Michael Wilks, THE PROBLEM OF SOVEREIGNTY IN THE LATER MIDDLE AGES (1963).

[12] For a typical assertion of the neutral character of liberal democracy, *see* Ernesto Laclau, EMANCIPATION(s) 34-35 (207)("If democracy is possible, it is because the universal has no necessary body and no necessary content…"). In contrast to this assertion, a rich set of critical traditions have re-emerged over the past few decades. While its earliest sources may stem from 20th century Marxist and neo-Marxist critiques of law (e.g., Pashukanis, Wallerstein), the majority of critical scholars look to either post-modern colonial literature and literary theory (e.g., Derrida, Said, Spivak) or the American tradition of Critical Legal Studies (e.g., Kennedy, Unger) and its progeny of theoretical camps attached to various forms of identity politics (e.g., feminist theory, queer theory, race theory, third world approaches to international

beneath the supposed indeterminacy and openness of liberal pluralism lie fixed structural limitations to the opportunities for legal imagination and practice. "[P]ossibilities are framed by circumstances," writes Marks, "While current arrangements can indeed be changed, change unfolds within a context that includes systematic constraints and pressures."[13] For Marks, these systematic coordinates are intimately linked to the modes and relations of production of global governance produced under the sway of financial-industrial capitalism, and which serve to [re]entrench the authority of a small minority of the world's population at the cost of vast and increasing inequality. Through a more historical lens, other scholars such as Nathanial Berman and Antony Anghie have detailed the continuing legacy of imperialism within the concepts and reasoning of international legal thought, especially in relation to the experience of colonialism. "Colonialism is never the other, never the past, it is always with us," explains Berman:

> [I]t has made the world we live in, both in the ex-metropoles and the ex-colonies. Our culture, our economy, our very languages are imbued with the colonial past. With us because trauma of destruction or of guilt never really leaves an individual or a culture. And finally, with us, because colonialism is not only the shame of the West, it's violent, shadow side, but rather it also expressed some of Western culture's highest ideals that even today we cherish. This is the real challenge… The horror and the dream.[14]

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law). In the last few years, led by scholars such as B.S. Chimni, Susan Marks and Akbar Rasulov, a new left-oriented approach to international legal theory appears to be emerging, which blends together post-structuralist and analytic Marxism (e.g., Althusser, Brenner, Foucault), American Legal Realism (e.g., Hale, Llewellyn), political economists (e.g., Fine, Galbraith, Marx, Plenkanov, Veblen), and an eclectic interdisciplinary array of post-liberal and intellectually left scholars (e.g., Badiou, Harvey, Meiville, Zizek). **For some recent examples of this scholarship, *see* Bill Bowring ; *see also* B.S. Chimni; Susan Marx; Rob Knox; Paavo Kotaiho; Umut Ozsu; Akbar Rasulov**

[13] **Marks,**

[14] *See* Nathaniel Berman, *The Alchemy of Empire, or Of Power and Primitivism*, inaugural lecture for the Centre for the study of Colonialism, Empire and International Law (CCEIL) at the School of Oriental and African Studies (SOAS)(transcribed recording of the lecture on file with author, and any errors solely my own fault); *see also* Michela Wrong, *Africa: The White Man's Guilty Burden* (The Statesman, June 12, 2006), *available at* www.newstatesman.com/200606120030 (noting that at a recent conference in Africa on British atrocities the audience were predominantly people "as white as the officials being criticized" who find intellectual enjoyment at no cost in obsessing over how villagers were "humiliated and exploited").

The combination of new historical research, continuing disparities of power within international law reminiscent of early colonial inequalities, and the reemergence of religion as a central theme of global governance in the dissolution of the Cold War (what is coined nowadays as the 'post-secular' era) have in many respects swept away the intellectual underpinnings of the traditional equation of international law with a secular agnostic ethos.[15] The scandal within the profession, however, is that these insights are predominantly marginalized – or more often, simply ignored – in relation to international law's disclaimed relationship to Christianity and its articulated agnostic (liberal) posture of objectivity and tolerance. This paper is an attempt to harness and expand on these existing critiques in order to undermine the continued reliance on disenchantment, especially its relation to a liberal secular sentiment, as an accurate description or beneficial ideal for international law. In contrast to the dominant claims within the discipline, my hypothesis is that an investigation of the relationship between international law and Christianity demonstrates that the discipline is still deeply immersed in the Christian tradition, and that its pluralist agnosticism hides forced choices and biases that narrow the possibilities of a more equitable and vibrant experience of law on the local and global level.

In arguing against the twin claims of secularism and agnosticism (what might be conveniently analogized to the terminology nowadays of 'liberal cosmopolitanism', and which I will argue depend on an attitude of 'disenchantment'), the paper adopts a two part analysis. In the first section, the paper maps out two pivotal moments within mainstream international legal narratives

[15] It is unclear to what extent the secularization thesis lost its status of sociological orthodoxy because of any immanent critiques, or alternatively, due to the political mobilization of evangelicals in the United States, the return of Orthodox Christianity to the Eastern European bloc, and/or the political upheavals throughout a number of Islamic countries, such as Iran. *See* Dwight Billings and Shaunna Scott, *Religion and Political Legitimization*, 20 Annual Review of Sociology 173-176 (1994)(attributing what they see as a "paradigm shift" not only to the rise of the "New Christian Right in the U.S. and the international resurgence of religious activism symbolized by the revolutions in Iran and Nicaragua", but also the trend in the 60s and 70s that witnessed "religious politicization to liberal activism… to legitimate African American civil rights, wommen's rights, gay and lesbian rights and opposition to the war in Vietnam"); *see also* Jonathan Fox, *Religion as an Overlooked Element of International Relations*, International Studies review, Vol. 3, No. 3, 53 (pointing to the rise of "theocratic states like Iran and Afghanistan", as well as the escalation of "religious rebellions… and ethno-religious conflicts", giving a partial list including, Algeria, Sri Lanka, the former Yugoslavia, the Kashmir province of India, and Israel)(2001);

where global governance is claimed to undergo a process of Christian disenchantment, and provides revisionist accounts to destabilize 'secularization' as a useful description of the discipline's trajectory. In the second section, the paper continues its examination of how the 'secularization' thesis functions in international legal argument, but seeks to critically analyze the various claims that such an agnostic approach allows for the profession to be guided by a tolerant pluralism within contemporary scholarship. In conclusion, the paper draws out a few brief reflections about the potential direction of future scholarship regarding the study of Christianity and international law. Adopting a dual strategy of historical recovery and narrative homology, my hope is that Christianity may be reclaimed as a presence within the very heartland of international law, and that it might serve as an unique opportunity to explore how we as a discipline have come to think about whom we are, what we do and the present in which we find ourselves.[16]

II. The History of an Illusion: Debunking the Disenchantment Thesis

The dominant conception within international law situates the discipline as the result, at least in part, of the socio-political disenchantment with Christianity. In its historical function, the invocation of Christianity thereby serves to delineate a series of markers (a memorabilia of moments) where legal thought essentially 'grew' up to become more, on the one hand, pragmatic and real world oriented, and on the other hand, tolerant, non-hierarchical, and attuned to the contingency and subjectivity of experience – what I have chosen in this paper to refer to as 'secular agnosticism' via the process of disenchantment, but which might bear close similarity to a number of common expressions in a more non-religious context, such as liberal cosmopolitanism, radical democracy, and so forth.[17] In this section, the paper will investigate the historical function of

[16] *See* David Kennedy, *A New Stream of International Legal Scholarship,* 7 Wisconsin International Law Journal 1 (1988).
[17] *See e.g.,* Mark Janis, *Religion and the Literature of International Law: Some Standard Texts*, in RELIGION AND INTERNATIONAL LAW, *supra* note 1, at 121-143 (looking at canonical texts to argue that Christianity has slowly

Christianity within international law through a two part approach that analyzes some of the 'key' moments of disenchantment, and then provides a brief revisionist history that might challenge the mainstream 'secularization' hypothesis. The markers of disenchantment, here, are first, the period of nascent modern liberalism symbolized by the Protestant Reformation, the Treaty of Westphalia, and the intellectual production of Hugo Grotius, and second, the advent of modern international law in the 19th century as a professional discourse of governance and knowledge.

II.A. Early Modern Law as the Mask of God

The birth of modern international law is generally claimed to emerge sometime between the 16th and 17th centuries, and is especially characterized by three sea changes. First, the hegemony of the res publica Christiana, symbolized in the twin institutions of the Holy Roman Empire and the Catholic Church, is believed to erode in favor of a political order of formally equal states within Western Europe. Second, in tandem with the shift towards a more flattened political system, the former 'objective hierarchy of normative meaning' gives way increasingly to a personalized experience of faith, and more generally, an appreciation of subjectivity and the necessity of mutual respect for political and spiritual compromise. Third, at the most abstract level, these movements from the Empire and Church to state bureaucracies, and from a pseudo-metaphysical Christian orthodoxy to a more rational, subjective faith, are characterized as part of a gradual secularization of Western European governance and legal thought.[18] This secularization, or disenchantment, thesis

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stopped being a source of international law); *see also*, David Kennedy, *Images of Religion in International Legal Theory*, in RELIGION AND INTERNATIONAL LAW, supra note 1, at 146 (describing the perceived role of religion in international law as "begin[ning] as a social force… transformed into a philosophy and survives only as a set of 'principles', guiding the practice of institutions… a standard bit of enlightenment ideology. International law inherits principles form religion, is born of chaos, is refined by philosophy, tried by war and confirmed as an institutional response to military sacrifice.")

[18] This is almost unimpeachable orthodoxy within even the more critical voices in international legal scholarship. *See e.g.,* Gerry Simpson, GREAT POWERS AND OUTLAW STATES 30 **(?);** *see also* Roberto Unger, LAW IN MODERN SOCIETY: TOWARD A CRITICISM OF SOCIAL THEORY (1976)(dating the origin of the Western concept of an autonomous legal system to the 17th century and connecting it to the rise of positivist theories in law and politics). For similar treatment outside of legal scholarship, *see* Quentin Skinner, THE FOUNDATIONS OF MODERN POLITICAL THOUGHT, vol. II, ix-x (focusing on notions of the political absolutism within territorial delineations and

dominates the histories that international legal scholars tell about the discipline. Here, for instance, is the eminent international legal historian and theorist, Martti Koskenniemi, describing the birth of a liberal democratic rule of law:

> The dissolution of the Pope's and the Emperor's authority was accompanied by a metamorphosis of the feudal community into the State… [T]hrough the individualistic ideas of the Renaissance and the Reformation a new consciousness was sown. What had been thought of as matters of faith were now seen as superstition… subjective rationalizations of power… [T]he Peace of Westphalia (1648) marks the transition from a Christian view of the world as an objective hierarchy of normative meaning to a historically relative consensus… The liberal doctrine of politics … [and the] idea that social order should be based on the subjective consent of individuals … [and] scientific study… emerged between the 16th and 18th centuries as an attempt to escape the anarchical conclusions to which loss of faith in an overriding theological-moral world order otherwise seemed to lead…[19]

These various themes of disenchantment, and its importance as a necessary precursor to a 'liberal doctrine of nation-state politics' that is tolerant and pragmatic, are in fact replete in the literature surrounding the meaning of the Protestant Reformation and the Treaty of Westphalia. "The secular character of the state was an invention of Western Europe that took hold of the Western political imagination in the 17th century," writes Richard Falk:

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the separation of legal and constitutional orders to argue that the modern concept of the state only originated in the 16th century).

[19] *See* Martti Koskenniemi, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 77-78, 94 (2nd edition, 2005). The German legal historian and diplomat, William Grewe recites an earlier version of this same presentation about the birth of the modern order of international order. "[The modern state] first appeared in the 16th century… only shortly before Machiavelli's time as a general term for the political body as such… [First, the] characteristic quality of the modern State is its sovereignty… [I]ndividual states emancipated themselves from traditional community ties rooted in the Holy Roman Empire and Church and stood beside each other as subjects of equal rank and dignity… Second, [is] its rational character… [T]he Reformation and Renaissance contributed to the development of a rational secular concept of the State… based on a rational system of law, a calculable legal system in which ritual religious and superstitious elements do not play a role … handled by rationally acting, legally educated professional officials… Third, the individualism of the modern State's basic structure was … [a] significant quality on which its edifice was built … [whereby] individual members … were emancipated from the communitarian ties which had bound them together in earlier periods. Fourth, the specific linkage of the modern State with the economic system of capitalism was of critical importance." ***See*** **William Grewe, THE EPOCHS OF INTERNATIONAL LAW 167 (English translation, 2000) – cited earlier.**

> Secularism has played a creative and profound role in achieving a relatively smooth transition from the realities of medieval Europe to modern Europe … promot[ing] and institutionaliz[ing] an ethos of tolerance that greatly pacified the struggle within Christianity between Protestant and Catholic rulers and that opened the way for … science and industry.

The formulation that links religious disenchantment with liberal tolerance, and equates this lineage with the legal concept of the nation-state, is also prevalent in legal studies of the 'founders' of international law, perhaps none more famous that Hugo Grotius. In a classic evaluation of Grotius' intellectual legacy, the late Hersh Lauterpacht writes:

> [Let us] explain the significance … of the Grotian tradition in the history of the law of nations. He secularized the law of nature. He gave it added authority and dignity by making it an integral part of the exposition of a system of law which became essential to civilized life… distinguished not only by the fact of its recognition of a source of law different from and, in proper cases, superior to the will of sovereign states…. [but] largely based on and deduced form the nature of man as a being intrinsically moved by a desire for social life, endowed with an ample measure of goodness, altruism, and morality, and capable of acting on general principles of learning from experience… [desiring] peaceful and organized life according to the measure of his intelligence…[20]

The difficulty with the liberal disenchantment, or secularization, thesis within international legal scholarship is that it is not accurate when placed against the historical record – what David Kennedy has coined, the 'history of an illusion' – and consequently leads to distortions of the

[20] *See* Hersh Lauterpacht, *The Grotian Tradition in International Law,* 23 British Yearbook of International Law 1, 24-25 (1946). Resurrecting the Grotian tradition of Hersh Lauterpacht, Martti Koskenniemi has characterized it as "a morality of attitude … of seriousness… a morality of tolerance and of personal and professional virtue… a morality of scales, controlled by the attempt to balance right with duty and freedom with reason… a morality of control and self control, for which the greatest desire is the end of desire… [taking] for granted the intrinsic rationality of a morality of sweet reasonableness, the non-metaphysical doctrine of the golden middle." *See* Martti Koskenniemi, *Lauterpacht: The Victorian Tradition in International Law*, 8 European Journal of International Law 215 (1997); s*ee also* Renee Jeffery, *Hersh Lauterpacht, the Realist Challenge and the Grotian Tradition in 20th Century International Relations*, European Journal of International Relations, Vol. 12, No. 2, 223-250 (2006). 92

distribution stakes of existing liberal democratic models of governance and apologetically reifies traditional legal doctrines from innovation. First, the purported shift from a univocal hegemonic Christianity to a more plural, democratic system of statecraft ignores the perpetual struggles for authority from a wide array of actors: between various theological camps within the Church,[21] between the Church and the Emperor,[22] between the Emperor and both city-states and aristocracies,[23] and so forth. In regards to internal divisions of the Church, for instance, the Papacy and Franciscan order heatedly debated the issue of evangelical poverty for more than two centuries, and from the 12th century onward, the Papacy faced increasing challenges from lay communities within Christianity on the basis of the 'corpus mysticum', with believers such as John of Salisbury going so far as to decry Benedict XII a heretical tyrant that justified "all men … to be prosecutors … [since] tyranny … is not merely a public crime."[24] Similarly, the Emperor and the Papacy regularly jockeyed for authority; while a string of Popes from Gregory VII to Innocent IV would claim 'universal' jurisdiction over secular authorities, 21 of the 25 Popes by the mid-11th century were elected directly by the Emperor and, throughout the following centuries, ecclesiastic orders were reliant upon the protection and maintenance from local aristocracies.[25] The consolidation of the Holy Roman Empire is likewise overstated. The Empire was often divided in rulership (e.g., between Charlemagne's sons), lacked a capital city or bureaucratic arm of permanent officials, found taxation difficult to enforce whereby the Emperor remained largely dependent on revenues from his own estates, and found itself increasingly bound by the discretion of local aristocracy and city states.[26] On the one hand, the rise of manufacturing and long distance trade in the 11th to 13th centuries spawned a multiplication of guilds that formed cities making up more than 10% of the

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population of Western Europe, and which increasingly assumed the power to conclude treaties between themselves, make independent alliances with foreign sovereigns, and raise their own armies and declare war – all without the permission of the Emperor (or the Pope).[27] On the other hand, by the 14th century, the principalities in what is today Germany, exercised extensive control over the Emperor, reserving the right to elect the Emperor's successors (e.g., Golden Bull of 1356), as well as appoint and administer the judges and notaries of the Imperial Court.[28] There was, in other words, simply no 'objective hierarchy of normative meaning'; the ideas of faith and politics were constantly up for grabs and fought over throughout the medieval and early modern period within Western Europe.

Second, when looking closely at the Christian doctrine in relation to legal thought, the development of early centuries of modern political liberalism was the product of a reinvigorated Christian faith, rather than any gradual disavowal, and was by no means espousing an ethos of general tolerance. A brief investigation of legal-theological doctrine in the Protestant Reformation and the works of Hugo Grotius are useful to illustrate how modern legal scholars generally mistake theological innovation for decline. In regards to the Protestant Reformation, the typical approach is to highlight the Lutheran turn from the Church to the laity, institutionalized dogma to subjective (or personalized) faith, further institutional separation of political and religious spheres, and the focus now on the vernacular and by extension, the emphasis on actual experiences of living faithfully in the world. If we recall Koskenniemi's description of the Reformation, it was the birth of a 'new consciousness', based on 'individualistic ideas', 'subjectivist consent', and the "loss of faith in an overriding theological-moral world order". In fact, the Protestant Reformation was in many respects not a breaking away from its Catholic origins, nor a turn towards liberal tolerance, and definitely did not instigate a retreat from Christianity. On the one hand, though in their early years Martin Luther

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and his colleagues would enter into direct conflict with the Papacy, they increasingly returned to Catholic doctrines and more rigid enforcement of belief as they gained authority. "[T]here is much that is Christian and good under the papacy; indeed, everything that is Christian and good is to be found there and has come to us from this source," concedes Luther by the 1530s, "I contend that in the papacy there is true Christianity, even the right kind of Christianity, and many great and devoted saints." Indeed, this reconciliation with Catholicism was largely in response to disdain towards the very laity that Luther had provoked in his rise to power. "The common people … have no knowledge whatever of Christian doctrine, and alas, many pastors are altogether incapable and incompetent to teach," laments Luther, "They live like dumb brutes and irrational hogs; and … they have nicely learned to abuse all liberty like experts." For Luther and his cohorts, political or spiritual deviation would no longer be tolerated. Condoning the Protestant principalities' consolidated army, the Swabian League, to crush 'peasant rebellion', Luther explained the more than 100,000 casualties in 1526, "[S]tern, hard civil rule is necessary in the world … The civil sword shall and must be red and bloody." The Protestant Reformation, in this respect, was neither a significant break from its Catholic heritage, nor an example of an ecumenical, or liberal, attitude towards politico-legal governance.

On the other hand, the Protestant Reformers – particularly the jurist, Philip Melanchthon - implemented a series of important theological innovations, which were designed to make Christian faith fully immanent in the daily affairs of not only the laity, but law and politics at large. Drawing upon the Catholic idea of the 'ecclesia' (an area situated between heaven and earth, which was mimicked in religious institutions connecting the living and dead in the body of Christ), Melanchthon stressed that not only was the laity the new Church, but that the social institutions and laws of the political order – the 'rational, positive law' - were the very 'masks of God'. As God was now 'hidden' in the earthly kingdom, speaking through 'masks', the law (for Melanchthon and

Luther) was a privileged "schoolmaster to bring us unto Christ". The state and its officials, therefore, had the divine responsibility (much like priests) to "transform the general principles of natural law into detailed rules of positive law' that would be judged to the extent that it would meet the "practical considerations of social utility and the common good". Rather than equating the turn from religious to political authorities with disenchantment, in other words, the legal innovations of Protestant Reformers aspired to make Christianity fully immanent in what had before remained largely 'secular' institutions.

This general confusion among legal scholars about legal innovation and liberal politics regarding Christianity can also be demonstrated in relation to the literature of Hugo Grotius. In relation to the typical claim that Grotius helped to 'secularize' the law of nations, scholars emphasize his early statement from De Iure Belli ac Pacis:

> What we have been saying would have a degree of validity even if we should concede that which cannot be conceded without the utmost wickedness, that there is no God, or that the affairs of men are of no concern to him…[29]

Recent scholarship, however, has undermined secular conclusion to this passage. First, the very next line seems to refute any agnostic reading. "The very opposite of this view [that there is no God, or that the affairs of men are of no concern to Him] has been implanted in us," writes Grotius, "partly by reason, partly by unbroken tradition, and confirmed by many proofs as well as by miracles attested by all ages [and] … it follows that we must without exception render obedience to God as our Creator."[30] In response, scholars such as Richard Tuck, have attempted to argue that these affirmations of religiousity are merely strategies to win over Christian populations and their leaders, and that the key to Grotius' textual argument is that God is no longer necessary to the logic of law.

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What makes this reading tempting is that as an Arminian Christian, Grotius shied away from sectarian doctrines that might upset relationships between Dutch Protestants and Spanish-Portuguese Catholics, thereby adopting a 'minimalist' faith that held to only a few central tenets: there is a single God that actually cares for all humanity and sits unseen in judgment, that Jesus is the resurrected Song of God, and that the faithful will enjoy everlasting life after death while the wicked will be punished.[31] But to interpret the text through a secular lens requires the reader maintain a willful ignorance to the tradition of Grotius' argument, as well as the larger context of his own literary production. For example, his famous quote concerning how the law of nations would function 'even without God' was itself a common technique of argument for Catholic jurist-theologians, such as Suarez. '[E]ven if God did not exist, or if He did not make use of reason, or if He did not judge of things correctly, nevertheless, if the same dictates of right reason dwelt within man, constantly assuring him," explains Suarez, "[F]or example[,] that lying is evil, those dictates would still have the same legal character which they actually possess because they would constitute a law pointing out that evil exists intrinsically in the object."[32] What the disenchantment thesis misses, therefore, is that these arguments were part of tradition of Christian apologetics in relation to political legitimacy and carried within its logic particular concerns and conceptions of identity and the possibilities and limits of behavior, which derived out of the Christian imagination.

Much like the Protestant Reformation and Treaty of Westphalia, the general trend in legal history and theory towards Grotius' writings is to grossly overstate the 'liberalism' attached to the supposed disenchantment of faith. For instance, unlike many scholars that discount the importance of Grotius' faith, the legal historian Mark Janis nevertheless characterizes this faith as a modernist spirit of liberal tolerance:

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> Grotius unashamedly brought the Bible to the law of nations… not to exclude other religious groups … but to show that his religion, a liberal and universal faith, proved that the law of nations was meant to include all peoples … a more forgiving faith, but a faith nonetheless, that could tolerate religious diversity … among the nations.[33]

A liberal reading of Grotius' writing is bolstered by the fact that he was in some regards original in reconciling the nominalist tradition of Occam and Duns Scotus (arguing that the normative order originates in the will rather than some natural order) with the Thomist tradition espoused by late medieval scholastics (that the law of nature was absolutely perfect and did not allow for even divine derogation) by situating the normative order int eh willed actions of sovereign, but the will itself now constrained to a procedural conception of reason and consent. The problem with falling into the seduction of thinking this proves Grotius was some sort of 'pioneer' of liberalism is two-fold. On the one hand, Grotius' polemic for the freedom of society to choose its form of government was conditioned upon the understanding that society was premised on 'rational order', which was almost exclusively reserved to the customs, institutions and practice of Christian States (e.g., where the 'masks' of God were thought to flourish). Thus, for instance, if a foreign territory did not structure land distribution around recognizable forms of industry and private property, Grotius argued the legal, if not moral, right of a conquering power to seize and use that land. On the other hand, whatever truth there was to the idea that Grotius inaugurated some minimal liberalism did not extend to the religious and political systems of 'heathenism', Islam, or Judaism. For instance, regarding Jewish populations, Grotius would argue in 'The Truth of the Christian Religion':

> [The Jews are] a people of so obstinate a disposition [that] … they have been driven out of their country… continued vagabonds and

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> despised [with] no signs of their future return; their teachers, as if they were inspired with a spirit of giddiness, have sunk into low fables and ridiculous opinions, with which the books of the Talmud abound … [They] are not heard [by God] … [and] we must of necessity conclude one of these two things, that either that covenant made by Moses is entirely dissolved, or that the whole body of the Jews are guity of some grievous sin, which has continued fo so many ages… that that sin is the despising the Messiah…[34]

Towards Muslim populations, Grotius was even harsher in his judgment. The "Mehometan Religion", argues Grotius:

> was bred in arms, breathes nothing else; and is propagated by such means only … many times very unjust[ly] … against a people who no ways disturbed them, nor were distinguished for any injury they had done; so that they could have no pretence for their arms, but religion, which is the most prophane thing that can be, for there is no worship of God, but such as proceeds from a willing mind … [They are] robber[s], and always effeminate … men void of humanity and piety [and] … plainly calculated for bloodshed, delight much in ceremonies … without allowing liberty to inquire into it…[35]

The lesson here, I believe, is that legal scholars have often adopted an overly narrow reading of the history and texts from the medieval and early modern period in order to maintain the liberal disenchantment thesis about the character and trajectory of the profession.[36] To do so, however, comes at significant costs. At the most basic level, it does a disservice to the aspirations of legal history to distill more precise accounts of the past, and thereby impedes possibility of meaningful self-reflection of scholars and policy makers engaged in the field of international law. Perhaps more concerning, however, is that disenchantment narratives can result in overly apologetic or utopian perceptions about the legal concepts and techniques within contemporary global governance. This is essentially Peter Danchin's concern over the scholarly treatment of the 'nation-state' - which will

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36 David Kennedy quote about standing in front of violence…

become central in the next stage of our analysis of 19th century secularization narratives - in the histories of international law:

> [In this sense, the] mainstream account of the origins of Western nationalism in Enlightenment terms of rights, equality and tolerance has served to obscure the historically exclusionary origins of the Western liberal state… reinforce[ing] a false distinction between Western civil nationalism and … non-Western ethnic nationalism… The origins of Western nationalism lie not in a civic beginning in an era of liberal democracy, but rather in a series of illiberal exclusions … gradually forgotten and transposed into a more secular, objective [legal order], creating the illusion of a commitment to inclusive universal values and toleration of diverse ways of life.[37]

II.B. 19th Century International Legal Theology[38]

The mainstream account of international law in the 19th century is driven by the motif of secularization whereby ecclesiastic sources of authority and natural law jurisprudence give way to a rule bound state structure (most often labeled, positivism), the discipline transitions from an armchair intellectualism to become an academic discipline of knowledge production and professional expertise, and the theological underpinnings are replaced by the focus on the material development and wellbeing of state populations – usually expressed in general terms as a shift from the 'res publica Christiana' to 'civilization'. The emphasis on civilization, of course, was limited to Western European forms of governance, but its formalist preoccupation with cultures and statecraft thereby is remembered to lay the foundations for what Martti Koskenniemi describes as a 'gentle civilizing spirit' that would ultimately allow even dispossessed populations the opportunity for claims to recognition under international law through the vehicle of either ethnic minority rights or national

[37] *See* Peter Danchin, *The Emergence and Structure of Religious freedom in International Law Reconsidered*, Journal of Law and Religion, Vol. XXIII, Legal Studies Research Paper, No. 2007-44 (2007)(offering one of the more interesting articles on the connection between international law and Christianity in the context of the liberal political tradition).

[38] For a significant extended conversation of this general theme, *see* John D. Haskell, *Divine Immanence: The Evangelical Foundations of Modern Anglo-American Approaches to International Law*, Chinese Journal of International Law 2012.

self-determination and break down the formerly entrenched hierarchies of European politico-legal entitlement:

> The decline of the res publicum Europaeum into a universal world law lacking distinctions no longer could be stopped. The dissolution into general universality simultaneously selled the destruction of the traditional global order of the earth. It was replaced by an empty normativism of allegedly recognized rules, which, for a few decades, obscured consciousness of the fact that a concrete order of previously recognized powers had been destroyed and that a new one had not yet been found.[39]

In this narrative, though international lawyers in the 19th century remained tied to imperialist tendencies, the profession itself underwent a significant shift to the extent that privileged cultures and forms of legal governance lost their divine sanction. Terms such as 'culture' and 'national self-determination' thereby come to be perceived as relatively unqualified emancipatory techniques of international law – on the one hand, liberated responses to the auspices of imperialism; on the other hand, non-religious descriptions and objectives for contemporary global governance. In terms of this transition within the 19th century, the legal historian, Gerrit Gong, solicits the classic statement of religious disenchantment in international law:

> This shift from overtly religious (Christian) and culturally or geographically limited (European) definitions of international law, to one based more on secular and universal 'civilization' is … clearly documented in the writings of the 19th century scholars.[40]

The turn to civilization, however, was less a retreat from Christian faith than a development of the Lutheran ideal of divine immanence in the legal institutions and norms of the chosen people, or societies – what we saw Protestant Reformation jurists, such as Melanchthon, had theorized as

[39] Carl Schmitt 227 Nomos

[40]

the 'masks of God', but now taken to new extremes. In fact, contrary to dominant claims as to the secularization of the period, the majority of first generation international lawyers in the 19th century were part of the liberal Protestant cultural elite, and self-consciously crafted legal concepts, such as the 'nation' and 'state', from late 18th and early 19th century theological innovations – what today is remembered by social historians in terms of religion, as 'new light' theology, or in socio-political terms, the 'Protestant crusade'.[41] In this section, the paper lays out the liberal Protestant influence on the development of the legal concept of the 'nation-state' to challenge the dominant 'secularization' thesis, and in doing so, provide some brief biographical information about the key international jurists in relation to their Christian affiliations. I begin by outlining the key components of liberal Protestant doctrine, and then trace its influence within international legal scholarship to demonstrate the evangelical character of an era too often labeled 'positivism' and characterized by its disenchantment with Christian faith.

The 'New Light' movement within the ideas and practice of Anglo-American Protestant society developed from a variety of internal and external conditions in the 19th century: escalating politico-social unrest from tensions with the rise of the industrialized urban workers, new insights from the sciences that pointed to a far vaster and older world (e.g., geology), methodological innovations in reading texts (e.g., German higher criticism) and the institutionalization of new academic disciplines (e.g., history), unprecedented engagement with colonialized populations and the subsequent exposure to sophisticated but foreign systems of belief and governance (e.g., China), as well as the increasing emphasis within Christianity on experiential rather than cognitive faith (e.g., the Great Awakening) and the doctrine of post-millennialism that posited humanity was called upon to bring forth the Kingdom of Heaven on earth (thereby instilling new conceptions of what time

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and progress meant, e.g., the new emphasis on perfectability, development, and so forth).[42] At the center of liberal Protestant theology was the sense that Christianity was 'growing up', and having entered into a new age, was on the one hand, given a new divine calling (e.g., to remake the world), and on the other hand, that this calling was grounded on the fact that God was immanent in humanity – on the sphere of the personal (e.g., God spoke to the 'heart' of the believer), institutional (e.g., God spoke through the laws and political institutions), and social (e.g., God spoke to the consciousness of the laity).[43] "The Christian conception of life and its supreme good," writes the prominent New Light theologian, Newman Smyth:

> … rests on this fundamental fact which Jesus announced, that the kingdom of god is not something wholly future, or remote from our present participation in it, but it is a real power and an actual reign of God already begun on earth… a kingdom of heaven into which we may now enter, and which offers through citizenship in it some immediate possession of the highest good and present part in the eternal life.[44]

Drawing upon European Pietism and the American experience with Jonathan Edward's Great Awakening, the consciousness, or sentiment, of the individual was vested with divine import – what mattered now was less obedience to an orthodox set of religious dictates on public display, than the newly privatized activity of the heart. "The highest idea which man can frame is that of the unity of divinity with humanity," the Presbyterian theologian Henry Smith explains, "and with such a marvelous adaptation to human sympathies ... [God offered] the very means of drawing us into the hallowed sphere of the glories of divinity."[45] The consciousness of the believer, however, was not simply inherited; it required the individual to become attuned to God's voice in the Biblical text, but

[42] Footnote with all the social histories of religion here
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perhaps more important to the daily walk of faith, in their legal institutions and social norms. These were a select few, but the calling was open to all people, to become what Matthew Arnold in his 1869 book, Culture and Anarchy, would term 'the apostles of order':

> This is the social ideal … this large class of gentlemen in the professions, the services, literature, politics, from business also – this large class not of the nobility, but with the accomplishments and tastes of an upper class … something peculiar to England … the kingdom of God is within you, and culture, in like manner, places human perfection in an internal condition … as distinguished from our animality … to divest the best knowledge of all that is harsh, uncouth, difficult, astract, exclusive; to humanize it, to make it efficient outside the clique of the cultivated and the learned, yet still remaining the best knowledge and thought of the time, and a true source, therefore, of sweetness and light … [T]he men of culture are the true apostles … mak[ing[reason and the will of God prevail … accounc[ing] the revolution of the times.

Thus, on the one hand, following the Lutheran theology of the 'masks of God', the liberal Protestant cultural elite would be required to establish new methods and focuses of inquiry to translate what the Protestant divine, William Channing, would call the 'essential' from the 'accidental', "the best knowledge and thought of the time" found within the production of "culture". The establishment of academic disciplines centered on the dynamics of the population and its institutional arrangements, along with acceptance and support of scientific innovation to discover the interworking of the 'natural' world, was central to this enterprise, or crusade. "We have been talking for a long time about natural theology," writes New Light theologian Octavius Frothingham, "it is time to begin to talk about social theology … Social science is the best modern teacher of theology."[46]

On the other hand, beyond reception of divine truth, Protestants followed after the Catholic doctrine of the 'ecclesia', understood as a space of "indivisible unity covering every aspect of man's

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political and social being" that called for the faithful to construct the "societal whole [as an] … earthly expression of a heavenly pattern" – what became known within 19th century theology as 'post-millennialism'. To return to Arnold, the 'apostles of order' were charged with "divest[ing] the best knowledge", "humaniz[ing]" the "harsh [and] uncouth", and "mak[ing] reason and the will of God prevail". This was not, in other words, simply a matter of ethical or religious re-commitment, but a calling to refashion the entire architecture of Western experience, from its laws to its cultural habits in "the professions, the services, literature, politics, [and] business" – and for our purposes, in terms of the 'nation-state' and its legal arrangements. "[T]he beginnings of a great political movement," writes the liberal Protestant theologian George Herron, "[has begun], inspired for the purpose of translating the righteousness of Christ into the legislation of the nation, and the making of his mind the national political sense. Evangelical Christianity would not be advanced through the orthodoxy of dogma, but instead, "to grow and spread both as a life and as a civilization", the "nation itself [the] bearer of civilizaition … an agency of the subjugation of the world to Christ". It was in this spirit, for instance, that the American missionary and amateur diplomat to the Chinese, W.A.P. Martin, justified the translation of the international legal texts by Johann Caspar Bluntschli and Henry Wheaton as direct missionary work: "I was led to undertake it … providentially I doubt not, as a work which might bring this atheistic government to the recognition of God and his eternal justice and perhaps impart to them something of the Spirit of Christianity."[47] In short, the very conceptual framework of the laws were both an essential source of divine truth, and an evangelical tool for - even unconsciously – bringing heathen populations at home and abroad to a true understanding of living righteously as a Christian. As the social historian Mark Neely explains:

> [I]nstitutions were crucial precisely because of the importance of intuition … [S]piritual truths [could lead] an individual [to] become a

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> Christian literally without knowing it; he could enter the church even before he understood the doctrine … [The] institutions of family, church and civil society – were subtle but crucial … [and] could impress themselves upon an individual in infancy and childhood before he was capable of rational understanding … Institutions shaped the individual before he could decide to shape himself one way or another.[48]

The first generation of international jurists that professionalized the discipline as a source of knowledge production and politico-legal management of local and global affairs were predominantly members of this liberal Protestant cultural elite. In America, for instance, the author of the first modern codes of war and the 'father' of the Institute of International Law, Francis Lieber, would be remembered by his colleagues and students as a 'partisan' for Christianity (a devout Episcopalian) who regularly entered into debates concerning religious education in the school system, fought for the importance of Protestant values in legislative reform on both the national and international level, and was active in a variety of social movements attached to what historians now call, the Protestant Crusade. Likewise, Theodore Woolsey, the President of Yale College, and a frequent author and lecturer on international law from the 1850s to 1880s, was the direct descendent of Jonathan Edwards, and graduating from Princeton with a degree in theology, would also write a collected volume of sermons and undertook the leadership on the American Commission for the Authorized Version of the New Testament. These men were in regular personal correspondence and collaborated regularly with Protestant colleagues in the United Kingdom and Europe. For example, Thomas Lawrence was not only an accomplished international legal scholar – winning the Whewell Scholarship at the University of Cambridge (where he also would later lecture, in addition to positions at Bristol University, the University of Chicago and the Royal Naval War College), a full member of the Institute of International Law, and the author of monographs on the principles of international law and the neutralization of the Suez Canal – but also a prominent religious figure,

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serving as rector of Upton Lovel and the Honorary Canon of Salisbury Cathedral, the Preberdal Stall of Wilsford and Wooford, and frequently writing and delivering sermons. In the memoirs following his death, Lawrence would be remembered for woring to demonstrate how the fundamentals of international relations were not merely reconciled, ut based on the principles of Christian ethics. Similarly, in Prussia, the close friend of Lieber and a key member and theorist to the Institute of International Law, Johann Caspar Bluntschli, would lead the Protestantverein movement (the collective Protestant effort to drive Catholicism out of German provinces) and was a devout follower of the Protestant mystic, Friedrich Rohmer, to the extent that on his deathbed, he claimed that his greatest accomplishment was in translating divine truth into the laws and political thought of his time. As the legal historian, Arthur Nussbaum notes in passing, the international law of the 19th century was in fact, a "Protestant science".

As liberal Protestants, international jurists in the 19th century shared a serious commitment to the theological tenets of their faith, and sought to advance this tradition into the internal logic and architecture of the emerging discipline of international law. "Christianity explains us to ourselves," explained the prominent Scottish jurist and member of the Institute of International Law, James Lorimer, "and the law which it teaches us, in being divine, is not on that account the less, but the more, human law … [I]t is Christianity alone which [is] opening a new avenue to the knowledge of God's will."[49] In particular, the 'fathers' of modern international law sought to follow their theological peers in the belief that the will of God was housed in legal institutions (e.g., the 'state', the 'laws') and the consciousness of the laity (e.g., the 'society', the 'nation'), and that it was their responsibility to deduce this will of God and to translate it into practical norms of governance on the local and global domain. "The laws of our social life … if they really possess the characteristic of law at all, are … not of our own making … [but] made for us by God; and our duty is to discover

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them," explains Lorimer, "[T]he science of society is pre-eminently our science … As an apostle of order, [the jurist] must accept the inevitable, trace out and define the laws of its action in detail … [and apply them] to the circumstances in which we are called to act."[50]

Since it was primarily societies and states within the Anglo-American and Western European domain that the Protestant tradition was dominant, it followed that these populations and their leadership were especially charged with advancing the message of God to humanity in the modern era. Jurists looked specifically to symbolic figures in Christianity for guidance in terms of who would individually count as an 'apostle of order'. Addressing a graduating class at his university, Lieber would state:

> I am convinced that it [is] only possible to conceive [of] character in its fullness … by the aid of Christianity and believe – I say it with bowing reverence – that in Him to whom we look for the model of every perfection we also find the perfect type of character…. the character of the gentleman… essentially English … the phoenix of the human species … [possessing the] most elevated and intense sentiment of personal dignity, a more religious respect for the divine part which the Almighty has vouchsafed to men… [and which] passes the bounds of states and tongues … a passport acknowleged through the wide domain of civilization … extend[ing] over entire hemispheres.[51]

Similarly, drawing from Coleridge's polemics from the 1830s, the famous British international jurist John Westlake, would hold out the Anglican clergyman as the standard of civilization abroad. "Whenever the Englishman colonizes," he writes,

> … the chief link which in the early stages maintains his connection with a more developed society is to be found in the English clergyman … the residence of a class combining leisure with literary

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> cultivation … [that which] Coleridge was still inclined to see in him [as] the representative of civilization.[52]

For Westlake and his colleagues, the 'apostles of order' would be cultivated in the best habits and knowledge of their era, but also have a keen sense of discipline and business acumen. In Lieber's work, the ideal Christ figure as a gentleman was personified in the British military regiment,[53] and it was specifically the "Anglican tribe which carries … liberal institutions and a common law" that was specifically charged with the "great lot … [a] proud and scared task… to rear and spread civil liberty over … every part of the earth", and in particular."[54] For Westlake, a question of civilization was ultimately whether a non-white race "furnishes a government" that allows the businessman to "carry on the complex life to which they have been accustomed", such as mining ore, developing commerce, play sport and satisfy curiosity.[55] Woolsey would summarize many of these traits in a sermon describing the character of the historical Christ as a role model for the modern 'apostle'. "Conceiving of him then," he states, "[leads us to discern] a spirit of daily industry … a spirit of patience, and the true workman, he who is neither slack from indolence … [but] regular, moderate [and] even in his efforts."[56]

To fail in this task would not simply lead to lose grasp of spiritual salvation, but in a more immediate register would spell the end of modern humanity:

> [R]eligion is a practical thing … its highest aim ever must be to be taken up into the lives of men, and hence to interweave itself with all actions and all history, it must exhibit life, or truth conviction and principles in action, before our eyes … The Christian Church of the present, with all its faults and weakenesses, is the salt and the light of the world … [and] human progress must cease, and civilization,

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> wherever the world shall throw away its faith in revealed religion … [and[the civilizing power of the Gospel.[57]

As apostles of order with high stakes, the international jurists thereby sought with deliberate passion to calibrate the discipline to the advancement of the Kingdom of Heaven on earth. In terms of legal institutions as a pedagogical tool for spiritual and material progress - the 'masks of God' - Francis Lieber would justify the overlapping emphasis on faith and law in his work, writing:

> [T]he Christian religion is interwoven with all the institutions which surround us and in which we have our social being … The Christian religion has found its way into a thousand laws, and has generated a thousand others. It can be no more excluded than the common law, or our language.

Likewise, international legal scholars would look to the social consciousness, or spirit, of the state – the 'nation – to guide politico-legal governance. "[T]he organ and regulator …[of] the Law of Nations]," writes the British international jurists, Travers Twiss, "is public opinion … result[ing] form the moral order of the universe [and] … constantly tend[ing] to unite the whole family of mankind into one great harmonious society."[58] This moral universe that united all humanity was in turn linked specifically to the principles of Christianity, as Lawrence explains:

> [T]he brotherhood of nations … must itself be effected by the common consent of civilized mankind, embodied in a great law-making document, which must be signed and ratified in the formal manner by those in each state who have authority to pledge its faith before the world … In short, they must resolve to apply the principles of Christianity to their trasnactions with one another … With this as the only alternative, men devoid of moral enthusiasm or spiritual vision may well resolve to give the precepts of Christ a trail in international affairs … a wing of a great army slowly forcing its

[57] Woolsey
[58] Twiss

> way onward against strong resistance … Enthusiasts for righteousness are the very salt of the earth.[59]

The emerging discipline of international law was not simply an attempt to codify existing state practices (or even to give legal expression to cultural personality per se), in other words, but a modern gospel to humanity, the vehicle for the transmission of the divine will into materialized existence – the 'spirit' or 'Word of God' made flesh. The nation-state was, as Bluntschli would formulate it, both "a moral and spiritual organism … taking up into itself the feeling and thoughts of the nation, of uttering them in laws, and realizing them in acts … [towards] the organization for the perfection of common life."[60] His colleagues agreed, and throughout their legal texts would write in celebration of international law's divine mandate. "The forward movement of international law … over the world, the possibility of a universal law of nations, spread[s] itself like the universal Gospel over mankind," argues Woolsey, "[T]he progress of the world, hereafter, will consist in setting aside the exclusive claims of Christ [while] retaining all that is in His moral precepts … [and something of its spirit … [to give] guidance … to science and human insight [so that] the coming ages will reach the point of perfection that is attainable by man."[61] Likewise, for Lieber, "The large system of institutions [are both the] apparatus … [and] organism of our civilization, whose object is to promote the culture of the mind [and] ultimately … an intenser devotion to God."[62]

The saturation of liberal Protestantism as an experience and imaginative framework of meaning and authority – both in the lives and thinking of the jurists – within the doctrines of the first wave of international law (as a familiar academic discipline and field of professional expertise) challenges the mainstream claim that religious disenchantment was a prevailing factor in the development of modern international law – more myth, practiced literary rituals to gain entrance

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into the priesthood of law, than any serious statement about the actual dynamics of legal historical development. Legal concepts first institutionized by the discipline in the 19th century - such as the 'nation' and 'nation-state', 'culture', 'national self-determination', as well as the background normative assumptions about the nature of law and its constitutive relationship to global patterns in the market and politics - may in fact be more the stuff of fantasy, or at least religious conviction, than they were what was left after metaphysical belief was stripped from the Western socio-political imagination. This is, of course, both cause for alarm and celebration. The threat is that what looks like formerly neutral legal concepts are in fact structurally biased, and as the products of theological interplay with 19th century political challenges to authority, may distort the actual limits, possibilities, and stakes of contemporary global governance. The good news, though, is that if international law is at least partly founded on faith without any necessary materialist ground, what looks 'natural' and pregnant with cynical resignation may in fact by far more contingent and open to reversals – or at least, may be remolded to allow for something new and more exciting in our formulations of the world and the role of law.

III. You've Got to Serve A Master: Forced Choices in Modern Agnosticism

What modernity as a product of a matured Enlightenment is believed to reject are two evils, that of metaphysical (or transcendental) truth and fundamentalism. To the extent that Christianity continues as an operative phenomena within the arena of international law, two choices emerge: on the one hand, religious certainties that are by and large meant to be kept at bay from disciplinary logic (and which are felt to easily slip into political forms of fanaticism), and on the other hand, a set of formal principles or empty ideals, which are accepted to the extent that they allow for universal participation regardless of the particular actor's material or subjective circumstances. To contextualize international law in relation to the theme of religious disenchantment, the question

facing global governance then is ultimately viewed as the product of a secular faith. Namely, how to debate and enforce obligations within the anarchic landscape of a morally agnostic world? Just as disenchantment is central to posing the central question that preoccupies international law, the answer – which it follows to be significant to understanding the dynamics of the contemporary imagination within the discipline – requires an analysis of the various aesthetics, or functions, that disenchantment plays in response by legal scholars.

In particular, there are at least three aesthetic choices within the mode of disenchantment available to international law.[63] The first, which I will just briefly address here before spending significantly more space addressing the remaining two options, relies upon abstract analogies, or equivalences, are established between what are seen as religious and secular agents (and practices) of the politico-legal field – God/State, Priest/Lawyer, Scriptures/Legislation, and so forth. The classic inspiration for this reasoning derives out of a decontextualized reading from an early passage in the manuscript, 'Political Theology', by the Nazi legal theorist, Carl Schmitt where he writes, "All significant concept of the modern theory of the state are secularized theological concepts." This sort of thin conception of the relationship between Christianity and law lends itself to two misfortunes: first, it stands in for more rigorous investigation into the more subtle ways that historical Christianity shaped core concepts of international legal doctrine, and which might still exercise powerful sway over the profession, and second, it typically descends into dull and ritualized denunciations of either legal 'faith' or 'cynicism, depending on one's particular disciplinary orientation (e.g., likes/dislikes critical legal studies, committed/ambivalent towards the usefulness of humanitarian norms). In short, the focus on analogizing theological and political concepts tends to enact a performative contradiction, that in the very act of analogy, reifies them as distinct conceptual categories without offering very much by way of further analysis.

[63] Definition of aesthetic given by schlag

The remaining two modes of disenchantment, I believe, are far more interesting – what I will undertake to examine in turn under the titles, 'Restoration Disenchantment' and 'Secular Fundamentalism'. The former is characterized by deploying disenchantment in a double movement: first, expressing some existential anxiety or crisis meant to be facing Western society, and second, proposing a politico-legal return to some traditional principles that arguably will restore the health, or stability, of the Western legal tradition, or more generally, the 'success' and progress of Western culture. The latter appears on its surface to take the opposite approach whereby legal scholars celebrate the disenchantment of any absolute faith – definitely religious, but also legal, moral, political, and so forth – as the very conditions of emancipation. Though these two aesthetics are fully capable of independent analysis, my ambition is to not only map out their internal logic in relation to the broader themes of the paper, but also to evaluate their blind spots and particularly the ways in which they ultimately collapse into one another. My hypothesis is that the scandal of disenchantment within contemporary international law is that it ultimately betrays its promise of avoiding transcendental argument or providing any meaningful guidance for achieving an equitable global system from within the law.

III.A. Restoration Disenchantment

In this mode of legal argument, disenchantment operates to firstly identify a crisis within the international order, and secondly, to propose a return to intellectual traditions rooted within the Western experience of governance. "Western man is undergoing an integrity crisis," writes the legal historian and founder of the historical law and religion movement, Harold Berman, "Our whole culture seems to be facing … [a] nervous breakdown."[64] This 'integrity crisis' is specifically rooted in the loss of religious faith among the general population in relation to law, and its supplementation by social theories of relativism and reliance on hedonistically-driven sciences:

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> Contemporary social science characterizes modern law by the words 'secular' and 'rational'. The alleged secularism of law is linked with the decline of the belief in either a divine law or a divinely inspired natural law. The law of the modern state, it is said, is not a reflection of any sense of ultimate meaning and purpose in life; instead, its tasks are finite, material, impersonal – to get things done, to make people act in certain ways … If law is merely an experiment, and if judicial decisions are only hunches, why should individuals or groups of people observe those legal rules or commands that do not conform to their interests?[65]

For Berman, disenchantment with the divine foundations of law explain what he sees as a breakdown in social cohesion among Western societies, and more generally, within the international legal order, but it also presents a corrective in a historical appreciation that "the Western legal tradition has always been dependent … on belief in the existence of a body of law beyond the law of the highest political authority … seeking new forms of unity … [that might combine] the dualism of ecclesiastical and secular jurisdictions, [which are] a distinctive if not unique feature of Western culture."[66] The operative themes for Berman are 'Western tradition', the synthesis of 'Christian' and 'secular' jurisdictions, and the steady march of law's aspiration towards universal representation, though ultimately his approach is tethered to a confessional reverence for the Christian version of God. "When we approach law as believers," he argues, "we must understand it as part of God's plan for salvation… It was in the West, and I believe it was only in the West, that … we know our mission goes beyond the law, but we also know that by this faith … we uphold the law." In this formula, it is Western forms of modernity that must be knocked from its pedestal, but only because it has forgotten that its 'secularism' relies upon a simultaneous avowal of the 'sacred', which teaches society that "man is … a creature of God who partakes also of God's creative powers…"

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[66] Non economic but communal

The adoption of 'restoration disenchantment' may lead in at least two directions for purposes of international law – towards a post-secular apology for a liberal democratic order of constitutional nation-states, or alternatively, to a totalitarian system that seeks to vest authority with the divine mandate to stand in for the universal. At the heart of the liberal derivative lay two subsequent truths: first, to quote the Cambridge legal theorist Philip Allott, that "human beings cannot live without a transcendental or spiritual aspect to their lives", and second, as Habermas argues, that religious faith – and particularly Christianity – requires "the assimilation and the reflexive transformation" of religion by "secular mentalities". For scholars within this orientation of disenchantment, the work of mutual assimilation between the 'sacred' and the 'secular' provides both a historically accurate description of the development of international legal thought and the universal principles for the implementation of a more inclusive and tolerant world order:

> The mutual co-penetration of Christianity and Greek metaphysics … has indeed … left its mark in normative clusters … [on] the the original religious meaning of … terms [such as] … responsibility, autonomy, and justification … but without emptying them through a process of deflation and exhaustion … [T]he translation of the concept of 'man in the image of God' into that of the identical dignity of all men that deserves unconditional respect … goes beyond the borders of one particular religious fellowship and makes the substance of biblical concepts accessible to a general public that also includes those who have other faiths and those who have none.[67]

The crisis of the international legal order, and the necessity of a historical appreciation for a Western oriented dialectic of religious and secular experience, is equally shared by prominent Christian intellectuals, such as Pope Benedict XVI:

> [D]emocracy [is] the most appropriate form of political order… [I]n order to appeal to the reason we share in common and to seek the

[67] Habermas

> basis for a consensus about the ethical principles of law in a secular, pluralistic society [that allows us to keep] open our awareness of the totality and of the broader dimensions of the reality of human existence … [and therefore] to amplify the doctrine of human rights with a doctrine of human obligations and of human limitations… There can be no doubt that the two main partners in this mutual relatedness are the Christian faith and Western secular rationality.[68]

There are, however, difficulties with the logic of this disenchantment hypothesis in the light of international law. For instance, the appeal to the twin intellectual traditions of Greek reason and Christian faith, and the more or less explicit connection to the Western experience, solicit a dubious presumption that these traditions (Greek, Christian, Western) were the sole agents responsible for the development of 'human rights' or that they operated across history predominantly in relation to one another, and moreover, it is highly unlikely that such traditions were not heavily influenced by a variety of external cultural, economic, and technological influences. Perhaps more troubling than the not-so-subtle naturalization, or universalizing, of some vague 'Western' experience – e.g., that these statements about 'the good' have some kind of metaphysical significance - is how the appeal to these normative principles or traditions of governance and meaning are not problematized in regards to their capacity for interpretation or implementation in the daily affairs of knowledge and governance. Even if a Greek inspired secular philosophy, encapsulated in a term such as 'reason', were agreed to, for example, upon what criterion of choice would an interpretative community make its determination as to what exactly reason encompassed? Moreover, it is more than a little troubling that absent from this account is the colonial experience, the often brutal rise of financial-industrial capitalism, or other violent catastrophes and mutations that occasioned the rise of the liberal constitutional state within the Western experience. In short, restoration disenchantment depends upon a set of highly questionable 'abstractions', which is posits as concrete and readily

[68] Ratzinger

useable techniques for deliberation, without accounting for their actual development or the inherent difficulties of deductive reasoning.[69]

While the totalitarian variation of restoration disenchantment shares the anxiety that the un-grounding of any historically limitless agent (e.g., God) or faculty of mind (e.g., reason) – what we might call a 'disenchantment of transcendence' - poses an immanent threat to the moral and material progress of the Western political order, for authors such as Carl Schmitt, this is due to a fundamental misunderstanding of what he sees as the two fundamental axioms of political/human existence within the liberal democratic mentality, respectively concerning the conceptions of sovereignty and community. Discarding the possibility of returning to a literal (metaphysical) faith in the Christian scriptures,[70] Schmitt nevertheless holds that these axioms can only be understood through the Genesis account of God's creation:[71] first, as an "extraordinary and fully arbitrary intervention of creation ex nihilo into the darkness of primal chaos" (e.g., the exception/miracle, sovereignty), and second, as a division, or cut, of this void into "stable oppositions of light and darkness" (e.g., friend-enemy).[72] To suppress the 'mystically produced' nature of sovereignty and community, Schmitt argues, not only opens the door to the calamities of a global police state and wars of total annihilation, but obstructs the possibility of both enabling political transparency and holding decision-makers morally responsible.

Concerning his first axiom (the conditions of sovereignty), the Genesis account for Schmitt is instructive for illuminating that sovereign power is not based upon any contractual/discursive

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[69] Althusser

[70] *See* Carl Scmitt, NOTE 15

[71] "All significant concepts of the modern theory of the state are secularized theological concepts not only because of their historical development – in which they were transferred from theology to the theory of the state, whereby, for example, the omnipotent God became the omnipotent lawgiver – but also because of their systematic structure, the recognition of which is necessary for a sociological consideration of these concepts… Only be being aware of this analogy can we appreciate the manner in which the philosophical ideas of the state developed in the last centuries… We have deservedly transferred the model of our division from theology to jurisprudence because the similarity of these two disciplines is astonishing." SCHMITT

[72] Genesis verses / See Reinhard NOTE NEIGHBOR 14-15

(democratic) basis or existing normative (legal) conditions, but instead premised on the capacity to create something from nothing. "[The] constitutive, specific element of a decision … cannot be anticipated… [and] is, from the perspective of the content of the underlying norm, new and alien… created out of nothingness."[73] If the precondition of existence, in other words, is nothingness, then the divine spark of life depends on a moment of rupture that is solely dependent on a decision, a will to power, which operates like kairos to arise completely unexpected, like 'a thief in the night'[74] – or what Schmitt describes in a theistic/theological register as either 'the miracle' or the 'exception'.[75] Here, the sovereign in none other than the (divine) agent capable of standing in and filling the space of the void, the guarantor of the political/moral order, dictatorial in the capacity to simultaneously declare the exception (miraculous in being previously impossible and beyond reason) and enforce its decision (the incarnation of its word as its own justification).[76] Sovereignty, in Schmitt's words, is a 'borderline' concept, standing outside the legal order yet constituting its internal measure, or again in religious language, both the corruption and infallibility of a given politico-legal regime (e.g., the absolute State, the Leviathan).[77] The legal order, therefore, far from standing outside of power looking in, is always itself the concrete realization of discrete political decisions behind which stands a dictatorial whim, some rupture or cut into a set of pre-existing affairs, to ensure the internal cohesion (obedience) of its constituency.[78]

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[73] *See* Schmitt PT ?/66 / 6

[74] Bible verse. However, much like emancipation, kairos is indeterminate to the extent that it lacks any substantive, or set ideological characteristics in itself, but only in relation to what it breaks through. *See* John Haskell, *The Strategies of Rupture in International Law: The Retrenchment of Conservative Politics and the Emancipatory Potential of the Impossible* (on file with author).

[75] Definition of 'rupture': 1. a. Breach of a covenant, intercourse, or the peace. b. A breach of harmony or friendly relations between two persons or parties. c. Breach of continuity; interruption. d. The act of breaking out into arms. … 3. a. A break in a surface or substance, such as the skin, flesh, etc. b. A break in the surface of the earth, etc.; a ravine, chasm, gorge, rift. 4. The act of breaking or bursting; the fact of being broken or burst. Rupture (v): 1. a. To break, burst … b. To cause a breach of; to sever….. 2. intr. To suffer a break or rupture. [From the Oxford English Dictionary]

[76] *See* Schmitt 66

[77] *Id.* at 55.

[78] Schmitt quote about

This notion of a rupture from a previous fabric, of a decision that tears through a prior state of affairs as if it did not exist, leads beyond the division between law and lawlessness and the enactment of sovereignty to the second axiom of the politico-theological in the wake of disenchantment – in principle, the bringing together of a multitude of dispersed individual wills to form a body politic, the community. Drawing upon the model of the Catholic Church to institutionalize a clear distinction between the faithful and the damned in this life and its predisposition to frame this opposition in starkly public terms that claimed absolute power in the ecclesiastic hierarchy to rule as spiritual and intellectual guides to objective human content, Schmitt posits that the divisive logic of the exception which founds the subject (both dictator and governed) only moves from a subjective to express some real structural incarnation in the formal recognition of war between an interiority of friends versus some exteriority defined as an enemy:[79]

> The distinction of friend and enemy denotes the utmost degree of intensity of a union or separation, of an association or dissociation… The political enemy need not be morally evil or aesthetically ugly; he need not appear as an economic competitor, and it may even be advantageous to engage with him in business transactions. But he is, nevertheless, the other, the stranger; and it is sufficient for his nature that he is, in a specifically intense way, existentially something different and alien, so that in the extreme case conflicts with him are possible… [who in] the extreme case of conflict… must be repulsed or fought in order to preserve one's own form of existence.[80]

What Schmitt emphasizes here in the founding of each new community is the necessity of some moment of pure antagonism, the institutional and subjective ethos of friend ('we') and enemy ('them'), that demands the promise, a horizon (the Last Battle of Armageddon?), of sacrifice (e.g., to the death). This is again a thoroughly Catholic (Augustinian) understanding of human nature and politics, and which has found its way into our own era through legal intellectuals, such as Schmitt,

[79] Bates, P.T. and the Nazi State. Note similarity to Berman.
[80] Schmitt

and more generally within the contemporary realist doctrines in international relations: in a sinful world beyond redemption, where humanity stands always on the precipice of falling into a Hobbesian state of nature bereft of God, internal stability and peace may only be achieved (remembering the tragic hubris of the Tower of Babel to unite all people in one language and cause) in discrete, necessarily limited units organized under some stern judge against the dangers of humanity's sin nature, of the brotherly predisposition to murder (e.g., Cain and Abel). Since humanity is inherently political, and the political is ineradicably antagonistic, the question for Schmitt therefore is not to delude oneself, as he believed of liberal democratic jurists, that humanity carries any natural sociability that can be brought out through deliberative values, but instead to project the inbred violence of law both vertically (the enforcement of the sovereign prerogative) and horizontally (the 'battling totality' united by a common foe).

The Schmitt approach to disenchantment, for all its critical acumen about the deceit of 'plurality' and 'consensus' within the theoretical characterization of liberal rule of law systems, seems fraught with dangerous blind spots. First, on the most immediate level, many international legal scholars (including myself) would be hostile to instilling any form of dictatorial or totalitarian regime, especially under the leadership of a single individual – for Schmitt, the Fuhrer Adolf Hitler. Second, the reliance on an absolute political sovereign, provides a deeply questionable characterization about the nature of sovereignty, especially in a fragmented global regime of multinational corporations and financial lending houses, transnational loyalties, powerful interest groups, and the exponential growth of political bureaucracies, regional governance institutions, and so on. If liberalism disclaims the coercion and forced choices within its rhetorical celebration of unbridled pluralism, Schmitt's insistence on identifying a transparent sovereign seems equally illusory, an abstraction standing in for the complex and constantly mutating systems of power deliberation. Third, even if such a sovereign could be located within the framework of the law,

there is no explanation or guidance within Schmitt's response to disenchantment as to either the feasibility or legitimacy of decision-making. By what standard can a judgment be made about the sovereign? To refuse this question leads to a form of idolatry, no longer to the law, but now requiring that to maintain the sovereign as the almost superhuman 'superlative' without the need of justification and possesses the capacity to stand in for the entire community, the idolater must actively forget the dispossessed within the system, their own potential vulnerability due to poor or disadvantageous top-down decisions, as well as the all-too-human origins of their venerated leader.

III.B. Secular Fundamentalism

Where Schmitt would condemn the empty formalism of the rule of law, and scholars such as Berman and Habermas would treat the absence of any metaphysical foundation for law with anxiety, secular fundamentalists celebrate the disenchantment of faith within international law as the very conditions for a more liberal participation of global society in the exercise of political decision-making and the fulfillment of the emancipatory promise within the cosmopolitan project of international law. "To rid [international legal cosmopolitanism] of suspicion," explains Koskenniemi:

> … [we] must remain open for other voices, other expressions of 'lack' … that, when given standing under it, redefine the scope of its universality … [I]t has no essence … every decision process with an aspiration to inclusiveness must constantly negotiate its own boundaries as it is challenged by new claims or surrounded by new silences. Yet because it is unachieved, it can sustain (radical) democracy and political progress, and resist accepting as universal the claims it has done most to recognize in the past… precisely because the universal they embody remains only a horizon… [a] possibility of the universal … by remaining 'empty', a negative instead of a positive claim, and thus avoids the danger of imperialism.[81]

By refusing any totalizing definition or application of universal truth (e.g., identity, meaning, principle), scholars are seen to be capable of critical distance from the idolatries of the past, and the

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rhetorical arguments of the present, that sustain inaction or complicity in the dark sides of the global legal structure. "[O]ur professional vocabularies … reinforce an unwarranted faith in the upward humanitarian spiral," explains the legal historian and theorist David Kennedy:

> We must unremember these stories, set them aside, demand evidence for their long-term promises … Only by forgoing such stories can humanitarians come to live again in history, with all its contingency and possibility … a profession committed to the human embrace of action, fallen from knowledge but poised for grace … Forged in disenchantment … Deciding – at once uncertain and responsible … [opening] the way for apostasy, for heresy…[82]

Disenchantment, in other words, operates as an apology for the authority of a secular, liberal international legal order - the existential courage to shirk the metaphysical pieties of the traditional legal doctrines becoming an argument for its concepts and deliberative techniques to be viewed as almost natural (or objective), a formally neutral vocabulary allows for competing political agendas without itself being captured within the antagonisms and contingency of history. The problem with this reasoning, however, is exactly that in its very disavowal of any religious or political content, the formal ideals of cosmopolitan international law thereby take on a fundamentalist transcendentalism to the extent these norms operate as the unitary measuring rod for recognition as a politico-legal subject:

> [I]t underpins the historical process by evoking some quasi-transcendental limitation, some quasi-trancendental a priori that is not itself caught in the contingent historical process … [and] thus ultimately leads to the Kantian distinction between some formal a priori framework and its contingent shifting historic examples… an ahistorical a priori Prohibition or Limitation which circumscribes every political struggle in advance.

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Indeed, for even progressive liberal authors such as Koskenniemi, the recognized shortcomings of contemporary international law are not insight into any possible biases within international legal structures, but the actual proof of the discipline's best aspirations and doctrines.

> [I]t is .. the force with which failure to respect such standards is felt as a scandal," he argues, "in which we recognize the mystery of obligation… This is a messianic argument and a Christian vision … [T]he fallibility of the human beings that inhabit that society and the law they create out of their own narrow vision … is not a recipe for resignation … but rather a cause for joy and anticipation… And the call for proselytism follows naturally: 'The liberation has begun, but it does not yet engage the majority of the world's people."[83]

The religious language here is not simple rhetorical flourish. To publically confess as a messianic argument and a Christianity vision for international law, that the 'liberation has begun' and to council against resignation is to adopt the song of the night-watchman in the Old Testament:

> How beautiful upon the mountain
> Are the feet of him who brings good tidings,
> Who publishes peace, who brings good tidings of good,
> Who publishes salvation,
> Who says to Zion, 'Your God reigns.'
>
> Hark, your watchmen lift up their voice,
> Together they sing for joy;
> For eye to eye they see
> The return of the Lord to Zion.[84]

The image of 'the return of the Lord' over the mountains harkens back to Moses' description in Deuteronomy of the blessings of God given to sustain the Jewish people through the trials of their exodus in the desert:

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The Lord came from Sinai,
And dawned from Se'ir upon us;
He shone forth from Mount Paran,
He came from the ten thousands of holy ones,
With flaming fire at his right hand.[85]

Yet the clarity of this moment is something that is remembered, the climax of a revelation that must be held on to against all odds:

The oracle concerning Dumah.
One is calling to me from Se'ir,
'Watchman, what of the night?
Watchman, what of the night?'

The watchman says:
'Morning comes, and also the night.
If you will inquire, inquire;
Come back again.'[86]

As noted by the Protestant sociologist, Peter Berger, the literal translation from the Hebrew reads 'the burden of Dumah', the word 'burden' signifying 'the weight of an oracle directed against this or that object of God's wrath'. Se'ir is a stretch of hills to the south-east of the Dead Sea, but Dumah appears not to be an actual location, its literal meaning 'silence'. In this sense, the role of mystic as night watchman is to testify to the 'burden of silence', to remind us through the night that morning will come, but that it will depend on us to 'inquire, inquire', and to 'come back again'.[87] By maintaining the openness to the sublime reality that grounds our political/spiritual existence (e.g., the night, the void), the night watchman initiates others into an unending effort to fill the void, to join in a song that can only be sung in the indeterminacy, or expectancy, of the morning. This is a

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87 *See* Peter Berger end of book

mystic register – but it is also embraced at the heart of liberal democratic theory, as described by the famous political theorist Ernesto Laclau:

> If the mystical experience is really going to be the experience of an absolute transcendence, it must remain indeterminate … [And] like mystic fullness, political fullness needs to be named in terms deprived, as much as possible, of any positive content…[88] Only if I experience the absolute as an utterly empty place can I project into contingent courses of action a moral depth … that makes possible a higher consciousness …[89] [And] because the universal has no necessary content … [as] an always receding horizon resulting from the expansion of an indefinite chain of equivalent demands … its non-solution is the very precondition of democracy.[90]

The scandal, in other words, of adopting a celebratory posture towards religious and political disenchantment within international law is that it is pregnant with at least two performative contradictions. From a religious point of view, the reliance on a mystical (and messianic) logic grounded in the Christian tradition is problematic, not only because it raises suspicion about the supposedly non-confessional nature of international legal doctrines (e.g., Eurocentric, neo-colonial, and so forth), but more importantly, that it insulates the vocabularies of the discipline from grounded structural evaluations, which might examine why normative aspirations and principles within international law so often fail to meet their promises, by calling upon its adherents to accept that the failure is simply 'the fallibility of human beings', if not the very proof of the system's emancipatory possibility. The scandal of disenchantment here is that it vests 'secular' legal relations with a divine, or 'natural', permanence said to be founded on sophisticated empirical observation and liberated (though subjective) pragmatic assessment, but are in fact merely a series of abstract categorizations, inherited from the Protestant faith in the wake of modern capitalist expansion, now

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[88] *See* Laclau, de vries book

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divorced from their historic or materialist contexts – it is, quite simply, metaphysic in orientation. And in this sense, it is not enough to ground legal reform and state programs on the modern justification of turning from 'God' or some reified notion of 'man' to instead embrace the 'plurality of subjectivities', or 'society', or in a more openly international legal vocabulary, 'nations' or 'cultures', for the very reason that these terms themselves do not point us any closer to the 'real'. They are new abstractions, divorcing us from the religious truth that the 'natural world' is not given but created, and that we are always already born into a system that is driven through economic modes of subsistence and the political relations and communicative regimes this engenders.[91] Empiricism, realism, the individual, and other words meant to lead us to the 'concrete' are not only value-laden, but provide meaning only to extent they can be linked within the broader systemic logic of production.

From a political standpoint, the claim that international law is guided by an agnostic universalism that disclaims any totalizing content is equally questionable. The disenchantment of liberal progressive lawyers here is in some sense neither skeptical nor pragmatic, but what Paul Campos has described as a form of 'secular fundamentalism'. The irony, he points out, is that an ethos attuned to the perpetual critique of radical indeterminacy and the lack of foundation can easily slip into "the very dogmatic systems it once rebelled against" with the "potential to become every bit as monistic, compulsory, and intolerant of any significant deviation from the social verities as the traditional modes of belief it derided and displaced".[92] The question, then, is not how to manage an anarchistic international legal system now that it is stripped of its metaphysical pretensions, but rather can we really conceive of any actors (e.g., enlightened legal scholars), systems (e.g., a liberal legal formalist order), or normative legal principles (e.g., national self-determination) that are truly 'stripped down' or capable of an almost asocial, 'empty' set of characteristics? And if this is not

[91] Althusser
[92]

possible, and that any claim to 'liberal tolerance' presupposes a dense array of normative assumptions and distributive stakes, how then do we confront the violence necessary to our (and any) politico-legal system, without slipping into either apologetic reasoning or ethical denunciation?

IV. Conclusion: New Scandals, Old Enchantments

The word 'scandal' is defined in the Webster Dictionary as "discredit brought upon religion by unseemly conduct in a religious person… loss of or damage to reputation caused by actual or apparent violation of morality or propriety."[93] The focus on unseemly conduct by a religious person, and its more secular variation, as a violation of propriety, are both directly relevant to the mainstream claim concerning the theme of disenchantment within the rhetoric of international law. In the first section of this paper, I sought to demonstrate that contrary to the assertion that the liberal cosmopolitan project within the discipline was born out of religious agnosticism is historically inaccurate, and more troubling, obscures the deeply illiberal foundations of international legal reasoning. Here, the scandal of disenchantment is that contemporary legal scholars either unconsciously or willfully ignore the deeply religious dynamics of their professional faith, which might understandably raise significant questions about the 'rationality' of the professional imagination and its conceptual toolbox. This is not an indictment of Christianity, nor its influence on international legal theory; rather, it illuminates that the discipline is both more close-minded than often considered, and more capable of intellectual revision and creative institutional rebuilding.

In the second section of this paper, I turned to examine two forms of contemporary disenchantment within the literature of international law, 'disenchantment restoration' and 'secular fundamentalism'. Except for the treatment of Carl Schmitt, my analysis focused on scholars considered, I believe, to range in their political commitments from mildly to progressive liberal, as it

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seems to me intuitive (and dull) the sort of critiques that would be made against neo-conservative hawkish proponents of the 'war on terror', and so forth. The hope animating this emphasis on the most prominent 'good guys' of international legal scholarship was two-part. First, I sought to analyze the function of disenchantment as it appeared as a rhetorical trope in their literary production. And second, I aspired to demonstrate that beneath the seeming differences, the two camps were in fact strikingly similar in their blind spots and political allegiances, and more particularly, that the seduction of agnostic universalism was a false promise. The scandal, in other words, is again that Christianity (and more generally, a metaphysical orientation) remains central to the argumentative logic of international law, and that it is ultimately promotes a deeply conservative agenda. International legal theory remains (tragically, both intellectually and politically) a top-down Enlightenment struggle of knowledge production and governance tied to modes of capitalist subsistence.

The liberal cosmopolitanism advanced through the rhetoric of disenchantment is regularly rehearsed in the literature and practices of international law. The problems, like the proposals for analysis and application, are predictable, and tend to wear down one's capacity for outrage or resistance to the looming dangers and gross injustices that surround the daily routines of global governance. Perhaps this is the real disenchantment, that we do not have the courage to return to a materialist conception of love that is active and seeks meaningfully to remake the world in righteousness. To do so, it would mean returning to (and misreading) the disclaimed enchantments from the past to better illuminate and address the scandals of our times – its ideological mystifications, its structured inequalities, its cannibalistic attitude to global populations. Here, in closing, I am reminded of St. Paul's letter to the Ephesians: "For our struggle is not against flesh and

blood, but against leaders, against authorities, against the world rulers of this darkness, against the spiritual wickedness in the heavens."[94]

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