

## Rule-Skepticism, “Strategery,” and the Limits of International Law

JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (Oxford Univ. Press 2005) (\$29.95)

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John Austin and H.L.A. Hart, among others, have argued that international law is not “law” at all.<sup>1</sup> Versions of this claim have become a contemporary diversion in and out of the academy, in part due to debates over the proper role, if any, of international law in the decision-making procedures of domestic courts.<sup>2</sup> For some, the claim is

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1. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (David Campbell & Phillip Thomas eds., 1998); H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1997). This view has been subject to indignant objection. For a reply to Austin, see Philip C. Jessup, *The Reality of International Law*, 18 FOR. AFF. 244 (1939). For a reply to Hart, see ANTHONY A. D’AMATO, *INTERNATIONAL LAW: PROCESS AND PROSPECT* (1987).

2. See, e.g., *Roper v. Simmons*, 543 U.S. 551 (2005); *Foster v. Florida*, 537 U.S. 990, 991 (2002); *Hearings of Nomination of John G. Roberts as Chief Justice of the Supreme Court: Hearing Before the Senate Judiciary Comm.*, 109th Cong. (2005) (exchanges between Judge Roberts and Senators DeWine and Kyl); Roger Alford, *In Search of a Theory for Constitutional Comparativism*, 52 UCLA L. REV. 639 (2005); Roger Alford, *Federal Courts, International Tribunals, and the Continuum of Deference: A Postscript on Lawrence v. Texas*, 44 VA. J. INT’L L. 913 (2004); Roger Alford, *Misusing International Law Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004); Roger Alford, *Federal Courts, International Tribunals, and the Continuum of Deference*, 43 VA. J. INT’L L. 675, 793 (2003); Paul Stephan, *Constitution and Customary International Law: The Intellectual Origins of the Restatement (Third) of the Foreign Relations Law of the United States*, 44 VA. J. INT’L L. 33 (2003); Jeffrey Toobin, *Swing Shift*, THE NEW YORKER, Sept. 12, 2005, at 42; David Gray, *A Prayer for Constitutional Comparativism in Eighth Amendment Cases*, 18 FED. SENT’G REP. 237–39 (2006); United States

functional. International law lacks the authority, predictability, and mechanisms of enforcement to qualify as “law.”<sup>3</sup> For others, the claim is structural, as it lacks the coherent body of second-order rules needed to provide legitimacy and validity.<sup>4</sup> While scholars and pundits may debate the persuasiveness of these critiques, the fact is that international law marches on. Treaty regimes continue to proliferate;<sup>5</sup> novel institutions dedicated to the enforcement of international law multiply;<sup>6</sup> nations go to war to ensure basic human rights and depose abusive despots;<sup>7</sup> international monetary organizations bind grants of aid to performance of duties established under international law;<sup>8</sup> new nations emerge from dark pasts with constitutional dedications to international human rights law;<sup>9</sup> transnational organizations emerge as international players on par with sovereign states; and international law talk is more than ever at a

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Association of Constitutional Law, *The Constitutional Relevance of Foreign Court Decisions: A Conversation Between Justice Breyer and Justice Scalia* (2005), available at <http://domino.american.edu/AU/media/mediarel.nsf/0/1F2F7DC4757FD01E85256F890068E6E0>.

3. AUSTIN, *supra* note 1; John Fried, *International Law—Neither Orphan Nor Harlot, Neither Jailer Nor Never-Never Land*, in INTERNATIONAL LAW: CLASSIC AND CONTEMPORARY READINGS 25, 26–37 (Charlotte Ku & Paul Diehl eds., 1998).

4. HART, *supra* note 1, at 213–37.

5. Consider, as recent examples, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, U.N. Doc. FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (1998) (entered into force Feb. 16, 2005), and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 36 I.L.M. 1507 (entered into force Mar. 1, 1999).

6. Among the most prominent are the International Criminal Court, the African Court of Justice, the International Criminal Tribunal for Rwanda, and the International Criminal Tribunal for the Former Yugoslavia.

7. NATIONAL SECURITY COUNCIL, NATIONAL STRATEGY FOR VICTORY IN IRAQ 4–5 (2005); David Luban, *Just War and Human Rights*, 9 PHIL. & PUB. AFF. 160, 160–81 (1980).

8. For example, the World Bank, the International Monetary Fund (IMF), and other international financial and trade organizations increasingly condition aid on governance reform. See Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 GEO. PUB. POL’Y REV. 1 (2001) (documenting and criticizing the World Bank’s efforts to condition aid on good governance reforms); see also François Gianviti, General Counsel, Int’l Monetary Fund, Address at International Monetary Fund Conference: Economic, Social and Cultural Rights and the International Monetary Fund 38–40 (2002), available at <http://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/gianv3.pdf> (describing the connection between social and political rights and economic viability that justifies the conditioning of IMF aid on good governance); Harold James, *From Grandmotherliness to Governance: The Evolution of IMF Conditionality*, 35 FIN. & DEV., No. 4 (1998) (providing a history of the IMF’s contemporary use of conditionality as a tool to combat corruption and advance the development of transparent democratic institutions).

9. See David Gray, *An Excuse-Centered Approach to Transitional Justice*, 74 FORDHAM L. REV. 2621 (2006).

premium in arenas as diverse as domestic courts, international relations, and politics.

While the persistence and advancement of international law may provide the faithful a moment to smirk,<sup>10</sup> they are left with a conundrum. Whether orphan or harlot, jailer or never-never land, international law wants for a central enforcement authority.<sup>11</sup> Absent the coherence of a stable coercive authority, practitioners and advocates must provide some account of why states do, in fact, indulge in international law talk, participate in international law regimes, and abide by international law norms. They must also explain why, sometimes, they do not. Critics face an obverse challenge. To avoid charges of being merely academic, they must provide some account for why states engage and, more often than not, obey<sup>12</sup> international law.

Building on work previously published in the pages of this journal,<sup>13</sup> Jack Goldsmith and Eric Posner (“authors”) pick up this gauntlet in *The Limits of International Law*.<sup>14</sup> In the opening pages of this efficient and thought-provoking book, the authors note these “undeniable but misunderstood facts about international law: that it lacks a centralized or effective legislature, executive, or judiciary; that it favors powerful over weak states; that it often simply mirrors extant international behavior; and that it is sometimes violated with impunity.”<sup>15</sup> Rather than citing these facts as empirical evidence of the failure of international law to become “law,” the authors treat the realities of international law, international law practice, and international politics as challenges to, and checks on, theory.

The authors’ principal argument is that the commonly held view of international law as exogenous to state interests and action, providing a check on state behavior, is backward. Applying tools of rational choice

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10. Mattias Kumm, *International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model*, 44 VA. J. INT’L L. 19 (2003).

11. Fried, *supra* note 3.

12. LOUIS HENKIN, HOW NATIONS BEHAVE 47 (1979); Leo Gross, *States as Organs of International Law and the Problems of Auto-Interpretation*, in LAW AND POLITICS IN THE WORLD COMMUNITY 64 (G.A. Lipsky ed., 1963).

13. Jack L. Goldsmith and Eric A. Posner, *International Agreements: A Rational Choice Approach*, 44 VA. J. INT’L L. 113 (2003); Jack L. Goldsmith and Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 VA. J. INT’L L. 639 (2000).

14. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) [hereinafter *LIMITS*].

15. *Id.* at 3.

and game theory, Goldsmith and Posner argue that international law emerges as a consequence of strategic interactions between self-interested states. The artifacts of these games that remain are what we call international law. States acting consistently with their interests may appear to “obey” international law, but to so claim is to mistake correlation for cause. What states really do is act in their interests, to the extent that their powers allow. The old ideas about the limits of international law are, then, a symptom rather than a cause. The true limits of international law are the interests of states and the dynamic effects of state interests in strategic engagement.

*The Limits of International Law* is a fascinating and thought-provoking contribution to the literature and it provides a set of moves sure to become standards in international law debates. The bold and clearly articulated views advanced by its authors provide numerous points of engagement for those sympathetic, skeptical, and opposed. This review essay indicates some of these, and predicts that, while the authors’ aspiration to develop a unified theory of international law may be too ambitious, their work will have enduring impact on the fields of international law and foreign relations.

#### PART I: CUSTOMARY INTERNATIONAL LAW (CHAPTERS 1 AND 2)

The Restatement (Third) of the Foreign Relations Law of the United States declares that “[c]ustomary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.”<sup>16</sup> While not the only definition of customary international law in circulation, the Restatement definition highlights both the emergent nature of customary international law and the main characteristic that distinguishes it from custom and comity:<sup>17</sup> motive. In the first section of *The Limits of International Law*, Goldsmith and Posner focus on these two features, arguing that the historical events alleged to give rise to “consistent practice” are better described as a series of contingent, bilateral, strategic events and that state practice in accord with past activity is motivated by self-interest, not “a sense of legal obligation.”

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16. AMERICAN LAW INSTITUTE, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987).

17. See Samuel Estreicher, *Rethinking the Binding Effect of Customary International Law*, 44 VA. J. INT’L L. 5, 11 (2003) (arguing that interactions frequently described in terms of customary international law are best understood through the lens of comity).

Goldsmith and Posner acknowledge that inter-state interactions frequently are described by the states themselves in terms of international law—more on this point *infra*, relating to Part III of the book—but maintain that actual state conduct in arenas allegedly regulated by customary international law is better explained by reference to the interests of states and the potential for achieving strategic equilibriums. The critical move in this analysis is the authors' claim that customary international law is rooted neither in uniform, multilateral engagements nor normatively linked bilateral exchanges, but, rather, is derived from historically contingent bilateral interactions. What states do, and do not do, in these circumstances, the authors claim, is neither predicted nor motivated by customary international law, but rather is motivated by self-interest and predicted by the strategic conditions of their game.

The authors identify four game forms that are the archetypes for customary international law: "coincidence" games dominated by Nash equilibriums,<sup>18</sup> "coercion" games,<sup>19</sup> iterated prisoner dilemmas,<sup>20</sup> and coordination games.<sup>21</sup> Viewed through this game-theoretic lens, the history of any particular norm of customary international law is revealed to be not a process of emergence, dominance, acceptance, and obedience, but a history of events in which states were forced to interact and subsequently conducted themselves in accordance with the strategy that best maximized their interests given the strategic conditions of the engagement. While replication of those strategic conditions may result

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18. As described by the authors, the conditions of such games provide for a single strategy that both maximizes the benefits for each state individually and maximizes efficiency of the game at large, so that no state has any incentive to alter its strategy unilaterally or in response to changes in strategy by other players.

19. The authors define these as games in which a powerful state establishes rules of conduct and can bear the costs of coercive enforcement against weaker states. These are versions of more familiar battle-of-the-sexes games, but with one player able consistently to enforce its preference.

20. Prisoner dilemmas contemplate circumstances in which equilibrium is achieved if both players adopt the same or complementary strategies, but each player may gain significantly, at the cost of other players, by changing strategy. The Pareto optimality achievable in these games is unstable. That instability can be corrected in an individual game if it is part of an iterated series, providing other players future opportunities to employ trigger strategies (tit-for-tat, defection, etc.) that impose costs on unilateral changes in strategy not present in isolated games. Goldsmith and Posner refer to these as "cooperation" games. In order to avoid confusion with other uses of the term "cooperation game" in the literature, this review prefers "iterated prisoner dilemmas."

21. Coordination games contemplate conditions in which each player's interests are maximized if both players adopt the same strategy and neither player's interests are advanced unless coordination is achieved. The authors' version of these games does not contemplate Pareto dominance of any coordinated outcome over other potential coordinated outcomes.

in consistent conduct, the authors argue that the actual course of action adopted by states is a function only of contemporary strategic conditions, without regard to any sense of legal obligation engendered by past conduct.

Goldsmith and Posner offer as case studies the customary international law relating to the doctrine of “free ships, free goods,” territorial waters, ambassadorial immunity, and the exemption from wartime prize for coastal fishing vessels. Particularly relevant to the authors’ historical analyses are the absence of consistent and universal conduct, changes in states’ publicly stated views of the content of customary law, occasions of breach, and the alleged failure of third-party states to impose enforcement mechanisms against violators. During the late eighteenth and early nineteenth centuries, for example, the United States, in the role of neutral or defendant, was a consistent proponent of free-passage for neutral trade vessels save in cases where an effective blockade was in place. During the Civil War, however, the Lincoln administration, now in the role of belligerent, argued for a broader prize privilege that included a definition of effective blockade inconsistent with those defended by previous administrations. Other state actors, Britain and Russia among them, also variously obeyed or adopted degraded views of the doctrine during the nineteenth century with the result that no semblance of universality persisted through World War I. The result, the authors note, was that the doctrine had essentially dissipated by the early twentieth century.

Goldsmith and Posner acknowledge that, whether “obeying” or “violating” the rules of “free ships, free goods,” states consistently attempted to characterize their own actions as obedience and those of their antagonists as violations. The authors maintain, however, that the traditional view of these interactions as rule-following is less powerful in explaining state action than an instrumentalist approach informed by game theory. Specifically, the authors argue that the consistent practice of forbearance that gave rise to the doctrine occurred in the midst of coincidence games in which there was no unilateral advantage in the use of warships to attack commercial vessels. States that subsequently “obeyed” either had nothing to gain from a unilateral shift in strategy, or were too weak to alter the conditions of the game. When interests cease to coincide, however, the authors argue that state conduct is predicted by analysis of engagements as coercion games. States with dominant navies seized commercial vessels to, say, cut off enemy supply lines and enforced equilibrium through the use of naval power. The customary

law rationales offered by these states may have served public notice of a shift in strategy to belligerents and commercial agents, providing added stability, but to characterize these rationalizations as motivated by a sense of legal obligation would be to put the normative cart before the motivational horse.

## PART II: TREATY LAW (CHAPTERS 3, 4, AND 5)

Stalwart believers in international law may be willing to give ground to critics when the topic is customary international law, but draw a line at treaty regimes. Treaties, after all, adopt a legal form and enjoy the formal consent of signatories and parties. Not only do treaties look more like real law, proponents argue that they act like real law, enhancing compliance and providing structure for an international legal regime. While treaty regimes labor under the structural deficiencies central to the “not law” critique, proponents claim that legal structure and formality, process of ratification, and the documentation of multilateral interests enhance the normative power of international law, constrain state parties, and lead states to act from a sense of obedience to treaty terms—as contract terms or as demands of right—even if doing so is contrary to their interests.

If treaties represent an enhancement of international law and constrain state action, sometimes binding states to sacrifice their interests, one may wonder why states would enter treaty regimes in the first place. Goldsmith and Posner certainly do, and their attempt to answer that question drives the agenda in Part II. Building on the arguments in Part I, the authors maintain that states are fundamentally self-interested actors and that treaty law finds its limits at the edges of strategic self-interest as shaped by bilateral games.

Particularly in coordination games and iterated prisoner dilemmas, it is not always possible to efficiently reach and maintain equilibriums through the informal processes of custom. Custom is a product of diffuse processes that cover long spans of history. Absent intervention, standards relating to the measurement of length or focal points that determine the contours of territorial waters, for example, will emerge as the weight of information provided by the experience of repeated contacts reaches a critical point. For any number of reasons, states are not always content to wait for the slow-turning wheels of history to grind out a polished custom; but attempts to create shortcuts expose daunting, multifaceted informational problems ranging from the ethical

to the technical. Part II contends that states enter treaty regimes to bridge these informational lacunae.

The movement away from protectionism and toward free trade in the late nineteenth and twentieth centuries was, the authors argue, motivated by autonomous state interests that provided sufficient motivation for states to unilaterally lower trade barriers even absent promises of reciprocity. As these barriers came down, however, states faced a number of challenges. Some were simple coordination problems. Commercial agents needed standards of measurement and transactional regulations; states needed meeting, negotiation, and arbitration structures. Treaties and treaty negotiations provided efficient solutions to these coordination problems.

More challenging problems arose relating to the temptations of states to succumb to the pressures of inefficient domestic producers to erect selective trade barriers. These, the authors argue, took the form of iterated prisoner dilemmas. Bilateral and, later, multilateral trade agreements enhanced the ability of states to achieve and maintain mutually beneficial equilibriums. Treaties clarified the line between equilibrium-sustaining conduct and breach. They also provided guidance on trigger strategies. Beyond these straightforward functions, the process of negotiating a treaty was expensive and ratification processes required internal debate. In light of these features, treaties signaled commitment and provided valuable information where internal dispositions might otherwise have been opaque.

While treaties provide an important tool for resolving informational deficits that limit the ability of states to reach and maintain equilibriums, Goldsmith and Posner maintain that treaties do not impose independent normative demands on state parties. When they do, states act in accord with trade treaties because it is in their interest to do so. Most treaties, the authors point out, want for formal enforcement structures. Even where, as in the structures associated with the General Agreement on Tariffs and Trade and the World Trade Organization, quasi-judicial edifices are created, actual consequences are meted out as trigger strategies executed by affected states. Third parties seldom, if ever, get involved. The authors are equally unimpressed with consent as a motivating force for compliance with trade agreements. As with customary international law, the authors maintain that the true prime mover is self-interest.

While readers may find the authors' game-theoretic story for trade treaties persuasive, and perhaps intuitive, the same cannot be said of

human rights treaties, which more than other areas of international law appear to have an obvious and compelling moral and legal valence. Nevertheless, Goldsmith and Posner maintain that, even in the field of human rights, legalism is a veneer; instrumental self-interest and strategic conditions better explain state conduct. Dominant among these in the authors' view are the autonomous interests of states. All governments, it is argued, have an interest in advancing the well-being of citizens within objective limits.<sup>22</sup> Citizens have an interest in the well-being of their cohorts, both domestic and international. States and their citizens also, as a general matter, have an interest in doing the right thing. Together with an interest in efficiency—repression and abuse are expensive and limit the development of social resources—these considerations are usually sufficient to preserve basic human rights protections in most states, regardless of international law considerations.

The authors recognize that not all nations or governments share these views and, therefore, coincidence games do not provide a complete account of international human rights practice. As the authors point out, however, international human rights law is toothless with respect to states.<sup>23</sup> States otherwise inclined to violate rights are unlikely to refrain due solely to the legal form of human rights treaties. They do, however, respond to coercive forces imposed by other states. Some citizens and their governments have an interest in ensuring respect for human rights, particularly for those with whom they share ethnic, religious, or other ties. These states routinely employ sticks and carrots in their foreign policy in an attempt to encourage other states to respect human rights. In order to qualify for aid or to avoid sanctions, then, states less inclined to respect human rights may be encouraged to ratify and respect human rights treaties. These coercion games are, of course, very unstable and depend on numerous contingencies ranging from the ephemeral political conditions in rights-engaged states to the needs of target states for aid. Taking account of these conditions, Goldsmith and Posner maintain,

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22. *LIMITS*, *supra* note 14, at 109.

23. This is true even of documents such as the International Convention on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. D, 95-2 (1978), 993 U.N.T.S. 3. While reporting and review procedures through the Human Rights Committee give the appearance of enforcement, the ICCPR is limited by "No Power" provisions that eliminate meaningful United Nations enforcement power. See *LIMITS*, *supra* note 14, at 111-12; David Gray, An Invitation to the Table: Reconceptualizing Human Rights Documentation Procedures [hereinafter Gray, An Invitation to the Table] (unpublished manuscript on file with author).

provides a much more powerful model for predicting state conduct than obedience to “the law.”

This account of human rights practice, as a blend of coincidence and coercion games, does not entirely explain the existence of human rights treaties. While some argue that the expanding body of human rights law reflects commitments and victories in legalization efforts, Goldsmith and Posner maintain that treaty regimes and ratification efforts are better explained by reference to the strategic needs of those engaged in the games. As with trade agreements, human rights treaties solve informational and coordination problems, clarifying what conduct will bring the stick and what the carrot. Ratification of the treaties also signals internal conditions. Signing a treaty may, then, enhance a state’s capacity to attract economic partners. Critical to the authors’ view, however, is that actual respect for treaty terms, as well as coercive measures deployed to ensure respect for human rights, are neither impelled nor limited by treaties. Ultimately, state conduct is driven by self-interest, not legal duty. The United States’ invasion of Iraq provides a useful example. While justified in part by humanitarian grounds, there is no serious dispute that the United States would not have invaded absent security concerns.

### PART III: RHETORIC, MORALITY, AND INTERNATIONAL LAW (CHAPTERS 6, 7, AND 8)

Part III of *The Limits of International Law* addresses what, in the authors’ view, are the objections of greatest concern: the rhetoric of international law, claims about the independent normative duties imposed by international law, and cosmopolitan theories of international right. The authors’ responses are nuanced, but broad strokes can be painted here.

States do, as a matter of fact, engage in quite a lot of international law talk. States highlight their own acts of obedience and criticize derogations by others. They provide international law explanations for their actions and go out of their way to provide international law rationalizations for changes of tack. They tie offers of aid to performance of international law duties and justify acts of aggression, from boycotts to invasions, under international law. As Goldsmith and Posner recognize, these facts about state conduct pose an empirical paradox for the unified theory of international law advanced in the

book. After all, if international law has no normative pull, then why do states expend so much time and energy discussing it?

According to Goldsmith and Posner, the answer is signaling. State-to-state and cross-border commercial transactions are enormously complex and present significant informational barriers that impose transactional costs. While these barriers may be efficiently overcome in the cases of states that share close ethnic, religious, historical, and geographic ties, discount rates rise in positive correlation with the exotic. International law provides states a way to lower their discount rates by signaling, *inter alia*, a general disposition to cooperate, external commitments to peace, and internal commitments that correlate with political and economic stability.

As with other signaling strategies, international law talk may be cheap; but, as the authors point out, whether the talk is cheap or expensive, states that hope to maximize their capacity to operate in fields of international relations and commerce must talk the talk. Of course, signaling in the abstract does not explain the normative tone of international law rhetoric. That, in the authors' view, is a function of the content of international law, which is frequently aspirational, and the form of international law, which, as treaties or customary law, assumes the form of "agreements," supporting normative claims of "ought" and "should" along with corollary assertions of breach and condemnation. The authors maintain, however, that these normative claims are neither redeemable nor subjectively compelling. The true driving force for states is instrumental interest in maximizing economic and political capacities. In today's world, that means maintaining at least a nominal position as a member of the community of international law states.

While some international law advocates may reject entirely the cleansing of all normative content from international law, others may hope to find common ground with Goldsmith and Posner by proposing a synthetic theory that incorporates some of the book's empiricism, but maintains that international law carries real moral force and imposes moral duties on states by virtue of its form and content. Such a view would accept that states seldom act out of a sense of duty to international law, but it would maintain that states should do so. On this reading, Goldsmith and Posner expose a motivational deficit, but leave the normative backbone of international law intact.

While a synthetic approach might have independent merit, the authors burn their bridges in the last two chapters. Their argument is blunt. States first and foremost bear a duty to serve the interests of their

citizens. Citizens may, coincidentally, hold an interest in some international law content. When this occurs, states ought to advance those interests. Where the demands of international law require sacrificing the interests of citizens, however, to do so would be both immoral and undemocratic. The authors argue that responses based on consent, collective good, and cosmopolitan aspirations fail to persuade, though they certainly do not warrant against sacrifice in the name of charity and goodwill where citizen sanction allows.

### COMMENTS

The title *The Limits of International Law* is, in some ways, too modest. The critical foundation upon which the authors' positive views are constructed is a form of rule-skepticism. In a pithy phrase, Ludwig Wittgenstein stated the problem thus: "no course of action could be determined by a rule, because every course of action can be made out to accord with the rule."<sup>24</sup> The version of rule-skepticism in *The Limits of International Law* contends that there is no reason to hold that state conduct is determined by international law when self-interest and strategic circumstances explain that conduct at least as well. Recognizing this analytic parallel illuminates some contributions and potential critiques of the project. While no conclusion is drawn here, it is suggested that thinking through the issues raised in this book will benefit, in particular, certain operationalist and constructivist views of international law.<sup>25</sup>

As with all skepticism, the authors' critical argument raises doubts, but resolves none. That the claim of rule-following is underdetermined does not entitle the skeptic to reject the doubted proposition or to accept its negative. Resolution requires additional evidence, which shifts considerable burdens of persuasion from the critical argument to the authors' positive theory. Goldsmith and Posner bear that burden by

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24. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 201 (3d ed. 1958). See also SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE 7–54 (1982); David Gray, What Can Be Said (July 2005) (unpublished manuscript on file with author). Students of this rigorous and somewhat esoteric debate must forgive the loose presentation of those issues in this review. Here rule-skepticism is invoked only as a thematic point of departure to suggest lines of future investigation, philosophical and otherwise. Legal positivists famously share a similar skepticism. See, e.g., H.L.A. HART, THE CONCEPT OF LAW 124 (2d ed. 1997).

25. See Fried, *supra* note 3; Jutta Brunnee and Stephan Toope, *International Law and Constructivism: Elements of an Interactional Theory of International Law*, 39 Colum. J. Transnat'l L. 19 (2000); Gray, Invitation to the Table, *supra* note 23.

describing histories of international law norms and state action which they use to measure traditional theories of international law. They claim that traditional theories of international law either fail to explain and predict action or are too Baroque to survive even a light passing of Ockham's razor. The authors maintain that a game-theoretic approach is, by contrast, more complete, powerful, and parsimonious.

Understanding these internal dynamics of the critical argument in *The Limits of International Law* highlights the central role played by empirical evidence. The authors' choice of examples, the narratives that they construct, and their historical analysis all provide potential points of clash for critics. Reciprocally, the demonstrated method invites attempts to replicate, foretelling a rush of articles, student notes, and Ph.D. theses that attempt game-theoretic histories in every area of international law. As the authors are acutely aware, their project will stand or fall based on the ultimate success of these attempts.

Among these empirical matters, one will require particular attention. The authors target claims that states are motivated by "a sense of legal obligation."<sup>26</sup> Much of the evidence deployed in support of this view cites occasions when, in the face of significant interests in doing so, states "violate" customary international law. Particularly significant are occasions when states advance legal arguments once rejected or shift their views on the content of the law in the face of an actual or expected conflict. Goldsmith and Posner cite these occasions as proof that states follow their interests rather than sacrificing them in order to conform to international law. This view of history will rightly be subject to some debate. Three possibilities immediately present themselves.

First, historians may argue that Goldsmith and Posner have culled a few pines from a vast forest of oaks. As compared with notorious violations, humdrum compliance with international law does not get much press. A full history may reveal that cited instances of non-compliance at the margins are few compared to much more numerous, but banal, occasions of conformity. If a full historical record reveals that compliance is the rule at the core, Goldsmith and Posner may justify their focus on the margins by claiming that the core is dominated by coincidence games. Determining the validity of that claim will, of course, require a much more complete account of the historical record than is provided in *The Limits of International Law*. However, if that

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26. LIMITS, *supra* note 14, at 23 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987)).

record reveals modest subjugation of other interests<sup>27</sup> or acknowledgment of legal duty as part of decision-making, then the authors' positive theory will have failed to carry the burdens of their critical agenda.

Historians may also find purchase in the authors' selection of examples. In particular, there are certainly occasions when powerful states forgo their interests in favor of obedience to international law. For example, the administration of President George W. Bush is notoriously skeptical of international law and incursions of international law into domestic jurisprudence. Nevertheless, it accepted and enforced the International Court of Justice's opinion in *Case Concerning Avena and Other Mexican Nationals*.<sup>28</sup> Supporters of the views advanced in *The Limits of International Law* may be tempted to respond by pointing out that the administration immediately gave notice that it would withdraw from the Optional Protocol to the Consular Convention Concerning the Compulsory Settlement of Disputes, negating its future obligations under the ICJ opinion in *Avena*. Of course, that is no safe harbor. Withdrawal from the Optional Protocol, and from the Anti-Ballistic Missile Treaty four years earlier, is demonstrative of a subjectively compelling sense of legal obligation. The administration withdrew in order to avoid sacrificing interests that ran counter to international law duties. If the administration did not regard itself as bound, there would have been no reason to withdraw.

Particularly in regard to the authors' account of customary international law, critics may also question the narrative that the authors construct from the historical record. As the authors point out, customary rules (and to some extent the normative frameworks of treaty regimes) are written over decades and centuries. The years that intervene between moments of significance are not empty. Changes in technology and international relations, for example, may prove a law unwise or present new challenges that old rules do not contemplate and cannot resolve. Cast in this light, it may be cynical to regard punctuated events of legal change as self-interested violations. Most law, domestic and international, undergoes change. Whether viewed through a Hegelian or

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27. Curiously, Goldsmith and Posner recognize that states often have an interest in the content of international law, particularly in the area of human rights, and have an interest in being recognized as obedient to international law. As discussed below, it is hard to disentangle these motives from the motive to obey.

28. *Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 12 (Mar. 31).

Kuhnian lens, the events that form the core of the authors' history may mark progress, not disobedience or lack of faith.<sup>29</sup>

Correlations between the argument in *The Limits of International Law* and rule-following debates also present opportunities and challenges for those more theoretically inclined. In particular, the core argument advanced in the book—that states act out of their interests rather than out of a sense of obligation to international law—begs the question of what it is to act from a sense of obligation to international law. From the canon, three possibilities emerge. First, acting from a sense of legal obligation may reflect a commitment to the normative content of a particular law.<sup>30</sup> Second, it may mean acting out of a sense of obligation to the law *qua* law, regardless of content. Third, it may mean acting in light of legal consequences.<sup>31</sup> The choice is far from trivial. The landscape of debates about *The Limits of International Law* will be determined by which definition of “obligation” is the target of design and where interlocutors stake their claims. A sketch of the topography is suggested here.

If acting from a sense of legal obligation means acting out of a commitment to the normative content of the law, then it may be argued that the critical argument in *The Limits of International Law* is of no particular moment. As Kant famously pointed out, law is a solution for devils.<sup>32</sup> It provides external regulation for those who lack the proper internal disposition. For the saints, the existence of law is of no motivational consequence whatever. There is nothing particularly novel or shocking in the claim that states are not always saints and, so, little to the observation that states do not always act from a sense of obligation

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29. The authors address a version of this view in Chapter 7. See LIMITS, *supra* note 14, at 197–203. There, they argue that making this historical case cleans international law of any binding moral authority independent of its content. As is suggested *infra*, this begs the important question of what it is to act from a sense of legal duty, among other difficulties. Those issues aside, if the authors grant this historical point, then they must either give away their critical argument or provide evidence that efforts to advance and reform international law reflect commitment only to the abstracted norms and not the international law, the international law system, or the institutions of international law.

30. IMMANUEL KANT, METAPHYSICS OF MORALS 6:218–21 (Mary Gregor ed., 1996); WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 43–44 (Wayne Morrison ed., Cavendish Publishing Limited 2001) (1765–1769).

31. See JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION, Chap. 1 (1781).

32. IMMANUEL KANT, PERPETUAL PEACE 8:355–85 (Ted Humphrey, ed., 1982); *Idea for a Universal History with a Cosmopolitan Intent*, 8:21–6, in IMMANUEL KANT, POLITICAL WRITINGS 41 (Hans Reiss, ed., 1997).

to the content of international law. After all, if everyone was a saint then there would be no purpose in law at all.

While all of this may seem a philosophers' quibble, it highlights elements of Goldsmith and Posner's argument that advocates can combine to resuscitate international law. Among the state interests the authors identify are investments of citizens in the normative content of international law. The authors focus on human rights, but neither history nor imagination excludes the possibility of citizens' taking an interest in other topics. With this potential in mind, the observation that states sometimes (or often) pursue interests that conflict with the demands of international law counts not as a condemnation of international law in the abstract, but as a useful diagnosis accompanied by a prescription for cure.

While some laws are mere regulations, solving simple coordination problems—rules on which side of the road to drive on, for example—others document core ethical commitments. Generating the latter is a collective process of ethical self-definition.<sup>33</sup> The movement leading to the entry into force of the Landmines Convention<sup>34</sup> indicates some of the interest-shaping potential of international law. Once established, such laws serve to document and remind “us” what “we” are about. With this in mind, the claim that states frequently act out of interests other than commitment to the content of international law is revealed as no more than a notation of anachronism or neglect. Divergence shows either that the law no longer reflects who “we” are, or that “we” have grown lazy and forgetful. In either event, the law provides a critical forum for self-examination and a priceless normative and historical vocabulary with which to describe events in relation to “our” interests.

To read Goldsmith and Posner as pointing out that states are not saints, while leaving room for their saintly potential,<sup>35</sup> does not rescue

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33. See JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS* 151–52 (1996). In Chapter 8, Goldsmith and Posner discuss the possibility of educating citizens to enhance their cosmopolitan dispositions. *LIMITS*, *supra* note 14, at 219–24. There, the issue was moral obligation for states to enter into treaties and other international law duties. The authors are rightly skeptical of claims of, or hopes for, a general cosmopolitanism. The educative program suggested here is much more modest, focused on the normative content of particular rules, existing and aspirational, in order to develop sufficient citizen interest in, and therefore state interest in, say, eradicating landmines or intervening to stop an ongoing genocide.

34. Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, *supra* note 5.

35. This review does not impute such a view to Goldsmith and Posner, who appear quite inclined to the contrary.

the international law orthodoxy. Rather, it indicates that international law and international law practice provide a forum for defining saintly interests and inspiring saintly commitments and action. Inversely, practitioners guided by this reading of *The Limits of International Law* will find international law useful as a normative platform for informing citizens about events in order to ensure state interest and action. From this operationalist point of view, breaches of international law should be recognized as moments of withdrawal, change, or ethical failure. Going forward, it suggests a focus in international law practice on consciousness-building,<sup>36</sup> with respect to both new and existing laws.<sup>37</sup> So viewed, international law has significant potential to overcome the multilateral collective action problems that drive Goldsmith and Posner's critique. The obvious point—that this potential has been tragically underutilized—should inspire more careful nurture and attention, rather than abandonment, of the system.<sup>38</sup>

Different but related concerns attach if the target for *The Limits of International Law* is the claim that states act out of a sense of legal obligation when they obey international law as “law,” regardless of its normative content. As a preliminary matter, it is unclear who, if anyone, really holds this view.<sup>39</sup> Socrates famously gives voice to the view that citizens have a duty to obey the law, even if it demands injustice, or accept willingly the consequences of disobedience,<sup>40</sup> but more common is the view that we are obliged to obey the law to the extent that it advances the purposes of justice and are obliged to disobey, as a matter of conscience, when it does not.<sup>41</sup> While few states can be accused of

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36. The power and potential of sentimental appeals and empathy should not be underestimated as a tool in this effort. See Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS* 111 (Stephen Shute & Susan Hurley eds., 1993). Goldsmith and Posner indicate some *sympathy* with the power of empathy, though it is limited to lines of solidarity (religion, ethnicity, etc.) more frequently associated with human rights abuses. *LIMITS*, *supra* note 14, at 115–19; see JAIME MALAMUD-GOTI, *GAME WITHOUT END: STATE TERROR AND THE POLITICS OF JUSTICE* 83–91 (1996). Rorty, by contrast, focuses on expanding the scope of empathy beyond these familiar lines in order to strengthen commitment to our “international human rights culture.” Rorty, *supra*, at 115.

37. It is worth noting that pursuing this path solves completely the anti-democratic critique advanced by Goldsmith and Posner in Chapters 7 and 8. *LIMITS*, *supra* note 14, at 185.

38. See Gray, Invitation to the Table, *supra* note 23.

39. *But see* Kumm, *supra* note 10.

40. PLATO, *Crito*, in *EUTHYPHRO, APOLOGY, CRITO, PHAEDO, PHAEDRUS* 151 (H.N. Fowler trans., 1990).

41. This, in fact, is Socrates's view. See PLATO, *Apology*, in *EUTHYPHRO, APOLOGY, CRITO, PHAEDO, PHAEDRUS* 151 (H.N. Fowler trans., 1990); *see also* BLACKSTONE, *supra* note 30, at

being Nelson Mandela or Martin Luther King, Jr., the international law literature is devoid of any serious argument that states should obey international law if doing so means committing or condoning an injustice.<sup>42</sup>

By contrast, legitimacy is a frequent issue of contest in international law debates. It is the linchpin of law's capacity to demand obedience as law. Whether focusing on the absence of a sovereign authority<sup>43</sup> or second order rules,<sup>44</sup> proponents of the "international law is not law" critique frequently claim that international law does not fulfill standards of legitimacy necessary to demand obedience. Goldsmith and Posner's contribution to this literature is in their examination of motivation.<sup>45</sup> Where Hart, say, argues that states have no obligation to obey international law, Goldsmith and Posner argue that states do not, in fact, act from a sense of duty to international law.

This claim must deal with attempts by states to justify their actions under international law, attempts to alter the content of international law, and occasions of withdrawal from treaty regimes, all of which provide evidence of a motivation to obey international law as law. Some responses are indicated in the text. In Chapter 6, for example, the authors argue that international law talk, including efforts to justify state action under international law, is motivated not by a sense of duty to the law, but by an interest in signaling a sense of duty to international law.<sup>46</sup> In Chapter 7, the authors argue that describing incidents of "breach" as efforts to initiate changes in the content of international law indicates a complete lack of duty to the international law as law independent of its content.<sup>47</sup> Without further elaboration, however, these responses fail to satisfy.

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42. As an example, consider NATO action in Kosovo in 1999. Most who argue that this action constituted a war of aggression in violation of the United Nations Charter and the Geneva Conventions admit that intervention to stop the genocide was necessary as a matter of conscience. *LIMITS*, *supra* note 14, at 198-99.

43. *AUSTIN*, *supra* note 1.

44. *HART*, *supra* note 1, at 213-37.

45. In Chapters 7 and 8, Goldsmith and Posner also argue that states have no independent moral obligation to enter into international law agreements or to obey international law if doing so conflicts with the interests of their citizens. *LIMITS*, *supra* note 14, at 185. This normative argument goes nowhere, of course, absent the empirical argument that the citizen, and therefore state, interests that actually determine state action bear a correlative relation to international law, at most.

46. *LIMITS*, *supra* note 14, at 167.

47. *Id.* at 197-203. Withdrawal is not discussed, but it is assumed that the authors would

The argument in the first case is that states do not obey international law but, rather, out of a desire to appear to obey international law, conduct themselves in accord with international law. Leaving aside the empirical challenge of demonstrating the truth of this claim, as a practical matter, the difference seems to amount to nothing. Either way, states attempt to conform their actions to the demands of international law. The point is stronger in response to the claim that states' attempts to modify the content of international law demonstrate that states are not committed to international law independent of its content. Absent some commitment to the body of international law, the international law system, or the institutions of international law, there is no reason to change the content. Neither is there reason to withdraw. In any event, even were the authors to make a clear and empirically compelling distinction, from a practical point of view, there is no apparent and significant difference between obedience and mere accord in this instance. For an operationalist who attaches the normative force of international law to participation in the system, this is enough.

The third potential target of *The Limits of International Law* also presents difficulties and potential for fans of international law. For a consequentialist, acting from a sense of legal obligation means no more than acting in light of law and the deterrent threats imposed by a legal authority. A consequentialist understands that agents are motivated by self-interest, not selfless commitment to rules or rule-following, and expects that agents will violate the law where the benefits outweigh the consequences (where "consequences" is understood as a function of risk of detection, risk of punishment, and severity of punishment) and will obey when the balance is reversed. "Obedience" is not an entirely transparent concept, of course, as it involves interpretation of the law.<sup>48</sup> Nevertheless, from a consequentialist point of view, acting out of a sense of legal obligation means no more than adopting a course of action that is consistent with a plausible view of the law. Looking at the universe of evidence offered in *The Limits of International Law*, that is exactly what states do.

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advance a similar view to those stated, perhaps arguing that formal withdrawal is meant to preserve a coordinative reputation.

48. As Justice Holmes pointed out, it is the task of lawyers to assess the risks of sanction posed by various courses of action based, in part, on the likelihood that a legal interpretation will be accepted. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 32 (Transaction Publishers 2005) (1881).

The examples presented by Goldsmith and Posner consistently find states advancing legal interpretations that sanction or at least allow their actions.<sup>49</sup> From a consequentialist point of view, this is all that there is to acting out of a sense of legal obligation. The absence of a central and predictable enforcement authority obviously changes matters, but not too dramatically—unless one is persuaded by the blunt version of the “international law is not law” critique, which Posner and Goldsmith do not endorse. The authority to evaluate legal justifications and impose punishment resides with other states.<sup>50</sup> That adds significant complexity to the calculus performed by a state contemplating a course of action, but it does not alter the fact that states’ decisions are based on risk assessments informed, in part, by the likelihood that their legal justifications will be accepted. Reciprocally, states contemplating enforcement measures must calculate the chances that their view of the law will be accepted and that they will not suffer retaliation or reprimand. Wealth and power may enhance the likelihood of acceptance and decrease the risk of punishment, but that phenomenon is not unique to international law. Domestic agents frequently weigh their options in light of their capacity to affect legal consequences through legal representation, lobbyists, and publicists.<sup>51</sup>

None of the foregoing provides a reason either to accept or reject the views advanced in *The Limits of International Law*. That is fitting. It is clear that the authors’ intention is to start rather than end a conversation. As an opening comment, the book is unapologetically ambitious. The

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49. The authors do not provide an extensive discussion of withdrawal, but it is a phenomenon of treaty law worth considering in this context. In light of exit-implied consent in political obligation debates, a persuasive argument can be made that, as examples, the Bush administration’s withdrawal from the Anti-Ballistic Missile Treaty in 2001, David E. Sanger, *Bush Offers Arms Talks to China As U.S. Pulls Out of ABM Treaty*, N.Y. TIMES, Dec. 14, 2001, at A1, and from the Optional Protocol to the Consular Convention Concerning the Compulsory Settlement of Disputes in 2005, Frederic L. Kirgis, *Addendum to ASIL Insight, President Bush’s Determination Regarding Mexican Nationals and Consular Convention Rights*, ASIL INSIGHT, at 1 (Mar. 2005), available at <http://www.asil.org/insights/2005/03/insights050309a.html>, are evidence of a strong sense of legal obligation.

50. Goldsmith and Posner make much of the fact that third-party states to any international law dispute seldom get involved to enforce compliance. While this suggests a limitation on the force that international law can bring to bear in a given circumstance, it is of no consequence to the argument. All that matters is that where international law is implicated, conflicts between states are at least nominally organized around competing interpretations of the law.

51. The prevalence of law talk in inter-state engagements is an issue of distraction for Goldsmith and Posner. The authors do advance an argument against the view that all this law talk reveals an ethical commitment to the rules, but do not address the consequentialist repackaging of rule-following proposed here.

authors propose a unified theory of international law grounded in the claim that international law neither reflects nor generates obedience, but, rather, provides a thin veil over the self-interest that truly drives state action. The brief comments offered here do not hope to capture the scope, insight, and nuance of this refreshing work. Rather, they suggest that meeting the challenge posed by Goldsmith and Posner does not require abandoning entirely the normative aspirations of international law, though it may drive advocates to reconsider the nature of international law and international law practice.

#### RECOMMENDATION

*The Limits of International Law* advances a view of international law and international law practice that is novel and thought-provoking. It is essential reading for those interested in international law, jurisprudence, and international relations. The views advanced in its pages deserve serious consideration and are sure to become standard currency in international law theory and practice. While, as the authors note, this short book may raise more questions than it answers, it lays the foundation for an approach to research and practice that is sure to become a force in many fields. Readers are advised not to be left behind.

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