

## Toward a Richer Institutionalism for International Law and Policy

KENNETH W. ABBOTT\*

### INTRODUCTION: IR-IL AND THE LAWYER'S SOCIAL ROLE

In 1992, early in the renaissance of scholarship at the junction of international relations theory (IR) and international law (IL), I suggested that the coming years might see 'the emergence of a new joint discipline' like that which had already emerged in law and economics.<sup>1</sup> It is probably fair to say that a true joint discipline does not yet exist and may never come into being. Yet the appearance of this *Journal*—a valuable and timely addition to the intellectual landscape—highlights the remarkable interdisciplinary progress made in little more than fifteen years.

Review articles have charted steady growth in publications applying IR-IL approaches by authors from both disciplines.<sup>2</sup> IR-IL is recognized as an international law 'method', or at least a framework for analyzing the workings of the international legal system.<sup>3</sup> Interdisciplinary teams combine methodologies to tackle complex issues,<sup>4</sup> and a growing number of scholars are trained in both

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\* Elizabeth Froehling Horner Professor of Law and Commerce, Northwestern University School of Law. As of January 2006, Professor of Law and Global Studies and Willard H. Pedrick Distinguished Research Scholar, Arizona State University

<sup>1</sup> Kenneth W. Abbott, 'Elements of a Joint Discipline' (1992) 86 Am. Soc'y Int'l L. Proc. 167. As pointed out at the time, there remains a significant 'two cultures' problem because of the differing approaches of most law and political science scholars. Remarks by Oran R. Young, *ibid.* at 172. And far fewer scholars participate in IL-IR than in law and economics.

<sup>2</sup> Anne-Marie Slaughter *et al.*, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 Am. J. Int'l L. 367.

<sup>3</sup> See 'The Methods of International Law' (symposium) (1999) 93 Am. J. Int'l L., reprinted as Steven R. Ratner & Anne-Marie Slaughter, eds., *The Methods of International Law* (Washington, DC: American Society of International Law, 2004).

<sup>4</sup> See e.g. Andrew T. Guzman & Beth A. Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in WTO Disputes' (Paper presented to the Roundtable on Interdisciplinary Approaches to International Law, Vanderbilt Law School, 2004), online: <<http://www.repositories.cdlib.org/bple/alacde/5/>>; Mark A. Pollack & Gregory C. Shaffer, 'Transatlantic Governance in Historical and Theoretical Perspective', in Pollack & Shaffer, eds., *Transatlantic Governance in the Global Economy* 3 (Lanham, Md.: Rowman & Littlefield, 2001); Kenneth W. Abbott & Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 Int'l Org. 421.

disciplines.<sup>5</sup> Law schools and political science departments offer courses explicitly on IR-IL or drawing on its ideas, and a book designed for law school classes is devoted to the IR-IL interface.<sup>6</sup>

The appeal of the interdisciplinary approach for lawyers and legal scholars is clear. Although IR is not well suited to resolving doctrinal questions,<sup>7</sup> it remains of value even for the international lawyer *qua* lawyer. As Anne-Marie Slaughter argues, integrating IR and IL 'can make international lawyers better lawyers': the diverse theoretical perspectives of IR help them to recognize the (often unspoken) assumptions that underlie their own and others' legal arguments, readings of texts and doctrines, and prescriptions, and to use distinct theoretical visions to generate responses and alternative proposals.<sup>8</sup>

Interdisciplinarity is of even greater value in the international lawyer's broader social role as policy maker,<sup>9</sup> or more fancifully perhaps as architect of global governance. Here IR helps lawyers and other policy makers to analyze social problems in theoretically informed ways and develop a wide range of ameliorative responses.<sup>10</sup> As Robert Keohane said of similar research in his presidential address to the International Studies Association, 'we ... seek knowledge in order to

<sup>5</sup> Anne-Marie Slaughter is the paradigm case; others include Richard Steinberg and Kal Raustiala. We autodidacts are envious.

<sup>6</sup> Oona A. Hathaway & Harold Hongju Koh, eds., *Foundations of International Law and Politics* (New York: Foundation Press, 2005).

<sup>7</sup> The families of IR theory do, however, lead to an emphasis on different doctrinal sources and modes of interpretation. See Kenneth W. Abbott, 'International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts' (1999) 93 Am. J. Int'l L. 361. For a thoughtful discussion of the positivist method in IL, see Bruno Simma & Andreas L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View' (1999) 93 Am. J. Int'l L. 302.

<sup>8</sup> Anne-Marie Slaughter, 'International Law and International Relations' (2000) 285 Rec. des Cours 12 at 26.

<sup>9</sup> In addressing policy formulation, as in other respects, modern IR-IL draws on the policy-oriented jurisprudence of the New Haven School. For a recent summary, see Siegfried Wiessner & Andrew R. Willard, 'Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflicts: Toward a World Public Order of Human Dignity' (1999) 93 Am. J. Int'l L. 316. For a discussion of differences between the traditional New Haven approach and theories discussed here, see Abbott, 'International Relations Theory', *supra* note 7 at 362.

<sup>10</sup> For valuable discussions of the difficulties and successes of lawyers and other policy makers in addressing such problems, see P.J. Simmons & Chantal de Jonge Oudraat, eds., *Managing Global Issues: Lessons Learned* (Washington, DC: Carnegie Endowment for International Peace, 2001).

improve the quality of human action.’<sup>11</sup>

In 1992 I outlined several intellectual tasks for which IR theory is especially helpful.<sup>12</sup> These include theoretically informed description, explanation and prediction, normative analysis, and finally the instrumental task of institutional design: constructing ‘law-based options for the future.’<sup>13</sup> Designing effective institutions, broadly defined, is increasingly recognized not only as an urgent task in today’s world, but also as perhaps the lawyer’s ‘most important creative role.’<sup>14</sup> It is also an exceedingly difficult task: even suboptimal institutions are resistant to change; politicians favor short-term solutions; inherited conceptions of appropriate form limit innovation; and unanticipated consequences are routine.<sup>15</sup> In these circumstances, an intellectual framework that helps policy makers identify and assess an array of imaginative options is of tremendous value.

In this article, I discuss how the theoretical approaches of IR can enhance the work of international lawyers and other architects of global governance. To increase the power of IR for that purpose, I argue that the IR theory known as institutionalism should be enriched by the incorporation of insights from other approaches. Institutional theory provides a natural analytical framework for policy makers. Yet an enhanced institutionalism would better encompass the increasingly complex architecture of global governance and provide more powerful support for institutional design.

The article proceeds as follows. Section I summarizes the leading schools of IR theory. Section II examines how adherents of these approaches have framed them as competitors in a zero-sum ‘paradigm war’. The section then contrasts recent scholarship that explores compatibilities among theoretical approaches. Section III

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<sup>11</sup> Robert O. Keohane, ‘International Institutions: Two Approaches’ (1998) 32 *Int’l Stud. Q.* 379.

<sup>12</sup> Abbott, ‘Elements of a Joint Discipline’, *supra* note 1 at 168-72.

<sup>13</sup> See Steven R. Ratner & Anne-Marie Slaughter, ‘Appraising the Methods of International Law: A Prospectus for Readers’ (1999) 93 *Am. J. Int’l L.* 291 at 292.

<sup>14</sup> Jeffrey L. Dunoff & Joel P. Trachtman, ‘The Law and Economics of Humanitarian Law Violations in Internal Conflicts’ (1999) 93 *Am. J. Int’l L.* 394 at 395. See also Slaughter, ‘International Law and International Relations’, *supra* note 2 at 217-24; Ronald B. Mitchell, ‘Regime Design Matters: Intentional Oil Pollution and Treaty Compliance’ (1994) 48 *Int’l Org.* 425. For a rationalist analysis of variables leading to major institutional design choices, see Barbara Koremenos, Charles Lipson & Duncan Snidal, eds., ‘The Rational Design of International Institutions’ (2001) 55 *Int’l Org.*

<sup>15</sup> See Paul Pierson, ‘The Limits of Design: Explaining Institutional Origins and Change’ (2000) 13 *Governance: An International Journal of Policy and Administration* 475.

provides an impressionistic empirical rationale for these bridge-building efforts by describing the complex governance arrangements that characterize several significant issue areas. It argues that one cannot even properly describe such arrangements, much less explain or design them, without an enhanced theoretical framework like that suggested here. Section IV explores how an enriched institutionalist theory might be created.

## I THE THEORETICAL PERSPECTIVES OF IR

IR is famously divided among competing theoretical paradigms. This greatly complicates the field,<sup>16</sup> but enriches it as well: the very multiplicity of approaches helps scholars identify alternative legal arguments and responses to social problems. The paradigms or families of IR theory direct our attention (variously) to two main features of international life: the *actors* whose decisions and conduct shape outcomes, and the *factors and processes* that cause, influence, or constitute decisions, actions and outcomes, from war, to cooperation, to compliance (or noncompliance) with legal rules.

I will only briefly summarize the major schools of IR theory here. Conventionally, these are identified as realism, institutionalism, liberalism and constructivism.<sup>17</sup> The first three of these generally share a rationalist methodology. They assume that actors behave purposively, pursuing their interests and goals through calculated choices and means-ends rationality, subject to any limitations on their decision-making capacity and any external constraints.<sup>18</sup> Decisions are governed by a 'logic of consequences,'<sup>19</sup> which means that efforts to change actors' behaviour for private or social gain must modify incentives or other determinants of consequences. Constructivist theory, in contrast, reflects a different mode of inquiry, methodology, and understanding of the

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<sup>16</sup> See Abbott, 'International Relations Theory', *supra* note 7 at 364.

<sup>17</sup> *Ibid.* at 364-8. Slaughter divides the schools somewhat differently, presenting three categories—realism, institutionalism and liberalism—each with a dominant rationalist version and a constructivist version or critique. Slaughter, 'International Law and International Relations', *supra* note 8 at 30-51.

<sup>18</sup> See Duncan Snidal, 'Rational Choice and International Relations' in Walter Carlsnaes *et al.*, eds., *Handbook of International Relations* (London: Sage, 2002). Rationalist theories generally view actors as egoistic, pursuing their own utility or payoffs even at the expense of others. However, rationalist theories can accommodate altruism and other non-egoistic goals to a considerable extent, if not completely. See *ibid.*; Kenneth W. Abbott & Duncan Snidal, 'Values and Interests: International Legalization in the Fight Against Corruption' (2002) 31:1 (Part 2) *J. Legal Stud.* S141.

<sup>19</sup> See James G. March & Johan P. Olsen, *Rediscovering Institutions* (New York: Free Press, 1989).

social world and the motivations of actors. I discuss these differences further below.

Realist theory has long been dominant in IR. It views states as the principal actors in world politics.<sup>20</sup> Realism is a prototypical rationalist theory: states pursue security and survival as their primary goals; they interact in conditions of anarchy and thus self-help is their only dependable strategy. Under these conditions, differences in state power—and distributions of power such as the bipolar pattern of the Cold War years and the current unipolar pattern—explain most important outcomes. States may cooperate and make legal commitments, but the powerful set the terms of cooperation, and the influence of institutions depends wholly on the underlying power realities.

Institutionalist theory comes in many varieties.<sup>21</sup> I refer here to ‘neoliberal institutionalism,’ the ‘most well-developed literature on international institutions.’<sup>22</sup> Institutional theory also focuses predominantly on states. However, it does so as a simplifying assumption, recognizing that states are legal fictions, or as a way to respond to realists on their own terms.<sup>23</sup> The theory clearly incorporates international institutions as well as states, and it can accommodate other actors as well.<sup>24</sup> Institutionalism is predominantly rationalist. States pursue many interests, not just power or security; goals such as prosperity, clean air and freedom from disease can only be achieved through cooperation. Scholars in this tradition identify conditions that impede beneficial cooperation, such as uncertainty and free-rider problems, and analyze how institutions can help overcome them, for example by disseminating information, assuring states that others are cooperating, and monitoring behaviour to reduce the incentive to cheat. Through mechanisms like these, institutions can affect behaviour independent of power.

Liberal theory has often been identified with normative arguments for international cooperation and law. But liberalism has in recent years been remade as a positive IR theory.<sup>25</sup> In this approach, as

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<sup>20</sup> A focus on states is not an inherent feature of rationalist theory, but a substantive assumption based on observation of international politics. See Snidal, ‘Rational Choice’, *supra* note 18.

<sup>21</sup> See Peter A. Hall & Rosemary C.R. Taylor, ‘Political Science and the Three New Institutionalisms’ (1996) 44 Pol. Stud. 936.

<sup>22</sup> Jon C. Pevehouse, ‘Democracy from the Outside-In? International Organizations and Democratization’ (2002) 56 Int’l Org. 515 at 518.

<sup>23</sup> See e.g. Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton, NJ: Princeton University Press, 1984) at 66-7.

<sup>24</sup> See Snidal, ‘Rational Choice’, *supra* note 18.

<sup>25</sup> See e.g. Anne-Marie Slaughter, ‘International Law in a World of Liberal

in theories of pluralism and public choice, the central actors are individuals, business firms, non-governmental organizations (NGOs) and other non-state actors (NSAs), who pursue their interests—or their values—primarily in domestic politics. In Andrew Moravcsik's influential formulation, the demands of private actors (rather than objective conditions) determine state preferences. States then act on the international plane to further their preferences as in realism or institutionalism.<sup>26</sup> By opening the 'black box' of the state, liberal scholars are able to focus, *inter alia*, on: (a) the effects of different domestic governance structures, especially democracy; (b) the actions of government agencies and officials, which increasingly cooperate below the level of 'the state';<sup>27</sup> and (c) interactions between international and domestic politics.<sup>28</sup> Transnational liberals highlight NSA activities across states and in international forums.<sup>29</sup> The growth of international NGOs has stimulated extensive research in this area.<sup>30</sup>

Constructivist theory reflects different understandings.<sup>31</sup> In this view, actors do not have objective identities or interests. Instead, the identities, interests and many other attributes of 'states', 'institutions', 'agencies' and 'NSA's'—indeed most interesting features of the world—are 'constructed' in the form of shared subjective understandings. Material attributes may be relevant, but what those characteristics mean in practice is the product of ideas. This perspective reflects the broad theoretical paradigm known as sociological institutionalism,<sup>32</sup> in which

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States' (1995) 6 Eur. J. Int'l L. 503.

<sup>26</sup> See Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 Int'l Org. 513.

<sup>27</sup> See Anne-Marie Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

<sup>28</sup> An example is 'second image reversed' scholarship, which examines the influence of international factors on domestic politics. See Peter A. Gourevitch, 'The Second Image Reversed: International Sources of Domestic Politics' (1978) 32 Int'l Org. 881; Pevehouse, *supra* note 22.

<sup>29</sup> See e.g. Robert O. Keohane & Joseph Nye, *Power and Interdependence: World Politics in Transition* (Boston: Little, Brown, 1977); Thomas Risse-Kappen, ed., *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions* (New York: Cambridge University Press, 1995).

<sup>30</sup> Valuable review articles include Thomas Risse, 'Transnational Actors and World Politics' in *Handbook of International Relations*, *supra* note 18 at 255; Richard Price, 'Transnational Civil Society and Advocacy in World Politics' (2003) 55 World Pol. 579.

<sup>31</sup> See James Fearon & Alexander Wendt, 'Rationalism vs. Constructivism: A Skeptical View' in *Handbook on International Relations*, *supra* note 18 at 52.

<sup>32</sup> See Hall & Taylor, *supra* note 21; Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996) at 14-22;

social 'structures', especially ideational structures of 'meaning and social value,'<sup>33</sup> are prior to and more influential than actors or 'agents'.

Constructivism also reflects a strong critical orientation, as its adherents seek to problematize features that others take for granted. For example, Alexander Wendt responds to realists that the demands of anarchy are not inherent, but have been intersubjectively constructed and learned.<sup>34</sup> States can modify them by creating new understandings, as in the Western European 'security community.'<sup>35</sup> Similarly, Michael Barnett and Raymond Duvall argue that 'power' is not limited to coercive influence wielded by states and other actors, but includes logically prior social processes that constitute actors with differential capacities.<sup>36</sup>

Since actors are merely the products of structures, in the constructivist view, they have less freedom of action than rationalists assume.<sup>37</sup> In particular, actors are rarely free to pursue means-ends rationality. Instead, they behave in conformity with the identities, values and norms to which they have been socialized and which they have internalized. Rather than calculating, then, actors deliberate as to what actions would be consistent with their values and identities,<sup>38</sup> using a 'logic of appropriateness.' Legal and social norms are influential, but less because they regulate behaviour than because they constitute identities and preferences.<sup>39</sup>

Arguments based on the logic of appropriateness are static—they relate to points at which actors' identities and preferences are

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Philip M. Nichols, 'Forgotten Linkages—Historical Institutionalism and Sociological Institutionalism and Analysis of the World Trade Organization' (1998) 19 U. Penn. J. Int'l Econ. L. 461 at 482-7.

<sup>33</sup> Finnemore, *supra* note 32 at 2.

<sup>34</sup> See Alexander Wendt, 'Anarchy Is What States Make of It' (1992) 46 Int'l Org. 391.

<sup>35</sup> See Emanuel Adler & Michael Barnett, eds., *Security Communities* (New York: Cambridge University Press, 1998).

<sup>36</sup> Michael Barnett & Raymond Duvall, 'Power in International Relations' (2005) 59 Int'l Org. 39.

<sup>37</sup> The contrast is with the 'methodological individualism' of rationalist theory. See Jeffrey T. Checkel, 'Why Comply? Social Learning and European Identity Change' (2001) 55 Int'l Org. 553.

<sup>38</sup> See e.g. Frank Schimmelfennig, 'The Community Trap: Liberal Norms, Rhetorical Action, and the Eastern Enlargement of the European Union' (2001) 55 Int'l Org. 47; Andrew Hurrell, 'International Society and the Study of Regimes: A Reflective Approach' in Robert J. Beck *et al.*, eds., *International Rules: Approaches from International Law and International Relations* (New York: Oxford University Press, 1999) 206-24.

<sup>39</sup> John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge' (1998) 52 Int'l Org. 855 at 871-4.

fixed.<sup>40</sup> But constructivists are also interested in the dynamic construction of identities and preferences, the ways in which these attributes can be modified through social interaction. This process-oriented analysis, discussed further below, is necessarily more actor-centered. As a result, it is more compatible with rationalist explanations.

## II THEORETICAL EXCLUSIVITY AND THE DEMANDS OF POLICY

IR scholarship has tended to treat these four families of theory as mutually exclusive and competitive. A common approach is to test hypotheses derived from two or more paradigms to see which provides the superior explanation of a set of data. Most IR scholars are closely identified with one approach and assert it as foundational—the *real ... world order*.<sup>41</sup> Scholars likewise tend to focus on substantive areas in which their preferred approach has traction.<sup>42</sup> Criticism of other approaches is common.

Mark Pollack and Gregory Shaffer make this point somewhat differently.<sup>43</sup> They note that the major theories' focus on different types of actors constitutes distinct 'images' of international governance: (a) an interstate or intergovernmental image (with realist, institutionalist and liberal versions);<sup>44</sup> (b) a transgovernmental image focusing on cooperation among national agencies below the state (liberal); and (c) a transnational image focusing on activities of NSAs (liberal). Again, scholars treat these as exclusive and identify with a particular image.<sup>45</sup>

Recent liberal scholarship has devoted more attention to

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<sup>40</sup> See Checkel, *supra* note 37.

<sup>41</sup> Cf. Anne-Marie Slaughter, 'The Real New World Order' (1997) 76 For. Aff. 183 [italics added].

<sup>42</sup> For example, realists focus on security; institutionalists on trade and environment; and constructivists and many liberals on human rights. Perhaps more likely, scholars choose an approach that has traction in areas in which they are interested. Either way, scholarship tends to sort by issue area as well as approach.

<sup>43</sup> See Pollack & Shaffer, *supra* note 4.

<sup>44</sup> Liberal theory is intergovernmental to the extent that it views states—or heads of government—as interacting internationally to further preferences established in domestic politics. Domestic and interstate influences can also run in the other direction, as in 'second image reversed' scholarship, *supra* note 28, and can interact, as in Robert Putnam's metaphor of the 'two-level game.' See Robert D. Putnam, 'Diplomacy and Domestic Politics: The Logic of Two-Level Games' (1988) 42 Int'l Org. 427.

<sup>45</sup> An extreme example is the largely fruitless debate over displacement of the state by civil society. See e.g. Samir Amin, *Capitalism in the Age of Globalization* (Atlantic Highlands, NJ: Zed Books, 1997); Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge: Cambridge University Press, 1996).



interactions across levels, especially between civil society and the state. But these are largely of one kind: efforts by NGOs and social movements to influence states.<sup>46</sup> At a given level, moreover, scholars tend to focus on a single type of actor: for example, most transnational scholars study NGOs, advocacy networks, and social movements,<sup>47</sup> and some study business,<sup>48</sup> but few combine the two. (A prominent exception is the literature on epistemic communities, knowledge-based networks of scientists and other individuals based in governments, international organizations (IOs) and private institutions.<sup>49</sup>)

It should be obvious from the summaries above, however, that the actors and the causal or constitutive factors highlighted by each theoretical approach are merely parts of a larger, more complex whole.<sup>50</sup> Each theoretical paradigm sets aside – by assumption – actors and influences that are manifestly significant in international governance, yet still asserts its exclusive and foundational character. This exclusivity is problematic for policy makers, who lack the luxury of choosing theoretical sides.

Policy specialists increasingly call for multifaceted governance strategies that involve multiple, complementary actor types and strategies. For example, Wolfgang Reinicke notes the incongruence between economic globalization and the policy problems it creates and governance mechanisms based on the territorial state. He calls for a process of ‘global public policy’ that can decouple elements of the ‘operational aspects of internal sovereignty’ from the governments of

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<sup>46</sup> This literature focuses on the tactics of civil society campaigns and conditions for their success. See Risse, ‘Transnational Actors’, *supra* note 30, and Price, ‘Transnational Civil Society’, *supra* note 30.

<sup>47</sup> See e.g. Margaret E. Keck & Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998).

<sup>48</sup> E.g. Virginia Haufler, *A Public Role for the Private Sector* (Washington, DC: Carnegie Endowment for International Peace, 2001); A. Claire Cutler *et al.*, eds., *Private Authority and International Affairs* (Albany, NY: State University of New York Press, 1999).

<sup>49</sup> See Peter Haas, ed., *Knowledge, Power, and International Policy Coordination* (special issue) (1992) 46 *Int’l Org.* Some scholars also study other governance networks that include state and non-state participants. See e.g. R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity, and Accountability* (Buckingham, Philadelphia: Open University Press, 1997); James N. Rosenau & Ernst-Otto Czempiel, eds., *Governance Without Government: Order and Change in World Politics* (Cambridge: Cambridge University Press, 1992); Thomas G. Weiss & Leon Gordenker, eds., *NGOs, the UN, and Global Governance* (Boulder, Colo.: Lynne Rienner, 1996).

<sup>50</sup> An apt, though pessimistic, metaphor might be the parable of the blind men, each of whom attempted to describe an elephant while touching only one part of its body.

territorial states and assign them to the actors best able to exercise them: IOs, national government agencies, epistemic communities, NSAs or others as appropriate.<sup>51</sup>

More recently, in two massive studies, Inge Kaul and her colleagues at the United Nations Development Program call for similar innovations to improve the production of global public goods.<sup>52</sup> They identify not only a 'jurisdiction gap' between global problems and territorial states, but also a 'participation gap' between NSAs and inter-state institutions. Echoing Reinicke, Kaul and colleagues recommend 'strategic horizontal management' of global issues, especially through partnerships that bring together government, business and civil society to implement international norms.<sup>53</sup>

Is it intellectually feasible, then, to draw on multiple theoretical perspectives for policy formulation and institutional design—in particular, to enrich institutionalist theory with insights from other schools? Two difficulties stand out. First, especially for rationalists, the aim of theory is to simplify reality by highlighting particular variables and processes for testing. Other methodological concerns, such as the demands of formal modeling and a commitment to explanatory parsimony, are also thought to justify a narrow focus.<sup>54</sup> To what extent can rationalist institutionalism be enriched without destroying it? Second, there exist deep ontological or epistemological differences

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<sup>51</sup> Wolfgang H. Reinicke, *Global Public Policy: Governing Without Government?* (Washington, DC: Brookings Institution Press, 1998) at 64-5 (incongruence of economic and political 'geography'), 85-90 (global public policy).

<sup>52</sup> Inge Kaul *et al.*, eds., *Global Public Goods: International Cooperation in the 21<sup>st</sup> Century* (New York: Oxford University Press, 1999); Inge Kaul *et al.*, eds., *Providing Global Public Goods: Managing Globalization* (New York: Oxford University Press, 2003).

<sup>53</sup> Kaul *et al.*, 'Introduction' in Kaul *et al.*, eds., *Global Public Goods*, *supra* note 52 at xix, xxvi (jurisdiction and participation gaps); Kaul *et al.*, 'How to Improve the Provision of Global Public Goods', in Kaul *et al.*, eds., *Providing Global Public Goods*, *supra* note 52 at 21, 50 (strategic horizontal management). Other analysts and scholars also support such arrangements, although they remain poorly understood. See e.g. Michael Edwards & Simon Zadek, 'Governing the Provision of Global Public Goods: The Role and Legitimacy of Nonstate Actors' in *Providing Global Public Goods*, *supra* note 52 at 200; Jasmin Enayati & Minu Hemmati, *Multi-Stakeholder Processes: Examples, Principles and Strategies: UNED Workshop Report* (2001), online: <<http://www.unedforum.org/practice/msp/workshop.pdf>>; Jane Nelson & Simon Zadek, *Partnership Alchemy: New Social Partnerships in Europe* (Copenhagen, The Copenhagen Centre, 2000), online: The Copenhagen Centre <[http://www.copenhagencentre.org/graphics/CopenhagenCentre/publications/partnership\\_alchemy.pdf](http://www.copenhagencentre.org/graphics/CopenhagenCentre/publications/partnership_alchemy.pdf)>; Weiss & Gordenker, *supra* note 49.

<sup>54</sup> See Snidal, 'Rational Choice', *supra* note 18.

between at least some formulations of rationalist and constructivist theory, suggesting that cross-fertilization will be difficult.<sup>55</sup>

On both points, however, recent scholarship is encouraging. As to rationalist theory, Duncan Snidal emphasizes the virtues of modeling and parsimony, yet concludes that for many purposes rationalists can and should selectively modify their assumptions to take account of insights from other approaches.<sup>56</sup> Rationalist theory can (and often does) incorporate NSAs, altruistic and non-material goals, communication, and beliefs and other collective, subjective features, typically as constraints. It has begun to address learning, although it can still do more to explore specific mechanisms of learning so as to better explain processes of change. The most difficult challenge is incorporating the possibility of preference change highlighted by constructivists: since preferences cannot be directly observed, explanations based on preference change are difficult to test and may become tautological. Even here, however, Snidal suggests ways to concretize the problem, for example by examining the changing influence of domestic NSAs as sources of preferences.<sup>57</sup>

As to the inconsistencies of rationalism and constructivism, James Fearon and Alexander Wendt argue persuasively that the difficulties are overstated.<sup>58</sup> Both approaches treat ideas as significant (although they are more central to constructivism). Both emphasize elements of structure and of agency (although with a different balance). In the real world, actors sometimes choose by calculating the consequences of their actions, at other times by following the dictates of their identities and values. Actors sometimes observe norms because of their regulative qualities, at other times because they have internalized them. In short, if one views rationalism and constructivism as pragmatic analytical tools, rather than as contending metaphysics, they are not incompatible.

Indeed, Fearon and Wendt see rationalism and constructivism as valuable complements, which bring different aspects of social life into focus. They urge scholars (and *a fortiori* policy makers) to cross the rationalist-constructivist boundary whenever doing so seems fruitful.

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<sup>55</sup> The principal ontological difference relates to acceptance of the primacy of agents (who may create social structures) or of structures (which constitute agents). While rationalists are generally in accord in terms of epistemology, constructivists debate the ability to know and thus the enterprise of social science. While this debate is less frequently joined between rationalists and constructivists, it puts at least some of them at odds. See Fearon & Wendt, *supra* note 31.

<sup>56</sup> See Snidal, 'Rational Choice', *supra* note 18

<sup>57</sup> Because of the complexities involved, these approaches require a 'soft' rationalist approach rather than formal modeling.

<sup>58</sup> See Fearon & Wendt, *supra* note 31.

Given our limited understanding of international behaviour, they argue, it would be foolish to exclude any useful approach on *a priori* grounds: we will not ‘help the planet by structuring IR as a battle of paradigms.’<sup>59</sup>

Other recent works exhibit a similar interest in the compatibilities among theoretical approaches. Barnett and Duval identify several conceptions of power: some are attributes of actors expressed in concrete interactions, others the result of social processes that constitute actors with particular capacities.<sup>60</sup> These conceptions cut across the schools of IR theory. For example, they suggest that power is not the exclusive preserve of realists, or of states: NSAs and IOs can wield ‘compulsory’ power, and their power can be based on normative and symbolic techniques like ‘shaming’ as well as material influences. Barnett and Duval conclude that there is no good reason to exclude any of these conceptions *a priori*.

Jeffrey Checkel associates himself with a particular branch of constructivist theory, but explicitly seeks to ‘move away from an “either/or,” “gladiator” style of analysis ...to a “both/and” perspective.’<sup>61</sup> He observes that compliance with international norms plainly involves both instrumental choice and social learning, and proposes a synthetic approach to compliance emphasizing ‘argumentative persuasion,’ a process that involves actors and institutions but takes seriously the possibility of preference change through deliberation and social interaction.<sup>62</sup>

Frank Schimmelfennig finds that the European Union (EU) offered membership to certain Eastern European states not because of intergovernmental bargaining, but because the candidates were shown to have adopted European values and norms.<sup>63</sup> Schimmelfennig expressly combines arguments from constructivism and rationalism. He posits that states and other actors are often weakly socialized to prevailing norms and standards of legitimacy,<sup>64</sup> and so give in to material interests. In these circumstances, advocates can use ‘rhetorical action’—the strategic deployment of normative arguments—to shame

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<sup>59</sup> *Ibid.* at 52.

<sup>60</sup> See Barnett & Duval, *supra* note 36.

<sup>61</sup> Checkel, *supra* note 37 at 581.

<sup>62</sup> Other influential works espousing versions of ‘argumentative persuasion’ include Neta C. Crawford, *Argument and Change in World Politics: Ethics, Decolonization, and Humanitarian Intervention* (New York: Cambridge University Press, 2002); Thomas Risse, “‘Let’s Argue!’: Communicative Action in World Politics’ (2000) 54 *Int’l Org.* 1.

<sup>63</sup> Schimmelfennig, *supra* note 38.

<sup>64</sup> On conceptions of legitimacy, see Morris Zelditch, Jr., ‘Theories of Legitimacy’ in John T. Jost & Brenda Major, eds., *The Psychology of Legitimacy* (Cambridge: Cambridge University Press, 2001).

them into compliance. Checkel and Schimmelfennig adopt different views of the role of argument and rhetoric, one more deliberative and social (closer to constructivism), the other more strategic (closer to rationalism). But both figure in the operations of international institutions.

Wayne Sandholz and Mark Gray, analyzing the impact of international integration on domestic corruption, argue that actors are motivated both by the desire to enhance their well-being and by the desire to act in appropriate or justifiable ways.<sup>65</sup> Economic and normative rationality are thus complementary: individuals routinely reason about utility and norms simultaneously, and consider both in making choices, although the interactions between them remain poorly understood.

In sum, IR scholars have begun to move decisively beyond 'paradigm war.' While there remains much to be done to fully clarify the interactions among theoretical approaches, this development opens dramatic possibilities for architects of global governance.

### III COMPLEX INSTITUTIONS IN INTERNATIONAL GOVERNANCE

Complex institutional arrangements are now prominent in global governance. These involve a range of actors, from IOs to NSAs, often in combination; a range of actor motivations, from the material to the normative; and a range of causal and constitutive governance mechanisms, from material incentives to normative persuasion. It is difficult for narrowly defined, exclusive analytical approaches even to describe these arrangements in a theoretically informed way, let alone to explain and predict their operations or to assess and deploy them in response to social problems. I do not attempt a systematic survey of institutional innovations here, but present several significant examples. These provide a strong if impressionistic empirical rationale for theoretical bridge building.

One dramatic recent example is the international response to the Indian Ocean tsunami of December 2004. An early warning system, operated through the Intergovernmental Oceanographic Commission of UNESCO, had been in place in the Pacific for 40 years, but none was operative in the Indian Ocean. A few treaties aim to facilitate disaster relief, although there remains a 'yawning gap' in the law of this field.<sup>66</sup> Still, IOs helped lead the international response: the United Nations (UN) coordinated relief efforts after the first few days, and specialized

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<sup>65</sup> Wayne Sandholz & Mark M. Gray, 'International Integration and National Corruption' (2003) 57 *Int'l Org.* 761.

<sup>66</sup> See David P. Fidler, 'ASIL Insight: The Indian Ocean Tsunami and International Law' (January 2005), online: American Society of International Law <<http://www.asil.org/insights.htm#2005>>.

agencies including the World Food Program and World Health Organization (WHO) began to work in their areas of competence.<sup>67</sup>

State agencies also played major roles. Military units provided logistic support. Foreign assistance programs like the US Agency for International Development contributed financial resources and conducted relief operations.<sup>68</sup> In addition, dozens of humanitarian NGOs helped supply food, water, medical care and other human needs; many state agencies and IOs channelled their contributions through NGOs.<sup>69</sup> Individuals, firms and other NSAs provided extraordinary donations of money, goods and services.<sup>70</sup>

Relief activity is typically rooted in humanitarian or altruistic values and identities, although self-interest certainly plays a role. What is more, while relief efforts concentrate on mundane operational tasks, they are suffused with norms and values, relating to the priorities of human needs, equality and human rights. Participants often see promoting those norms as part of their role.

Many international health programs likewise combine all three of Pollack and Shaffer's images of governance, and most are suffused with norms and values as well as interests. The Global Fund to Fight AIDS, Tuberculosis and Malaria was created in 2001, after the UN

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<sup>67</sup> For information on UN activities, see online: <<http://www.un.org/apps/news/infocusRel.asp?infocusID=102&Body=tsunami&Body1>>.

<sup>68</sup> For information on US Agency for International Development (USAID) activities, see online: <[http://www.usaid.gov/locations/asia\\_near\\_east/tsunami/](http://www.usaid.gov/locations/asia_near_east/tsunami/)>.

<sup>69</sup> For example, the USAID worked closely with local and international NGOs in the course of its relief efforts. Its periodic 'fact sheets' reporting on these efforts summarize the amounts of USAID assistance channeled through 'implementing partners' such as CARE, Church World Service, Mercy Corps and other NGOs. These reports also solicited public donations to 'humanitarian organizations that are conducting relief operations', and included internet links to such organizations. See e.g. USAID, 'Indian Ocean—Earthquake and Tsunamis' Fact Sheet #30 (2 February 2005), online: <[http://www.usaid.gov/our\\_work/humanitarian\\_assistance/disaster\\_assistance/countries/indian\\_ocean/fy2005/indianocean\\_et\\_fs30\\_02-02-2005.pdf](http://www.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/countries/indian_ocean/fy2005/indianocean_et_fs30_02-02-2005.pdf)>. For a discussion by the current Administrator of USAID of NGO interactions with state agencies and IOs in humanitarian emergencies, see Andrew S. Natsios, 'NGOs and the United Nations System in Complex Humanitarian Emergencies: Conflict or Cooperation' in Weiss & Gordenker, *NGOs, the UN and Global Governance*, *supra* note 49 at 67.

<sup>70</sup> To cite just one example, the United States Fund for UNICEF notes that it received 'the greatest outpouring of support in the history' of the Fund for the Agency's work in response to the tsunami. See online: United States Fund for UNICEF <<http://www.unicefusa.org/site/pp.asp?c=duLR18O0H&b=277164>>.

General Assembly endorsed a proposal from Secretary General Kofi Annan at its Special Session on HIV/AIDS.<sup>71</sup> The Fund is a financial mechanism providing grants for national programs to combat the three most lethal communicable diseases. It is structured as a partnership, with a Board that includes representatives of donor and recipient governments, IOs such as WHO, the World Bank, and the Joint UN Program on HIV/AIDS (UNAIDS), Northern and Southern NGOs, philanthropic foundations, businesses, and persons living with the diseases. The Fund derives most of its resources from government contributions, but also receives significant private donations.

The Fund promotes parallel forms of collaboration in recipient countries. Country Coordinating Mechanisms (CCMs) submit proposals and supervise grant implementation. CCMs typically include representatives of the health professions, NGOs and the private sector as well as government; representatives of development IOs sometimes participate. CCMs nominate 'principal recipients' to carry out Fund-supported programs, and these may be public or private entities. Business firms further participate in 'co-investment' schemes, expanding prevention and treatment for employees and their dependents while Fund-supported programs assist surrounding communities.<sup>72</sup>

In sum, in the Global Fund, states, IOs, government agencies and NSAs do not function as distinct categories: all four actor groups support the Fund, govern it, and carry out its programs. Moreover, while the Fund is a technical instrument, it is instinct with norms and values: those of the actors that created and govern it and those implicit in the programs and institutional structures it supports. These include norms of community and participation as well as humanitarian and public health values. The Fund advances these norms through the 'consequences' of its grants and conveys their 'appropriateness' through its structures, guidelines and decisions, as well as through argument and persuasion.

The world's largest public health program, the Global Polio Eradication Initiative, is also spearheaded by organizations from all three levels of governance: WHO<sup>73</sup> and UNICEF;<sup>74</sup> the US Centers for Disease Control and Prevention, which provide technical expertise, staff and financial support;<sup>75</sup> and Rotary International, a voluntary service

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<sup>71</sup> See online: The Global Fund to Fight AIDS, Tuberculosis and Malaria <[www.theglobalfund.org](http://www.theglobalfund.org)>.

<sup>72</sup> Co-investment was negotiated among the Fund, the ILO, and the Global Business Coalition on HIV/AIDS, *ibid*.

<sup>73</sup> See online: Global Polio Eradication Initiative <<http://www.polioeradication.org>>.

<sup>74</sup> See online: UNICEF <[http://www.unicef.org/immunization/index\\_polio.html](http://www.unicef.org/immunization/index_polio.html)>.

<sup>75</sup> See online: Centers for Disease Control and Prevention

NGO that is donating hundreds of millions of dollars, supplying volunteers and advocating for public and private support.<sup>76</sup> Similarly, early participants in the Medicines for Malaria Venture (MMV)<sup>77</sup>—created to speed development of antimalarial drugs—included the WHO<sup>78</sup> and the World Bank, the Swiss Agency for Development and Cooperation, and the International Federation of Pharmaceutical Manufacturers Associations and Rockefeller Foundation. MMV likewise receives financial support from IOs, governments and NSAs, including the Bill and Melinda Gates Foundation and several corporations.<sup>79</sup>

Complex institutional forms also figure in many areas of international rule making. One example is standard setting for business on issues such as labour rights and environmental protection.<sup>80</sup> In addition to traditional legal methods such as treaties and legislation, business standards are promulgated and supervised by IOs such as the OECD and UN, business firms and industry associations, NGOs and, most interestingly, multi-stakeholder groups that bring together firms and NGOs, sometimes with government or IO participation. Most of these bodies lack authority to issue legally binding rules, promulgating instead what my co-authors and I term ‘privatized soft law.’<sup>81</sup> Like more diffuse norms of corporate social responsibility, these standards combine ethical considerations (appropriateness) with the prospect of commercial

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<<http://www.cdc.gov/programs/global04.htm>>.

<sup>76</sup> See online: Rotary International: Polio Plus <<http://www.rotary.org/foundation/polioplus>>. Rotary estimates that by the conclusion of the Initiative it will have contributed some \$600 million.

<sup>77</sup> See online: Medicines for Malaria Venture <<http://www.mmv.org>>.

<sup>78</sup> See online: Roll Back Malaria <<http://rbm.who.int>>. The WHO Roll Back Malaria program is itself organized around partnerships.

<sup>79</sup> The Gates Foundation is a major contributor to many public health programs, and is sometimes accorded a governance role on a par with public bodies. For example, it has a permanent seat on the Board of the Global Alliance for Vaccines and Immunization (GAVI), along with four IOs. Online: Global Alliance for Vaccines & Immunization <<http://www.vaccinealliance.org>>.

<sup>80</sup> This discussion draws on a collaborative research project with Duncan Snidal and Sonya Sceats. See Kenneth W. Abbott & Duncan Snidal, ‘The International Standards Process: Setting and Applying Global Business Norms’ in Peter Nobel, ed., *International Standards and the Law* (Berne: Staempfli, 2005); and Kenneth W. Abbott, Sonya Sceats & Duncan Snidal, ‘The Governance Triangle: States, Firms, NGOs and Global Business Standards’ (Paper prepared for Roundtable on Interdisciplinary Approaches to International Law, Vanderbilt University Law School, November 12-13, 2004) [unpublished].

<sup>81</sup> Abbott, Sceats & Snidal, *supra* note 80 at note 16.



advantage (consequences).<sup>82</sup>

The UN Global Compact (UNGC) enlists business firms and other organizations to implement voluntarily treaty norms originally drafted for states.<sup>83</sup> The Office of the Secretary-General and the UN agencies responsible for the relevant treaties govern the UNGC, with input from a multi-stakeholder Advisory Council. Participating firms are expected to commit to UNGC principles, make them a part of their corporate strategy and culture, report publicly on their implementation, and advocate them to others. The UNGC eschews any suggestion of coercive enforcement, instead providing opportunities for firms to share experiences, engage in dialogue with NGOs, and form local partnerships. In short, it relies mainly on the logic of appropriateness.<sup>84</sup> Yet Barnett and Duvall see the UNGC as exercising three types of power that cross the boundaries of standard theories: compulsory power as NGOs 'shame' participating firms, institutional power as the UNGC empowers NGOs to comment on firm performance, and productive power as participation constitutes a new kind of actor: the socially responsible corporation.<sup>85</sup>

The Global Reporting Initiative (GRI) grew out of the Council for Environmentally Responsible Economies (CERES),<sup>86</sup> a group of NGOs and socially responsible investors that issued voluntary standards on environmental practices and public reporting following the Exxon Valdez oil spill. CERES launched GRI, in cooperation with the UN Environment Program, to strengthen its reporting system.<sup>87</sup> GRI promulgates guidelines and indicators with which firms can report on their social, economic and environmental impacts. (The UNGC urges participants to follow GRI guidelines.) Its Board includes individuals from business, labour, NGOs, government, and the UN Environment Program. A Stakeholder Council selects and advises the Board. GRI receives financial support from participating firms, foundations, project fees and other sources.

Complex institutions like these have arisen for several reasons.

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<sup>82</sup> See Abbott & Snidal, 'International Standards Process', *supra* note 80 at 7. For a discussion of the 'business case for CSR', see online: Business for Social Responsibility <<http://www.bsr.org/Meta/About/index.cfm>>.

<sup>83</sup> See online: UN Global Compact <<http://www.unglobalcompact.org>>.

<sup>84</sup> This befits an institution largely designed by a constructivist scholar, John Ruggie, while serving as Assistant Secretary General and strategic advisor to Kofi Annan. See John G. Ruggie, 'The Theory and Practice of Learning Networks: Corporate Social Responsibility and the Global Compact' (2002) 5 J. Corp. Citizenship 27.

<sup>85</sup> Barnett & Duvall, *supra* note 36.

<sup>86</sup> See online: Ceres <<http://www.ceres.org>>.

<sup>87</sup> GRI became independent in 2002. See online: Global Reporting Initiative <<http://www.globalreporting.org>>.

First, traditional approaches have proven insufficient: in addition to the 'jurisdiction gap' between states and global problems, states exhibit wide disparities in capacity and legitimacy. Furthermore the costs of negotiating and implementing treaties are high, and many IOs remain underfunded and weak. Second, many global issues have become very broadly defined: examples include 'sustainable development,' 'human development' and even 'health,' which the WHO defines as 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity.'<sup>88</sup> Institutions that hope to address such issues must combine traditionally distinct disciplines. Third, as already noted, issue areas like disaster relief, health, CSR and development are saturated with norms and values. Advocates demand responses that are legitimate and fair, reflect prevailing norms, and minimize the 'participation gap'. I discuss the implications of these points below.

#### IV TOWARD A RICHER INSTITUTIONALISM

In the abstract, institutionalism would seem to provide a natural framework for lawyers and other policy makers seeking innovative responses to global problems. After all, the whole panoply of cooperative arrangements—including formal IOs<sup>89</sup> like the WHO, transgovernmental forums like the Basel Committee on Banking Supervision,<sup>90</sup> epistemic communities, and multi-stakeholder schemes like the Global Fund—are in social science terms all 'institutions'. So too are legal rules, 'soft law' and other norms.<sup>91</sup>

As a theory, however, institutionalism has painted itself—and been painted by critics—into a corner. It has become associated solely with interactions among states, and so is condemned for ignoring the NSAs, transgovernmental forums and multi-stakeholder arrangements so prominent on the world stage. Further, it has become associated solely with a rationalist-functionalist account of behaviour, and so is condemned for ignoring the norms and values that drive many international actions and the subjective mechanisms of influence

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<sup>88</sup> *Constitution of the World Health Organization*, preamble, online: World Health Organization <<http://w3.whosea.org/EN/Section898/Section1441.htm>>.

<sup>89</sup> For a discussion of the functions of such institutions, see Kenneth W. Abbott & Duncan Snidal, 'Why States Act Through Formal International Organizations' (1998) 42 J. Confl. Resolution 3.

<sup>90</sup> See online: Bank for International Settlements <<http://www.bis.org/bcbbs>>.

<sup>91</sup> Principles, norms and rules constitute three of the four elements in the canonical definition of 'regime' in institutionalist theory. See Stephen D. Krasner, 'Regimes and the Limits of Realism: Regimes as Autonomous Variables' in Stephen D. Krasner, ed., *International Regimes* (Ithaca, NY: Cornell University Press, 1983).

embodied in institutions like the UNGC.

To cite just a few examples of this criticism, Oona Hathaway and Harold Koh observe that to legal scholars in the 'fairness' and 'legal process' traditions, as to constructivists, institutionalism overlooks 'the persuasive power of legitimate legal obligations' and the influence of ideas and norms.<sup>92</sup> Martha Finnemore and Stephen Toope argue that an institutionalist conception of legalization cannot take account of 'the practices, beliefs and traditions of societies,' 'the interaction of overlapping state and nonstate normative systems,' 'legitimacy' or 'normativity.'<sup>93</sup> Andrew Hurrell argues that institutionalism ignores significant causal factors not based on interests, such as a sense of community and a perception of injustice.<sup>94</sup> And Richard Shell argues that organizations following an institutionalist 'regime management model' face problems of 'long-range stability, distributive fairness, and procedural justice.'<sup>95</sup>

International politics are clearly richer than the arid realm these (somewhat exaggerated) accounts identify with institutionalism. Duncan Snidal and I argue elsewhere that this is notably true of international law.<sup>96</sup> Law (like many other norms and institutions) is sought by multiple actors: states, to be sure, but also government agencies, IOs and NSAs of widely varying character, including business firms, labour unions, NGOs, epistemic communities, ethnic groups, churches and so on. These actors are motivated not only by self-interest, but also by values and principled beliefs. They pursue law through normative persuasion, rational argument and bargaining, depending on the audiences they address. They view law both as an instantiation of values and norms and as an instrumental tool. And law affects behaviour both by modifying 'consequences' or incentives (such as positive and negative sanctions, which depend on power, and the concrete effects of domestic and international reputation) and by invoking considerations of 'appropriateness' (such as persuasion, socialization, law-abiding identity, the subjective effects of reputation, and internalization through legal processes).<sup>97</sup>

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<sup>92</sup> Hathaway & Koh, *supra* note 6 at 111.

<sup>93</sup> Martha Finnemore & Stephen J. Toope, 'Alternatives to "Legalization": Richer Views of Law and Politics' (2001) 55 *Int'l Org.* 743 at 749, 750.

<sup>94</sup> See Hurrell, 'International Society', *supra* note 38, at 210-15, 224.

<sup>95</sup> Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' (1995) 44 *Duke L.J.* 829 at 907.

<sup>96</sup> See Abbott & Snidal, 'Values and Interests', *supra* note 18; 'Hard and Soft Law in International Governance', *supra* note 4.

<sup>97</sup> On internalization through legal process, see Harold Hongju Koh, 'Why Do Nations Obey?' (1997) 106 *Yale L.J.* 2599; 'Bringing International Law Home' (1998) 35 *Houston L. Rev.* 623. For a discussion of the role of soft law, and the 'normative intermediaries' that invoke it, in avoiding ethnic

What is needed, then, is a richer institutionalism: one that brings to bear liberal insights into the role of NSAs, government agencies and domestic politics, constructivist insights into the role of values, norms and identities, and processes such as shaming, persuasion and socialization, and realist (and other)<sup>98</sup> insights into the role of power. As noted above, in many scholarly contexts concern for parsimony or the demands of formal modeling will still justify the use of spare, discrete theories. In other scholarly contexts and in the realm of policy, however, a more expansive approach is desirable.

An enriched institutionalism should remain fundamentally actor-centered and purposive in orientation. The institutions of most concern to international lawyers and policy makers are purposive creations,<sup>99</sup> although they frequently have unanticipated effects. Some are the products of conscious, centralized design, as with the Global Fund and UNGC, while others are the result of decentralized but purposive assertions of authority by actors intent on advancing their interests and values by any means available, as with the disaster relief regime. Managing such arrangements and attempting to improve them likewise require purposive action.

Which elements of theory could be incorporated into a purposive institutionalist framework without doing violence either to itself or to the original approaches? A precise answer is impossible, as the relevant research remains at an early stage. The difficulties are clearly greatest in the case of constructivism. As an initial cut at this problem, consider two classes of constructivist insights that can be visualized as occupying the ends of a spectrum: one class would be relatively easy to encompass in an expanded institutionalism, the other much more difficult (as the metaphor of the spectrum suggests, other insights might fall in between).

As to the first, constructivist scholars are devoting increased attention to actor-centered processes of norm creation and diffusion that unfold before norms have been fully internalized. For example, Martha Finnemore and Kathryn Sikkink posit a 'life cycle' of norms, which begins as norm entrepreneurs, typically NSAs, use techniques of persuasion to enlist states as norm supporters. Those 'early adopter' states help enlist others until a tipping point is reached, and eventually the norms are widely internalized. In describing this process, Finnemore

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conflict, see Steven R. Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 N.Y.U.J. Int'l L. & Pol. 591.

<sup>98</sup> See Barnett & Duvall, *supra* note 36.

<sup>99</sup> Where this is not the case, as arguably with the *opinio juris* component of customary IL, other approaches must be brought to bear.

and Sikkink even speak of 'strategic' social construction.<sup>100</sup> Similar strategies figure in Schimmelfennig's analysis of rhetorical action within the EU and Barnett and Duvall's interpretation of the powers of the UNGC.

Processes like these may involve persuasion, socialization and internalization, constituting actors with new understandings of their identities and interests. Yet they may also entail coercion in the form of shaming and political pressure, causing some actors to modify their behaviour for purely instrumental reasons. Institutions such as the EU, the UN and human rights bodies are prominent platforms for advocates and forums for persuasion in these strategies. What is more, international institutions themselves actively rely on these strategies, as the example of the UNGC suggests. Whether one likes it or not,<sup>101</sup> the insights of strategic social construction could readily be incorporated into an expanded institutionalist framework, and would provide a far richer understanding of the activities of institutions.

As to the second class of constructivist insights, consider John Ruggie's formulation of the 'constructivist challenge' to rationalism.<sup>102</sup> Ruggie notes that constructivism is concerned with questions such as how states acquired their identity in the international system and how the identities of particular states change due to historical events. He urges consideration of constitutive factors such as 'world views,' 'civilizational constructs, cultural factors' and rules defining broad social practices such as state systems and international orders.<sup>103</sup> Similarly, Finnemore urges attention to the full 'international social structure of which [states] are a part,' including cultural practices, philosophical principles and social values.<sup>104</sup>

Deep social factors like these operate over periods of historical time longer than most institutions, and certainly most policy makers, can readily address. In addition, many of these concepts are extremely broad and difficult to operationalize. While undoubtedly significant, influences of this sort are less relevant to the institutionalist project, and difficult to accommodate in an institutionalist framework. Indeed, it would seem difficult for any theory to address them systematically.

In creating an enhanced institutionalism, one lesson of

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<sup>100</sup> See Martha Finnemore & Kathryn Sikkink, 'International Norm Dynamics and Political Change' (1998) 52 Int'l Org. 887 at 910-11.

<sup>101</sup> Checkel, *supra* note 37 at 557-9, criticizes analyses like that of Finnemore and Sikkink for their consistency with 'thin rationalism', arguing that constructivism provides little independent value.

<sup>102</sup> *Supra* note 39.

<sup>103</sup> *Ibid.* at 863-4, 866-7, 871.

<sup>104</sup> Martha Finnemore, *National Interests in International Society* (Ithaca, NY: Cornell University Press, 1996) at 2.

constructivism might be that (at least some) norms, values, identities and understandings—and changes in those elements—are important parts of the structural context within which actors pursue their goals. The context of cooperation, in other words, extends beyond the standard institutionalist focus on patterns of interests. Broad social understandings may be relevant: for example, international society is now far more amenable to NSA participation than in the past. Specific norms may be even more relevant: Finnemore describes how poverty alleviation came to dominate development policy,<sup>105</sup> while Snidal and I have described how corruption came to be seen as a barrier to development.<sup>106</sup> For advocates in these issue areas, prior norms were part of the problem, while new understandings made institutional action possible. Influential norms and understandings can be introduced into the context of cooperation with only a modest loss of parsimony.

A second lesson might be that actors often rely on subjective and normative strategies in interactions related to institutions. Constructivist scholars such as Finnemore and Sikkink recognize that norm entrepreneurs engage in purposive activity to spread or instantiate values and to encourage compliance with norms; the techniques of strategic social construction are subjective.<sup>107</sup> To influence audiences responsive to ethical considerations, they select and frame issues to resonate with prevailing norms, appeal to accepted moral principles, and engage in other forms of normative persuasion. (Self-interested actors use similar strategies to appeal to these groups.) Once norms are in place, they use techniques like shaming to encourage implementation. Advocates may rely on these strategies because of their normative commitment or because of their comparative advantage in using them. To influence self-interested actors, of course, norm entrepreneurs must deal with incentives. Even here, however, their politics may be distinctive.<sup>108</sup>

A third lesson might be that international institutions themselves embody subjective and normative meaning, and rely on subjective and normative strategies in their operations. For example, the architects of the UNGC were careful to select highly legitimate norms. They extracted the UNGC principles from instruments that are visible and widely respected and were adopted in broadly representative processes, including the Universal Declaration of Human Rights and

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<sup>105</sup> *Ibid.* at 89-127.

<sup>106</sup> Abbott & Snidal, 'Values and Interests', *supra* note 18 at S158-S160.

<sup>107</sup> See e.g. Finnemore, *National Interests*, *supra* note 104; Finnemore & Sikkink, 'International Norm Dynamics', *supra* note 100; Keck & Sikkink, *supra* note 47; Audie Klotz, *Norms in International Relations: The Struggle Against Apartheid* (Ithaca, NY: Cornell University Press, 1995).

<sup>108</sup> See Abbott & Snidal, 'Values and Interests', *supra* note 18 at S147-S150.

the ILO Declaration on Fundamental Principles and Rights at Work (itself drawn from widely ratified ILO conventions). The institution clearly applied the lessons of legitimacy theorists like Thomas Franck.<sup>109</sup>

The UNGC was also designed to utilize subjective techniques to diffuse its principles among firms: 'it promotes public commitments to international norms; internalization in corporate policies, culture and daily business operations; socialization through dialogue with peers and stakeholders; and learning through exchanges of experiences, partnerships and networks.'<sup>110</sup> The governance structures of the Global Fund and its Country Coordinating Mechanisms likewise instantiate norms of participation and socialize actors to them. As Finnemore argues, international institutions can 'teach' norms to states and other actors, even instructing them in what they should want; some are 'active teachers with well-defined lesson plans for their pupils.'<sup>111</sup> Jon Pevehouse similarly observes that regional organizations promote democratic transitions through processes of socialization as well as classic institutionalist techniques like tying the hands of national leaders.<sup>112</sup>

Institutionalism can also learn important lessons from liberal theory, and with fewer intellectual difficulties. These lessons can be applied at the same three stages of analysis: the context of cooperation, the strategies of actors, and the techniques of institutions.<sup>113</sup> However, Moravcsik's widely cited formulation of liberalism may not be the most fruitful for this purpose, as it confines the activities of NSAs to domestic politics.<sup>114</sup> Approaches that also address transnational activities may be more helpful.

A first lesson of liberal theory might be that NSAs (like values and norms) are integral parts of the context of cooperation. NSAs are often the moving force behind international cooperation.<sup>115</sup> Individuals can be successful norm entrepreneurs: examples include Henry Dunant

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<sup>109</sup> See Thomas M. Franck, *The Power of Legitimacy Among Nations* (New York: Oxford University Press, 1990).

<sup>110</sup> Abbott, Sceats & Snidal, *supra* note 80 at n. 58.

<sup>111</sup> Finnemore, *National Interests*, *supra* note 104 at 12.

<sup>112</sup> Pevehouse, *supra* note 22.

<sup>113</sup> Space precludes full consideration of incorporating realist insights; however, they too would apply at the same three points. For example, power relationships are important elements of the context of cooperation; powerful states use various strategies, some more subtle than others, to shape institutions; and the rules and governance of institutions are carefully designed to accommodate powerful states, take advantage of their power and constrain them.

<sup>114</sup> See Moravcsik, 'Taking Preferences Seriously', *supra* note 26.

<sup>115</sup> NSAs also oppose many institutional developments.

for the laws of war and the Red Cross,<sup>116</sup> and Rafael Lemkin for the prohibition of genocide.<sup>117</sup> NGOs spearhead developments in human rights and many other issue areas. Epistemic communities define environmental problems, place them on political agendas and propose solutions. Business groups champion rules on trade, intellectual property and other economic activities. The existence, organization, resources, access and public appeal of these groups strongly influence cooperation. As Barnett and Duvall suggest, these actors are all invested with power. Domestic politics and governance are also relevant. Democracy, regulatory and judicial independence, rules regarding international agreements, rights afforded civil society and similar internal attributes of states help to determine the success and form of international cooperation.

A second lesson might be that NSAs use a wide range of political strategies to promote (and resist) international cooperation; these often involve or complement international institutions. I earlier discussed subjective strategies employed at the formation and implementation stages, systematized in formulations like Finnemore and Sikkink's life cycle of norms. Scholars in this tradition emphasize the importance of organizational platforms for advocates. NSAs often use IOs for this purpose, even when their normal agendas are more limited. The governance structures and norms of IOs, including access for NSAs and sources of influence on states, influence the nature and success of such strategies.<sup>118</sup>

Of special interest from a liberal perspective are strategies that link international and domestic politics. For example, Margaret Keck and Kathryn Sikkink posit a 'boomerang model,' in which local NSAs unable to vindicate rights at home first engage a transnational NSA coalition. The coalition publicizes the offending state's behaviour and promotes action by other states and IOs with leverage. Those actors then pressure the offending state's government.<sup>119</sup> Thomas Risse and Sikkink expand this model to explore dynamic domestic-transnational-international linkages.<sup>120</sup>

A final lesson might be that NSAs play significant roles in international institutions, as participants in those institutions, as targets

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<sup>116</sup> See Finnemore, *National Interests*, *supra* note 104 at 73-82.

<sup>117</sup> See Keck & Sikkink, *supra* note 47 at 81-2, 87-8.

<sup>118</sup> See Finnemore & Sikkink, *supra* note 100 at 899-901.

<sup>119</sup> See Keck & Sikkink, *supra* note 47 at 12-13.

<sup>120</sup> Thomas Risse & Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse *et al.*, eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge: Cambridge University Press, 1999) 1 at 17-35.



of institutional strategies, both normative and operational (as in the Global Fund), and as authors of parallel and complementary strategies (that is, as international institutions in their own right). The subject of NSA participation in international regimes, in particular, has already given rise to an enormous literature. Some of this literature is positive, much of it is normative.<sup>121</sup>

One can think about both the positive and normative aspects of NSA participation in terms of the earlier discussion of the emergence of complex institutional forms. I suggested three main reasons for this development: (1) the 'jurisdiction gap' and other deficiencies of state and inter-state action; (2) the broad interdisciplinary definition of many international issues; and (3) the 'participation gap' and other demands for legitimacy, fairness and consistency with prevailing norms. I would argue that NSA participation is expanding to provide the competencies needed to address these problems.<sup>122</sup>

'Competencies' has a decidedly rationalist tone, but I mean it to include normative attributes. To be sure, material and instrumental competencies are essential in areas like disaster relief, health and even standard setting: these include expertise, organizational authority, administrative skill and resources. But normative or value-based traits are also important. Normative competencies include commitment to relevant norms (both perceived commitment, as a basis for legitimacy and trust, and actual commitment, to sustain participation), and familiarity with the subtleties and interplay of norms, independence and powers of persuasion. Obviously states, IOs, NGOs, business firms, and other NSAs possess these attributes in varying degrees. Actors with particular competencies will seek to use them to deal with problems, while actors engaged in institutional design will seek to incorporate them through expanded participation.

## CONCLUSION

This article has not spelled out precisely what a more expansive institutionalist theory would look like, let alone actually created one. I have merely tried to indicate why such an approach would be valuable and what some of its elements might be. Perhaps most important, I have tried to indicate that developing such an approach is a practicable goal. The theoretical exclusivity and competitiveness that has characterized IR and IR-IL scholarship would suggest that such an enterprise is futile, and in many contexts scholars will indeed be best served by exploiting distinctions among spare theoretical models. Yet in other contexts,

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<sup>121</sup> See e.g. Shell, *supra* note 95 (arguing for a 'trade stakeholders model' of WTO governance).

<sup>122</sup> I have developed the concept of actor competencies in collaboration with Sceats and Snidal. See Abbott, Sceats & Snidal, *supra* note 80 (discussing the competencies needed in business standards institutions).

notably policy-making and institutional design, these conclusions do not hold. In those settings, theoretical exclusivity should not be the exclusive way to proceed.