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# What Can a Few Make of Mankind?

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Harlan Grant Cohen and Timothy Meyer (eds). *International Law as Behavior*. Cambridge: Cambridge University Press, 2021. Pp. 296. £85. ISBN: 9781107188433.

## Abstract

Harlan Grant Cohen and Timothy Meyer present *International Law as Behavior* as a collection that aspires to exemplify and set an agenda for an interdisciplinary movement of scholars studying the ‘behavioral roots of international law’. This review essay places the book within a larger context of interactions between behavioural psychology and social sciences. Identifying the origins of contemporary behavioural international law scholarship in behavioural economics, and especially the 1970s work of the psychologists Amos Tversky and Daniel Kahneman, this essay questions the plausibility of the model of human motivation theorized in *International Law as Behavior*. Moreover, detailed analysis of the consequences of explaining international law phenomena using behavioural concepts demonstrates that responsibility is systematically under-attributed to the powerful and over-attributed to the vulnerable. Ultimately, this essay contends that viewing legal and social phenomena through behavioural psychology offers little explanatory power, while inuring us to a condition of passivity and control, seeking to replace politics with technique.

## 1 Introduction

In 1948, the psychologist B.F. Skinner published *Walden Two*, a novel about a fictional utopian community living in an unspecified part of rural North America.<sup>1</sup> The community he described was constructed according to the principles of the ‘science of

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<sup>1</sup> B.F. Skinner, *Walden Two* (1948; reprinted 2005).

behaviour' that he himself had outlined in his 1938 book *The Behavior of Organisms*.<sup>2</sup> Skinner had conducted experiments on rats, with the core aim of establishing causal relationships between a unit of behaviour, like a rat pressing a small lever in a cage, and a modification to that rat's environment, like providing a pellet of food. *Walden Two* replaced rats with humans. All aspects of inhabitants' lives were continually subject to experimental observation, and all aspects of their lives were structured according to the causal relationships that Skinner believed could be identified between incentives and behaviours.

Walden Two is a curious place. Its inhabitants are perpetually baffled by the irrational acts of visitors from the outside world. Social practices like expressing gratitude, emotional responses like feeling jealous, and cultural norms attaching importance to family ties or religion have all been identified as irrational hangovers from a prescientific culture and dispensed with. Most of human history is considered a tangle of irrationalities and mistakes. With the advent of the 'science of behavior', humans have become masters of their own formation. In a society that remakes its structures and culture according to this science, the greatest challenge will be to finesse the psychological techniques by which the personalities and emotions of future generations will be controlled. A protagonist in Skinner's novel says: 'When we ask what Man can make of Man, we don't mean the same thing by "Man" in both instances. We mean to ask what a few men can make of mankind. And that's the all-absorbing question of the twentieth century. What kind of world can we build – those of us who understand the science of behavior?'<sup>3</sup>

Behaviouralism is a branch of psychological theory that begins inquiry into some aspect of psychological interiority from externally manifested, observable acts of subjects. Early behaviouralists like Skinner, or the Russian physiologist Ivan Pavlov, extrapolated methods and principles from research based on observing animals like rats and dogs and applied them to human subjects. The core behavioural premise is that any access we can attain to human psychology will necessarily be through observable acts, utterances or our bodies. There are strong and weak variants of this premise. Some behaviouralists, of which Skinner is the most prominent example, are 'radical' behaviouralists, so-called because they have maintained that a science of psychology can only be successfully based on such externally observable, ideally measurable acts. They have sought to exclude 'mentalist' psychological explanations; explanations that rely on unobservable processes internal to the subject.<sup>4</sup> These strong variants were subjected to prominent critiques – most notably, Noam Chomsky's 1959 review of Skinner's application of behavioural premises to linguistic theory in his 1957 book *Verbal Behavior*.<sup>5</sup>

<sup>2</sup> B.F. Skinner, *The Behavior of Organisms: An Experimental Analysis* (1938).

<sup>3</sup> Skinner, *supra* note 1, at 279.

<sup>4</sup> Chomsky, 'Book Review: *Verbal Behavior*. By B.F. Skinner (The Century Psychology Series.) Pp. Viii, 478. New York: Appleton-Century-Crofts, Inc., 1957', 35 *Language* (1959) 26, at 32. Chomsky continued his critique of Skinner's 'speculations on human behavior'. For another prominent example, see Chomsky, 'The Case Against B.F. Skinner', *New York Review of Books* (30 December 1971).

<sup>5</sup> Chomsky, 'Book Review', *supra* note 4; B.F. Skinner, *Verbal Behavior* (1957).

Chomsky accepted that Skinner's prior research had developed some genuine insights in the field of animal behaviour by training rats to perform relatively complex tasks in experimental settings using reinforcing stimuli like food, but he argued that to extrapolate from these findings with the aim of theorizing human behaviour, and especially to 'provide a way to predict and control verbal behavior by observing and manipulating the physical environment of the speaker', was an impossibility.<sup>6</sup> An important recurrent aspect of Chomsky's critique was the point that it is impossible to explain how humans acquire and use language based only on the kinds of external stimuli defined by Skinner – that is, excluding 'internal' factors such as, for example, 'inborn structure, the genetically determined course of maturation, and past experience'.<sup>7</sup> The force of Chomsky's critique on this point was one of the catalysts for consensus forming around weak variants of behaviouralism that accommodated some explanations based on mental processes internal to the subject.

In 1959, the year of Chomsky's critique, a French delegate speaking in a debate of the United Nations (UN) Trusteeship Council derided what he characterized as the Soviet delegate's repetition of untruths in the hope that one day they would be accepted as truth by saying that 'the peoples of the world, and especially those of Africa, did not have the conditioned reflexes of Pavlov's dog'.<sup>8</sup> In the summer of 1959 at the UN Headquarters in New York, the idea that groups or states could be conditioned like the reflexes of Pavlov's dog was so absurd as to function as a slur (deployed on this occasion by a diplomat seeking to defend France's neo-colonial economic interests in former colonies). But the core understanding of how human psychology operates that underpinned Pavlov's conditioning of how dogs reacted when trained to associate a bell with food and Skinner's behavioural utopia is more influential today than it was in 1959. In the summer of 2021, UN Secretary-General Antonio Guterres announced that behavioural science should be mainstreamed across the entire UN system. Like all important things at the UN, behavioural science now has an acronym – BeSci.<sup>9</sup>

Today, as Harlan Grant Cohen and Timothy Meyer's edited collection *International Law as Behavior* correctly identifies, behaviouralism is ascendant. The book's aim is an agenda-setting one. Cohen and Meyer believe a methodological movement can be discerned among scholars in fields including economics, psychology, sociology, anthropology and international relations, which focuses on 'the behavioral roots of international law'.<sup>10</sup> The book is an effort to draw together and showcase ways of

<sup>6</sup> Chomsky, 'Book Review', *supra* note 4, at 26.

<sup>7</sup> *Ibid.*, at 27.

<sup>8</sup> Trusteeship Council, Meeting Records, Effects of the European Economic Community on the Development of Certain Trust Territories, General Assembly Resolution 1275 (XIII), Doc. T/SR.L037, 4 August 1959, at 470, para. 46.

<sup>9</sup> This announcement was accompanied by the publication of a report and the issuance of a 'guidance note' from the secretary-general. M. MacLennan and J. Jochim, United Nations Behavioural Science Report (2021). The United Nations' (UN) mainstreaming of behavioural science is being promoted by the Behavioural Science Group, hosted by the UN Innovation Network, which is conducting an active schedule of events focused on using behavioural methods across the UN system. It is possible for employees of UN bodies to become members of this group.

<sup>10</sup> Grant Cohen and Meyer, 'International Law as Behavior: An Agenda', in H. Grant Cohen and T. Meyer, *International Law as Behavior* (2021) 1, at 1.

studying international law that take observed behaviour – of states or individuals – as their central object of analysis. *International Law as Behavior* is the first book-length statement of how the behavioural paradigm of psychology has and should influence international law scholarship and practice. However, it is not the first such statement. Jean Galbraith, Anne van Aaken, Tomer Broude, Ganesh Sitaraman and David Zions have all been earlier and prominent advocates of behavioural insights in international law, publishing significant law journal articles on the topic between 2013 and 2015.<sup>11</sup> In 2019, volume 30(4) of the *European Journal of International Law (EJIL)* carried a symposium entitled ‘The Psychology of International Law’, which performed a similar function to *International Law as Behavior*. Introducing this *EJIL* symposium, van Aaken and Broude sketched an agenda for the application of methods from behavioural psychology to international law, and the symposium contributions applied this approach to specific topics.<sup>12</sup> The prevalence of this body of work makes Cohen and Meyer’s identification of a methodological movement seem accurate. As Anna Spain Bradley’s chapter in *International Law as Behavior* notes, ‘the behavioral trend in international legal scholarship is upon us’.<sup>13</sup>

In this review essay, I examine a set of basic problems that arise whenever behavioural psychology is used to explain how people have acted or will act in social contexts. The contributions to *International Law as Behavior* reflect these problems. In section 2, I briefly trace the path that behavioural ideas have taken to reach international

<sup>11</sup> Galbraith, ‘Treaty Options: Towards a Behavioral Understanding of Treaty Design’, 53 *Virginia Journal of International Law* (2013) 309; van Aaken, ‘Behavioral International Law and Economics’, 55 *Harvard International Law Journal* (2014) 421; Broude, ‘Behavioral International Law’, 163 *University of Pennsylvania Law Review* (2015) 1099; Sitaraman and Zions, ‘Behavioral War Powers’, 90 *New York University Law Review* (2015) 516; see also the recent *American Journal of International Law (AJIL) Unbound* symposium ‘The Limitations of the Behavioral Turn’, which includes contributions from prominent advocates of behavioural approaches to international law: Van der Zee, Fikfak and Peat, ‘Introduction to the Symposium on Limitations of the Behavioral Turn in International Law’, 115 *AJIL Unbound* 237. For more critical reflections on the implications of employing behavioural concepts, especially nudging, in governance contexts, see Lepenies and Malecka, ‘Behaviour Change: Extralegal, Apolitical, Scientific?’, in H. Strassheim and S. Beck (eds), *Handbook of Behavioural Change and Public Policy* (2019) 344; A. Kemmerer et al. (eds), *Choice Architecture in Democracies: Exploring the Legitimacy of Nudging* (2016). On behavioural methods in international relations, see Hafner-Burton et al., ‘The Behavioral Revolution and International Relations’, 71 *International Organization* S1. Recently, analysis of behavioural research has shown that the results of prominent studies purporting to experimentally verify the effectiveness of behavioural interventions cannot be replicated, and, in some cases, established behavioural scholars appear to have fabricated results. This has caused some former advocates of behavioural policy interventions to doubt whether these interventions have any effect on targeted individuals or whether they may in fact prompt side effects that achieve the opposite results to those intended. In one example, roadside signs warning drivers of fatal traffic accidents with the intention of ‘nudging’ them to drive more carefully were shown to result in increased accidents because they placed stress on passing drivers. For an analysis of this ‘replication crisis’ and its implications for law and policy-making, see K. Chatziathanasiou, ‘Nudging After the Replication Crisis: On Uncertain Effects of Behavioral Governance and the Way Forward’, *Verfassungsblog* (30 August 2022), available at <https://verfassungsblog.de/nudging-after-the-replication-crisis/>.

<sup>12</sup> Van Aaken and Broude, ‘The Psychology of International Law: An Introduction’, 30 *European Journal of International Law* (2019) 1225.

<sup>13</sup> Spain Bradley, ‘Advancing Neuroscience in International Law’, in Grant Cohen and Meyer, *supra* note 10, 191, at 192.

law. This is useful for two reasons. First, it offers a corrective to an ahistoricity that characterizes contemporary behavioural research in law, perhaps due to the fact that advocates of this approach prefer to avoid tracing their intellectual lineage to controversial figures like B.F. Skinner. Second, it allows us to see that the ideas upon which contemporary behaviouralists rely gained prominence in the 1970s as a critique of an implausible model of human motivation that was then dominant in economics. Taken out of this context, these ideas remain a moderate critique of a model to which few outside the specific disciplinary context of 1970s economics would subscribe. In section 3, I show how this critique is reheated in *International Law as Behavior*, as behavioural ideas are used to mount a critique against two similarly implausible caricatures – this time within international law scholarship instead of economics: rational choice approaches to international law and a vaguely sketched ‘doctrinalism’. Section 4 illustrates another core recurrent problem of behavioural explanations of legal and administrative outcomes, which is that responsibility is systematically under-attributed to powerful individuals and over-attributed to the vulnerable. Section 5 examines contributions to *International Law as Behavior* that do not seem to substantively fit with the overall aim of the book but, as such, do illustrate a tendency of the behavioural paradigm to absorb methods and insights from other traditions and claim them as its own. I conclude, in section 6, by reflecting on Hannah Arendt’s prescient 1958 warning that behaviouralism may inaugurate a politics of passivity that should concern us all.

## 2 Roots of International Law Behaviouralism

Behaviouralism has come to international law through behavioural economics. In the 1970s, a body of research used ideas and methods from behavioural psychology to challenge models of decision-making and motivation that were then current in economics. The two prominent representatives of this research were Amos Tversky and Daniel Kahneman, whose ‘prospect theory’ relied on behavioural methods of observing human subjects.<sup>14</sup> Tversky and Kahneman’s writings had a foil – the idea, subscribed to by economists, that people make decisions and are motivated as utility maximizing, self-interested and completely informed individuals. Tversky and Kahneman modified these hyper-rationalist theories of motivation by observing that people do not always act in ways that these models would predict.

They introduced the idea that sometimes people fail to act like the economists’ rational actor due to being influenced by failures of thought that disrupt their otherwise rational thinking. They theorized these failures using concepts that have become common in many social science disciplines and policy-making circles today, like ‘biases’, ‘framing’ and ‘anchoring’. Many of the substantive insights that Tversky and

<sup>14</sup> Kahneman and Tversky, ‘Prospect Theory: An Analysis of Decision under Risk’, 47 *Econometrica* (1979) 263.

Kahneman described with these concepts can seem reasonable and intuitive without experimental observation. In fact, they could only seem banal were they not presented alongside their foil, the economists' strongly rationalist and individualistic understanding of how people act in social life. Apparently surprised to find that real people were less rational than the economists predicted – that they could be influenced by irrelevant information or might allocate their time other than rationally – Tversky and Kahneman catalogued these failures to achieve perfect rationality. Deviations from the ideal model of the economists' rational actor, Tversky and Kahneman theorized these failures as predictable and correctable. Essentially, they said that their experiments had shown that sometimes people failed to act with perfect rationality in ways that were systematic. Because they were systematic it followed that it was possible to intervene to pre-empt these failures. Tversky and Kahneman's 'prospect theory' was a moderate critique of the improbable theories of motivation that were then current in economics, which had the aim of correcting peoples' behaviour back towards the improbable ideal of the perfectly rational actor.

Tversky and Kahneman were members of the same psychological tradition as Skinner, but a generation removed, and were the inheritors of the weak variants of behaviouralism that had garnered consensus within psychology after the widespread critique of radical behaviouralists like Skinner. Tversky and Kahneman's brand of behaviouralism has been influential. In 2002, Kahneman won a Nobel Prize in Economics for developing the field of behavioural economics with Tversky, who had died in 1996. Kahneman popularized the research he had undertaken with Tversky in the 2011 book *Thinking, Fast and Slow*, which became a bestseller.<sup>15</sup> These ideas were widely taken up by scholars of law and regulation, most prominently by the behavioural economist Richard Thaler (who had previously collaborated with Kahneman) and the constitutional law scholar Cass Sunstein. Thaler and Sunstein's 2008 book *Nudge: Improving Decisions About Health, Wealth, and Happiness* made the idea of 'nudging' famous.<sup>16</sup> These methods were applied in the Obama administration when Sunstein was appointed administrator of the White House Office of Information and Regulatory Affairs. In 2010, the United Kingdom's Conservative-Liberal Democrat government set up the 'Behavioural Insights Team', or 'Nudge Unit', to oversee the application of behavioural methods across government policy, and other governments have followed suit.<sup>17</sup> These ideas have been adopted by international organizations,

<sup>15</sup> D. Kahneman, *Thinking, Fast and Slow* (2011). For another popularized account of Amos Tversky and Daniel Kahneman's work, see M. Lewis, *The Undoing Project: A Friendship That Changed the World* (2017). For an ethnographic study of the adoption of behavioural techniques by the Dutch government, see J. Feitsma, *Inside the Behavioural State* (2019).

<sup>16</sup> R.H. Thaler and C.R. Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness* (2008). For Richard Thaler's popularized account of his work in behavioural economics, see R.H. Thaler, *Misbehaving: The Making of Behavioural Economics* (2016).

<sup>17</sup> I have examined the application of behavioural premises to the government of the United Kingdom's response to the COVID-19 pandemic elsewhere. R. Derrig, 'Lockdown Fatigue: Pandemic from the Perspective of Nudge Theory', *Verfassungsblog* (26 May 2020), available at <https://verfassungsblog.de/lockdown-fatigue-pandemic-from-the-perspective-of-nudge-theory/>.

especially the World Bank, the European Union and, most recently, the UN.<sup>18</sup> Their application to international law has been one of the most recent examples of their influence.

### 3 Reheating a Moderate Critique of an Implausible Ideal

*International Law as Behavior*, like all of the research that has applied Tversky and Kahneman's ideas to different topics across the social sciences, rehears the same critique that Tversky and Kahneman first made, essentially applying the same strategy that ensured their success. It is a two-step strategy, which begins by identifying a target, and goes on to critique this target using insights of behavioural science. The target is typically a rationalist foil. This foil must be an approach to a discipline that relies on (or can be caricatured as relying on) a highly rationalist view of how people act in social contexts. In most cases, this foil is essentially the same as Tversky and Kahneman's. For example, a behaviouralist piece of research will maintain that a particular problem is still dominated by the economists' assumption that the perfectly rational actor is alive and well. Behavioural insights are then introduced to counter this unrealistic model and to propose corrections designed to push the slightly less than rational actor, which the behaviouralist claims exists in reality, closer to the ideal of the perfectly rational actor.

Of necessity, scholars applying behavioural ideas to international law have found their own rationalist foils. One common approach has been to use game theory and rational choice approaches to international law as the required foil and as a corrective to which behavioural ideas are introduced. The other approach has been to maintain that an assumption of 'doctrinalist' methods is that judges or lawyers always perceive and apply the law with perfect rationality – rationality being understood as synonymous with neutrality and emotional objectivity – and, on this basis, to use doctrinalism as the foil. The problem with the former is that it overstates the influence of game theory and rational choice approaches within international law scholarship – by a huge margin if one looks at the field globally and by a large margin even considering only post-war US international law and international relations scholarship, where these approaches have had the most prominence. The problem with the second is that it relies on a crude caricature of 'doctrinalism'.<sup>19</sup> Both problems can be illustrated by *International Law as Behavior*.

<sup>18</sup> Gauri, 'The Right to Be Nudged? Rethinking Social and Economic Rights in the Light of Behavioral Economics', World Bank Policy Research Working Paper Series no. 8907 (2019). Noting the behavioural underpinnings of the European Union's conditionality policies, see V. Vita, 'The Rise of Spending Conditionality in the European Union' (2018) (PhD thesis on file at the European University Institute, Florence). On the centrality of behavioural psychology to the business model of technology companies like Google, see S. Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (2019).

<sup>19</sup> See, e.g., Grant Cohen and Meyer, 'International Law as Behavior: An Agenda', in Grant Cohen and Meyer, *supra* note 10, 1, at 6 ('[i]nternational lawyers become increasingly occupied with doctrinal debates over the relative value of this military manual or that domestic court decision, these states' actions or those states' silence as evidence of state practice and/or *opinio juris*').

Cohen and Meyer's introduction invokes both the rational choice and doctrinalist foils. Although they believe that classical thinkers derived 'theories of international behavior ... from religion (Vitoria and Suarez), morality (Grotius), right-reason (Gentili), or imagined natural histories (Hobbes)', and that international lawyers have continued to theorize the behaviour of states and other actors since then (jumping forward to the 20th century to illustrate this by citing approaches and figures as varied as the New Haven School, rational choice approaches to international law, Max Weber, Pierre Bourdieu, Sally Engle Merry and others), Cohen and Meyer maintain that 'the heart of international law practice [and] scholarship' today remains 'dominated by doctrinal analysis'.<sup>20</sup> They approve of the fact that 'rationalist and economic analyses of international law have thrived' in the wake of Anne-Marie Slaughter and Kenneth W. Abbott's early 1990s call for more interdisciplinary collaboration between international relations and international law, but they believe that '[w]hat we need now are tools to complicate that picture by exploring how international actors actually behave, how their rationality is bounded by psychology'.<sup>21</sup> This apparently contradictory and somewhat eccentric picture of a field descending from a centuries-long tradition of research into the relation between law and behaviour (based on a very broad definition of behaviour), which is unaccountably still dominated by unnamed doctrinalists and a few scholars undertaking 'rationalist and economic analyses of law', is necessary because behaviouralists only have something to say if everybody else sees the world in a highly rationalist way. In this picture, doctrinalists and law and economics scholars are both rationalist, if in different ways.

This pattern of a rational choice/doctrinalist foil, followed by the behavioural critique, continues as the reader moves through *International Law as Behavior*. Jean Galbraith's chapter on 'Deadlines as Behavior in Diplomacy and International Law' opens with both foils, arguing that international legal scholarship has been concerned with the behaviour of states but has explored this behaviour either through 'observations drawn from legal practice' or by using 'assumptions of instrumental rationality'.<sup>22</sup> Now, Galbraith maintains, there is 'a substantial – and rapidly growing – body of work that expressly approaches international law using insights on human behavior drawn from empirical research on individuals and groups, with special attention paid to developments in behavioural economics and cognitive psychology'.<sup>23</sup>

Tomer Brude and Yahli Shereshevsky's chapter, 'Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavior Hypotheses', focuses on the rational choice foil as an object of critique. They take issue with what they characterize as a middle ground of scholars who do not clearly reject or accept the utility of 'soft law' but have developed a 'series of "standard" rational choice conjectures for

<sup>20</sup> Grant Cohen and Meyer, *supra* note 10, at 2-3; 6.

<sup>21</sup> *Ibid.*, at 8, citing: Slaughter, 'International Law and International Relations Theory: A Dual Agenda', 87 *American Journal of International Law* (1993) 205; Abbott, 'Modern International Relations Theory: A Prospectus for International Lawyers', 14 *Yale Journal of International Law* (1989) 335.

<sup>22</sup> J. Galbraith, 'Deadlines as Behavior in Diplomacy and International Law', in Grant Cohen and Meyer, *supra* note 10, 19, at 20.

<sup>23</sup> *Ibid.*, at 20.



soft law's influence', primarily addressing an article written by Meyer and Andrew T. Guzman as well as Guzman's wider writing on international law from the perspective of rational choice theory.<sup>24</sup> Broude and Shereshevsky want to modify rational choice theories where 'human decision-makers are assumed, under prevailing conditions of resource scarcity, to act as utility-maximizing and self-interested beings that respond to incentives (positive and negative) in accordance with stable preference priorities', proposing instead 'alternative explanations derived from psychology and behavioural economics' that may better explain why soft law exists and is used.<sup>25</sup>

Both Galbraith's and Broude and Shereshevsky's chapters rely heavily on Tversky and Kahneman's theorization of how individuals fail to fulfil the ideal of perfect rationality. For Galbraith, these are failures to rationally allocate time to meet deadlines due to what Tversky and Kahneman argued are predictable mental phenomena like the 'planning fallacy' (over-optimism about how long things will take) or 'loss aversion' (people can be more afraid of losing things than attracted to gaining them).<sup>26</sup> Galbraith's core point is that, as 'evidence strongly suggests that aspects of this research demonstrate general human traits', it may be possible in an international law context to correct for these mental phenomena, for example by assigning deadlines to treaty ratification processes in ways that may make it more likely treaties will be ratified.<sup>27</sup>

Broude and Shereshevsky start with what they think is a 'longstanding puzzle': 'Why do international and domestic legal actors *employ* and even *apply* international soft law sources, that by any definition, are not formally binding and are technically unenforceable?'.<sup>28</sup> Their chapter first surveys a series of rational choice answers to this question, finding these attractive though lacking in various ways, before using behavioural concepts to provide what they think are better answers to this puzzle. The implication of their analysis is that, because it is not binding and is unenforceable, it is irrational for any actor to react in any way to soft law. However, they suggest that a number of mental phenomena theorized by behavioural psychologists may explain why actors do in fact use and respond to soft law. These phenomena include the 'status quo bias' (people prefer a *status quo* over change, and soft law could indicate a *status quo*);<sup>29</sup> the existence of informational and reputational 'cascades' (people may rely on information provided by other people, especially highly regarded others, or people can wish to conform, and soft law may constitute such information or the indication of a consensus with which to conform);<sup>30</sup> or the effect of 'anchoring' and of 'reference

<sup>24</sup> T. Broude and Y. Shereshevsky, 'Explaining the Practical Purchase of Soft Law: Competing and Complementary Behavior Hypotheses', in Grant Cohen and Meyer, *supra* note 10, 98, at 101. Addressing Guzman and Meyer, 'International Soft Law', 2 *Journal of Legal Analysis* (2010) 171. For Andrew Guzman's general rational choice theory of international law, see A.T. Guzman, *How International Law Works: A Rational Choice Theory* (2008).

<sup>25</sup> Grant Cohen and Meyer, *supra* note 10, at 101, 108.

<sup>26</sup> *Ibid.*, at 33, 36.

<sup>27</sup> *Ibid.*, at 38.

<sup>28</sup> *Ibid.*, at 98, 99 (emphasis in original).

<sup>29</sup> *Ibid.*, at 115–117.

<sup>30</sup> *Ibid.*, at 118–120.

points' (people can be influenced by irrelevant information, and soft law may contain such irrelevant information).<sup>31</sup> These are all concepts drawn from the work of Tversky and Kahneman and from others who have built on their work.

Many of the modifications made by Tversky and Kahneman to rational actor models – such as that individuals sometimes set deadlines over-optimistically, or can be cautious about losing things, or may wish to conform, or can be influenced by information that a truly rational actor would ignore – are intuitively reasonable observations. One question is whether we need to theorize the 'planning fallacy', 'loss aversion', 'the status quo bias' and so on and observe and measure subjects to arrive at these observations. The fact that anyone would feel able to say such things only after attempting to devise a process to objectively measure human subjects is symptomatic of a simplistic conception of human psychology. In fact, many bodies of knowledge have long disabused us of the simplistic idea that our real motivations are always known to us and rational. As Samuel Moyn has noted in a review of Cass Sunstein's 2019 book *On Freedom*, Western philosophy, including Christian thought and theorists like Karl Marx and Sigmund Freud, has long held central the idea that, whether due to sinful lusts, ideology or rationalization, our conscious motivations are not necessarily our true motivations, but, as Moyn writes, 'Sunstein simply ignores these traditions and assumes that people's desires are credibly their own'.<sup>32</sup> Like Sunstein, the contributions to *International Law as Behavior* also ignore these traditions, initiating inquiry into human motivation from a year zero constituted almost uniformly by Tversky and Kahneman's 1970s critique of the economists' rational actor.

They also ignore traditions of specifically legal thought that have taught us that what legal actors do cannot necessarily be explained only on the basis of their conscious and professed motivations. Cohen and Meyer's introduction does address traditions like American legal realism, the New Haven School, the law and society movement, sociological approaches to legal research and others but mainly to appropriate them along with Vitoria, Suarez, Grotius, Gentili and Hobbes as proto-behaviouralists.<sup>33</sup> They give no substantive credence to the lessons these traditions taught us about the ways in which the conscious and professed motivations of legal actors may differ from their real motivations. To do so would undermine the vague caricature of doctrinalism against which *International Law as Behavior* is pitched. Anna Spain Bradley captures the book's general posture on this point when she simply asserts that an 'assumption throughout legal history has been the view that humans are capable of behaving rationally'.<sup>34</sup> Just like Sunstein's nudgeable actor, the rational actor taken as an object of critique in *International Law as Behavior* has never heard of Freud or Christianity, while the doctrinalist found within its pages has certainly never heard of legal realism.

<sup>31</sup> *Ibid.*, at 120–124.

<sup>32</sup> Moyn, 'The Nudgeocrat: Navigating Freedom with Cass Sunstein', *The Nation* (2019); C. Sunstein, *On Freedom* (2019).

<sup>33</sup> Grant Cohen and Meyer, *supra* note 10, at 2–7.

<sup>34</sup> *Ibid.*, at 226.

## 4 Under-Attributing Responsibility to the Powerful; Over-Attributing Responsibility to the Vulnerable

In the preceding section, I have suggested that in *International Law as Behavior* we find a moderate critique of implausibly rationalist models of human action, whether of caricatured doctrinalists or rational choice international law scholarship. The book further seeks to pursue the rationalism it critiques by correcting for the ways in which individuals fail to achieve it in reality, with the result that the model of human motivation offered as a corrective in *International Law as Behavior* is itself an implausible one. But even if this essential implausibility is bracketed, other problems emerge when behavioural concepts are used to explain legal or administrative outcomes. These problems suggest a politics underlying this methodology. The simplest way of describing the leitmotif of these problems is that behavioural explanations systematically under-attribute responsibility to powerful individuals and over-attribute it to vulnerable individuals. This occurs because behavioural explanations of social acts are so heavily psychologized that no room is left to allocate responsibility for a particular situation or outcome to structures larger than the individual. This pattern systematically favours those who benefit from inequality, discrimination or dominant ideologies and hurts those who are on the weaker side of an unequal relationship, are discriminated against or are the losers in an ideological contest. Examples from *International Law as Behavior* illustrate this problem.

At the centre of Galbraith's chapter is a case study on the role that deadlines may have played in prompting states to ratify the Chemical Weapons Convention (CWC), but a footnote also offers the example of the UN Convention on the Law of the Sea (UNCLOS).<sup>35</sup> Galbraith suggests that the fact that the entry into force date of the CWC came at the beginning of a legislative session of the US Congress allowed its supporters to trigger 'loss aversion'. Galbraith in turn notes that UNCLOS entered into force just after a round of congressional elections, 'a poor time for congressional action', and still has not been ratified by the USA.<sup>36</sup> While it is reasonable to note that there may have been more convenient times for the US Congress to have addressed ratification of UNCLOS, it seems improbable to suggest that this explains to any significant extent why the USA did not ratify the convention. As Galbraith has described elsewhere, the USA did not ratify UNCLOS primarily due to its vehement objections to redistributive aspects of the regime agreed for seabed mining in Part XI.<sup>37</sup> It should be noted that

<sup>35</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1993, 1974 UNTS 45; United Nations Convention on the Law of the Sea 1982, 1833 UNTS 3.

<sup>36</sup> Grant Cohen and Meyer, *supra* note 10, at 36, n. 67.

<sup>37</sup> Galbraith, 'Prospective Advice and Consent', 37 *Yale Journal of International Law* 247, at 301–303. On the politics of the law of the sea in the context of decolonization, see the work of Surabhi Ranganathan, e.g. Ranganathan, 'Decolonization and International Law: Putting the Ocean on the Map', 23 *Journal of the History of International Law* (2021) 161. The USA maintains this posture in a continuing debate over distributive politics in the law of the sea. On US opposition to redistributive aspects of a treaty on the conservation and sustainable use of marine biological diversity of areas beyond national jurisdiction (the BBNJ process), see R. Derrig, 'Egoism on the High Seas', *OpinioJuris* (27 September 2022), available at <http://opiniojuris.org/2022/09/27/egoism-on-the-high-seas/>.

Galbraith makes this suggestion about UNCLOS in a footnote, but it deserves attention because it is representative of a pattern that is evident in other contributions to the book of behavioural concepts being used to explain unflattering acts of the USA in ways that minimize the responsibility of the powerful individuals determining those acts. In this example, responsibility for the non-ratification of UNCLOS is attributed to US politicians, but only in a very trivial way (as it was submitted at ‘a poor time’). Their ideological opposition to international redistribution is ignored, and Galbraith explains non-ratification as a result of a collective mental slip-up. Bad timing meant that loss aversion could not be deployed by supporters of the treaty. This behavioural mental phenomenon could not favour UNCLOS as it did the CWC.

As to whether behavioural concepts are of assistance in explaining why the USA ratified the CWC, Galbraith’s substantive case study of this treaty ratification is relatively brief, with much of the chapter being taken up by a literature review of empirical social science research into how deadlines affect behaviour. Galbraith’s use of the concept of ‘loss aversion’ seems to amount to the suggestion that the then secretary of state, Madeline Albright, successfully rushed the Senate into giving its advice and consent by misleadingly suggesting that a series of disadvantageous consequences would follow for the USA if it failed to ratify before the CWC entered into force, including suggestions that US chemical manufacturers would suffer economic loss.<sup>38</sup> As discussed in section 3, we might again ask whether we needed the concept of ‘loss aversion’ and the purportedly objectivist methods from which this concept claims validity to make these observations about the motives of the US Senate. Galbraith’s short case study of the CWC would remain equally plausible were no mention made of this concept.

Meyer’s chapter, ‘Cooperating without Sanctions: Epistemic Institutions versus Credible Commitments Regimes in International Law’, again sees behavioural concepts deployed to excuse reactionary politics of the USA. Through the idea of ‘epistemic cooperation’, which draws on the behavioural economics research into Oliver E. Williamson’s transaction costs, Meyer argues for the utility of international legal regimes that distribute information in ways that are likely to condition state behaviour rather than using sanctions.<sup>39</sup> This approach is similar to Sunstein and Thaler’s idea of ‘nudging’ – namely, changes made to an actor’s environment, such as by the provision of information, prompt behavioural responses. One of Meyer’s examples is the Framework Convention on Tobacco Control’s (FCTC) coordination of scientifically informed guidelines on tobacco control, which states parties will have an incentive to voluntarily follow due to the general benefits of limiting exposure to tobacco.<sup>40</sup> Meyer notes that, when the FCTC was being negotiated,

some nations, led by the United States, pushed back against broader limitations on tobacco advertising, promotion, and sponsorship, as well as a legally binding ban on handing out free

<sup>38</sup> Grant Cohen and Meyer, *supra* note 10, at 25–26, 36.

<sup>39</sup> T. Meyer, ‘Cooperating without Sanctions: Epistemic Institutions versus Credible Commitments Regimes in International Law’, in Grant Cohen and Meyer, *supra* note 10, 45. For Meyer’s work on ‘epistemic cooperation’ more broadly, see Meyer, ‘Epistemic Institutions and Epistemic Cooperation in International Environmental Governance’, 2 *Transnational Environmental Law* (2013) 15.

<sup>40</sup> Framework Convention on Tobacco Control 2003, 2302 UNTS 166.

tobacco samples. Insisting on writing legally binding standards into the treaty could well have caused negotiations to founder. Instead, drafting broad standards giving states discretion to act in accordance with recommendations from the WHO allowed the agreement to go forward with the idea that states might unilaterally adopt controls in accordance with expert recommendations.<sup>41</sup>

Meyer's conclusion goes further than simply saying non-binding standards were better than nothing. The presence of behavioural concepts in this analysis spins what might otherwise be explained as a simple win for Big Tobacco, which made the US government protect their ability to advertise and *hand out free tobacco samples*, into a reasonable, scientifically informed outcome. Responsibility for this outcome is only trivially attributed to the powerful (here, tobacco companies and US officials) because their interests and ideological postures are taken as given and not examined. What is problematized is what should be done given those interests and ideologies, and behavioural methods then lend a patina of scientific respectability to the watering down of legal measures. At the same time, by asserting that change should come about through voluntary individual choices, responsibility is over-attributed to less powerful actors. Meyer patronizingly asserts that inadequate tobacco regulation may be a problem of ignorance: 'Developing countries may be unaware of the severe health consequences of tobacco regulation or of the financial costs of health care arising from tobacco-related disease.'<sup>42</sup> This pattern – of asserting that serious social problems are best addressed by communicating information designed to incentivize individual choices beneficial to targeted individuals too ignorant to know their own good – has characterized behaviourally informed policy-making of neoliberal governments around the world, especially concerning social welfare policies. Here, Meyer transplants it faithfully to international law. It is a pattern that excuses legislators of most responsibility, while asserting that the subjects of behavioural governance, who are less powerful and often quite vulnerable, are entirely responsible for their own circumstances.<sup>43</sup>

Perhaps one of the clearest examples of behaviouralism serving an apologia for US power is found in Ryan M. Scoville's chapter 'Egocentric Bias in Perceptions of

<sup>41</sup> Grant Cohen and Meyer, *supra* note 10, at 63–64.

<sup>42</sup> *Ibid.*, at 62.

<sup>43</sup> Making a similar point in relation to Cass Sunstein's work, see Moyn, *supra* note 22; see also Lind, 'Neoliberal Twee', *Tablet Magazine* (14 September 2022) ('Cass Sunstein's latest TED Talk of a book offers the kind of technocratic whimsy that left and right can agree to hate'). The extent to which behavioural theories have shaped 'the growing tendency of some Governments to use the opportunities provided by the digital welfare state to try to alter social behaviours, such as sexual activity or preferences, approaches to cohabitation, the use of alcohol or drugs and the decision to have children', is suggested, though not explicitly examined, in the important work of Philip Alston as special rapporteur on extreme poverty and human rights. UN General Assembly, Note by the Secretary-General, Report of the Special Rapporteur on Extreme Poverty and Human Rights, Doc. A/74/493, 11 October 2019, at 19, para. 67. For a powerful philosophical reconstruction of the deep interactions between behavioural psychological theory, neo-liberalism and technology, see the work of the philosopher and cultural theorist Byung-Chul Han. B.-C. Han, *Psychopolitics: Neoliberalism and New Technologies of Power* (2017). For an examination of the negative consequences of applying behavioural psychology in the field of global health policy, a trend widespread in the UN system, and especially on how this has affected how 'the poor are conceptualised as objects of policy', see V. Das, *Affliction: Health, Disease, Poverty* (2015).

Customary International Law’,<sup>44</sup> From behavioural research building on and including Tversky and Kahneman’s work, Scoville draws two mental phenomena – ‘the false consensus effect’ (people may think that many other people agree with their views and that disagreeing others are deviant) and ‘the false uniqueness effect’ (people may think their views are uncommon).<sup>45</sup> Scoville argues that these phenomena could help explain why differences exist over the identification of customary international law; in what directions perceptions of the law are likely to shift; how parochialism affects customary international law; and how rational choice accounts of customary international law could be modified to make them more accurate.<sup>46</sup> Considering parochialism, Scoville notes that American courts and scholars often identify norms by referring to practices and positions of the USA and Western European states. Scoville argues that, while ‘cynical’ interpretations hold that courts and scholars do this ‘to promote American empire, sustain the marginalization of peripheral states, and mold the law to reflect US interests’, thanks to the ‘false consensus effect’ and the ‘false uniqueness effect’, we can conclude that ‘[s]ocial psychology, in contrast, suggests a far more innocent explanation – that analysts cite primarily to Western sources because they genuinely perceive that American and Western norms reflect global consensus’.<sup>47</sup> To describe this as an under-attribution of responsibility to the powerful is perhaps an understatement. This is a low point of *International Law as Behavior*, one that captures a slippery blend of apparent naiveté and rationalization of oppressive power that pervades the book.

A final example of this theme is Spain Bradley’s chapter ‘Advancing Neuroscience in International Law’.<sup>48</sup> Bradley surveys the field of neuroscience, arguing that functional magnetic resonance imaging (MRI) technologies can provide a biological basis for behavioural research.<sup>49</sup> Drawing on work in the field of ‘neurolaw’, Bradley argues that the physical characteristics of subjects’ brains observed on such scans can be connected to behavioural theories about ‘error, mistake, bias, and other decision-making pathologies’.<sup>50</sup> For example, behavioural predictions concerning decision-making failures might be linked to observations of damage to parts of a subject’s brain.<sup>51</sup> Much of the chapter focuses on ways to map neural pathways, blood flow to different parts of the brain or hormone releases, which could support behavioural hypotheses about topics like whether Barack Obama was influenced by empathy as he oversaw the killing of Osama Bin Laden,<sup>52</sup> whether judges’ decisions are influenced by emotion<sup>53</sup> or why people may trust members of a social group with which they identify.<sup>54</sup>

<sup>44</sup> Scoville, ‘Egocentric Bias in Perceptions of Customary International Law’, in Grant Cohen and Meyer, *supra* note 10, 74, at 74–97.

<sup>45</sup> Grant Cohen and Meyer, *supra* note 10, at 75–79.

<sup>46</sup> *Ibid.*, at 91–97.

<sup>47</sup> *Ibid.*, at 96.

<sup>48</sup> Spain Bradley, *supra* note 13, at 191–229.

<sup>49</sup> Grant Cohen and Meyer, *supra* note 10, at 192, 205.

<sup>50</sup> *Ibid.*, at 219.

<sup>51</sup> *Ibid.*, at 192.

<sup>52</sup> *Ibid.*, at 215–217.

<sup>53</sup> *Ibid.*, at 194.

<sup>54</sup> *Ibid.*, at 213.

Bradley notes the preliminary character of neuroscientific research and its application to law but offers some troubling suggestions about topics that these methods might address in the future. Some examples cited by Bradley make clear that this research constitutes a problematic effort to find biological bases for socially constructed categories. For example, the chapter speculates about whether neuroimaging may be used to support assignments of levels of criminal responsibility; the possibility of using neuroscience to predict 'an individual's future behavior, particularly the risk of violence'; rethinking legal doctrines like that of the reasonable person; and linking neuroscientific theories about the 'range of normal variation' in the shape of human brains to collective decision making and the behaviour of states.<sup>55</sup> Now discredited 'scientific' disciplines like phrenology asserted biological bases upon which systems of discrimination, oppression and social control were built. Bradley does not consider the fact that phrenology is a clear intellectual antecedent of contemporary neuropsychological theory. Bradley's speculations about using neuropsychological theories about the shape of human brains, blood and hormone flows to establish biological bases for behavioural mental phenomena envisage dystopian levels of responsibility being assigned to very vulnerable individuals, while gifting a technique of control to the powerful.

## 5 A Tendency to Subsume

Four of the book's chapters do not directly employ behavioural methods. It might be concluded that their inclusion in the book is conceptually incoherent, but they do illustrate a tendency of behaviouralism to subsume bodies of knowledge drawn from other disciplines and claim them as its own. The contributions by Tamar Megiddo ('The Missing Person of International Law Scholarship: A Roadmap for Future Research') and Andrew Keane Woods ('The Wrong Way to Weigh Rights') both critique the centrality of the state as a unit of analysis in international law and international relations scholarship. Megiddo argues for the individual to be taken as the core unit of analysis in international affairs, attacking a 'statist' paradigm that dominates interdisciplinary research on international law.<sup>56</sup> Woods critiques scholarship that uses quantitative social science methods to measure state 'compliance' with human rights obligations, offering some persuasive analysis of the extent to which this focus on measuring compliance distracts from more sophisticated methods of investigating impacts of human rights regimes.<sup>57</sup> However, both Woods and Megiddo advocate behavioural methods as the solution to what they see as the 'statist' preoccupations of international law. Without employing behavioural methods or theories, both chapters fit comfortably with the behavioural impulse to individualize the state by conceptualizing it as solely an aggregate of individual people.

<sup>55</sup> *Ibid.*, at 108–200, 201, 208–209.

<sup>56</sup> Megiddo, 'The Missing Person of International Law Scholarship: A Roadmap for Future Research', in Grant Cohen and Meyer, *supra* note 10, 230, at 230–232.

<sup>57</sup> Woods, 'The Wrong Way to Weigh Rights', in Grant Cohen and Meyer, *supra* note 10, 265, at 265–269.

When criticizing realist international relations scholars who have focused on states rather than individuals, it is perhaps a shame that Megiddo did not engage with the literature on Hans Morgenthau's extensive interaction with another of the 20th century's great paradigms of psychology – Freudian psychoanalysis. Megiddo's reading of Morgenthau casts him as simply despairing at the impossibly complex task of incorporating irrational and ideological factors into his analysis of foreign policy. However, Robert Schuett's work has persuasively reconstructed extensive connections between Morgenthau's realism and Freudian concepts.<sup>58</sup> Megiddo relegates to a footnote the following intriguing quotes from Morgenthau: '[A] theory of foreign policy which aims at rationality must ... abstract from these irrational elements and seek to paint a picture of foreign policy which presents the rational essence to be found in experience, without the contingent deviations from rationality which are also found in experience' and 'Political realism presents the theoretical construct of a rational foreign policy which experience can never fully achieve'.<sup>59</sup> Reading these quotes together with Schuett's writing on Morgenthau's engagement with Freudian concepts, we can at a minimum perceive a sophisticated awareness of the problem posed by the irrationality of unconscious motivations.

The chapter by Galit A. Sarfaty, 'Toward an Anthropology of International Law', offers an excellent overview of recent important research applying anthropological methods to international law contexts. Sarfaty's own case study on human rights in the 'organizational culture' of the World Bank develops a rich portrait of the bank and how its officials relate to human rights in their work by drawing on extensive ethnographic and interview-based research. Sarfaty describes 'how Bank lawyers have recently translated human rights into an economic framework to resonate with the disciplinary group that is dominant within the institution. They have thus attempted to depoliticize rights by vacating their emancipatory dimension'.<sup>60</sup> Unfortunately, a similar point could be made about the translation of political and legal problems into the language of behavioural science, itself an economic paradigm. Sarfaty's own chapter includes some framing by reference to 'the rational actor theories that have historically dominated international relations', and it seems odd to think of anthropological research as a response to, or a modification of, rationalist assumptions rather than a tradition of inquiry adopting a distinct point of ontological departure.<sup>61</sup> Elena Baylis' chapter, 'Transnational Collaborations in Transitional Justice', includes few references to behavioural ideas and presents a nuanced analysis of interactions between 'internationals' and 'nationals' among the staff of hybrid tribunals.<sup>62</sup> Baylis emphasizes 'the part played by individual actors in developing international law

<sup>58</sup> Schuett, 'Freudian Roots of Political Realism: The Importance of Sigmund Freud to Hans J. Morgenthau's Theory of International Power Politics', 20 *History of the Human Sciences* (2007) 53.

<sup>59</sup> Grant Cohen and Meyer, *supra* note 10, at 235, n. 12, citing H.J. Morgenthau, *Politics among Nations* (1948; reprinted 1985).

<sup>60</sup> G.A. Sarfaty, 'Toward an Anthropology of International Law', in Grant Cohen and Meyer, *supra* note 10, 128, at 137.

<sup>61</sup> Grant Cohen and Meyer, *supra* note 10, at 133.

<sup>62</sup> Baylis, 'Transnational Collaborations in Transitional Justice', in Grant Cohen and Meyer, *supra* note 10, 158, at 158.



in practice, through their roles as members of communities of practice and transnational legal networks'.<sup>63</sup>

While, in some sense, these chapters share *International Law as Behavior's* interest in viewing states as aggregates of individuals, their place in the book can also be understood in the light of Cohen and Meyer's introductory effort to subsume many other traditions of legal and social thought into behaviouralism.<sup>64</sup> This appears to be based on the dubious idea that if we are to proceed from an ordinary language definition of 'behaviour', everybody is ultimately studying this phenomenon.

## 6 Conclusion

It is perfectly reasonable to assume that people fail to rationally allocate time, or overestimate the normality of their opinions, or are influenced by irrelevant information. Rather than focus on these observations, I have sought in this essay to examine a set of basic problems that arise whenever behavioural concepts are used to explain how people have acted, or will act, in social contexts. I have suggested that when they are not presented as a critique of an essentially implausible, caricatured rationalist view of human motivation, the substantive observations described using behavioural concepts are at best banal, symptomatic of a simplistic conception of human psychology. What is worse, the tragicomic aim of this critique is to engineer interventions that will correct the individual back towards the caricatured rationalist actor that was the initial object of the critique.

In tracing the route that behaviouralism has taken to get to international law, I have emphasized that behavioural research ignores other important traditions of legal, social and psychological theory that have long told us we are not rational beings and which have theorized the consequences of that insight for our interpersonal relationships, our politics and society. While ignoring what these traditions have already taught us about ourselves, behavioural approaches to law proclaim their own novelty and frequently attribute any resistance to their methods to the disciplinary-bound myopia of those cast in the role of conventional lawyers and scholars. A representative example of this posture can be found in Cohen and Meyer's introduction to *International Law as Behavior*. Bemoaning international lawyers' preoccupation with doctrinal debates, they say:

Engaging in those debates requires expertise in law, legal doctrine and legal argument rather than the science of behavior. Extralegal studies of legal questions are rendered beside-the-point doctrinally, precisely because they threaten to replace lawyers with social scientists and, in turn, law with policy. But the stylized versions of empirics and theory embedded in modern doctrine also allow international lawyers to wave their hands at the ever-increasing complexity of each ... the methodological tools, norms, and languages of sociology, psychology, anthropology, economics, and empirics have developed to a point where rigorous study requires significant expertise. Even borrowing insights from these various fields requires enough

<sup>63</sup> *Ibid.*, at 159.

<sup>64</sup> Grant Cohen and Meyer, *supra* note 10, at 1–7.

familiarity with a methodology's specific beats to allow translation out of the field's language and into that of international law.<sup>65</sup>

This is a well-worn trope, in which the behavioural scientist plays an omniscient Renaissance figure of whom lawyers are correctly fearful, sensing their own inability to keep pace with the complexity of the modern world and our ways of studying it, knowing the inevitability of the replacement of their craft by the 'science of behavior'. Contrary to this caricature, it is behaviouralists who 'wave their hands' at vast bodies of knowledge gathered in many disciplines about our irrational, moral and unconscious motivations. Rather than failing to follow the 'specific beats' of these other bodies of knowledge, the appropriate metaphor for the behavioural position might be that of a member of an orchestra, abruptly taking to the stage mid-performance to begin playing an entirely different melody to the rest of the orchestra, while loudly complaining that the poor technical skills of their colleagues are the cause of the disharmony.

But a more important concern is one raised by Hannah Arendt in her 1958 book *The Human Condition*:

The trouble with modern theories of behaviorism is not that they are wrong but that they could become true, that they actually are the best possible conceptualization of certain obvious trends in modern society. It is quite conceivable that the modern age – which began with such an unprecedented and promising outburst of human activity – may end in the deadliest, most sterile passivity history has ever known.<sup>66</sup>

Arendt's concern, which presaged the rise of behavioural global governance we see today, should be our concern too. Descriptions do work of social construction, and this is a concern about what behavioural theories might make of our society if they become our mode of describing it. It is a concern that, when we make laws or design policies premised on the behavioural conception of the person, those laws or policies aim to make people do things not by communicating with them in a reasoned way, or asking them to contribute to a collective project, but, rather, by changing their environment in ways in which a putatively scientific theory maintains will make them act more like a rational actor. So the behavioural citizen is not an engaged or active citizen; they are, as Arendt warned, deeply passive. They are passive in that they are influenced by adjustments to their environments into which they have no input. At the same time, as I suggested earlier in section 4, the most vulnerable of these citizens are systematically attributed unjust levels of responsibility for social problems that are not of their creation, while the powerful are excused.

As can be seen in the examples from *International Law as Behavior* analysed in this review essay, if behavioural methods are used to reorganize society, politics are erased and replaced by these techniques. Skinner's *Walden Two* is a portrait of such a society. Politics are simply not required. The community's organization is a purely scientific matter. Inhabitants' needs are experimentally established and then satisfied. Their motivations are identified, and their context is shaped to correct for them. Order is

<sup>65</sup> *Ibid.*, at 6–7.

<sup>66</sup> H. Arendt, D.S. Allen and M. Canovan, *The Human Condition* (2nd edn, 2018), at 322.

maintained not by force but, rather, by the creation of environments that administer positive reinforcement.

Today's behaviouralists often wish to disassociate themselves from these roots of their science, but, like Skinner, they also see political disagreement as an aggregate of many individual failures of rationality. They also argue that the appropriate response to these failures is to alter peoples' environments in ways that correct for them, to help all achieve perfect rationality in unison and permit politics to wither away as a prescientific phenomenon. Ultimately, behavioural techniques of governing still ask Skinner's question: what can a few make of mankind? 'What kind of world can we build – those of us who understand the science of behavior?'<sup>67</sup>

<sup>67</sup> Skinner, *supra* note 1, at 279.