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LEGAL REALISM AND INTERNATIONAL REALISM
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NEGLECTED REFORMIST CONVERGENCES BETWEEN POLITICAL SCIENCE AND LAW
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"I was talking with a colleague and remarked something to the effect that I guessed that it was time to talk about the relationship between ideas and their social context. He then remarked, 'That's the ten thousand dollar question, Schlegel!' and we passed on to other things."

John H. Schlegel

For approximately five years, the field of legal studies has seemed to be marked – especially in the United States – by a movement toward historiographical re-evaluation of the theoretical legacy of legal realism. On one side, political scientists have been re-examining the ontology of traditional realism in international relations, by fine-tuning the study of the careers and works of its most well-known representatives. Nonetheless, the concrete

exchanges that existed between the theorists of these two schools have until now not been examined at all – or only very little. The relationships between the realism of international relations and international law are usually studied from the perspective of an opposition between a generation of public law specialists marked by liberal internationalism and a generation of political science realists who, to put it mildly, are harshly critical of legal conceptualism, which in their opinion has little place in the anarchic state of international relations.¹

However, at the same time that the realist point of view was asserting itself in the theory of international relations (that is, between 1925 and 1945, in the works of Nicholas J. Spykman, Frederick L. Schuman, and Brooks Emeny, followed by those of Hans J. Morgenthau, Kenneth Thompson, John H. Herz, and Arnold Wolfers, among others), legal theory was also marked by the rise of a powerful realist movement (represented by figures such as Roscoe Pound and Benjamin Cardozo, then Karl N. Llewellyn, Jerome Frank, Thurman W. Arnold, and Felix Cohen). These two movements had a profound impact on American intellectual life. In *The Crisis of Democratic Theory*, Edward A. Purcell was one of the first to put into perspective the empiricist and behaviorist offensive launched during the interwar period by both American social scientists and realist legal scholars. He did so by connecting this phenomenon to American democratic liberalism of the first half of the twentieth century.² However, whilst he referred to political science’s behaviorism in order to compare it to theories of legal realism, Purcell went no further than drawing a parallel between *internal* social relation specialists, saying little about political scientists and legal scholars who sought to promote realism in external policy involving international relations. The latter nonetheless also developed their theories based on a critique of legal formalism: a formalism which, drawing support from the creation of the League of Nations, presided over the expansion of international law in the 1920s. Since then, very few studies, even in the United States, have explored this connection between legal realism and international realism, no doubt because, as Harry N. Scheiber indicates, the common view was that “the Realists should be remembered as having been concerned exclusively with the analysis and reform of domestic jurisprudence and legal process”.³ While Jonathan M. Zasloff and Richard H. Steinberg, in a 2006 article, certainly compared the two intellectual phenomena, they avoided linking them in a causal relationship. In their case, they only indicate that “the shift to realism as the modal position in U.S. foreign policy derived wholly from the shift to realism in international law scholarship or from the shift to legal realism in institutions”.

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³ Harry N. Scheiber, “Taking legal realism offshore: the contributions of Joseph Walter Bingham to American jurisprudence and to the reform of modern ocean law”, *Law and History Review*, 26(3), “Law, War, and History”, Fall 2008, 649-78 (650). In his study of legal realism, Schlegel follows Purcell in avoiding the subject of realism in international relations: see John H. Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: University of North Carolina Press, 1995). Some more recent articles transpose the link between legal realism and international relations by applying it to a reflection on the current international system within the framework of a critical approach, but without taking account of the original connections that existed between the realisms of these two disciplines. See Nourse and Shaffer, “Varieties of new legal realism”, 61-137.
American jurisprudence”.1 As a result, they concentrate not on the laboratory of the interwar period itself, but on the epistemological impulsiveness of this generational ferment, after it had passed through the filter of World War II.

Would it not, however, be possible to shed light on the mutual and applied conceptual discussions that were occurring prior to World War II between the two poles of “realism” represented by legal realism and international realism? If so, how would this affect our understanding of classical realism? On the basis of this question, this article’s goal is to retrace the direct or indirect connections between these theorists before the beginning of the Morgenthau era, that is, during the 1920s and 1930s when the democratic content of American political institutions was polemically redefined. Keeping in mind liberalism’s philosophical “crisis”, I will first review the questions that were raised by legal realism. Second, I will identify the socialization processes at work between realist legal scholars and political scientists in the United States between the wars. This will then allow us to examine the political-philosophical and methodological bases shared by the two groups, by looking in greater detail at their common relationship with American progressivism during the period 1890-1920. Based on the results obtained, the article will conclude by expanding its focus to international relations theory, situating itself within the broader perspective of current research that seeks to re-evaluate classical realism in international relations.

Legal realism: a disruption to American legal theory during the interwar period

According to the naturalist (or nominalist) point of view of legal realism, the general rules of law are less important than the specific facts of a given case: justice, as it is rendered on a daily basis, shapes law in a dynamic way, more decisively than the overarching body of general rules. This interpretation took off in the United States at the end of the 1920s, as an extension of an older movement dominated by the dean of the Harvard Law School, Roscoe Pound (1870-1964). Pound wanted law to be more in line with the realities of a period socially troubled by industrialization and, soon, the economic crisis. In 1925, Pound wrote:

"Legal history [...] must show us what our traditional legal materials really are and how they came to be what they are. It must show us [...] how or how far they were reshaped by the civilization of later times, and how they responded or failed to respond to changes in the social, political, and economic order."2

This sociological view of the law would be followed by other legal scholars and lawyers, such as John C. Grey at Harvard and Louis D. Brandeis, a Boston lawyer who advised judges to consider the social implications of their decisions. These developments in sociological jurisprudence were systematized by legal realism, as demonstrated by the example of its most celebrated representative, Karl N. Llewellyn (1893-1962). Teaching at Columbia from 1925 to 1951, he became recognized as one of the most eminent specialists in legal theory, thanks to the flattering response to The Bramble Bush. On Our Law and Its Study, published in

1930. For this empiricist, the law was primarily an inductive, not deductive, reality, created by the specific daily decisions of judges, lawyers, and all of those involved in the administration of justice, summarized in his most well-known statement: “what these [government] officials do about disputes is, to my mind, the law itself”.

In this regard, this idea centered on law-crafts – which oppose “paper rules” to “real rules” (that is, “what ought to be” to “what is”) – goes further than Pound’s sociologism or Brandeis’s consequentialism, to connect with the functional and skeptical lessons of Oliver Wendell Holmes, Jr., the real spiritual father of realist legal scholars, according to whom the needs and conflicts of human society are more essential than the developments of law. With this in mind, and with other legal scholars from his generation who made up the network of legal realists in the true sense of the term (Charles E. Clark, William O. Douglas, Walter Nelles, Edwin M. Borchard, Jerome Frank, Felix S. Cohen, Thurman W. Arnold, Walter W. Cook, and Ernest G. Lorenzen, among others), Llewellyn launched an anti-conceptualist offensive during which legal realists, like Felix S. Cohen, made a distinction between two camps, opposing their “functional approach” to “transcendental nonsense”. In spite of the nuances differentiating its representatives, legal realism had the wind in its sails at the beginning of the 1930s in the United States, and found determined defenders among the community of legal scholars, especially among law historians. But it also drew criticism, so violent in fact that it led to its general disappearance as of 1935, a conclusion accelerated by the radical nature of some of the group’s theorists.

This American disputatio between legal realism and conceptualism may seem to be, from a certain point of view, a striking reflection of the major quarrel between realists and idealists. At the end of the 1930s, this dispute structured – although less uniformly than general opinion has long believed – what has come to be called the “first debate” of international relations, especially from the moment when Edward H. Carr, in his Twenty Years Crisis (1939), strongly denounced the “utopianism” and abstract legalism of the defenders of the League of Nations and collective security. In the same way that Frank took aim at the “conceptualism” of Langdell and Beale, Carr took issue with the “naïveté” of Zimmern and


2. Purcell, The Crisis of Democratic Theory, 76.


Angell. According to Steinberg and Zasloff, as indicated earlier, the apparent parallel between the two debates is not enough to suggest that the evolution of American foreign policy towards realism should be tied to the realist shift defended by Llewellyn et al. in jurisprudence or the teaching of law. As these two authors correctly note, all American secretaries of state from 1889 to 1945 were certainly jurists, and yet in spite of the fact that they “maintained a position of influence in American diplomacy”, it is also true that concurrent diplomatic alternatives developed institutionally in the United States after World War II:

“Think tanks fostering the professional study of international relations, and the growth of the U.S. military establishment, created two central loci for thinking about national security.”

Thus, because experts in strategy, geopolitics, and political science began to move into positions held by jurists in the State Department and the Pentagon beginning in the mid-1940s, it makes sense to suggest that during the Truman-Eisenhower era, the ontological link between international law and American foreign policy was not strengthened but instead grew weaker. The channels between the possible influence that legal realism may have exercised over international legal scholars on the one hand, and the diplomatic “realism” of the cold war on the other, would thus be unlikely.

It nonetheless seems possible to contest Steinberg and Zasloff’s analysis: aside from the simple fact that it was a jurist, John Foster Dulles, who ruled over the State Department from 1953 to 1959, the question concerning a link between legal and international realism appears relatively more complex. It seems to me in fact that there are two ways to consider the respective roles of law and political science in the United States with regard to international studies in the 1930s: either as epistemological isolates whose respective realist tendencies represent distinct chemical compounds; or as an academic and research continuum which involved a significant number of interpersonal connections between realist legal scholars and political scientists, gradually forming a shared zeitgeist between 1925 and 1935. I would suggest that the second view is closer to reality.

To demonstrate this, it is necessary to review in detail what was at stake intellectually in the roaring twenties. A specific case will help us: that of a then-unknown 34-year-old political science specialist who, one evening in the spring of 1927, decided to take a seat at a round table at the annual conference of the American Society of International Law.

An example of an unnoticed “realist connection”: The Llewellyn-Spykman case

9 April 1927: the annual dinner of the American Society of International Law (ASIL). Opening a debate on the legal protection and guarantees granted to foreign nationals within a state’s territory, the session chairman, James W. Garner, invited a young political scientist who was present to share his comments with the attendees. For a brief moment, the young man observed the assembly of his jurist colleagues then, with a feigned uneasiness that increased his pronounced Dutch accent, began by describing himself as an out-of-touch observer compared to the cultured specialists around him:

1. Steinberg and Zasloff, “Power and international law”, 72.
“Mr. Chairman, [...] I belong to that intolerable group of people who are theorists. One gentleman, evidently a practical lawyer, very ably stated this morning what is wrong with the theorists. Now, there is more wrong with me than merely being a theorist, and that is, I am not even a legal theorist. I am, if you will pardon me the word, a social theorist, one who does a little bit of his social theorizing in the field of international relations.”

Nicholas J. Spykman, an assistant professor who two years earlier had joined Yale’s political science department and seven years later, with the assistance of the Rockefeller Foundation, established the first independent department of international relations in the history of that university, then paused for a moment. He continued in the same mocking tone, a tone that, just like the content of his words, justifies citing him at length:

“[...] I can never compete with the thirty-second degree of abstraction that the well-trained legal mind is capable of. [...] Even as a theorist I leave international justice to the metaphysician. To me the problem of making law is the problem of defining norms that shall be applicable to concrete situations, and if we are interested in the problem of what the law ought to be, we should have a rather clear-cut picture of what these relations are to which that law is to be applied. So far I have not heard anything definite about what these relations are. I have heard a lot of discussion about the protection of citizens abroad and about the protection of property abroad, but nothing about the nature of the citizens and the property.”

It may be supposed, based on an initial analysis and given Spykman’s later career – he was to become the most well-known of American “geo-politicians” – that we are witness here to the public – and insolent – opposition expressed, as expected, by the realism of international relations to legal formalism, in the midst of the enemy’s camp. This event, which preceded by more than ten years the interventions by Edward H. Carr and Hans J. Morgenthau in the same dispute, is already interesting in itself, from the simple perspective of the historiography of international relations. But to stop there would be to leave aside a more surprising fact, namely, that this infantile accusation by one of the future leaders of international realism was in reality in line with a critical framework more akin to sociology and law than to political science. This was not by chance. At that time, Spykman, who had come to the United States in 1920 and was now equipped with a doctorate in sociology obtained at Berkeley in 1923, was in fact intellectually tied to a young realist legal scholar with a promising career, who, like him, had the ambition of renewing the ontology and methodology of his discipline by rebalancing the relationship between “what is” and “what ought to be”. In Spykman’s diatribe, an echo of the voice of the future leader of legal realism, Karl N. Llewellyn himself, can be heard. This heretofore unnoticed connection is, however, but one example of the links that existed before 1940 between the two realisms defined in the introduction, a connection that has been reconstituted through archival work.

Spykman’s own career is intriguing. It is difficult to grasp the position he occupied in American classical realism prior to Morgenthau and what his relations with the legal scholars of

3. This is how it was expressed in Shinohara, US International Lawyers, 60.
his generation might mean without taking into account his origins as a sociologist, and author of a pioneering dissertation on Georg Simmel's social theory, published in 1925.¹ His categorization as a geo-politician has caused his relativist and socially centered work on international relations to be forgotten, and it has never been documented. From the beginning of the 1920s he did, however, affirm that “what applies for the concept of society must of course apply for that of international society”² and clarified, as a good follower of Simmel, that the only social phenomenon that makes any sense is interaction:

“The relation between John and Mary is [...] the social behavior of John and the social behavior of Mary seen as a unit. Nothing but the behavior has empirical reality.”³

It was in “Methods of approach to the study of international relations” in 1933 that Spykman most clearly connected the internal-external relations of individuals to the internal-external relations of states by resituating them within an environment marked by forms of conflictual socialization, a model based on one in Simmel. Simmel was the author of the first “classical conflict theory”, which, as Frédéric Ramel indicates, went beyond “an ambiguity, or even a paradox that sociology had up to then refused to apprehend”.⁴ From these premises, he drew original realist conclusions by applying them to a sociologized and counter-hegemonic political geography approach that he developed in America’s Strategy in World Politics (1942), just before his untimely death in 1943.⁵

The originality of Spykman’s approach makes it possible to understand why the realist connection between the leader of legal realism, Karl N. Llewellyn, and Spykman himself could be made through the surprising pivot of Simmel’s functional relativism. Llewellyn cites Spykman positively several times in the foundational articles he wrote for the Columbia Law Review in 1930, the same year he published the works that would make him famous – The Bramble Bush and Cases and Materials on the Law of Sales.⁶ The encounter no doubt took place during the summer of 1925, right after Spykman had been recruited to Yale and while Llewellyn, an assistant professor there for three years, was teaching his final law courses before leaving definitively for Columbia. The discussions between the two men can be reconstructed based on Llewellyn’s three articles. In the first, written for The American Economic Review in December 1925, he mentions Spykman’s preoccupations with “social engineering”, which he compares to the goals he himself attributes to the discipline of law, while also indicating that he had carefully read The Social Theory of Georg Simmel.⁷ In the second, which dates from 1930, he spends some time on – and praises – Spykman’s ideas concerning “interaction”:

4. Frédéric Ramel, Les fondateurs oubliés. Durkheim, Simmel, Weber, Mauss et les relations internationales (Paris: Presses universitaires de France, 2006), 43. [Translator’s note: All translations from the French are by the translator of this article, unless an alternative published English-language source is given in the footnotes.]
“[...] as part of [those interactions, there is] what Nicholas Spykman so strongly and properly stresses: that the word ‘official’ tacitly presupposes [...] all those patterns of action (ordering, initiative) and obedience (including passivity) on the part both of the official and of all laymen affected [...]. Something of this sort is the idea underlying ‘consent of the governed,’ [...] but these older phrasings have no neatness of outline [...] they act as a soporific, while the Spykman formulation acts as a stimulant to the curiosity and imagination. [His] formulation brings out with fresh emphasis the difference between paper rules and resultant behavior, and the extent to which the behavior which results (if any) from the official formulation of a rule depends on the patterns of thought and action of the persons whose behavior is in question.”

In a 1932 article, Llewellyn again returned to Spykman, mentioning directly conversations he had had with him:

“[My] approach to conflict of function derives largely, I suspect, from M. M. Knight [...] and from conversations with N. J. Spykman.”

The phenomenon noted here (the interested and profitable reading by realist legal scholars of socially centered works written by a realist political scientist) is significant due to Llewellyn and Spykman’s leading status in their respective realisms, and the reciprocity of their exchange. Spykman, in the debates of the period (like that of April 1927), as well as in his subsequent internationalist publications, is unequivocally transposing the ontology of legal realists.

It might be thought that this meeting of minds was simply the result of a chance personal encounter, especially because it ultimately came about in two closed-off disciplinary fields. But this fails to account for two important facts. The first is that realist legal scholars were not satisfied with simply applying their empirical and sociological methodology to internal jurisprudence, but extended it to external policy, contrary to what has been said on this topic. The second fact is that between the wars, political scientists and legal scholars working in the international field interacted a great deal with each other and mutually influenced each other. In reality – as well as symbolically – the Llewellyn-Spykman connection was just the tip of the iceberg of a much more extensive network of intellectual exchanges, which suggests, as we will see in a moment, that studies postulating that the groups were closed off to one another are incorrect.

Personal interconnections between realist legal scholars and political scientists during the interwar period: elements supporting the thesis of a continuum and mutual influence

As a first step, it seems necessary, as indicated earlier, to finally break with the idea that legal realists were not interested in international issues. Certainly, Joseph W. Bingham was a specialist in jurisprudence, Walter W. Cook in the conflict of rights.

3. This is especially the case in “Methods of approach” in 1933 (most notably on page 79), but also in America’s Strategy in World Politics.

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Karl N. Llewellyn in sales law, Herman Oliphant in commercial law, Hessel E. Yntema in comparative law, and Edwin W. Patterson in insurance law. And the realist jurists of the “Yale group” (the university where they were particularly influential) were no exception: Underhill Moor was an expert in the banking system, Wesley Sturges in credit and arbitration, William O. Douglas in corporate law, and Myres McDougal was originally concerned with property law. But a more careful examination reveals that a number of these realists were applying their conceptual frameworks to the most concrete of international realities. John Bassett Moore illustrates this: a professor at Columbia, and member of the Permanent Court of Justice in The Hague, the classic example of a realist legal scholar invested in research in international relations.1 John Dickinson (1894-1952), a political science professor at Harvard, then a law professor at the University of Pennsylvania, considered the work of anthropologists and legal historians in arguing for the functional nature of conflict and the need to build solid social relations internally and externally: he was a lecturer on international relations at the end of the 1920s.2 Hessel E. Yntema, who actually began his career in political science, became one of the worldwide specialists in international comparative law,3 and it was thanks to his action that the United States participated in the Hague Conference on International Law.4 Joseph W. Bingham (1878-1973) applied his realism to international maritime law, by developing a line of reasoning in 1930 that led indirectly to the establishment of Exclusive Economic Zones (EEZ) in 1982.5 Bingham, Moore, and Dickinson were also members of the executive office of the American Society of International Law (ASIL). At the Yale Law School (YLS), Myres McDougal (1906-1998) moved quickly from property law to international law, in which he was a leading light in the 1940s in the “New Haven School” where he worked with Harold D. Lasswell.6 An acerbic despiser of conceptualist theories, Ernest G. Lorenzen, who taught at the Yale Law School from 1917 to 1951, studied the conflict of laws from an international perspective.7 Still at Yale, the same interest in external issues can be observed in the work of Walter W. Cook (1873-1943), who throughout his career used the legal realist method to address


2. Dickinson, fairly critical of the position adopted by the Young Turks of legal realism, aligned himself more with Pound and Cardozo’s line of reasoning on sociological jurisprudence. He also insisted on the differences to be made between “democratic dogma” and real democracy; that is, concerning a political system that feeds on competition between social groups, arbitrated by the government. Here we can see Merriam’s influence. See John Dickinson, “Democratic realities and democratic dogma”, The American Political Science Review, 24, 1930, 283-309, quoted in Mark Bevir, Modern Pluralism. Anglo-American Debates Since 1880 (Cambridge: Cambridge University Press, 2012), 145. Significantly, Dickinson himself also makes reference, beginning in 1929, to Spykman’s The Social Theory of Georg Simmel. Where Llewellyn drew on this work to form his views on the functional nature of conflict, Dickinson took from it the necessity of intermediary socialization structures for keeping large groups together. See John Dickinson, “Social order and political authority”, The American Political Science Review, 23(3), August 1929, 593-632 (621). The section quoted by Dickinson is Spykman’s The Social Theory of Georg Simmel, 136-7.


many international relations subjects from a functional approach, and who in particular, using consequentialist logic, developed a theory on choice-of-law that limited a state’s sovereignty on its own territory if its interest was strengthened by international cooperation.1 This balanced view between cooperation and competition was also found in the doctrine on “destructive competition” popularized by Edwin M. Borchard, a fairly fierce constitutional realist from the Yale Law School, who both denounced the “jurist analytical school” and mistrusted any definition of state sovereignty that was too rigid and would as a result block any possibility for international cooperation.2 As a non-interventionist internationalist, Borchard was also a marvelous embodiment of the conceptual and interpersonal bridge that international relations established between political science and law during the interwar period, by drawing the two sides closer together.3 Very close to John Basset Moore, he in fact tried in 1929 – with the help of Charles E. Clark, the dean who led the Yale Law School into becoming a realist bastion4 – to create an International Law and International Relations Institute within the Yale Law School, a project that until now has gone unnoticed in historiography.5 A regular at the meetings of the American Association of Political Science, passionately opposed to the League of Nations, this jurist nonetheless collaborated very closely with Spykman, who fought for the United States’ membership in the same League of Nations.6 Borchard as well as Lorenzen also taught in the program on international relations created by Spykman at Yale in 1934-35.7 Aside from their differences on the matter of isolationism and their muted opposition over the academic control of international relations (a battle between jurists and political scientists that was administratively won by Spykman), the thread that linked the two men was that of a socially centered functionalism valid both internally and externally. Even though Yale, which housed both Clark’s Law School and Spykman’s Institute of International Studies, was an important nexus for realist sociability, there were other channels for relations between international realists in law and political science. Frederick L. Schuman (1904-1981) is an example of an interesting career from this perspective. After obtaining his doctorate in political science from Chicago in 1927, he was a political science professor there until 1936, before teaching for 32 years at Williams College. As a realist focused on the issue of power, he published a large number of works on international relations in the 1930s, using an approach based on a branch of anthropology (culture-and-personality studies), and by becoming an advocate for what he called “new political science”, that is, 1. Walter W. Cook, “The jurisdiction of sovereign states and the conflict of laws”, Columbia Law Review, 31(3), March 1931, 368-84. For a very careful study of the balance achieved by Cook between socially centered empiricism and taking account of the ethical concerns of judges, see Michael S. Green, “Legal realism, Lex Fori, and the choice-of-law revolution”, The Yale Law Journal, 104(4), January 1995, 967-94. 2. Edwin M. Borchard, “Political theory and international law”, in Charles Merriam and Harry E. Barnes (eds), A History of Political Theories. Recent Times (New York: Macmillan, 1924), 120-39. 3. Edwin M. Borchard, “Research in international law and international relations at Yale University”, Yale Archives, Yale University International Relations 1931-1934, RG11, Series 200, Box 416, Folder 4941. 4. See “US isolation wrong, Spykman says”, Yale Daily News, 61, 4 December 1934. 5. In the department chaired by Spykman, Borchard taught international law, and Lorenzen taught the conflict of laws. See “Graduate announcement, international relations for the academic year 1935-1936”, Bulletin of Yale University, 21(11), 15 February 1935, Yale Archives, Secretary’s Office, Records 1899-1953, Yale Institute of International Studies, Research in International Relations, suppl., 1934, RU 49, YRG4A, SIV, B326, F636.
“the description and analysis of power relations in society”.¹ It is not surprising that, as a political scientist trained by Charles Merriam, he would regularly quote the person who inspired the legal realist school, the “great dissenter” Oliver Wendell Holmes.²

Between 1925 and 1935, this type of pedagogical porosity between law and political science (made possible by a tacit condominium in the epistemologically elastic field of international relations) was enhanced by methodological convergence. The most obvious illustration is the transfer of knowledge undertaken by a certain number of realists, with the goal of developing the same functional approach by navigating between internal and external orders. Two cases of crossover demonstrate this: those of Frederick S. Dunn (1863-1962) and Harold D. Lasswell (1902-1978).³ Dunn, a former jurist in the State Department, the author of notable works on international law influenced by legal realism, picked up sticks and moved to the international relations department Spykman had just created at Yale in 1934. There he combined his legal approach to international disputes with a realist account of the question of power.⁴ With Arnold Wolfers, in 1940 Dunn became Spykman’s successor at the head of the Yale Institute of International Studies (YIIS), which, beginning in 1943, he helped to shift from a classical “Spykmanian” realism to a policy-oriented national security realism. There was a new important connection: William T. R. Fox, his political science colleague at Yale, indicated that Dunn’s international law approach and his rejection of “the inadequacy of conventional modes of legal analysis” was originally inspired by the sociological jurisprudence of Walter W. Cook, whom he knew from Johns Hopkins.⁵ Lasswell did the reverse. Trained in political science at Chicago in the 1920s, and then a political science professor at the same university in 1926, he was influenced (like his realist colleague Schuman) by The Present State of the Study of Politics, in which as early as 1921 Charles Merriam was advocating for an exploration of the sociological foundations of political behavior. A supporter of the behaviorist revolution and the study of social change processes, Lasswell finally chose law, becoming an associate professor (from 1938-39) then a tenured professor (in 1946) at Yale Law School. There, like all the pragmatists of his generation, but with a particular brilliance, he developed a realist analysis of the impact of the internal-external continuum in the international realm; he expanded the research program contained in his World Politics and Personal Insecurity published in 1934, by applying it to mass communication techniques in particular. This line of research was aided by his close relationship with Myres McDougal, a top legal realist at YLS, and by the Institute of Human Relations’ transdisciplinary project created in 1928 at Yale.⁶ In addition, symbolically demonstrating the constant admixture I am seeking to sketch out in this article, it is interesting to note that, throughout the war, Lasswell was himself also a researcher associated with the YIIS of Spykman, Wolfers,
and Dunn. It included scholars trained in political science at Chicago, among whom were William T. R. Fox, Grayson Kirk, and Gabriel Almond. Lasswell’s article “Interrelations of world organization and society” (1945) no doubt best demonstrates the result of this realist association and contact, at the meeting point of the two disciplines.1 As in the cases of Dunn, Spykman, Borchard, and Llewellyn, with Lasswell we can see a convergence between law and political science, where international realism and legal realism intermingle from an empirical and socially centered point of view.

Power and social change: the functional-reformist application among realist jurists and political scientists

Following the individual cases just examined of conceptual and academic interactions between realist political scientists and jurists – and where the connection between the departments of political science and law at Chicago, Yale, and Columbia seems fairly dominant – we now need to look at two new elements in order to assert with more confidence the existence of mutual and applied influence between the international realists from the two camps. On the one hand, there is the socializing role played by the annual meetings of the American Political Science Association (APSA) and the American Society of International Law (ASIL) between the wars; and, on the other hand, the effect of the backdrop of the New Deal’s reformist agenda. I studied all of the ASIL and APSA conferences by consulting their programs and minutes from 1925 (the year that the academic study of international relations really took off)2 to 1941 (when Pearl Harbor ended isolationism and changed the power relationship between idealists and realists). In these documents, I focused on those occasions (as indicated on the official program, or attested to during discussions) when the principal realists – who were defending a sociological approach to national and international topics – spoke to the meetings, regardless of whether they were jurists or political scientists.

The result speaks volumes. Alongside the conceptualist connection of international relations embodied by Quincy Wright or Charles G. Fenwick (who kept a firm hold on the chairmanship or position of secretary on certain key APSA and ASIL committees between 1925 and 1945), there was also a realist network – very directly oriented towards the study of international relations – that was much less informal or epistemologically compartmentalized than expected. It was represented by political scientists or legal scholars sharing the same affinity for the interactional mix of competition and cooperation which, according to them, founded internal and external social orders. Studying the meeting minutes of these spaces for socialization from the point of view of intersecting participation, we can see that Frederick S. Dunn, Brooks Emeny, John H. Herz, Samuel F. Bemis, and Nicholas J. Spykman (the latter being a member of the organizational committee of ASIL’s annual conference) regularly

1. Harold D. Lasswell, “The interrelations of world organization and society”, The Yale Law Journal, 55(5), August 1946, 889-909. From the first page, he quotes Llewellyn’s The Cheyenne Way and Merriam’s Systematic Politics. He contrasts this second work with the “sterile dogmatism” of Mises and of Hayek, whose Omnipotent Government and The Road to Serfdom were both published in 1944 (Lasswell, “The interrelations of world organization and society”, 906). This again shows that the realists-reformers who were part of the Chicago-Yale-Columbia connection rejected the results achieved through the alliance between internal cynical non-interventionism and external dogmatic idealism – an intellectual mixture they fought against through a more realistic account of the factors of power in internal and international societies.

2. This development was due, among other things, to the 1924 adoption of the Rogers Act, which professionalized the American Foreign Service.
interceded with the legal scholars, while Karl N. Llewellyn, Thurman W. Arnold, Thomas R. Powell, Charles G. Haines, Jerome Frank, and John Dickinson gave presentations at APSA.1 Borchard and Lasswell specialized in taking on responsibilities in the two associations. To the bilateral relations above, we should also add the mutual formation and influence which occurred as a result of rubbing shoulders within a transdisciplinary group.

A third element is part of the equation, one related to the ethics of conviction. The functionalist ideal shared by empiricists in law and political science would in fact be put into practice. Legal realists attempted to do so through the New Deal, while realist political scientists sought to carry it out through a pragmatic commitment to a better balance between national and international societies (this particular debate was focused on the operation of the League of Nations). On the side of the jurists, even Jerome Frank, the most extreme of the legal realists, believed in the virtues of social engineering to strengthen an American democracy that had been overtaken by the political-economic and ideological contradictions of the modern era, which he demonstrated in his functions as judge on the United States Court of Appeals for the Second Circuit. The Yale group’s involvement in the New Deal was particularly great:2 in 1936, Thurman W. Arnold became assistant attorney general responsible for antitrust enforcement, while William O. Douglas joined the Securities and Exchange Commission, then the Supreme Court. In 1939, Roosevelt appointed Charles Clark to the United States Court of Appeals for the Second Circuit.3 After being involved in Roosevelt’s election campaign in 1932, John Dickinson was appointed Assistant Secretary of Commerce in 1933: he dedicated himself in particular to issues of international maritime commerce, while also continuing to teach law and international relations. Roy Kreitner is right in noting that the legal realism of the 1930s was not only a sensibility centered on the judge’s jurisprudence and daily work, but also a social commitment.4 For Dalia Tsuk Mitchell, who took up Morton J. Horwitz’s vision, the progressive social engineering of realist jurists revealed their convictions with regard to the balance of power internally.5 Its representatives “drew on a reservoir of contemporary social thought that supported reform intended to combat the conditions of the Depression”6 and studied the dynamic models that could connect interaction between individuals and social groups, on the one hand, and the predictive understanding of justice, on the other. The works by realist economist and legal scholars Robert L. Hale (1884-1969) and Morris R. Cohen (1880-1947), denouncers of the negative socio-political effects of non-interventionism, reveal the same concern for a social-political balance shared by Cook, Frank, and other representatives of the movement.7

This is a key point, in my opinion: there was in fact no reason that this functionalist philosophy
should not be applied, by means of international public law, to international relations, especially
since the only thing separating it and law was a narrow epistemological barrier. The central
phenomenon that therefore seems important to bring out here is that realist legal scholars and
realist political scientists shared the same interest in social engineering. Both groups were
attempting to functionally re-establish the rules of national and international societies, essentially
through the New Deal internally, and, externally, through a fight for a “realist” League of
Nations (Spykman), non-interventionism (Borchard), and renewed maritime law (Bingham),
seeking always for a balance of powers. The two themes converged naturally in 1936, with a
round table at the annual APSA conference, chaired by John Dickinson, entitled “Domestic
Planning and Foreign Policy”. Bringing together legal realism and international realism in this
article finally makes it possible to understand why, contrary to the realism of national security
(Edward Mead Earle)1 and then neo-realism (Waltz), classical realists, regardless of their minor
differences, remained convinced of the ties between internal and external orders. Among these
realists, many also specialized in the analytical back-and-forth between these two orders
(Spykman and Schwartzenberger among the political scientists; Borchard, Lorenzen, and Cook
among the legal scholars, and Lasswell and Dunn in both disciplines).2 Their point in common
was no doubt the conviction that conflict has a regulating function for internal and external
policies. What engenders violence is not conflictual interaction but rather the normative status
quo. This is why these realist legal scholars and political scientists (realist because they gave
credence to the concept of power) sincerely believed they were reformers (because they valued
the change needed for re-balancing any social order). Ontologically, their realism thus adopted
the form of an analysis of the distribution of power factors that regulate internal and external
political orders in such a way that these orders act in harmony with the rhythms of social
change, avoiding obstacles that lead to frustration and violence. The expression “frustrated
idealists” (Edward J. Bloustein) reveals perhaps something essential concerning the position of
this generation that was keen to make international relations – and law, for the legal realists –
an entirely separate social science.3 If we seek to identify a common ancestor for these realists
from two different camps, it is no doubt important to refer back to the ideas of David Hume,
who was both an empiricist philosopher responsible for the distinction between is and ought,
and a political theorist of the internal and external balance of power.

The best proof of ontological kinship between realist legal scholars and political scientists is
found implicitly: their relativism simply provoked similar knee-jerk reactions. In the 1930s,
legal realists were the first to be indicted; the political scientists would follow beginning in
1940. Neil Duxbury thus recalls:

“Some American legal realists, regarded as skeptics, were accused not only of being epistemolog-
ical relativists but also, by extension, of being political traitors, since the assertion that all knowl-
edge can be placed in doubt was seen at least to imply that there can be no meaningful way to
choose between one political system and another. Quite simply, realists suddenly found themselves
charged with offering an apologia for totalitarianism.”4

1. David Ekbladh, “Present at the creation: Edward Mead Earle and the Depression-era origin of security studies”,
2. Lasswell was chairman of the APSA in 1956 and of the ASIL from 1966 to 1968.
Fall 1964, 24:33 (24).
In a 1936 article, Frank, Llewellyn, and Arnold were vilified as “contemporary prophets” of a “jurisprudence of despair” which is simply another name for nihilism. Among political scientists, Spykman, who gave the title “Social Change” to his first international relations course in 1934, was, from 1942, being called defeatist, amoral, and neo-Machiavellian. The geopolitical nature of his final publications, from 1937 to 1942, increased the suspicion weighing on him. Some among the jurists as well as the political scientists sought to escape this moral excommunication caused by relativist deviationism: in 1936, Joseph W. Bingham resigned himself to making clear that his criticism of the legal process was not to be taken as a defense of socialism or communism: “It is significant of the turmoil of passion and prejudice in our current debates on matters of politics and government, that a credo caveat of this sort is necessary even in a studious discussion of a legal problem,” he wrote, greatly offended. Lasswell, who had according to David Easton an “Elitist Amoral Phase” before 1940, shifted then, again according to Easton, to a more consensual “Decisional Moral” phase. John H. Herz, for his part, explicitly labeled his classical realism as “liberal”.

These re-positionings are essential for understanding the intertwined evolution of the disciplines of political science and law after 1945. The truth, in the end, is that the two realist approaches we are studying failed together; not, however, by disappearing, but more subtly, by being re-characterized. The following hypothesis might be posited: the accusations made against Arnold, Spykman, and Frank influenced the way in which Hans J. Morgenthau, at the end of the 1940s, modeled his Westphalian realism on the normative values of American democracy. By incorporating the notion of the “moral dignity of the national interest”, he was able to include liberal communion in his construction uncontested and remove any philosophical hesitations that might have weighed on it. Once this Americanization of international realism was achieved, a way opened up for a critical dialogue between political science and legal studies, which both underwent their own ontological stress test: law, by rejecting in large part the “bad philosophy” (Carl Friedrich) of legal realism, retaining only a wariness concerning too resolute a conceptualism; political science, by incorporating international realism, only once this realism had treated religion tactfully and affirmed its anti-communist stance, two factors which dispelled any doubt about its liberalism (according to the moral understanding of this term at the beginning of the cold war). The concrete results of this evolution can be measured based on the content of the American Journal of International Law (AJIL). Founded in 1906, the journal was first controlled by a group of public legalists...

7. Reinhold Niebuhr played an important role in this shift.
8. An established fact to be compared with the position of the inaugural realists such as Spykman (whose biting irony on the subject of American Puritanism was denounced by Mead Earle as “sarcastic”) and Schuman (who was a victim of McCarthyism in the 1950s).
law specialists who sought to eliminate the role of power—and thus of war—in international
affairs. After 1945, the AJIL did however see a plethora of legal analyses influenced by
the realism of international relations, which strongly called into question conceptualist dogma-
tism. Contrary to all expectations, given the journal’s origins, the AJIL’s studies and articles
thus demonstrated not a separation from but an ongoing dialog with law and power in
international relations. This back-and-forth phenomenon would no doubt not have taken
place if law itself had not first been called into question by its own cohort of “realist” Young
Turks. Without this internal secession, which preceded by ten years (1925-1935) the “first
debate” of international relations (1935-1945), there would have been too few consistent
points in common between legal scholars and political scientists to create a large enough
space for convergence, a space in which the arguments of each discipline could be taken
into account by the other.

When we examine the twin nominalist and relativist “thrusts” represented by legal realism
and international realism, we can see that what emerges are explicit relationships and echoes,
not merely a vague commonality between two intellectual ventures, one of which quickly
failed after 1930, while the other enjoyed sustained success after 1945. In the academic world,
legal realism had faded by the end of the 1930s, but the methodological and ontological
foundations of the questions it raised were in part transferred to international relations. In
the end, the realism of American internationalist legal scholars and political scientists from
between the wars seems less defined by “cynicism” than by a shared reformist and functional
interactionism.

The legacy of the realist “respiration”: a few surprising long-term
epistemological effects

From the perspective of political science, what are the theoretical consequences of what
this article has sought to bring to light? Essentially, I have attempted to provide a
potentially finer-grained understanding of the legacy and possibilities of the first real-
lists: poorly understood, they had been folded into a diverse group of authors from the 1930s
and 40s who apparently lacked enough theoretical talent to be able to establish a school,
and whose random dazzling moments were ultimately incorporated into and filtered by the
authoritative synthesis of the book Politics Among Nations. In reality, even before this “Mor-
genthau moment” from 1948-54 – that is, the establishment of the realist gambit of corporate
independence described by Nicolas Guilhot, which opened a 30-year theoretical hegemony –
some legal scholars and a few political scientists of the lost generation had mounted a
realist challenge that took account of the transactional balance between cooperation and
competition by weighing both representations and interests. They certainly undertook this

2. The shared methodology or sensibility does not mean, however, that identical conclusions can be reached.
   For an example of an unreserved critique by a realist legal scholar with regard to the work of a realist political
   scientist (who moreover was himself a former legal scholar), see McDougal’s commentary of Schwarzenberger’s
   realism: Myres S. McDougal, “Dr. Schwarzenberger’s power politics”, Yale Law School Faculty Scholarship Series,
   Paper 2471, January 1953.
   1948).
4. Nicolas Guilhot, “The realist gambit: postwar American political science and the birth of IR theory”, Interna-
   tional Political Sociology, 2, 2008, 281-304; Jean-Jacques Roche, Théories des relations internationales (Paris:
   Montchrestien, 2004), 35.
in their respective spheres, but also and equally (which is the central point of this article), they did it in common through international relations. This challenge not only constituted an ontological alternative to legal and political conceptualism but also allowed for a methodological opening up of a stimulating series of possible heuristics, which other schools, beyond the artificial bipolar blockage of the cold war, would later exploit without always being aware of this precedence. What could be termed inaugural realism is however far from being a simple empiricism or the totemic worship of power. Instead, through a surprising curve in the space-time of theory, it seems to herald – sixty years ahead of its time – the nuances of critical approaches that, from a post-positivist perspective, sought to renew the epistemology of political science. This renewal began in the 1990s by taking account of the perceptions of actors on the international scene.

Examples to demonstrate this hypothesis abound. During the 1990s, can it not be said that constructivist theorists like Onuf and Kratochwil,1 with their particular interest in relationships between international law and international relations, are repeating, 60 years later, the same basic discussion between Karl N. Llewellyn and Nicholas J. Spykman? According to Adriana Sinclair, the arrival of the constructivist paradigm, heralded by World of our Making by Nicholas Onuf,2 had become absolutely necessary, because international relations had failed to achieve their primary goal, namely, “understanding that our social reality is constructed”.3 At the same time, Sinclair nonetheless notes that Onuf himself emphasizes the impossibility of “constructing” without taking into consideration a materiality whose limits we must acknowledge, while also evaluating “the consequences of ignoring or defying” them. The latent realism of this constructivism (more evident with Onuf and Wendt than with Kratochwil) lends support to J. Samuel Barkin when he wonders what in the end really divides constructivists and realists.4 Of course, there is a real contrast between constructivism and Waltz’s systemic neorealism. But what happens when comparing contemporary constructivism and classical realism? Given their connections with legal realism and knowledge of sociological jurisprudence, is it possible that the forefathers of international relations realism, before the “Morgenthau moment”, could not have known that social reality was socially constructed? I have attempted here to suggest that this was not the case. Spykman (instructed by Simmel) and Dunn, and later Thompson and Fox (with his concept of pragmatic meliorism)5 – and even Morgenthau himself – did not deny that reality was socially constructed. They were opposed (to varying degrees, it is true6) to it being morally reconstructed, which is fundamentally different from the perspective of the degree of artificiality and subjectivity of the “construction” considered. We should also note that at the beginning of the 1940s Morgenthau’s main criticism of international law was directed primarily at the

fact that it was not able to integrate the contributions of the “behaviorist revolution”:1 in his mind, this did not at all involve a quantitative methodology, which was the subject of the “second debate”, but instead, social behavior. Also, none of the five realist theorists just mentioned ever formally wrote that international law was of no use, and most took into account the psychological factors and misperceptions involved in making decisions. Morgenthau’s philosophical realism and Spykman’s sociological realism converged on this point, as indicated by Kenneth Thompson:

“In the 1930s, [Hans Morgenthau] and Professor Nicholas Spykman of Yale were often dissenters at the Carnegie Endowment Conferences on International Law and Related Subjects. They were alone in urging that greater attention be paid to the political and social conditions in which international law was operative.”

With some distance, we can in the end see that the neo-idealist analyses of the 1990s that describe a solely objectivist realism – supposedly blind to the effects of social change – as well as other more recent contributions by legal scholars simplifying international realism to the extreme by comparing it to the most inflexible theorists of conflict of laws, or who describe realist political scientists as having been against international law, in fact twist the content of classical realism (and of legal realism).2 The disdain is understandable, due to a blinding double effect: on one hand, the Morgenthalian canonicate partly decentralized the socially centered functionalism of proto-realists by returning it to the concept of interest governed by the animus dominandi; on the other hand, and to a greater degree, the systemic empire of Waltzian neo-realism of the 1970s severed any ties between the internal and external orders of international relations, relegating the classical forefathers of the realist paradigm to a past quickly effaced by a structural para-dogma. To some extent, the study we have traced of the relationships between legal realism and international realism in the 1920s and 30s has allowed us to discover some of the nuances of that first period, which has led to recovering the essential difference that separates moral reconstruction and social construction among the inaugural and classical realists. From a research point of view, perhaps the most interesting element is the fact that the first international realists generally approached social change with the same reformist presuppositions as legal realists. And what appeared particularly obvious to Purcell regarding the Lasswell-McDougal pair should in fact also be applied to their predecessors.

The debate between formalism and realism in international law theory was not settled once and for all with the violent anti-naturalist reaction of the 1940s, and the consequent triumph of “reformers” over “traditionalists”.4 A half-century has passed and the way in which a more sociological approach can and must influence (or not) real justice in a more objective sense

1. Steinberg and Zasloff, “Power and international law”, 71.
continues to be the subject of lively debate, especially in the United States. This is why, in assisting critical approaches, international legal realism has clearly experienced renewed interest among a new generation of researchers, especially through New Legal Realism (NLR). Because the neo-idealism of the 1990s has lessened its expectations, the same tendency for a “dialogue at the margins” between realists and constructivists, even though it is less significant and somewhat belated, concerns political science today, by way of international relations. The growing interest in pragmatism, the attempt to define “post-realism” as well as the repositioning of classical realism begun by Anglo-American researchers and developed in France in spite of a more hostile context, all confirm that the metatheoretical sense of history does not exist. As Donald J. Puchala writes: “a number of international relations’ conceptual ‘wheels’, like interdependence, have been rediscovered several times [...].” 7

The group of authors that should thus be renamed the inaugural realists – the ones whose “thought” Waltz wanted to replace with a “theory” – has slowly been rediscovered, as the biographies of its primary representatives are finally published. In this domain, the networking of the numerous ongoing studies may confirm that non-structural realist classicism, from Morgenthau to Herz and Spykman, including Fox, Schwarzenberger, Thompson, and even Schuman, reveals not only a forgotten pattern for a surprisingly modern socially-centered approach, but may also provide a framework for reconstituting – or at least partially consolidating – a theory of international relations, one that continues to be threatened with fragmentation due to the ontological dilemma between is and ought. 10


3. On “pragmatism” in international relations, see in particular the very interesting discussion between Gunther Hellmann, Helena Rydqvist-Apunen, Jörg Friedrichs, Rudra Sil, Markus Kornprobst, and Patrick Thaddeus Jackson, in Gunther Hellmann, “Pragmatism and international relations”, International Studies Review, 11(3), September 2009, 638-62; also the September 2014 issue of Millennium (“International relations as a social science” debate).


8. Parent and Baron, “Elder abuse”, 193-213. See also Frankel, Roots of Realism.


10. For a stimulating analysis of the coherence of the theoretical field of international relations, see Alex Macleod, “La théorie des relations internationales”, in Frédéric Ramel and Thierry Balzacq (eds), Traité de relations internationales (Paris: Presses de Sciences Po, 2013), 989-1018.