Leiden Journal of International Law (2016), 29, pp. 1061–1080
 doi:10.1017/S0922156516000509

Getting to Peace: Roger Fisher's Scholarship in International Law and the Social Sciences

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Abstract
This article examines Roger Fisher's scholarship in international law in the decades prior to the publication of *Getting to Yes*. Fisher engaged with the same major questions as other international law scholars during the Cold War, but his scholarship was distinguished by the degree to which he grappled with the cutting-edge social science of the mid-century. Even as Fisher collaborated with game theorists and nuclear strategists to understand the theory of conflict, he maintained a critical view of the basic assumptions of game theoretic analysis – defending certain normative elements of the methodology even as he denied its descriptive claims. Subsequent work sought to generate robust descriptions of the role of law in international decision-making during crises. Fisher's normative and descriptive studies of the role of law in such crises led directly to *Getting to Yes*, creating a body of 'meta-game theory' that situated formal studies of conflict within a lawyer's understanding of dispute resolution. Fisher's engagement with social scientists helps illuminate current methodological debates in international law by highlighting the stakes of these theoretical questions and the tensions between scholarship and practice in international law.

Keywords
game theory; negotiation; Roger Fisher; scholarship; social science

1. Introduction

This article examines Roger Fisher's scholarship in international law from the mid-1960s through the 1981 publication of *Getting to Yes*.[1] It reads this body of work as an intervention in the methodology of international law, shining a light on an innovative engagement between international lawyers and social scientists during the Cold War. Today, these methodological debates are shaped by a largely American effort to ground international law in certain strands of international relations theory[2] (an idea with roots going back decades[3] and that has been taken up by

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1 R. Fisher and W. Ury, *Getting to Yes* (1981).

2 See, for example, J. Goldsmith and E. Posner, *The Limits of International Law* (2005).

3 From Harold Lasswell in 1970: 'For years we have been told that the legalistic approach to the legal process is unnecessarily sterile and that a new birth of relevance calls for full account to be taken of the findings

practitioners outside the academy[4]) and a largely European defence of international law's autonomy.[5] On both sides of the debate, this is seen as being about a methodological turn away from normativity toward supposedly positive analysis, with everything that entails (instrumentalism, managerialism, etc.).[6] This article provides a different perspective on these debates by following one international lawyer's engagement with international relations scholarship, through private communication as well as polished publications.

Fisher's attempt to bridge the theory of international law and social science in the 1960s and 1970s complicates our understanding of both the history of these social sciences,[7] and the historical relationship between social scientific methods and international law.[8] The brash public statements of certain social scientists contrasted with a recognition within their community of the tentative and limited nature of their theories and models.[9] Fisher and friends critiqued game theory's applications without abandoning its insights, and contributed to it by contextualizing the 'games' and situating decision-making. On the basis that these theories were instructive but insufficient to structure behavior, they used detailed case studies to identify how international law could channel political decision-making in crises.

Fisher's normative and descriptive studies of the role of law in decision-making during crises led directly to *Getting to Yes*,[10] creating a body of 'meta-game theory'. The subsequent evolution of negotiation theory went in other directions, making it a distinct specialty within legal practice[11] and obscuring its deep connections with the theory of international law. Beyond the incongruity of finding a theory that emphasizes peaceful conflict resolution and emotional awareness growing out of the hyper-rational, militarized space of nuclear strategy, Fisher's engagement with social scientists helps illuminate current methodological debates in international

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and procedures of the rapidly expanding social and behavioral sciences. Proclamations of the importance of this development are not rare.' See H. Lasswell, 'Introduction', in W. Gould and M. Barkun, *International Law and the Social Sciences* (1970), xv. See also K. Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', (1989) 14 *Yale Journal of International Law* 335; A. Slaughter, A. Tulumello and S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship', (1998) 92 AJIL 367.

4 See J. Ohlin, *The Assault on International Law* (2015), 9–14.

5 See, for example, J. Klabbers, 'The Relative Autonomy of International Law or The Forgotten Politics of Interdisciplinarity', (2005) 1 *Journal of International Law & International Relations* 35.

6 See Ohlin, *supra* note 4, at 13; Goldsmith and Posner, *supra* note 2, at 15. The field of international relations is much broader (see M. Pollack, 'Is International Relations Corrosive of International Law?', (2013) 27 *Temple International and Comparative Law Journal* 339, at 354–65), and this article does not intend to address the breadth of that scholarship. Its focus is on a few episodes in the history of the relationship between international law and international relations in the 1960s and 1970s.

7 See, for example, P. Erickson et al., *How Reason Almost Lost Its Mind: The Strange Career of Cold War Rationality* (2013).

8 The terms were set in M. Koskenniemi, *The Gentle Civilizer of Nations* (2001), 497–508. It has been critiqued, such as by S. Moyn, 'The International Law that is America', (2013) 27 *Temple International and Comparative Law Journal* 399.

9 For precursors in the policy sciences, see W. Thomas, *Rational Action: The Sciences of Policy in Britain and America, 1940–1960* (2015).

10 Fisher's co-author, William Ury, described *Getting to Yes* as reworking the 1979 text *International Mediation* into 'a general book on negotiation for … anyone who has to negotiate'. See W. Ury, 'In Memoriam: Roger Fisher', (2013) 126 *Harvard Law Review* 898, at 899–900.

11 See, for example, R. Fisher, 'What about Negotiation as a Specialty?', (1983) 69 *ABA Journal* 1221.

https://doi.org/10.1017/S0922156516000509 Published online by Cambridge University Press

law by highlighting the stakes of these theoretical questions and tensions between scholarship and practice in international law.

2. International law of interests

By the 1960s, certain strands of international law were already building a jurisprudence based on interests and power, focused on understanding the tensions among legal doctrine, social facts, and norms.[12] This had antecedents in the sociological jurisprudence of Roscoe Pound and in the traditions of Legal Realism, which had already influenced international law.[13] Wolfgang Friedmann saw sociological jurisprudence as better able to understand the deep interactions between the development of the law and the resolution of social problems amidst the changing needs of international society.[14] In his 1965 Storrs Lectures on Jurisprudence at Yale, C. Wilfred Jenks emphasized the importance of a suitably humble and experimentally-minded sociological orientation to allow lawyers to understand the vital problems facing international society.[15]

In Friedmann's framework, interests reflected desired goals and power was a means of attaining those goals. However, turning the pursuit of power into an explicit state interest was 'antithetic to the ideals of international order, peace and cooperation'.[16] Means and ends remained distinct. International law functioned both to restrain conflicts of power and to facilitate the creation of communities of interest.[17] The two reinforced each other: exclusion from the co-operative order would operate as a sanction, promoting peaceful coexistence.[18] Lawyers could play a creative function in the international order by designing systems to facilitate co-operation.

Friedmann identified related efforts in the policy-oriented 'New Haven School' led by Myres McDougal and Harold Lasswell.[19] Lasswell had been one of the leading figures in the development of behavioural social sciences in America, and the New Haven School retained an affinity with the social scientific analysis and instrumentalist pragmatism of mid-century Chicago.

McDougal and Lasswell argued that a search for deep universalistic foundations of international law ('make-believe universalism'[20]) could not be sustained amidst the existing multiplicity of legal orders. The tasks for international lawyers should,

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12 For an overview, see D. Kennedy, 'The Mystery of Global Governance,' (2008) 34 *Ohio Northern University Law Review* 827, at 836–40.

13 S. Astorino, 'The Impact of Sociological Jurisprudence on International Law in the Inter-War Period: The American Experience', (1996) 34 *Duquesne Law Review* 277.

14 W. Friedmann, *The Changing Structure of International Law* (1964), 76–7.

15 C.W. Jenks, *A New World of Law? A Study of the Creative Imagination in International Law* (1969), 279–80. In language that begs repeating, Jenks defined the requirements for legal reconstruction as 'freshness of mind, earthiness, and a sturdy idealism', see ibid., at 21.

16 Friedmann, *supra* note 14, at 50.

17 Ibid., at 57–8.

18 Ibid., at 369.

19 Ibid., at 46–7.

20 M. McDougal and H. Lasswell, 'The Identification and Appraisal of Diverse Systems of Public Order', in M. McDougal et al. (eds.), *Studies in World Public Order* (1987), 3 at 5 (essay originally published in 1959).

https://doi.org/10.1017/S0922156516000509 Published online by Cambridge University Press

instead, be to create the international public order that would achieve shared values of human dignity amidst recognized differences by performing research and providing recommendations to decision-makers, focusing on moments of choice and opportunities for genuine interventions.[21] International law could move from the protection of *minimum order*[22] toward the establishment of the *optimum order* that could achieve positive goals through co-operation by acknowledging both fundamental difference and the necessity of interdependence, mediated through institutions and patterns of communication, and commitments to peaceful conflict resolution.[23] Instrumental social scientific methods would support policy purposes as part of the 'disciplined use of all relevant modes of thinking and observation'.[24] The prioritization of the study of interests and power was broadly connected to a sociological understanding of international law[25] even as scholarship integrating international law with novel social scientific methods threatened to deformalize law toward more decentralized modes of governance.[26]

In an exchange of letters between Roger Fisher and Hardy C. Dillard at the University of Virginia on the methodology of international law, Dillard argued that:

> [t]he search for "truth" and the attainment of "values" are thus intimately joined and not divorced as much traditional philosophy assumed. The concept of "process" ... conceives of value and truth as connected ideals stimulating and validating a continuing and unfolding search not for what *is* both true and good but for what *becomes* both true and good.[27]

The emphasis on process recalled the influential 'legal process' school of Hart and Sacks,[28] which was being extended into international law by Abram Chayes.[29]

Fisher recognized that perceptions of the law could be situated and partial[30] but added: 'I still believe it desirable, useful, and perhaps essential, that human beings at some times be asked to behave as if rules had an objective existence.'[31] It was here that

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21 See M. McDougal, 'Perspectives for an International Law of Human Dignity', in McDougal et al. (eds.), *supra* note 20, at 987, 989–90. See also McDougal and Lasswell, *supra* note 20, at 6–39.

22 See generally M. McDougal and F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961). See also M. McDougal, 'International Law of Human Dignity', in McDougal et al. (eds.), *supra* note 20, at 1000.

23 Ibid., at 1000–5.

24 M. McDougal, 'The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order', in McDougal et al., (eds.), *supra* note 20, at 947, 948.

25 In Duncan Kennedy's periodization of legal consciousness, the rise of 'the social' corresponds to the period from 1900–1968, with policy analysis as one manifestation of this approach to law. See D. Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in D. Trubek and A. Santos (eds.), *The New Law and Economic Development: A Critical Appraisal* (2006), 19.

26 See Gould and Barkun, *supra* note 3, at 230; see also A. Cohen, 'Negotiation, Meet New Governance: Interests, Skills, and Selves', (2008) 33 *Law and Social Inquiry* 503.

27 Letter from H. Dillard to R. Fisher, 8 December 1964, Roger Fisher Papers [RFP], Harvard Law School Special Collections, Box 1, Folder 2.

28 See W. Eskridge, Jr., and P. Frickey, 'The Making of *The Legal Process*', (1993) 107 *Harvard Law Review* 2031. On the relationship between facts and values in legal process, see W. Eskridge, Jr., 'Nino's Nightmare: Legal Process Theory as a Jurisprudence of Toggling Between Facts and Values', (2013) 57 *St. Louis University Law Journal* 865.

29 A. Chayes, T. Ehrlich and A. Lowenfeld, *International Legal Process* (1968). See also M.E. O'Connor, 'New International Legal Process,' (1999) 93 AJIL 334, at 336–7.

30 Letter from R. Fisher to H. Dillard, 5 November 1964, RFP Box 1, Folder 2.

31 Letter from R. Fisher to H. Dillard, 16 December 1964, RFP Box 1, Folder 2.

https://doi.org/10.1017/S0922156516000509 Published online by Cambridge University Press

Fisher differed most strongly with McDougal: acknowledging partial perspectives did not mean denying the reality of the underlying laws.[32] Rather than privileging the social, Fisher emphasized the mutual reliance of law and society on each other. Questions about the relationship between facts and norms remained at the center of these diverse approaches to international law.

3. Nukes and normativity

Nuclear weapons raised the stakes of controlling armed conflict; violating the rules prohibiting the use of nuclear force could well be illegal, but in a world governed by the logic of mutually assured destruction, legalistic responses seemed rather inadequate.[33] The challenge was to understand the incentives that would facilitate compliance with law,[34] including when the rules had already been violated.[35] This was a question of strategy – in which law would play its part, but no more than that.[36] A legalistic framework seemed to rely too heavily on rules external to the political process, against which the rational calculation of incentives promised a more realistic basis for creating a stable peace. But taken too literally, models also had the potential to devolve into sterility and formalism, far abstracted from lived reality. While primarily associated (in the popular imagination[37] and in the halls of power[38]) with military strategists, formalistic social science models were also taken up by researchers focused on building lasting peace *without* the use of militaristic means.[39] The tools of rational calculation may not have been ideologically neutral, but neither were they exclusively the property of one side or the other.

The analytical foundation for the formal analysis of strategy was laid by Thomas Schelling in *The Strategy of Conflict* in 1960. This study built upon the insights of game theory applied to competitive, zero-sum scenarios as well as the insights of organizational behavior and communication theory regarding co-operation.[40] Decision-makers faced strategic scenarios that were at least partly nonzero-sum, involving co-ordination problems whose solutions required a certain degree of open communication.[41] Strategy in nonzero-sum games required each party to credibly signal to the other and to accurately read the other's signals in return.[42] A

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32 R. Fisher, 'Review: Law and Policy in International Decisions', (1962) 135 *Science* 658, at 659. Whether or not Fisher accurately read McDougal is another matter.

33 See G. Schwarzenberger, *The Legality of Nuclear Weapons* (1958), 59: '[A] treaty outlawing the use of even the whole "family" of nuclear weapons would be grotesquely incongruous to the challenge confronting us. As hitherto, the world powers would continue to prepare themselves for the contingency that the other side would break its solemnly pledged word, and everything would remain exactly where it was before'.

34 See R. Fisher, 'Bringing Law to Bear on Governments,' (1961) 74 *Harvard Law Review* 1130, at 1140.

35 R. Fisher, 'Enforcement of Disarmament: The Problem of the Response', (1962) 56 *Proceedings of the American Society of International Law at its Annual Meeting* 1, at 10.

36 See C. Boasson, 'The Place of International Law in Peace Research', (1968) 5 *Journal of Peace Research* 28, at 30; see also I. Brownlie, 'Some Legal Aspects of the Use of Nuclear Weapons', (1965) 14 *International and Comparative Law Quarterly* 437.

37 See, for example, the movie *Dr. Strangelove or: How I Learned to Stop Worrying and Love the Bomb* (1964).

38 See, for example, F. Kaplan, *Wizards of Armageddon* (1983).

39 See, for example, K. Boulding, 'Is Peace Researchable?', (1963) 6 *Background* 70.

40 See T. Schelling, *The Strategy of Conflict* (1980), 14–15.

41 Ibid., at 83.

42 Ibid., at 160.

https://doi.org/10.1017/S0922156516000509 Published online by Cambridge University Press

significant problem at the height of the Cold War was how to develop the institutions, mechanisms, and trust that would allow for this exchange of information without neglecting the zero-sum dimensions of conflict.

The language of game theory found wide application in explaining strategic situations, beyond the boundaries of its academic discipline. At the 1963 meeting of the American Society of International Law (ASIL), in a panel chaired by Fisher, Schelling noted that the common comparison of international conflict with the game of 'chicken' (made by none other than Bertrand Russell[43]) inappropriately glossed over certain analytic distinctions. It did not take two to play 'chicken', it took two to *avoid* the game; within the structure of the game, unilateral avoidance was simply 'chickening out'.[44] Third parties could also thrust the game upon its players.[45] Addressing international lawyers, who he described as 'the one group of social scientists that can be described as applied game theorists',[46] Schelling emphasized the need for collaborative approaches to avoid games of chicken, but observed that in a world of states that believed in playing chicken, the only solution was to play the game properly.[47] Leaving the game required collective action.

Formal methods promised to unpack the concept of conflict by identifying the background forces.[48] The classical division of international law between 'war' and 'peace' had been reformulated by Friedmann into one of 'coexistence' and 'cooperation',[49] but for Schelling the relevant distinction was based on the structure of the underlying interests: zero-sum and nonzero-sum.

International lawyers and military strategists both understood that rules affected the likelihood of either deterring or escalating conflicts. Strategists quickly recognized the shortcomings of bright-line doctrines, such as 'Massive Retaliation':[50] they were clear signals that would, in theory, deter adversaries, but would always put credibility on the line when tested.[51] The question was how to respond to threats in ways that would prevent further escalation.[52] The Kennedy and Johnson administrations employed a doctrine of 'flexible response' that required every action to be met with its equal and opposite reaction; 'flexibility' meant proportionality without discrimination, inflexible in the face of any given threat.[53] Such *in*flexible procedural commitments led to *lex talionis*.[54]

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43 See B. Russell, *Common Sense and Nuclear Warfare* (1959).

44 T. Schelling, 'The Threat of Violence in International Affairs', (1963) 57 *Proceedings of the American Society of International Law at Its Annual Meeting* 103, at 106.

45 Ibid., at 107.

46 Ibid., at 108.

47 Ibid.

48 See, for example, J. Galtung, 'A Structural Theory of Aggression', (1964) 1 *Peace Research* 95.

49 See D. Kennedy, *International Legal Structures* (1987), 198.

50 See J.L. Gaddis, *Strategies of Containment: A Critical Appraisal of Postwar American National Security Policy* (1982), 151.

51 Ibid., at 171–2.

52 See generally H. Kahn, *On Escalation: Metaphors and Scenarios* (1965).

53 Gaddis, *supra* note 50, at 235–6.

54 H. Kahn, 'Nuclear Proliferation and Rules of Retaliation', (1966) 76 *Yale Law Journal* 77, at 86. He allowed that 'some allowance might be made for responsible authorities to avoid at least the most rigid kind of "city-for-city" retaliation', see ibid., at 88.

Much depended on what one understood the scope of conflict to be. Fisher advanced the notion of law as a means of 'fractionating' conflict, breaking large, complex, and intractable problems into sub-problems that could be addressed through legal analyses and narrow deals.[55] This was particularly important in the context of the totalizing conflict that characterized the Cold War.[56] As Fisher told an arms control official at the State Department: 'The main point ... is that law is not primarily a way of avoiding bad conduct but rather a way of coping with it so that it does not get out of hand.'[57] Herman Kahn made a similar point: '[Conflict] is as inevitable as death and taxes. But conflict need not inevitably lead to ... crises and escalations.... One important aspect of escalation control and crisis management, then, is simply conflict management.'[58] The system of rules that formalized US-Soviet negotiations constituted, in his view, the most important contribution to arms control by creating opportunities for legal analysis and negotiation on concrete issues.[59]

Fisher had identified three basic interests in international conflict: winning a particular dispute, preserving power, and preserving respect for a given procedure or structure. The only way to reconcile these goals was to lower the stakes of a given dispute so that a party could stand to lose it while maintaining the health of the overall system.[60] If all disputes were of such gravity that they could not be lost, no stable order could be maintained. Law could not be applied meaningfully to existential matters.[61] Fisher argued that the insistence on keeping problems bundled together and requiring all-or-nothing solutions inhibited the search for workable results.[62] In the context of the Cold War, large issues of principle and ideology could not be negotiated; small issues could be dealt with in a more textured and sensitive manner, resulting both in a greater likelihood of settlement and better results.[63] This carried the risk of multiplying these smaller conflicts – though for some analysts (such as Kahn) this was better than having the only choices be 'holocaust or surrender'.[64]

4. The critique of strategy

Fisher's research agenda focused on how law could help resolve international crises. He had fought in the Second World War and understood that international law could potentially be a matter of life and death.[65] At Harvard, he examined how scholars

55 R. Fisher, 'Fractionating Conflict', in R. Fisher (ed.), *International Conflict and Behavioral Science: The Craigville Papers* (1964), 91.
56 See R. Falk, *Legal Order in a Violent World* (1968), 80.
57 Letter from R. Fisher to F. Eimer, 14 January 1976, RFP Box 31, Folder 6.
58 Kahn, *supra* note 52, at 260.
59 Ibid., at 261.
60 Letter from R. Fisher to R. Birmingham, 7 May 1974, RFP Box 35, Folder 1.
61 See J. Stone, 'Law, Force, and Survival', (1961) 39 *Foreign Affairs* 549, at 551: 'The refusal by states to accept third-party judgment in that wide range of conflicts which most threaten international peace is a stark fact of life. And no hopes for a rule of law, however eloquently expressed, are likely to make it disappear.'
62 Fisher, *supra* note 55, at 106.
63 Ibid., at 103.
64 Kahn, *supra* note 52, at 150.
65 R. Bordone, 'In Memoriam: Roger Fisher', (2013) 126 *Harvard Law Review* 875, at 876.

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could identify opportunities to meaningfully engage with practice. Disciplinary and professional boundaries were permeable for Fisher's circle. Fisher, at Harvard Law School, remained affiliated with Kahn's Hudson Institute, while Kahn published in law journals. Fisher addressed the incongruity of this situation:

> Some friends are confused by the fact that I am an active board member of both the peace-concerned Council for a Livable World and Herman Kahn's Hudson Institute … The focus of my interest throughout this time has been on process: How does one best carry on a conflict so as to advance the interests in which he or she is legitimately interested without causing needless violence?[66]

Fisher saw the work of military strategists as contributing to the project of achieving international peace.

Other proponents of the nascent academic discipline of peace and conflict studies also recognized the proximity of their work to that of strategists;[67] the difference was in the orientation of the analyst to the possibility of conflict.[68] Prominent game theoreticians affiliated with peace research included Kenneth Boulding, Anatol Rapoport, and Thomas Schelling – the latter two also central contributors to game theory as applied to nuclear strategy.

Even as Fisher respected how game theorists of all persuasions formulated crisp conclusions about international behavior, he also recognized the limitations of models as guides to actual conflict resolution. Fisher outlined two criticisms of game theory: that it accepted the form of the game as given, and that it avoided the problem of the selection of preferences.[69] His ideas for future directions of research would scale down, advance commitments of actors, reflect on the relationship between means and ends, and on 'independent' and 'joint' decisions, and examine opportunities to break out of a game's framing.[70] The danger of game theory was that concern with playing the game well naturalized the form of the game itself; Fisher's project was to redirect attention to how the rules and the stakes of the game were defined. One of his 'major problems' with the use of formal models was 'the extent to which making game theory assumptions tends to structure a problem and affect our thinking in ways that are not constructive. There is no such thing in life, all things considered, as a zero-sum game'.[71]

In the mid-1960s, a group of game theorists and lawyers, convened by Fisher under the auspices of the American Academy of Arts and Sciences, inaugurated a searching critique of the application of game theory to international conflict that probed the contested nature of the social science's positive and normative commitments.[72] The critique contained three elements. First, examining the relationship between the content and the frame of the model: how did the analyst construct the model, and

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66 R. Fisher, *Dear Israelis, Dear Arabs: A Working Approach to Peace* (1972), 3.
67 See J.W. Burton, '"Peace Research" and "International Relations"', (1964) 8 *Journal of Conflict Resolution* 281, at 285.
68 See K. Boulding, 'The Role of Law in the Learning of Peace', (1963) 57 *Proceedings of the American Society of International Law at Its Annual Meeting* 92, at 94.
69 R. Fisher, Notes on Schelling's *What is Game Theory?*, 1966, RFP Box 69, Folder 20.
70 Ibid.
71 Letter from R. Fisher to S. Eberhard, 22 June 1976, RFP Box 31, Folder 6.
72 R. Fisher, 'Introduction', in Fisher (ed.), *supra* note 55, at 1.

https://doi.org/10.1017/S0922156516000509 Published online by Cambridge University Press

what assumptions governed the process of model formation? Second, did models offer *positive* explanations of behavior, or were they primarily *normative* appeals to a certain kind of rationality? Third, to the extent that they were positive models of behavior, what were the normative implications of acting upon them? These concerns addressed the major questions of designing a robust legal framework for the nuclear age.

The heart of the critique came from the iconoclastic game theorist Anatol Rapoport. He highlighted two dangers of strategic thinking: the over-simplification of complex problems to create workable models, and misrepresentation of facts by forcing them into a model's existing analytical boxes.[73] Crucially, Rapoport described these shortcomings as internal to the process of formal modeling itself, and in his view they had to be addressed by bringing in social norms and ethical values that lay outside of the immediate strategic conflict.[74] The problem lay in the rigidity that a model assumed as it was formulated.

Decisions regarded as 'wise' were often not 'rational' and vice versa. Rapoport's example was a particularly dangerous military mission with a 25 per cent survival rate that could be done equally effectively by simply sending half the number of pilots on suicide missions. Even if such an approach saved lives without sacrificing military effectiveness, it violated basic norms of military responsibility and conduct, and was not entertained.[75] This fact of decision making suggested that there was more at play than simply maximizing results and minimizing costs. Baseline concepts of fairness mattered, even if 'seemingly "irrational"'.[76] Formal methods could optimize within certain rules, but those rules themselves had independent origins and remained external to the formal analysis.

More profound problems related to the treatment of uncertainty in strategic analysis, in which 'the drive to simplify leads to a reduction of the problem to a more definite one: that of decision under risk where the probabilities of outcomes are known'.[77] The distinction between calculable risks and unknowable uncertainties was analytically fundamental, but the drive to apply models required treating uncertainties as risks, making the game more mechanical than it would otherwise be. The assumption of a predictably rational actor on the other side of the game turned a dynamic, two-person game into one of simple maximization, pitting the subject against a naturalized enemy.[78]

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73 A. Rapoport, 'Critique of Strategic Thinking', in Fisher (ed.), *supra* note 55, at 211, 212.

74 Ibid., at 223.

75 Ibid., at 227. Another vivid example was Kahn's analysis of the Strangelovean 'Doomsday Machine,' in which the device's perceived strategic advantages indicated 'that the way we talk about these weapon systems is wrong'. He observed that 'Except for some intellectuals, especially certain scientists and engineers (a curious exception that may reflect some inadequacies in technical education) who have overemphasized the single objective of maximizing the effectiveness of deterrence, the device is universally rejected. It just does not look professional to senior military officers … and it looks even worse to senior civilians. The fact that more than a few scientists and engineers do seem attracted to the device is disquieting'. See H. Kahn, 'The Arms Race and Some of its Hazards', (1960) 89 *Daedalus* 744, at 748.

76 Rapoport, *supra* note 73, at 228.

77 Ibid., at 228.

78 Ibid., at 229 and 233. On this naturalization of the enemy, see P. Galison, 'The Ontology of the Enemy', (1994) 21 *Critical Inquiry* 228.

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Arthur Waskow, in another contribution to the Craigville Papers, also criticized the unreality of strategic discourse. Strategists:

> are unable to check their hyper-rational constructions with the real world and hence let their mental pictures run away with them, just as the man deprived of all contact by touch, sight, smell, and hearing of the outside world begins to hallucinate in order to make some sort of world for himself.[79]

The metaphor of sensory deprivation highlighted the practical dangers of letting theory guide policy while also implicitly reaffirming the necessity of recognizing one's perspective rather than striving for a disengaged, purely analytical stance. The seriousness of the issue and its manifest madness generated both earnestness and dark humor.[80]

Models were tools in search of problems to solve, but it was rarely obvious what the problem was.[81] The process through which actual disputes in all of their complexity were translated into models receded into the background once the model was created. This process involved making value-based judgment calls about behavior and what would be factored into the analysis. The power of the model was in its simplicity, but this simplicity required deviating from reality – precisely the problem with legal formalism that these scientific methods were meant to resolve.

The requirements of formalization pushed analysts to oversimplify models in search of what was analytically tractable rather than what was realistic. Excessive formality trivialized the problem and prevented taking a properly psychological view of it. Ultimately, formal models revealed more about the analyst than the problem: 'in "solving" such a problem we do not discover a portion of reality and act upon knowledge so obtained; we make a portion of reality'.[82] This was not necessarily a shortcoming. To the extent that an analyst wanted to make normative claims about international behavior, it could be perfectly appropriate to 'make a portion of reality'. But to the extent that modeling posed as positive analysis of behavior, it could be dangerously wrong.

To their proponents, the value of these theories was not that they described how actors *actually* behaved, but rather that they explained how rational actors *should* behave under certain assumptions. Reflecting upon this several decades later, Fisher explained:

> Our approach does not assume a world of rational actors. On the contrary, we are trying to reason about reality, with all its irrational components … If we do well at trying

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79 A. Waskow, 'Nonlethal Equivalents of War', in Fisher (ed.), *supra* note 55, at 123, 139.

80 See S. Ghamari-Tabrizi, *The Worlds of Herman Kahn: The Intuitive Science of Nuclear War* (2005). Fisher proposed surgically embedding nuclear launch codes in the heart of an aide, requiring the President to 'look at someone and realize what death is – what an innocent death is. Blood on the White House carpet'. Friends at the Pentagon responded that 'Having to kill someone would distort the President's judgment. He might never push the button.' See R. Fisher, 'Preventing Nuclear War', (1981) 37 *The Bulletin of the Atomic Scientists* 11, at 16. Alex Wellerstein notes the contradiction inherent in the combination of 'the coldly logical and the deeply emotional' at the heart of deterrence. See A. Wellerstein, 'The Heart of Deterrence', *Restricted Data*, 19 September 2012.

81 Rapoport, *supra* note 73, at 236.

82 Ibid., at 234–5. See also M. Shubik, 'Some Reflections on the Design of Game Theoretic Models for the Study of Negotiation and Threats', (1963) 7 *Journal of Conflict Resolution* 1, at 2.

https://doi.org/10.1017/S0922156516000509 Published online by Cambridge University Press

> to figure out what ought to be done, we may earn a larger role for reason than it now plays. The approach is to ask, 'What is the best advice we could give?' The more often reason produces good answers the more likely it is to be called upon in the future.[83]

The widespread adoption of these methods could possibly narrow the gap between prediction and reality. At the same time, theory could only go so far in influencing the behavior of decision makers. Formal strategic models were vehicles for improving the quality of decisions, not a substitute for judgment.

Defenders of formal methods, such as D.G. Brennan, an analyst at RAND, argued that the theory did not determine behavior. Far from being captives of the formal models of the theory, most strategists did not know the theory at all.[84] Many alluded to the insights of game theory without engaging in formal analysis.[85] The utility of game theory done right, for Brennan, was that it could provide intellectual clarity, not a roadmap to resolving conflicts. Ultimately, the game theorists defended theirs as a deeply human enterprise. Said Brennan,

> they do share a belief that it is important to try to understand the problems of war and peace much better than we have as yet, even at some risk that the understanding proves bad for us … it is not merely love of abstractions that makes most of the known strategists work at their trade. In part, it is precisely 'a passionate concern for human values'.[86]

This connection between ethical inquiry and the analysis of rationality was crucial to such peace studies scholars as Boulding[87] and Rapoport, who had written that '[t]he idea of turning the cold and brilliant light of mathematical investigation on a subject where passions obscure reason is in itself the embodiment of the best in scientific ethics'.[88]

David F. Cavers, at Harvard Law School, explained to Brennan the perception that popular discussions of strategic analysis promoted a kind of militant sensibility:

> we have been in … a period in which strategic notions permeated a great deal of public thinking about our international relations, and, as concern with this subject (a fascinating one to the amateur) grew widespread, I believe some of the grosser faults which Rapaport [sic] attributes to the experts became manifest in their publics – even, I have noted on occasion, among devoted peaceniks.[89]

Cavers noted the intellectual affinity between the military-oriented strategic analysts at the Hudson Institute, RAND, and the Pentagon, and the scholars associated with the study of peace who had begun to draw upon the same techniques.[90] The question was whether the militaristic origin of these intellectual tools would

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83 R. Fisher et al., *Coping with International Conflict* (1996), 13.
84 D.G. Brennan, 'Strategy and Conscience', (1965) 21 *The Bulletin of the Atomic Scientists* 25, at 27.
85 Schelling, *supra* note 40, at 119. See also Shubik, *supra* note 82, at 1.
86 Brennan, *supra* note 84, at 29.
87 K. Boulding, 'The Ethics of Rational Decision', (1966) 12 *Management Science* B–161, at 162.
88 A. Rapoport, 'Lewis F. Richardson's Mathematical Theory of War', (1957) 1 *Conflict Resolution* 249, at 298. Elsewhere, he wrote that 'the ethics of science must become the ethics of humanity. I hold this view because I do not believe that one can separate either knowledge of what is from desires of what ought to be, or means from ends'. See A. Rapoport, 'Scientific Approach to Ethics', (1957) 125 *Science* 796, at 798.
89 Letter from D. Cavers to D.G. Brennan, 8 July 1965, RFP Box 2, Folder 2.
90 Ibid.

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influence the content of the analysis.[91] Cavers noted that building foreign policies on the basis of strategic analysis would foreground the strategic element in disputes and could escalate conflicts that the approach was designed to avoid: 'Clausewitz's dictum may be not only right but reversible.'[92] The arrow of causality was bi-directional: the existence of certain models at hand could lead to disputes being framed in ways that were most amenable to resolution by those tools. Brennan admitted that there were legitimate concerns about the overuse of strategic analysis, drawing parallels between the construction of elaborate plans and the entangled sets of alliances and plans that led to the First World War.[93] As Fisher wrote (in a defence of the circle of nuclear strategists against a critique by the sociologist Irving Horowitz[94]), '[t]he assumption of unchanging hostility which underlies much strategic thinking directs attention away from the problem of altering that hostility'.[95] The frame of analysis naturalized the behavioral and normative assumptions with which it was constructed.

The danger of applying models unthinkingly compounded the dangers of being unreflective about the construction of the model. Furthermore, the value of the model was in being a guide to action within dynamic games; as models attempted to predict the behavior of other parties, they naturalized responses and made them more likely to occur. The theory was caught between describing the world and creating it, without being fully aware of doing either. While the logic of behavior within a particular game could be analyzed with rigor and precision, Fisher recognized that meta-rules determined which game was being played and how the rules of the game could be changed, and that the partial, situated perspectives of the players differed from the 'God's-eye' view of the analyst.[96] The contribution of lawyers to the early critiques of behavioralist social scientific models was in their appreciation of the complexity of the application of rules. Their emphasis was on the meta-rules that determined which game was being played in the first place, precisely the level of intervention where international law could have the most immediate impact.

5. Models as heuristics for devising and advising

The Craigville Papers were one instance of international law engaging with the day's cutting edge political science as a partner. Lawyers sought inspiration from the developments of political science while also engaging in the processes of both internal and external critique. For Fisher, any sources of potentially useful insights

91 Letter from R. Fisher to S. Melman, 27 October 1969, RFP Box 34, Folder 18.
92 Letter from D. Cavers to D.G. Brennan, 8 July 1965, RFP Box 2, Folder 2.
93 Brennan, *supra* note 84, at 30.
94 I.L. Horowitz, 'The Conflict Society: War as a Social Problem', in H. Becker (ed.) *Social Problems: A Modern Approach* (1966), 695.
95 Letter from R. Fisher to W. Gum, reviewing I.L. Horowitz's 'The Conflict Society', 30 March 1965, RFP Box 1, Folder 1.
96 See B. Patton, 'In Memoriam: Roger Fisher', (2013) 126 *Harvard Law Review* 890, at 891: 'Roger thought Harvard should change its motto from "Veritas", the singular "truth", to "Partial Truths and Illuminating Distortions".' On the 'God's-eye' view and situated perspectives generally, see D. Haraway, 'Situated Knowledges: The Science Question in Feminism and the Privilege of Partial Perspective', (1988) 14 *Feminist Studies* 575.

https://doi.org/10.1017/S0922156516000509 Published online by Cambridge University Press

into behavior or into the structure of the international order could inform legal intervention. But law could not be captive to the claims of social scientists. Models could not replace the need to think about the analytical framing of specific problems. For Fisher, this position on methodology reflected his understanding of the subjects of the law as simultaneously free and constrained, neither powerlessness nor omnipotent:

> If a person takes everything as determined, he can watch the world as a pure spectator sport, confident that nothing he can do will affect anything. If he operates on the assumption that there are no limits on his power, he is certainly wrong and is likely to be ineffective. Between these two extremes, each of us, explicitly or implicitly, takes some forces and conditions in the world as given and focuses on an area in which he believes a change can be made.[97]

To find those points of intervention, Fisher created a typology of important scholarly tasks and believed that academics neglected certain important questions. Two seemed particularly fruitful: devising options for conflict resolution, and advising decision-makers – be they politicians, journalists, academics, or otherwise.[98] By focusing his efforts on these 'points of choice,' Fisher wanted to improve the process of decision-making itself.

Decision-making was a central theme in mid-century social science, from neoliberal theories of individual decision-making, to technocratic theories of optimization, to social theories identifying constraints on agency.[99] Any and all of these could be mined for insights. For the creative process of 'devising', Fisher sought out individuals who could bring diverse perspectives to bear on the process of brainstorming.

Fisher defended the scholarly merit of his engaged approach to scholarship:

> I flatly reject this view that it is more scientific to adopt the vantage point of a pure spectator rather than of a potential actor. For a pure spectator there are no criteria of relevance (. . .) trying to answer the question of what ought to be done requires a more perceptive eye on what actually happens than does a factual description of foreign affairs.[100]

Fisher's vision of international law scholarship was *situated*[101] and *problem-centered*.[102] A situated perspective reflecting on how decisions are made *in situ* revealed more, for Fisher, than the 'neutral' position of the analyst.[103] Fisher

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97 Fisher, *supra* note 72, at 4.

98 Letter from R. Fisher to D. Bell, 8 March 1974, RFP Box 35, Folder 1.

99 See Erickson, *supra* note 7.

100 R. Fisher, *International Conflict for Beginners* (1969), xv–xvi.

101 Other studies have situated problems in international law within complex historical and political contexts; see O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance Towards Culture, History and Community* (2000). However, situated analysis as a form of legal scholarship (see J. d'Aspremont, *Epistemic Forces in International Law* (2015), 6–8) remains distinct from bringing scholarly notions of situatedness to bear on legal practice.

102 Problem-centricity is itself problematic. The loaded term 'problem-solving' is often read as being in some way technocratic; emphasis is placed on the *solving*, assuming that the definition of the problem remains stable. Under this reading, problem-solving is read as precluding the possibility of critically appraising the 'problem'. See H. Charlesworth, 'International Law: A Discipline of Crisis', (2002) 65 *Modern Law Review* 377, at 382.

103 Michael Barkun made a related point at the 1971 ASIL roundtable: 'Law-in-action is never as satisfactorily viewed from the top as from the bottom. We learn far more about American law by riding around in police

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focused on the myriad actors whose decisions constituted the stuff of international law; there could be no sharp distinction between scholarship in international law and concrete action in the international system.[104] The international law that Fisher envisioned was above all else pragmatic, methodologically heterodox, and attuned to the lived reality of legal practice.

6. Building theories of advising and problem-solving

Fisher wanted to move international law away from big, Austinian questions of enforcing compliance with the standing rules of international law to creating a system to resolve small questions of reasonably complying 'with future-oriented decisions that deal with a particular event'.[105] The crucial intervention in international law for him was to get decision-makers to recognize the health of the international legal system as one of their primary interests. One of the most valuable roles for the international lawyer was therefore to educate the statesman about the importance and the utility of supporting mechanisms for dispute resolution.[106]

Fisher identified four basic purposes in writing *Dear Israelis, Dear Arabs* in 1972. Two were straightforward: to give his views on how parties might approach the resolution of the Arab-Israeli conflict, and to stimulate discussion about conflict resolution strategies generally. The other two concerned scholarship in international law: to explore the use of *advice* as a means of understanding conflict, along the lines of Machiavelli's project in *The Prince*,[107] and to prompt further inquiry into the purposes of legal scholarship and of legal education.[108] The question of how theory could be applied to understand specific facts struck him as 'the cutting edge of theory'.[109]

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cars than by listening to oral arguments before the Supreme Court. And it is an equally good bet that we would profit more by examining the day-to-day functioning of an embassy, law firm, or foreign ministry than by expending the same energies on a critical Security Council debate or on World Court litigation.' See M. Barkun, 'The Social Scientist Looks at the International Law of Conflict Management', (1971) 65 AJIL 96, at 100.

104 The recent controversy regarding Harold Koh's position as a visiting professor at NYU suggests the need for robust scholarship on the role of advising a state on matters of international law. See, for example, R. Goodman, 'Advancing Human Rights from Within: The Footsteps of Harold Koh', *Just Security*, 10 April 2015. Appropriately enough, within contemporary scholarship, Koh's transnational legal process comes the closest to explaining how advising works. See H. Koh, 'Transnational Legal Process', (1996) 75 *Nebraska Law Review* 181, at 207.

105 R. Fisher, *Points of Choice* (1978), 28.

106 Ibid., at 21.

107 Fisher, *supra* note 66, at 2. This invocation of Machiavelli recalls Koskenniemi: 'The fantasy position of the managerialist is that of holding the prince's ear – hence the anxious concern for concrete results, insistence on the policy-proposal at the end of the article.' See M. Koskenniemi, 'The Politics of International Law – 20 Years Later', (2009) 20 EJIL 7, at 15. But for Fisher, the purpose of keeping the prince in mind is not to drive towards immediate implementation of solutions, but rather that analysis must always keep a specific decision-maker in view, and be explicit about how that choice of decision-maker informs the character of the solutions considered.

108 Fisher, *supra* note 66, at 2.

109 Although Fisher did not flesh out this thought in detail, the idea of using theory to understand facts – inverting the traditional empiricists' command to understand theory in light of underlying facts – seems to reflect Thomas Kuhn's influential observations from *The Structure of Scientific Revolutions* concerning the theory-ladenness of facts, cutting-edge theory in the mid-1960s.

Fisher dispensed with the search for causal explanations of crises, recognizing that historical analysis opened up questions rather than definitively resolving them.[110] He also rejected doctrinal legal analysis; international crises would not be resolved by a tribunal employing adjudicative methods, and so there was little point in pretending that judges were the appropriate decision-makers.[111] This was part of a conscious re-orientation within Fisher's own work, which he described in a letter to the President of the International Court of Justice, Manfred Lachs, as being 'more about law than within it'.[112]

Fisher nevertheless framed his analysis in legal terms, precisely because law mattered beyond the courtroom. *Dear Israelis, Dear Arabs* contains numerous draft legal texts that translated political statements into carefully-worded documents explaining legal positions and procedures, such as drafts of possible Security Council resolutions.[113] This kind of legal analysis maintained its prospective character and was directed to the immediate parties to the dispute.[114]

It was precisely by rejecting litigation-oriented legal analysis that he could explore how legal doctrines fit into the positions of the actors as they understood them. Fisher maintained that the situated perspectives offered in his letters in *Dear Israelis, Dear Arabs* did not cohere into any overarching objective perspective:

> Each letter contains advice that is submitted as being worthy of consideration whether or not any other party follows the advice that is given them. Each letter stands on its own merits, not as part of a master plan. Each letter is independent of the others. I was not trying to play God.[115]

The structure of the project nevertheless showed Fisher's belief that it was important for an analyst to inhabit multiple perspectives on the problem, even if he or she ultimately had to advocate for one.[116]

Against the perception that international crises were spaces devoid of legal restraint, Fisher and his colleagues studied decision-making to show that arguments based in international law mattered. But the attempt to identify legal arguments in international practice raised the theoretical question of what counted as legal argumentation in the first place. The importance of this questioning was twofold: first, to note that empirical work that explicitly disavowed abstract inquiry necessarily drew upon (unacknowledged) theoretical concepts, and second, to identify how legal theory could develop greater sophistication by taking the complexities of legal practice seriously.

The ASIL supported Fisher's research on the application of law in international crises. Four scholars each wrote a case study – Thomas Ehrlich on Cyprus, Robert

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[110] Fisher, *supra* note 66, at 9–10.
[111] Ibid., at 10.
[112] Letter from R. Fisher to M. Lachs, 6 May 1974, RFP Box 35, Folder 1.
[113] Fisher, *supra* note 66, at 51–8.
[114] Ibid., at 10.
[115] Ibid., at 5.
[116] Ibid., at 12–13. He observed that '[t]he most interesting aspect of the exercise was that of putting myself first as an adviser to one party and then as an adviser to another'. See Letter from R. Fisher to M. Lachs, 6 May 1974, RFP Box 35, Folder 1.

R. Bowie on the Suez, Abram Chayes on Cuba, and Georges Abi-Saab on the Congo – with Fisher supplying a concluding volume to build 'a better theoretical account of the international system and the roles which law can play in it'.[117] The four case studies gave their authors (and invited commentators) opportunities to weigh in on theoretical issues as well, shaped by the presence of leading international legal process scholars, such as Chayes and Ehrlich. The ASIL project focused on identifying concrete ways in which law influenced – or could have influenced – decision-making: by influencing the formulation of problems; by constraining the space of available actions; by creating opportunities to channel authority and power; by providing a means for advocacy by policy-makers; and by authorizing international organizations to play a role in events.[118] A recurring feature of the essays is the complex relationship between the empirical project of studying the various roles of international law, politics and strategy in crises, and the theoretical project of defining what law is. Hans Linde offered a comment that identified the heart of the problem: 'To determine what role law played *in fact*, and how, presupposes that we recognize evidence of law when we see it. It presupposes either stipulated or implicit criteria for "law".'[119] As the case studies made clear, the legal questions were not always obvious.

In his study of the Suez crisis, Robert Bowie argued that amidst the strategic considerations at play in the control of the canal, the actors made legal claims,[120] even if the legality of the outcome was hard to defend.[121] For Stephen Schwebel, commenting on Bowie's essay, the critical legal element in the Suez crisis was that the violation of the Charter was instigated by two of the world's leading democracies, threatening the UN project as a whole.[122] Given these particular actors, the integrity of the international legal system required identifying a place for international law.

Fisher acknowledged the primary role of politics in crises.[123] However, he maintained that even in politicized crises, '[g]ood legal arguments carry weight. A good lawyer can be persuasive in convincing one of the legality, and hence, to some extent, of the justice, of both the ends which a state is pursuing and the means employed'.[124] The connection between the legality of the process and the legality of the substantive ends figured prominently in this analysis, reflecting Fisher's longstanding interest in law as structuring processes of dispute resolution. As he put it:

> [t]he crisis-prevention aspect of an international system lies not so much in the normative content of the substantive rules as in the system of rules itself and in the machinery for coping with differences among states … The legal system we seek is a way of dealing with man's fallibility, not ending it.[125]

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117 Fisher, *supra* note 105, at 7.
118 T. Ehrlich, *Cyprus, 1958–1967* (1974), 41, 120–1. See also G. Abi-Saab, *The United Nations Operation in the Congo 1960–1964* (1978), 198–9.
119 Ehrlich, *supra* note 118, at 142–3.
120 R. Bowie, *Suez 1956* (1974), 98–9.
121 Ibid., at 115.
122 Ibid., at 140-1.
123 Fisher, *supra* note 105, at 73.
124 Ibid., at 69.
125 Ibid., at 23–4.

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The major innovative move was in exposing the complexity of international legal procedure and the ways in which such procedures were contested by decision-makers in moments of crisis.

This point was driven home in the essay by Chayes, who had served as Legal Adviser at the US State Department during the Cuban Missile Crisis. As Chayes described it, the process of giving and receiving legal advice did not operate mechanistically. As he explained:

> decision-making is *not* a wholly integrated and rational activity. It involves large elements of misperception, faulty evaluation, miscalculation, failure of communication. These are not occasional or sporadic lapses in an essentially rational exercise. They are massive and they are endemic. Most important, decision-making is a *corporate* process in which individual participants react to different constellations of personal, bureaucratic, and political motives and constraints.[126]

Both the subjects of international law and the interests of those subjects had to be problematized, for:

> law is *not* a set of fixed, self-defining categories of permissible and prohibited conduct. This conception is invalid even as to domestic law, but it is especially so as to international law because of the diffuse modes of establishing and clarifying rules.[127]

Chayes argued that the contestability of legal analysis was to its benefit. Legal analysis would rarely provide an unequivocal solution, but '[i]n return for shedding its oracular pretensions' it could help identify the points of genuine controversy.[128] Furthermore, knowing that decisions could be subjected to legal scrutiny would have a disciplining effect.[129]

One of the principal tasks of the international lawyer was therefore to reframe the problems facing the decision-maker in order to reveal the structure of the problem and the available options. Fisher believed that doing so would show why international law mattered for the conduct of international relations: 'The key elements of a crisis are uncertainty as to what should happen next and large stakes. The key elements in effective international machinery are certainty as to the next step and the ability to keep the stakes small.'[130] Law would fractionate conflicts and bring 'analytical clarity' to international politics 'to increase the role of reason'.[131]

The application of international law to international crises occurred through the intervention of international lawyers. Even when international legal norms were also internalized by other actors (as Louis Henkin emphasized[132]), the application of those norms nevertheless depended on the invocation of certain concepts of law and legal obligations that could be traced back to the work of lawyers. As legal norms became more complex, or simply more irregular, room for discretion increased and the specific psychology and ideas of individual lawyers mattered more in the

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126 A. Chayes, *The Cuban Missile Crisis* (1974), 101.
127 Ibid., at 101.
128 Ibid., at 102–3.
129 Ibid., at 103.
130 Fisher, *supra* note 105, at 23.
131 Ibid., at 20.
132 Chayes, *supra* note 126, at 153.

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implementation. Crises tended to be low-regularity, high-discretion episodes where the situated perspective was vital. Institutionalizing international law would make the application of international law norms more automatic and less subject to the discretion of individual actors. The problem of institutionalizing international law was inseparable from the problem of understanding international law from the perspectives of the various actors in international crises.

While the empirical methodology in the *Points of Choice* project relied upon certain claims about the nature of international law, the empirical findings simultaneously complicated theories about law. Studies of decision-making *in situ* made the idea that legal actors acted on the basis of enlightened self-interest difficult to maintain, while also problematizing the identity of the subjects of international law themselves. The study of decision-making opened up the black box of the state to examine the complicated power dynamics – institutional and simply personal – that shaped a state's legal response.

7. Institutionalizing conflict resolution

Teaching remained an important part of Fisher's work, integrated with ideas about scholarship and practice.[133] Unusually for a law professor, Fisher taught a course for undergraduates at Harvard College. This course encouraged wide-ranging thinking about conflict resolution, with students encouraged to offer specific advice for a chosen 'prince', as Fisher had tried in *Dear Israelis, Dear Arabs*. He described this approach in a letter to Derek Bok as 'teach[ing] students to take an activist or problem-solving approach rather than the descriptive approach of a spectator'.[134] The process of assembling material for this course occurred in parallel with the *Points of Choice* project. Fisher noted the difficulty of designing adequate case studies for the study of conflicts; unlike legal case studies, there were no easy bounds on the structure of these cases.[135]

In addition to these courses, Fisher continued hosting 'devising seminars' on current topics with faculty from throughout the university. It was there that Fisher decided to create a university-wide program dedicated to negotiation, though the idea had been percolating for some time previously.[136] As originally conceived, the negotiation program would focus on resolving international crises. An accompanying clinical program would allow law students to intervene in international conflicts, much in the way that Fisher himself had tried to turn his office at Harvard into 'the State Department on the Charles'.

This change in the substantive orientation of Fisher's work reflected a methodological shift. Howard Raiffa, a 'bona fide game theorist' and an early participant

[133] As he described in a letter to a former student, teaching international law at the University of Connecticut, '[o]ne would like students to learn not so much about law as how to deal with law and how to use law in dealing with problems … An essay on the nature of bicycle riding by one who cannot ride a bicycle is similar to all too many papers by law students'. See Letter from R. Fisher to R. Birmingham, 7 May 1974, RFP Box 35, Folder 1.

[134] Letter from R. Fisher to D. Bok, 6 May 1977, RFP Box 31, Folder 3.

[135] Ibid.

[136] See Letter from R. Fisher to K. Deutsch, 3 April 1974, RFP Box 35, Folder 1.

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in Fisher's circle, distinguished three types of social scientific theories: normative theories, positing how rational actors should behave; positive theories, describing actual decision-making processes; and prescriptive theories, which link the *ought* to the *is*.[137] He identified the last as Fisher's focus. But Fisher's engagements with game theoreticians and with legal advisers reflected his deep concern with the other two strands of scholarship. Fisher recognized that normative theories of rational action were insufficiently grounded in practice to guide behavior (as international legal doctrine could also be), and that existing practices in crises gave short shrift to law.

The goal of the Harvard Negotiation Project was to integrate research, practice, and education in negotiation as a method of resolving international conflict.[138] There was a distinctly evangelical tenor to its mission.[139] Negotiation meant understanding the ways in which conflicts could be resolved, which required getting beyond a fixation with litigation. Negotiation would be a foundational skill for thinking about disputes, including both their theoretical structure and how they were actually resolved.

Notably, Raiffa explained that participating in the world of negotiation altered his own view of what game theory could do.[140] The program was not simply an opportunity for the law to use the insights of social scientific modeling to better understand competitive and collaborative behavior, and neither was it a process of transforming an abstract social scientific research program into a project capable of real-world insights. It was an opportunity to develop something new, building upon a felt need for this kind of interdisciplinarity.[141] But this need seems to have been felt more keenly by the social scientists than by international law scholars.

As the negotiation workshop continued its work in the early 1980s, the focus on international conflicts gradually fell away and the program became focused on negotiation more generally. It engaged with consultants and built ties to the Harvard Business School and the Kennedy School of Government. Its break from the original vision was swift and decisive. As novel and influential as its form of negotiation theory was, its research program has not influenced the shape of international law.

This suggests an important lacuna in our understanding of the international law of the 1960s and 1970s – neglected even by Harold Koh, whose approach to international law among contemporary scholars is arguably closest to Fisher's. Grappling with Fisher's work complicates our stories about mid-century international law by showing an avowedly instrumental approach to international law that questioned whether ends were properly understood, and a managerialism that invoked

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137 H. Raiffa, *Negotiation Analysis* (2007), 1.

138 Report of the Harvard Negotiation Project, 31 March 1981, RFP Box 68, Folder 18.

139 See R. Mnookin, 'In Memoriam: Roger Fisher', (2013) 126 *Harvard Law Review* 886, at 889.

140 Raiffa, *supra* note 137, at xi–xiii.

141 In the 1980 edition of *The Strategy of Conflict*, Schelling lamented the slow progress toward creating this discipline: 'In putting these essays together to make the book [in 1960], I hoped to help establish an interdisciplinary field that had then been variously described as "theory of bargaining", "theory of conflict", or "theory of strategy". I wanted to show that some elementary theory, cutting across economics, sociology and political science, even law and philosophy and perhaps anthropology, could be useful not only to formal theorists but also to people concerned with practical problems … The field that I hoped would become established has continued to develop, but not explosively, and without acquiring a name of its own.' Schelling, *supra* note 40, at v–vi.

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Machiavelli and 'yes-able propositions' to highlight how situational such propositions were, all while embracing the objective reality of the law and the possibilities of Pareto optimality. His method, captured in *Getting to Yes*, did not point to solutions, but rather enabled participants to find their own – perhaps more 'management consultant' than 'managerial'.

The question remains why Fisher's contributions have been excised from our history of international law – the question of what does or does not constitute scholarship in international law. His emphasis on procedure gave him strange bedfellows, making him suspect to partisans on both sides of major questions in international law. He did not simply provide cover for American hegemony, he directly worked with (and publicly defended) some of the most prominent advocates of American power. He embraced the warm, beating heart within the icy world of nuclear strategy before subjecting it to serious critique. These heterodox positions followed from an underlying concern with method. As international lawyers continue to grapple with the stakes of methodological questions, Fisher's scholarly peregrinations deserve a central place in our understanding of our discipline.