Beyond the Justice Cascade: How Agentic Constructivism could help explain change in international politics,”


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In the process of writing my recent book, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics*, I had the opportunity to reflect on the theoretical tools that international relations theory gives us to understand change in the international system.¹ I was exploring the emergence and effects of individual criminal accountability for past human rights violations, including the possibility that political leaders could be prosecuted and imprisoned. I argue that the dramatic increase in human rights prosecutions are all part of an interrelated trend in world politics towards greater accountability – a trend that Ellen Lutz and I have called the “justice cascade.”² I believe that the rise of individual criminal accountability for past human rights violations represents an important and puzzling change in world politics because it challenges the “reigning orthodoxy’ in this area: the doctrine of sovereign immunity that prevents a sovereign state or state official from being prosecuted. Yet, for the most part, the puzzling change has been neither anticipated nor explained by social scientists.

International relations theory continues to be weak when it comes to explaining change: not only neo-realism and neo-liberal institutionalism, but also more structural versions of constructivism, English school, and many types of critical theory also lack more precise

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theoretical tools for helping us understand change. As a result, all major approaches to IR theory are much better at explaining continuity than change. I believe that liberalism places greater emphasis on agency and thus has greater potential in explaining change, but I do not engage with that debate at this point because my main concern here is to develop an agentic constructivist argument and relate it to debates within constructivism and critical theory.

Although a large body of work embodying what I call "agentic constructivism" has existed now for over a decade, constructivism has become primarily identified with its more structural proponents. An agentic approach is not new, but here I use a new label to categorize and build upon a body of empirical and theoretical work, including work by such scholars as Richard Price, Martha Finnemore, Michael Barnett, Thomas Risse, Chris Reus Smit, Vincent Pouliot, Antje Wiener, Audie Klotz, and many others who might be seen as sometime using an agentic constructivist approach.

Like constructivism more broadly, agentic constructivism is concerned with the role of human consciousness in international politics, but unlike structural constructivism, it focuses on the role of human agency in the origins of new norms and practices, and is thus better positioned to explain change, especially by exploring how such new norms emerge, diffuse, and can eventually challenge old logics of appropriateness and old logics of consequences. It pays attention to human agency in struggles for the creation of new norms which may, over time create new understanding of the ways states and non-state actors ought to behave, and new understandings of the national interests of states. My work has used primarily an agentic constructivist approach since the publication of my first articles in International Organization in

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1986 and 1993, but I didn’t use that term to describe it until quite recently. Specifically, I didn’t use the term agentic constructivism because I have never been particularly interested in labels, but also because I believed such work fell naturally within constructivism. It is only over time when I realized that constructivism was increasingly defined and understood primarily or exclusively as a structural approach that I began to see the need to highlight that some constructivists had long placed more attention to the agency side of the agent-structure debate.

**Attention to Agency:**

The agentic constructivist does not reject the agent-structure problem, or the importance of structures. Indeed, most would firmly agree with Wight when he says that “agents always bring their structures with them.” Nor does an agentic constructivist approach embrace pure methodological individualism with a constructivist twist, where individuals can create new worlds out of whole cloth (though I have no doubt it will be interpreted as such). It is simply to say that for those of us who believe fully that structures and agency are mutually determined, too much attention has been lavished on the structural side of the equation, and far too little on the agency side. Social theorists of the agent structure divide have, almost en masse, situated themselves on the structural side of the agent-structure debate. Agentic constructivism is an attempt to give more theoretical and empirical attention to the agency side of the debate. I argue that such attention is particularly useful and necessary to explain change in the international

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system, and that by focusing on agency, such an approach also provides a bridge for more cooperation and dialogue between scholars and the world of practice.  

That fact that agentic constructivism was not considered a full part of the constructivist approach dawned on me gradually. The turning point came in 2009 when Ian Hurd gave a talk at the University of Minnesota (which I considered a hotbed of agentic constructivism) and told us that constructivism was so associated with the idea of the internalization of rules and norms and with logics of appropriateness and structural arguments that it leaves agent centered research almost entirely to rationalism. For Hurd, “constructivism presents itself as a theory of how international structures constitute states and their interests.” Thus, he argues, "rather than transcending the agent-structure problem… constructivism has largely reinforced it by becoming the structural complement to rationalism’s agenticism.”  

In other words, even well informed constructivists have come to think of constructivism as all about internalization, socialization, and logics of appropriateness, and the entire agentic constructivist agenda, which has focused on explaining change – on advocacy, norm building, norm entrepreneurs, strategic social construction, use of hypocrisy and self entrapment, etc. seems to get lost. 

There may be various reasons for this state of affairs. First, it may simply be more difficult to explain change than continuity, and the element of contingency in the agency side of agency-structure debate doesn’t lend itself to producing clear models that stick in the minds of scholars. Second, the great influence and prestige of the work of Alex Wendt has correctly left

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8 Note that Hurd was the scholar who wrote the entry on “Constructivism” for The Oxford Handbook of International Relations, edited by Reus-Smit and Snidal, 2008, so his view of constructivism carries certain weight.
its lasting imprint on constructivism, and Wendt is without doubt, a proponent of structural
constructivism.9 While he has stressed the importance of both agent and structure in his theory,
the weight is always upon structure. He devotes few pages to agency in his magnum opus, and
those pages mainly develop holist views of agency and discuss how agency is dependent on
structure. Wendt recognized his “bias toward structure,” and so tries to emphasize that “structure
exists, has effects, and evolves only because of agents and their practices.” But, for Wendt
agency mainly instantiates structure, rather than alters or modifies it.10 In a contrast of
constructivism and rationalism, Wendt (writing with Fearon) stressed that constructivism is
entirely a holist approach, where all attempts at “bottom-up” explanation are relegated to
rationalism. Almost in passing, they mention that constructivism has sometimes neglected “the
microfoundation” of actor constitution.11 But it is not just the influence of Wendt, or the
clarity of the logics of appropriateness metaphor, but also the captivating intellectual power of
post-structuralism and post-modernism which has reinforced the bias toward structure. Most
constructivists have, at a minimum, been influenced by post-structuralism and post-modernism
in some important way. As Wight point out, the “death of the subject” has now assumed the
status of a postmodern mantra, an article of faith, and that one only has to state it for its truth to
be accepted. That the ‘subject is dead’ requires no argument and no proof.”12 I experienced
this recently first hand when I presented the keynote address that later became this article to a
large audience at the Millennium annual conference at the London School of Economics. It
seems that the mere invocation of the need for an agentic constructivist theory to explain what

appears to be important change in the world was sufficient to provoke quite unusual hostility and scorn. I was not clear what part of the argument provoked the greatest hostility – the possibility of agency, the claim about positive change in the world, or the criticism of existing theory, but something was afoot, and it might have been the questioning of the postmodern mantra of the death of the subject. In the end, the main theoretical debates within the constructivist or critical theory camp has been mainly between the more modernist scientific realists like Wendt and Wight, who are still nevertheless structuralists, and the post-modern or post-structuralist theories, for whom the death of the subject is an article of faith. For many of these approaches, however, political action becomes an unthinking following of roles or scripts, rather than a thinking, arguing political process. Nor do they do not provide much of an opening to the world of political practice, either as a research site, or as a community with which to share the results of research because it might be of interest and use in the political world.

Meanwhile the agentic constructivist approach has been developed primarily by scholars with a strong empirical research agenda, many of whom assumed they were doing constructivist research because they explored how agents were engaged in social construction. Many of these authors were interested in processes of change, almost all did empirical work including interviews with political actors, and some engaged more deeply in the world of political practice. Finally, many of these actors were also interested in issues of ethics and the normative implications of their work. For moral judgment to be possible, people must be understood as “autonomous beings who are responsible for many of their own actions.” 13 For example, it is no accident that the many of the participants in Richard Price’s edited volume on *Moral Limit and Possibility in World Politics* include those who sometimes employ an agentic constructivist

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approach, including Price, Christian Reus-Smit, Marc Lynch, Martha Finnemore, and Ann Towns. Price explains that the volume “seeks to leverage the constructivist agenda of empirically explaining how moral progress has occurred for the critical project of plausible moral alternatives to deal with global dilemmas.” The Price volume does not dwell at all on agency, however, because, I would suggest, it takes it for granted that the chapters with their detailed attention to agency are unproblematically a part of the constructivist enterprise of “taking into account both agency and structure and their recursive effects upon one another.”

But one can no longer assume that agentic constructivism is an unproblematic part of the constructivist approach. Rather it needs to be named, or labeled, and defined. Even choosing of the name reminded me how unfamiliar the label is. There is not even agreement about whether the proper adjective is “agentic” or agential. Some prefer agential when referring to an agent or agency, but I think that agentic constructivism is slightly less unwieldy. This term is not entirely new, and has been used by some other authors. For example, J. Furman Daniel and Brian Smith use the term twice in passing in an article that argues for more attention to agency in understanding statesmanship. In particular, Daniel and Smith list work by Vincent Pouliot and Antje Weiner as examples of the approach, and highlight in particular “Colin Wight’s agentic constructivism.” Although Wight provides lucid and useful discussions of agency, he does not

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15 Price, 2008, p. 49.

16 Wight, for example, seems to prefer the adjective “agentinal” as in “the attribution of agential powers” or “agential talk” in Wight, 1999, p. 128. See, also, for example, Karen Bard, who uses the term “agential realism” in her work *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke University Press, 2007).

17 For example, a paper by Dingding Chen, entitled, "Why We Need an Agentic Approach to IR," was presented at the annual meeting of the International Studies Association, Hilton Hawaiian Village, Honolulu, Hawaii, Mar 05, 2005, but the paper was not downloaded, so it is not possible to trace that argument exactly.

18 “Statesmanship and the Problem of Theoretical Generalization,” *Polity*, 42:2 (April 2010), see in particular page 166, ft. 40, and p. 171. They mention three authors as examples of agentic constructivism: Colin Wight, Vincent Pouliot, and Antje Weiner.
use the term agentic constructivism to describe his own work or that of others, and in fact, when push comes to shove, he locates himself “on the structural side of social theory.” 19

Nevertheless, Wight is one of the few IR social theorists who provides an persuasive and reasoned theory of agency. Here I adopt Wight’s definition of agency, which he crafts from combining elements from Gayatri Spivak and Roy Bhaskar. From Spivak, Wight takes the idea that to speak of agency “one has to assume the possibility of intention,” and even “the freedom of subjectivity.” 20 Wight illustrates freedom of subjectivity using his own case: “Even as I recognize that I have no choice but to live within some culturally constructed codes, I am engaged in reflection on my current position and future potentials ….a subject capable of reflecting upon, and constantly renegotiating, the forces of construction.” 21 Wight then weds the idea of agency as “freedom of subjectivity” to Bhaskar’s account of agency as both intentional and “embodied” in a position in which practices take place. 22 In this sense, Wight suggests that for agency to work, agents must have both the freedom to act, and the ability or power to act, through being embodied in a position that permits certain practices.

Wight correctly criticizes Barry Buzan’s definition of agency as “the faculty or state of acting or exerting power,” which he characterizes as both the dominant view of agency in the IR discipline, but also similar to the natural sciences where an agent has a “natural force of effect on matter,” such as an oxidizing agent. 23 Any person working empirically with human agency understands that there is lots of agency out there that actually fails to exert power. Particularly

if the question is how to think about the importance of agency for defining change in the world, to define agency as the state of exerting power and causing change would be tautological. Thus, I much prefer Wight’s definition as more consistent with the exercises of agency one sees in politics, which involves intentional action from agents in a particular position, but may or may not exert power, and may or may not lead to change.

It is Wight’s definition of agency as involving the possibility of intention, the possibility of freedom of subjectivity, and the fact that all agency is embodied or located in a position-place that I will adopt here. But although Wight clarifies that a “position-place” is not a script which agents must follow, there is in his description at least of hint of determinism in which only certain actors in certain position-places are able to exercise agency. I will instead treat position-place the way social movement theorists treat political opportunity structures. Of course, some position-places from which agents act are privileged in that they provide more opportunities and resources for action, but position place does not by itself determine agentic outcomes. History has examples of agents operating from more marginalized position-places who nevertheless bring about change as a result of the power of their ideas and their strategies (such as anti-slavery, woman suffrage, decolonization, and, I would argue, individual criminal accountability for state officials for human rights violations).

Agentic constructivism then is concerned with the “the micro-foundations” of creating and constituting new actors and new conditions of possibility. It looks at those parts of social processes where new actors take on and challenge (and sometimes change) existing logics of appropriateness. It is characterized by logics of arguing, as articulated by Risse, and also by
struggle and protest necessary to challenge reigning orthodoxies. These actors don’t mindlessly “enact” or “perform” scripts, but question them. At rare times, they are capable of not simply “instantiating structures,” but transforming structures. Their actions may be transgressive of existing logics of appropriateness, sometimes intentionally inappropriate. The contrast I’m making is of course too stark. New actors, even when they question and challenge reigning orthodoxies, also work on the basis of other unquestioned background knowledge, but unless we understand what is new in their proposals we can’t understand change. In the end, agency requires the possibility of intention and the possibility of the freedom of subjectivity. This does not mean that all agents are constantly fully intentional and freely subjective. The challenge for agentic constructivism in explaining change is to understand which taken for granted structures motivate and inform agency, at the same time as we understand which other structures are challenged and sometimes changed.

To date, agentic constructivists have failed in providing an equally compelling metaphor to that of logics of appropriateness (though Risse has certainly proposed one with his logic of arguing). Second, agentic constructivists, despite advances, have failed to answer satisfactorily some of our own most important questions. In particular, I believe that we have not provided compelling explanations for two key questions about the origins of norms -- or where do norms come from; and about norm “resonance” – or why do some norms win out over others. On the issues of origins, Paul Kowert and Jeff Legro argued in their chapter in *The Culture of National Security* in 1996 that “sources of norms remain ill-defined, incompletely theorized and understudied.” Katzenstein, in the conclusions to the volume, agrees with Kowert and Legro that the book still had little to say about the question of the manner in which norms and identities are

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constructed, and suggested that "the domain of social psychology offers one possible microfoundation for studying the origins of norms." 25

Yet, almost 15 year later as I worked on The Justice Cascade, I still found a dearth of material explaining why some norms emerge and succeed and others don’t. Or is it just that the answers we agentic constructivists have provided – norm entrepreneurs, social movements, epistemic communities – are not completely satisfactory because we can’t explain why some norm entrepreneurs succeed and some fail? The norm emergence question is thus related to the norm resonance question. What makes certain ideas appealing at particular moments of history and others less so? In the end, agentic constructivists have provided primarily “path dependence” arguments. New norms are appealing because they “fit” with older norms, or because they are more consistent with existing institutional structures and laws. Much agentic constructivism is engaged in exactly the kind of eclectic theorizing that Peter Katzenstein and his co-author Rudra Sill have advocated: theorizing with an “aversion to excessively abstract ontologies and principles in favor of useful interpretations that can be deployed to cope with concrete problems.” I embrace the idea of eclectic theorizing and find it useful to characterize much of my work. But, one of the problems with such eclectic theorizing is exactly its inability to produce powerful metaphors and claims that help grab the attention of scholars and organize knowledge in clear ways. So, the very eclectic character of much of the writing and research from an agentic constructivist perspective seems to have permitted it to be defined as not even part of constructivism by scholars such as Hurd.

And so my contribution here really emerges by way of self critique. When I was working on The Justice Cascade, I found that that my arguments about change tended to echo ones I had

25 Katzenstein, ed. 1996.
made before, rather than advancing the theoretical understanding of change. The pattern of norm emergence in this issue area looks very much like the norm life cycle that Martha Finnemore and I described and explained in our 1998 article, with distinct phases and dynamics – the processes of norm emergence look very different than the processes of norm tipping points or cascades. The norm of individual criminal accountability for state officials is an emergent norm, so it hasn’t even started to enter the phase of norm internalization. The norm emergence stage was characterized by norm entrepreneurs. In this particular case, the norm entrepreneurs in question are an interesting combination of advocacy networks, epistemic communities, and transgovernmental networks of like minded countries, the usual suspects of the agentic constructivist agenda. In the justice cascade, one source of new ideas about individual criminal accountability came from old ideas about criminality in domestic criminal law systems, which norm entrepreneurs had combined with emerging international human rights law.

But I am still dissatisfied with our inability to explain how agents worked in the context of old structures to create something new. How can agentic constructivists begin to move the theoretical agenda ahead to help understand, and perhaps even do a better job of anticipating change? In this article, I take on only a small part of the theoretical agenda I discuss above, and that is to explore the process at the very beginning of new norm emergence, when agents first imagine and create new practices. I argue that through an “alchemy of agency” intentional agents with freedom of subjectivity located in a particular position-place worked hard to press for some form of accountability. In doing so, they operated within older ideational and institutional structures, especially domestic criminal law, and older ideas of revenge and retribution, but they combined such older ideas with newer human rights ideas to create something new. The outcomes, however, were the result of the interactions of multiple
agencies, which partially escaped the calculations and desires of any one actor. I will illustrate and develop this argument by exploring the early process of accountability in Greece and Argentina, two countries that first used domestic human rights prosecutions for their own leaders. But first I want to turn to the issue of what I mean by change.

**What is change?**

The first question is of course, what constitutes change? One strong definition of change would focus on those processes and outcomes that existing IR theory not only did not anticipate, but actually predicted would not happen. Yet, very often when these changes occur, the tendency of IR theorists is to say either that it is not important or significant, or it is what they we would have expected. This perhaps is not surprising from a neo-realist, for whom the big issues are the rarely occurring systems change or systemic change. But it is more troubling that constructivism and critical theories have sometimes taken a similar position – either that change hasn’t occurred or that the change that occurred can be understood as an expected outcome of existing theories. So, for example, no IR theorists anticipated the justice cascade, and yet many have since told me that such policies are not surprising because they are obviously in the interest of powerful Western states, or liberal capitalist individual values. Yet, I would argue that the changes associated with the rise of individual criminal accountability for state officials was not at all anticipated, and thus must constitute what we could call genuine change.

I argue that a decentralized but interactive system of accountability for violations of core political rights is emerging. Domestic, foreign and international courts are increasingly holding state officials criminally accountable for past human rights violations. Such a development, I

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26 See, for example, Robert Gilpin, *War and Change in World Politics*, p. 39.
argue, is a great puzzle for international relations theory because powerful state officials jealously guard both their own immunity from prosecution and their sovereignty to be free from external interference. This is unexpected development for international relations theory. Some think of this process as the “criminalization of international law,” but it could also be thought of as the “individualization” of international law, because it focused on the individual, both as the perpetrator of crimes, and as a victim who had standing to bring forward cases against perpetrators, including his or her own government.

In 1977 in his classic work, Hedley Bull recognized that such a claim offered a particularly potent challenge to the logic of a society of sovereign states.

"Carried to its logical extreme, the doctrine of human rights and duties under international law is subversive of the whole principle that mankind should be organised as a society of sovereign states. For, if the rights of each man can be asserted on the world political stage over and against the claims of his state, and his duties proclaimed irrespective of his position as a servant or a citizen of that state, then the position of the state as a body sovereign over it citizens, and entitled to command their obedience, has been subject to challenge, and the structure of the society of sovereign states has been placed in jeopardy. The way is left open for the subversion of the society of sovereign states on behalf of the alternative organizing principle of a cosmopolitan community."27

Bull also issued two serious challenges: one is empirical - the task of documenting the extent and nature of changes, and the other theoretical - to specify what kind of alternative vision of international politics might modify or supplant theories focused almost exclusively on the centrality of interactions among sovereign states. International relations scholars have responded

to the empirical challenge of documenting the extent and nature of the changes in the
international system, but that we have not yet responded in a satisfactory way to the theoretical
challenge. I suggest that one of the reasons we have been unable to do so is that we have not yet
generated a sufficiently compelling agentic theory of change.

The justice cascade was not spontaneous, nor was it the result of the natural evolution of
law or global culture in the countries where the prosecutions occurred. These changes in ideas
were fueled by the human rights movement. The cascade started due to the concerted efforts of
small groups of public interest lawyers, jurists, and activists as well as their allies in states who
drafted and reinterpreted the relevant law and litigated the legal cases. But as we know, agents
don’t operate freely unfettered by the structures of the international system, but rather within the
constraints and the possibilities provided by the existing material and ideational structures of the
world.

The work of these norm entrepreneurs was facilitated by two broad structural changes:
the third wave of democracy and the end of the Cold War. The third wave of democracy is a
necessary factor to explain both the emergence and diffusion of the norm of individual criminal
accountability.\footnote{Samuel Huntington, \textit{The Third Wave: Democratization in the Late Twentieth Century} (Norman, Oklahoma: University of Oklahoma Press, 1991).} But, democracy is not in any sense a sufficient condition, since the earlier
second wave of democratization was not accompanied by human rights trials, and even in the
third wave, fewer than half of the countries that experienced democratic transitions used human
rights prosecutions. The end of the Cold War both extended the third wave of democracy and
altered the structural context within which debates about accountability could occur. The
breakup of the USSR created a new group of democratizing states that would adopt transitional
justice measures including prosecutions. More importantly, by taking attention away from a
polarized struggle between communism and anti-communism, the end of the Cold War also created a more permissive atmosphere for holding former repressive leaders, of whatever ideological stripe, accountable for past human rights violations. The related trends of democratization and the end of the Cold War are thus important for understanding the justice cascade, but they only provide the background or scope conditions, not a fully satisfactory explanation. As Ruggie has argued, such structural changes cannot tell us enough about the content of regimes; in order to fully understand this, we need to know both about power and social purpose, or meaning.29

In a deeper sense, the norm entrepreneurs of the Justice Cascade operated within more stable structures of the international system – specifically the system of sovereign states governed by enduring doctrines of state immunity, and the powerful ideational and institutional structures of modern international and domestic law, especially in this case, criminal law, which had unquestioned assumptions about the necessity of punishment for criminality, and institutions to enact such punishment. What makes the Justice Cascade such a promising area to think about the role of agency operating within structures is that these two structural forces operated in opposition to one another. The system of sovereign states and the doctrine of sovereign immunity created certain condition of possibility: until the mid 1970s it was impossible to imagine that state officials would be held criminally accountable for human rights violations. Meanwhile, the ideational structure of criminal law and the accompanying notions of rule of law pressed for the idea that no one was above the reach of the law and that certain kinds of criminal acts, such as murder, should be punished.

29 John Ruggie, Constructing the World Polity: Essays in International Institutionalization.
Thus power is an essential part of the story of the justice cascade, because it is the main factor explaining why it has taken so very long for individuals to hold state officials accountable for crimes. One of the great puzzles of this issue is that for centuries, judicial systems in countries around the world have held individuals criminally accountable when they committed murder, kidnapping, or aggravated assault. But, if state officials committed the same crimes even on a much larger scale, they were virtually never held criminally accountable. The immunity/impunity model has been the reigning orthodoxy largely because powerful state officials benefited from being protected from prosecution, and they used their power to avoid accountability. What the power of the structures of the system of sovereign states and the doctrine of sovereign immunity cannot help us understand well, however, is why all this started to change. It can’t explain how and why the idea of individual criminal accountability came to be applied in a world where many perpetrators still hold the monopoly on violence.

Powerful states did not lead the trend toward individual criminal accountability for human rights, and in some crucial instances, they actively opposed it. Except in a handful of cases, like in the former Yugoslavia today, powerful states also did not force other states to use domestic prosecutions. Nor did powerful states lead the trend toward international and foreign prosecutions. A United States endorsement was crucial for creation of the ICTY and the ICTR, but it has been the major opponent of the ICC, the main embodiment of the new criminal accountability model.

Power is also useful for understanding why accountability is unevenly applied, but not why individual criminal accountability emerged. Power helps us understand, for example, why French judges find Argentine or Tunisians officials guilty of human rights violations in foreign
trials, but have refused to move ahead in a case against Donald Rumsfeld. But it can’t tell us how it became possible in the first place to hold foreign human rights trials in French courts.

The culminating point of the justice cascade was the creation of an International Criminal Court with some autonomy from the Security Council, a legal development opposed initially by all five powerful permanent members of the Security Council-- the US, Russia, China, France, and the United Kingdom--as well as large and influential newly industrializing countries like India, Mexico, and Indonesia. Although the U.K. and France eventually voted in favor of the more autonomous ICC in 1998, they opposed it throughout the period of negotiations. The ICC was eventually created through a campaign led by the pro-change coalition of small like-minded states and NGOs, many in Europe, but including states and NGOs from around the world, with important leadership from former authoritarian countries like Argentina and South Africa. China and the US voted against the Rome Statute. In the entire history of human rights law-making with regard to justice, by far the most coercive moment occurred quite late in the game, when the United States first opposed many parts of the Statute of the International Criminal Court (ICC) and then later tried to undermine the ICC by seeking bilateral agreements with as many countries as possible saying that they would not submit US citizens to the Court’s jurisdiction. Here, the United States expended significant power resources to secure such agreements, providing additional aid, threatening to cut military economic aid and training, and actually cutting such aid. There is no other example that I am aware of in the history of human rights law where a powerful country expended such resources to secure a particular human rights legal outcome. But note that this example runs counter to the argument that the powerful impose international law. In this case, the most powerful state of the system tried to block the implementation of human rights law exactly because it had failed in its efforts to control the drafting process.
**Structural Power**

Power is exercised at different levels, and direct coercion or compulsion is only the most obvious form. Michael Barnett and Raymond Duvall have reminded us that worldviews also have structural power. They argue that actors’ worldviews are in turn are directly shaped by their social positions, such as their class position or geopolitical location in a wealthy country.\(^{30}\) For example, the ideas and perspectives underpinning the justice cascade are about empowering the individual vis-à-vis the collectivity and the state, and about punishing certain forms of criminality. An individualist perspective is indeed inherent in a Western liberal legal and philosophical tradition, hegemonic in the world today and at the time most human rights law was drafted. Thus, the move to individual criminal accountability could be seen operating within another set of ideational structures that include the structural power of the hegemonic liberal world view. Likewise, the Justice Cascade focuses on a relatively small range of criminality, primarily murder, but also at times, torture, or the use of rape or the recruitment of child soldiers as war crimes. But empowering such an individual vis-à-vis her state runs deeply counter to the structural power of states in the state system, as Hedley Bull reminded us in the passage I cited earlier. Thus, human rights law presents a quandary for scholars of structural power, because different structures come into conflict with one another. We might expect that when state power comes up against liberal ideas of individual rights asserted against the state, state power would win. But, the idea of the individual sometimes wins over the ability of state officials to protect themselves from prosecution.

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\(^{30}\) See Michael Barnett and Raymond Duvall, “Power in International Politics” *International Organization* 59 (Winter 2005), p. 53. They write, “Scholars focusing on structural power conceive structure as an internal relation—that is, a direct constitution relations such that the structural position, A, exists only by virtue of its relation to structural position, B. The classic examples here are master-slave and capital-labor relations. From this perspective, the kinds of social beings that are mutually constituted are directly or internally related; that is, the social relational capacities, subjectivities, and interests of actors are directly shaped by the social positions that they occupy.”
Some scholars of structural power have argued that the power of the individual is an idea associated with the ascendant capitalist worldview. Some even chalk up human rights trials to this increasingly dominant capitalist ideology. When I was in graduate school, capitalism was also used to explain the rise of military coups and repressive governments. When I first started studying political science, the dominant “structural power” argument about repression was that the demands of accumulation in the capitalist system required deepening of industrial structures, and thus authoritarian regimes in the developing world capable of repression of labor movements. I don’t think scholars of structural power can claim both that capitalist ideology is behind both the move to authoritarian regimes and the move to democracy and human rights trials. Rather it appears that the capitalist economic system and ideology have coexisted with both labor repression and human rights prosecutions. We need to find more focused explanations for the rise of individual criminal accountability.

I believe that the power of sovereign states and the doctrine of sovereign immunity is the most important explanation for why accountability was kept off the agenda for so many years, and why even people harmed by human rights violations rarely even considered the possibility of prosecuting repressive state officials. I also believe that both coercive and structural power can help explain the still quite uneven application of the individual criminal accountability model for state officials. But, it cannot explain the emergence and success of the doctrine and practice of accountability.

31 Some versions of dependency theory made this argument, as did Guillermo O’Donnell’s theory of “bureaucratic authoritarianism.” Noam Chomsky and Edward Herman have made and continue to make this argument today.
Ideas and Norms:

We need constructivism -- a theoretical approach that takes seriously the independent role of human consciousness in social life, to explain why the new trend towards individual criminal accountability emerged and spread. The most influential version of this approach, what I call “structural constructivism,” focuses on the deep ideational structures that guide state behavior. 32 In many situations, these constructivists argue, states and individuals don’t make rational choices about what to do but instead are guided by almost automatic understandings of what is appropriate behavior in particular circumstances. But change cannot be understood without seeing how new ideas emerge and spread. These new ideas often challenge the older ideas that constitute the ideational structure of the international system. For example, with respect to the issue of prosecutions, old ideas about sovereignty and sovereign immunity maintained that high-ranking state officials should not and could not be prosecuted. The new ideas about individual criminal accountability for human rights violations stress that state officials should and could be held accountable. These new ideas “catch on” through new logics that are not captured either by a “logic of consequences” or a “logic of appropriateness.” When activists first pushed for criminal trials, they were not following any logic of appropriateness. They were being consciously and explicitly “inappropriate” – and they knew it, which was why it was a frightening thing to consider at first.

When existing ideational structures come into conflict with one another, as they do in the Justice cascade, we need a more agentic constructivist approach to help us understand when one wins out over the other. For example, agentic constructivism turns us to the type of empirical research and process tracing necessary to really understand how and where new ideas and

practices begin and how they spread. For example, I find in the case of the Justice cascade, and contrary to many theories of norm change, that the specific norms in question in the justice cascade begin first in the semi-periphery, countries like Greece, Portugal, and Argentina hold the first domestic human rights prosecutions, or even in the periphery itself, as early norm adopters included places like Bolivia, Guatemala, and Haiti. These countries initiate these novel policies in the 1970s, and mid 1980s, before the end of the Cold War or other system change that could explain it easily. They do so largely in the absence of any great power pressure to hold such trials. Still, the cascade phase begins in 1998, with the arrest of Pinochet and the adoption of the ICC statute, and there is no doubt that the end of the Cold War creates a window of opportunity within which the justice cascade flourished. Contrary to some expectations however, the practice of individual criminal accountability has not disappeared or even slowed considerably after 2001 and the beginning of the war on terror.

If this trend were the mere enactment or instantiation of dominant western ideology, we would not expect it to be patterned in this way. Rather, activists in the semi-periphery of the international system are intentionally using tools from international human rights law and from domestic criminal law to craft a novel response that challenges the enduring power of elements of the sovereign state. But, I also wish to issue a cautionary note. Exactly because activists are tapping into deeper ideational structures beyond their control, they need to do so with care and even some misgivings. Modern criminal law, and pre-modern notions of revenge carry with them a lot of baggage that is much less hospitable to human rights ideas. While at the time, we are in no danger of excessive punishment of state officials for human rights violations, our sympathy for a victim-centered approach to accountability should not blind us to the dangers of letting the demands for punishment or for retribution go too far.
In the remaining pages of this article, I wish to draw from two country experiences, two of the earliest examples of human rights prosecutions that eventually contributed to the justice cascade, to explore the ways in which agents, operating from within tightly constrained ideational and institutional spaces, nevertheless crafted something new, and through an alchemy of agency, transmuted the old into the first examples of the modern human rights prosecutions.

**Greece:**

On July 23, 1974, the Greek authoritarian government was overthrown after the policies of the military junta had led to the Turkish invasion of Cyprus and brought Greece to the brink of a war with Turkey that it could not win. Greeks were outraged about the military debacle, and when the junta fell, celebrations spilled out into the streets of Athens, where people chanted their support for democracy and the constitution. They also shouted, “All the guilty to Goudi,” meaning that the junta leaders should be tried and sent to the Goudi neighborhood of Athens where executions were traditionally held. In 1975, Greece held unprecedented trials of military personnel for crimes during the previous regime and imposed heavy punishments on a significant number of individuals, including the top leaders of the junta. Some saw the trials as the Greek equivalent of the Nuremberg and Tokyo trials, but they were actually quite different. At Nuremberg, the allied powers used an international tribunal to judge the leaders of defeated Germany, while in Greece citizens judged their own state officials—in their own domestic courts—for the rights violations of the authoritarian regimes.

The chant “All the guilty to Goudi” is not a human rights slogan. It harkens back to ancient cries of “Death to the King,” which were not about legal accountability, but about some

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kind of ritual cleansing of the body politic through the sacrifice of the leader. The people in the
streets were calling for old-style political trials, not for a juridical process that would observe the
rights of both perpetrators and survivors of violent repression. Later, however, the governments
and citizens transformed anger in the streets into public support for what would become the first
domestic human rights prosecutions since WWII. In this sense, the initial demands reflected a
more primal urge for punishment or revenge, but it was transmuted into processes of individual
criminal accountability.

The regional context of emerging human rights consciousness, law, and institutions was a crucial
factor that facilitated the early use of human rights prosecutions. Greece, then under a
democratic government, joined the Council of Europe in 1949, just after it was founded, and was
an early ratifier of the European Convention on Human Rights. Since Greece had been an early
and active user of the Commission and the Convention, it made it more difficult for it to
repudiate the Commission when other European countries later filed their case against Greece for
human rights violations under the military regime, eventually leading Greece to withdraw from
the Council of Europe.

By 1973, the military government in Greece was weakening. The government’s bloody
repression of the student uprising at the Athens Polytechnic University on November 17, 1973
further undermined the regime. The government eventually sent a tank to crash through the
gates of the University, and ordered the troops to fire on civilians, killing dozens and injuring
hundreds. But it was the military debacle in Cyprus that was the final blow to the regime. This
defeat led the Greek military itself, in the summer of 1974, to overthrow the seven-and-a-half-

year military regime and turn over power to the civilian ex-Prime Minster, Constantine Karamanlis.

Constantine Karamanlis was not new to politics in Greece when he was called back from exile in France to serve as Prime Minister after the fall of the military junta. He had served in many positions in almost all the post-war governments, including as Minister of Defense, before serving three terms as Prime Minister from 1955 to 1963, when he formed and led a party of the Right. Although his first weeks in office in 1974 were uncertain, Karamanlis firmly took the reins of government and worked quickly to reestablish civilian control. But whatever action that Karamanlis took to reestablish rule of law in Greece, to the left in Greece, he would always be a man of the right. The bulk of the victims of the dictatorship were people of the left, many of them members of the Communist Party, which had faced persecution in Greece ever since the Greek Civil War in 1946-49. To his detractors, Karamanlis would always be “too conservative, too authoritarian for the times.”

Soon, demands for accountability started to emerge. Newspaper reports from this period record “a growing public demand for retribution against the former dictators.” A resistance organization, Democratic Defense, made the first public calls on record for prosecuting those responsible for the authoritarian regime. In late August 1974, opposition leader Andreas Papandreou, the son of former Socialist Prime Minister Georgio Papandreou, published a carefully worded call for a trial of perpetrators in a major Greek newspaper.

37 Alivizatos and Diamandouros, “Politics and the Judiciary in the Greek Transition to Democracy.”
The first concrete legal step toward trials were criminal cases filed by individuals against individual state officials for treason, murder, and torture, using private prosecutions provisions in Greek criminal law. The private suits both forced the government’s hand and relieved it of the burden of having to initiate prosecutions itself. In early October 1974, the Karamanlis government issued a decree explicitly excluding the top leaders of the military regime from the benefits of the amnesty law, thus paving the way for prosecutions. In a landslide electoral victory in November 1974, the government received support for its position. According to the press covering the elections, “most Greeks call for punishment of the junta and its henchmen less out of vengeance than to discourage others from imitating them.” The disagreements were less about the need for some kind of punishment and more about the type and scale of punishment.

Many in Greece stressed that they didn’t see the decision to hold trials as particularly innovative or unusual. There was a long tradition of political trials in Greece. Because of this, many people took it for granted that Karamanlis would try the leaders of the former regime and execute them, as in the past. This was the meaning of the call, “All the guilty to Goudi.” Most famously, five top political leaders and one military leader had been executed in 1922 by a firing squad in the Goudi barracks after a speedy trial for treason amidst a military defeat, leading to the withdrawal of Greek troops and refugees from the territory now held by Turkey. This loss of territory to Turkey is still referred to by the Greeks as “the Great Catastrophe.” Greek historical memory was sharp, and 1922 was a vivid point of reference in Greek identity. The 1922 trials, however, were not human rights prosecutions. They were trials for treason, but they were a “parody of justice,” without proper due process or testimony from crucial witnesses. They were

really political revenge. But the 1922 trials stood out in the collective memory and provided a clear reference when the public considered what should happen to the Greek junta leaders. There were also trials with executions after the coup of 1935 and after WWII for some Nazi collaborators. Greek political history thus provided the conditions that made prosecutions more likely.

Karamanlis was well aware of these past trials, but he believed that they had contributed to political instability because those who were tried and executed often became martyrs. There was a powerful swing to the left during the dictatorship. When Karamanlis came back, he was caught in a bind. On the one hand, given Greece’s move to the left and the political tradition of trials, he had to hold prosecutions to legitimate his government and convince people that it was not simply a return to the incomplete democracy of the past. But for Karamanlis, “execution makes blood, and blood makes martyrs.” So the solution that Karamanlis arrived at was to hold prosecutions but to stay executions.

Three main sets of trials took place in Greece. The first and most important were these treason trials of the top leaders of the military regime for having overthrown the democratic government in April of 1967. They were not, properly speaking, human rights prosecutions, because they were for the interruption of democracy, not for individual violations of human rights. But in the wake of the treason trials came two sets of prosecutions that constituted genuine modern human rights prosecutions – the first for torture, and the second for the murder of students in the bloody repression of the uprising at the Athens Polytechnic University on

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40 Interview with Constantina Botsiou, Athens, Greece, June 27, 2008.
41 Interview with Constantina Botsiou, Athens, Greece, June 27, 2008.
42 Interview with Evanthis Hatzivassiliou, Athens, Greece, June 25, 2008.
November 17, 1973. The treason trials were the most important trials; once the major leaders of the regime were imprisoned, tried, and convicted to death for treason, the back of the former regime was broken; it was therefore possible to continue with the other prosecutions. Like the treason trials, the torture prosecutions and the Polytechnic trial were also initiated by private citizens using private prosecution provisions and were later taken over by the state. Although Greek law at the time did not specifically prohibit torture, the prosecutions were based on accusations of violations of the existing criminal code provisions against abuse of power and bodily damages.

The treason trials against 24 members of the military regime took place from late July to mid August 1975. Foreign and domestic journalists were allowed access, but the public was excluded. Eventually, 18 of the protagonists of the 1967 coup were found guilty, and the three top leaders of the coup, Generals Papadopoulos, Pattakos, and Makarezos, were sentenced to death. President Karamanlis commuted the death sentences to life in prison, provoking a sharp reaction from opposition political parties and the press. The move was vehemently criticized, especially by the left, who still clamored for revenge for the brutalities of the regime. In response to Karamanlis’s decision to commute the death penalty, the leader of the opposition, Andreas Papandreou, said that “with this last act, the government [had] finalized its mockery of the people and of justice and [had] become historically identified with the junta.”

Karamanlis personally had long opposed the death penalty but also believed that executions would play poorly in the rest of Europe, and he was committed to gaining Greek membership in the EEC.

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44 Interview with Constantina Botsiou, Athens, Greece, June 27, 2008.
Eventually, 55 active and retired officers and conscripts were tried in a military court in Athens. In the two major sets of torture trials, thirty-seven of the accused were found guilty, and they were given prison sentences that ranged from the most serious, 23 years, to the least serious, three-and-a-half months.\textsuperscript{45} In a report on the first trials, Amnesty International commended the government for meeting high standards of jurisprudence and for not allowing the prosecutions to degenerate into show trials.\textsuperscript{46}

The Greek case stands out as the first time that a government held its own officials accountable for past human rights violations. But this is not how the Greek protagonists or scholars remember the prosecutions. When asked why Greece held trials, they continued to say that it was “obvious” that such trials should be held, that there was “no choice,” that it was “in the air.” It soon became clear that the Greeks did not see these trials as the first example of human rights prosecutions, but rather as a continuation of a long Greek tradition of political trials. This is an example of how movements can use some path dependent political traditions as a source to create new human rights innovations. When opposition leader Papandreau said that by commuting the death sentence of the top leaders in the junta, Karamanlis made a “mockery of justice,” he entirely missed the point. When the Greek judiciary insisted on due process and Karamanlis commuted the death penalty, they broke the connection to the old political trials, like the executions in Goudi in 1922, and set the scene for genuine, modern human rights prosecutions.

What is interesting about the “agency” so prominent in this example, is that the outcome was in part an unintended result of the interacting agency of diverse individuals. Left to his own

\textsuperscript{45} Alivizatos and Diamandouros, “Politics and the Judiciary in the Greek Transition to Democracy.”

devices, Karamanlis would not have chosen human rights trials, and yet the pressure from activists who initiated trials and from groups in the streets led to the outcome. Left to their own devices, some of the activists in the streets might have preferred perfunctory justice followed by executions. Certainly they opposed the commuting of the death penalty. Drawing on new elements in European human rights law and global and regional human rights activism, and in the context of a ruptured transition, where the previous authoritarian regime was weakened and unable to control the conditions of the transition, the Greeks managed to hold what later we could classify as the first modern domestic human rights prosecutions. A similar process of the alchemy of agency was present in the next major set of human rights prosecutions in Argentina in 1985.

The case of Argentina:

Argentina has been more than just another case in the literature on transitional justice. Argentina helped invent the two main accountability mechanisms that are the focus of much of the debate on transitional justice: truth commissions and high-level human rights prosecutions. Transitional justice strategies do not have to be home-grown to be effective, but the Argentine case illustrates that important innovation in the area of transitional justice has come and can come from diverse sources.

In the early years of the military dictatorship, the opposition could not imagine, much less articulate a demand for human rights prosecutions. Yet by 1983, when the military regime was still in power, the demand for “trials and punishment for all the guilty” (“Juicio y Castigo a Todos los Cupables”) became both a slogan and a primary demand of the human rights movement in Argentina. There was another slogan that was also chanted in the demonstrations: “Al paredón, al paredón, ni olvido ni perdon,” (To the wall, to the wall [to be shot by the firing
Neither forgetting nor pardon”). It echoes the Greek street chants to execute perpetrators. Although catchy and rhyming in Spanish, the firing squad chant never achieved the prominence of the slogan for trials and punishment for all the guilty. Argentines in the human rights movement had moved from fear of putting the word “justice” in their slogans to including the much more precise words referring to trials and to punishment. They were making the maximalist demand of trials for all the guilty, so here, for the first time, we have citizens chanting a slogan about human rights prosecutions.

What had changed to bring this slogan into being, to make it possible to conceive of and demand trials? The Inter-American Commission for Human Rights had issued its report calling for prosecutions and punishment, giving some legal cover to the demands of local groups. But more importantly, the Argentine military had lost a disastrous war over the Falklands or Malvinas Islands in the South Atlantic in 1982. The military was delegitimized not only for their loss in the war, but also for their mismanagement of it. Young Argentine conscripts, sent to the Malvinas with inadequate supplies, suffered from cold and hunger to the apparent indifference of their superiors. This delegitimation of the military regime limited the control that the military would have over the conditions of the transition to democracy.

By 1983, human rights advocates in Argentina had settled on the demand for judgment and punishment, and they had begun to flesh out what this would mean in practice. The specifics of the prosecutions emerged after the presidential campaign and the transition to democracy under the new government of Raúl Alfonsín, a centrist politician of the Radical Party.

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Alfonsín had been a member of one of the key human rights organizations, the Permanent Assembly for Human Rights, during the dictatorship. Initially, however, Alfonsín didn’t take a strong position on trials and accountability. Whatever the human rights movement meant by justice and punishment, Alfonsín and his advisors had more modest aspirations. During his electoral campaign, Alfonsín committed himself to seek justice for human rights violations, but he had to balance these commitments with the desire to integrate the armed forces into the democratic polity and prevent future military coups.

The transitional justice mechanisms that eventually emerged during the Alfonsín government were the result of interactions between the human rights movement, the government, and the political opposition, each of which were engaged in forms of improvisation in an unfamiliar realm. According to Inés Gonzalez and Oscar Landi, the treatment of human rights violations in Argentina during this period “was a process with a life of its own, the course and results of which escaped the calculations and desires of each of the actors directly involved.”

This statement, by some of the leading analysts of this period, captures exactly what I want to say about the alchemy of agency. Intentional agents with freedom of subjectivity located in a particular position-place worked hard to press for some form of accountability, but the outcome partially escaped the calculations and desires of any one actor.

The Alfonsín government had originally planned to give the armed forces sole jurisdiction to prosecute military personnel for human rights violations and then to pardon those sentenced before the end of the administration. But when the government presented its military reform bill to Congress, the opposition added various provisions that hampered the government’s

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ability to limit the scope of trials, including a provision for the mandatory appeal of these human rights cases to a civilian appeals court.49 When the armed forces failed to make even a minimum good faith attempt at prosecution, the trials were thus transferred to a civilian court.

No previous trials of the top leaders of authoritarian regimes for human rights violations during their governments had ever been held in Latin America. Thus when the prosecutors began their work on the trial, they didn’t have any road map of how it should be done. Although the Greek trial had been held almost a decade earlier, that model was not present in the minds of the Argentines as they organized their trial. In Argentina, as in Greece, the prosecutors used domestic criminal law, not international human rights law, so that they could not be accused of retroactively applying the law.

By 1985, when Argentina tried its top leaders for human rights violations, the global human rights movement was gaining strength and stability, and diverse groups spread the news of the Argentine experience with prosecutions. Other countries responded both positively and negatively to the Argentine experience with accountability. In this sense, the Argentine case created great controversy, and thus drew attention to the model, for better or worse. Finally, individual Argentine citizens and others familiar with the Argentine experience moved around the globe and carried their knowledge of the Argentine experience with them.

In most of these endeavors, Argentine groups didn’t work in isolation. There is extensive documentation of the transnational linkages of the Argentine human rights movement.50 By the


late 1970s, the legal and institutional framework for human rights was rather new and still quite inert. It existed as a possibility, but its potential had not yet been actualized or set into motion. Activists from countries like Argentina and Chile, with the support of state and nongovernmental allies mainly from Europe and the United States, through their practices, made use of the opportunities presented by these institutions, transforming them from potential into actual mechanisms of human rights change. The single most important international human rights institution in the case of Argentina was the Inter-American Commission of Human Rights (IACHR), which produced a pioneering report on human rights in Argentina that first recommend that state officials be tried and punished for their crimes. The IACHR had made the recommendation before, but Argentina was the first country to follow through on the recommendation.

The Argentine case set into motion a series of actions and reactions. The Chileans, for example, explicitly designed their transitional justice strategy to avoid what they considered the “mistakes” of the Argentine experience. They would have truth and reconciliation with a truth commission, but not individual criminal accountability through trials. This strategy held firm from 1990 until 1998, when Pinochet was arrested in London. The South Africans considered the Argentine, Chilean, and Salvadoran examples, and designed an innovative strategy that they hoped would provide a better combination of the search for truth, justice, and reconciliation. The South African Commission for Truth and Reconciliation was designed to give amnesty only to those perpetrators who came forward and told the whole truth about their involvement in human rights violations. In principle, perpetrators who did not come forward or did not tell the truth could be prosecuted. Transitional justice had become an international affair, and the particular choices that domestic actors made were conditioned but not determined by prior choices
elsewhere. Thus, another aspect of an agentic approach to international relations is that it suggests that agency is not only present in the origination of norms, but in other parts of the diffusion cycle, where other agents choose, adopt, localize, vernacularize, and make new norms fit their purposes. The norm chain is thus often a chain of learning and adaptation rather than the unthinking emulation implied by the notions both of diffusion and of a logic of appropriateness.

**Conclusions:**

I argue that we need to articulate more clearly a theory of agentic constructivism in order to explain certain international phenomena, such as the emergence and diffusion of the justice cascade. This is not a new theory, but an attempt to label and synthesize over a decade of scholarship, mainly within the constructivist approach, that nevertheless is often overlooked when constructivism is defined as a structural theory about logics of appropriateness. In this sense, I attempt to begin to flesh out from existing scholarship an agentic theory of the micro-foundations of actor constitution and issue creation. Such a theory emphasizes agency but does not ignore the role of structures. Rather, it suggests that particularly in cases where various structural forces come into conflict with one another that emphasis on agency can help explain change. Secondly, it suggests that while agents operate within the constraints of their structural conditions, they are capable of transmuting the structural materials with which they work to create something new from the old. What is created is done so by intentional actors, but the outcome is the result of the interaction of differently placed agents, and as such may indeed be different from that proposed by any one agent. It is this possibility of creating something new out of the old and of creating change that is the result of the interaction of agencies, that I refer to as the alchemy of agency. It provides a better bridge to the world of practice because it involves
taking at face value the possibilities of change, and it sends us out into the world of political practitioners to trace the origins and processes of such change.

Such an approach is not intended to be a new theoretical identity or an all purpose recipe to address any problem, but rather a useful set of tools for certain kinds of issues or puzzles in international relations. I argue here that traditional approaches have not proved very useful to address a small but very important subset of issues involving international change, and that agentic constructivism offers considerable promise for providing theoretical insights into these issues of change.