The Profession, the Public, and International Law

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In the fall of 1976, Richard R. Baxter, the Manley O. Hudson Professor of International Law at Harvard Law School, gave an address entitled "The Current Science of International Law in the United States Today." In a portion of the speech relevant to this symposium, Professor Baxter noted that, like many professions, American international lawyers believed they "could play a larger part in public life, or could do more for mankind . . ., or [could] simply capture somewhat more influence and prestige within society [or the] public arena." The capacity of the profession to do this, Baxter said, depended in part upon its ability to assess honestly its strengths and weaknesses. Among the strengths that Baxter noted were the openness of the American government concerning United States practice in foreign affairs; the growth of American publications in the field (including the many student publications); and the "plethora" of international law organizations and conferences and other continuing legal activities related to international law. The quarter-century that has passed since Baxter's speech has brought further favorable developments in these contexts.

On a less self-congratulatory note, Professor Baxter acknowledged that the American international law profession was also characterized by many weaknesses. Taking into account the changed circumstances of the years since Professor Baxter's speech, much of this criticism is relevant today. I propose to look at the principal criticisms that Professor Baxter raised, to reflect on the criticisms as they apply today, and to add a few new ones to the list. I speak from the perspective of a private practitioner who has watched talented young lawyers join my law firm and often depart for a life in government or teaching. Because of my involvement in the American Society for International Law ("ASIL") and other professional organizations such as the International Law Association, and an occasional foray into teaching, I also spend a good deal of time with law professors and their students.

* Peter D. Trooboff, a partner at Covington & Burling, served as president of the American Society of International Law and is currently a member of the United States delegation to The Hague Conference on Private International Law.

1. At the time of his talk, Professor Baxter was one of the preeminent international law scholars in the world. Among his many activities, Professor Baxter served as editor-in-chief of the American Journal of International Law and president of the American Society of International Law—one of the few people ever to hold both positions at once. Soon after the speech, the United Nations called upon Professor Baxter to serve as a judge on the International Court of Justice. Unfortunately, his untimely death occurred early in his term on September 25, 1980. See Richard R. Baxter: Judge of the International Court of Justice In Memoriam, 4 Hastings Int'l & Comp L Rev viii (1980).

2. Professor Baxter's talk was never published. All quotations from the speech are from a tape of the talk in my possession, a copy of which is on file with The Chicago Journal of International Law.
I. PROVINCIALISM

Professor Baxter's first criticism of the American international law profession was its "provincialism." He pointed out that many American international lawyers draw their perceptions of international law "from our own practice ... the length and shadow of our own law." Noting that the Restatement of the Foreign Relations of Law of the United States\(^3\) takes an American view of international law, he worried that American international lawyers' "knowledge of the views and practice of other countries is too often superficial or non-existent." He added that American students of international law, "wrapped in the cocoon of English" and unable to read the three or four languages of their European counterparts, did not study other countries' state practices or even their scholarship. Knowledge of French and one other foreign language was, in the Professor's estimation, essential for American scholars in the field.

My sense is that we are beginning to see some improvement on this front. The new joint programs with foreign law schools are alleviating this problem. I refer, for example, to the joint degree programs that Columbia and Cornell have established with the French law schools. This being said, the fall-off in the study of French and German in the high schools and colleges is having a severe impact in the law schools. My law firm does not receive applications from many students who are well-versed in French or German and who have studied law in one of those systems. Even with the increased popularity of Spanish, the study of Spanish and Latin American law does not attract as great a number of students as it should.

Also, many of our scholars do not devote adequate attention to following the literature and considering the work of colleagues in other nations, even when they are in English. In particular, our scholars tend to write without mentioning the work of overseas colleagues who have explored similar subjects in their national publications. In short, we are still too parochial and too persuaded that our views deserve more respect per se than their merit sometimes justifies. My sense is that government officials and scholars in other systems are becoming impatient with this narrow perspective, and that our intellectual isolation might weaken our political influence.

II. FUNDAMENTAL SCHOLARSHIP AND THE NEEDS OF THE PROFESSION

Professor Baxter next regretted that there were "very few individuals writing in a large way about the major themes of international law." Rather, American academic output was "most adept in putting a legal gloss on contemporary events." Noting the "relative poverty of our scientific work," Professor Baxter said that published works did not adequately address the theoretical issues and overlooked important subjects of contemporary importance. They were not addressing "general problems in the law" or "bringing order into particular areas of international law." He decried, particularly, the

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absence of "no great magisterial treatise on international law since Hyde."

To some extent, this concern has been allayed. Certainly, the recent debate on whether customary international law is federal common law constitutes a good example of the very kind of return to first principles that Professor Baxter advocated. And the writings of the leading lights in our profession have not dodged the hard issues of legitimacy, human rights, use of force, and the like that are at the core of today's international legal controversies. Unfortunately, the number of articles that demand such rethinking of accepted views is limited. There are still too many pieces that simply, as told by Professor Roger Fisher, "describe the view out the back of the bus on where we have been, rather than looking out the front window at where we are or should be going."

A further, rather different, difficulty is the inability of the practitioner of international law to keep up with the volume of new publications. When it appeared over thirty years ago, International Legal Materials was a welcome innovation in a world where finding documents was difficult. With the growth of the Internet and its many sources of materials, the problem today is discrimination rather than availability. The ASIL experiment with International Law in Brief and its distribution by e-mail have shown that there is a strong market for solid and timely synthesis and summaries of key developments in our field. It remains to be seen whether such communications will be commercially viable. Perhaps the worst mistake that has occurred with respect to publication in the field was the decision of the Office of the Legal Adviser, State Department, to discontinue publication of the Digest of International Law. A number of us tried to reverse this decision, which was made on the grounds of budget and perceived priorities. The several series of the Digest permitted U.S. practice to be known and often to be viewed as "general practice accepted as law." It seemed at the time of cancellation—and seems now—pervasive to eliminate this publication in a world in which the United States seeks to extend its influence through reasoned discourse. Fortunately, some of the information that would have appeared in the

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4. Baxter was referring to Charles C. Hyde, International Law, Chiefly as Interpreted and Applied by the United States (Little 1922), which is now available in newer editions.


6. As I had the privilege to work for Professor Roger Fisher for a year as a research associate at Harvard Law School, I frequently heard him make this remark both in the classroom and in personal conversations. Professor Fisher is the co-author of the following books: Roger Fisher, William Ury, and Bruce Patton, Getting To Yes: Negotiating Agreement Without Giving In (Penguin 1991); Roger Fisher, Elizabeth Kopelman, and Andrea Kupfer Schneider, Beyond Machiavelli: Tools for Coping with Conflict (Harvard 1994).


8. Office of the Legal Adviser, Department of State, Digest of US Practice in International Law.
Digest is now included in the American Journal of International Law's section on "Contemporary Practice of the United States Relating to International Law." Given the relatively limited cost of producing the Digest, I hope that the decision to cancel it will be reversed some day.

III. NEW SCHOLARS TEACHING INTERNATIONAL LAW

In what he described as "the most alarming problem" of the international legal profession, Professor Baxter reported that the best and brightest graduates were not entering into the teaching of international law. "We are not producing the requisite number of young scholars that we ought to be bringing along into senior teaching posts now." In that connection, he noted the retirement of the post-World War II generation that had dominated the field during the first decades of the Cold War.

At the time of Professor Baxter's talk in 1976, this criticism was apt. While there were dedicated and knowledgeable new entrants in the field, they were not the star graduates from their law schools. In a word, the new international law scholars of the late 1950s, 1960s, and early 1970s had not, as a general matter, enjoyed prestigious clerkships or other marks of the highest academic distinction among American law school graduates. And they were not writing seminal pieces of scholarship.

Beginning in the 1980s and continuing into the 1990s, a number of law schools were able to attract as law faculty recent graduates with stellar credentials. We have seen faculties add new professors of international law from a talented group of former clerks of the U.S. Supreme Court, the U.S. Courts of Appeals, District Courts, and the Iran-United States Claims Tribunal. Many of these new scholars have produced the very kind of major works of scholarship that Professor Baxter correctly noted should be required to be considered for senior status in the field. Regrettably, few of them have developed expertise in comparative law, again because multiple language competence is essential for this work.

IV. COURSE OFFERINGS OF AMERICAN LAW SCHOOLS

Professor Baxter criticized the international law course offerings of American law schools. He criticized especially the absence, at any law school, of a structured program that included a core of skills in international law and tested those skills before graduation.

On this point, I would disagree somewhat with my friend and mentor. While having such a structured program might be valuable for a few students, I think that the problem today is somewhat different. The contemporary issue is whether law schools are enticing students who will engage in general practices to study at least one or two courses in international law. Given the globalization of our economy, this seems to me a far higher priority. I am no longer impressed by international

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9. Tape on file with CJIL.
practitioners who report that they never took a course in international law. In my judgment, those students who want to work in the field should take a few courses that provide a core understanding of the international legal system and of U.S. foreign relations law. It is simply not practical for the law firms to train young lawyers from scratch when there are many students wanting to do such work who have the necessary background.

One of the reasons why some students avoid the field in law school is that law faculties have not worked hard enough in developing new courses that meet the needs of the current generation of students. It may not be practical to separate public international law and international business transactions into separate introductory courses. I suggest schools could design a course to encourage the best students to study in one semester some of the essential issues in the field. I would urge that such a course include enough comparative material to provide an understanding of how different legal systems think about the same legal issues, both in private and public international law. And I would urge the teaching of the act of state doctrine from a conflicts as well as a foreign relations law perspective, to encourage students to study conflicts of law during their remaining years in law school. Transnational practitioners cannot work with lawyers in other systems if they lack an understanding of comparative legal analysis and have no ability to sort out conflicts issues.

Finally, I would express a personal preference for persuading students to take one international law course that teaches an understanding of research techniques in the field. I am surprised how many students are unfamiliar with techniques for researching basic issues. Students should know something of the Digests of International Law, the two Restatements, Whiteman, and how to find international materials, not only on the Internet, but also in books.

V. INCREASING UNDERSTANDING OF THE ROLE OF INTERNATIONAL LAW IN GLOBAL MANAGEMENT

Robert Zoellick, former Under Secretary of State and White House Deputy Chief of Staff in the Reagan and Bush administrations, recently noted that although international agreements and institutions can “facilitate bargaining, recognize common interests, and resolve differences cooperatively,” international law, unlike domestic law, merely codifies an already agreed-upon cooperation. “Even among democracies, international law not backed by enforcement mechanisms will need negotiations in order to work, and international law not backed by power cannot cope with dangerous people and states. Every issue need not be dealt with multilaterally.”

It is difficult to quarrel with the notion that in some circumstances (such as Iraq’s

invasion of Kuwait), law will succeed only if backed by power, or that even
democracies require enforcement mechanisms to ensure compliance (such as WTO
remedies for trade disputes). It is also true that many issues do not lend themselves to
multilateral legal solutions. But in many more instances than Mr. Zoellick allows, the
creation, implementation, and enforcement of international law depend upon the
United States' participation in multilateral arrangements. While the United States
can do much to slow the international legal process, international legal norms can
nonetheless emerge despite persistent U.S. objections. Our interests are often best
served by listening more carefully to why others differ when we stand alone (such as
with the International Criminal Court or the Land Mine Treaty). In many instances,
we should work with those who disagree in finding a common ground that serves
mutual interests rather than insist that, without us, there can be no rule. In the
coming century, there may well be a rule despite our objection and, in any event, U.S.
interests will not be served by abstaining from the process of shaping new rules.

The emergence of the United States as the sole remaining superpower after the
Cold War has led some to think that our views on international legal subjects can and
should dominate. Those holding these views fail to appreciate the core argument that
Abram and Antonia Chayes have made in their book, The New Sovereignty: Compliance
with International Regulatory Agreements. As they explain, "[i]n today's setting, the only
way most states can realize and express their sovereignty is through participation in
the various regimes that regulate and order the international system." The Chayeses
brilliantly show, through multiple examples, how every aspect of the international
legal process, from the formation of norms to enhancing compliance, depend, in the
contemporary world, upon what they refer to as "regime management" rather than
unilateral action or ad hoc coalitions. Their work also shows how this same need for
collective action arises even in the field of national security and defense policy.

For today's international lawyer, the challenge will be to articulate domestically a
politically acceptable understanding of the Chayeses' argument that will lead to less
unilateralism in United States policy on a wide range of issues. Unfortunately,
international lawyers have not yet found their voice on this subject or the argument to
persuade opinion makers in this country. This is amply demonstrated by any reading
of the Congressional debates on how, for example, additional United States economic
sanctions will somehow achieve U.S. foreign policy objectives.

That is not to say that the United States should refuse to act unilaterally when
that becomes the only means for protecting its national interest. Nor should we fail to
object when international bodies, including the General Assembly of the United
Nations, seek to promote so-called legal principles that are contrary both to our
interests and to the foundation for the global society that we envision. Nonetheless, if
we have learned anything from the past several decades, it is that from non-

Regulatory Agreements (Harvard 1995).
15. Id.
proliferation policies to the environment, from trade to suppressing terrorism, United States unilateralism will almost certainly fail to achieve a wide range of long-term U.S. objectives. Indeed, some of the very policies that Mr. Zoellick advocates have no prospect for success other than through multinational cooperative efforts. In examples ranging from the Warsaw Convention to drug trafficking, the United States wants and needs an international system that allows the formulation of rules to constitute an element of the cooperative process.

International lawyers in this country must figure out how to demonstrate to political leaders and the public that a progressive development of international law can promote their political objectives. They must find a way to persuade politicians that United States interests are served by agreeing to evolving international legal norms and contributing to their enforcement by our own exemplary conduct. That is what I think Lou Henkin meant when he spoke of the need for governments and peoples to "take international law seriously."

VI. ROLE OF THE LEGAL ADVISER

Finally, I would be remiss if I did not comment on the problem that exists in the way that international legal policy is made within the United States government. The Legal Adviser of the Department of State no longer occupies the preeminent position in the Administration as was the case in an earlier period. The consequences are rather serious. Further, the Legal Adviser has grown within the State Department to over 200 lawyers as a result of the merger of the Arms Controls and Disarmament Agency and the U.S. Information Agency. With departments and agencies from the Environmental Protection Agency to the Department of Labor playing an active role in shaping international legal principles, the Legal Adviser is no longer the focal point for U.S. legal participation in the global community.

We may have reached the point when legal policy coordination in the field of international law will be effective only if there is someone on the National Security Council who has that responsibility. Alternatively, the Legal Adviser at State has to gain higher visibility within the State Department, probably starting with granting him or her the status of an Under Secretary of State. The American Society of International Law and the American Branch of the International Law Association proposed just such an elevation of the Legal Adviser over two decades ago and, if anything, the need for such a step has only become greater since their report.

VII. CONCLUSION

I hope this short piece has shown not only Professor Baxter's prescience but also

16. Louis Henkin, Notes from Incoming President, Newsletter: The American Society of International Law 2 (Apr-June 1992) ("The principal challenge and the principal opportunity for the Society lie in a major new program to help make international law more relevant, more material—to help assure that governments and peoples take international law seriously." (emphasis in the original).
where we have made progress since his 1976 appraisal of our field. And perhaps it will, in addition to suggesting some new thoughts on this same subject, familiarize a few readers with Richard R. Baxter, a preeminent American scholar whose perspectives continue to influence those of us whom he taught and guided over the years.