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SYMPOSIUM DEBATE TRANSCRIPT: THE PROMISE OF INTERNATIONAL LAW: REALISM VERSUS LEGALISM.

This debate took place at Notre Dame Law School on February 21, 2020 as part of the Volume 10 Symposium. The Symposium featured two panels and a debate, all incorporating the theme of *International Law & the Rule of Law*. Recordings of all three sessions, as well as opening remarks from one of the Journal's faculty advisors, Professor Mary Ellen O'Connell, and the dean of Notre Dame Law School, G. Marcus Cole, can be found on the *Journal of International & Comparative Law* website.¹

Moderator: Professor Michael C. Desch (Department of Political Science, University of Notre Dame)

Debaters: Professor John Mearsheimer (Department of Political Science, University of Chicago) and Professor Mary Ellen O'Connell (Notre Dame Law School)

TRANSCRIPT

Introduction (Rocheville): Good afternoon, everybody. Thank you all for joining us for our featured lunchtime debate: "The Promise of International Law: Realism versus Legalism." My name is Brad Rocheville, the editor-in-chief of the *Journal of International & Comparative Law*, here at the Law School and it is my pleasure to introduce the moderator, Professor Michael C. Desch. Professor Desch is the Packey J. Dee Professor of International Relations at the University of Notre Dame and the founding director of the Notre Dame International Security Center. He specializes in international relations, American foreign policy, international security, political thought, and world politics. Professor Desch previously served two terms as chair of Notre Dame's Department of Political Science and was the founding director of the Scowcroft Institute of International Affairs and the first holder of the Robert M. Gates Chair in Intelligence and National Security Decision-making at the George Bush School of Government and Public Service at Texas A&M University. He also served as assistant director and senior research associate at Harvard University's Olin Institute of Strategic Studies. Professor Desch has written a number of articles and books, including *Cult of the Irrelevant: The Waning Influence of Social Science on National Security*. He previously worked for the federal government at the U.S. Department of State, as a congressional research service for a U.S. Senator. Professor Desch received an M.A. of International Relations, a PhD in Political Science from The University of Chicago. Please join me in welcoming Professor Michael C. Desch.

Desch: Hi. Thanks for the kind introduction. It is ten times longer than the introduction that I'm going to give our two speakers. Nonetheless, it's

¹ Symposium, *International Law & Rule of Law*, NOTRE DAME J. OF INT'L & COMP. L., Feb 21, 2020, <https://ndjicl.org/symposia/vol-10>.

appropriate. My colleagues and I are thrilled to co-sponsor this event, particularly this top of the fight card event, which I'm re-titling "The Promise or False Promise of International Law". Each of our legal pugilists is going to get ten minutes of opening remarks and then they'll get five minutes of follow-up, and then we're going to go to Q&A from the audience, and I'll give each of our speakers a brief last word. Mary Ellen O'Connell needs no introduction in this forum and I'm not going to give her one, other than to say that she is the Robert and Mary Marion Short Professor of Law and a research professor in international dispute resolution. She has published two books with Cambridge University Press that came out in 2019, so we're looking forward to hearing her in this debate. On the other side of the card, we have Professor John Mearsheimer. He is the R. Wendell Harrison Distinguished Service Professor of Political Science at The University of Chicago. He also has a recent book out: *The Great Delusion: Liberal Dreams in International Realities*. Professor Mearsheimer will speak first.

Mearsheimer: Thank you very much for the kind introduction. Thank you, Mary Ellen, for inviting me to visit today for this debate and thanks all for coming out to listen. The subject before us today is the relevance of international law for international politics. This boils down to the question of how international law affects state behavior. Before I get into the heart and soul of my argument, I want to make two preliminary points. The first is that I'm talking about international law only. I'm not talking about domestic law. And, as will become clear by the end of my talk, I have very different views of domestic law and international law. My second point is that I view international institutions and the rules that are at the heart of them as effectively the same as international law. I consider laws, rules, and institutions as within the same package of entities. Occasionally, I'll use the words "law" and "rules", but my arguments apply to both. Now, in the context of discussing realism and legalism, I'm simply going to give you one realist view on international law. I don't know if I agree with Hans Morgenthau or Kenneth Walsh on every point. You will get John Mearsheimer's view of international law and I'm going to make two major points. The first is that many people think realists believe that international law and international institutions don't matter at all. Some people even say that we realists believe that international law and international rules are dangerous, that we must get rid of these things. Nothing could be further from the truth. I just want to make that clear. Realists like me believe that international law and institutions matter. International institutions matter in big ways for several reasons. First, if you're interested in running the world, there's no way to do it in our highly globalized world without international institutions. There is a tremendous amount of interdependence in terms of economics, security, and politics among nations. There's no way that a great power like the United States can manage things like trade without rules, without laws. Thus, they are absolutely essential. Consider the Cold War, in which the United States created a Western order that included NATO, the EU, the IMF, and the World Bank, among others. These are all institutions that we needed and they were comprised of rules and laws. So, the idea that a realist like me thinks great powers don't need institutions is erroneous. Second, the United States writes the rules in ways that favor positions it anticipates taking later. That's just the way it works. Third,

relatedly, this strategy is really useful for coercing minor powers. International law and institutions are really great for the United States because they help it achieve its goals. Consider the Non-Proliferation Treaty, which is how the United States prevents countries around the world from acquiring nuclear weapons. The United States likes nuclear weapons. However, it does not believe anyone else should be allowed to have them. And it uses international laws to prevent others from getting those weapons. The United States likes the international regime because of its simplicity. The fourth and final reason that America favors the international legal regime is because it permits the U.S. to break rules it does not like. Furthermore, it is very important to realists that international law and international institutions cannot force states to obey the law when those states think it is in their vital interest not to obey the law. Basic realist logic justifies this claim. And I think this is the point where Mary Ellen and I fundamentally disagree. I think that Mary Ellen and people of her persuasion believe that international law and international institutions can exercise coercive power over states when their vital interests are at stake, and that those states will be compelled to obey the rules. Realist 101 logic makes me think that this is impossible. The basic argument here is that states operate in an anarchic system. There's no higher authority above states. States can never know the intentions of other states. They wake up one day living next to Adolf Hitler who has considerable power and malign intentions. You dial 911 to call the international system and there's nobody on the other end. In that kind of world, you have to make sure you have as much power as possible. To the Americans in the room, how many of you go to bed at night worrying about Canada or Mexico attacking the United States? The answer is "none" and the reason is because America is like Godzilla surrounded by Bambis. That is the best way to survive in a system that lacks a higher authority according to basic realist logic. This tells us that when you're in a self-help world and the law says you have to do something that is at odds with your perceived vital interests, you're going to break the law or disobey the rules. This is not to say that you're a constant lawbreaker because, again, my argument is that great powers write rules they like and therefore usually obey. Nonetheless, there are those situations where international rules are at odds with a nation's vital interests and that nation then violates those rules. This is fundamentally different from domestic politics because a higher authority exists in there. What Thomas Hobbes called the Leviathan, we call the state. When you get into trouble, you call the police and your lawyer. And in that context, law has a different meaning—not a completely different meaning, but a very different meaning. I think Mary Ellen and I would agree completely on the importance of the rule of law inside the black box. But once outside the black box and in the realm of international politics, I believe international law matters. The world Mary Ellen envisions can only exist if you escape international anarchy. A really terrific little book that you can read on the subject is Lowes Dickinson's book, entitled *The European Anarchy*. Dickinson, one of the founding fathers of the League of Nations after World War I, invented the concept anarchy as it applies to international politics. This is a brilliant little book and he basically said that as long as you operate in an anarchic world, states are going to behave the way I argue that they will. And he said that if you want to escape that world, one must transcend anarchy and move into hierarchy—e.g., create an international system that looks like what you have

in domestic politics. In other words, a world state. Well, for better or for worse, I do not envision the rise of a world state because the most powerful political ideology on the planet is nationalism, and nationalism requires nation-states. Nation-states do not disappear. We are going to live in a world of nation-states as far as the eye can see. That means we're going to continue to live in international anarchy. And as long as we live in international anarchy, there's no way the great powers are ever going to obey international law or the rules that are at the heart of institutions if they think those laws or rules clash with their vital interests. Thank you.

Desch: Thanks John. On time and on target. Mary Ellen, you may begin.

O'Connell: I don't know about all these war metaphors and fighting metaphors. I'm here for an exchange of intellectual ideas. I want to just promote with all of you a better idea than the one we just heard. This has nothing to do with force and violence and everything to do with persuasion, beauty, and attracting all of you to a new way of thinking. Professor Mearsheimer deserves our respect. He deserves even our admiration. Imagine that Professor Mearsheimer, and just a few others, have succeeded in making this realist idea you just heard the dominant idea in U.S. foreign policy. My aim in this debate is to win all of you, but him, especially, away from that idea, in favor of what was once the true and important goal of U.S. foreign policy: promoting the rule of law in the world. That was the central aim of U.S. foreign policy for 175 years. I think we can get it back and we can do it starting today, right here. I'm going to make this argument in three parts. First, I'm going to define some terms. Second, I'm going to explain why legalism is superior to realism. And finally, I will show the harm that persisting with realism causes and argue that only a return to fidelity of law will lead to a better future for everyone listening in this room, in the overflow room, and around the world at large. Legalism, like realism, refers to a set of beliefs about the way the world works. Realists believe the world works on the basis of human survival instinct. They maintain that individuals seek self-interest to accumulate wealth and other material goods, and that nations, just like individuals, act on self-interest too. Realists believe that individuals and states are locked in a competition with each other for wealth and will use force to achieve a desired outcome in that competition. Legalists, on the other hand, understand that the survival instinct that motivates human beings constitutes just one among many instincts. Although people are self-interested, they are also interested in the welfare of others. Oftentimes, they elect to promote another person's self-interest at the expense of their own. Human beings can be motivated by altruism, selflessness, spirituality, and emotion, as well as materialism. Law relies on people being both self-interested and concerned about the welfare of others. It thereby creates neutral principles and policies to resolve disputes and guide conduct. Law is based fundamentally on accepting and complying with these neutral rules and processes, regardless of coercion. Coercive enforcement is a part of law, but law does not depend on coercion. It is not essential to law. What is essential to the rule of law is that force is subordinated to law—that the physically powerful are not treated as superior to others under the law. The subjects of law are equal, whether human beings, organizations, or states. Professor Mearsheimer is right: it is hard to imagine the

international community coercing the United States if the U.S. doesn't want to obey a particular rule. The international community expects voluntary compliance, with the occasional need for some kind of enforcement, and it does have means to make it costly even for the United States to disobey. Yet, fundamentally, it's about the belief in law, that we once held very dearly in America, and that we can again. Legalism promotes the idea that law and legal means are the moral and ethical approaches to problem-solving. Law is neither government nor liberalism. Governments administer states and represent them on the international plane. Law precedes government and it is essential to create government. It is necessary to create states. States are not organic creatures like people or animals; instead, they are legal constructs that need the law to exist. Without law, there is no institution of the state, let alone a governmental institution of the kind that Professor Mearsheimer likes. He very much likes NATO and we just heard him say he likes world trade institutions like the WTO. Respect for law and improvement in the law that founded these entities is needed to improve them for the good of the United States and all states. Finally, liberalism is not law but a set of beliefs. However, it is a set of beliefs about the proper relationship between individuals and their governments within states. Liberalism relies on law to limit government control of individuals. Consequently, liberalism has only limited relevance to international law; I share many of Professor Mearsheimer's criticisms of liberal hegemonists who violate international law and use military force to promote their liberal beliefs. Why is legalism a better idea than realism? Both legalism and realism are ideas—basic human constructs. However, law is a far older concept that has withstood the test of time. Law is the idea we return to after catastrophic failures to obey the law, such as in World War I, World War II, Vietnam, and in 2003 after the Iraq invasion. Law us about the human capacity for altruism and the virtue of obedience to law, even when our action is done wholly in the interests of another. These are the ideas of St. Thomas Aquinas, and they should be contrasted with the ideas of another Thomas—that Professor Mearshimer has already mentioned—Thomas Hobbes. Hobbes, a 17th-century British commentator, saw life as nasty, brutish, and short. He viewed human beings as in a perpetual war of all against all and that we would never conduct ourselves with generosity and respect for each other, unless coerced by government or anarchy. How many of you in this room need to be coerced or punished into being generous to another human being? Where would charitable donations be if fear was the only motivating factor? And, nevertheless, Hobbes' views influenced the development of realism, which was first invented in Europe in the 1930s, and aimed precisely at undermining international law. Early realism then traveled to the U.S. through the work of Hans Morgenthau, a German refugee and long-time political scientist at the University of Chicago. He promoted this idea in a book first published in 1948. In a series of 1951 lectures at the University of Chicago, U.S. diplomat George Kennan called on the U.S. government to abandon what he called the legalistic, moralistic, approach in U.S. foreign policy. Kennan wanted the U.S. to take advantage of its technological prowess at the end of World War II to amass weapons and military assets. He hoped this approach would get the U.S. to abandon the rule of law as part of foreign policy. Kennan thought the U.S. could become the newest global coercive power by dictating policy to other nations for its own material benefit.

Accordingly, the military-industrial complex was born and a thirty-year slide away from the rule of law—first abroad and then at home—began. The U.S. has been paying dearly for increases in spending on weapons and military assets as well as the abandonment of the rule of law. I'll provide just a few examples. First, consider the abject failure to commit the resources necessary to deal with the true existential threat this country faces, for example climate change and environmental collapse. We all know the harms of this failure: global pandemics, sea level rise, drought, flood, storms, famines, mass-species die-offs, uncontrolled fires in Australia, Brazil, and California. Professor Mearsheimer might say this is not the fault of realism, but thanks to the mono-focus on projecting coercive power in the world, the U.S. will spend \$989 billion dollars in one year on its military budget. The U.S. is already in debt to the tune of \$23 trillion dollars, much of this sum being held by China. Yet, while the entire budget of the United Nations' environment program is just \$222 million, the U.S. pays only a small fraction of that. Just think about what could be done about climate change if only half of this year's U.S. military budget went to address it. And second, when you spend all of that money on weapons, what do you do next? You go to war. Realism is behind this country's endless wars. Professor Mearsheimer will say that he opposed all foolish wars, but in his book, *The Grand Delusion*, he discusses countering China's growing economic and military might and suggests there may be a need to go to war with China. Things have gotten so out of hand in America's lawless campaign to project military power that even the U.S. Congress is working to establish legal constraints on the executive's ability to go to war. Two historic war-powers resolutions have now been passed, restraining war with Iran and Yemen. This is the right approach for the future and the U.S. needs to continue it. These last years of the superior U.S. economy should be spent rebuilding the rule of law and restoring a sense of prestige in legal compliance over violation. The world should no longer give in to the idea that one state can dictate the law, make the rules, and break them at will. If the U.S. wants the world legalism can deliver, it needs to respect international law and accept it for what it is. The future—your future—needs to embrace legalism and reject realism.

Desch: Thank you Mary Ellen. The next round is going to be five minutes of exchange between John and Mary Ellen. For the folks in the overflow room, if you would like to send me a question for either of our speakers during the third and final phase of the debate, send them to me at [EMAIL] and I'll try to get it in at the Q&A.

Mearsheimer: First of all, I didn't talk about U.S. policy at all, but I just want to be clear—as Mary Ellen made clear—that I have opposed U.S. foreign policy since 1989, including all of these crazy wars, and almost all of my fellow realists have opposed these wars as well. These wars have been promoted by liberal institutionalists, liberal interventionists, liberal hegemonists, or neoconservatives. As regards her first point, that I've had this profound influence on American policy and world politics, I wish it were true. We would have had many fewer wars had I been in charge. However, this is not a debate about agency versus structure, or how much power individuals have versus the structured system. And I am a Hobbesian. Hobbes talks about the state of nature;

I talk about anarchy. They're synonymous. He talks about individuals in the state of nature; I talk about states in anarchy. And my basic argument is that when you don't have a higher authority you cannot be certain about the intentions of individuals in Hobbes' case and states in my case. When you encounter somebody very powerful, you have no choice to privilege survival and the balance of power, and that causes you to violate international law. Mary Ellen never addressed that point nor did she show any flaw in my logic, and I believe that to run me off the table she must show some flaw in my line of thinking. Regarding her point that the United States for about 170 years behaved according to the rule of law, I respond that this behavior did not occur until after realists had started pervading bad ideas in the wake of World War II. Remember America's checkered history. The U.S. started out as thirteen measly colonies strung out along the Atlantic seaboard. Colonists marched across the continent to the Pacific Ocean, murdered huge numbers of Native Americans and stole their land. What is now the southwestern United States was stolen from Mexico. America invaded Canada in 1812 for the purpose of making it part of the United States. The only reason the Caribbean is not part of the United States today is not because the U.S. didn't have a big enough appetite to annex it, but rather because the northern states didn't want more slave-holding states in the union. When Adolf Hitler invaded the Soviet Union on June 22, 1941, he often talked about the fact that his model was the United States. He referred to the Volga River as "mein Mississippi." He described America as a country that really knows how to create "lebensraum" (colonization). The United States is one of the most ruthless great powers in modern history. The idea that it was promoting or adhering to international norms and international law for 170 years doesn't bear much resemblance to the story I know. Mary Ellen also pointed out that states have other interests besides survival. I think that's absolutely right: states have other interests and those interests are important. However, survival has to be the primary interest because if you don't survive you can't pursue other interests. And this brings back Hobbes who argued for a special priority on survival. This priority explains why states will disobey laws in situations where such laws are perceived to clash with their vital interests. Mary Ellen says that law does not depend on coercion. However, I think that law depends to some extent on coercion. It doesn't depend exclusively on coercion. However, international law faces significant limits without nation states. People can't just depend on the interests or moral virtue of the actors. While I do not disagree that these interests and virtues are important, Mary Ellen's approach still requires the presence of a coercive entity called the state or the world state. Finally, I would clarify that I was not trying to equate law with liberalism. I think that law is terribly important to running the international system and I think it's true in domestic politics as well. I've read a number of articles and books over the years where people talk about how much emphasis the Third Reich placed on domestic law. They really cared about law. Thus, law is very important on its own and I wouldn't equate it with liberalism. My simple point is that when you're talking about international law, it (1) has great virtues, but (2) there are limits to what it can accomplish compared to domestic law because of anarchy and structure—not because of John Mearsheimer.

Desch: Thank you, John. Mary Ellen, five more minutes. I'll keep track. I'm in charge of the rule of law here.

O'Connell: John underplays how much influence he's had and he presents himself as humble for playing such a small role. I do not say that the liberal hegemonists who have used military force to try to promote their various goals—such as human rights, arms control, or counterterrorism—are good realists. However, I object to the idea that unless you have a military advantage in international relations you will not survive in the world. This view presents international relations as a competition in which the only moral or correct thing for a national leader to do is ascend to the top of a military asset pile. That idea, as wrong as it may be, has seeped into America's foreign policy establishment at the expense of a commitment to the rule of law in the world. This has made us very vulnerable and put the it in a very dangerous position. Within nine years, this country will have the second-largest economy in the world, not the first, and then many of Professor Mearsheimer's views look very different. However, I suggest to you that by then it may be too late. Originally, I thought China would escape the realist notion that it is a good idea to spend significant resources, including intellectual capital, on developing new weapons, but China seems to be turning toward realism because it sees that the U.S. has been so committed to it. Thus, many nations have come to understand that the only way a country gets respect from the United States is to have a bigger military. We now find ourselves trapped in this realist mentality that the only thing to do is to have more weapons, to spend more money on the military, to fight proxy wars, or—as John suggests in *The Grand Delusion*—that we may even have to go to war with China. This terrifies me most of all because I think invading Iraq was as wrong as prolonging the war in Afghanistan. Yet, this is the logic of realism that we must escape. Professor Mearsheimer says we cannot escape it because I'm not properly describing the true structure of the world, but that “structure” is an idea. We cooked this up; this is Thomas Hobbes' view of the world. It wasn't Hugo Grotius' view of the world. Hugo Grotius, Hobbes' contemporary, could see that when people come together and cooperate—indeed, even sacrifice—a fundamental rule of law system becomes possible. Only then could structures of law be formed. And what we've lost through the realist onslaught is a basic belief in the human capacity to care about others and care about the law. And while Professor Mearsheimer says it works very differently domestically and internationally, I'm afraid that it does not. For example, when the United States breaches treaties, summarily executes people overseas using drones, ignores the most important treaties it has ever drafted and ratified—e.g., the United Nations Charter with its core prohibition on the use of force—why does that stop at the border? The U.S. often believes that it can break every rule it has ever made. Today, in America we have misplaced our priorities. We erroneously believe that what matters is having more money or Twitter followers. If that's the kind of material power that counts, then why should anyone care what a judge says? Why would we care that the congressional designation of spendable monies is allocated toward the military and not some other project? We are seeing the law degraded at home because we have lost the proper understanding of law in the first place. Law is not about being coerced, but instead about commitment to a set of ideas for how to regulate our lives together. It involves mutual principles

that don't recognize hegemony or superiority based on money. Law is based on humanity and it applies to groups and people. Moreover, you can have law without government; this has been the best way to characterize the structural world beyond the state and has been the dream of the United States. Has America lived up to this dream? Absolutely not. I wish that Professor Mearsheimer had mentioned slavery as the original sin of this country, a clear violation of what we used to understand as natural law. That understanding has been eroded by the onslaught of realism, the new scientism, that is derived from a scientific view that material evidence is all that matters. We've lost the great ideas of law. That's why I'm so happy we're having this debate at Notre Dame Law School, because here we understand natural law and that there never should have been slavery or a use of military force to slaughter native peoples in this country. We've lost original ideas of natural law in modern science, but we can get them back. We are now capable of moving to a deeper and richer understanding of the law at home and abroad because we are seeing the cost of not having those old ideas. We have become too comfortable stripping them away and entertaining the false materialist notion that "if we have more, we can get more" because the U.S. is presently ahead in the technological game. Well, it will not be ahead very much longer. There is a movement toward generosity and toward understanding these more basic natural law ideas. I see this in the vast movement for the environment and in the struggle for good governance from Hong Kong to Chile. Many people around the world now recognize that this realist, top-down, hegemonic, structural view is wrong. The U.S. founding fathers understood that the U.S. may not always abide natural law. However, they nonetheless maintained that America was established on a natural law basis and that all Americans have an inalienable right to live independently. Furthermore, those founding fathers had the genius to see that natural law is superior to government and that from it comes a commitment to law. This approach should carry greater influence over our foreign policy. We would have a much better world today had we not succumbed to the competitive, selfish, and self-interested ideas of realism.

Desch: Thank you very much, Professor O'Connell. In my view the institution of moderator is misnamed. The moderator should not moderate, the moderator should sharpen the debate. Thus, with that presumption in mind, John began by observing that from the perspective of realism, international law in terms of even great powers abiding by its rules should be evident much of the time. The exception is when, in his view, international law contradicts the vital interests of the state. What is the poster-child example for you of vital state interests trumping international law and how often should we expect to see that in the world? Mary Ellen, I want you to answer the opposite side of this coin and identify some poster children, or at least a poster child, in which you think international law trumps vital state interests. John?

Mearsheimer: When vital interests trumped international law? Well, the Iraq war in 2003 offers a classic example for when American policymakers and a large chunk of the American public believed that vital interests trumped international law. However, the reality in almost all these cases is that laws are interpreted in different ways. When the United States violates international law, it goes to a law school and finds a bunch of clever law professors to explain why

violating international law is not *really* violating international law. You folks are all trained to make any argument defending any side of a given case. Therefore, lawyers provide the U.S. government with an explanation that it is actually following international law when it is not.

Desch: How often, in your view Professor Mearsheimer, do you see—or expect to see—states directly and overtly violating international law to promote their own interests?

Mearsheimer: Not much at all. As I said before, because the great powers write the rules and laws they don't have to violate them much at all. Yet we mostly hear about the cases in which the law is violated. Leading up to the Iraq War, and I think Mary Ellen is correct about the cause of the war in 1999, which was itself a violation of international law. There are a number of similar cases, but they are high profile matters that involve military conflict of some variety. However, the vast majority of the time the United States is obeying the rules because it wrote them. And furthermore, in this highly interdependent world that we live in, there is no way you can run it without rules. I think President Donald Trump, with his profound hostility towards international institutions and belief that you can essentially do away with them and the United States can run the world out of its back pocket, is delusional. And again, when we waged the Cold War, we built institutions. I know Mary Ellen doesn't want to hear this, but we're loading up the shotgun to deal with China; that's what the Trans-Pacific Partnership (TPP) was. It was foolish of President Trump to withdraw from the TPP. The TPP was an institution that was created by the Obama Administration for the purpose of putting the crosshairs on China.

Desch: Thanks. Mary Ellen, an example of a poster child of international law trumping vital national interests?

O'Connell: I just don't see the duality in your question. It is in the U.S.' national interests to comply with international law, so I don't make the separation that you do. Everything that Professor Mearsheimer said is enhanced if you believe that the U.S. has an honest—as opposed to a cynical—view of the law. The TPP is a desirable treaty. But who's going to make a treaty with the United States today, when the U.S. walks away from treaties and says it can just tear them up. If we decide treaties are not in our vital interests, we'll just walk away. We'll quote Mearsheimer. You can't have your cake and eat it. If treaties of any kind—trade treaties or arms control treaties—are going to work, they must be shown a level of acceptance and respect by leading countries like the United States. Treaties that are not respected will not produce benefits. True, we skated through the post-Cold-War period for a while saying "well we can have this law but we don't need to bother about that law." That's the story of the Iraq Invasion of 2003. The U.S. simply claimed "we still deserve the prestige of law, because we have a legal argument in the form of a letter to the Security Council." No international professional lawyer who understands the law on the use of force, unless working for the U.S. government or British government, or recently employed by them, believes the Iraq Invasion was lawful. And now, where are we? Do you know how many justifications under public international law President Trump has

made for his unlawful uses of force? One. He sent a letter after the killing of Qasem Soleimani. That's it. He ignored the uses of military force against Syria, the hundreds of drone strikes carried out by the U.S. around the world, and his planned attack against Iran last summer. Why should President Trump bother? He's read Professor Mearsheimer's work. He knows the lawyers will just tell him he can do what he wants and that he doesn't have to obey the law. Thus, the impact of realism is that we no longer understand what the law is. Law properly understood binds people and nations on a comprehensive basis, first and foremost as natural law. That's not law we make up. That's law that we discern through our ethical and moral understanding to be required for how to behave with each other in ways of respect and dignity. That's what law is. It has plenty of positive law layered on top of it, but if you ignore that structural aspect of law, you're never going to get the benefits of law that Professor Mearsheimer correctly wants.

Desch: Okay, we have a question from an undergraduate who is in the overflow room. For you, Mary Ellen, that will maybe prompt you to elaborate your last point. Nick writes: what exactly does Professor O'Connell mean by the notion that law precedes states. It seems like a very counterintuitive idea. Is she speaking of a divine law or a natural law? If she is speaking of civil law, how could it exist before the state does?

O'Connell: We don't talk about civil law as distinct in the field of international law. International law has three components: positive law made through treaties, the development of custom among nations, and certain general principles that are found through comparing national law. This framework accounts for the fact that law is binding; the principles that we make through positive law should be respected and should change and be developed only through authoritative processes: treaty-making and customary law-making. Natural law sets the outer limits of the positive law we can make. It tells us we can never have a treaty that would allow the use of military force because the use of military force is fundamentally prohibited as a feature of natural law. Genocide is also prohibited by natural law. Consequently, you could never have a treaty that permits one state to wipe out a group of people in another state. That is natural law and you have to have both natural and positive law to have a truly effective legal system. Where does the institution of the state come from? Take the U.S. for example. It was not a sovereign state in 1776. The U.S. wanted to be accepted into the community of states and it had to make the legal argument that it deserved recognition as a state in accordance with certain factors. These factors include having a population, a sense of boundaries, a government in effective control, and that the young nation would honor its international commitments. That's how any entity becomes a state. It is what the Palestinians are searching for now: a sense of acceptance into a system of states. For international law to exist at all, and to offer that status to any entity like Palestinians or like early Americans, there must be an international system grounded in natural law. However, as our founding fathers understood, the governments of the many states they wanted America to join already accepted international law as their common bond; natural law is the source of the definitions that define when nations qualify for

admission into that club of states. Therefore, without law, you don't get states, let alone governance.

Desch: Okay, I'm going to throw it open to the audience. The jeopardy rule is in force, meaning whatever you say has to be brief and end with a question mark. One question per person. Andrew, we'll start out with you, and then Roger.

Andrew: Thank you to you both. You both alluded to the rise of China, especially on the world stage. And I know China has increasingly exerted more influence in the United Nations. I'm wondering how both of you see the next decade. How do you see American involvement with international rules of law, particularly as they change in response to China's growing influence? Especially for you, Professor Mearsheimer, do you think there will arise situation in which the U.S. will have to disobey, like you said in your theory?

Mearsheimer: On the subject of China, as Mary Ellen said, the Chinese are realists to the core. She thinks it is a recent development. I don't think it's a recent development. When I go to China and I open my talks, I say "it's good to be back among my people," because China is a thoroughly realist country. Mary Ellen thinks that it's because they read my book or are imitating the United States. No, it's because China was weak from roughly 1850 to 1950. They refer to that period as "the century of national humiliation". The Chinese fully understand that weakness in international politics precedes falling prey to the other great powers. Accordingly, many nations really want to be powerful. This has been very difficult for Americans to understand because we were born into this very powerful country and we take it for granted. However, were we a small country surrounded by gorillas we would think about international politics in fundamentally different ways—and I can guarantee you the Chinese are nervous at the thought of being weak. They want to really be powerful and they'll do everything they can to push the United States out of Asia—first beyond the first island chain and then beyond the second island chain. As I tell them when I go to China, if I were sitting in Beijing and I were the national security advisor to the Chinese government, I'd want the Americans out too. However, I'm an American and I have no intention of letting China push the U.S. beyond the first island chain, much less the second island chain. And that's what's going to lead to the clash. Regarding international institutions, this is a fascinating question. The U.N. is basically useless for modulating or dealing with the U.S.-China competition because of the veto. If the U.S. pushes something the Chinese do not like, they will veto it, and vice versa. Like in the Cold War, the U.N. will not be very useful. What's actually going to happen here is that the Chinese and the Americans will create their own institutions. During the Cold War, the West had several institutions that included NATO, the European Union, International Monetary Fund, and World Bank. On the eastern side, you had Comecon and the Warsaw Pact. Those were the Soviet-dominated institutions and those institutions were designed to wage the Cold War. This is the road that we are headed down today with the Asian Investment International Bank (AIIB) and the Belt and Road. This was what the TPP was all about and why the Trump Administration was foolish to walk away from it. I'll be long dead by the time we can tell for sure whether I'm right, but what I think you're going to see is the

creation of the set of Chinese-dominated institutions and American-dominated institutions for purposes of waging the competition that I think is almost sure to occur between those two countries. I do think it is a tragedy, but my view of international politics is a tragic one.

Desch: Mary Ellen, to throw a related question on the table, Nick Carter, another undergraduate, asks how a return to legalism by the United States—were it to happen—would help to better manage the rise of China than John's realpolitik redux approach?

O'Connell: Great question. I'm a student of Chinese history and I could debate with Professor Mearsheimer how to best characterize China as a country. I will concede that China under communism is fundamentally oriented toward materialism, and this has left it vulnerable to adopting the realist approach that we see in U.S. foreign policy. There they are beginning to believe they also have to compete by piling up lots of weapons and projecting aggression around the world in an attempt to dominate their sphere of influences. Dealing with that presents a losing prospect for the U.S. I do think that a return to legalism is really the only way forward for the U.S. and I don't think we got anywhere by being realists. However, China effectively owns the U.S. already. As economists are telling us, we are not going to have more money than China in a few years. What I would suggest, and what I have written in my new book, *The Art of Law in the International Community*, is that we can invite cooperation for the good of the planet as a whole; we can work with the Chinese to help them solve some of their problems with corruption and over-emphasis on materialism in their own system. This approach has left them unable to deal, for example, with the coronavirus pandemic. The U.S., as a country founded upon the rule of law, can begin to teach this. Sadly, it can't happen all at once—well, it might happen quickly if we have another catastrophic disaster—and I'd rather see U.S. do this incrementally because the realist ideas we heard from Professor Mearsheimer run deep in China. We have to begin somewhere to show the benefit of moving forward. I also agree that we have to try to revive the U.N. The realists have really undermined the U.N; I've never seen it so weak. If President Trump is re-elected, I can fully imagine the U.S. will leave the U.N.

Desch: Okay, Roger Alford is next on the list.

Alford: I think the entire debate is based on a faulty premise that international law routinely rests on the question of the law of conflict. I think that the vast majority of international law has nothing to do with this. It would be a bit like saying when you go to law school all you talk about is criminal law and the protection against violent crime. But international law is focused on dual taxation treaties, contracts, aviation and open skies, telecommunications, energy, environmental law, trade, monetary policy, extradition, intellectual property, competition law, freedom of speech, among others. The vast majority of international law has nothing to do with conflict.

Desch: John, this seems directed at you.

Mearsheimer: I believe I said that. In response to Michael, I don't disagree. But we do have these things called the laws of war and we do have wars, and wars matter enormously. It matters more than all those other things you were talking about.

Desch: Okay, we have a lot of questions piling up, and the carriage turns into a pumpkin at 1:45, so I want to keep things moving along. The gentleman in the blue suit in the front row.

Audience member 1: Professor O'Connell, you discussed the concept of natural law. How do we defend international law if we equalize natural law to international law or put it in the same bucket?

O'Connell: Oh yes. I didn't say this would be easy. We, and by "we" I mean the U.S., have lost a lot of ground after the 60's, when we started to define success in terms of keeping a technological and material advantage over others. And it was at the same time that we lost a more comprehensive understanding of what law even is and focused narrowly on the law we could make ourselves. Then we thought that we could break the law because we are so powerful with all our weapons. No one was going to force our compliance. America lost the idea that it is the sanctity of treaties and the *jus cogens* peremptory norms that really matters and we just don't know how to talk about them anymore. One of the big commitments made by Notre Dame Law School is to resurrect this language understanding. It will be up to people like you studying here at this law school to help get that very difficult and challenging message out. I think you are up to the task, because you have the ideas and see all the practical things that international law does, including those that Professor Alford mentioned. You understand fundamentally that you don't get those practical benefits unless you're willing to accept—at some basic level—that it all applies, and that even countries with lots of weapons don't get to pick and choose which laws they will follow at will. Thus, the good parts of international law inevitably require some self-sacrifice. I think it's in the spirit of generosity and other-orientedness. I don't have a tragic view of life. I think we're capable of so much, and it's a matter of unleashing it and getting ourselves out of this cul-de-sac that we've painted ourselves into, especially in this very privileged country. So, thank you for being here; help spread this word when you go back to Chile to teach.

Desch: Okay, I don't have a tragic view of life either, but I do have a tragic view of the clock. So, we've got time for a very brief question from the gentleman in the back.

Audience member 2: Professor O'Connell, you discussed militarism as in direct opposition to legalism, but what happens when you have people who just won't obey the laws? For example, consider a situation where the military is broken down or at least where military spending is cut. What stops the lawbreakers?

O'Connell: Law functions fundamentally first and foremost without coercion. You need voluntary compliance with only a minimal threat of coercion. There's no law that works because a policeman polices every moment of its enforcement,

threatening penalties. That said, we have long accepted that some coercion is certainly appropriate to signal the importance of a rule. Indeed, part of the reason why we set up the United Nations—the reason envisioned by President Franklin Roosevelt—was to have an effective response to the core rule behind the United Nations Charter—the Article 2 prohibition against the use of force. Roosevelt wanted a collective means to respond when core rules were violated. However, what happened was the U.S. took advantage of its technological and military superiority; instead of saying the U.S. would comply and respect the rules, it tried to have its cake and eat it too. As a result, the U.N. is now dysfunctional as a neutral enforcer of the law. It still has some coercive means left for responding to crises, but even those have been badly abused by the United States. Economic countermeasures could be a very effective means for enforcing the law short of going to war. However, the United States is imposing countermeasures in violation of the law such as right now in Iran. We have a lot of work to do before these mechanisms function well. Thank you very much for your question.

Desch: Okay I'm going to read one more question and this could be a set up to final remarks from our speakers, because I think it's addressed to both of you. "Forgive me if I'm missing something basic, but I'm wondering what exactly is at stake here? Is the debate descriptive in the sense that you are comparing analytical frameworks for understanding states' actions or is it proscriptive in the sense of advocating that states should act in a legalistic way?" What is at stake here and if you want to fold in any last thoughts on anything else as well. John, why don't you start out.

Mearsheimer: What is at stake is an important intellectual discussion about one of the central issues of international politics and not much more needs to be said about that. I'd make two additional points in the minutes allotted. I hope that people don't believe I think that international law is irrelevant or bad and I went to great lengths to make the case that I thought international law serves a very important purpose. And Mary Ellen's comments cut in the other direction and portray me as someone who is hostile to international law. I'm not. My main point here is to emphasize the limits of international law when it comes to the security realm. I think it is very important to understand that fact. You want to know the strengths of international law and we've emphasized them here, me included, as well as the limits, because it sharpens your mind. I think the key limit boils down to the question asked earlier: what does legalism do when confronted with Adolf Hitler? I don't believe Mary Ellen answered that question, just like I don't believe she answered my question of how we should deal with the Hobbesian dilemma.

O'Connell: Thank you. I think Professor Mearsheimer and I were both being descriptive and proscriptive. We actually agreed quite a bit on what we're both seeing in the world. He believes the way forward is with a good deal of international law but not in the realm of military force, where it really counts. I'm saying you can't enjoy the benefits of international law unless you're willing to apply it to the military realm. International law is clear. There are times when military force is lawful. The United States used military force lawfully one time since the Second World War under the U.N. Charter. And that is the only time

it has proven a general success: when we helped Kuwait become liberated from Iraq after Iraq invaded in violation of the U.N. Charter in 1990. The world came together at the U.N. and worked together to liberate Kuwait, and Kuwait has been liberated for almost 30 years. Kuwait has maintained its independence thanks to the U.N. Charter and not the kinds of regime change that Vice President Cheney wanted, many of which would have gone beyond what international law required. If that's my last word, even in the military realm, obeying the law has extraordinary benefits, and can help us free up resources for the challenges human beings really need to tackle.

Desch: I have one more task, and I ask John and Mary Ellen to come up right next to me here. It's the end of the fifteenth round. I want you to join me in thanking both the speakers for a terrific back-and-forth.