RECONSTRUCTING INTERNATIONAL LAW AS COMMON LAW

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Geh' unter, Welt, und störe
Nimmer die süßen, ätherischen Chöre.
—Franz-Peter Schubert, *Auflösung*, D.807.[1]

ABSTRACT

This Article demonstrates that the predominant critique of international law as useless to assess international behavior overreaches. Threatening the integrity of international law, proponents of this critique, which includes leading international law scholars, conclude that "international law" masks an international politics. This politics operates by means of the technical idiom of competing self-contained treaty regimes addressing the various areas of international legal regulation. This Article demonstrates that this critique of international law is internally inconsistent. It explains that the critique's juxtaposition of international politics with international law is inconsistent with the postmodern practice of deconstruction upon which their critique relies, meaning that the premise of the critique cannot be defended on its own terms. The Article next recalibrates the critique. It shows that rather than proving that international law is invalid, the critique actually demonstrates that international law functions like a common law. This means that international law follows an inductive rule-establishment process. An inductive process establishes norms on the basis of factual regularity. This Article will show that good faith drives this inductive

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1. "Dissolve, world, and never more disturb the sweet ethereal choirs." SUSAN YOUENS, SCHUBERT'S POETS AND THE MAKING OF LIEDER 221–22 (1996). Johann Baptist Mayrhofer authored the poem to which Schubert penned the *Lied*. The "*Resolution*," which is the subject of the *Lied*, presents as complementary the institution of an ideal (the realm of ethereal choirs) and the demise of the real world that is too impure to hold it. The *Lied*'s desire is consistent with much international law scholarship, which either strives to demonstrate the existence of a pure paradigm or, in the case of the critique, works to show that the entire international legal enterprise is futile because it cannot attain this ideal. This Article takes seriously the real world within which international law must function. It seeks to deconstruct the twin idealism and nihilism around which Schubert composed his *Lied* and reconstruct a normative order that embeds *Störung* (trouble) heterogeneity, diversity at its very core.

rule establishment in international law. Good faith coordinates and translates how international law takes account of a wide variety of facts for purposes of establishing a rule and assessing the violation of a rule. It does so by placing these facts in the context of what emerges as the core goal of international law: protection of the legitimate differences in interest, experience, and perspective of the subjects international law intends to govern.

Introduction

At a time of unprecedented growth in multilateral and bilateral treaty making, critics warn that "international law is singularly useless as a means for justifying or criticizing international behavior."[2] Alarmingly, some of international law's greatest critics are leading scholars from *within* the international legal academy, including figures such as Martti Koskenniemi and David Kennedy; worse still, they use the growth of international law—previously advanced as a sign of the vitality of international law—as symptom of its purported uselessness.[3] These new critics are a strong presence in international legal discourse.[4] The prevalence of such internal

2. Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument 67 (2005); *see also* Robert E. Dalton, Book Review, 106 Am. J. Int'l L. 898, 898 (2012) (reviewing 1 The Vienna Convention on the Law of Treaties: A Commentary (Olivier Corten & Pierre Klein eds., 2011)) (noting the "unprecedented growth of treaty making over the last four decades and the establishment by states of [new] international tribunals").

3. *See, e.g.*, Koskenniemi, *supra* note 2, at 67. Martti Koskenniemi is a former legal adviser to Finland's Ministry of Foreign Affairs, a former member of the U.N. International Law Commission, and is a Professor of International Law at the University of Helsinki. *Martti Koskenniemi, Curriculum Vitae*, U. Helsinki: Erik Castrén Inst. L. & Hum. Rts. (2014), *available at* http://www.helsinki.fi/eci/Staff/Koskenniemi_CV.pdf; *cf.* Frank J. Garcia, *Globalization, Power, States, and the Role of Law*, 54 B.C. L. Rev. 903, 913 (2013) (observing that Koskenniemi's critique of international law has achieved "canonical" status); David Kennedy, *Modern War and Modern Law*, 16 Minn. J. Int'l L. 471, 473 (2007) [hereinafter Kennedy, *Modern War*] ("[A]s law became an ever more important yardstick for legitimacy, legal categories became far too spongy to permit clear resolution of the most important questions . . . ."). David Kennedy is the Manley O. Hudson Professor of International Law and Faculty Director of the Institute for Global Law and Policy at Harvard Law School. *See David W. Kennedy, Biography*, Harv. L. Sch., http://hls.harvard.edu/faculty/directory/10468/Kennedy (last visited Nov. 15, 2014). He has been described as "quite possibly the leading [critical] explorer of the traditional paradigm." Ediberto Román, *A Race Approach to International Law (RAIL): Is There a Need for Yet Another Critique of International Law?*, 33 U.C. Davis L. Rev. 1519, 1528 (2000); *cf.* Thomas Buergenthal, *Lawmaking by the ICJ and Other International Courts*, *in* American Society of International Law: Proceedings of the 103rd Annual Meeting 403, 406 (2009) (referring to the growth of international law as sign of its vitality); Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart*, 21 Eur. J. Int'l L. 967, 979 (2011) (same).

4. *See, e.g.*, Eyal Benvenisti & George W. Downs, *The Empire's New Clothes: Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595 (2007) (arguing that the fragmentation of international law reflects a dangerous, nonegalitarian system under-

criticism at a time of an exceptional expansion of international law reveals a deep and urgent identity crisis within international law.[5]

The legal theory behind this critique relies upon postmodern "deconstruction" to unmask the supposed futility of international law.[6] Deconstruction is Jacques Derrida's core contribution as "one of the three most important philosophers of the 20th Century."[7] Deconstruction aims to show that any theory inherently draws upon a multiplicity of inconsistent, hidden discourses.[8] It therefore argues that any theory cannot ultimately defend a single axiomatic preference over a rival preference.[9] This is because any such preference ultimately rests upon arguments from extraneous source discourses that are inconsistent with the ultimate preference the target discourse seeks to defend.[10] For example, deconstructive practice would show that a hypothetical preference of "chocolate" over "candy" ultimately would need to justify this preference by reference to the sweetness of chocolate—and thus by reference to an attribute or discourse also most closely associated

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mining the integrity of international law); Andreas Fischer-Lescano & Gunther Teubner, *Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law*, 25 MICH. J. INT'L L. 999, 1005 (2004) (rejecting that epistemic communities in international law could be governed by a "market place of ideas"); Paul B. Stephan, *Privatizing International Law*, 97 VA. L. REV. 1573, 1578–79 (2011) ("Privatization that destabilizes the domain of international law by making it less clear where international rules apply thus produces high costs that require exceptional justification.").

5. *See, e.g.*, Harlan Grant Cohen, *International Law's* Erie *Moment*, 34 MICH. J. INT'L L. 249, 251 (2013) ("The conflict between the NAFTA tribunals and NAFTA state parties [regarding the state parties' adoption of an authoritative interpretation of the treaty which since has been rejected in effect by several NAFTA tribunal] well illustrates international law's current identity crisis."); *see also* Rafael Domingo, *The Crisis of International Law*, 42 VAND. J. TRANSNAT'L L. 1543 (2009) (arguing that international law is in crisis because of its near exclusive reliance upon the nation state).

6. *See, e.g.*, KOSKENNIEMI, *supra* note 2, at 530–31 (noting his reliance upon Jacques Derrida); David Kennedy, *When Renewal Repeats: Thinking Against the Box*, 32 N.Y.U. J. INT'L L. & POL. 335, 481 (2000) (relying similarly on Derrida-type reasoning); Gunther Teubner, *The Law Before It Is Law: Franz Kafka and the (Im)possibility of the Law's Self-Reflection*, 14 GERMAN L.J. 405, 407 (2013).

7. *See* Pierre Legrand, *Siting Foreign Law: How Derrida Can Help*, 21 DUKE J. COMP. & INT'L L. 595, 596 (2011) (quoting Mark C. Taylor, *What Derrida Really Meant*, N.Y. TIMES, Oct. 14, 2004, http://www.nytimes.com/2004/10/14/opinion/14taylor.html.

8. *See* JACQUES DERRIDA, DE LA GRAMMATOLOGIE 35 (1967) [hereinafter DERRIDA, GRAMMATOLOGY] (discussing the inconsistent discourses upon which Heidegger's philosophy is premised); *see also* JACQUES DERRIDA, L'ÉCRITURE ET LA DIFFERENCE 294–340 (1967) [hereinafter DERRIDA, L'ÉCRITURE] (discussing the distinctions between deconstruction and psychoanalysis).

9. *See* Jack M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 748 (1986).

10. *Id.* at 757.

with candy.[11] This move shows that the stated axiomatic value preference (say, of chocolate) is internally untenable because both chocolate and candy are sweet.[12]

Consistent with deconstructive practice, international law critics argue that international law cannot defend a preference for either of the two dominant metatheories of international law, consent-based positivism (in our hypothetical, chocolate) or norm-based natural law theory (in our hypothetical, candy).[13] They posit that defense of either of these ultimate preferences is premised upon arguments drawn from the opposing discourse.[14] Consequently, international legal critics posit that any international law argument is both over- and under-legitimized[15] because it is necessarily premised upon inconsistent and competing axioms.[16] Therefore, the critique continues, because reconciliation of these axioms is impossible, there is no criterion for "legality." This means that any set of facts can be justified by a coherent legal argument.[17] In order to avoid revealing this problem, whenever a legal argument runs out, international courts and tribunals invoke "good faith" to decide the dispute.[18]

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11. As discussed in detail below, the preference is not one of taste (preferring the taste of chocolate to the taste of sweets). It is one of asserted first principle—organizing one's world around a "chocolate calf" and rejecting all mention of sweets as heresy. *Infra* Part I.A.

12. Balkin, *supra* note 9, at 757.

13. David Kennedy, *The Sources of International Law*, 2 Am. U. J. Int'l L. & Pol'y 1, 20 (1987) (dividing international law into "hard" and "soft" arguments) ("A 'hard' argument will seek to ground compliance in the 'consent' of the state to be bound. A 'soft' argument relies upon some extraconsensual notion of the good or the just."); *cf.* Koskenniemi, *supra* note 2, at 59 ("[International law] can either be 'descending' or 'ascending' . . . . [Descending] is premised on the assumption that a normative code *overrides* individual State behaviour, will or interest. . . . [Ascending] is premised on the assumption that State behaviour, will and interest are determining of the law.").

14. Kennedy, *supra* note 13, at 22 ("These hypothetical arguments reflect the relationship between hard and soft sources as well as their incompatibility and exclusivity. Although one cannot make both sets of arguments together, the proponent of a given norm must continually switch from one rhetoric to the other."); *cf.* Koskenniemi, *supra* note 2, at 164 (noting that law oscillates between inconsistent forms of arguments and that success lies only "in rhetoric").

15. Koskenniemi, *supra* note 2, at 67 ("Because it is based on contradictory premises [international law] remains both over- and underlegitimizing: it is overlegitimizing as it can be ultimately invoked to justify any behavior (apologism), it is underlegitimizing because incapable of providing a convincing argument on the legitimacy of any practices (utopianism).").

16. *Id.*; *see also* Kennedy, *supra* note 13, at 22 (explaining the inconsistent and competing axioms of international legal critics).

17. *See, e.g.*, Koskenniemi, *supra* note 2, at 164; Kennedy, *supra* note 3, at 487.

18. *See, e.g.*, Koskenniemi, *supra* note 2, at 269; *see also* Robert D. Sloane, *Human Rights for Hedgehogs?: Global Value Pluralism, International Law, and Some Reservations of the Fox*, 90

This good faith argument, the critics submit, imports political preferences by stealth.[19] Thus, international law, as understood by these critics, is just a convenient rhetoric that disguises and supposedly legitimizes international politics.[20] The growth of intersecting contemporary treaties confirms the purely political character of international law as each new treaty regime competes with—and reaches different results in similar disputes—from pre-existing treaty regimes.[21] This "political" character of treaty making is criticized particularly with regard to the growth of international investment treaties pursuant to which foreign investors can obtain money damages against host states for the regulatory impairment of their investments.[22] As critics of the international investment "regime" frequently point out, the investor-state regime is far more restrictive of state conduct than, for example, human rights, trade, or general international law rules of diplomatic protection.[23]

But the use of deconstructive practice by international legal theorists ultimately unravels their critique. Deconstructive practice is aimed at deductive philosophical theories arguing *a priori* from the nature of rationality to support their preference for a certain metaphysical or moral system.[24] International legal theorists relying upon deconstructive practice thus show that international law is not a deductive system working upon the basis of axiomatic first

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B.U. L. Rev. 975, 982 (2010) (noting the indeterminacy of good faith in the human rights context).

19. *See, e.g.*, Koskenniemi, *supra* note 2, at 269.

20. Koskenniemi, *supra* note 2, at 164; *see also* Kennedy, *supra* note 13, at 22 (noting that characterizations of rules as hard or soft are likewise subject to rhetorical manipulation); Martti Koskenniemi & Päivi Leino, *Fragmentation of International Law? Postmodern Anxieties*, 15 Leiden J. Int'l L. 553, 561–62 (2002) (Tribunals constituted under different treaty instruments are "engaged in a *hegemonic* struggle in which each hopes to have its special interests identified with the general interest.").

21. *See, e.g.*, Stephan, *supra* note 4, at 1611 ("The variety of these tribunals and a lack of hierarchy among them in turn allow the cherry-picking on which progressive development of legal doctrine depends.").

22. *See, e.g.*, M. Sornarajah, The International Law on Foreign Investment 229–30 (2010); William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Sphere: The Standard of Review in Investor-State Arbitrations*, 35 Yale J. Int'l L. 283 (2010).

23. *See, e.g.*, Burke-White & von Staden, *supra* note 22, at 285 ("[T]he strict standards of review . . . while perhaps appropriate in commercial arbitration . . . may be inappropriate with respect to many issues raised in modern investor-state arbitrations that are, at heart, public law questions."); Anthea Roberts, *Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System*, 107 Am. J. Int'l L. 45 (2013).

24. *See, e.g.*, Robin West, Narrative, Authority, and the Law 266–67 (1993) ("[The postmodern critique] has exploded the philosophical notion" relied upon by the deontological argument that law could be "deductively derived from a categorical moral truth or an abstract principle of justice" and the "rationalist faith" in teleological arguments about law relying upon an empirically grounded but universal human good.).

principles, for much the same reason that deconstructive practice has criticized such deductive systems in other areas.[25] This conclusion is intuitively plausible as international law develops incrementally without a central legislature, executive, or judiciary.[26]

Yet international legal theorists make a stronger claim: that international law is "singularly useless" as such and is nothing but a guise for international politics.[27] This stronger claim expresses precisely the kind of systemic preference deconstructive practice rejects as impossible: international *politics* is preferred to international *law*.[28] This preference permits the critics to state that international law is useless because it is subsumed by politics.[29] However, this move is not tenable pursuant to their chosen methodology.[30]

Although this Article ultimately refutes the critique, the critique does aid in illuminating a way to address the current identity crisis of international law.[31] It reveals that international law functions as an inductive system, rather than a deductive system, meaning any search for a deductively based identity is misplaced.[32] The inductive international legal system develops when international legal actors resolve specific problems by coordinating their approach

25. *See, e.g.*, Koskenniemi, *supra* note 2, at 66; Kennedy, *supra* note 13, at 22; *see also* Georg Schwarzenberger, The Inductive Approach to International Law (1965) (providing a primer on inductive approach to international law); *cf.* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 Harv. L. Rev. 1791, 1822–40 (2009) (reaching the same conclusion by way of a different route); Todd Weiler, *NAFTA Article 1105 and the Principles of International Economic Law*, 42 Colum. J. Transnat'l L. 35, 49–53 (2003) (outlining the inductive approach to international law).

26. *See, e.g.*, Jeremy Waldron, *Are Sovereigns Entitled to the Benefit of the International Rule of Law?*, 22 Eur. J. Int'l L. 315, 316 (2011) ("There is no world government, no large state-like entity lording it over all or almost all social, cultural, economic, and political activity in the world, in the way that national governments lord it over all or almost all such activity in particular countries.").

27. *See, e.g.*, Martti Koskenniemi, The Politics of International Law 65 (2011); Koskenniemi, *supra* note 2, at 67.

28. Koskenniemi, *supra* note 2, at 562–617; Koskenniemi, *supra* note 27, at 65, 133.

29. *See* sources cited *supra* note 25.

30. *See, e.g.*, Legrand, *supra* note 7, at 609 (2011) (deconstructive practice "eschew[s] the unduly crude binary distinction between law and non-law").

31. *See* Richard K. Sherwin, *Sublime Jurisprudence: On the Ethical Education of the Legal Imagination in Our Time*, 83 Chi.-Kent L. Rev. 1157 (2008) (outlining how a similar Cartesian struggle inspired Giambattista Vico's work).

32. *See, e.g.*, Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J.L. & Educ. 253, 255 (1967) (noting the dynamic character of world social processes).

with prior solutions to facially similar problems.[33] This inductive coordination therefore closely resembles another principally inductive legal system: the common law.[34]

The centerpiece of the inductive international legal process, as the critique ably established, is good faith.[35] As this Article will show, good faith functions not, as previously assumed, as a legal axiom with a single meaning.[36] Rather, it functions "comparatively"—it is a means to translate and coordinate the component parts of inductive rule establishment.[37] It explains how the various parts of international law rule establishment fit within a common discourse despite their substantive differences.[38] But it also remains a "principle" rather than a placeholder. It makes international law about the protection of difference, about respect for the otherness encountered in international, cross-cultural transactions.[39] In doing so, good faith overcomes the fulcrum deconstructive practice.[40] Rather than preferring an identity over what is different from it, good faith creates an identity out of difference itself.[41]

Part I of this Article outlines the radical critique of international law as useless and explains its theoretical underpinnings of decon-

33. *See, e.g.*, Richard B. Bilder, *The Office of the Legal Advisor: The State Department Lawyer and Foreign Affairs*, 56 AM. J. INT'L L. 633, 680 (1962) (discussing the common-law-inspired problem method used by U.S. state department attorneys).

34. *See id.*; *see also* Goldsmith & Levinson, *supra* note 25, at 1863 ("Our ambition has been to reconnect and reconceive international and [U.S.] constitutional law as common solutions to the same basic problem of legally constituting and constraining the state."). The U.S. constitutional law parallel is only of limited use given that international legal actors do not act *within* a constitutional system, subordinating them to a World State. *See* Waldron, *supra* note 26, at 317–20 (outlining the theoretical problem posed by the absence of a sovereign in international law). Instead, they act as equals and seek to enforce bilateral voluntary undertakings, assign right of ways or set borders, and impose liability for wrongful acts—all functions much more closely aligned with the common law of contracts, property, and torts.

35. *See* sources cited *supra* note 18.

36. *See* Gerald G. Fitzmaurice, *Some Problems Regarding the Formal Sources of International Law*, *in* SYMBOLAE VERZIJL 153, 164 (1958).

37. *See, e.g.*, Holning Lau, *The Language of Westernization in Legal Commentary*, 61 AM. J. COMP. L. 507, 523 (2013) ("[T]ropes such as 'legal translation' have gained popularity among comparative law scholars. The metaphor of translation conveys processes of adaptation, through which ideas are altered to fit local conditions.").

38. *See id.*

39. *See infra* Part IV.

40. *See, e.g.*, Pierre Legrand, *Paradoxically, Derrida: For a Comparative Legal Studies*, 27 CARDOZO L. REV. 631, 684 (2005) (According to deconstructive practice, the "identity of the text cannot lie in its univocity. What that text *is* requires its equivocality, demands that the differentiation of meanings be regarded as constituting an integral part of it, as *being* it.").

41. *Id.*

struction. Part II demonstrates that the critique defeats itself through use of its own deconstructive practice. Part III reconstructs international law on the basis of the valid insights of the critique. It outlines how good faith operates to translate and coordinate the component parts of inductive rule establishment of international law. Part IV addresses how good faith resolves the current identity crisis in international law by protecting the legitimate difference in interest, experience, and perspective of the subjects international law intends to govern. Part V concludes.

I. The Critical Challenge

The predominant critique of international law seeks to show that international law is not an independent means of justifying or criticizing international behavior from within the discipline of international law.[42] This point of view is significant because the most influential of the earlier critics of international law, H.L.A. Hart, sought to provide a "descriptive sociology" of law, thus taking an external point of view.[43] In other words, from an external perspective, international law did not behave like national law and therefore was not a true merited form of law. The new critique breaks with the classical approach of critiquing international law as ineffective by rejecting "sociolog[y] for international law."[44] Instead, the new critique has the far more ambitious goal of demonstrating that international law is fatally incoherent internally, irrespective of its external constraints and differences from more traditionally accepted forms of national law.

The predominant critique of international law looks to show that international law is built upon contradictory premises. Such a structure would show that international law is ultimately self-defeating.[45] The resolution of international legal disputes thus turns upon disguised political choice, given that the structure, as seen by the critics, is useless.[46]

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42. Koskenniemi, *supra* note 2, at 13 ("[T]his is also a 'pure law' approach in that it relies on the self-regulating nature of legal argument. Any study of separate social, historical or psychological 'factors' is excluded from it.").

43. *See, e.g.*, Frederick Schauer, *The Limited Domain of the Law*, 90 Va. L. Rev. 1909, 1910 (2004) (explaining Hart's project of "descriptive sociology" and the puzzlement it caused most legal theorists given Hart's analytical philosophical (rather than sociological) outlook).

44. Koskenniemi, *supra* note 2, at 13; *see also* Kennedy, *supra* note 6, at 407 n.23 (explaining the similarities between Kennedy's work and Koskenniemi's on point).

45. Koskenniemi, *supra* note 2, at 67.

46. *See, e.g.*, Ugo Mattei & Luigi Russi, *The Evil Technology Hypothesis: A Deep Ecological Reading of International Law*, 2012 Cardozo L. Rev. de novo 263, 277 (2012) (drawing

This Part explains the theoretical underpinnings of the technique of radical doubt applied by the currently predominant critique.[47] It demonstrates that the critique seizes centrally upon the open-endedness of good faith in international law.[48] It explains what the critique identifies as the structure or grammar of international law.[49] Finally, it shows that the critique is valid only with regard to its understanding of international law as a deductive practice, but not in its ultimate conclusion that international law is invalid.[50]

A. *The Critical Method: Derrida's Deconstruction*

Martti Koskenniemi is the leading international law critic writing from a philosophical perspective.[51] His critique of international law, like that of like-minded scholars, is indebted to Jacques Derrida's "deconstructive" practice.[52] This deconstructive practice seeks to "teas[e] out the hidden antinomies in our language and thought"[53] meaning that "a deconstructive reading can show how arguments offered to support a particular rule undermine themselves, and instead, support an opposite rule."[54]

The conceptual tools of deconstructive analysis are first to identify the "presence" that is privileged in any given theoretical framework.[55] In philosophical terms, the preference of a "presence" is to

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together Koskenniemi's critique and those of other critical writers to support the "non-neutrality of international law").

47. *Infra* Part I.A.

48. *Infra* Part I.B.

49. *Infra* Part I.C.

50. *Infra* Part I.D.

51. *See* Garcia, *supra* note 3, at 913 (noting Koskenniemi's "canonical" importance).

52. Koskenniemi, *supra* note 2, at 530–31 (explaining Derrida's influence); *see* Kennedy, *supra* note 6, at 481 (noting the influence of Jacques Derrida and Michel Foucault); Teubner, *supra* note 6, at 407 (noting his reliance upon Derrida); *see also* Derrida, Grammatology, *supra* note 8, at 24–25, 39 (introducing the concept of "deconstruction"); Derrida, L'Écriture, *supra* note 8, at 293 (distinguishing deconstruction from psychoanalysis); Joshua D. Wright & Douglas H. Ginsburg, *Behavioral Law and Economics: Its Origins, Fatal Flaws, and Implications for Liberty*, 106 Nw. U. L. Rev. 1033, 1082 (2012) (broader background of critical theory in law); David Kennedy, *A Rotation in Contemporary Legal Scholarship*, 12 German L.J. 338, 352 (2011) ("The parallel structure of CLS scholarship is expressed by its relationship to certain extralegal philosophic literatures. Let me take two European intellectual traditions which have been particularly influential in CLS work as examples: critical theory and structuralism.").

53. Balkin, *supra* note 9, at 744.

54. *Id.*; *cf.* Derrida, Grammatology, *supra* note 8, at 206 (noting that deconstructive practice reveals the hidden premises of classical ontology and epistemology).

55. *See* Balkin, *supra* note 9, at 746, 748; *see also* Derrida, Grammatology, *supra* note 8, at 23 (explicating the centrality of presence in Western philosophy); Derrida, L'Écriture, *supra* note 8, at 293 (noting the central importance of "presence" to deconstruction).

engage in an "ontology" or "ontological argument," referring to the study of, or argument about, what "is."[56] For instance, to say that the world can be broken into single elements (fire) or to contest that the world around the philosopher exists are ontological arguments.[57] Similarly, the argument that because all things are material, holes must either be material or not exist is ontological.[58]

Academic philosophy classifies ontological investigations as "metaphysical."[59] Central to Derrida's own work was the critique of ontology, the privileged presence of the spoken word, the "logos," over the written word in Western thought.[60] Derrida identified that the principal reason for the preference of the spoken word over written word is that speech is a more authentic expression of thought than writing. Writing, therefore, is a representation of speech.[61]

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56. *See Logic and Ontology*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/logic-ontology/ (last modified Aug. 30, 2011) ("[O]ntology is the study of what there is. . . . But ontology is usually also taken to encompass problems about the most general features and relations of the entities which do exist."). Constitutional law scholars frequently argue in openly "ontological" terms. *See, e.g.*, Mitchell N. Berman & Kevin Toh, *Pluralistic Nonoriginalism and the Combinability Problem*, 91 TEX. L. REV. 1739, 1769–72 (2013) (discussing the ontological dimension of the originalism-non-originalism debate); Khiara Bridges also states as follows:

> That this is Justice Powell's view of the ontology of race . . . and ethnicity . . . is affirmed by his decidedly nonoriginalist explanation of why strict scrutiny under the Equal Protection Clause is appropriate for all racial classifications and not solely those that burden the historically disadvantaged . . . .

Khiara M. Bridges, *The Dangerous Law of Biological Race*, 82 FORDHAM L. REV. 21, 55 (2013); Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389, 1456 (2013) ("Accepting this claim requires accepting at least some cognitivist premises about the basic ontology of emotion, but crucially it does not presuppose any indeterminacy in constitutional law."); *cf.* DERRIDA, GRAMMATOLOGY, *supra* note 8, at 35 (noting the crucial link between the deconstruction of logocentric linguistics and ontological argument).

57. *See, e.g.*, 2 THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA 803 (Christopher Berry Gray ed., 1999) ("Doubts about the reality of things in the universe are usually labeled 'ontological skepticism' . . . ."); *Heraclitus*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/heraclitus/ (last modified Mar. 29, 2011) ("The standard view of Heraclitus' ontology since Aristotle is that he is a material monist who holds that fire is the ultimate reality; all things are just manifestations of fire.").

58. *See* David Lewis & Stephanie Lewis, *Casati and Varzi on Holes*, *in* PAPERS IN METAPHYSICS AND EPISTEMOLOGY 183 (1999).

59. *Logic and Ontology*, *supra* note 56 ("These kinds of problems quickly turn into metaphysics more generally, which is the philosophical discipline that encompasses ontology as one of its parts."); *cf.* Berman & Toh, *supra* note 56, at 1769–72.

60. *See, e.g.*, DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 11 (explaining purpose of Grammatology to focus attention on logocentrism of writing); Balkin, *supra* note 9, at 755.

61. *See, e.g.*, DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 21–22 (noting the Aristotelian link of the voice to the soul); *id.* at 136–37 (explaining the structural importance of the voice to Western metaphysics); Balkin, *supra* note 9, at 756.

The next step is to demonstrate how the preference can be inversed by demonstrating that the "privileged presence" is logically dependent upon the concept it deems secondary.[62] Thus, speech itself is a representation of thought and as such suffers from precisely the same flaw as writing does.[63]

Next Derrida established a relationship of "différance," a deconstructive neologism.[64] Différance simultaneously indicates that (1) the terms of an oppositional hierarchy are differentiated from each other (which is what determines them); (2) each term in the hierarchy defers the other (in the sense of making the other term wait for the first term); and (3) each term in the hierarchy defers to the other (in the sense of being fundamentally dependent upon the other).[65] Derrida concluded that this relationship of différance leaves a "trace" in the antinomous pair of concepts in a relationship of "différance."[66]

The manner in which discourses are "laden with traces," its modality of différance, is important to such a practice of reading or deconstructing the discourse because it determines the means through which truth is created within that discourse. In other words, traces reveal the "blind spots" of the discourse and permit a fuller, recontextualized reconstruction of the discourse's meaning.[67] Viewing the discourse broadly, and recognizing both its inherent "blind spots" and the emplacement of its "traces," deconstructive practice submits that it is possible to see the discourse's entire "realm of imagination, fantasy, speculation" by appreciating its potentiality, or in deconstructive jargon, its "spectrality."[68] This potentiality is defined by the "fabric of traces" within the dis-

62. Balkin, *supra* note 9, at 747–48; *see* DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 31 (concept of "privileged presence"); DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 92 (explaining that language in its own right must be a writing for logocentric metaphysics to get off the ground).

63. *See* DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 31; *see also* Balkin, *supra* note 9, at 757 ("One can demonstrate that each identified characteristic of writing is true of speech as well; in other words, speech is a kind of 'writing' that suffers from the same inadequacies attributed to writing.").

64. DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 38, 92; Balkin, *supra* note 9, at 751.

65. Balkin, *supra* note 9, at 752.

66. DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 92; DERRIDA, L'ÉCRITURE, *supra* note 8, at 95–96; Balkin, *supra* note 9, at 752.

67. *See, e.g.*, Simon Critchley, *Derrida: The Reader*, 27 CARDOZO L. REV. 553, 555 (2005) (explaining the significance of blind spots for Derrida).

68. W.J.T. Mitchell, *Picturing Terror: Derrida's Autoimmunity*, 27 CARDOZO L. REV. 913, 913–14 (2005)

course.[69] Overall, this "fabric of traces," potentiality, or "spectrality" marks a discourse's incorporation of external discourses and its potential to grow and incorporate external sources in the future.[70]

Deconstructive practice ultimately submits that meaning is "constructed" or created by the participation of actors in a discourse.[71] As a matter of terminology, it is because meaning is "constructed" that it can be "deconstructed."[72] The constructed nature of discourse shows that there is no ultimate "objective meaning" or reality which could anchor it.[73] There is only more discourse within which meaning is embedded and through which meaning is created.[74]

To understand a discourse, one must look beyond the immediate propositions that statements made within that discourse seek to establish.[75] Derrida's critical insight was that no valid argument could ever be constructed if one understood "discourse" as a battle of propositional syllogisms.[76] Derrida argued that any existentially meaningful syllogistic argument would ultimately break down into either naked self-contradiction or, more likely, deductively impermissible non-monotonicity—in other words, it would justify a proposition by means of a proposition drawn from different,

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69. Arthur Austin, *A Primer on Deconstruction's "Rhapsody of Word-Plays"*, 71 N.C. L. Rev. 201, 220 (1992) ("As a text, it is 'no longer a finished corpus of writing, some content enclosed in a book or its margin, but a differential network, a fabric of traces referring endlessly to something other than itself, to other differential traces.'") (quoting Jacques Derrida, A Derrida Reader: Between the Blinds 257 (Peggy Kamuf ed., 1991)).

70. Legrand, *supra* note 7, at 609 ("In sum, spectrality marks 'the relation of the intimacy of the living present to its outside, the openness upon exteriority in general, upon the non-self.'").

71. *See, e.g.*, Derrida, Grammatologie, *supra* note 8, at 32 (explaining that "[f]or Nietzsche, reading, and thus writing, the text, are originary operations") (author's translation).

72. Elizabeth A. Pendo, *Disability, Doctors and Dollars: Distinguishing Three Faces of Reasonable Accommodation*, 35 U.C. Davis L. Rev. 1175, 1222–23 (2002) ("Much, but perhaps not all, of what can be socially constructed can be socially (and not just intellectually) deconstructed, given the means and the will.") (quoting Susan Wendell, The Rejected Body: Feminist Philosophical Reflections on Disability 45 (1996)).

73. Derrida, Grammatologie, *supra* note 8, at 227; *cf.* Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 Stan. L. Rev. 399, 430 (2001) ("Beginning in the 1970s, theorists such as Jacques Derrida began to argue against the existence of an intrinsic connection between language and the objective world, suggesting instead that language derived its meaning from social context and the internal relationship among words.").

74. Derrida, Grammatologie, *supra* note 8, at 227.

75. *Id.* at 25 (discussing the significance of historical "sediments" within a discourse).

76. *Id.* at 95 (submitting that the "trace is in effect the absolute origin of sense in general. This means, again, that there is no absolute origin of sense in general. The trace is the 'différance' that opens up appearance and meaning") (author's translation).

inconsistent premises.[77] Therefore, arguments are either "polytonic," engaging multiple differentiating discourses, or meaningless.[78] The point at which such polytonicity occurs reveals a "trace."[79]

The meaning of statements made within a discourse thus must be read precisely in light of their "polyvalence."[80] Statements within a discourse have several meanings.[81] These meanings exceed the statements' facial propositional content by tying the statements to their linguistic-historical context.[82] Deconstructive

77. *See infra* Part I.D for a discussion of monotonicity.

78. DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 128–30 (discussing the pluri-dimensionality of discourse).

79. *Id.* at 142 (noting the origin of the trace in non-monotonicity).

80. *Polyvalent*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/polyvalent (last visited Nov. 15, 2014) (defining polyvalent as "effective against, sensitive toward, or counteracting more than one toxin, microorganism, or antigen"). I use the term "polyvalence" as a complement of polytonicity. An argument is non-monotonic—or polytonic—if the sufficiency of a conclusion is strengthened or undermined by adding further propositions. *But see* Bruce Chapman, *Rational Choice and Categorical Reason*, 151 U. PA. L. REV. 1169, 1169 (2003). This is the case in inductive reasoning, but not in deductive reasoning. Polytonicity thus refers the quality of an argument. Polyvalence refers to the quality of a proposition within an argument. Not just does the implication of a conclusion from an argument change when adding or subtracting propositions, the propositions themselves interact with more than one discourse structure. In other words, polyvalence means that a proposition cannot be judged exclusively by reference to its denotation but must take account of its multiple connotations. *Cf.* Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 YALE STUD. WORLD PUB. ORD. 249, 250–51 (1980) ("In a heterogeneous community of varying levels of interaction, the authority signal may have to incorporate, either simultaneously or sequentially, many different authority systems.").

81. At the very least, they distinguish between connotations and denotations, sense and reference, intension and extension, all of which have a recognized place in legal discourse. *See, e.g.*, Lee J. Strange, *Originalism and the "Challenge of Change": Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927, 955 (2009) ("The distinction between sense and reference, and related philosophy of language concepts, helps originalism meet changing circumstances because the Constitution's sense can apply to referents not in existence when the Constitution was ratified."). The more interesting proposition is that propositions do not have a fixed meaning at all but are open-textured. This is the sense in which the term is used in this article. *Cf., e.g.*, 1 LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS 32 (G.E.M. Anscombe trans., 2d ed. 1967) (discussing the organizing concept of family resemblance).

82. DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 25. This recontextualization is a (more radical) cousin of Gadamerian hermeneutics. *See* DIALOGUE AND DECONSTRUCTION: THE GADAMER-DERRIDA ENCOUNTER 75–128 (Diane P. Michelfelder & Richard E. Palmer eds., 1989); Jacques Derrida, *Comme il avait raison! Mon Cicérone Hans-Georg Gadamer*, DERRIDA EN CASTELLANO (Mar. 23, 2002), http://www.jacquesderrida.com.ar/frances/gadamer.htm (noting that through the discussions between their respective students, "we have rather come closer to each other than further apart").

practice is a manner of reading and retracing an argument in light of its systemic and historical context.[83]

Koskenniemi deconstructs international law with remarkable fidelity to Derrida's critique of classical metaphysics.[84] Koskenniemi places the antinomy of concreteness and normativity at the heart of his investigation of international law.[85] This antinomy, Koskenniemi argues, reveals the internal inconsistency within international law.[86] This inconsistency thus proves the ultimate conclusion that "international law is singularly useless as a means for justifying or criticizing international behavior."[87] As discussed in Part II, Koskenniemi's deconstruction ultimately fails on its own premise because it is blind to Derrida's broader reconstruction of discourse by acknowledging its polyvalent spectrality—and thus its ability to create rather than merely reflect meaning.

B. *The Central Role of Good Faith Within the Critique*

The prevalent critique of international law consistently identifies good faith as the key common denominator of its larger deconstructivist task. This Section outlines its challenge to good faith in three key examples: (1) the definition of sovereignty,[88] (2) the interpretation of treaties,[89] and (3) the creation of international legal obligations by means of unilateral acts.[90] The problem identified in each of these areas can be reduced to a common theoretical denominator: good faith is the pivot of a deconstructive analysis of

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83. *See, e.g.*, Critchley, *supra* note 67, at 555, that states:

> [D]econstruction is . . . a reading that does two things. . . . This means reading the text in its original language, knowing the corpus of the author as a whole, and being acquainted with its original context and its dominant contexts of reception. . . . On the other hand . . . the text is levered open through the location of . . . 'blind spots' . . . .

84. Koskenniemi, *supra* note 2, at 530–31.

85. *See, e.g.*, *id.* at 164; Kennedy, *supra* note 13, at 22.; *see also* Robert Wai, *Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization*, 40 Colum. J. Transnat'l L. 209, 240–41 (2002) (discussion of Koskenniemi's dichotomy).

86. Koskenniemi, *supra* note 2, at 66 (discussing the necessary oscillation between apologism and utopianism); *see also* James Thuo Gathii, Book Review, 107 Am. J. Int'l L. 494, 498 (2013) (reviewing Sundhya Pahuja, Decolonising International Law: Development, Economic Growth and the Politics of Universality (2011)) ("[C]ritical approaches—including critical race theory as well as feminist and new approaches to international law— . . . have demonstrated the indeterminacy, identity politics, political and economic agendas, and structural biases of many rules of international law.").

87. Koskenniemi, *supra* note 2, at 67.

88. *Infra* Part I.B.1.

89. *Infra* Part I.B.2.

90. *Infra* Part I.B.3.

international law. Good faith is the concept that simultaneously permits international law courts and tribunals to resolve disputes and betrays the indeterminability of international law by defying legal definition.[91]

1. Good Faith and the Definition of Sovereignty

One of the most problematic and extensive problems for international law is to define "sovereignty."[92] Sovereignty defines the "sphere of liberty" of the state in international law.[93] This sphere of liberty can either be defined entirely by referencing to a legal order that is analytically prior to the state's factual power or by deriving the legal order from the genealogical primacy of power that shaped it.[94] Both positions are ultimately part of the modern liberal project because they "[b]oth project a normative model

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91. Compare Saul Litvinoff's discussion in *Good Faith* with Gerald G. Fitzmaurice's discussion in *Some Problems Regarding the Formal Sources of International Law.* The former states that"[G]ood faith . . . is the pivot around which revolves the possibility of reaching solutions fairer than the traditional ones in situations where, in spite of the prudence with which a party might have anticipated the contingencies that could occur in the course of performing a contract . . . ." Saul Litvinoff, *Good Faith*, 71 TUL. L. REV. 1645, 1662 (1997). The latter states the following:

> It is that the sources of international law cannot be stated, or cannot fully or certainly be stated, in terms of international law itself, and that there are and must be rules of law that have an inherent validity, in whose absence no system of law at all can exist or be originated. Such a rule, for instance, is *pacta sunt servanda.* This rule does not require to be accounted for in terms of any other rule.

Fitzmaurice, *supra* note 36, at 164.

92. *See, e.g.*, Helen Stacy, *Relational Sovereignty*, 55 STAN. L. REV. 2029, 2040–51 (2003) (explaining the structural strain on the definition of sovereignty and arguing for its redefinition in light of globalization); Louis Henkin, *Human Rights and State "Sovereignty"*, 25 GA. J. INT'L & COMP. L. 31 (1996) ("'[S]overeignty' has been transmuted into an axiom of the inter-state system, which has become a barrier to international governance, to the growth of international law, and to the realization of human values."); Hallie Ludsin, *Returning Sovereignty to the People*, 46 VAND. J. TRANSNAT'L L. 97 (2013) (arguing for a reconception of sovereignty according to classical interpretations of the concept as popular sovereignty); Frédéric G. Sourgens, *Positivism, Humanism, and Hegemony: Sovereignty and Security for Our Time*, 25 PENN ST. INT'L L. REV. 433, 437 (2006) (establishing "the respect of human dignity as the overriding source of sovereignty" by way of historical analysis).

93. KOSKENNIEMI, *supra* note 2, at 224; *cf.* Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUR. J. INT'L L. 885, 887 (2004) ("Under international law, sovereignty protects the state against foreign interference. . . . Under municipal law, sovereignty expresses the state's supreme power and therefore its supremacy over all other societal spheres.").

94. KOSKENNIEMI, *supra* note 2, at 226–27; *see* Ludsin, *supra* note 92 (recent discussion of theories premising sovereignty in legal command); Sourgens, *supra* note 92 (same); Stacy, *supra* note 92, at 2032–34 (recent discussion of Hobbesian theories premising sovereignty in state power).

about how relations between statehood and law should be understood without taking a stand on material justice."[95]

The classical formulation of sovereignty sought to marry both positions by positing "that State sovereignty is the starting-point of international law in the same way as individual liberty is the basis of the municipal legal order."[96] The Permanent Court of International Justice, in a case between France and Turkey concerning the exercise of jurisdiction by Turkey on the high seas over a French vessel named the S.S. Lotus, relied upon this assumption and declared that "State sovereignty must be presumed as extensive as possible."[97] As there were no rules prohibiting Turkey's exercise of jurisdiction, it was deemed permissible.[98]

The problem of applying the so-called *Lotus Principle* is that international law opposes competing claims to sovereignty by multiple states (for instance, the French right to exclusive jurisdiction over vessels flying its flag on the high seas and the Turkish right to try those docking in its territorial waters for the deaths of its own nationals).[99] Quoting Lord McNair, Koskenniemi thus refutes the

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95. KOSKENNIEMI, *supra* note 2, at 227. The link of both accounts of sovereignty to the liberal project is contestable. *See, e.g.*, Adeno Addis, *The Thin State in Thick Globalism: Sovereignty in the Information Age*, 37 VAND. J. TRANSNAT'L L. 1, 61–68 (2004) (linking liberal sovereignty to legitimacy premised upon "institutionally provided guarantees for the respect of human rights and for the provision of democratic governance" but noting the problematic anticommunitarian assumptions of liberal sovereignty).

96. KOSKENNIEMI, *supra* note 2, at 256.

97. *Id.* at 255; S.S. "Lotus" (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

98. S.S. "Lotus", 1927 P.C.I.J. at 32; *see* Anne Peters, *Does Kosovo Lie in the* Lotus-*Land of Freedom?*, 24 LEIDEN J. INT'L L. 95, 100–01 (2011) (recent discussion of the theoretical implications, and continued relevance, of the Lotus Principle).

99. *See* KOSKENNIEMI, *supra* note 2, at 267 (noting that the *Lotus Principle* thought through to its logical conclusion means that the procedural posture of a dispute determines its outcome because the burden of proving a customary rule would be on the claimant). The Restatement (Second) of Foreign Relations law provides the following discussion of the *Lotus* case:

> In the Case of the S.S. "Lotus," P.C.I.J., ser. A, No. 10 (1927), [1927–1928] Ann. Dig. 153 (No. 98), 22 Am. J. Int'l L. 8 (1928), the dispute between France and Turkey turned on whether Turkey had jurisdiction to prescribe a rule attaching criminal penalties to the conduct of a French merchant officer in a collision on the high seas. . . . France sought a declaration from the Court that Turkey had violated international law in prosecuting and convicting the French merchant marine officer on the basis of the Turkish criminal law in issue. The French officer had been arrested on Turkish territory and was properly within the physical power of the Turkish courts. Had this power been enough to establish jurisdiction, there would have been no need to argue and determine whether Turkey had jurisdiction to prescribe the criminal law that its courts applied to him. But the case was argued and decided on the proposition that unless Turkey had jurisdiction to prescribe the criminal law in issue, its enforcement of the law against a French national within its physical power violated international law.

RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW § 7, reporters' note (1965).

Lotus Principle as a viable conception of sovereignty as impermissibly one-sided because "it reduces the *reciprocal* benefit . . . due to the other Party, also a sovereign State, which seems to me to be absurd."[100] To respond to this one-sided conception of sovereignty, judicial practice developed a "constructivist approach" according to which a "State's rights and duties are not determined by abstract presumptions based on sovereignty but by 'balancing the equities.'"[101]

Problematically for the constructivist approach, there are multiple possible equitable solutions.[102] Therefore, the conception of equity according to which sovereignty is determined itself requires justification—a justification which Koskenniemi concludes cannot be forthcoming.[103] Koskenniemi notes that "[t]he same consequence follows from suggestions to delimit conflicting sovereignties by reference to a principle of good faith."[104] Good faith refers "to the subjective, mental states of the acting organs—in which case they cannot be normatively controlling because we cannot assume to know these states better than those organs themselves."[105] Alternatively, good faith refers "to a non-subjective theory of justice—a theory which conflicts with the principle of the subjectivity of value."[106] In either case, seeking to oppose a conception of good faith limitation of sovereignty to a state which refuses to accept it is "an attempt to impose others' political views on it."[107]

In other words, in the context of "sovereignty," good faith is the deconstructive "trace" of the oppositional mutual dependence of concreteness and normativity in international law.[108] Arguments

100. Koskenniemi, *supra* note 2, at 267 (quoting Baron Arnold Duncan McNair, The Law of Treaties 765 (1986)) (emphasis added).

101. Koskenniemi, *supra* note 2, at 267; *see also* Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16 Eur. J. Int'l L. 979, 995–97 (2005) (outlining a constructivist argument on how international criminal law would slowly displace sovereignty concerns).

102. Koskenniemi, *supra* note 2, at 268 (quoting Paul Reuter, *Quelques Réflexions Sur L'équité en Droit International*, 15 Rev. Belge Droit Int'l Pub. 165, 171 (1981) ("There are always multiple possible equities and each of them is supported by a different politico-philosophical conception.") (author's translation)).

103. Koskenniemi, *supra* note 2, at 268–69. This conception of constructivism may misunderstand the inductive element of constructivist rule establishment. Ronald Dworkin, *Hard Cases*, 88 Harv. L. Rev. 1055, 1063–65 (1975) (noting the process by which political values are internalized in legal discourse over time); *see also* Cryer, *supra* note 101, at 996–97 (applying this methodology to international criminal law).

104. Koskenniemi, *supra* note 2, at 269.

105. *Id.*

106. *Id.*

107. *Id.*

108. *See* discussion *supra* Part I.A.

premised upon concreteness (i.e., the subjective will of the state) invoke "good faith" to appeal to objective value; the state could not in good faith have intended this or that result (whether or not they actually did).[109] On the other hand, arguments premised upon normativity (i.e., the objective constraints upon the state) invoke "good faith" to derive state consent to the norm; the state hypothetically would in good faith have had to accept a rule had it known of the possibility of a future dispute.[110]

2. Good Faith in the Interpretation of Treaties

The prevalent critique of international law identifies the same problem for treaty interpretation.[111] It again presupposes a conflict between two opposing views, "consensualism" and "non-consensualism."[112] Consensualism is subjective: it supposes that "treaties bind because they express consent."[113] Non-consensualism is objective: it assumes that "they bind because considerations of teleology, utility, reciprocity, good faith or justice require this."[114]

The Vienna Convention on the Law of Treaties, a multilateral treaty codifying customary international law on the interpretation of treaties, does not resolve this conflict with its adoption of the apparent primacy of "ordinary meaning."[115] As explained by Kos-

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109. Koskenniemi, *supra* note 2, at 269.

110. *Id.*

111. *See, e.g.*, *id.* at 333–43; *see also* David Kennedy, *The Turn to Interpretation*, 58 S. Cal. L. Rev. 251 (1985) (arguing that liberal theories of interpretation do not overcome the indeterminacy laid bare by critical theory); Kennedy, *supra* note 13, at 21–24 (arguing that treaty interpretation is indeterminate); Ugo Mattei & Anna di Robilant, *The Art and Science of Critical Scholarship: Postmodernism and International Style in the Legal Architecture of Europe*, 75 Tul. L. Rev. 1053, 1073 (2001) (discussing postmodern critical legal studies in civil law interpretation).

112. Koskenniemi, *supra* note 2, at 333; Kennedy, *supra* note 13, at 20–24 (drawing a similar distinction by reference to "hard" and "soft" law).

113. Koskenniemi, *supra* note 2, at 333; Kennedy, *supra* note 13, at 21 (providing a similar definition for "hard" sources of international law); *see, e.g.*, Prosper Weil, *Towards Relative Normativity in International Law?*, 77 Am. J. Int'l L. 413, 433 (1983) (stating on the orthodox consensualist position: "Where conventional rules are concerned, the formality that presides over the conclusion of treaties and the principle of relative effect have enabled consensualism to be established without ambiguity or restriction: whether a state is committed by a treaty, and as from when, can be precisely ascertained").

114. Koskenniemi, *supra* note 2, at 333; Kennedy, *supra* note 13, at 21 (providing a similar definition for "soft" sources of international law); *see, e.g.*, Jordan Paust, *Terrorism's Proscription and Core Elements of an Objective Definition*, 8 Santa Clara J. Int'l L. 51, 57 (2010) (stating on the classic non-consensualist position: "An objective meaning is one that is generally shared in the international community").

115. Vienna Convention on the Law of Treaties art. 31(1), *concluded* May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] ("A treaty shall be interpreted in good faith

kenniemi, "what is 'normal' cannot be ascertained independently of taking a stand on whether the expression's normal sense is the sense it had for the parties or which is reasonable (in accordance with justice, good faith, etc.)";[116] in other words, "[n]ormal meaning has no independently normative character."[117]

Koskenniemi points out that a subjective theory for treaty interpretation is fraught with difficulty because "[i]f the problem is finding out what States had consented to, then we cannot argue from consent to support our interpretation."[118] Nor can we get behind mental reservations of the state against which we would seek to enforce the interpretation.[119] Therefore, "[a]ll we have are non-subjective points about text, subsequent conduct, teleology, good faith etc."[120] Or in terms of Derrida—"[i]l n'y a pas de hors-texte."[121]

The objective view fares no better. The treaty interpreter must justify "his view about what it is that the text" mandates.[122] As the interpreter does not look for intent, "he must refer to some non-subjective criterion."[123] But the "system simultaneously denies there to be such a thing as 'objective normality' or any other non-subjective criterion."[124] The placement of words in context thus faces Derrida's textuality problem from the other direction: just as there is no extra-textual vantage point from which to derive intent,

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in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."); *see, e.g.*, Myres McDougal, *The International Law Commission's Draft Articles upon Interpretation: Textuality* Redivivus, 61 AM. J. INT'L L. 992, 998 (1967) (warning that the Vienna Convention's rule of interpretation contemporary to its drafting is "so vague and imprecise and so impossible of effective application that a sophisticated decision-maker can easily escape [its] putative limits").

116. KOSKENNIEMI, *supra* note 2, at 335.

117. *Id.*; Kennedy, *supra* note 13, at 42–43. On a similar problem in the U.S. common law of contracts, see, for example, Lawrence M. Solan, *Contract as Agreement*, 83 NOTRE DAME L. REV. 353, 356–57 (2007) (arguing that the exception of the objective approach to contract has "little explanatory power" and in fact reflects "a preference for reliable evidence of actual subjective intent, and act[s] as a species of estoppel").

118. KOSKENNIEMI, *supra* note 2, at 336.

119. *Cf.* Wells v. Weston, 326 S.E.2d 672, 676 (Va. 1985) ("In evaluating a party's intent, however, we must examine his outward expression rather than his secret, unexpressed intention. . . . A meeting of the minds requires a *manifestation* of mutual assent, and a party's mental reservation does not impair the contract he purports to enter.").

120. KOSKENNIEMI, *supra* note 2, at 336.

121. DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 227 (emphasis omitted) ("there is nothing beyond the text") (author's translation); *see also* Arthur Austin, *Deconstructing Voice Scholarship*, 30 HOUS. L. REV. 1671, 1678–84 (1993) (explaining the context for Derrida's conclusion).

122. KOSKENNIEMI, *supra* note 2, at 336.

123. *Id.*

124. *Id.*

there is no such extra-textual vantage point from which to derive objective meaning.[125] Koskenniemi thus concludes on the basis of this internal inconsistency in interpretive approach that "the liberal system of treaty interpretation deconstructs itself."[126]

Again, it is good faith, which serves as the deconstructive "trace."[127] Good faith leads the consensualist to an objectification of interpretation.[128] It deprives the state to whom interpretation is opposed of the benefit of opaque "mental reservations."[129] But good faith leads the non-consensualist to a "subjectification" of interpretation in the sense of linking it to presupposed subjective intentions.[130] It deprives the state, to whom interpretation is opposed of the benefit of certain consequences that would flow from a literal application of the treaty text, to the problem at hand because these results counterfactually could not have been intended.[131]

Koskenniemi thus concludes that the "structure of treaty interpretation is governed by the *constant shift from a subjective into an objective position and vice-versa*."[132] This shift means that "[a]rgument either stops at a position where it will look apologist or utopian or continues interminably."[133] This result is obscured "by doctrine's use of *strategies of evasion*," (invocation of good faith) "which make it seem as if the subjective and objective were not conflicting and as if a resolution gave effect to what everybody had already consented to."[134]

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125. *See* Austin, *supra* note 121.

126. Koskenniemi, *supra* note 2, at 337.

127. *See* discussion *supra* Part I.A.

128. Koskenniemi, *supra* note 2, at 337.

129. *Id.* (noting that the majority decision in the *Case Concerning the Interpretation of the Algerian Declarations of 19 January 1981* held that "a 'clear formulation' of [Article II of the Claims Settlement Declaration] excluded Iranian claims from the Tribunal's jurisdiction" because "it was the clearest evidence of Party consent").

130. *Id.*

131. *Id.* (noting that the dissent in the *Case Concerning the Interpretation of the Algerian Declarations of 19 January 1981* objected that "reciprocity had been the very basis on which Iran had entered the agreement" and by "excluding reciprocity, the majority had violated Iranian consent and unjustifiably preferred the justice of literality to the justice of reciprocity").

132. *Id.* at 342.

133. *Id.*

134. *Id.*; see Hersch Lauterpacht, *Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties*, 26 Brit. Y.B. Int'l L. 48 (1949) (classical treatment of treaty construction by means of canons of construction as evasion).

3. Good Faith and Unilateral Acts

Having deconstructed consensual acts of states, this leaves the option of a radical reduction of international law into a web of unilateral acts, or instances of estoppel or acquiescence by states.[135] This means obligations arise because of their unilateral assumption by the state through action or inaction.[136] This reduces state obligation to a pure good faith standard because it explicates the binding nature of conventional, customary, and unilateral rules by reference to the good faith obligation of states to keep their word.[137]

The critical school also rejects reliance upon unilateral acts to explain international law because the "doctrine has been unable to provide a coherent explanation for why certain statements bind as unilateral assumptions of an obligation."[138] Again, there is an oscillation "between a subjective and an objective understanding of such statements neither of which seems capable of being consistently preferred."[139] Koskenniemi succinctly expresses the problem as follows:

> To preserve sovereign independence and equality effect must be given to the subjective understanding of the statement by the declaring State as well as by the States to whom the declaration was made. To solve differences of interpretation, appeal must be made to a non-subjective standard. The tension between sub-

135. *See, e.g.*, Hiram E. Chodosh, *Neither Treaty nor Custom: The Emergence of Declarative International Law*, 26 TEX. INT'L L.J. 87, 92 n.18, 122–24 (1991) (discussing states' consent and unilateral acts).

136. *See, e.g.*, W. Michael Reisman & Mahnoush Arsanjiani, *The Question of Unilateral Governmental Statements as Applicable Law in Investment Disputes*, *in* VÖLKERRECHT ALS WERTORDNUNG: FESTSCHRIFT FÜR [COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT] 409, 410–18, 420 (Pierre-Marie Dupuy et al. eds., 2006) (outlining International Court of Justice (ICJ) jurisprudence on unilateral acts and estoppel).

137. *Id.* at 420; *see also* Duncan B. Hollis & Joahua J. Newcomer, *"Political" Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 525 (2009) ("[P]rinciples of good faith and reliance implicate estoppel with respect to a state's unilateral declarations."); Brigitte Bollecker-Stern, *L'affaire des* Essais nucléaires français *devant la Cour internationale de justice*, 20 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 299, 330 (1974) (noting the good faith link between unilateral acts and estoppel).

138. KOSKENNIEMI, *supra* note 2, at 345; *see also* Kennedy, *supra* note 13, at 45–57 (noting that commentators find both the soft principle of good faith and the hard intent-based rule necessary for determining the binding nature of unilateral statements but view the two as incompatible).

139. KOSKENNIEMI, *supra* note 2, at 345–46; *see also* Kennedy, *supra* note 13, at 57 (stating that in choosing an objective approach over a subjective one, the court in the 1974 Nuclear Tests case "downplay[ed] the subjective nature of its initial intent based approach").

> jective interpretations and the non-subjective standard is wiped away by assuming that each renders the same result.[140]

The problem, for critical scholars, is epitomized by the *Nuclear Tests* case.[141] It assumed that "unilateral declarations bind insofar as they express subjective intent."[142] It was extremely unlikely that the declaration at issue in the case, a public statement by the president of France to desist from atmospheric nuclear tests in the South Pacific, was intended to indicate an assumption of an international legal obligation on the part of France—especially considering "[France] had itself in another connection denied that unilateral statements of this kind would be binding"[143] and "neither Australia nor New Zealand [the applicants in the *Nuclear Test* case] had relied on the statements."[144] This means "the standard must relate to some fully non-consent-related criteria of justice, or good faith, trust etc."[145] This, however, "contradicts the Court's original, subjective understanding of unilateral declarations."[146]

Further, the problem presented by unilateral acts is not overcome by relying upon the doctrines of estoppel or acquiescence. Estoppel and acquiescence use subjective reliance "in good faith" as the main marker of liability.[147] Both doctrines thus would reverse the result of the *Nuclear Test* case because Australia and New Zealand did not in fact rely upon the French statement of cessation of nuclear tests.[148] Even had Australia and New Zealand relied "in good faith," liability would be premised not upon the subjective intent of the sending state, but upon the reasonableness of the receiving state's conduct.[149] "Good faith" thus again

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140. Koskenniemi, *supra* note 2, at 346 (footnote omitted).

141. Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20); *see, e.g.*, Bollecker-Stern, *supra* note 137 (contemporary appraisal of the dispute).

142. Koskenniemi, *supra* note 2, at 350; Kennedy, *supra* note 13, at 57; *see also* Timothy P. Bulman, *A Dangerous Guessing Game Disguised as Enlightened Policy: United States Law of War Obligations During Military Obligations Other than War*, 159 Mil. L. Rev. 161 (1999) (noting the importance of subjective intent to the ICJ's reasoning in the *Nuclear Test* case).

143. Koskenniemi, *supra* note 2, at 351; Bollecker-Stern, *supra* note 137, at 330–31 (analyzing the communications before the court); *see also* Kennedy, *supra* note 13, at 53 (noting that a purely intent-based theory of unilateral acts would make them freely revocable).

144. Koskenniemi, *supra* note 2, at 354; Bollecker-Stern, *supra* note 137, at 331.

145. Koskenniemi, *supra* note 2, at 354.

146. *Id.*; *cf.* Kennedy, *supra* note 13, at 53–54 (outlining a similar critique of the judgment).

147. Ian Brownlie, Principles of Public International Law 643–44 (7th ed. 2008) (stating that estoppel in international law requires showing of "reliance in good faith").

148. Koskenniemi, *supra* note 2, at 354.

149. *Id.* at 355–60.

introduces a normative element, an objective test, to resolve the dispute.[150]

The deconstructive "trace" in each instance—unilateral act, acquiescence, estoppel—is again good faith. Like in the context of treaty interpretation, good faith objectifies intent.[151] To achieve an "objective" theory of intent, good faith is thus non-consensual.[152] But when an argument starts from a non-consensual premise, good faith re-contextualizes the objective standard in the subjective attitudes of the relevant international actors.[153] Therefore, to defend the non-consensual theory of assent, good faith again becomes consensual.[154] This oscillation between consensual and non-consensual premises thus hides from the view that it "was not possible to hold behaviour binding because it reflected intent" [155] because "this would have required knowing intent independently of the act."[156] But "it was impossible to hold the act binding due to its inner essence because we do not know which 'essences' are binding."[157] This reveals that good faith per "*the doctrine's own assumptions*" causes decisions that are "*simply subjective, arbitrary choice.*"[158]

C. *The Critique's "Grammar of International Law"*

The prevalent critique of international law concludes that the "subjective, arbitrary" nature of international legal decision making outlined in the previous Section is embedded within the deep structure, or "grammar,"[159] of international

150. *Id.*
151. *Id.* at 363.
152. *Id.* at 363–65
153. *Id.*
154. *Id.*
155. *Id.* at 364.
156. *Id.*
157. *Id.*
158. *Id.*
159. The critique uses "grammar" not in the linguistic but in the philosophical sense as denoting a deeply embedded structure within a specific practice. *See id.* at 304 (using "legal language-games" to explain the origins of his theory, a term typically associated exclusively with late Wittgenstein); *see* WITTGENSTEIN, *supra* note 81, at 5 ("language-games"); *see also* Anthony Carty, *Language Games of International Law: Koskenniemi as the Discipline's Wittgenstein*, 13 MELB. J. INT'L L. 859, 864–85 (2012) (reviewing MARTTI KOSKENNIEMI, THE POLITICS OF INTERNATIONAL LAW (2011)) (explaining the importance of language games in Koskenniemi's works on international law); Bruce A. Markell, *Bewitched by Language: Wittgenstein and the Practice of Law*, 32 PEPP. L. REV. 801, 809 (2005) ("Grammar in this sense in [sic] not a set of rules regarding verb declensions and conjugations. Rather, it is more like an accounting of acceptable and accepted uses of language. It governs the syntax of sense."); Jeremy Webber, *The Grammar of Customary Law*, 54 MCGILL L.J. 579, 618–20 (2009) (Wittgensteinian grammar denotes "the way in which a language's structure

law.[160] Such a structure delimits the permissible propositions and actions within a given practice.[161] It defines the manner in which the practice develops and grows, in the same way that language "develops" to incorporate new social realities.[162] A grammar in this sense is the deep set of rules according to which a given practice is constructed and continues to construct itself.[163]

The grammar of international law, according to its current critics, focuses upon the necessary oscillation between idealist, law-based arguments and realist, fact-based observations.[164] Thus, Koskenniemi proposes that the tension between fact and law within international legal discourse is "grammatical" rather than accidental because a "professionally competent argument is rooted in a *social concept of law*."[165] This social concept of law requires both that law "emerge[s] from the way international society is, and not from some wishful construction of it,"[166] and that "any such doctrine or position must also show that it is not just a reflection of power—that it does not only tell what States do or will but what

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and terms enable and constrain what a competent speaker can say intelligibly."); Shaunnagh Dorsett & Shaun McVeigh, *Conduct of Laws: Native Title, Responsibility, and Some Limits of Jurisdictional Thinking*, 36 Melb. U. L. Rev. 470, 490–91 (2012). In the context of structuralist and post-structuralist philosophy, it similarly denotes the deep structure of social construction. *See, e.g.*, Michael J. Kaufman, *The Value of Friendship in Law and Literature*, 60 Fordham L. Rev. 645, 701 (1992) ("Derrida thereby channels the anxiety of influence from the entire logocentric tradition of Western philosophy by demonstrating that his techne—the new science/art of grammatology—puts the lie to all prior scientific, artistic, political, philosophical, and legal claims to truth."); Balkin, *supra* note 9, at 758 ("Derrida's project, at least in its initial incarnation, was a call for a science of 'writing,' or a Grammatology, which would investigate and expose the hidden logocentric biases of Western thought.").

160. Koskenniemi, *supra* note 2, at 364 (emphasis omitted); *see also id.* at 568 (defining the term "grammar" of international law); *cf.* Mark Neocleous, *International Law as Primitive Accumulation; Or, the Secret of Systematic Colonization*, 23 Eur. J. Int'l L. 941, 942 (2012) ("The 'vocabulary of international law' is now accepted (again, at least among critical international lawyers) to be deeply connected to the 'grammar of colonization'."); Kennedy, *supra* note 6, at 407 (discussing the deep structure of international legal practice).

161. *See supra* Part I.B.

162. Wittgenstein, *supra* note 81, at 5.

163. *Cf.* Devon W. Carbado, *Yellow by Law*, 97 Calif. L. Rev. 633, 637–38 (2009) (discussing the various levels to which practices can be socially constructed).

164. *See, e.g.*, Koskenniemi, *supra* note 2, at 580 (outlining a hypothetical legal argument to illustrate the necessary oscillation of legal argument); Kennedy, *supra* note 13, at 95 (International law "is a discourse of evasion which constantly combines that which it cannot differentiate and emphasizes that which it can express only by hyperbolic exclusion.").

165. Koskenniemi, *supra* note 2, at 573; *see also* Kennedy, *supra* note 6, at 407 (discussing the deep structure of international legal practice).

166. Koskenniemi, *supra* note 2, at 573.

they *should* do or will."[167] This social concept brings about a "deformalization" of sovereignty doctrines in favor of a balancing test premised upon equities rather than "hard" legal rules.[168] This "[d]eformalization is a product of a legal grammar that insists that the law must reflect the society that it is expected to regulate while remaining autonomous from a society it is supposed to transform."[169]

The "deformalization" of law means that international law is structurally incapable of resolving any legal dispute.[170] The "moves" of counsel in international legal disputes "build up a defensible argument" but "they do not 'produce' the decision" because the "argumentative architecture" of international law "allows *any* decision, and thus also the critique of any decision without the question of the professional competence of the decision-maker ever arising."[171] Decisions "are matters of 'feel' and choice; they are the politics of international law," which, though predicable, operate outside of the law itself.[172] The critique can thus conclude that "international law is singularly useless as a means for justifying or criticizing international behaviour."[173]

D. *The Critique's Unstated Deductive Paradigm*

The problem the prevalent critique identifies fundamentally is one of logic: it sets up an inconsistency between the "internal," "ascending," "consensualist," and "external," "descending," "normative" first principles.[174] International lawyers, arbitrators, and

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167. *Compare id.* at 573–74, *with* Aldo Zammit Borda, *A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals*, 24 EUR. J. INT'L L. 649 (2013) (providing a contrary view of the deformalization of international law).

168. *Compare* KOSKENNIEMI, *supra* note 2, at 580–81, *with* Richard Collins, *International Institutions and the Politics of Constitutionalism*, *in* AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE 102ND ANNUAL MEETING 433, 433 (2008) ("Post-Cold War hopes for revitalized institutions protecting a liberal world order seem jaded by anxieties of systemic incoherence (fragmentation and deformalization) . . . .").

169. KOSKENNIEMI, *supra* note 2, at 583.

170. *Id.* at 67; *see also* Kennedy, *Modern War*, *supra* note at 3, at 473 ("[A]s law became an ever more important yardstick for legitimacy, legal categories became far too spongy to permit clear resolution of the most important questions . . . .").

171. KOSKENNIEMI, *supra* note 2, at 589.

172. *Id.*

173. *Id.* at 67.

174. *See id.* ("Because [international law] is based on contradictory premises it remains both over- and under-legitimizing: it is overlegitimizing as it can be ultimately invoked to justify any behavior (apologism), it is underlegitimizing because incapable of providing a convincing argument on the legitimacy of any practices (utopianism)."); *see also* Kennedy, *supra* note 13 (setting up a similar structure).

judges hide this inconsistency by invoking good faith.[175] Once good faith is unmasked as insufficient to bring international legal argument to a close, it becomes clear that international law ultimately must "*accept[ ] self-contradiction*" or alternatively take recourse to "*some form of moral objectivism which cannot be justified with the legal approach itself.*"[176] This leads to argument from "an ad hoc position" as in the following:

> [I]t works so as to produce the most varied kinds of arguments from precedents, treaty-texts, lawyers' writings, policies, functionalistic theories etc. Being inherently uncertain about what the law actually is (is it binding standards, is it effective standards?) he mixes elements borrowed from all possible styles of legal and quasi-legal argument: classical positivism, naturalism, sociology, fundamental rights theories etc.—degenerating sometimes into a sophisticated hotchpotch of learned citations and naïve historicism. Such scholarship survives only because it is *ad hoc*.[177]

Good faith, in other words, is a legal equivalent of the little Dutch boy sticking his finger in the hole in a dam.[178] It works as a temporary fix.[179] It cannot stand in for a permanent solution.[180] The temporary fix of good faith is a flight to simulacrum, not resolution of the aporia inherent in the structural assumptions of international law.[181]

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175. *See supra* Part I.A.

176. Koskenniemi, *supra* note 2, at 254; *see also id.* at 177 ("Neither an internal nor an external perspective seems to grasp the meaning of a conduct objectively.").

177. *Id.* at 188.

178. Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 Am. U. L. Rev. 1, 63 (1982) (New human rights "concepts can be the equivalent of the Dutch boy's finger that at the last minute plugged the hole in the dike. We are in a desperate situation; we need to be brave.").

179. Koskenniemi, *supra* note 2, at 188.

180. *Id.*

181. *Id.* at 66; *cf.* Koskenniemi, *supra* note 27, at 304 ("It also follows that different legal language-games do not possess greater or smaller distance to something that could be called an independent 'reality'. The methods create their own 'realities.' "). On the concept of simulacrum:

> The absorption of one pole into another, the short-circuiting between poles of every differential system of meaning, the erasure of distinct terms and oppositions, including that of the medium and of the real—thus the impossibility of any mediation, of any dialectical intervention between the two or from one to the other. Circularity of all media effects. Hence the impossibility of meaning in the literal sense of a unilateral vector that goes from one pole to another. One must envisage this critical but original situation at its very limit: it is the only one left us. It is useless to dream of revolution through content, useless to dream of a revelation through form, because the medium and the real are now in a single nebula whose truth is indecipherable.

Jean Baudrillard, Simulacra and Simulation 83 (Sheila Faria Glaser trans., Univ. of Mich. Press 1994) (1981). For a discussion of Baudrillard's simulacrum in an international

The critique's central, but unexpressed, assumption is that international law functions as a fully *deductive* normative system.[182] Deductive reasoning, consistent with formal logic, proceeds syllogistically. This means that it establishes whether an asserted conclusion follows necessarily from the prepositions upon which it is based.[183] If the premises of the syllogism contradict each other, the syllogism cannot be closed and the proposed conclusion cannot meaningfully be implied.[184] Further, logical syllogisms are "monotonic," meaning that an implication from a given set of premises is unaffected by the addition of a new premise.[185]

The prevalent critique of international law clearly identifies a failure of monotonicity in international legal discourse. The structure of legal argument outlined above "oscillates" between two different sets of first principles.[186] Each first principle makes a claim exhaustively to define permissible legal discourse.[187] Thus, a conclusion that is defensible in light of one such first principle should not *need* justification by reference to a competing first principle.[188]

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legal critique of neo-liberalism consistent with Koskenniemi, see James Der Derian, *A Virtual Theory of Global Politics, Mimetic War and the Spectral State*, *in* AMERICAN SOCIETY OF INTERNATIONAL LAW: PROCEEDINGS OF THE 93RD ANNUAL MEETING 163, 172 (1999) ("A neoliberal order that ultimately relies on the cyberdeterrence of an overwhelming U.S. superiority in military planning, logistics and information technology seems uncomfortably close to Baudrillard's simulacrum."). For a discussion of Baudrillard's simulacrum in general jurisprudence, see Sherwin, *supra* note 31, at 1170 (defining simulacrum as "what Baudrillard has described as 'substituting the signs of the real for the real'") (quoting BEAUDRILLARD, *supra*, at 2); John J. Chung, *Money as Simulacrum: The Legal Nature and Reality of Money*, 5 HASTINGS BUS. L.J. 109 (2009).

182. KOSKENNIEMI, *supra* note 2, at 60–67 (setting out the argument of "indeterminacy as contradiction").

183. *See, e.g.*, Berman & Toh, *supra* note 56, at 1774 n.95 (addressing a similar problem in constitutional adjudication and noting that "deductive logic (i.e., the syllogism) . . . endorse[s] a procedure in which a court first explicitly identifies the applicable abstract rule or principle for a class of situations and then determines whether a particular situation belongs to the class").

184. *See* Vern R. Walker, *Theories of Uncertainty: Explaining the Possible Sources of Error in Inferences*, 22 CARDOZO L. REV. 1523, 1535 (2001) ("An inference is deductively valid if simultaneously asserting the premises and denying the conclusion creates a contradiction" and implying that the contradiction between premises would lead to valid conclusions.); *see also* John Nolt et al., *A Logic for Statutory Law*, 35 JURIMETRICS J. 121, 151 (1995) ("Both classical and intuitionistic logic permit disjunctive syllogism and the inference from a contradiction to anything else.").

185. *See* Chapman, *supra* note 80, at 1180 n.30 ("[I]f some proposition p is sufficient to imply another proposition q, then the compound proposition p and r should also imply q; in other words, the sufficiency of p for q should not be undermined by adding r.").

186. *See, e.g.*, KOSKENNIEMI, *supra* note 2, at 225; Kennedy, *supra* note 13, at 95.

187. KOSKENNIEMI, *supra* note 2, at 59.

188. *Id.* at 354 ("[H]aving recourse to the three arguments [intent, reliance, and equity] is contradictory. Each of them makes the other two superfluous.").

Reference to competing first principles demonstrates that the argument suffers from impermissible logical inconsistency by violating the monotonicity of deductive syllogisms.[189]

This leaves the question whether the prevalent critique also shows that the premises upon which international legal argument is based are truly contradictory. Such a showing would be problematic not only for deductive reasoning but also for other forms of logical reasoning.[190] Facially, key representatives of the prevalent critique do make such claims.[191] They concede nevertheless that these inconsistent premises of consent-based reasoning and norm-based reasoning *could* support the same result—a state *could* consent to a materially just rule that is not in its immediate policy interest.[192] This possibility means that the premises are teleologically inconsistent but not in logical contradiction.[193]

This possibility is significant because it shows that the critique is troubling *only* in the context of a fully deductive normative system. The logical inconsistency the critique uncovered is limited to monotonicity, the need to argue from incongruous premises mutually to support a desired result.[194] This observation does not defeat an inductively organized system, however, which by definition is

189. Chapman, *supra* note 80, at 1180 n.30.

190. *See, e.g.*, *Inductive Logic*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/logic-inductive/ (last modified Oct. 29, 2012).

191. *See, e.g.*, KOSKENNIEMI, *supra* note 2, at 63 ("International legal discourse is incoherent as it incorporates *contradictory assumptions* about what it is to argue objectively about norms."); Kennedy, *supra* note 13, at 20 ("As I have defined them, hard and soft sources are mutually exclusive categories which together account for all possible sources that might be imagined.").

192. KOSKENNIEMI, *supra* note 2, at 408–09 ("But *making* this choice will render the resulting norm unacceptable because either utopian or apologist—*unless we assume that the world is in fact a heaven in which all important norms are backed by State practice and consent.*") (emphasis added). The same observation could also be made about Kennedy's distinction between "binding" and "authoritative" sources. It is not logically foreclosed that all authoritative norms are in fact consented to. *See* Kennedy, *supra* note 13, at 21. To make such an assumption is not as uncommon as Koskenniemi (and Kennedy) would make it appear. Thus, the leading U.S. political philosopher, John Rawls, relies precisely upon a reflective equilibrium between our moral intuitions and pure rationality as the basis of his theory of justice. JOHN RAWLS, A THEORY OF JUSTICE 20 (1971) ("It is an equilibrium because at last our principles and judgments coincide; and it is reflective since we know to what principles our judgments conform and the premises of their derivation.").

193. Walker, *supra* note 184, at 1535 (showing that a contradiction between premises logically exists only if both premises cannot simultaneously be true). They appear to be in contradiction because both rely upon cases of actual or hypothetical contradiction. *See* Kennedy, *supra* note 13, at 21. To place them in actual contradiction would require the absurd result that international legal actors could only consent to rules that are inherently unjust.

194. *See* Chapman, *supra* note 80, at 1180, n.30.

precisely non-monotonic.[195] Scientific, paradigm-based reasoning similarly argues simultaneously from observational data points and paradigmatic assertions in order to resolve scientific "puzzles"—instances in which scientific theory does not appear to fit current measurements of observable phenomena.[196] Finally, persuasive argument rejects monotonocity and instead relies, when possible, upon the overlap of multiple sources of validation for any given assertion.[197]

This limitation for Koskenniemi's project is fully consistent with Derrida's deconstructive practice. As discussed above, Derrida's aim was to critique ontological systems.[198] Such systems *conceive of themselves* as deductive.[199] The proof that no such a deductive system can maintain itself without self-contradiction suffices to the Derridean project; it demonstrates the absurdity of an absolute preference.[200]

As discussed in the next Part, this limitation is not consistent with the critique's larger claim that "international law is singularly useless as a means for justifying or criticizing international behavior."[201] Importantly, it has demonstrated that international law is not a deductive legal system.[202] Therefore, international law is not an analytical system of juridical science of the sort taught in the faculties of law of the European continent (and the United States) in the mid- to late nineteenth century.[203] But this difference does not mean that international law cannot be a synthetic, inductive norm generating system.

II. Deconstructing the Critique

The predominant critique of international law cannot demonstrate that international law is not an independent means of justify-

195. *See, e.g.*, Hawthorne, *supra* note 190, § 2.2.

196. Thomas S. Kuhn, The Structure of Scientific Revolutions 81, 96–105, 108 (4th ed. 2012).

197. *See, e.g.*, Anthony T. Kronman, *Rhetoric*, 67 U. Cin. L. Rev. 677, 707 (1999) (discussing the incongruous elements of persuasive speech).

198. *See supra* Part I.A.

199. *See, e.g.*, West, *supra* note 24, at 266–67.

200. *See* Derrida, Grammatologie, *supra* note 8, at 55 (explaining that the point of deconstruction is not to invert traditions but to reveal their blind spots).

201. Koskenniemi, *supra* note 2, at 67.

202. *See supra* Part I.B.

203. *See* Roscoe Pound, *Fifty Years of Jurisprudence*, 51 Harv. L. Rev. 444 (1938) (discussing law and jurisprudence).

ing or criticizing international behavior because the critique's own reasoning method undermines its conclusion.[204]

Its conclusion depends upon the premise that the structural indeterminacy in international law can be overcome only by politics.[205] This conclusion cannot be supported by the critique's own method.

What is the "political" into which international law dissolves?[206] It is not the "political" as the term is understood in foreign affairs, as in the following:

> Little seemed to be gained by thinking about international legal argument as being "in fact" about something other than law. Had I responded to my superiors at the Ministry when they wished to hear what the law was by telling them that this was a stupid question and instead given them my view of where Finnish interests lay, or what type of State behavior was desirable, they would have been both baffled and disappointed, and would certainly not have consulted me again.[207]

If the "political" does not refer to foreign affairs, what does it refer to? It refers initially to "the lack of coherence of legal argument"—the indeterminacy at the heart of the good faith standard.[208]

But the "political" does more than refer to an indeterminacy; it is the principle which predictably *resolves* this indeterminacy in legal practice.[209] The "political" thus answers the need for "demonstration of 'false contingency', [sic] the idea that because the argumentative structures are open, anything goes in fact."[210]

The "political" does so by "demonstrat[ing] the emergence and operation of structural bias" within specific adjudicative bodies.[211] These adjudicative bodies are created by a "politics of redefinition, that is to say, the strategic definition of a situation or problem by reference to a technical idiom so as to open the door for applying

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204. Koskenniemi, *supra* note 2, at 67.

205. *See, e.g.*, *id.* at 164; *cf.* Kennedy, *supra* note 13, at 22.

206. For a discussion of "politics" in Koskenniemi, see Koskenniemi, *supra* note 2, at 562–617; Koskenniemi, *supra* note 27, at 133.

207. Koskenniemi, *supra* note 2, at 564.

208. Koskenniemi, *supra* note 27, at 65; *see also id.* at 61 ("It is impossible to make substantive decisions within the law which would imply no political choice.").

209. *Id.* at 65 ("A demonstration of the lack of coherence ('politics') of legal argument is only a preface to the more important point that although all the official justifications of decision-making are such that they may support contrary positions or outcomes, in practice nothing is ever random.").

210. *Id.* (citing Susan Marks, *False Contingency*, 62 Current Legal Probs. 1, 1–22 (2009)).

211. Koskenniemi, *supra* note 27, at 65.

the expertise related to that idiom, together with the attendant structural bias."[212] This means that "in the end, legitimizing or criticizing state behaviour is not a matter of applying formally neutral rules but depends on what one regards as politically right, or just."[213]

The claim of "bias" spells problems for the definition of the political. By making a claim of bias, the critique submits that adjudication is not arbitrary but subject to ready prediction.[214] The claim that the political mode of decision making can readily be predicted to the point of revealing a bias means that there are *rules* upon which otherwise "political" decisions are made.[215]

Likewise, the rules upon which judicial bodies reach such "political" decisions are not themselves "political."[216] They do not use the language of foreign affairs or generally reflect diplomatic, economic, or belligerent pressures.[217] Rather, they are embedded in the *technical* idiom of lawyers.[218]

This type of predictability of political decision making entails that there must be a *law* to the "politics of international law."[219] The critique's claim of systemic technical bias implies that there is a manner of balancing the objective and subjective factors encompassed in the invocation of good faith that predictably brings about like results in like cases.[220] This statement thus relies upon a law—a predictable and consensually carried value system reflected in the

212. *Id.* at 67.

213. *Id.* at 61.

214. *Id.* at 65; *see also* KOSKENNIEMI, *supra* note 2, at 589 ("[Politics] does not mean that decisions would be random or difficult to predict.").

215. KOSKENNIEMI, *supra* note 27, at 66 ("This is how novel preferences usually are consolidated. The argument is that owing to 'recent developments' in the technical, economic, political, or whatever field (typically linked with some sociological language about 'globalization'), new needs or interests have emerged that require a new treatment.").

216. *Id.*

217. KOSKENNIEMI, *supra* note 2, at 564.

218. KOSKENNIEMI, *supra* note 27, at 67 ("Political intervention is today often a politics of redefinition, that is to say, the strategic definition of a situation or a problem by reference to a technical idiom so as to open the door for applying the expertise related to that idiom, together with the attendant structural bias.").

219. On the link between predictability of decision and law, see, for example, Caleb E. Mason, *An Aesthetic Defense of the Nonprecedential Opinion: The Easy Cases Debate in the Wake of the 2007 Amendments to the Federal Rules of Appellate Procedure*, 55 UCLA L. REV. 643, 679 (2008) (discussing the analogy drawn between "the famously inchoate but incredibly accurate ability of professional chicksexers to look at anatomically identical newborn chicks and separate the males from the females" and the practice of law); *see also* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 597–99 (1987) (discussing the link between predictability and common law rules of precedent).

220. *See* KOSKENNIEMI, *supra* note 27, at 67.

constitution of an international adjudicative body—in its refutation of law.[221]

This mode of argument thus does to the critique what the critique did to international law at large.[222] It seizes upon a stated preference of one value system (politics) over another (law).[223] It then deconstructs the argument supporting this preference for the political over the legal.[224] It shows that the political cannot consistently be preferred over law.[225] In other words, there remains a legal substratum, even after international legal discourse is subjected to the most radical form of internal critique in the arsenal of contemporary philosophical inquiry.[226]

The remaining substratum is no accident.[227] Deconstructive practice posits that there is no external point of reference, which could serve to unhinge and materially correct any discourse.[228] "*Il n'y a pas de hors-texte*"—there is nothing outside of the discourse.[229] One could reason with Derrida as follows: "*il n'y a pas d'hors droit*"—there is nothing outside of the law.[230] One leading scholar on deconstruction noted the following:

> [Deconstructive practice] eschew[s] the unduly crude binary distinction between law and non-law (the kind of dualism which Derrida, throughout his decades of writing, consistently derided as "metaphysical"). [It] reveal[s] that law does not exist in isolation from other discourses but is affected by them as regards to its very constitution: it is constructed, made, fabricated, assembled, actively constituted of them.[231]

The "political" thus is absorbed within law and functions through legal discourse and not instead of it.[232] In fact:

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221. Koskenniemi, *supra* note 2, at 18–20 (arguing against the tenability of "law as both "an artificial creation, based on the concrete behavior, will and interest of States" and normative "in the sense of being capable of impartial ascertainment and application").

222. *See id.* at 63 ("International legal discourse is incoherent as it incorporates *contradictory assumptions* about what it is to argue objectively about norms.").

223. Koskenniemi, *supra* note 27, at 61, 65; Balkin, *supra* note 9, at 752 (discussing deconstructive practice).

224. *See supra* Part I.A.

225. *See supra* Part I.A.

226. On the concept of substratum (or under-layer) of pluridimensional discourse under linear inquiry, see Derrida, Grammatologie, *supra* note 8, at 128–30.

227. Christopher Johnson, System and Writing in the Philosophy of Jacques Derrida 6 (1993) (noting the centrality of the cultural substratum to Derrida's thought).

228. *See, e.g.*, Balkin, *supra* note 9, at 747–58.

229. Derrida, Grammatologie, *supra* note 8, at 227.

230. *See id.*

231. Legrand, *supra* note 7, at 609 (emphasis omitted).

232. Koskenniemi, *supra* note 27, at 67.

> To be clear, it is not the point to reject these notions: they are necessary, and, at least today, nothing is conceivable without them. The point principally is to put into evidence the systemic and historical solidarity of concepts and movements of thought that one often believes oneself capable innocently to separate.[233]

Law is certainly not value neutral.[234] Rather, it is marked by the heterogeneous values of all of the participants in legal discourse.[235]

What sets law apart from other discourses is the *manner* in which it takes account of value.[236] The critique provides the material to answer this question.[237] Most of its analytical framework correctly describes the international legal process.[238] Both the material and the analytical framework simply must be employed toward an alternative ultimate conclusion from the one advocated by the critique.

III. Inverting the Critique

The predominant critique of international law provides the foundation upon which one may reconstitute international law. The deconstructive practice the critique employs focuses upon the deep structure of a discourse.[239] It shows how discourses achieve cloture only through latent borrowing from rival discourses; as termed in deconstruction, a discourse operates through "traces" of its rival discourses.[240] The systemic recurrence of the same concept to create systemic cloture is of unique significance to deconstructive practice.[241] This systemic recurrence reveals a deep structure, which is simultaneously open-ended, accepting of premises from rival discourses and self-contained.[242] This deep structure, or

233. Derrida, Grammatologie, *supra* note 8, at 25 (author's translation).

234. Legrand, *supra* note 7, at 609; *cf.* Derrida, Grammatologie, *supra* note 8, at 55.

235. It is in this sense non-monotonic. *See supra* Part I.D.

236. *See, e.g.*, Robert Alexy, *The Construction of Constitutional Rights*, 4 Law & Ethics Hum. Rts. 20, 28–30 (2010); Frederick Schauer, *Balancing, Subsumption, and the Constraining Role of Legal Text*, 4 Law & Ethics Hum. Rts. 34, 45 (2010) (discussing the manner in which competing values are taken into account in a balancing test).

237. *See supra* Part I.B.

238. *See supra* Part I.B–D.

239. *See supra* Part I.A.

240. Derrida, Grammatologie, *supra* note 8, at 69.

241. *Id.* at 92.

242. *See, e.g.*, Legrand, *supra* note 7, at 624–25. It takes the text beyond stasis, that is, beyond the analytical limits reductively allowed by the hard copy, thereby recasting the text as a hypertext whose constitution is shown to be the product of an intricate, decentered, structure interactive, and interconnected discourses linked through multiple pathways in an open-ended textuality where the interpreter, as he pursues this or that string of references, as he elects his reading route, becomes, in significant ways, the inventor of meaning.

"grammar," makes visible the stress field within which international law develops.[243]

As the critique has demonstrated, the central structural element within the "grammar" of international law is good faith.[244] Good faith is the key trace through which international law appropriates and applies value.[245] This conclusion confirms the centrality of good faith to international law already inherent in traditionally doctrinal international law scholarship.[246]

Though foreign in its terminology, this structural question is already inherent to common law scholarship.[247] It, too, is concerned with how to define an independent legal discourse that remains permeable to social needs and moral imperatives.[248] How law continuously absorbs these outside influences without losing its own identity is a core question of U.S. jurisprudence.[249] Common law scholarship thus is uniquely instructive in translating the

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243. HERAKLIT, FRAGMENTE ¶ B8 (Bruno Snell ed., 1995); *cf.* Louis E. Wolcher, *The Paradox of Remedies: The Case of International Human Rights Law*, 38 COLUM. J. TRANSNAT'L L. 515, 536 (2000) ("'What opposes unites,' said Heraclitus in one of his most famous fragments. What *opposes* within the category of law are paired concepts . . . . What *unites* these opposing sub-concepts is precisely their claim to the status of being what we call 'law.'"). The author reads Heraclitus not as setting up a dialectic in the Hegelian sense, which would permit an ultimate resolution of tension, but in a Nietzschean way, which would maintain the tension unresolved. *Cf.* MIHAILO DJURIÆ, NIETZSCHE UND DIE METAPHYSIK 154–62 (1985) (discussing Nietzsche's reception of Heraclitus conception of the creative tension in the concept of play and its relation to the eternal repetition of the same); *see also* Sean Gaston, *Writing and World*, *in* READING DERRIDA'S *Of Grammatology* 68, 69 (Sean Gaston & Ian Maclachlan eds., 2011) (discussing the importance of this concept to Derrida's deconstruction).

244. *See supra* Part I.B.

245. *See supra* Part I.B.

246. *See, e.g.*, Robert P. Barnidge, *The International Law of Negotiation as a Means of Dispute Settlement*, 36 FORDHAM INT'L L.J. 545, 557 (2013) ("[Good faith] is, as the ICJ has noted, '[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source' . . . .") (alteration in original) (quoting Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (Dec. 20)). Also:

> The principles commonly cited in this sense are all basic legal doctrines fundamental to all national legal systems, principles without which it would be difficult to conceive of international law as a legal system, principles such as *pacta sunt servanda* (the obligation to abide by one's commitments), res judicata, good faith, and responsibility for the consequences of one's acts.

Steven J. Burton, *Freedom of the Seas: International Law Applicable to Deep Seabed Mining Claims*, 29 STAN. L. REV. 1135, 1163 (1977); *see also* Bernardo M. Cremades, *Good Faith in International Arbitration*, 27 AM. U. INT'L L. REV. 761, 780 (2012) ("Basic texts have helped solidify the general principle of good faith in international law.").

247. *See, e.g.*, Schauer, *supra* note 43, at 1955–56 (2004) (To understand the distinctiveness of legal practice "is to try to understand . . . the practice (in the Wittgensteinian sense) of law as we know it and the institutions of the law as we know them.") (footnote omitted).

248. *See id.*; *see also* MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 66–68 (1988).

249. *See supra* Part I.A.

deconstructive observations concerning the influence of conflicting discourses and influences into jurisprudential conclusions.

This Part explains the theoretical importance of the recurrence of a core "trace" to create systemic cloture.[250] It notes the similarities of this theoretical treatment of traces in deconstructive practice to common law scholarship's necessary flexibility in taking outside influences into account.[251] This Part will then apply this theoretical common law framework to the critique of international law.[252] This Part finally concludes that per the insights of the critique, good faith is the central ingredient that permits international law to synthesize rules by translating and coordinating the component parts of international law through inductive rule establishment, similar to the common law method.[253]

A. *The Structural Significance of "Traces"*

Deconstructive practice, upon which the predominant critique relies, submits that meaning is "constructed";[254] there is no ultimately "objective meaning" or reality to anchor it.[255] Instead, there is only more discourse within which meaning is embedded and through which meaning is created.[256] Overall, the key to understanding discourse is that arguments are "polytonic" as revealed by the "spectrality" within the discourse.[257]

Understanding discourses as "constructed" and polytonic implies that discourses operate inductively.[258] As shown, they are non-monotonic and, as such, do not operate deductively.[259] Rather

250. *Infra* Part III.A.

251. *Infra* Part III.B.

252. *Infra* Part III.C.

253. *Infra* Part III.C.

254. *See, e.g.*, DERRIDA, GRAMMATOLOGY, *supra* note 8, at 32 (explaining that "[f]or Nietzsche, reading, and thus writing, the text, are originary operations") (author's translation).

255. *Id.* at 227; *cf.* Scott L. Cummings, *Community Economic Development as Progressive Politics: Toward a Grassroots Movement for Economic Justice*, 54 STAN. L. REV. 399, 430 (2001) ("Beginning in the 1970s, theorists such as Jacques Derrida began to argue against the existence of an intrinsic connection between language and the objective world, suggesting instead that language derived its meaning from social context and the internal relationship among words.").

256. DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 227.

257. *Id.* at 142 (noting the origin of the trace in non-monotonicity).

258. *See, e.g.*, Daniel Hays Lowenstein, *"Too Much Puff": Persuasion, Paternalism, and Commercial Speech*, 56 U. CIN. L. REV. 1205, 1205 (1988) ("Our knowledge of the empirical world in which we live is constructed by inductive reasoning from particular instances.").

259. *See supra* Part I.D.

than discovering absolute truth through philosophical reason, truth values are created.[260]

Deconstructive practice offers an explanation for how a discourse can engage and incorporate multiple inconsistent premises without losing its own discursive identity.[261] At its most mundane, it explains how inductive, creative, or persuasive discourses operate despite their lack of a deductive first principle or axiom from which all other propositions within that discourse would have to be derived.[262]

Less mundanely, deconstructive practice shows how arguments communicating through multiple layers become polytonic because their propositions communicate in multiple discourses at once; they are polyvalent.[263] Deconstruction demonstrates that discourses manage to contain both polytonic arguments and polyvalent propositions without need for a "common denominator" according to which to balance the relative weight of each component part.[264] Balance is a synthetic function of the fabric of traces within the discourse and not an analytic function to be superimposed upon the discourse by its participants.[265]

Irrespective of Derrida's broader philosophical claims, these conclusions are significant for legal scholars because all but the most ardent legal scholars agree that law is "constructed."[266] This is most clearly the case in the context of parliamentary legislation, in which law is most visibly constructed through majoritarian com-

260. *See, e.g.*, Dennis M. Patterson, *Good Faith, Lender Liability, and Discretionary Acceleration: Of Llewellyn, Wittgenstein, and the Uniform Commercial Code*, 68 Tex. L. Rev. 169, 197 n.176 (1989) ("[T]he 'rule' by which he 'justifies' his decision is the result of his own creative reasoning process, an inductive not a deductive process.").

261. *Id.*; *see also* Derrida, Grammatologie, *supra* note 8, at 25 (explaining the form and function of polytonic and polyvalent discourse in argument).

262. Legrand, *supra* note 7, at 615 n.43 (noting the creating element of understanding in Derrida and Gadamer).

263. Derrida, Grammatologie, *supra* note 8, at 128–30.

264. On the traditional assumption that balancing is not possible without such a criterion, see Alexy, *supra* note 236, at 28; *see also infra* Part III.B (noting that criterion is often required for a balancing test).

265. *See, e.g.*, Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 755 n.53 (1993) (outlining the distinction between analytic and synthetic reasoning for purposes of U.S. legal scholarship); *cf.* Giovanni pico della Mirandola, Oration on the Dignity of Man 28–29 (A. Robert Caponigri trans., 2012) (providing the classic humanist definition of synthetic argument).

266. *See, e.g.*, José E. Alvarez, *Are Corporations "Subjects" of International Law?*, 9 Santa Clara J. Int'l L. 1, 9 (2011) ("[I]n our progressive era . . . scholars acknowledge that all legal concepts are constructed and can be deconstructed to suit distinct normative agendas . . . .").

promise.[267] But the same is true for international law, which operates outside of the context of so-called "orderly" legislation and nevertheless remains constructed.[268] The principles of deconstructive practice could therefore provide precisely the kind of normative cohesiveness for international law, inverting the critiques that rely upon deconstruction to gut international law's significance.[269]

B. *The Relevance of the Common Law Experience*

Derrida's interest in critiquing claims to "authoritative" interpretation within a discourse overlaps some of the critiques of the manner in which common law judges adjudicate claims.[270] Most visibly, in the context of U.S. constitutional law, U.S. Supreme Court justices seek to establish a regime of interpretive preference and, on the face of decisions, argue for a result on the basis of a methodological paradigm.[271] Thus, some submit that "the discoverable public meaning of the Constitution at the time of its initial adoption should be regarded as authoritative for purposes of later constitutional interpretation."[272] Others submit to the belief that this is the result required by the U.S. constitutional tradition as it is "adapted flexibly to contemporary circumstances."[273] Unsurprisingly, U.S. legal scholars have applied deconstructive techniques to show that any broad paradigmatic preference in the final analysis borrows from the arsenal of its antagonist: originalists argue that from today's point of view, their interpretive position must be adopted to protect deeply held, contemporary, moral, and legal

267. *See, e.g.*, JÜRGEN HABERMAS, THEORIE DES KOMMUNIKATIVEN HANDELNS 232–33 (1999).

268. *See, e.g.*, Waldron, *supra* note 26, at 315–16 (discussing the applicability of the rule of law ideal at the international level); Jeremy Waldron, *Response: The Perils of Exaggeration*, 22 EUR. J. INT'L L. 389, 399 (2011) ("[T]he main source of anything like legislation in the international arena remains multilateral conventions," which are not plenary.).

269. *See, e.g.*, KOSKENNIEMI, *supra* note 2, at 67.

270. *See, e.g.*, Michel Rosenfeld, *Derrida's Ethical Turn and America: Looking Back from the Crossroads of Global Terrorism and the Enlightenment*, 27 CARDOZO L. REV. 815, 820 (2005) (noting the deep affinities between Derrida and "American approaches to law and justice"); *see also* John T. Valauri, *As Time Goes by: Hermeneutics and Originalism*, 10 NEV. L.J. 719, 728 (2010) (comparing hermeneutics and originalism to the common law).

271. *See, e.g.*, Alexander Tsesis, *Footholds of Constitutional Interpretation*, 91 TEX. L. REV. 1593, 1596 (2013) ("The critique of any accepted method of interpretation is itself a meta-analysis of existing norms and hierarchies, which might take the form of extralegal arguments—be they philosophical, sociological, or political.").

272. *See* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 377 (2013).

273. *See* Dawn Johnsen, *Justice Brennan: Legacy of a Champion*, 111 MICH. L. REV. 1151, 1172 (2013).

values.[274] Similarly, living constitutionalists submit that their position is justified by the intent of the framers to draft a "living" document in the first place.[275] Similar methodological problems famously plagued the common law of contracts, torts, and beyond.[276]

Given that Derrida's philosophical interest touches upon a live problem in common law adjudication, it is not surprising that common law scholarship deals with much of the same problem: what makes "law" a separate discourse from arbitrary imposition of political will?[277] Is there even such a thing as a legal discourse given that the common law cannot maintain a substantive coherence without running into precisely the kind of self-contradiction Derrida unmasked?

1. Common Law Through a Deductive Lens

One theoretical approach espoused by common law academics is to reject that law operates deductively, at all.[278] A deductive system could be closed as a matter of pure legal inquiry.[279] Such legal

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274. *See, e.g.*, Andrei Marmor, *Meaning and Belief in Constitutional Interpretation*, 82 Fordham L. Rev. 577, 577 (2013) (arguing that originalism and leaving constitutionalism are "inconclusive" because "the way concepts are used in a given contexts depends on various pragmatic determinants, and those, in turn, depend on the nature of the conversation in question"). Furthermore Erwin Chemerinski states as follows:

> What disturbs me about Justice Scalia's jurisprudence is that by denying that it is making value choices, it pretends that its decisions are a result of a neutral judicial methodology . . . . [V]alue choices are not defended, but rather hidden behind a claim that the results have been discovered not chosen.

Erwin Chemerinski, *The Jurisprudence of Justice Scalia: A Critical Appraisal*, 22 U. Haw. L. Rev. 385, 385 (2000). *But see* Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation*, 103 Nw. U. L. Rev. 857, 864 (2009) (arguing for originalism from a purely internal perspective and admitting that the constitution historically understood "furnish[es] decent, or at least colorable, arguments against agreeing to exercise government authority pursuant to such a constitution, or even against agreeing to be bound by it as a citizen").

275. *See, e.g.*, Johnsen, *supra* note 273, at 1178–81.

276. *See* Frederic G. Sourgens, Reason and Reasonableness in the Common Law (Oct. 2, 2013) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2335167 (addressing the concept of reasonableness in the common law and constitutional jurisprudence).

277. *See* Schauer, *supra* note 43, at 1955–56.

278. Arguably even the nineteenth century U.S. formalism did not consider the common law a fully deductive legal system. *See, e.g.*, Bruce A. Kimball, *Langdell on Contracts and Legal Reasoning: Correcting the Holmesian Caricature*, 25 Law & Hist. Rev. 345, 375 (2007) ("A narrower understanding of the formalism charge is that Langdell viewed law not as a geometrical pyramid, but as a purely deductive system, in which logical consistency is the sole criterion of validity. . . . But Langdell was not exclusively deductive, as Holmes knew well.").

279. Joan Tronto, *Law and Modernity: The Significance of Weber's* Sociology of Law, Book Review, 63 Tex. L. Rev. 565, 575 (1984) ("In the *Sociology of Law*, Weber stressed the need

inquiry would analogize between legal rules by means of mediation between a set of axiomatic first principles.[280] While there might remain some indeterminacy in such a legal space because multiple solutions are similarly valid approaches to a problem, this indeterminacy should, in theory, be overcome by further rule refinement in other areas of law.[281] A deductive legal system would posit that law is both substantively and formally closed, meaning that in principle any legal rule could be implied out of the substance of the legal first principle and the formal structure that tethers legal rules together.[282]

Much of U.S. common law scholarship emphatically rejected this approach from the late nineteenth century onwards,[283] largely because of the belief that legal norms cannot be established in the abstract.[284] Instead, a legal rule can only be constructed through factual analysis.[285] The comparison of factual scenarios to each other permits one to divine broadly consistent legal rules inductively.[286] This inductive process uses existing legal principles as a guiding normative paradigm but establishes rules principally casuistically, by determining the salient facts in other cases, which most

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for a 'gapless,' highly deductive legal system [which] . . . . would account for all circumstances and subsume all legal problems under explicit legal categories.").

280. *See, e.g.*, John Henry Merryman, *The Italian Style III: Interpretation*, 18 STAN. L. REV. 583, 594–95 (1966) (classical view of lacuna in civil law).

281. J. Michael Veron, *In Search of Precedent in the Oil Patch: Louisiana's Market Value Cases*, 44 LA. L. REV. 949, 950 (1984) (In civil law, "[a] group of judges' decisions applying statutes by analogy to disputes for which no statute specifically provides an answer may be regarded as an editorial 'gloss' (called *jurisprudence constante*) covering a lacuna in the statutory law, but no single decision is considered authoritative.") (footnote omitted).

282. Arguably, this is an idealized picture of even the classic civilian conception of the complete law. *See* Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 10 (1994) ("The classic civilian conception of equity sees the judge as a legislator of last resort who fills lacunas of the Code when positive law is silent.").

283. *See, e.g.*, BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921) ("The common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively. Its method is inductive, and it draws its generalizations from particulars."); OLIVER WENDELL HOLMES, JR., THE COMMON LAW 36 (1881) ("[The common law] is forever adopting new principles from life . . . and it always retains old ones from history . . . .").

284. CARDOZO, *supra* note 283, at 13; HOLMES, *supra* note 283, at 36.

285. CARDOZO, *supra* note 283, at 13; HOLMES, *supra* note 283, at 36.

286. *See, e.g.*, Stephen R. Perry, *Judicial Obligation, Precedent and the Common Law*, 7 OXFORD J. LEGAL STUD. 215 (1987) ("'[T]he common law' is best regarded as the institutionalized process of adjudication itself, rather than as the body of relatively stable (but nonetheless constantly changing) dispute-settling standards which emerge from that process."); *cf.* EISENBERG, *supra* note 248, at 66–68 (1988) (adopting a similar position in the context of finding morally necessary exceptions to announced and otherwise coherent precedent).

closely resemble current dispute, and then adopting the rule from the most closely analogous case to the dispute at bar.[287]

2. Common Law Through an Inductive Lens

This inductive approach to common law instead adopts a balancing test that looks to both the formal legal rules announced in case law and pragmatic exigencies.[288] Balancing tests are polytonic because they rely upon multiple, facially inconsistent, if not mutually contradictory, principles.[289] The choice of which principles are included within the balancing test is principally historical and thus, as a matter of legal form, links the current dispute to the resolution of similar past disputes.[290] The components of any legal balancing test therefore appear to "unpack" the spectrality of Derridean analysis.[291] They rely upon multiple socially relevant value attachments within a given discourse to have a difficult dispute make legal sense—appropriating it to the legal domain.[292]

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287. *See, e.g.*, Michael S. Moore, *Precedent, Induction, and Ethical Generalization*, *in* PRECEDENT IN LAW 183, 183–216 (1988) ("[C]ommon law reasoning, like that in science and ethics, is non-hermeneutic in nature . . . .").

288. S.L. Hurley, *Coherence, Hypothetical Cases, and Precedent*, 10 OXFORD J. LEGAL STUD. 221, 223–24 (1990) (At the "heart of the deliberative process . . . [is] all-out theorizing, looking for hypotheses which account for the resolutions of issues we found in stage three [gathering settled cases that have proposed apparently conflicting solutions to relevant legal problems].").

289. *See, e.g.*, Alexy, *supra* note 236, at 28 (proposing a three staged law of balancing: "[t]he first stage is a matter of establishing the degree of non-satisfaction of, or detriment to, the first principle"; the second stage establishes "the importance of satisfying the competing principle"; the third stage "answers the question of whether or not the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first principle"); *see also* Schauer, supra note 236, at 34 (discussing Alexy's law of balancing). Alexy attempts to create a weight formula that can be deductively established within a discourse. Alexy, *supra* note 236, at 29. Alexy assumes that this deductive weight formula will ultimate reflect the "empirical assumptions concerning what the measure in question means in the concrete case for the non-realization of the one principle and the realization of the other principle." *Id.* at 30.

290. *See* Schauer, *supra* note 236, at 45 ("[A]rguing persuasively for the rationality of non-formal legal and judicial decision-making, Alexy has served a valuable purpose in showing that the non-formal side of law is not the irrational side of law."); *see also* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1063–64 (1975) ("Political rights are creatures of both history and morality: what an individual is entitled to have, in civil society, depends upon both the practice and the justice of its political institutions.").

291. Schauer alludes to the "written-ness" of law as constraining its balancing function. *See* Schauer, *supra* note 236, at 45. Treating law as "written" rather than "spoken," grammatological rather than logocentric, is a key point of overlap between common law balancing analysis and deconstruction and permits a meaningful translation of principles between both practices. *Cf.* Rosenfeld, *supra* note 270, at 820 (noting the affinities between Derrida and U.S. common law analysis).

292. The ultimate balancing test within the common law is not the straightforward balance of multiple factors but the balance of the balance of these factors. This balance is

3. Common Law Through a Deconstructive Lens

Other scholarship, such as that by Frederick Schauer, seeks to provide a metatheory of this inductive approach.[293] Schauer approaches the common law problem from the same linguistic vantage point as deconstructive practice.[294] He looks for the manner in which the discourse is constructed rather than analyzing the facial content of a legal proposition.[295] Schauer finds significance in the presence within common law of a similar problem-resolution strategy when strict rule-based reasoning runs out.[296] However, he ultimately rejects the idea that because legal rules cannot resolve all actual disputes, there is no such thing as "law" or that "law" is useless as a means for justifying or criticizing behavior.[297]

Like Derrida, Schauer's ultimate analysis heads toward charting a "grammar" of the common law.[298] This grammar seeks to reveal

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a synthetic part of the common law process of decision making. *See* Sourgens, *supra* note 276, at 9.

293. *See* Schauer, *supra* note 43, at 1910.

294. Schauer also describes that:

> [N]either those controversies nor the tools of analytic jurisprudence alone can settle the issue, but they illuminate the important connection among the various perspectives seeking to challenge or to endorse a limited domain understanding of law. . . . [This] helps so much in understanding the phenomenon of law and the character of legal reasoning.

Id.

295. *Id.* at 1932 ("Thus, we might imagine a system characterized by *procedural* differentiation, in which law is differentiated from other decisionmaking venues not by the sources it uses but by how it uses them."). Although Schauer insists in the article that he seeks a formal justification for law, rather than a procedural one, his argument ultimately turns on the manner in which courts and lawyers use policy arguments even when unconstrained by legal limitation. This suggests that what he has in mind is that what makes law legal is a manner of argument, the how of pedigreeing of rules, not the rule itself. *Id.* at 1940 ("In numerous areas of law, therefore, it turns out that courts themselves see law as a limited domain, even to the extent of creating such a domain when they are plainly authorized to operate in a far broader fashion."). Moreover:

> Policy and principle appear before us when the law runs out, and also when the results the law generates even when it has not run out seem extremely, and not just somewhat, unwise as a matter of policy or extremely, and not just a little bit, unjust as a matter of morality.

Id. at 1942.

296. *Id.*

297. *Id.* at 1933–42.

298. *Id.* at 1955–56 (explaining his goal as understanding "the practice (in the Wittgensteinian sense) of law as we know it and the institutions of the law as we know them"). Practice in the Wittgensteinian sense *is* grammar. Dennis M. Patterson, *Wittgenstein and the Code: A Theory of Good Faith Performance and Enforcement Under Article Nine*, 137 U. PA. L. REV. 335, 363–66 (1988) ("[T]o understand the grammar of a concept one needs to investigate the point(s) the concept serves in social practices (the activities into which it is woven), which practices must themselves be the focus of attention in any investigation of meaning.").

the deep structure within the common law.[299] This structure illuminates the tension between the various components of the most basic balancing test—the reasonable person standard—and predicates how the common law can cognize and resolve problems as legal disputes.[300]

4. Overall Interaction Between Common Law and Deconstruction

There is, of course, no perfect overlap between deconstructive practice and common law jurisprudence. Common law jurisprudence, to the extent it has taken the linguistic turn, appears largely indebted to analytical philosophy, which is suspicious of, if not hostile toward, the "continental post-modern" theories of Derrida, Deleuze, Guatari, Baudrillard, etc.[301] But appearances deceive; both U.S. common law jurisprudence and deconstructive practice share the hugely significant influence of Charles Sanders Peirce.[302] Peirce's theory of constructed meaning plays a significant role for deconstructive practice[303] and Peirce is a founding member of the most important U.S. theory of jurisprudence: pragmatic instrumen-

299. It is perhaps not surprising that Derrida's "Grammatology" has a key analytical tool in common with Wittgenstein's Philosophical Investigations: the language game. *See* DERRIDA, GRAMMATOLOGY, *supra* note 8, at 16; WITTGENSTEIN, *supra* note 81, at 225, 241. For a recent discussion on the importance of Wittgensteinian language games in common law jurisprudence, see Nicola Lacey, *The Path Not Taken: H. L. A. Hart's Harvard Essay on Discretion*, 127 HARV. L. REV. 636 (2013).

300. *See, e.g.*, Sourgens, *supra* note 276, at 874–75 (discussing the concept of reasonableness in the common law from such a grammatical perspective).

301. *See, e.g.*, Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 52 (2013) (noting H.L.A. Hart's relation to the "linguistic turn" and British analytical philosophy). Analytic philosophy currently refers to post-Wittgensteinian English-speaking academic philosophy and is typically distinguished from Continental Philosophy (referring to continental European systems of thought). Keith S. Donnellan, *Analytic Philosophy*, ENCYCLOPEDIA BRITANNICA, http://www.britannica.com/EBchecked/topic/22568/analytic-philosophy (last updated Mar. 15, 2013).

302. For an introduction to Charles Sanders Peirce, see *Charles Sanders Peirce*, STAN. ENCYCLOPEDIA PHIL., http://plato.stanford.edu/entries/peirce/ (last modified Nov. 12, 2014).

303. *See* Peter C. Schanck, *Understanding Postmodern Thought and Its Implications for Statutory Interpretation*, 65 S. CAL. L. REV. 2505, 2539 (1992) ("Peirce's semiotics may have actually had a greater impact on Derrida's thought than on the postmodern Americans."); David E. Pettigrew, *Peirce and Derrida: From Sign to Sign*, *in* PEIRCE'S DOCTRINE OF SIGNS: THEORY, APPLICATIONS, AND CONNECTIONS 365, 368 (Vincent M. Colapietro & Thomas M. Olshewsky eds., 1995) ("Common to Derrida and Peirce then . . . is the notion that fundamental to the relation of signs, and the operation of signs as such, is a notion of difference . . . ."); *see also* DERRIDA, GRAMMATOLOGIE, *supra* note 8, at 70–72 (discussing Peirce's influence on deconstruction).

talism.[304] Deconstruction thus is "marked" by a significant common law influence.

These points of contact between common law jurisprudence and deconstructive practice suggest that deconstructive practice is not an exclusively critical tool. It can, in fact, help reconstruct the discourse of international law as a common law. To do so, it is first necessary to understand the "grammatical" place of good faith within international legal discourse. Having done so, it is possible to define both function and substance of good faith within international legal discourse.

C. *The Grammatical Place of Good Faith in International Law*

The chief achievement of the prevalent critique of international law is its resolution of one of the most enduring conundrums of international law: what is "good faith?"[305] Classically, Sir Gerald Fitzmaurice noted just prior to his election to the International Court of Justice that good faith "cannot be stated, or cannot fully or certainly be stated, in terms of international law itself"[306] because "[it] does not require to be accounted for in terms of any other rule."[307] He concluded with near religious reverence that while indefinable, "[i]t could neither not be, nor be other than what it is"—an axiomatic principle of international law.[308]

The prevalent critique of international law agrees with Fitzmaurice that good faith cannot "be accounted for in terms of any other rule" of international law.[309] But the critique provides a superior explanation for the apparent impossibility to define good faith:[310] good faith does not in fact have single definition.[311] Therefore,

304. James R. Hackney, Jr., *The Intellectual Origins of American Strict Products Liability: A Case Study in American Pragmatic Instrumentalism*, 39 AM. J. LEGAL HIST. 443, 449 (1995) (noting that Peirce's work would be "central to pragmatic instrumentalism"); *see also* Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981) (providing the classic study of pragmatic instrumentalism for the common law).

305. *See, e.g.*, Andrew D. Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELB. J. INT'L L. 339, 344 (2006) ("Unfortunately, of all the principles of international law, the principle of good faith is perhaps the hardest to define.").

306. Fitzmaurice, *supra* note 36, at 164.

307. *Id.*

308. *Id.*

309. *Id.*

310. *Cf.* BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 105 (2006) (noting that good faith cannot be defined).

311. *See, e.g.*, KOSKENNIEMI, *supra* note 2, at 342 (noting the use of good faith as a strategy of evasion).

good faith is not axiomatic in the sense intended by Fitzmaurice.[312] This axiomatic status for good faith is foreclosed by the non-monotonic nature of legal argument.[313]

1. The Translative Function of Good Faith

The critique treats international law not as a deductive but as a linguistic system.[314] As discussed above, this linguistic system inductively constructs meaning for and within international law.[315] It does not deprive international law of meaning as the critique had originally argued.[316]

A deconstructive approach instead reveals the methodological task that good faith must meet: it must address the problem that international law is an inductive norm-creating process that is superimposed over pre-existing norm-creating processes.[317] Law is not constructed out of thin air; it relies upon other discourses.[318] To synthesize these competing discourses, international law must adopt a perspective that internally accounts for the social practices to which it relates, while also projecting rules that are intended to govern these social practices.[319]

In this way, good faith parallels a problem identified in areas such as comparative law and social sciences that study far away cultures in that these disciplines must deeply immerse themselves

312. Fitzmaurice, *supra* note 36, at 164.

313. *See supra* Part I.D.

314. *See, e.g.*, Koskenniemi, *supra* note 2, at 562; *cf.* Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law I,* 39 Am. J. Comp. L. 1, 5 (1991) (explaining that because comparative law is concerned with the differences between a plurality of legal rules and institutions, "comparative law is like comparative linguistics [because] . . . comparative methods have proven to be the best means available for highlighting structural regularities that would otherwise pass unobserved").

315. *See supra* Part III.A.

316. *See supra* Part II.

317. *See, e.g.*, W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society,* 108 Yale L.J. 935, 938 (1999) (explaining that the hallmark of the New Haven School of International Law is its insistence on a "systematic way of gathering and organizing information about the comprehensive social process and, even more important, on the clearest design of the lenses through which the jurist looked—lenses that could distinguish between perspectives and operations, authority and control, constitutive and public order decisions, and so on").

318. Legrand, *supra* note 7, at 609. The same observation has been made by U.S. scholars closely associated with pragmatic instrumentalism. *See, e.g.*, Myres S. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 1 Am. J. Comp. L. 24, 37 (1952) ("Institutions are the patterns of practices, the myths and techniques, the doctrines and procedures, by which such distributions [of values within society] are effected and may of course, vary in infinite detail from community to community.").

319. Legrand, *supra* note 7, at 609; *cf.* McDougal et al., *supra* note 32, at 255.

within these cultures to make statements about them.[320] This produces a paradox because they must straddle an internal point of view of a participant in the social discourse and an external point of view of an observer of that discourse.[321] Good faith, like com-

320. *See, e.g.*, Scharlette Holdman & Christopher Seeds, *Cultural Competency in Capital Mitigation*, 36 HOFSTRA L. REV. 883, 884 (2008) ("[Anthropology] calls for cultural self-awareness, knowledge of and immersion in the relevant culture, and non-judgmental receptivity to new information."); Cris Shore & Richard A. Wilson, *Introduction—Anthropology's Interdisciplinary Connections*, *in* THE SAGE HANDBOOK OF SOCIAL ANTHROPOLOGY 7, 7–10 (Richard Fardon et al. eds., 2012) (discussing the different methodological approaches to immersion in culture used in contemporary anthropological fieldwork); Vernon Valentine Palmer, *From Lerotholi to Lando: Some Examples of Comparative Law Methodology*, 53 AM. J. COMP. L. 261, 269 (2005) ("[E]thnocentrism is 'the most pervasive problem in anthropology.' . . . [T]he researcher uses his or her own bias while problematizing, concluding, reasoning, or systematizing the study of another culture.") (footnote omitted). For the centrality of immersion in culture for comparative law, see, for example, Palmer, *supra*, at 266 ("[Comparative law] *always* requires total immersion and deep preparation in specific foreign languages and cultures before being attempted; the foreign system should always be seen from the inside and in socio-cultural context . . . ."); *see also* Hiram E. Chodosh, *Comparing Comparisons: In Search of Methodology*, 84 IOWA L. REV. 1025, 1067 (1999) ("Insufficient consideration of the complex interaction of [purpose, content, and mode of differentiation] is likely to render poor results."); Vivian Grosswald Curran, *Cultural Immersion, Difference and Categories in U.S. Comparative Law*, 46 AM. J. COMP. L. 43, 51–52 (1998) (comparing cultural immersion to Hans-Georg Gadamer's "pre-understanding"); Nora V. Demleitner, *Combating Legal Ethnocentrism: Comparative Law Sets Boundaries*, 31 ARIZ. ST. L.J. 737, 760 (1999) (explaining how cultural conceptions of space influence the law governing treatment of prisoners); McDougal, *supra* note 318, at 29 ("The 'law' that is being studied is still too often regarded as a body of doctrine or rules, divorced from power and social processes."); Sacco, *supra* note 314, at 25 ("The comparative method examines the way in which, in various legal systems, jurists work with specific rules and general categories."). This problem is not exclusively only of comparative law. H.L.A. Hart noted that the key to understanding law was the taking of an internal point of view. *See* H.L.A. HART, THE CONCEPT OF LAW 80–88 (spec. ed. 1994); *see also* Dennis Patterson, *Explicating the Internal Point of View*, 52 SMU L. REV. 67, 69–74 (discussing the internal point of view in Hart's analytic jurisprudence); Frederick Schauer, *The Jurisprudence of Custom*, 48 TEX. INT'L L.J. 523, 527–28 (2013) (addressing how the internal point of view can be used to explicate the normativity of customary international law).

321. PIERPAOLO DONATI, RELATIONAL SOCIOLOGY: A NEW PARADIGM FOR THE SOCIAL SCIENCES 41 (2011). This perspective suggests a relational reading of society that does not divorce the *internal* point of view of the actors (the subjective view point) from the *external* point of view of their orientations (the systemic or functionalist viewpoint) but maintains the intrinsically collective referents of both. From here, the relational theory of society—always recognized as being real—can proceed to differentiate between different forms of society. It does so on the basis of the type of relations that subjects realize between their "internal" points of view and requirements that are "external" to them. *See also* Adeno Addis, *Cultural Integrity and Political Unity: The Politics of Language in Multilingual States*, 33 ARIZ. ST. L.J. 719, 784 (2001) (In multicultural and multilingual societies, "[t]he act of critically engaging the 'Other' is simultaneously a process of self-reflection and self-discovery.").

parative law and anthropology, must *translate* and *coordinate* these pre-existing norm-creating processes into international law.[322]

This translative, coordinating function means that good faith both must defer to these social practices and subsequently differentiate international legal rules from them.[323] These practices are not "data points" such as those used in a chemical experiment.[324] The cultural practices instead are themselves the result of a culture's synthetic process of appropriating its own world and therefore only make sense through that lens.[325] Good faith thus must defer to these anterior synthetic processes to conclude its own synthesis; it must then translate this synthesis into its own process of decision making.[326] In this sense, good faith can be viewed as marked by traces from the social world and vice versa.[327]

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322. Sacco, *supra* note 314, at 12 (noting the translative dimension of comparative law).

323. For instance, note Máximo Langer's statement as follows:

> [T]he translation metaphor distinguishes the source . . . legal system—where the legal idea . . . comes from—from the target one—into which the legal idea . . . is translated. The translation metaphor also allows a distinction to be made between the original "text"—the legal idea . . . as developed in the source legal system—and the translated text.

Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 33 (2004). William Michael Treanor, on the other hand, states:

> Even in construing the Fourteenth Amendment, a translator should therefore look to the earlier time period to discover original intent because the principle underlying the translation model is that the judiciary should defer to considered majoritarian decisionmaking embodied in constitutional law and the earlier period is the only one in which such decisionmaking occurred.

William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 861 (1995) (footnote omitted).

324. Even "data points" in chemical experiments are "constructed" to a point due to the paradigmatic nature of scientific discovery. KUHN, *supra* note 196, at 81, 96–105, 108 (discussing paradigm development in the scientific context).

325. To explain the communicative problem of the social sciences, see HABERMAS, *supra* note 267, at 163 ("The scientist cannot 'use' the language he has 'found' in the object of his study. He cannot 'enter' the language without referencing the pre-theorized knowledge of the participants in this *Lebenswelt*; knowledge which these participants master as scientific laymen and introduce unanalyzed into each communicative process.") (author's translation); *see also* Curran, *supra* note 320, at 53 (discussing the risk of erroneous conclusions due to a lack of cultural immersion); Sacco, *supra* note 314, at 12 ("Not only can two codes in different countries use the same words with different meanings, but two codes in the same country may give different meanings to the same words . . . .").

326. Sacco, *supra* note 314, at 12 (noting the translative problem of comparative law).

327. Paul Hockings, *Conclusion: Enthographic Filming and Anthropological Theory*, *in* PRINCIPLES OF VISUAL ANTHROPOLOGY 507, 517 (Paul Hockings ed., 1995) (noting the frequency with which the Heisenberg principle is discussed in anthropological circles).

Such translation from the practice of international society into international legal rules operates by factual analogy.[328] It requires an appreciation and coordination of the original problem to be addressed by the various discourses that international law itself synthesizes.[329] By relating the problems encountered within the various discourses to each other, this pragmatic outlook pierces beneath the synthetic reconstitution in the relevant discourses.[330] It can then compare, contrast, and incorporate the discourses' problem-solutions to allow for a translation of these discourses into international law.

But good faith also must *differentiate* international law from unadulterated policy science.[331] As noted above, international law does not dissolve completely into politics.[332] Good faith permits international law to be maintained as an independent and "legal" discourse.[333] As illustrated, good faith provides cloture to the oscillation of international legal arguments, and, unlike originally argued by its critics, this cloture permits international law to construct meaningful responses to legal problems.[334]

The manner in which good faith provides this cloture, as the critique had argued, is not contained within the express rules or styles of argument of international law.[335] The application of international law thus follows what Rodolfo Sacco refers to as a "cryptotype," or "implicit rule," which keys the "non-verbalized

328. Sacco, *supra* note 314, at 27–30; Ole Lando, *The Common Core of European Private Law and the Principles of European Contract Law*, 21 HASTINGS INT'L & COMP. L. REV. 809 (1998) ("[O]nly in viewing a legal system's treatment of a problem as illustrated by cases that the impact of the rule on that legal system could be analyzed . . . .").

329. *See* Lando, *supra* note 328, at 814–15 (discussing the functional approach of comparative law).

330. Curran, *supra* note 320, at 47 ("[T]he difficulty of perceiving the ubiquity of the comparative act is due to the fact that traditional categories of legal analysis obfuscate differences within those categories. Distinct legal discourses within legal systems . . . have tended to be undifferentiated under traditional categorizations."); McDougal, *supra* note 318, at 31 ("It is . . . obvious that different decision-makers responding to different variables may in cases which a disinterested observer would regard as comparable use the same technical doctrines to reach different results or different technical doctrines to reach the same results."); Palmer, *supra* note 320, at 275; Sacco, *supra* note 314, at 24.

331. *See* Sacco, *supra* note 314, at 14 ("The legal rule preexists the linguistic formula we use to describe it" and as such must be understood as both distinct from but captured within language.).

332. *See supra* Part II.

333. *See supra* Part II.

334. *See supra* Parts I.B, II.

335. *See supra* Part I.B.

rule" of decision in international disputes.[336] Sacco explains as follows:

> Man continually follows rules of which he is not aware or which he would not be able to formulate well. Few would be able to formulate the linguistic rule we follow when we say "three dark suits" and not "three suits dark" whereas in special context we might speak of "the meadows green." . . . Linguists are now defining this phenomenon. We are subject to specific rules without perceiving them. Our visible, superficial language is the result of identifiable transformations of latent linguistic patterns that are more permanent than the visible ones.[337]

To follow Koskenniemi, participants in the international legal discourse know *how* a dispute must be resolved—how words must be arranged—even if they cannot readily explain *why*.[338]

Cryptotypes encode law on the strength of analogies of the facts to multiple competing problem solution paradigms.[339] Cryptotypes assign disputes to a "problem," and corresponding problem solutions, by this synthetic comparison.[340] This synthesis by factual analogy integrates the dispute, and problem solutions proposed by the parties, within the fabric of accepted problem solutions cognizable at international law.[341]

The operation of good faith by factual analogy confirms the inductive nature of international law.[342] It is not possible to provide an axiomatic theory of international law according to a single first principle of good faith.[343] Rather, it is only possible to find factual analogies between different disputes. It is this factual anal-

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336. Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law II*, 39 Am. J. Comp. L. 343, 385 (1991); *see also* Michele Graziadei, *Legal Transplants and the Frontiers of Legal Knowledge*, 10 Theoretical Inquiries L. 723, 735–36 (2009) (discussing the concept of cryptotypes); Christiane C. Wendehorst, *The State as a Foundation of Private Law Reasoning*, 56 Am. J. Comp. L. 567, 586 (2008); Bernhard Grossfeld & Edward J. Eberle, *Patterns of Order in Comparative Law: Discovering and Decoding Invisible Powers*, 38 Tex. Int'l L.J. 291, 294 (2003). The problem of defining good faith, which historically plagued international law, makes the nature of good faith as cryptotype more likely. *See* sources cited *supra* notes 305–11.

337. Sacco, *supra* note 336, at 384–85.

338. Koskenniemi, *supra* note 27, at 69–70.

339. *Cf.* Sacco, *supra* note 314, at 29 ("Judging [legal formants'] consistenc[ies] required work based on a factual method.")

340. *See* Sacco, *supra* note 336, at 386 (providing an example of synthetic comparison by using the different understandings of the legal term "delivery" in German, French, and Italian law).

341. *See* Michael D. Nolan & Frédéric G. Sourgens, *Issues of Proof of General Principles of Law in International Arbitration*, 5 World Arb. & Mediation Rev. 505, 513–16 (2009) (on integration).

342. *See supra* Part III.

343. *See supra* Part III.A.

ogy, this pragmatic foothold, which permits international lawyers to predict the likely outcome of an international legal dispute even if they cannot provide a principled reason for their preference.[344]

Good faith thus has a triply translative and coordinating function. First, it is translative of the social practices upon which international law is built.[345] It is thus possible to understand fundamental problems and cast aside divergences, which the good faith comparison reveals to be superficial rather than real.[346] Hence, international lawyers can assist in resolving foreign policy problems through negotiation because their understanding of the facts of a dispute uncovers hidden points of contact and *"translates"* the respective interests of each party into solutions that could command mutual support.[347]

Second, good faith is translative in giving authority to the rules announced within international law.[348] It creates legitimating links between legal outcomes and normative discourses in the communities affected by the outcomes.[349] In terms familiar to legal positivists, good faith ensures that international norms are "recognized" as law despite the lack of strong constitutional structures within the international community governed by international law.[350]

Finally, good faith operates the cryptotype of international law.[351] As such, it organizes law into linguistic families of varying degrees of family resemblance.[352] It then translates legal arguments into these factual family resemblances in order to determine the outcome for any given dispute.[353] In a word familiar to com-

344. *See* Koskenniemi, *supra* note 27, at 67.

345. Sacco, *supra* note 314, at 23–30.

346. *See id.*

347. *See* Bilder, *supra* note 33, at 680 n.32.

348. Hart, *supra* note 320, at 80–88; *cf.* McDougal & Reisman, *supra* note 80, at 251 ("In an integrated community in which authority is relatively stable and internalized in participants . . . behavior not conforming to authoritative communication is likely to cause dysphoria in the deviating actor and may trigger autopunitive responses.").

349. It would fail to communicate an authority signal "in the sense of community expectations" of authoritative decision. McDougal & Reisman, *supra* note 80, at 250–51 n.4.

350. *See, e.g.*, Schauer, *supra* note 320, at 523–34 (discussing the Hartian rule of recognition in the context of customary law).

351. *See* Sacco, *supra* note 336, at 385–86.

352. *See* Wittgenstein, *supra* note 81, at 32–33 (discussing family resemblances in language).

353. *See id.* at 33.

mon lawyers, good faith *distinguishes* to give cloture to the oscillating movement of legal arguments identified by the critique.[354]

2. Theoretical Consequences of the Translative Function of Good Faith

The critique reveals that good faith, in deconstructive terminology, is the "archi-trace," or trace of tracing, at work within international law meaning—it is the gateway through which legal argument becomes polytonic.[355] By invoking good faith, arguments from heterogeneous argumentative premises (consent, justice, hard, soft, etc.) can be synthesized *within* the international legal discourse.[356] This synthesis occurs predictably, in that participants in the international legal discourse know which invocation of good faith will succeed in convincing international judges, arbitrators, or legal advisors.[357] But synthesis cannot be brought about analytically—it cannot be simulated by a calibrated balancing test because there is no single unit of balance which could be brought to bear upon the heterogeneous discourses woven together in international legal argument.[358]

Good faith further works to modify each proposition within a legal argument. Good faith effectively translates each proposition from its dominant premise to other minor premises, with which it is also compatible.[359] It opens up the "traces" within legal propositions and thus creates meaning for the proposition within more

354. *See, e.g.*, Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. Rev. 899, 977 (2009) ("We use factual similarities among cases but combine those factual discussions with attention to principle and policy that can legitimately distinguish the cases in which a rule applies and in which it does not apply.").

355. Derrida, Grammatologie, *supra* note 8, at 90–91 (defining archi-trace); Derrida, L'Écriture, *supra* note 8, at 295; Drucilla Cornell, *Rethinking the Beyond of the Real*, 16 Cardozo L. Rev. 729, 779 (1995).

356. This synthetic internalization of decision is deeply relevant to the rhetorical tradition. *See, e.g.*, Richard Brooks, *The Emergence of the Hellenic Deliberative Ideal: The Classical Humanist Conception of Comparative Law*, 30 Hastings Int'l & Comp. L. Rev. 43, 67–68 (2006); M.F. Burnyeat, *Enthymeme: Aristotle on the Rationality of Rhetoric*, *in* Essays on Aristotle's *Rhetoric* 88 (Amélie Oksenberg Rorty ed., 1996); Kronman, *supra* note 197, at 700; Sherwin, *supra* note 31, at 1175–82; Frédéric G. Sourgens, *Comparative Law as Rhetoric: An Analysis of the Use of Comparative Law in International Arbitration*, 8 Pepp. Disp. Resol. L.J. 1, 1–9 (2007).

357. *See supra* Part II. Again, this is consistent with the rhetorical tradition. *See supra* Part I.A.

358. *See* Alexy, *supra* note 236, at 28–30; Schauer, *supra* note 236, at 45 (discussing the manner in which competing values are taken into account in a balancing test).

359. In other words, good faith subjectifies objective argument and vice versa as discussed in *supra* Part I.B.

than just the proposition's dominant discourse.[360] In short, the invocation of good faith makes legal argument polytonic because it renders the propositions within the legal argument polyvalent and connects them to the totality of discourses relevant to the process of legal decision making.[361]

Although the critique ultimately overshoots its mark, it still meets the deconstructive mission to reveal good faith as the ultimate structural "blind spot" of international law.[362] It is the equivalent of Martin Heidegger's "voice of Being" for German modern ontology.[363] It is the concept that cannot ultimately be explicated consistently within the system that comes to rest upon it.[364] It is the concept that harbors the key tension that permits deconstructive practice to reveal that there is more afoot in international legal argument than the facial propositional content of international law argument.[365]

IV. The Substance of Good Faith

The function of good faith creates doubt as to its substance at international law. Good faith appears incorporeal, unspeakable, and hidden.[366] In fact, it can fulfill its function precisely because it defies definition.[367] One can wonder—is good faith more than a sleight of hand invented to distract from the fact that the international jurist really has no clothes in which to dress his arguments?

The answer is a strong "yes." Good faith continues to have a vibrant substance despite the problem of its ultimate definition. Good faith is about the mutual engagement of and mutual regard due to others, or the "Other."[368] Since its appearance as Roman

360. Derrida, Grammatologie, *supra* note 8, at 88 (noting how the movement of "différance" as an irreducible archi-synthesis "opens up at once in one and the same possibility, temporalization, the relation to the other and language").

361. *See supra* Part III.A.

362. Critchley, *supra* note 67, at 555–56 (discussing the importance of blind spots for deconstructive practice).

363. Derrida, Grammatologie, *supra* note 8, at 36 (explaining that the posited *silence* of the "voice" of being represents the conceptual breaking point of Heideggerian metaphysics because it both maintains it within and at the same time breaches the boundaries of logocentrism).

364. *Id.*

365. *Id.*

366. *See supra* Part III.C.

367. *See supra* Part III.C.

368. Addis, *supra* note 321, at 784 ("In that process of engaging the 'Other,' an individual or a group may see its limitations and hence may cease to view the position of the other as nothing more than a distortion of the reality which just happens to coincide with its views.").

fides, it stood guard over the duties to foreigners.[369] Less archeologically, good faith in all of its usages considers whether each party has taken the other for full.[370] Have the parties treated each other with due regard for their respective interests? It is this due regard that requires treaties to be performed "in good faith," prohibits abuse of rights, and creates obligations to abide by unilateral promises, etc.[371] Good faith requires a certain kind of respect for and acceptance of difference.

The substance of good faith as mutual respect for difference shows itself in the presumption of good faith.[372] The presumption of good faith requires one to prefer a reading of the evidence that is consistent with international legal obligation, even if the conduct at issue on its own may appear strange.[373] Moreover, the presumption of good faith equally applies to all parties to a dispute.[374] In order to overcome this presumption, the party alleging a lack of good faith has the burden to provide positive proof that the conduct violated any international duty.[375]

The presumption of good faith requires engagement of others. Difference of conduct, perception, or experience is not reason enough for either party to condemn the other.[376] By requiring engagement, this presumption helps to uncover misunderstanding.[377] It incorporates a maximum amount of compliant and

369. *See, e.g.*, Clifford Ando, *Aliens, Ambassadors, and the Integrity of the Empire*, 26 Law & Hist. Rev. 491, 494–98 (2008) (tracing the history of foreign relations at Rome from religious origins to a Stoic conception of international law and society); 2 Theodor Mommsen, Römisches Strafrecht 44–46 (1874) (discussing the historical roots of Roman law in pontifical and augural orders of priests); M. Tullius Cicero, De Officiis, at I.xiii.40 (Walter Miller trans., T. E. Page & W. H. D. Rouse eds., 1913).

370. Cheng, *supra* note 310, at 133–34; *see also* David Kaye, *Adjudicating Self-Defense: Discretion, Perception, and the Resort to Force in International Law*, 44 Colum. J. Transnat'l L. 134, 170–71 (2005) (discussing the problem of good faith as due regard).

371. *See* Nolan & Sourgens, *supra* note 341, at 525–27 (cataloguing recent decisions of international courts and tribunals).

372. *See, e.g.*,]Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. 432, 505 (Dec. 4) (Weermantry V.P., dissenting); Chevron Corp. v. Ecuador, Interim Award, ¶ 139 (UNCITRAL Dec. 1, 2008), http://www.italaw.com/sites/default/files/case-documents/ita0150.pdf; Canfor Corp. v. United States, Decision on Preliminary Question, ¶ 328 (UNCITRAL June 6, 2006), http://www.italaw.com/sites/default/files/case-documents/ita0122.pdf.

373. *See supra* Part I.B.

374. *See, e.g.*, Isabelle Van Damme, Treaty Interpretation by the WTO Appellate Body 19–20 (2009) (discussing the mutuality of the presumption).

375. *Chevron Corp.*, ¶ 139.

376. *See supra* Part I.B.3.

377. Addis, *supra* note 321, at 784.

acceptable conduct within the scope of international law.[378] This presumption is particularly important in approaching newer or less sophisticated actors on the international legal stage.[379] In that context in particular, the good faith presumption respects difference.

The principle of *pacta sunt servanda* in the law of treaties similarly incorporates such a standard of due regard.[380] The International Law Commission noted in codifying the principle of *pacta sunt servanda* in the Vienna Convention on the Law of Treaties: "the obligation must not be evaded by a merely literal application of the clauses" of a treaty.[381] Rather, a treaty right must be exercised reasonably.[382] The treaty obligation thus is not coextensive with its text.[383] Rather, *pacta sunt servanda* also looks to the reasonable reliance interests of the parties—and thus requires an engagement of their different interests in concluding the treaty in the first place.[384]

Pacta sunt servanda similarly requires engagement of others.[385] It requires treaty parties to consider the reliance interests created by their counterparties in the performance of treaty duties.[386] The reliance interests of treaty parties, as is the case in most contractual exchanges, differ.[387] In fact, the reason they have agreed to an

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378. *See, e.g.*, Paushok v. Mongolia, Award on Jurisdiction and Liability, ¶ 299 (UNCITRAL Apr. 28, 2011), http://www.italaw.com/sites/default/files/case-documents/ita0622.pdf.

379. *Id.* ("[T]he fact that a democratically elected legislature has passed legislation that may be considered as ill-conceived, counter-productive and excessively burdensome does not automatically allow to conclude that a breach of an investment treaty has occurred.").

380. Vienna Convention, *supra* note 115, art. 26.

381. *Draft Articles on the Law of Treaties: Text as Finally Adopted by the Commission on 18 July 1966*, [1966] 2 Y.B. Int'l L. Comm. 187, 211, U.N. Doc. A/CN.4/190.

382. *See, e.g.*, Elizabeth A. Nowicki, *Not in Good Faith*, 60 SMU L. Rev. 441, 454 n.39 (2007) (linking *pacta sunt servanda* to reasonableness); Mitchell, *supra* note 305, at 344–45.

383. *See, e.g.*, Alex Glashausser, *What We Must Never Forget When It Is a Treaty We Are Expounding*, 73 U. Cin. L. Rev. 1243, 1300 (2005) (discussing jurisprudence rejecting literalism).

384. *See, e.g.*, Patrick M. Norton, *A Law of the Future or a Law of the Past? Modern Tribunals and the International Law of Expropriation*, 85 Am. J. Int'l L. 474, 503 (1991) ("The primacy of commutative considerations in bilateral adjudication is reflected in the opinions examined here by the numerous references to 'good faith,' 'fair dealing,' reliance and *pacta sunt servanda*—all considerations commutative in character.") (footnote omitted).

385. *See* Günther Handl, *The Legal Mandate of Multilateral Development Banks as Agents for Change Toward Sustainable Development*, 92 Am. J. Int'l L. 642, 661 n.137 (1998).

386. *Id.*

387. *Cf.* E. Allan Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 Colum. L. Rev. 217, 224 (1987) ("Recovery measured by the reliance interest may, however, differ depending on the ground on which it is based.").

exchange is a difference in interests.[388] *Pacta sunt servanda* requires each party to call to mind what the other party sought in the exchange and act reasonably in light of that exchange.[389] Again, good faith requires a fundamental mutual respect for difference.[390]

This mutual respect for difference is writ large in the prohibition of abuse of right.[391] This good faith doctrine, closely related to *pacta sunt servanda*, prohibits any actor to exercise even a clear right when its exercise is abusive to others.[392] This prohibition of abuse of right thus projects the *pacta* principle to a large scale: international legal actors must be mindful of the different interests of others in all instances and act accordingly.[393]

This leaves the question: by what measure is reasonableness established? As the critique has shown, there is no one answer to this question.[394] There is no single measure of good faith balancing.[395] At times, good faith is determined from an ascending point of view by reference to state conduct.[396] At others, good faith is determined from a descending point of view by reference to prevalent normative standards that the parties did not openly assent to precisely.[397] At still other times, the decision is simply one of utility.[398] As discussed in the previous Section, this multiplicity of facial units of balance is a structural necessity of international legal

388. *See, e.g.*, Gregory Todd Jones, *Sustainability, Complexity, and the Negotiation of Constraint*, 44 Tulsa L. Rev. 29 n.38 (2008) ("Indeed, it is these differences that are the basis for the interest-based, integrative bargaining . . . .").

389. *See id.*; *see also* Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 Ohio St. J. on Disp. Resol. 669, 695 n.54 (2003) ("Fisher and Ury initially intended *Getting to YES* to be a guide for the mediation of international disputes, building upon Fisher's earlier work in the field of international relations.").

390. *See* sources cited *supra* note 389.

391. *See, e.g.*, Mobil Corporation v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 169–85 (June 10, 2010), http://www.italaw.com/sites/default/files/case-documents/ita0538.pdf (summarizing abus de droit in investor-state arbitration); Certain Questions of Mutual Assistance in Criminal Matters (Djib. v. Fr.), 2008 I.C.J. 179, 278 (June 4) (Keith J., concurring); Aerial Incident of 10 August 1999 (Pak. v. India), 2000 I.C.J. 12, ¶ 40 (June 21) (rejecting Pakistan's abuse of right argument).

392. *See* Vienna Convention, *supra* note 115, art. 26.

393. *See, e.g.*, Mitchell, *supra* note 305, at 349–51; *see also* I.I. Lukashuk, *The Principle* Pacta Sunt Servanda *and the Nature of Obligation Under International Law*, 83 Am. J. Int'l L. 513, 517 (1989).

394. *See supra* Part I.B.

395. *See supra* Part I.B.

396. *See supra* Part I.B.

397. *See supra* Part I.B.

398. *See supra* Part I.B.

discourse.[399] It is a consequence of the inductive process of norm establishment in international law.[400]

But one should not confuse this difference in the unit of measurement with the substance of what good faith measures.[401] On both the most abstract and most concrete level, good faith measures the regard due for difference. As difference manifests itself in manifold manners, the consideration of difference is similarly multifaceted.[402]

In fact, due regard for difference would be self-defeating if it only looked to a single measure. Rather than giving due regard to difference, it would trivialize difference, domesticate "the Other."[403] A difference that is one-dimensional and readily definable ceases being different at all and simply becomes integrated within a structure of identity.[404] It atrophies and ossifies distinctiveness.[405] The polyvalence of good faith thus is not only a structural requirement of the international law rule establishment process, it is a substantive necessity of duly regarding difference, or "taking [difference] seriously."[406]

V. Conclusion

This Article sought to invert the prevalent critique of international law.[407] Rather than proving that international law is singularly useless as a means of critiquing or justifying international behavior, it showed how the tools of the critique brought to light the fabric of the process of synthetic meaning creation of international law.[408] But the point of the Article was not to dispel a critique—even one striking at the heart of the legitimacy and tenability of international law as a discourse. The critique was simply the most radical expression of a deeper, widely shared malaise

399. *See supra* Part III.C.2.

400. *See supra* Part III.C.1.

401. *See, e.g.*, Schauer, *supra* note 236, at 39 (rejecting the criticism that balancing without a defined unit of balance is irrational).

402. *See, e.g.*, Derrida, Grammatologie, *supra* note 8, at 25 (discussing the multiplicity of hidden sediments of different discourses in Western metaphysics); *see also* Legrand, *supra* note 7, at 606–07 (discussing the concept of spectrality).

403. *See, e.g.*, Derrida, Grammatologie, *supra* note 8, at 117–18 (discussing the domestication of difference in the context of the treatment of Chinese writing in Leibniz).

404. *Id.* at 130–42 (discussing the pluridimensional nature of difference).

405. *Cf.* Martin Heidegger, Was Heisst Denken? 30 (1997) (discussing the transformation of insight into common place).

406. *See generally* Ronald Dworkin, Taking Rights Seriously (1977) (discussing the theories of legal positivism and utilitarianism).

407. *See* Koskenniemi, *supra* note 2, at 67.

408. *Id.*

within the international legal academy asking: "what is international law discipline about?"[409] This Article provided a sketch of how to answer this question. The common thread of international legal practice is its encounter of *difference*.[410] Instead of defining difference as "violation" of a preordained normative order, international law takes the radically opposite approach of placing difference at the center of its normative process.

To resolve the identity crisis of international law is to realize that international law cannot have an identity. Norm as identity relegates difference—treats what "differs" as wrongful.[411] To take difference seriously is to equivocate, oscillate, balance, include rather than deduce, determine, pronounce, and condemn.[412] In a time when international affairs are defined as a "clash of civilizations" or the "end of history," this markedly more humble, pragmatic, and constructive ambition of international law gives purpose to international lawyers. Theirs is the task of creating a common realm, a common language of international engagement, and joint approach of problem solution—to engage the real world rather than metaphysical speculation.[413]

409. *See, e.g.*, H.E. Judge Gilbert Guillaume, President of the International Court of Justice, Speech to the General Assembly of the United Nations (Oct. 30, 2001) ("The proliferation of international courts may jeopardize the unity of international law and, as a consequence, its role in inter-State relations."); Weil, *supra* note 113, at 413 (discussing the same problem).

410. *See, e.g.*, Douglas M. Johnston, The Historical Foundations of World Order: The Tower and the Arena 56 (2008) (discussing the current systemic importance of diversity and imagination in international law making).

411. *Cf.* Addis, *supra* note 321, at 784.

412. *See supra* Part III.C.

413. *See* Samuel P. Huntington, The Clash of Civilizations and the Remaking of World Order (2011); Francis Fukuyama, The End of History and the Last Man (2006).