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The Elements of International Law

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United States v. La Jeune Eugenie, 26 F. Cas. 832 (C.C.D. Mass. 1822) (No. 15,551), as believing that the slave trade was in violation of this naturalist vision of international law. But just three years later, Story had to endure the indignity of silently recanting his position as a member of the Supreme Court ruling in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825). And, indeed, *The Antelope* is usually regarded as the beginning of the "infection" of positivism in the American approach to the law of nations, what with Chief Justice Marshall's comment that

> [w]hatever might be the answer of a moralist to this question [the legality of the slave trade], a jurist must search for its legal solution, in those principles of action which are sanctioned by the usages, the national acts, and the general assent, of that portion of the world of which he considers himself a part, and to whose law the appeal is made. [We must] resort to this standard as the test of international law . . . .

Id. at 120-22. Of course, British courts had already reached this conclusion. (*See* The Le Louis, 165 Eng. Rep. 1464 (Adm. 1817).

Wheaton's *Elements*, published barely 11 years after *The Antelope* decision, marks this contradiction and confluence of natural law and positive law sources. And, indeed, the earlier publication of Joseph Story's volume, *Conflict of Laws* (in 1834), is a crucial moment in this story. As ably and humorously explained by Professor Alan Watson in his book, *Joseph Story and the Comity of Errors: A Case Study in Conflict of Laws* (1992), Story's move to a territorial basis for resolving conflicts issues (largely, although erroneously, derived from Ulrichus Huber) was critical in establishing a difference between private and public international law. Henceforth, territorial sovereigns began to regard themselves as unrestrained by international law to decide such matters as prescriptive and adjudicatory jurisdiction.

There is one other figure in this mix of intellectual sources for nineteenth-century international law. That is John Austin. Although Austin's work follows Wheaton's by a few decades, his writings reflect the most extreme of English legal positivism. His renunciation of international law as not "law" at all, remains a crippling blow, one that conditions much of the debate that follows. Wheaton may well have anticipated the positivist critique and attempted to blunt it somewhat by recognizing that international law was – and remains – an admixture of natural and positive sources for obligation, of moral restraint and positive consent. Wheaton's American empirical pragmatism comes as a welcome diversion from later English and Continental positivist absolutism.

As international law has now experienced a half-century of a return to balanced naturalist and positivist outlooks – is that not the entire thrust of the "human rights revolution"? – it seems propitious to look back and trace the intellectual origins of these developments. Far from being a morality play, a Manichean drama of conflict between good and evil sources of international legal obligation, the tension between natural law and positive law is more of a *yin* and *yang*, a mystic relationship that mutually nourishes and annihilates the other. Henry Wheaton embodied a rare combination of those impulses. His example as a scholar, diplomat and lawyer should continue to inspire, if not periodically perplex, us.

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THE ELEMENTS OF INTERNATIONAL LAW

Henry Wheaton is the Blackstone of international law. By giving lawyers a simple, clear and convincing description of international law, as he understood it, Wheaton shaped the law of nations for his contemporaries, and their successors for at least half a century after his death. Wheaton's *Elements of International Law*, first published in 1836, went through many editions, culminating in the canonical eighth edition, with notes by Richard Henry Dana, Jr., published in 1866. Dana's became the most frequently cited version, and was selected by the

Carnegie Endowment for reproduction in its series on the Classics of International Law.

Wheaton's Elements of International Law

Wheaton's ideas still permeate the international legal order that they did so much to establish, but Wheaton himself is largely forgotten. Mentioned (if at all) only in quotations from nineteenth-century court decisions, Wheaton is seldom read and almost never cited. Yet no subsequent treatise has reached the same level of influence as Wheaton's *Elements*, and much of Wheaton's thinking remains embedded in the institutions of contemporary international law. Wheaton's arguments are worth reviewing and evaluating for their own sake, but also for the insights that they give into the philosophical foundations of the international legal order.

There has been a tendency among some recent scholars to exaggerate the separation between law and morality, even in international law (*see e.g.* Alfred P. Rubin, *Ethics and Authority in International Law* (Cambridge, 1997). A close look at Wheaton confirms how late and incompletely (if ever) this doctrine infiltrated accepted public law doctrine. Just as lawyers since Cicero had understood that states should be communities of free and equal citizens, associated in pursuit of the common good, so Grotius, Wolff, Vattel and Wheaton saw international law as supporting a community of free and independent states, associated together for justice. The nature and moral independence of states requires a well-established set of laws to govern their community, just as human nature requires certain laws to regulate human society. The measure of both is justice.

This does not mean that people or states receive justice, unmediated, directly from nature. They must turn instead to the evidence of history, public opinion, judicial decisions, custom and other institutions that reveal justice through human behavior. Wheaton understood the value of collective perceptions in clarifying the details of international law. *The Elements of International Law* includes many specific precepts of international legal doctrine, supported by extensive citations to publicists, to decisions by various courts, and to other expressions of human opinion that show where history, morality and consensus have generated specific rules of international conduct.

The Sources of International Law

Henry Wheaton identified justice as the ultimate arbiter of international law (Wheaton, *Elements*, 3, 20), making use of those principles "which sound policy dictates as necessary to the security of any state"(xv). Europeans first recognized these maxims through their study of the canon law and Roman Civil Law, as revived by Spanish casuists and learned professors at the University of Bologna. The professors of Roman law were the public jurists and diplomats of their age and continued to be so even after the Protestant Reformation of Europe. Naturally, such learned men looked to well-recorded Roman civil law precedents to discover the basic requisites of justice, and to settle international disputes (xiv).

The value that Wheaton saw in Grotius and other public jurists (xvi) is the benefit that he himself offered to statesmen, by writing impartially to clarify justice, as revealed through reason and experience. What Wheaton's treatise on the "reciprocal duties of sovereign states" lacked in the force of "positive law", it gained through the moral sanction of enlightened opinion, responding to truth and sound reason (xvi-xvii). Wheaton's concentration on the relationship between states might seem at times to endorse the positivism that he elsewhere so explicitly rejected (xix), but Wheaton always measured international law according to "the principles of justice" which "ought to regulate the mutual relations of nations" (3).

Wheaton adapted his formal definition of international law from James Madison, believing that: "international law, as understood among civilized nations, may be defined as consisting of those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations; with such definitions and modifications as may

be established by general consent." (20) Wheaton sought specific evidence for the content of international law from (in order of importance): first, the writings of publicists; second, treaties; third, the ordinances of particular states; fourth, the adjudications of international tribunals; fifth, private government archives; and finally, from the history itself, of how states have behaved in the past, and what they recognize as justice (20-23). The primacy that Wheaton gave to publicists, and their views, in determining international law, depended on their impartiality, as recognized by statesmen, and so ultimately on reason itself (20).

States

Wheaton's treatise concerns states, and their mutual relations (25). States, in this context, constitute separate political societies, supreme in their own spheres, and independent from the rest (27, 44). Wheaton posited a "great society" of states, with determinate rights and duties between them (28). Membership in this society depends on mutual recognition (29), with sanctions enforced by opinion (77). But the fundamental rights, which all states enjoy with regard to each other, derive from their separate existence as independent moral beings. Wheaton calls these basic rules the "*absolute*" international rights of states (75). There are also "*conditional*" rights, derived from particular conditions and circumstances (75).

The "*absolute*" rights of states include self-preservation, self-defense, peaceful expansion, peaceful internal development (75-77), and all the other ordinary processes of self-realization, naturally due to independent moral actors, living in a "state of nature" (77). International law depends for its efficacy entirely upon "moral sanctions", not including the resort to arms, except in exceptional circumstances (77-78). Wheaton hesitated to articulate the particular conditions of any specific "right to intervention," for fear that states would abuse it, as a pretext for invasion (79). He approved Britain's vigorous resistance to any overarching world government, which might superintend the internal affairs of other states (80). This policy of non-interference extended to protecting the independence of Spain's former American colonies, which Wheaton approved (81).

Wheaton supposed that the principles of international law might sometimes justify interference to *support* wars of national liberation "when the general interests of humanity are infringed by the excesses of a barbarous and despotic government" (95) or the "general peace" and "balance of power" are threatened (98-99). This despite every state's right "as a distinct moral being" independently to alter or abolish its own municipal constitution of government (100), without the interference of others (103). The difference here lies in Wheaton's distinction between "barbarous' and "civilized" governments. "Civilized" governments, established for the good of their own citizens, enjoy a right to autonomy which "barbarous" governments, acting despotically to dominate and exploit their own subjects, do not (97).

This illuminates the circumstances in which independent states may properly enforce the universal law of nations. Wheaton suggested (for example) that piracy was a crime by the universal law of nations, while slavery was not (174). The "general, ancient and admitted practice" of states, their treaties, and various transactions of civilized nations had once accepted slavery and the slave trade. To make these crimes "by the universal law of nations" Wheaton required a treaty, or universal change in state practice (174, 177). Notwithstanding that the slave trade was, as John Marshall observed (and Wheaton admitted), "contrary to the law of nature", nonetheless the enslavement of those defeated in lawful wars was an ancient practice, still widely recognized in Africa, where many European states had been willing to purchase slaves. Universal practice and opinion had once supported the slave trade and so (Wheaton supposed) must the law (178-179).

Jurisdiction

The law of nations, as recognized in Wheaton's day by "all civilized and commercial states throughout Europe" was in part unwritten, and in part conventional. Wheaton sought the

unwritten law first "in the great principles of reason and justice", but then also in the judicial decisions of various tribunals in every country, which tend to make the unwritten law more "fixed" and "stable" (356). The mutual independence of states leaves them without any common arbiter or judge, and so each must, in the end (of necessity) become a judge for itself against the others, whenever they disagree (309). The rules of law that Wheaton laid down tried to restrain this discretion to the "clear and open denial of justice" (310).

Wheaton understood that older and less humane rules of international conduct had gradually been replaced by newer and better principles, when publicists such as Grotius and Vattel articulated new standards. The law of nature often supplies a rule (such as proportionality) which publicists and practice make more complete (359). This "progress of civilization" (as Wheaton recognized) was not complete in his own time (378), despite the efforts of enlightened statesmen (380), nor is it now. In many cases, justice fails from an absence of reciprocity. For one state, unilaterally, to embrace the just rule, might leave it defenseless against the others (391). When one state exercises its jurisdiction unjustly, to harm another's nationals, Wheaton understood that the second state may respond with reprisals, to prevent "*the denial of justice*" (409).

Wheaton explained that the jurisdiction to legislate and to enforce the law in each separate and independent state properly extends throughout that state's own territory, to its own nationals (wherever situated), to offences committed on its vessels on the high seas, and "to the punishment of piracy, and other offences against the law of nations, by whomsoever and wheresoever committed" (151, 161). Regarding pirates and other international criminals (458), Wheaton believed that since these are "common enemies of all mankind," all nations have an equal interest in their apprehension and punishment (162). Wheaton did not accept that the international law of his period extended to the punishment of ordinary murders on the high seas (164) or to preventing the African slave trade (165-167), except as between nations that had mutually agreed to do so (173).

Here Wheaton's commitment to "reason" and to "nature" gave way to a positivistic doctrine of previous consent. When states had first consented to the slave trade, a right had vested, such that states could not now withdraw their consent, to reflect their new sense of justice (179). Wheaton elsewhere accepted that "the progress of civilization" can change international law to support "the serious interests of mankind" (195-196), so Wheaton's views on slavery stand revealed as products of his own moral blindness. His position would seem to have been that once universal consent has recognized the justice of a doctrine of universal international law, that doctrine may not be superseded, except by subsequent universal consent.

Conclusion

The relationship between Wheaton's fundamental principal of international law ("justice") and his subsidiary measure ("consent") (20), depends on a belief (borrowed from Grotius) that justice itself requires good faith, even in war (416). Thus treaties and agreements become binding, even when unjust, through the underlying moral obligation to keep one's word (with certain obvious exceptions) (40-41,292). Wheaton accepted a doctrine of "moral impossibility," which sometimes limits this binding influence of treaties. "Moral impossibility" arises when fulfilling a treaty engagement would injure third parties (281). Coerced consent also voids treaties, because coercion violates justice (284).

The value of Wheaton today lies less in the specifics of his explanation of international law as it existed in his day, than his underlying conception of where law comes from, and the purposes that law serves. If international law consists in "those rules of conduct which reason deduces, as consonant to justice, from the nature of the society existing among independent nations," (20) then the justice and nature of this international society will merit close attention. Wheaton's work should remind contemporary scholars of international law that there can be no

law without justice, no justice without community, and no international community without reflection about the underlying purposes that all states exist to serve.

The greatest weakness of Wheaton's *Elements* lies in his overwhelming commitment to states as the sole subjects of international law. States provide a useful vehicle for codifying and enforcing the international law, but not at the expense of individual justice (as Wheaton himself admits). The strong analogy made in liberal international law from Grotius to Wheaton between the liberty and equality of the individuals within the state, and the liberty and independence of the state within international society, breaks down when states deny their citizens' rights at home. Wheaton's commitment to justice of international society offers a vehicle for correcting despotic states. His emphasis on "civilized" values disparages "barbarism" and injustice.

Wheaton's distinction between "civilized" and "barbarous" nations lies at the heart of his practical legacy. Both terms seem crude and impolitic to modern sensibilities, but they capture important truths about the structure of international society, still recognized in the Statute of the International Court of Justice (Article 38(c)). Not all states deserve a place in the community of "civilized" nations, because not all states meet the minimum requirements of justice. Standards of membership can and should rise, as enlightenment advances -- which it has since the twelfth century on the basis of a civilian tradition, derived from Rome. Wheaton understood the purposes of international law better than many contemporary lawyers, but also its nature and sources. "*Le droit international, ou droit des gens positif, est fondé sur la morale internationale, qu'on a ordinairement appelée le droit des gens naturel*" (Wheaton, *Elements*, xi) (Preface to the 1848 edition).

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THE RELATIVITY AND HISTORICAL PERSPECTIVE OF THE GOLDEN AGE OF INTERNATIONAL LAW

I. Introduction

Nicholas Onuf's well-written lead article, "Henry Wheaton and the Golden Age of International Law", sparked my interest in writing this essay, not so much as a comment of Onuf's, but as a supplementary and free-style study of the idea of such golden age. At the outset, I find it interesting that my experience bears some similarity to Nicholas Onuf's: we can both trace ourselves to someone famous in our field. One of my former favorite law teachers at Peking University Law School was Professor (and now Judge Emeritus) Wang Tieya, who, in the 1930s, studied international law under, among others, Hersh Lauterpacht, who, in turn, had been a student of F.L. Oppenheim's. While an LL.B. student (1979-1983), I read, mostly on my own, a good portion of Kelsen's *Principles of International Law* (2nd ed.), Brierly's *The Law of Nations* (6th ed.), Akehurst's *A Modern Introduction to International Law* (3rd ed.), Starke's *An Introduction to International Law* (7th ed.), and more importantly Oppenheim's *International Law* (7th and 8th eds.), although I hardly consumed them well due to my language barrier, not to mention reading them "from cover to cover." I must admit, though, that Wang's and Oppenheim's overall positivist approach had a great deal of influence upon my subsequent study and teaching of international law.

It is not totally clear whether the assertion that the 19th century was the "golden age of international law" covers the entire nineteenth century solely or *more or less* that period; nor whether such "golden age" refers to the positive growth of international law (*i.e.*, the "law" of nations *per se*) or to the doctrinal development of international law (*i.e.*, the science of international law). Indeed, it is even questionable, as Professor Onuf observes, whether there is sufficient support for this assertion. Nevertheless, I am inclined to preserving the above assertion by attaching new or clarified meanings to the "golden age" from