

2008

h-dipla

H-Diplo Article REVIEWS

<http://www.h-net.org/~diplo/reviews/>

No. 187b

Published on 23 July 2008

H-Diplo Article Review Managing Editor: Diane N. Labrosse

H-Diplo Article Review General Editor and Web Editor: George Fujii

John Hepp. "James Brown Scott and the Rise of Public International Law." *Journal of the Gilded Age and Progressive Era* 7.2 (April 2008): 151-179.

URL: <http://www.h-net.org/~diplo/reviews/PDF/Spiro-Hepp.pdf>

Reviewed by **Peter J. Spiro**, Charles Weiner Professor of Law, Temple University—Beasley School of Law

Part 2 of an Article Review Forum (for part 1, a review by Benjamin Coates, see No. 187a)

I suspect every academic discipline has them, scholars from three or four generations back with whose names everyone is familiar but not much beyond that. To the extent they are engaged, it is on a piecemeal, selected-topic basis. Their work is no longer read cover to cover, and if in fact they have any substantive reputation it is, at best, as vaguely out of fashion. It's the professional disadvantage being dead.

So it is with international legal scholars and James Brown Scott. All of us know his name, from footnotes or the library shelves, or from promotional materials of the American Society of International Law (donations to which of \$1,000 or more come with membership in the "James Brown Scott Club"). Some will have addressed elements of his work (in my case some of his passionate work on nationality and international law¹), but few international legal scholars know much more about Scott than that.

And so we are in debt to John Hepp for his graceful description of Scott's career. Frustrating as he may have been for Hepp to study, the piece sketches a life that will sit comfortably with Scott's progeny. We who practice and study public international law today belong to the college that Scott created. Hepp notes the importance of associations to the culture of professionalism, and that certainly describes the place of the American

¹ See James Brown Scott, *Observations on Nationality* (New York: Oxford University Press, 1931).

Society of International Law among international lawyers.² It is good to know those who framed one's own community landscapes.

More importantly, Hepp's essay contextualizes Scott's career as representing the contemporary place of international law. This is done along three dimensions: the place of international law in the legal academy, the methodological tendencies of international legal scholarship, and the place of international law on the global landscape. On all three counts Scott's experience can be charted as one of early promise and dashed aspirations. But on all three we may be seeing today a vindication of his efforts. The first half of the twentieth century was not kind to international legal scholars or to international law. The first half of the twenty-first is looking considerably friendlier.

As Hepp describes, Scott was at the center of the watershed move in legal education to the case method, a pedagogical approach that continues to dominate in law school classrooms today. He served as the founding editor of a casebook series (for West Publishing) which remains one of the leading players in legal publishing. That fact would probably startle law professors teaching today. The possibility of a central place for international law in the law school curriculum soon dissipated; by 1914, as Hepp describes, Scott was defensively declaiming a Minnesota law professor's classroom apology for teaching the subject at all. Through much of the twentieth century, international law was a marginalized field in the law school curriculum. Many legal academics questioned the status of international law as such.³

All the same, international legal scholarship reflected broader currents in the legal academy. As Hepp notes, international law took up the trend towards sociological jurisprudence, as the likes of Quincy Wright and Philip Jessup deviated from the formalism of Scott's generation. Myres McDougal and the New Haven School subsequently perfected the sociological approach in international law, in such a way as almost to eliminate any vestiges of formalist method. In the case of international law, though, the move was more of necessity than academic fashion, for there was little formal law to work with.

Or at least little formal law having any bearing on underlying reality. Scott's fate was ultimately tied up in the two great wars and the accompanying fall of international law. International law obviously hadn't worked to serve peace and justice; witness the 1928 Kellogg-Briand Pact outlawing war (a treaty, by the way, that remains in effect – as a formal matter – to this day). Scott and international law may have had powerful

² For more on Scott's role in the founding of the American Society of International Law, including material from the Society's archives, see Frederic L. Kirgis, *The American Society of International Law's First Century, 1906-2006*, ch. 1 (Leiden & Boston: Martinus Nijhoff, 2006).

³ See, e.g., H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

influence during the first quarter of the century. But by the time of his death in 1943, Scott must have been mightily depressed at the shambles of his life project.⁴

Today's world would look considerably brighter to him on all fronts. First, international law is regaining a central place in legal education. Such schools as Harvard and Michigan have recently introduced international law to the required first-year law-school curriculum. As international law comes to affect all facets of the law, not just on great questions of foreign relations but in such areas as tax, family, bankruptcy, and criminal law, "domestic" law faculties are coming on board. Student enrollments and faculty appointments are reflecting the trend, and after several decades of lackluster scholarship, international law is delivering on the research front.

The method may not be legal formalism, but Scott's approaches nonetheless resonate. His idiosyncratic (for his day, considering the orientation of twentieth century international law towards elites) premise that international law required no sanction other than that of public opinion is coming to pass, as a range of constituencies press their agendas at the international level. The work of non-governmental organizations – including but well beyond the American Society of International Law – would supply Scott with ample evidence for the proposition. The phenomenon remains fledgling in the United States, but other publics are mobilizing to enforce international law, armed with tools of the new global economy.

And formalism now has purchase as academics and policymakers confront an accumulating body of formal international law. The proliferation of international tribunals in recent years has been remarkable, from the dispute resolution body of the World Trade Organization to the International Tribunal for the Law of the Sea to the International Criminal Court.⁵ These bodies are generating law that clearly counts as such, in the sense that they are affecting behavior on the ground. Formalism in international law is plausible, at least, in a way that wasn't true even twenty years ago.

All of which is by way of seconding Hepp's call to study more closely the lives of Scott and his contemporaries in international law. Their work is now relevant in a way that it never has been before, perhaps more relevant than even during their own lives.

Peter Spiro is Charles Weiner Professor of Law at Temple University – Beasley School of Law. He writes on issues relating to citizenship, the constitutional aspects of foreign relations, and international legal theory. He is the author of *Beyond Citizenship: American Identity After Globalization* (Oxford University Press

⁴ Although the motivation was unclear, he rewrote his will in 1942 to eliminate a \$10,000 bequest to the American Society. See Kirgis, *supra*, at 161-62.

⁵ For a clearinghouse effort to track the development of these institutions, see the Project on International Courts and Tribunals, <http://www.pict-pcti.org/>.

H-Diplo Article Review

2008). Spiro is a former law clerk to Justice David H. Souter of the U.S. Supreme Court and currently serves as a member of U.S. Department of State's Historical Advisory Committee.

--Commissioned for H-Diplo by Diane Labrosse

Copyright © 2008 H-Net: Humanities and Social Sciences Online.

H-Net permits the redistribution and reprinting of this work for non-profit, educational purposes, with full and accurate attribution to the author(s), web location, date of publication, H-Diplo, and H-Net: Humanities & Social Sciences Online. For other uses, contact the H-Diplo editorial staff at h-diplo@h-net.msu.edu.