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THE LEGACY OF ELIHU ROOT

The panel was convened at 9:00 a.m., Friday, March 31, by its moderator, Charles N. Brower of the Iran-U.S. Claims Tribunal, who introduced the lecturer and commentators: Anne-Marie Slaughter of Princeton University; Anthony Carty of Aberdeen Law School; and Jonathan Zasloff of the University of California at Los Angeles School of Law.

INTRODUCTORY REMARKS BY CHARLES N. BROWER

The first President of this Society wrote these words as the opening sentence in Volume I, Part I of the *American Journal of International Law* one hundred years ago under the title “The Need of Popular Understanding of International Law”: “The increase of popular control over national conduct, which marks the political development of our time, makes it constantly more important that the great body of the people in each country should have a just conception of their international rights and duties.”

How sharply relevant those words ring a century later! It therefore is not just fitting, but in fact of urgent timeliness that at this Centennial Annual Meeting we revisit “The Legacy Of Elihu Root.”

To lead us through that legacy as lecturer we are favored by the presence and efforts of our own Anne-Marie Slaughter. Her most important accomplishment in professional life, of course, has been to have served as our Society’s President. She happens also, however, now to be serving as Dean of the Woodrow Wilson School of Public and International Affairs and Bert G. Kerstetter ‘66 University Professor of Politics and International Affairs at Princeton University. A less widely known fact, which appeals to me as a resident of The Netherlands, is that her mother is from nearby Belgium.

For commentary on Anne-Marie’s presentation, we draw on two contrasting disciplinary perspectives. Anthony Carty is a Northern Irishman who first learned law in Belfast (which to me as the father of a British Army officer who was decorated for valor during service there seems a faintly curious place to have learned it!) and after further education in England has migrated to the University of Aberdeen as professor of public law. His specialty is the theory of international law, an example of which in his list of publications that particularly struck me and that may give you a flavor of his approach to the subject, is “Nietzsche And Socrates? Or the Spirit of the Devil and the Law.” By contrast, Jonathan M. Zasloff, a law professor at UCLA, is a transplanted New Yorker and a legal historian whose four graduate degrees include a Ph.D. from Harvard for which he wrote his thesis on none other than—you guessed it!—Elihu Root.

REREADING ROOT

By Anne-Marie Slaughter

Elihu Root was a Wilsonian living at the dawn of a new century, a time that he perceived as an age of globalization and democratization. “The greatest change in the conditions of national life during the past century,” Root wrote, “has been in the advance and spread of democratic government,” an advance that he argued was necessary for international law to survive.¹ Root was also an idealist who believed in practical problem-solving. “Politics is

¹ Elihu Root, *The Effect of Democracy on International Law*, 11 ASIL Proc. 2 (1917).

the practical exercise of the art of self-government, and somebody must attend to it if we are to have self-government.”²

Sound familiar? The 2006 National Security Strategy announces that “the goal of [U.S.] statecraft is to help create a world of democratic, well-governed states that can meet the needs of their citizens and conduct themselves responsibly in the international system.” Moreover, the U.S. approach “is idealistic about our national goals, and realistic about the means to achieve them.”³

But how can this be? *Elihu Root*, revered founder of the American Society of International Law and champion of a law-governed international system? And George W. Bush, the president who, in his first term, resolutely set the face of his administration against international rules and institutions and indeed international constraints of any kind?

There are many answers to the question, and many differences between Bush and Root. But there are in fact many similarities, which means that rooting around in the differences is an interesting, if sometimes dark, mirror on the nation we were then and the nation we have become.

I propose to reread Root for three purposes: as revelation, as revisionism, and as ritual.

REREADING ROOT AS REVELATION

It seems meet and fit to reread Root on the occasion of the centennial of one of the great societies he founded, the other two being the Council on Foreign Relations and the American Law Institute. As members of the Society, we can steep ourselves in the verities of our past. Unexpectedly, however, rereading Root sheds a very interesting light on the direction of present American foreign policy. As just noted, he shared not only the goals but in many ways the worldview that our present secretary of state and secretary of defense do, but he had quite a different vision of how they should be pursued.

The Similarities

Let’s begin with the similarities. In 1908 Root gave a presidential address at the second annual meeting of the Society, entitled “The Sanction of International Law.” He framed his entire discussion of international law in the context of globalization. “In former times,” nations were isolated from one another and “regarded only the physical power of other nations.” “Now, however,”

there may be seen plainly the effects of a long-continued process which is breaking down the isolation of nations, permeating every country with better knowledge and understanding of every other country, spreading throughout the world a knowledge of each government’s conduct to serve as a basis for criticism and judgment, and gradually creating a community of nations.⁴

As is often noted, the period of globalization just prior to the first world war was as intense, and perceived as such, as is the period of globalization that has occurred over the past several decades, accelerating after the Cold War.

² *Lincoln as a Leader of Men*, in *MEN AND POLICIES: ADDRESSES BY ELIHU ROOT*, 69–75 (Robert Bacon & James Brown Scott eds., 1924).

³ THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (Mar. 16, 2006), available at <<http://www.whitehouse.gov/nsc/nss/2006/intro.html>> [hereinafter NATIONAL SECURITY STRATEGY].

⁴ Elihu Root, *The Sanction of International Law*, 2 ASIL PROC. 14 (1908).

Nine years later, Root gave another presidential address at the Society's annual meeting, this one entitled "The Effect of Democracy on International Law." His context for this address was unavoidably "the great war, which is steadily drawing into its circle the entire civilized world." He acknowledges indirectly the dashing of his great hopes for the steady progress of international law governing a community of nations, asking his audience to "consider how it may be possible to reestablish the law of nations upon a durable basis," and, specifically, to "inquire whether the political and social conditions" after the war would permit the establishment "upon some basis of principle a system of international law which can be maintained and enforced."

Root's answer, in a nutshell, is that a durable system of international law can be established only within a community of democracies. He begins by analyzing the causes of the "continued and persistent progress" of democracy in countries all over the globe, concluding, "The existence and assured continuance of development of democracy is the great fact forecasting the future conditions under which the effort to reinstate the law of nations is to be made."⁵ Conversely,

The progress of democracy . . . is destroying the type of government which has shown itself incapable of maintaining respect for law and justice and resisting the temptations of ambition, . . . [and is] substituting a new form of government which in its nature is incapable of proceeding by the same methods, and necessarily responds to different motives and pursues different objects from the old autocratic offenders.⁶

Compare, once again, the language and the reasoning of the 2006 National Security Strategy:

It is the policy of the United States to seek and support democratic movements and institutions in every nation and culture, with the ultimate goal of ending tyranny in our world. In the world today, the fundamental character of regimes matters as much as the distribution of power among them.

More specifically, the authors of the National Security Strategy echo Root's seemingly essentialist logic. "Governments that honor their citizens' dignity and desire for freedom," they write, tend to uphold responsible conduct toward other nations." Conversely, "[G]overnments that brutalize their people also threaten the peace and stability of other nations. Ergo, "promoting democracy is the most effective long-term measure for strengthening international stability" and "extending peace and prosperity."

Many spluttering members of the audience are already preparing to pounce, pointing out that Root talks of the future of international law, whereas the National Security Strategy speaks rather of international stability and peace. And true enough, search in vain through the National Security Strategy for any mention of international *law*. But these differences help make my case that rereading Root today illuminates a great deal about problems with the logical underpinnings of the current Strategy—or perhaps with the lack of such underpinnings. For now, suffice it to establish that Root's rhetoric and professed goals mesh neatly with those of both Woodrow Wilson and of George W. Bush.

The Differences

Let us turn now to the differences. What is particularly interesting about Root's perception of globalization in his era is his emphasis on the way in which increased knowledge of the

⁵ Root, *supra* note 1, at 5.

⁶ *Id.* at 7.

behavior of other nations served “as a basis for criticism and judgment.” Familiarity did not breed contempt, but it did breed mutual examination and evaluation. Even more striking, this process of reciprocal criticism and judgment leads not to conflict, but to community-building. Within Root’s perceived community of nations, he saw “standards of conduct . . . being established, and a world-wide public opinion . . . holding nations to conformity or condemning them for disregard of the established standards.”⁷

The power of global public opinion plays a critical role in Root’s famous account of the “sanction of international law.” He tells the tale of how the enforcement of international law cannot depend on force, but must instead rest on the force of public opinion. Indeed, Root argues that domestic law similarly relies on the power of public sanction: “In the vast majority of cases men refrain from criminal conduct because they are unwilling to incur in the community in which they live the public condemnation and obloquy which would follow a repudiation of the standard of conduct prescribed by that community for its members.”⁸ And when “law and public opinion point different ways,” it is public opinion that will carry the day.⁹ Root takes pains to demonstrate the ways the “impulse of conformity to the standard of the community and the dread of its condemnation” shape individual behavior in virtually every aspect of public and private life.

As with individuals, so with nations. For Root, the development of “world-wide public opinion” as a result of globalization meant that all “civilized nation[s]” must heed it. Indeed, “The deference shown to this international public opinion is in due proportion to a nation’s greatness and advance in civilization.”¹⁰ Make no mistake, however—nations, like individuals, do not conform to the dictates of public opinion because they like to be liked. National interest plays a healthy part, based on a perfectly rational calculation of both the costs of “condemnation and isolation” attendant on a breach of “the standard of nations” and the benefits of “securing the protection of the law” by complying with it.¹¹

And what *is* international public opinion? It is “the consensus of individual opinion in the nations.” It is exercised “not so much by governments as by the people of each country whose opinions are interpreted in the press and determine the country’s attitude towards the nation whose conduct is under consideration.”¹²

Here is the link to Root’s faith in democracy. He has no illusions about the “great wrongs” that democracies are “liable to commit.”¹³ In the end, however, democracies are saved by the absolute necessity of their subjection to law. Only law can hold a democracy together, “and, as in a democracy the law is an expression of the people’s own will, self-respect, and personal pride, and patriotism demand its observance.”¹⁴ The public that makes the law is the public that enforces it, once again “by the power of public opinion.” Moreover, the “most important difference” between a democracy and an autocracy is that a democracy

⁷ *Id.*

⁸ Root, *supra* note 4, at 452.

⁹ *Id.*

¹⁰ *Id.* at 455.

¹¹ *Id.*

¹² *Id.* at 456.

¹³ Root, *supra* note 1, at 7.

¹⁴ *Id.* at 7–8.

cannot fall sway to the “sinister policies of ambition” of its leaders. The need of public discussion of public policy in a democracy will destroy such policies.¹⁵

The National Security Strategy, by contrast, offers a much vaguer account of how precisely democracy will lead to the promised land of global peace, stability, and prosperity. To begin with, it puts freedom first. “Effective democracies,” in turn, are states in which “freedom is indivisible. Political, religious and economic liberty advance together and reinforce each other.”¹⁶ Effective democracies are also, *by definition*, “states that are . . . responsible to their neighbors.”¹⁶

Essentially, then, for the Administration, all good things simply go together. Economic liberty leads to increased demands for political and personal liberty; political and personal liberty promotes accountable government and responsible international behavior. Moreover, when such conditions are achieved it will be morning in the international system. No mention of democracies’ propensity to commit “great wrongs,” or indeed wrongs of any kind. And little notion of how to ensure that demagogic leaders or nationalist leaders or simply venal leaders cannot manipulate the passions of newly democratic populace to further their own lust for power.

REVISING ROOT

Jonathan Zasloff and others portray Root as an arch-legalist, a man with such an unshakable faith in the power of law that he believed international arbitration could end war. He was undoubtedly a man of the world, serving in multiple cabinet positions and as a U.S. senator, as well as a Republican elder-statesman. As noted above, he founded not only the Society, but also the Council on Foreign Relations, the bastion of the celebrated “East Coast foreign policy establishment.” Zasloff acknowledges his worldliness, but nevertheless describes him as so unshakably in the thrall of “classical legal orthodoxy” that he saw the world of active political conflict only in terms of contending legal principles.

Yet here is a man who wrote: “To be safe democracy must kill its enemy when it can and where it can. The world cannot be half democratic and half autocratic. It must be all democratic or all Prussian. There can be no compromise.”¹⁸

These do not sound like the sentiments of a legalist, or if so, a very Wilsonian legalist. For Wilson, contrary to standard stereotype, did not believe that international institutions would go of their own accord. They were to be powered, in the best Kantian tradition, by the liberal democratic structures and values of their members. For Root, “If it is all democratic, international law, honored and observed, may well be expected as a natural development of the principles which make democratic self-government possible.”¹⁹

As to how international law would actually operate in a community of democratic nations, Root assumed that as with domestic law, legal rules would reflect public opinion as much as shape it. Here he was positivist indeed, but not anthropomorphic. He rejected Arnold Wolfers’ billiard-ball world decades before Wolfers conceived it, imagining instead that

¹⁵ *Id.* at 8. Root also falls back on de Tocqueville’s classic account of how democracy is incompatible with the secrecy, steadiness of purpose, and careful and patient planning necessary for successful foreign policy. *Id.* at 9. Root flips de Tocqueville’s analysis to insist that “the settled and continuous policies of a democracy are defensive”; democracies cannot sustain the expense and military discipline necessary for policies of aggression. *Id.* at 8, 10.

¹⁶ *Id.*

¹⁷ *Id.* at 4.

¹⁸ Root, *supra* note 1, at 10.

¹⁹ *Id.*

every democratic government would have to answer not only to its own people but to the people of other nations. Nor did he suppose that governments would have to pay attention to global public opinion out of the goodness of their hearts; on the contrary, as the United States witnessed all too clearly after the 2003 invasion of Iraq, negative public opinion in other democracies sharply constrained their governments' freedom of action in support of the United States, even where the governments themselves might have been inclined to be more supportive.

As Rick Kirgis tells us, the members of the Society were so dispirited by the outbreak of World War I that from 1918–1920 “no annual meeting was held, largely because of disillusionment about the utility of international law as an instrument of peace.”²⁰ Yet as of the annual meeting in 1917, Root was already vigorously searching for a new foundation on which to build a durable and effective edifice of international law. He found it, but only in theory—the theory of a democratic world.

Root's (and Wilson's, and Kant's) theory is still untested globally, but with strong support from the experience of the only durable community of democratic nations the world has ever known: the European Union. But here the standard account of Root illuminates a paradox. Just as Root is known as a classic positivist legalist, when in fact he came to believe that the future of international law was indissolubly linked with the future of democracy, so too does the European Union advocate a fairly standard positivist legalist view of international law around the world. Indeed, Mark Leonard, who sees the European “way of law” as transforming the world in the twenty-first century, posits that regions around the world will follow the path of European integration, but without insisting that those regions democratize first. Yet Europe is, thus far, the only test of Kant's original theory—and a successful one. It insists on full liberal democracy, with all of the checks and balances and human rights guarantees necessary to create and sustain liberal democracy, for all its new members. Yet it often seems to ignore the lesson of its own past, and the path of its own future, when looking at the rest of the world.

REREADING ROOT AS RITUAL

It is easy to scoff at Root's allegedly antiquarian views. Imagine thinking that law can be enforced by the sanction of public opinion! But Root, like Mill beforehand, assumed that democracy rested on educated public opinion, not the public opinion queried constantly by polls. His faith in the sanction of public opinion was a faith in the sanction of society itself, a society with the ability and will to govern itself.

Root took the idea of popular *self*-government seriously, meaning self-government in the sense of ingrained habits of restraint and self-control. “Democratic government,” he wrote, “cannot be carried on except by a people who acquire the habit of seeking true information about facts, of discussing questions of right and wrong, of interest, and of possible consequences, who have kindly consideration for opposing opinions, and a tolerant attitude towards those who differ.”²¹

In a world of failed, failing, and fragile states, in which “capacity-building,” “good-governance,” and “post-conflict stabilization and reconstruction” are the order of the day, frustrated reformers and aid-givers so often pin the blame for weak institutions, continued

²⁰ Frederic L. Kirgis, *The American Society of International Law: The First Hundred Years 2*, at <<http://www.asil.org/pdfs/ASILHistory.pdf>>.

²¹ Root, *supra* note 1, at 8.

violence, and one-party rule on the absence of a “democratic culture.” Yet what is such a culture other than the habits of mind and attitudes described by Root?

Moreover, consider careful empirical studies such as Thomas Tyler’s *Why People Obey The Law*, which concludes precisely that habits of obedience and respect for the legitimacy of the law play a far greater role in explaining ordinary law-abiding behavior than the fear of punishment. As Root wrote, “for the great mass of mankind law established by civil society are enforced directly by the power of public opinion, having, as the sanction for its judgments, the denial of nearly everything for which men strive in life.” What he meant by public opinion in this context we might better understand as peer pressure, which psychologists tell us accounts far more for our children’s behavior than any amount of parental influence and which defines entire sub-cultures within our own society, among suburban teens or inner-city youth, in which not obeying the law is a badge of cool just as much as obeying it is a badge of respectability and maturity for their parents.

In his later days, however, as Anthony Carty tells us, Root no longer thought that habits of mind buttressed by public opinion was enough to preserve either domestic or international order.²² Rules remained indispensable, even if backed by nothing more than the determination of a people or a group of nations to regulate themselves.

Anthony Carty offers us a compelling account of how this early view meshed later with a more sophisticated account of how democracy and international law can and must mesh. In Carty’s words, “[T]here is a deep logic in Root’s turn to international law. It is not that democracies favor it but, rather, that they need it as a form of self-discipline. People’s resentments and sense of injustice suffered from other countries must be disciplined into agreed international standards.”²³

For this purpose, however, international standards must be precise enough to actually constrain. Carty continues:

There is no point in general declarations against war, or offering in alliances, to undertake to defend another country against attack. Hence Root opposed Article 10 of the League Covenant, which offered League members a collective territorial guarantee. Such formulae are too vague, and one cannot tell in advance what kind of conduct by one country another country is going to find itself having to defend. Instead one needs precise rules of conduct, which are a clear application of agreed principles.²⁴

Root thus moved from a pure and somewhat naive view of a deliberative democracy, filled with tolerant and earnest debaters to a more sophisticated understanding of the role of competing interest groups, the excesses of populist sentiment, and the inability of democratic politicians to resist the resulting pressures. Agreement on international rules by democratic legislatures served as a pre-commitment strategy, a way for democracies to tie themselves to the mast of their better selves.

Carty also notes that Root added an appreciation of the necessary role of force to his earlier reliance on public opinion as the principal sanction behind international law. True enough, precisely because dictators could be immune to any sanction other than force. Conditions would likely be different in a world composed only of democracies, but he did not live in that world.

²² See *infra* p. 210.

²³ *Infra*, p. 211.

²⁴ *Id.* at 211–12.

In the end, what is ultimately most powerful in rereading Root is his *faith*. His faith in law—domestic and international. But above all his faith in humanity—in the capacity of individual human beings to live up to their better selves. He had seen their worst sides, in politics and in war. Yet he kept his faith above all in the capacity of individuals and nations to restrain themselves.

That faith contrasts sharply with, for instance, the account of international law favored by current UN Ambassador John Bolton, who sees lurking in “virtually every area of public policy” a proposal by people he calls “globalists” that is “consistent with the overall objective of reducing the individual autonomy of nation-states, particularly the United States.”²⁵ As Senator Joseph Biden once said, “This administration believes that alliances and international institutions are more of a burden than a benefit. They allow the Lilliputians to tie down Gulliver.”²⁶ Liberty, in this equation, equals unlimited freedom of action. It appears unimaginable either that the United States might face a rival power that could benefit equally or more from the absence of constraint, or that the United States might actually *choose* to incur a short-term cost for a long-term gain, on either principled or self-interested grounds.

Justice Kennedy yesterday said that an American defines his self-image, discovers her own identity, in finding that the Constitution is theirs. It is part of “who we are”; if we are taught properly, “it is our national faith.” Root’s life and career embodied that faith. We should reread him every year, to rekindle it and strive to make it true—for our own nation and for all nations.

COMMENTARY BY ANTHONY CARTY*

I take Anne-Marie’s reading of Root to be that he was just as committed as the present U.S. regime to democracy as the basis of world peace, but that he combined this with a firm insistence that democracy was to be a foundation for the construction of international law that was to bind all states, including the United States. A commitment to democracy coming from the United States has made many people wary of both and the usual arguments for such scepticism are well known and well founded. In the debates on the philosophy of international law surrounding Rawls, Teson, Buchanan, Grove, Beitz, and others, we hear it argued that, according to some normative views, only those states that meet the requirements of transnational justice, understood as respect for individual rights, are entitled to enjoy the rights and privileges of members of good standing of the international community. While such a formulation may not be a blank check to attack states, which fail to meet these criteria, it has been pointed out that restraint is still based upon prudence rather than law.

I think it is clear that Anne-Marie is not asking us to down such a path with Root. In an article entitled *A Dangerous Myth*,¹ she objects strongly to a Jed Rubenfeld distinguishing Europeans who embrace international law as a form of international constitutionalism while Americans prefer democratic constitutionalism. She concludes that this oversimplifying dichotomy is a licence for the United States to continue on its present path of self-destruction, while what is really needed is collective respect for a body of rules created bottom up and ratified by democratic legislatures, because they serve all nations’ long term interests.

²⁵ John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT’L L. 205, 220 (2000).

²⁶ Senator Joseph Biden, “Toward Enlightened Nationalism,” Speech to New American Strategies for Security and Peace (Oct. 28, 2003), <<http://www.senate.gov/member/de/biden/general/newsroom/details.cfm?id=214221&&>>.

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¹ Published in PROSPECT, January 2005.

I think Anne-Marie may be a little worried about convincing people that Root, besides being a democrat committed to the international rule of law, was also fully aware of the extent of the risks facing international society and that he had an at least intellectually convincing explanation as to how to put the rule of law into place—that is, a rule of law which consists of more than declaring and waging war in all directions against every supposedly undemocratic society.

The risk of providing a pretext for a country to use the language of democracy to project danger onto other countries is not Root's way and I would like to develop this. His fighting speech on "The Effects of Democracy on International Law," given on April 26, 1917, to which Anne-Marie refers, could appear to be aggressive. He speaks of no compromise with Prussianism and, just as President Wilson (Anne-Marie calls him a Wilsonian) he thought the dismantling of authoritarian regimes a primary U.S. war aim in 1917. However, one needs to take a long view of the life of Root. Between 1917 and 1925 Root gave a series of important lectures to the ASIL and elsewhere,² which give a very complex impression of his vision of international order. I think these papers also refine and modify the vision Root expressed in his paper, "The Sanction of International Law" of 1908 on the role of world public opinion as an effective sanction of international law. These papers are consistent with one another. One might suggest that following the refusal of the United States to support any positive role for the League of Nations and its failure to adhere to the World Court, Root paints a very sharp picture of a world society, in which with the vital exception of the Soviet Union, every major state is democratic. He develops an approach to international law in this context, which I think can be described as conservative democratic (in contradistinction to liberal democratic).

Democratic states are now for Root already clearly acutely ethnocentric. Most nations are not even remotely aware that the standards and beliefs to which they adhere are not understood, interpreted and applied by other countries, quite simply because differences of habit, traditions, history, lack of contact and so on make nations unable to communicate effectively with one another. There is no trace in Root's thinking that any one nation has a special insight into universal values. However, Root does not want to put the clock back. He does not want to return to the secretive ambitions of the dynasts. However, in place of their evils we now have the resentful rancor of the democratic political societies, who are unable to grasp the complexities of international relations. Politicians, however internationalist and competent they may be, are very vulnerable to the whipping up of prejudiced public opinion, e.g., by the press. However reasonable may be the compromises politicians want to make with other nations, they will most likely be pilloried for making them. This is even assuming the politicians are in good faith. Indeed Root's conservatism extends to scepticism of the political process itself, *and that is the distinctive reason he wishes to combine democracy with international law*. Here he parted company with President Wilson who did not, in his view, give sufficient prominence to the need to develop and codify international law.

So there is a deep logic in Root's turn to international law. It is not that democracies favor it but, rather, that they need it as a form of self-discipline. People's resentments and sense of injustice suffered from other countries must be disciplined into agreed international standards. There is no point in general declarations against war, or offering in alliances, to

² These lectures are collected in ELIHU ROOT, *POLITIQUE EXTERIEURE DES ETATS-UNIS ET DROIT INTERNATIONAL* (Jean Teyssaire trans., 1927), and include subjects such as democracy and foreign affairs, the Permanent Court of International Justice, the codification of international law, and the effects of World War I on international law and international relations.

undertake to defend another country against attack. Hence Root opposed Article 10 of the League Covenant, which offered League members a collective territorial guarantee. Such formulae are too vague, and one cannot tell in advance what kind of conduct by one country another country is going to find itself having to defend. Instead, one needs precise rules of conduct, which are a clear application of agreed principles. For instance, Germany could be isolated and defeated in the war because the whole international community could see that it was violating basic standards of the laws of war, particularly in its submarine campaigns. At the same time, Root does accept that there was no point in other nations simply appealing to international standards once a major figure like Germany chose to defy world society. Force had to be used. Law had to have a physical sanction. In this sense, the war taught Root that the optimism of his 1908 lecture on public opinion as a sanction was not enough. No amount of appeals by neutrals in the first years of the war made any impression on Germany, and Root was an early advocate of U.S. entry into the war, calling for the punishment of Germany. Again, this view is consistent with the development of a distinctly conservative approach to international law.

The subtlety of Root's mind is that after the war, he appeared to turn full circle on the German question and oppose tying the League Covenant to the Versailles Treaty, which he felt would make the League into a victor's charter enshrining existing power constellations. The 1919 did not enshrine principles of self-determination consistently and would not last. This is why his understanding of the rule of international law was of a law still to be made, developed, and codified. Democracy came into the picture because there was no other way to do this than, as Anne-Marie argues (see *supra* note 1), through democratic legislatures. Standards did need to be worked out by experts and then endorsed through a legitimate political process, after which they would be applied by a judiciary which was not politically appointed. Finally, there had to be compulsory adjudication of disputes among states. A conservative democratic vision meant more, not less, international law. There is nothing naive or idealistic about this program. Root was convinced by the early 1920s that democratic nations would fight with one another about next to nothing. Politicians were too vulnerable to public pressure to prevent this, and so the place of international law was vital.

So, in conclusion, how does conservative democratic international law compare to neo-conservative and liberal democratic visions? The neo-conservatives consider that there are self-evident universal standards which present no really serious problems of interpretations, so that it can very well fall upon one courageous nation to uphold and enforce the standards in the absence of any altruistic engagement by other powers. Multilateralism is not always going to work, and one cannot argue that standards are not universal because only a few countries uphold them.

Liberal democratic theory appears uncertain in the face of neo-conservatism, because it is also largely committed to the existence of clear universal values, of human rights and democracy, and it also believes that states which do not respect the rule of law domestically are not legitimate and ultimately only prudence dictates not fighting them, e.g., the People's Republic of China. Liberal democratic theory is basically optimistic about the values which are already shared in the world, so that problems of unilateralism are not expected to occur frequently. Coalitions of the willing will be easy to find and delinquent states are readily discernible as falling well below the universal standards, which are very widely accepted, e.g., Afghanistan, Liberia, Serbia, Sierra Leone, and, perhaps Sudan, but, oddly enough, not Iraq. Of course, there is no need for impartial adjudication because Liberal democratic states

feel good about themselves and know their values are right. So NATO could run away from the World Court when Serbia challenged it.

It is clear that liberal democratic theory is rather woolly and vulnerable to neo-conservatism's more cavalier attitude to international law. Can conservative democratic international law theory help? I think it can, and Anne-Marie is right to advise us to look so closely to Root. He favors democracy, human rights, and the rule of law *as good things in themselves*. However, far from having a unique insight into universal values, democratic societies have a clear propensity to project their own prejudices onto other societies under the guise of universal values. The political process can help little here, precisely because democratic politicians are so vulnerable to the very processes they need to control. Therefore, the way to use the democratic has to be international. These volatile democratic societies must be led to agree in advance to a process of international legal codification that consists of collectively agreed, precise standards of conduct to regulate the very concrete issues and situations about which the democratic nations tend usually to wind themselves up to fight with one another. Root calls for democratic leadership to construct an international law, which is fit to govern the world, a law, which should be subject to compulsory adjudication by judges who are free from political influence in their appointment. This conservative vision is constructive, but it is also ironical, detached, and, ultimately, very severe.

COMMENTARY BY JONATHAN ZASLOFF*

Anne-Marie has clearly presented one of the best two examples of Elihu Root endorsing democracy as the basis for a law-governed international order.¹ I should add that, in my view, these are the *only* two examples of this trend in Root's thought.² Recall that Root delivered both of these speeches during World War I. The war obviously challenged the most basic premises of the classical paradigm in American foreign policy thought: it was hard to explain why the great powers were fighting each other to the death if international law could provide a neutral, apolitical venue for nations to resolve their disputes.

In the midst of this war, Root's commitment to classical principles began to waver. But after the war (indeed even before its end), Root returned to classicism. This is a man who told Colonel House confidentially in 1918 that the reason why the war had started was that there was no international legal principle requiring mandatory international conferences. "If Sir Edward Grey had obtained the conference he sought in July 1914," Root asserted, "the war would not have started."³ That is an enormous move, and cannot be explained through a belief in the democratic peace.

I thus must also disagree somewhat with Tony Carty's argument that Root's wartime thought extended itself to the postwar period. After the armistice, we never again see an emphasis on democratization as a principal or even important element in Root's thought. Indeed, he devoted most of his energies toward promoting international institutions such as the World Court, which had little connection to the popular will in whatever way one might understand that term. And when he received a diplomatic task, such as representing the

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¹ Elihu Root, *The Effect of Democracy on International Law*, 11 ASIL PROC. 2 (1917).

² Although it is also true that in the other example, the emphasis on democratization is unstated until the final paragraph of the address. See Elihu Root, *The Outlook for International Law* (Presidential Address at the Ninth Annual Meeting of the American Society of International Law, Washington, D.C., Dec. 28, 1915), in *ADDRESSES ON INTERNATIONAL SUBJECTS* 391, esp. 403 (1916) ("Some of us believe that the hope of the world's progress lies in the spread and perfection of democratic self-government.").

³ Elihu Root to Edward M. "Colonel" House, Aug. 16, 1918, Elihu Root Papers, Library of Congress.

United States at the Washington Conference of 1921–1922, he seemed more eager to develop closer relations with nations such as imperial Japan, which could be described as many things, but not as a democracy.

Root did think that nations' domestic institutions played a central role in determining whether they could become a part of the community of law-abiding nations. But the operative variable for him as for other classicists was "civilization," not democracy. What exactly was "civilization"? Root never specified, perhaps because for his generation and social class its denotation was obvious: great powers were civilized, colonized peoples were not. Complex, differentiated, and industrial societies were civilized; simple, traditional, and agricultural ones were not. In the vast majority of Root's writings, he appeared to assume that the world of law-abiding states was coextensive with "civilized ones."⁴

None of this is to denigrate the idea that democracies might be more law-abiding than dictatorships. This is a good idea; it is a major idea; it is an important idea. But it is not Root's idea. It is, in fact, Anne-Marie Slaughter's idea. She should not be so modest! I recall that, during the eighties, many conservatives thought that President Reagan was being unduly influenced by some of his more centrist advisors: "Let Reagan be Reagan," they insisted. To that I say: Let Slaughter be Slaughter! It's an important idea, but there is no need to share it with Root here.

Instead, reinterpreting and updating the concept of "civilization," no matter how mixed its pedigree, might be a more fruitful way to honor Root's legacy. The current foreign policy debate's focus on "democracy" in my view somewhat misses the point. Anne-Marie and my mutual friend, Fareed Zakaria, have correctly pointed to the rise of "illiberal democracy" as a major—and deeply troubling—trend throughout the globe.⁵ Illiberal democracies may have elections, and they may even be relatively free and fair, but that hardly brings about the habit of law-abiding behavior that was central to Root's philosophy. Mere elections are not enough, particularly in ethnically divided societies: as Donald Horowitz has rightly observed, a vote in such a country is not an election—it is a census.⁶ We need look no farther than Iraq to see the truth of this observation. The result is often a crude majoritarianism where the rule of law has no role. Iraq is not the only case: Russia serves as another example.

Instead, as Zakaria has argued, if we want to develop liberal democracies, we need to focus on the "liberal" part first. We need to put energies into the development of courts systems, intermediate institutions, and civil society—the kinds of institutions that make liberalism possible.

What does this have to do with Root? Quite simply, the institutions that make liberalism possible are those that make civilization possible. That's a very large leap: surely, there have been "civilized" nations that are not liberal. For our purposes, however, it's a workable one. One could justly doubt the "civilization" of a society where there is no rule of law, no middle class, and no intermediate institutions. Put another way, you can't have civilization without civil society and the public institutions to preserve and nurture that civil society.

⁴ The racial basis of this concept should be apparent, although Root's respect for Japan and China should make it clear that he was no crude racist. He also worked closely with Latin American nations and took seriously the idea that they were full and equal members of the international community. Indeed, he was the first secretary of state to travel outside the United States during his term of office, making a highly successful goodwill trip to Argentina, Brazil, and Chile. Thus, while "civilization" has racial overtones, it was not a proxy for racial prejudice, and in fact broke down intercultural barriers.

⁵ See FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* (2003).

⁶ DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 86 (1985).

Root understood this. He never thought deeply about how to create civil society or its necessary supporting institutions, and as secretary of war resisted the idea that the Philippines could achieve self-government. But he would have been appalled at a government that could invade a severely divided country, promise democracy, and expect to leave within a matter of months without having any notion of the facts on the ground. He was an outstanding administrator who prized competence and an attention to detail: at both the War and State Departments, he refused to tell political hacks that they were doing a “heckuva job” when they were not, and he held them accountable when he discovered malfeasance.⁷ Thus, even if Root himself never accepted the democratic peace thesis, his legacy powerfully reminds us that such ideas depend not upon high theory, but the rough-and-tumble development of concrete social institutions.

So far, so good. But there is a deeper problem. This institutionalization process cannot occur in the absence of state power. State order and law enforcement are crucial in developing the habits of law-abidingness that Root justifiably cared so much about.⁸ Failed states are not good places to live, and that’s not because people there are bad people. Rather, unless there is a critical mass of law enforcement, people retreat into the clan, the group, the ethnicity, the gang. Law-abidingness becomes the law of the jungle.

This lesson applies internationally as well: that is the central problem with Root’s vision of the international legal order. Without some kind of enforced order, law cannot develop. Of course, we don’t have an international super-state (and Root very explicitly rejected one). The closest we can get is a stable, robust balance of power that deters aggression. Only then can we begin to speak of effective international law. Root missed this central and critical point. Like all classicists, he rejected balance-of-power thinking, and this doomed his framework.

Classicists such as Root postulated a sharp antinomy between “the rule of law” and “the rule of force.” They were wrong. The rule of law can only arise through the rule of force. Setting forth such a sharp distinction served the deepest ideological needs of classicists, who were deeply conservative men reluctant to acknowledge that their economic and political position rested upon the exercise of coercion. Contemporary scholars, however, should do better.

Root was an admirer of the Concert of Europe,⁹ which had kept the peace (or at least minimized war) on the continent for nearly one hundred years. But what he ignored was that the Concert was dependent upon a stable balance of power for it to develop. When Germany’s rise ripped that balance apart, all the institutions of the Concert collapsed.

Our view of the European Union should be based upon the same framework. The Europeans have achieved something truly remarkable in their new set of international institutions. But these institutions developed under the stable U.S.-Soviet balance of power and the American nuclear umbrella. France and Germany attempted similar sorts of cooperative economic arrangements in the 1920s, but failed because of legitimate French security fears regarding

⁷ Richard Leopold’s assessment is judicious and accurate: “Stability, cleanliness, good roads, new schools, economic benefits, and responsible governors—these things the insular possessions received from Root in abundance. But representative institutions were granted sparingly, and the promise of freedom was absent.” RICHARD W. LEOPOLD, *ELIHU ROOT AND THE CONSERVATIVE TRADITION* 38 (1954).

⁸ It is instructive that Anne-Marie relies on Tom Tyler’s justifiably praised work for a theory of obedience to international law. But Tyler does not argue that the perceived legitimacy of legal institutions is *sufficient* for social order. Tyler based his study on a poll of people in Chicago, which despite some rough spots, is a law-abiding, stable American city under the control of state authority. Put another way, the world is anarchical: Chicago is not. And while Chicago is a city of great diversity, it does not compare to the wide variety of interests and values in nations throughout the globe. Tyler did not apply his findings to international life. There is a reason for this.

⁹ See PHILIP C. JESSUP, *2 ELIHU ROOT* 377 (1938).

its giant eastern neighbor.¹⁰ After World War II, NATO made such fears obsolete, and allowed skillful diplomats such as Jean Monnet to begin the integration that they had always envisioned.

Let me be clear: I am not arguing that international law and legal institutions are mere ephemera. State power (domestically) and the balance of power (internationally) are necessary conditions for the rule of law, but they are not sufficient ones. Under conditions of international political stability, the potentially enormous cooperative benefits of international institutions as originally outlined by Robert Keohane¹¹—regularizing cooperation, reducing transactions costs to agreements, and supporting multilateral policies—can emerge. States are far more likely to focus on the absolute gains promised by international institutions if their basic security needs are met. Insistence on *realpolitik* does not require exclusive devotion to it.

Similarly, it would be foolish to ignore the profound impact that domestic institutions and ideas can have on international behavior. Notions of the liberal peace, set forth impressively by Anne-Marie in the legal literature and originating in Kantian theory, have correlations too impressive to reject or explain away.

Thus, Richard Steinberg and I have recently argued that only an integration of such theories can adequately explain international behavior and develop a robust theory of international law. We contend that “[n]one of the metatheories of the past century has been able to deliver the knockout blow that some have once thought possible.”¹² Instead, “practical wisdom and effective judgment” are necessary in order to understand the complex interaction of “primacy of power” and the “fierce desire for cooperation.”¹³ While this may be unsatisfying for those who seek a parsimonious theory of international behavior, it does have the distinct advantage of adhering more closely to reality.

And in the end, such adherence is really the test of any conception of international law. It is why we should honor Root’s contributions and recognize his flaws. This is where I part company most significantly with Anne-Marie; she claims that “what is ultimately most powerful in rereading Root is his faith.” I disagree: if we have learned anything over the last five years, it is that faith-based policymaking doesn’t work. Another great American international lawyer, Alexander Hamilton,¹⁴ provides us with a better motto: “I have thought it my duty to exhibit things as they are, not as they ought to be.”

¹⁰ My colleague Marc Trachtenberg emphasizes that French officials wanted early on to cooperate with Germany and achieve greater integration of the two nations’ economies. See generally MARC TRACHTENBERG, *REPARATION IN WORLD POLITICS: FRANCE AND EUROPEAN ECONOMIC DIPLOMACY, 1916–1923* (1980). But he acknowledges that “reparation was always far more a political than an economic problem.” *Id.* at 342. Although Paris was not trying to crush Germany with reparations payments, it insisted on fulfillment of the terms of the Versailles Treaty: opening up the Versailles settlement raised the specter of abandoning the German disarmament clauses that stood as France’s central protection. Cooperative arrangements could be implemented, French officials believed, but only in the context of an overall political settlement that guaranteed French security. See *id.* at 171–72. The failure to achieve this settlement doomed the cooperative effort. But this should hardly be surprising in light of the imbalance of power. After all, as Trachtenberg observes, “One inescapable fact dominated the French vision of international politics: forty million Frenchmen faced sixty million Germans, and the demographic gap was clearly widening.” *Id.* at 99. Embedding both nations in the framework of U.S.-Soviet competition ended the problem.

¹¹ See, e.g., Robert O. Keohane, *Neoliberal Institutionalism: A Perspective on World Politics*, in *INTERNATIONAL INSTITUTIONS AND STATE POWER* 1 (1989); Robert O. Keohane, *The Demand for International Regimes*, in *id.*, at 101.

¹² Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 *AJIL* 64, 86 (2006).

¹³ *Id.* at 87.

¹⁴ For an excellent and, at times, disturbing analysis, see Stephen Peter Rosen, *Alexander Hamilton and the Domestic Uses of International Law*, 12 *DIPLOMATIC HIST.* (1979).

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