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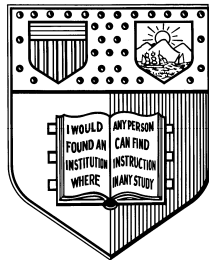
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Review Essay: The Limits of Their  
World

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# CORNELL LAW SCHOOL

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### **Review Essay: The Limits of Their World**

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## Review Essay

### The Limits of Their World

*The Limits of International Law.* By Jack L. Goldsmith and Eric A. Posner, Oxford University Press, 2005.

#### Reviewed by Robert Hockett<sup>†</sup>

*“[W]e, like our ancestors, can only press against the receding wall which hides the future.”*<sup>1</sup>

*“Draw us from base content and set our eyes on far-off goals.”*<sup>2</sup>

*“The limits of my language mean the limits of my world.”*<sup>3</sup>

Ours are brisk times for those lawyers whose studies and practices lead beyond national boundaries. For the agents who interest us growingly *act* across boundaries—as do acts’ consequences and the values they implicate. The law, for its part, has sought to keep pace: the norms that emerge from states’ treaties and practices growingly speak not just to—or for—states, but to and for persons as well.<sup>4</sup> And the *content* of norms

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1. BRIAN URQUHART, *HAMMARSKJÖLD* 46 (1994) (quoting Dag Hammarskjöld, address at the dedicatory celebration marking completion of the new buildings of the University of Chicago Law School (May 1, 1960)).

2. MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* 202 (2001) (quoting Eleanor Roosevelt, from what her son reports to have been her nightly prayer).

3. LUDWIG WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 149 (C.K. Ogden trans., Routledge & Keegan Paul, 8th Impression 1960) (with posthumous contingent apologies to the author, who might have disavowed of this employment of his often quoted 5.6).

4. See generally THOMAS M. FRANCK, *THE EMPOWERED SELF: LAW AND*

both accordingly and increasingly is recognized to proceed, not just from the dickerings of diplomats professing to speak for their strategy-spurred states, but from a ripening sense of world decency and respect for human persons—as well as from the joint deliberations of executive officials, judges, regulators, academics, cause-advocates, and private practitioners, who speak to a welter of cross-cutting, widely shared, only sometimes pecuniary concerns.<sup>5</sup>

Our times are heady as well for all those who would seek to explain the behavior of agents—be they individual or collective agents—as unmediated outgrowths of axiomatizable rational choice models or strategic “games.” For such models and games, to be rendered informative, not trivial, require that definite, corroborable ascriptions be made—not in respect just of agential preferences, but of preference-formation and real thought processes too.<sup>6</sup> And the more that we learn empirically about

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SOCIETY IN THE AGE OF INDIVIDUALISM (1999) (discussing how individualism has emerged as an increasingly preferred alternative to nationally imposed identity). Consider also the mandate of the proposed new International Criminal Court, as well as that of the Yugoslavian War Crimes Tribunal. Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999; Statute of the International Tribunal, May 25, 1993, 32 I.L.M. 1192. Compare these observations to that made by our authors: that states will play the “starring role” in their exposition because NAFTA spoke not to President Clinton, but to the United States. JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 4–5 (2005).

5. See, e.g., ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004) (positing that governments are increasingly working through transnational global networks); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT'L L. 1 (2002) (discussing the future of international cooperation in the context of transgovernmental networks). This turn appears canonically to have begun with ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) (advocating a managerial approach to international dispute resolution through global transgovernmental networks), though it is anticipated by the approach to international law associated with the New Haven school, further mentioned *infra* note 129 and accompanying text. Both go quite unnoticed in *The Limits*. See GOLDSMITH & POSNER, *supra* note 4.

6. See, e.g., DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* (1994) (providing a comprehensive critique of rational choice theory); *THE RATIONAL CHOICE CONTROVERSY: ECONOMIC MODELS OF POLITICS RECONSIDERED* (Jeffrey Friedman ed., rev. paperback ed., Yale University Press 1996) (1995) (collecting essays from rational choice theorists responding to Donald P. Green and Ian Shapiro's critique); see also GARY S. BECKER, *ACCOUNTING FOR TASTES* (1996); *CHOICES, VALUES, AND FRAMES* (Daniel Kahneman & Amos Tversky, eds., 2000); JON ELSTER, *SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATION OF RATIONALITY* (1989); ROBERT H. FRANK, *CHOOSING THE RIGHT*

these matters, the more that we come to appreciate them as bounded, embedded, and endogenous to norm-generative life in communion with others.<sup>7</sup>

It therefore might not have been thought that a new book presented as a general account of international law, written by two distinguished scholars of the field, could proceed as if the past several decades' developments just had not occurred. Yet that is in essence what we are confronted with in Jack Goldsmith and Eric Posner's new, *The Limits of International Law* (*The Limits*)—a world of fetishized, black-boxy Scrooge-states, incomprehensibly seeking in large part to eat one another, calculating and gaming with those and with cognate objectives in view, constrained by no more than the weapons that others possess all while “empt[il]y, happ[il]y,”<sup>8</sup> or mendaciously speaking as if the routines and mere memoranda of understanding that emerge from this contest were law.

I of course caricature slightly, but only slightly, we'll see—and certainly less, I believe, than do Goldsmith and Posner the world and its order. And their caricature proves more than inaccurate—it is potentially paralyzing. For its stories, were they to mislead, say, persons in high places who lacked in our authors' own gifts or integrity, could work as dark augurs—self-verifying prophecies-backward, as it were—dragging us hindways straight back to the dreary and inhumane tar pits we thought we had left. They would be, that is to say, altogether needlessly, tragically, and self-fulfillingly *limiting*.

Happily, however, in one sense the book moves from darkness toward light: each of its succeeding chapters occasions more hope, in our grappling with it, than its predecessor. In what follows, therefore, since I—just like Goldsmith and Posner at bottom, I think—am an optimist, I shall by and large follow

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POND: HUMAN BEHAVIOR AND THE QUEST FOR STATUS (1985); JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (Daniel Kahnemann et al., eds., 1982); JAMES G. MARCH, A PRIMER ON DECISION MAKING: HOW DECISIONS HAPPEN (1994); ARIEL RUBINSTEIN, MODELING BOUNDED RATIONALITY (1998); HERBERT SIMON, MODELS OF MAN (1957). It is remarkable that, as in the case of the New Haven and “disaggregated state” schools, none of this extensive and widely discussed literature is so much as noted in *The Limits*.

7. There is much too much here to cite exhaustively. By way of a truly minimal sampling, see BECKER, *supra* note 6; CHOICES, VALUES, AND FRAMES, *supra* note 6; ELSTER, *supra* note 6; FRANK, *supra* note 6; JUDGMENT UNDER UNCERTAINTY, *supra* note 6; MARCH, *supra* note 6; RUBINSTEIN, *supra* note 6; SIMON, *supra* note 6. Again, no notice of these developments is found in *The Limits*.

8. See *infra* note 267 and accompanying text.

our authors' own order. Part I provides a few brief methodological preliminaries—matters regrettably never directly addressed by our authors—which serve as the critical backdrop to our foreground critique. Part II turns to schematizing the authors' "core theory," following their own proffered roadmap. It charitably interprets what I take Goldsmith and Posner to believe themselves to be doing, while highlighting the principal conceptual, methodological, and empirical concerns occasioned by that preview along the way.

Part III shifts to the authors' own efforts at further elaborating and "applying" their theory. We find here confirmed all the fears that the preview brought forward. Hence, we are brought to consider more fully some truly surprising lacunae and muddles: the authors' never-justified attachment to bilaterality and static analysis, their consequent empirical sterility and confused norm-reductivity, and ultimately, therefore, an altogether hapless, hopeless, ethical repugnance.

Part IV then turns to our authors' attempts at addressing *critiques* of their story. These amount in the end, quite ironically, to implicit endorsements of that principal complaint which the authors do *not* ever forthrightly discuss—or even, it seems, so much as anticipate: that while futilely guised as descriptive, their story defaults to legitimative, thus covertly and insidiously to prescriptive. This Part accordingly also affords opportunity to consider the glimmers of promise that engagement with the book can provide, and how all of us both might, and indeed ought, to widen and redeem them. Wittingly or otherwise, Goldsmith and Posner afford us occasion to ponder more fully what a just, decent world order will look like—and how we might now both augment and accelerate our movement, already well underway, toward consummation. On that note of hope, I conclude.

## I. METHODOLOGICAL PRELIMINARIES

A few preliminaries here will prove helpful in what follows. Goldsmith and Posner proffer what they call a "theory" of international law, one they report will in some (not quite specified) sense outperform what they label "the traditional" account. But they say nothing directly about what they think to constitute or to be the purpose of a theory. Nor do they address what they think to be required of a satisfactory theory, or to be appropriate criteria by which to cross-compare competing theories. I shall therefore have at some points to impute positions

on these matters—metatheoretic positions—to the authors in my efforts to interpret their intentions and claims.

The metatheoretic positions that I shall attribute to Goldsmith and Posner are guided by two interpretive norms. The first I shall call, familiarly, a “principle of charity.” When in doubt, I attribute to Goldsmith and Posner what I take to be the best, most compelling understandings of theoretic adequacy and appropriate cross-comparison as consistent with the second interpretive norm.

The second interpretive norm might be labeled “textual answerability.” The metatheoretic positions that I attribute to Goldsmith and Posner ideally will cohere harmoniously with, or at any rate not stand in significant tension with, specific statements that the authors actually make.<sup>9</sup>

What one takes to be the best understandings of theoretic adequacy and appropriate cross-comparison, unsurprisingly, will ride upon an understanding of what “theories” are. A theory, I take it, is an effort to order and simplify—while not “oversimplifying”—hence to explain, in some causal fashion, what might in the absence of the theory confront us as a disordered array of phenomena. Simplicity, in turn, pertains to the number of independent—or free, or exogenous—variables that one employs in causally accounting for a given dependent—or bound, or endogenous—variable. A theory that causally accounts for the same events as another while positing fewer causal elements is simpler, more elegant or parsimonious than the other, and typically thought better on that account.<sup>10</sup>

“Oversimplifying” is the act of stripping down the number of free variables to such degree as begins objectionably to weaken the theory along one or more of the other dimensions of theory assessment. An oversimplifying theory often is said to be objectionably “reductive,” having implausibly purported to explain away some erstwhile free variables on the proffered ground that they are extensionally equivalent to, or themselves causally explicable by, others.

I take it that to “explain” or “account for” some empirical

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9. The two interpretive norms—charity and textual answerability—obviously could come into conflict were one seeking to make sense of someone who was hopelessly incoherent. Happily, we do not encounter that problem here.

10. The best known champion of elegance of this sort probably is Willard Van Orman Quine. *See, e.g.*, WILLARD VAN ORMAN QUINE, WORD AND OBJECT 19–21 (1960).

(purportedly dependent, endogenous) phenomenon is in part to point to some other empirical (for purposes of the theory, independent or exogenous) phenomenon that temporally precedes it, and, ideally, rests in some intuitively graspable, structurally characterizable causal nexus with it. We seek, in accounting for data, both (a) a statistical correlation and (b) ideally, some intuitively appreciable, mechanico-causal “story” that accounts for the correlation itself, rendering the latter more than merely *statistically* significant.

Our expectations regarding a suitable causal nexus or story, in turn, generally appear to be such as to prefer that the causal relation be describable at the most micro or foundational “level” accessible to us in view of the current state of the empirical sciences. What used to pass for a causal relation in biology, for example, might now have to be further elaborated if we seek to plumb more deeply to the level of biochemistry, and further still if we would reach down to biophysics, and so on. The demand for more fundamental levels of causal accounting, hence for a fuller causal story, often is couched as a demand for more “fine-grained” or “nuanced” analysis.<sup>11</sup>

The idea that a particular macro-correlation might be thought unnecessarily clumsy or coarse-grained draws attention to—though it is analytically distinct from—another attribute, hinted at already, that we demand of satisfactory empirical explanations or accounts: this is the demand that they explain or account for as many instances of the phenomenon to be explained—the dependent or endogenous variable—as possible, ideally for all of them. If every pandemic followed upon the appearance of sunspots and no appearance of sunspots failed to be quickly followed by a pandemic, we might come to hold a “sunspot theory of pandemics.” Whereas if the correlations were statistically significant but nonetheless prone to exception, we would seek a more fine-grained account operating at a more physically fundamental level of analysis to explain instances both of correlation and of correlational failure. We would seek “intervening causes.” So demands for micro-correlational nuance and for maximal empirical corroborability often go hand in hand.

Nonetheless, they are conceptually distinct demands, as is revealed by the recognition that we would likely, today, seek in-

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11. See, e.g., R. HARRÉ, AN INTRODUCTION TO THE LOGIC OF THE SCIENCES (1960); W.H. NEWTON-SMITH, THE RATIONALITY OF SCIENCE (1981).

tervening causes between sunspots and pandemics even in the presence of perfect correlability. We want the aforementioned story for intuition-grounded reasons independent of statistics-grounded reasons. We want posited mechanical relations or correlations to cohere with our general understandings of “the way things work.” And those general understandings are the product both of our direct experiences and of our knowledge of the sundry scientific disciplines at their current stages of development.

One corollary of the foregoing desiderata, of course, is that a theory be empirically testable at all. For the theory purports to account for some *observed* phenomenon, by treating it as significantly correlated with, and causally generated by, some other phenomenon. And that accounting accordingly generates predictions that can be corroborated or falsified—expectations to the effect that, where the purported cause is found, the putative effect typically will follow. A theory that can under no conceivable circumstances be corroborated is self-refuting, inconsistent, or incoherent, and so cannot satisfactorily account for or explain anything at all. And a theory that can under no conceivable circumstances be shown false is trivial, tautologous, or uninformative; it does not generate any empirical expectations at all. Such a theory says nothing about the world, and so does not explain or account for any feature of the world.<sup>12</sup>

The three desirable attributes of theories—that they causally account, as simply and mechanico-intuitively as possible, for as many instances of the phenomenon to be explained as possible—are also the three attributes by reference to which theories are evaluatively cross-compared. A theory that scores better than another along one of those metrics will, other things being equal, typically be thought superior to the other. The possibility that other things might *not* always be equal, however, highlights a potential indexing problem: how to weigh

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12. That is not to say that such a theory need be without value. A tautological theory might reveal something about the interrelations of essential concepts that we employ, hence something about the structure of our thoughts or even, therefore, of some set of concept-contoured things that we think about. A useful case in point is Walrasian general equilibrium theory. While it is empirically trivial in the sense that it generates conclusions that scarcely could fail to follow on its premises, nonetheless it is valuable in showing what we commit ourselves to in accepting those premises. I do not, incidentally, wish to be taken for suggesting that the distinction between informative and tautological theories or claims is hard and fast; for our purposes, consider these “ideal types.”

comparatively—how to commensurate—differing scores along these distinct dimensions when one theory scores better than another on one, and worse than that other on another. I do not have any commensurating algorithm to offer, though were push to come to shove, empirical corroboration probably would “outweigh” elegance and intuitive appreciability. As it happens, however, push seldom does come to shove; it is rare for theories to score much more highly than others along one dimension while scoring much less highly than those others along other dimensions.<sup>13</sup> And for our present purposes in particular, we shall see that we face no indexing problem at all. For it turns out that those theorists of international law whom Goldsmith and Posner label “traditionalists” strictly dominate our authors; they “win” on all counts.

Two final methodological observations will prove helpful. The first has to do with the earlier-mentioned possibility of hyper-reductivity in some theories’ putative simplifications. The best authorities hold that the human or moral sciences, which make indispensable use of such phenomena as self-consciousness, self-understanding, and meaning-ascription as explanatory variables, are not ultimately reducible to “harder” sciences that do not accommodate such concepts.<sup>14</sup> If those authorities are correct, then an account of “behaviors associated with international law,” such as Goldsmith and Posner purport to provide,<sup>15</sup> will warrant skepticism insofar as it purports to explain such behavior without reference to the meanings that agents themselves attribute to their actions. Such explanations will have either to posit occult processes that “really” are prompting the agents’ actions even as those agents (self-deludingly) think otherwise, or to attribute dishonesty to the agents—an attribution which, violating as it does the principle of charity that I employ in interpreting Goldsmith and Posner’s

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13. See, e.g., Willard Van Orman Quine, *On Simple Theories of a Complex World*, 15 *SYNTHESE* 103 (1963) (discussing the preference for simplicity in theories).

14. See, e.g., DAVID J. CHALMERS, *THE CONSCIOUS MIND: IN SEARCH OF A FUNDAMENTAL THEORY* 93–122 (1996); HILARY PUTNAM, *MEANING AND THE MORAL SCIENCES* 83–94 (1978); JOHN R. SEARLE, *INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND* 262–72 (1983); PETER WINCH, *THE IDEA OF A SOCIAL SCIENCE AND ITS RELATION TO PHILOSOPHY* 66–94 (6th Impression 1970) (1958); Donald Davidson, *Mental Events*, in *EXPERIENCE AND THEORY* 79, *passim* (Lawrence Foster & J.W. Swanson eds., 1970); Donald Davidson, *Thinking Causes*, in *MENTAL CAUSATION* 1, 3–12 (John Heil & Alfred Mele eds., 1993).

15. See GOLDSMITH & POSNER, *supra* note 4, at 13.

claims themselves, probably ought not to be made absent strong evidence that can independently ground it.

My last methodological remark is that, whereas I have elaborated what I have said about metatheoretic desiderata principally by reference to *positive* empirical theories, theories also can be normative in character, purporting to bring explanatory order to, say, some otherwise disorderly array of distinct moral judgments.<sup>16</sup> And normative theories are subject to metatheoretic criteria just as are positive theories, though the specific criteria in the two cases might in some respects diverge.<sup>17</sup> Because Goldsmith and Posner proffer what they take for a positive theory that they think superior to other positive theories, however, and because, pursuant to the earlier adverted principle of charity, I wish to take them at their word, I shall find little in this review to say about normative theorizing apart from the following.

While it has been something of a fashionable commonplace for over two centuries to distinguish strictly between positive and normative claims and accounts—to hold “is” radically distinct from “ought”<sup>18</sup>—the gulf between them is not always crisply demarcated or wide, at least not when that which is theorized either is, or is closely associated with, human behavior itself (law-making and law-following in particular).<sup>19</sup> And so even the act of putatively theorizing in positive fashion can bear consequences that admit of a normative evaluation,<sup>20</sup> which in turn can in some circumstances subject the *theorizer* to normative evaluation. Hence, if human behavior can itself be influenced by somebody’s putatively positive theorizing in such

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16. This is of course part of the Rawlsian program in JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

17. See generally Robert Hockett, *The Deep Grammar of Distribution: A Meta-Theory of Justice*, 26 *CARDOZO L. REV.* 1179 (2005) (considering what metatheoretic criteria should be employed in evaluating normative theories).

18. See DAVID HUME, *A TREATISE OF HUMAN NATURE* 469 (L.A. Selby-Bigge ed., 2d ed., Oxford University Press 1978) (1888).

19. E.g., JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996); HILARY PUTNAM, *THE COLLAPSE OF THE FACT/VALUE DICHOTOMY AND OTHER ESSAYS* (2004); John R. Searle, *Prima-facie Obligations*, in *PHILOSOPHICAL SUBJECTS: ESSAYS PRESENTED TO P.F. STRAWSON* 238 (Zak Van Straaten ed., 1980).

20. For an interesting study, see Robert H. Frank et al., *Does Studying Economics Inhibit Cooperation?*, 7 *J. ECON. PERSP.* 159 (1993) (examining whether economists’ exposure to the self-interest model encourages self-interest behavior).

manner as to lead people to engage in activities that are morally wrong, the putatively positive theorist will potentially bear some responsibility for more wrongdoing's having come to occur in the world.

If the putatively positive theory the proffering of which issues in such consequences is uniquely empirically robust, we might in the aforementioned case be presented with something like a "tragic" trade-off: "truth *versus* goodness," or something like that. But the corrupting theory of course need *not* be empirically robust, or might be otherwise inferior to an *alternative* positive theory that is *not* morally corrupting. This might be because the first theory accounts for fewer purportedly dependent phenomena, or because that theory is hyper-reductive, or because it proffers as exogenous variables some pseudo-phenomena that are so ill-individuated as not really to generate empirical predictions at all (rendering the theory nonsensical or trivial), or because, perhaps by dint of its falling prey to one or more of the just-listed weaknesses, it proves to be self-fulfillingly prophetic. In such cases there is no trade-off at all. And so in such cases the theory and theorizer will be, very simply, answerable at the bar of moral accountability.

## II. THE LIMITS IN BRIEF—IN AIM AND IN OUTLINE

On with the accounting: Goldsmith and Posner will "seek to explain how international law works by integrating the study of international law with the realities of international politics."<sup>21</sup> To that end, their "theory gives pride of place to two elements of international politics usually neglected or discounted by international law scholars: state power and state interest."<sup>22</sup> So "power" and "interest," apparently, will serve as independent variables here. And Goldsmith and Posner will employ "a methodological tool infrequently used in international law scholarship, rational choice theory, to analyze these factors."<sup>23</sup> The latter comes as a curious announcement. One

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21. GOLDSMITH & POSNER, *supra* note 4, at 3.

22. *Id.*

23. *Id.* Some international law scholars have made liberal, and typically more formally sophisticated, use of rational choice and game theoretic modes of analysis. See, e.g., Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421 (2000); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); George Norman & Joel P. Trachtman, *The Customary International Law*

might have thought, in view of the promise to explain “how international law works,” that it would be the latter that would be “analyzed.” But we shall see that the real problem turns out to be that “power” and “interest” indeed should have been analyzed, in order to firm up our free variables and accordingly generate veritably corroborable or falsifiable empirical predictions, and yet never are analyzed.

Having named the purportedly free variables, Goldsmith and Posner turn to their story. “Put briefly,” their theory asserts “that international law emerges from states acting rationally to maximize their interests, given their perceptions of the interests of other states and the distribution of state power.”<sup>24</sup> Goldsmith and Posner candidly admit that they “are not the first to invoke the idea of state interest to explain the rules of international law.”<sup>25</sup> Nor, they might have added, are they the first to invoke the idea of power to explain the rules of international law. “But too often,” they lament, “this idea [of state interest] is invoked in a vague and conclusory fashion.”<sup>26</sup> That charge, which like most in the book does not find itself leveled at any named person or persons, of course sets a stan-

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*Game*, 99 AM. J. INT'L L. 541 (2005); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 559 (2002); Pierre-Hugues Verdier, *Cooperative States: International Relations, State Responsibility and the Problem of Custom*, 42 VA. J. INT'L L. 839 (2002); Vincy Fon & Francesco Parisi, *Customary Law and Articulation Theories: An Economic Analysis*, (George Mason Univ. Sch. of Law, Law & Econ. Working Paper Series, Paper No. 02-24, 2002), available at [http://ssrn.com/abstract\\_id=335220](http://ssrn.com/abstract_id=335220). This is a minimal sampling. Were we to turn to the international relations and international regimes literatures, examples would proliferate in yet greater abundance.

24. GOLDSMITH & POSNER, *supra* note 4, at 3. An interest is not the sort of thing that one ordinarily thinks to be subject to cardinal or ordinal quantification (compare “they maximize their trousers” and “she maximized her lawnmower”). Thus, I shall be taking Goldsmith and Posner to mean something like “maximize the degrees to which their interests or preferences are satisfied.” For the latter to make sense, we shall require some satisfactory specification of states’ “satisfaction,” “utility,” or “welfare” functions. As a foundational matter, that in turn will require, among other things, some means of commensurating satisfactions of distinct interests or preferences in cases where greater attainment of one such preference requires trading off some degree of satisfaction of some other interest(s) or preference(s). And as both a foundational and an ethical matter, we shall want the state’s utility or welfare function to ride in some satisfactory way upon the utility or welfare of its citizens. Difficulties for Goldsmith and Posner’s approach raised by the first mentioned requirement figure into much of the discussion in Part III. Difficulties raised by the second mentioned requirement figure into much of the discussion in Part IV.

25. *Id.*

26. *Id.*

dard to which it will be fair to hold the authors themselves.

Goldsmith and Posner next undertake to clarify some of the *assumptions* embedded in their account. One is “that the state is the relevant agent” in analyzing international law.<sup>27</sup> Another is “that a state has an identifiable interest, and that states act rationally to *further* these interests.”<sup>28</sup> Now states’ interests, in turn, Goldsmith and Posner classify as states’ “preferences about outcomes.”<sup>29</sup> The latter are “not always easy to determine,” we are (indeed understatedly) warned, since states “subsume[] many institutions and individuals that obviously do not share identical preferences about outcomes.”<sup>30</sup> For that reason, the authors advise, “preferences of the state’s political leadership”—like those of the state, here somehow apparently still aggregated—effectively will proxy for preferences of the state itself.<sup>31</sup> Our authors will also “avoid strong assumptions about the *content* of state interests and assume that they can vary by context,”<sup>32</sup> a tack which of course can prove helpful to the theory’s ready empirical corroborability, and should keep us mindful of our authors’ earlier recorded lament that too often the idea of state interest is invoked in a “vague and conclusory fashion.”<sup>33</sup>

States reduce to human persons, in Goldsmith and Posner’s world, in respect of more than just interests and preferences. States’ very existence rides upon citizen psychology,<sup>34</sup>

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27. *Id.* at 4.

28. *Id.* (emphasis added). The inconsistency between singular “interest” and plural “interests” in the last two assumptions does not detain the authors, nor do the aggregation and indexing problems implicit in use of the singular in the second stated assumption. *See supra* note 24, on the significance of that lacuna. For more on the matter *see also infra* Part III.

29. GOLDSMITH & POSNER, *supra* note 4, at 6.

30. *Id.*

31. *Id.*

32. *Id.* (emphasis added).

33. *Id.* at 3.

34. *Id.* at 4. That is one piece of the well-known “declaratory” theory of state existence, individuation, and recognition, pursuant to which a state objectively exists once a defined “people” claim to have formed state institutions bearing effective jurisdiction over a defined territory and capable of fulfilling interstate obligations. The competing view is the “constitutive theory,” pursuant to which states themselves are creatures of international legal recognition. *See, e.g.,* LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 39–49 (1989). A particularly interesting recent discussion in the constitutive spirit, which integrates state constitutivity with transnational normativity, is found in Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV.

and states act only through their leaders.<sup>35</sup> It might therefore have been insisted that a sufficiently fine-grained or nuanced theory of state action should be grounded in some satisfactory micro-foundational theory of individual choice. Yet our authors will nevertheless give states the “the starring role in [their] drama.”<sup>36</sup> For “international law addresses itself to states and, for the most part, not to individuals or other entities.”<sup>37</sup> It is far from clear, however, that international law’s formally addressing states rather than persons would warrant either an empirical explanation (which is what we are promised) or an ethical justification (which soon will be effectively promised)—as distinguished from a juridical description of state behavior ungrounded in some account of the behavior of the persons through whom states act. And so Goldsmith and Posner slip rather too quickly here into an elision which, as we will see in Part III, ends up haunting their empirics, and, as we will see in Part IV, ends up haunting their ethics.

Finally, our authors posit the usual “assumptions”—stipulative definitions, really—associated with “rationality” as comprehended by rational choice theory (hereinafter “RCT”).<sup>38</sup> Rationality is familiarly conceived in “instrumental” terms, and rational choices generate “consistent, complete, and transitive” preference orderings.<sup>39</sup> Goldsmith and Posner are clear about

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1749 (2003).

35. GOLDSMITH & POSNER, *supra* note 4, at 4, 6.

36. *Id.* at 4–5.

37. *Id.* at 5. “International law” does indeed denote *lex inter nationes*. In light of international law’s morphology throughout the late twentieth and early twenty-first centuries into something increasingly more like *lex inter nationes et homines*, many scholars and journals have, for over a decade, recommended a terminological shift to some such label as “transnational law” rather than “international law.”

38. *Id.* at 7.

39. *Id.* Completeness also goes by the name of “categoricity” in the literature. For fuller elaboration of the more familiar RCT axioms, see KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (1951); AMARTYA K. SEN, *COLLECTIVE CHOICE AND SOCIAL WELFARE* (1970). Fuller axiomatizations of RCT typically (1) insist, for the sake of parsimony, upon independence as between axioms, and (2) include (not always without controversy), an “expected utility” axiom, in order to accommodate uncertainty, risk preference and/or nonconstant marginal utility. See JOHN VON NEUMANN & OSKAR MORGENTHAU, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* 24–31, 76 (3d ed. 1953). It is also customary, though it proves problematic, to insist upon one or more forms of interpersonal utility-noncomparability, universal domain, independence of irrelevant alternatives, and weak or strong Paretianism in circumstances involving the choice and/or welfare of multiple persons, i.e., “social choice,” “bargaining,” or “game” situations. See ARROW, *supra*; NEUMANN &

not actually attributing satisfaction of the RCT axioms to “the decision-making process of a ‘state’ in all its complexity.”<sup>40</sup> Rather, they will employ RCT “pragmatically as a tool to organize [their] ideas and intuitions and to clarify assumptions.”<sup>41</sup> This, they argue, will lead in turn to “better and more nuanced explanations of state behavior related to international law than other theories do.”<sup>42</sup> We will keep that promise in mind.

With general aims and assumptions laid out, Goldsmith and Posner next provide a skeletal preview of their theory. “Consider,” they instruct us, “two states.”<sup>43</sup> At any “time one” ( $t_1$ ), our “two states have certain capacities and interests.”<sup>44</sup> “[I]nterests are determined by leaders who take account in some way of the preferences of citizens and groups.”<sup>45</sup> Capacities, presumably, carry forward the authors’ earlier promised attention to power.<sup>46</sup> “[C]apacities include military forces, economic institutions, natural resources, and human capital.”<sup>47</sup> At  $t_1$ , “the states divide available resources” (including, or included among, the aforementioned capacities?) “in some stable fashion.”<sup>48</sup>

Now at a subsequent “time two” ( $t_2$ ) the ubiquitous exogenous “shock,”<sup>49</sup> disturbs the  $t_1$  division of resources.<sup>50</sup> One state’s “power” (stock of resources?) increases relative to the other’s.<sup>51</sup> In consequence, “naturally,”<sup>52</sup> the newly engrossed state demands that its just-increased share of world resources be augmented yet further<sup>53</sup>—simply because, evidently, in light of the boost to its share of world resources (hence “power”) in-

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MORGENSTERN *supra*; SEN, *supra*; John F. Nash, Jr., *The Bargaining Problem*, 18 *ECONOMETRICA* 155 (1950). For reasons I explain in Part III, I think that “instrumental” prefixed to “rationality” is superfluous.

40. GOLDSMITH & POSNER, *supra* note 4, at 7.

41. *Id.*

42. *Id.* at 7–8.

43. *Id.* at 10. This attachment to bilaterality proves consistent and critical throughout *The Limits*.

44. *Id.*

45. *Id.*

46. *See id.* at 3.

47. *Id.* at 10.

48. *Id.*

49. This shock is familiar in particular to macroeconomists.

50. GOLDSMITH & POSNER, *supra* note 4, at 11.

51. *Id.*

52. These scare quotes are my own, and I use them because this word captures some peculiar assumptions embedded in the authors’ account.

53. GOLDSMITH & POSNER, *supra* note 4, at 11.

duced by the “shock,” it can. Now, we are told, if our two states “had perfect information about each other . . . and if transaction costs were zero, their relations would adjust smoothly and quickly to the shock, and at time three [ $t_3$ ] there would be a new division of resources.”<sup>54</sup>

We might of course begin to wonder at this point what intuitive grounding this picture affords us for any existence theorem that might be derived for new equilibria in a formally more rigorous model than the one we are given. For new resources conferred by a shock presumably furnish capacity to demand yet more resources, then more, etc. *ad plenum*.<sup>55</sup> We shall return to this matter later, confining ourselves for the present to our authors’ preliminary, schematic presentation of their theory.

Goldsmith and Posner suggest that the “behavioral regularity” that is any new equilibrium division of resources will be attributable to either of four possible explanatory models.<sup>56</sup> One model, labeled “coincidence of interest,” posits that “neither of the two states has an interest” in departing from the new equilibrium, whatever action the other state might take.<sup>57</sup> It would seem we might also characterize this prospect, given the authors’ earlier apparent interpretation of “interest” as resource-wanting, as a situation in which there remains nothing more in the world not held by a state which that state regards as a resource, nothing more for which the state has either use or desire. If that follows, then it seems that state satiety is possible. And this is so notwithstanding the authors’ earlier apparent postulate that “shocks” taking the form of resource-augmentation in one state immediately induce a desire in that state for more (of another state’s) resources.<sup>58</sup>

The authors’ announcement that a coincidence of interest in respect of resource division might be possible, then, comes as something of a puzzle that we shall have to consider below. It

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54. *Id.*

55. Perhaps the authors will wish to postulate diminishing interest returns to power/resource acquisition, or power returns to resource acquisition—hence concavity and, ultimately, the prospect of a fixed point. Certainly they appear to be relying upon such a prospect. But of course, in view of power’s—like interest’s—want of specification here, we are left but charitably to speculate.

56. GOLDSMITH & POSNER, *supra* note 4, at 11.

57. *Id.* at 11–12 (emphasis omitted).

58. *But see supra* note 55 and accompanying text (noting that the authors fail to clarify this point).

also calls to mind the authors' earlier complaint about other (again unnamed) theorists' explanations for international law compliance by reference to "preferences for complying."<sup>59</sup> For if a "successful theory of international law must show why states comply . . . rather than assuming that they have a preference for doing so,"<sup>60</sup> then surely it will be fair to demand that a successful theory of stable, resource-dividing equilibria likewise show why states remain in equilibrium rather than assuming that they bear a happily coincident lack of interest in upsetting it.<sup>61</sup>

The authors' second explanatory model for a given equilibrium, familiarly labeled "coordination," resembles the first, save that each state now has regard for the possible actions of the other.<sup>62</sup> The idea here is that it does not matter what particular division of relative state holdings occurs, so long as each state understands clearly that it is the present division.<sup>63</sup> It is unclear what relevance coordination, as distinguished from cooperation (more on which presently), has to resource-division scenarios, however. The paradigmatic cases of coordination found in the RTC and economics literatures typically involve flows of activity *qua* flows—traffic is the usual story—not scarce goods consumption.<sup>64</sup> Thus it is not clear what explanatory value coordination has in accounting for a new equilibrium division of *resources* at *t*<sub>3</sub>. Again we leave further consideration to Part III, where we shall find that coordination indeed proves in large part superfluous.

The "third possible explanation" for a new equilibrium division, the authors tell us, is the state of affairs in which each state would "benefit" by upsetting the existing equilibrium at *t*<sub>3</sub> by seizing more of the resources held by the other, but in view of the cost that the other state, if resisting seizure, could im-

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59. GOLDSMITH & POSNER, *supra* note 4, at 10.

60. *Id.* Nobody is named as assuming this, and we shall consider the prospect of finding independently observable indicia of such preferences as simply correlatable explanatory variables. *See infra* Part III.

61. The usually effective international norm of respect for international boundaries and the respect for that norm among American officials and the American public might better account for the United States not having seized petroleum reserves from Canada and Mexico than does any lack of American interest in those resources.

62. GOLDSMITH & POSNER, *supra* note 4, at 12 (emphasis omitted).

63. *Id.*

64. *See, e.g.*, THOMAS SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 67–68, 113–15, 119–24 (1978).

pose, the rational course of action is to refrain from attempting the seizure.<sup>65</sup> The states accordingly refrain.<sup>66</sup> That situation the authors label, tugging at the language a bit, “cooperation.”<sup>67</sup> It is cooperation with Marquis of Queensbury Rules.

The “final” possible explanation for a given equilibrium, say Goldsmith and Posner, is “coercion.”<sup>68</sup> One state “is satisfied with the existing” division, but the other state wishes to take from that first state’s allotment.<sup>69</sup> “If [that second state] is sufficiently powerful, it can dictate the new” division.<sup>70</sup> That would seem hard to dispute. “Power” in this scenario plays a role cognate with that of “interest” in the first scenario and “preferences for international law compliance” in the authors’ caricature of “traditional” international law scholarship. If a state really wishes to take in some sense and is sufficiently powerful in some sense, it surely can (and perhaps even will) take in some sense.

It bears emphasis that these four scenarios all are presented as tools for explaining comparative statics, not dynamics.<sup>71</sup> The authors will employ them in attempts to explain equilibria and, presumably (though this is not stated) initial departures therefrom.<sup>72</sup> They will *not* employ the models to describe the actual process of adjustment, post-shock, from one equilibrium to its successor.<sup>73</sup> Presumably a dynamic model in

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65. GOLDSMITH & POSNER, *supra* note 4, at 12.

66. Returning to the scenario contemplated *supra* note 61, perhaps Goldsmith and Posner suppose that Canada and Mexico could impose costs that exceed those occasioned currently by lack of energy independence.

67. GOLDSMITH & POSNER, *supra* note 4, at 12 (emphasis omitted).

68. *Id.* (emphasis omitted).

69. *Id.*

70. *Id.*

71. This weddedness to statics, like that to bilaterality noted *supra* note 43, will prove crucial throughout the authors’ account. Both commitments reflect and account in significant part for the many empirically implausible and ethically troubling claims to which the authors are committed. The many empirically vacuous claims to which they are committed are attributable to their other foundational commitment—namely, that to infinitely plastic state interests as telic ends.

72. Shocks, then, would be understood by reference to the explanatory models themselves, but we will see that such explaining never actually happens.

73. What counts as an “exogenous shock” sufficient to disturb a given equilibrium presumably will be understood by reference to the model employed to account for the equilibrium thus disturbed. So the authors will at least be equipped to hypothesize as to what sets a particular dynamic process in motion.

the spirit of Goldsmith and Posner's statics would integrate the free (exogenous) variables of their static scenarios in some fashion with the rough picture (story) of gradual information-revealing bluff, bargain, and conflict that the authors have earlier briefly suggested transpires between equilibria.<sup>74</sup> And given the surprisingly rough-hewn character of the static models, such integration would not seem too much to ask. But again, not even such an integration will address the equilibrium-existence problem absent some refinement. I shall say more on the difficulties these absences occasion in Part III and Part IV.

Despite their abstention from constructing a dynamic model of state interaction, our authors nonetheless commit themselves to the task of "argu[ing] that some combination" of the four static "models" will, presumably in combination with *independent* data concerning "power" and "interests,"<sup>75</sup> "explain[] state behaviors associated with international law."<sup>76</sup> "These models," they admit, "do not exhaust the possibilities of international interaction."<sup>77</sup> But they do "provide a simple and useful framework for evaluating a range of international legal regimes."<sup>78</sup> "[E]ach model has different characteristics that make it more or less stable and effective [at what?], depending on the [which?] circumstances."<sup>79</sup> "Taken together, however, the four models offer a different explanation for the state behaviors associated with international law than the explanation usually offered in international law scholarship."<sup>80</sup> The "different explanation" is that international law is a product of "self-

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74. GOLDSMITH & POSNER, *supra* note 4, at 11.

75. Because "power" and "interests" are taken as exogenous variables accounting for endogenous international law, they must be independently defined, individuated, and located. However, we shall see that they seldom are in *The Limits*.

76. GOLDSMITH & POSNER, *supra* note 4, at 13. In view of the upcoming illustration of international law as epiphenomenal, it is reasonable to suppose that they will explain state behavior by reference to the models—which do not, crucially, ever themselves involve law as explicandum, meaning that law is assumed away as causative by the models themselves—and then will simply assert that what purports to be law is a sort of hologram generated by that behavior.

77. *Id.*

78. *Id.* "Evaluating" here is never explained, and thus the claimed usefulness of the admittedly simple framework remains obscure. The most charitable answer appears to be that which I have just proposed. See *supra* note 76.

79. GOLDSMITH & POSNER, *supra* note 4, at 13.

80. *Id.*

interested” (and bilateral) state interaction, rather than—and this curious contrast is crucial—a (multilaterally constructed and enforced) *check* upon such action.<sup>81</sup>

In the absence of a dynamic model, of course, such a claim will be quite conveniently easy to sustain, though it will also in consequence be interminably contestable and ultimately, one fears, uninformative. For causation, of course, is processual, or at the very least intertemporal, in character.<sup>82</sup> At an instant, we do not have free (independent, exogenous) and bound (dependent, endogenous) variables—or indeed variables at all if examining but a single pair of states such as Goldsmith and Posner’s commitment to bilaterality restricts us to doing—only copresence. That is not causation. A natural supposition that we might have made of any set of “rules” reached implicitly (by custom) or explicitly (by formal agreement) over time would be that they both are the product of interaction at one time or interval and operative as a varyingly weak or strong constraint upon interaction at a subsequent time or interval. But an exercise in single- or two-period statics, devoid of attention paid the process of adjustment from equilibrium to equilibrium, conveniently deflects our attention from the possibility of such symbioses. And symbioses of that kind, I take it, are precisely what most “traditionalists,” as well as ordinary citizens, would suppose to be at work in the evolution of international law.<sup>83</sup>

The fact of symbioses of this kind also underwrites a hope, I believe, for ongoing progress—much of which has been at work over the past several decades—in rendering global life more just and more decent for all human beings. It therefore appears here already that, in the manner contemplated at the end of Part I, Goldsmith and Posner’s static analysis risks sliding from positive vacuity to normative condemnability. Unless its further elaboration as discussed below fares better than it

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81. *Id.*

82. Causation is processual if time is continuous, and it is intertemporal if time is densely packed. *See* BERTRAND RUSSELL, *PRINCIPLES OF MATHEMATICS*, 447–79 (1903) (examining this distinction).

83. *See, e.g.*, W. MICHAEL REISMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE* 1–13 (2004) (interpreting international law in relation to what is called “the global constitutive process”). A number of occasions arise in Parts III and IV to note the degree to which Goldsmith and Posner’s positions avoid obvious implausibility, as distinguished from convenient unaffability, only when put forward in static contexts, while what they label “traditionalist” views turn out to be the more parsimonious and intuitively satisfying accounts in dynamic contexts.

has in the preview, we shall suspect that the theory quite warrantlessly forecloses the very hope that “traditional” international law theorists, with intertemporally richer and empirically more plausible understandings of global developmental processes, effectively underwrite.

Goldsmith and Posner devote the remainder of their book to “applying [their] framework to various regimes of international law.”<sup>84</sup> Part 1 treats customary international law (CIL). Part 2 discusses treaty law. And Part 3 addresses “external challenges” to the account.<sup>85</sup> Conspicuously absent is any attention paid the other two traditional sources of international law as “codified” in the enabling Statute of the International Court of Justice—“general principles of law recognized by civilized nations” and “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”<sup>86</sup> That lacuna, we will see, both dovetails with and is partly explicable by the other self-imposed limitations under which the authors labor in their accounts of customary and treaty law. Because treaties and especially custom proceed from actions taken by state leaders in their official capacities, it is somewhat less obviously implausible to take them for minimally efficacious, epiphenomenal traces of such actions than it would be to treat general principles, standards, or rules articulated by conscientious persons endeavoring to opine impartially in similar fashion. We take up this gap again in Part III and Part IV.

### III. *THE LIMITS* ELABORATED AND APPLIED—HENCE FOUND FURTHER WANTING

As noted, Goldsmith and Posner elaborate and apply their theory to only two of the four or five traditional sources of international law—custom and treaty. We consider these in turn.

#### A. *THE LIMITS* ON CUSTOM

##### 1. Elaborated

Part 1 of *The Limits* considers CIL. Citing the Restatement of U.S. Foreign Relations Law (and nothing else), the authors

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84. GOLDSMITH & POSNER, *supra* note 4, at 13.

85. *Id.* at 13–14.

86. Statute of the International Court of Justice art. 38, §§ 1(c), (d), June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute].

report that CIL “is typically defined as the general and consistent practice of states that they follow from a sense of legal obligation.”<sup>87</sup> That sense of legal obligation, or *opinio juris*, is often labeled “the ‘psychological’ element” of CIL.<sup>88</sup>

CIL is of course notoriously elusive and open-ended. Its “psychological component” cannot be directly observed, but requires “objective,” “behavioral” indicia.<sup>89</sup> And sometimes, therefore, the behavioral element might be employed objectionably as a stand-in for the psychological component, rendering the latter effectively redundant.<sup>90</sup> The behavioral element itself can be difficult to discern or pin down.<sup>91</sup> For the concepts of “state practice,” “norm crystallization,” “widespreadness” and “uniformity,” upon which salient behavior’s individuation depends generate problems of appropriate description and contouring, particularly when it is evolutionary processes that we are observing. While such problems have long been familiar to lawyers, particularly common lawyers, Goldsmith and Posner appear to regard them as scandalous, evidently longing for a world in which lawyers, like chemists or Platonists, might traffic in natural kinds or pure forms.

Thus, our authors report, “There is little agreement about what *type* of state action *counts* as state practice.”<sup>92</sup> And the possibility arises that “[t]hose who study and use customary international law—courts, arbitrators, diplomats, politicians, scholars—invoke these sources selectively.”<sup>93</sup> Similar dangers of source-selectivity afflict questions of widespreadness and uniformity, since there are “190 or so states.”<sup>94</sup>

Apparently the danger of source-selectivity afflicts findings of *opinio juris* as well. For what evidence counts and “[t]he appropriate conditions for the use of such evidence are unsettled.”<sup>95</sup> Moreover, “there is no convincing explanation of the process by which a voluntary behavioral regularity transforms

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87. GOLDSMITH & POSNER, *supra* note 4, at 23 (citing RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 102(2) (1987)).

88. *Id.*

89. *Id.* at 24.

90. *Id.*

91. *See id.* at 23–24.

92. *Id.* at 23 (emphasis added).

93. *Id.* at 23–24.

94. *Id.* at 24.

95. *Id.*

itself into a binding legal obligation”<sup>96</sup>—though no account on offer is actually named and critiqued. This latter statement is an ironic lament in view of now-burgeoning literatures concerned with precisely the evolution and “internalization” of customary norms.<sup>97</sup> Indeed, one of our authors is himself a distinguished contributor on the topic, at least of such evolution if not internalization.<sup>98</sup> But perhaps because invoking those literatures in the CIL context would frustrate the authors’ preferred picture of CIL as unremittingly epiphenomenal,<sup>99</sup> they simply complain about the gap they perceive between regularity and normativity in traditional scholarship rather than discussing possible—or now proffered—solutions.<sup>100</sup>

Goldsmith and Posner announce that rather than attempting to resolve, they will simply sidestep the “issues” that they identify.<sup>101</sup> They will focus instead upon “two sets of issues that are rarely discussed in the international law literature but that are fundamental to understanding” CIL.<sup>102</sup> The first set of issues comprises “the unarticulated assumptions that underlie the traditional conception of” CIL as “unitary, universal, and exogenous.”<sup>103</sup> It is unclear how these “issues” differ from those that the authors report they will sidestep. Goldsmith and Pos-

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96. *Id.*

97. *See, e.g.*, DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000); HABERMAS, *supra* note 19; Goodman & Jinks, *supra* note 34.

98. *See, e.g.*, ERIC POSNER, LAW AND SOCIAL NORMS 36–46 (2000) (handling, with sensitivity, accounts of exogenously operative and occasionally internalized normativity).

99. The authors’ preferred picture is discussed *infra* Part III.A.

100. One might imagine a fruitful line of inquiry by way of filling the gap that began with the psychological findings on norm internalization and proceeded to a theory of state leaders’ parallel internalization by acting in official capacities and identifying with their states, thereby investing their states with personality and some capacity for quasi-socialization. One might imagine our authors themselves taking this line, given their methodological choice of leaders as proxies of states, and given one of the authors’ interest in social norms. At the very least one might have imagined them grappling with the interesting recent work of Professors Goodman and Jinks along these lines. *See, e.g.*, Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004) [hereinafter Goodman & Jinks, *How to Influence States*]; Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005) [hereinafter Goodman & Jinks, *International Law and State Socialization*].

101. *See* GOLDSMITH & POSNER, *supra* note 4, at 25.

102. *Id.*

103. *Id.* (emphasis omitted).

ner describe unitarity as identity of behaviors' "logical form."<sup>104</sup> This the authors do not further explain, nor does the concept find further employment in the text.<sup>105</sup> "Universality" refers to CIL's binding all states save those that persistently object during a rule's crystallization.<sup>106</sup> And "exogeneity" denotes a rule's operating as "an external force that influences states."<sup>107</sup> Our authors announce that their "theory . . . [will] challenge[] each of these assumptions."<sup>108</sup>

The "second set of issues" that Goldsmith and Posner deem fundamental to understanding CIL and yet insufficiently discussed by traditionalists "concerns the traditional paradigm's inability to explain international behavior."<sup>109</sup> The "traditional paradigm" apparently ought, but cannot, explain "how [CIL] emerges from disorder"; "how it changes over time"; "why [it] changes in response to shifts in the relative power of states, advances in technology, and other exogenous forces"; why "states frequently change their views about the content" of CIL; "why domestic courts and politicians almost always apply a conception of [CIL] that is in the state's best interest"; why states violate their promises to obey CIL; or "why states comply with" CIL.<sup>110</sup> Yet these "issues," much like the first set of issues, we shall find to receive minimal if any consideration in *The Limits* itself.

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104. *Id.* (emphasis added).

105. The concept of logical form is familiar to linguistics and mathematical logic. *E.g.*, NORBERT HORNSTEIN, LOGICAL FORM: FROM GB TO MINIMALISM (1995). But Goldsmith and Posner do not address what they have in mind. Presumably it relates to isomorphism among certain relations—ordered sets of behaviorally linked states—claimed to have come to constitute customs. So, for example, let *R* be a dyadic relation defined over pairs of states, such that "*Rxy*" is true if and only if *x* acts in the *R* manner toward *y*. If it comes to pass that over time we increasingly observe such circumstances as *Rab*, *Rba*, *Rac*, *Rbc*, etc., and there appears to be a sense of obligation among the leaders of the first named states to relate their states to the second named states in that *R* manner, then the *R* relation might come to be called "customary." Goldsmith and Posner's professed concern over a unitarity assumption conveys skepticism as to whether there ever is any sufficiently well-individuated and recurring such *R* in the first place, rather than, say, *Rab* in one case, *Sba* in the next, *Tac* in the next, etc. But they provide no reasons, and there seems no obvious difficulty in singling out all manner of such "*R* relations," for example refraining from invading absent an imminent threat extending diplomatic immunity, etc.

106. GOLDSMITH & POSNER, *supra* note 4, at 25.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 25–26.

Having thus set the stage, Goldsmith and Posner next begin elaborating their theory. This asserts that “numerous . . . combinations of coincidence of interest, coercion, bilateral prisoner’s dilemmas, and bilateral coordination” will better account for “many apparently [but illusorily] cooperative universal behavioral regularities” among states than does “the standard account” that CIL “governs all or almost all states.”<sup>111</sup> This of course sets the stage for a point-by-point comparison of the authors’ account and some “traditional” account in respect of some illustrative regularities. But we soon shall find that this expectation goes unfulfilled.

Goldsmith and Posner recognize that it will at least initially appear odd to undertake to explain purportedly *universally applicable CIL* by reference to merely *bilateral games*.<sup>112</sup> They apologize for the oddity by expressing skepticism about the prospect of employing *multilateral* strategic models. They offer several reasons: (1) Monitoring costs rise with the number of “players.”<sup>113</sup> (2) Also with such a rise in the number of players, the likelihood falls of mutual understanding as to what constitutes cooperation. The likelihood similarly falls of (3) states employing mutually low discount rates, (4) shared expectations of indefinite game-iteration, and (5) mutually high benefit/cost differentials as between cooperation and defection.<sup>114</sup>

But Goldsmith and Posner say nothing about why they suppose that the empirical eventuation of these armchair-specified tendencies would prove quantitatively decisive. Nor do they consider the possibility that the listed factors, should they prove empirically operative, might simply *limit* likely values of  $n$  in an  $n$ -party “game” without limiting it to so low a value as 2.<sup>115</sup> So, for reasons that remain mysterious, it will

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111. *Id.* at 35. These are the “models” described earlier, *see id.* at 11–12, now supplemented by several four-celled tables (two actors facing binary choices), *see id.* at 27–34, of the kind reliably encountered in beginning texts on game theory.

112. *Id.* at 36.

113. *Id.*

114. *Id.*

115. It seems intuitively more plausible, for example, to hypothesize more variable functional relations between changes in the number of players and changes in the supposed likelihoods, rather than a Goldsmith/Posner style switching function. The actual functions presumably would manifest concavity, such that the move from two to three players scarcely affects likelihoods (1) through (5) at all, the move from three to four a bit more, etc. In such case multilaterality with  $n > 2$  could well be the norm, and all that would vary

counter-intuitively be Goldsmith and Posner's bilateral gaming *versus* the traditionalists near-universal *opinio juris* where CIL is concerned, though the two competing views never actually end up being cross-compared by reference to parsimony, mechanism-intuitive plausibility, empirical corroboration, or any of the earlier cited "issues" mentioned by our authors' in their argument.

## 2. Applied

Our authors next turn to what they call "applying" their theory by examining four case studies<sup>116</sup> "chosen on the basis of their prominence and on the availability of a detailed historical record."<sup>117</sup> The authors, however, spare us the mentioned details. The first study reports that the United States was a champion of the "free ships, free goods" rule during the seventy years it was not a belligerent in any major conflict, then stretched, bent, and selectively interpreted the rule during the Civil War.<sup>118</sup> Little is said about what interest the United States was "maximizing" or why the United States interpreted the rule liberally (or indeed at all) rather than simply disregarding or abrogating it.<sup>119</sup> Also conspicuously absent is any reference to "coincidence of interest," "coercion," "cooperation," or "coordination" by, of, or between the United States and any other state.<sup>120</sup> So the models go unused, and the possibility that *opinio juris* played some causal role in motivating or modulating behavior is effectively ignored.

Next the study explains that during the Spanish-American War, no state violated the "free ships, free goods" rule, possibly because Spain's weak navy and the presence of few seizable goods on neutral ships gave rise to a coincidence of interest.<sup>121</sup> Thereupon the authors report that during the Boer War the

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would be the *precise* value of  $n > 2$  from norm to norm.

116. The four case studies "are the 'free ships, free goods' rule of wartime maritime commerce; the breadth of the territorial sea; ambassadorial immunity; and the wartime exception from prize for coastal fishing vessels." GOLDSMITH & POSNER, *supra* note 4, at 45.

117. *Id.*

118. *Id.* at 46–48.

119. That proves significant below in connection with the prospect of more parsimoniously and plausibly explaining state behavior without assuming away normativity.

120. GOLDSMITH & POSNER, *supra* note 4, at 11–12.

121. *Id.* at 48–49.

British first abided by the rule, then stretched its interpretation for a few months as the United States had done during its Civil War (rather than abrogating or disregarding it), then returned to strict adherence under threat of retaliation from the United States and Germany.<sup>122</sup> The authors find a similar story in the Russo-Japanese War, save that the Russians were more cynical than the British in loosely interpreting the rule before threats of retaliation.<sup>123</sup> The only model at work here appears to be coercion,<sup>124</sup> which as employed resembles what traditionalists call (informal) “enforcement” in the international system. And as in the Civil War case, the authors make no attempt to account for Britain or Russia’s differential regard for the rule, or for the choice to stretch interpretations rather than simply to violate the rule. *Opinio juris*, by contrast, might well so account, and so afford more nuance, intuitive intelligibility, and empirical explanatory success to traditionalists than *The Limits* grants Goldsmith and Posner. Finally on “free ships, free goods,” Goldsmith and Posner offer a few words on the First World War,<sup>125</sup> which they report “is well known [to have] destroyed any pretense of a law of maritime rights.”<sup>126</sup> The reason? It is “no doubt because of changes in technology, stakes, and interests.”<sup>127</sup> Oh.

Goldsmith and Posner tell a similarly sketchy tale of state hypocrisy in respect of the CIL of territorial waters.<sup>128</sup> More than explanations, we find here proto-explanations, plausible hypotheses that might, but also might not, be borne out by intensive empirical study of the “incident report” sort rendered familiar by practitioners of the New Haven school of international law scholarship.<sup>129</sup> That latter school and methodology, incidentally and indeed astonishingly, receive literally no men-

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122. *Id.* at 49–50.

123. *Id.* at 50–51.

124. *See id.* at 12 (explaining the coercion model).

125. *See id.* at 51–52.

126. *Id.* at 51.

127. *Id.* at 52. Goldsmith and Posner fail to specify which “technology, stakes, and interests” caused the destruction of this legal concept.

128. *Id.* at 59–66.

129. Much has been written both on, and in the spirit of, the New Haven school. *See generally* CHEN, *supra* note 34, at 14–22. The canonical New Haven school casebook probably is REISMAN ET AL., *supra* note 83. Two well-known introductions to international law written from the New Haven school point of view are CHEN, *supra* note 34, and ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* (1994).

tion whatever in the text, index, or bibliography of our authors' self-styled work of international law scholarship.

Goldsmith and Posner's ambassadorial immunity "case study"<sup>130</sup> probably is their best. This perhaps is unsurprising. For diplomatic relations are of their very essence bilateral and cooperative in nature, hence trivially amenable to treatment as cases of iterated bilateral cooperation. So states in Goldsmith and Posner's rendering turn out to be consistent in conferring and respecting diplomatic immunity.<sup>131</sup> And the interest in ongoing communication between governments, coupled with states' roughly equal retaliatory capacities, unsurprisingly affords incentives to cooperate. Bilateral diplomatic relations also typically satisfy the prerequisites for long-term cooperation, while conspicuous failures of these prerequisites to obtain are readily found in the best known cases of *violation* of diplomatic immunity.<sup>132</sup>

Goldsmith and Posner's final case study is a close reading and critique of the venerable *Paquete Habana* decision of the United States Supreme Court,<sup>133</sup> a decision commonly cited for its observation that CIL "is part of our [U.S.] law."<sup>134</sup> Here the discussion, which is more or less continuous with the authors' earlier treatment of "free ships, free goods," is devoted principally to an alleged selectivity in the Court's marshalling of evidence.<sup>135</sup> The charge here is somewhat ironic in view of the treatment that our authors themselves have given "free ships, free goods" only several pages (and fully several case studies) earlier.<sup>136</sup>

## B. THE LIMITS ON TREATY LAW

### 1. Elaborated

Goldsmith and Posner's account of treaty law serves as a sort of adjunct to their account of custom. Treaties, in the au-

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130. GOLDSMITH & POSNER, *supra* note 4, at 54–59.

131. *See id.* at 54–55.

132. *See id.* at 55–58.

133. *See id.* at 66–78.

134. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

135. GOLDSMITH & POSNER, *supra* note 4, at 70–73.

136. *See id.* at 45–54. A critique of *Paquete Habana* also seems a bit out of place in a putative sequence of "case studies," unless the authors intend here a pun on the word "case."

thors' rendering, simply clarify the contours of custom.<sup>137</sup> And since custom is bilateral and akin to a "course of dealing" between two parties to a series of commercial transactions, treaties are akin to written bilateral contracts that sharpen the terms of an ongoing relation. Goldsmith and Posner end up both appealing to, and disavowing, the contract analogy.<sup>138</sup> And that ambivalence, we shall see, stems directly from an ultimately futile attempt to have things both ways: on the one hand taking treaties for broadly significant, and on the other hand wishing to strip them, as they have done the custom upon which treaties are parasitic in their account, of both multilaterality and normative importance.

"The conventional international lawyer's wisdom about treaties," Goldsmith and Posner report, "is uncomplicated."<sup>139</sup> When states enter agreements, they obligate themselves to comply with those agreements. *Pacta sunt servanda*.<sup>140</sup> "Under mainstream international law theory," a treaty "enhances compliance [with an agreement] by increasing the normative strength of the agreement and thus a state party's sense of obligation."<sup>141</sup> Mainstream international law scholars accordingly "explore the conditions for normativity and urge that these conditions . . . be strengthened whenever possible."<sup>142</sup>

Goldsmith and Posner acknowledge that traditionalists recognize (a) that states sometimes violate treaty provisions, and (b) that imprecision in terms, inadequate "third-party" enforcement power, and self-aggrandizing behavior sometimes account for such violations.<sup>143</sup> Our authors also acknowledge the existence of formal agreements among states that do *not* purport to carry the force of law—so-called "nonlegal agreements," sometimes labeled "soft law."<sup>144</sup> And they recognize that "[c]onventional wisdom about nonlegal agreements is more varied" than that about treaty law.<sup>145</sup> But these "nods" to the var-

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137. *See id.* at 84–85.

138. *Compare id.* at 90 (finding "limited value" in drawing an analogy between international agreements and domestic contracts), *with id.* at 98 (explaining that international agreements and contracts are analogous as both convey the seriousness of commitment).

139. *Id.* at 83.

140. *Id.*

141. *Id.*

142. *Id.*

143. *See id.* at 83–84. "Traditionalists" too, then, can be "realists" in part.

144. *See id.*

145. *Id.* at 84.

ied and protean nature of contemporary international law are all that we find.<sup>146</sup> And the want of more attention to these recent developments does not simply render *The Limits* curiously “retro” in flavor; we shall see that it leads our authors into conceptually troubled waters.

In putative contrast to “the traditional view” (or views) of explicit international agreements, Goldsmith and Posner’s view of “[t]he basic logic . . . of treaties and nonlegal agreements follows directly from the models of cooperation and coordination set forth in part 1.”<sup>147</sup> (“Coercion” and “coincidence” will now largely drop from view.) In essence, the guiding idea is that successful cooperation requires shared understanding as to what *counts* as cooperation—coordinated interpretation of what we might call the “essential terms” of cooperation. “If [CIL] is weak because of its ambiguity, then states will have strong incentives to clarify [CIL] by communicating with each other.”<sup>148</sup>

Now in view of Goldsmith and Posner’s treatment of custom as epiphenomenal and possessed of no normative pull in any event, it is mysterious how it could be “weak” or why states would bear incentives to “strengthen” it.<sup>149</sup> So presumably what Goldsmith and Posner have in mind here is that states bear incentives to render explicit—by treaty or nonlegal agreement—the implicit coordinative settlements that their solely interest-driven, not law-driven, behaviors amount to. And so explicit international agreements—treaties and “nonlegal agreements” alike—both will on Goldsmith and Posner’s account collapse into essentially but one phenomenon. Both will amount to

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146. I allude here in part to the explosion of attention now being paid to both (a) “soft law” that emerges from “networks” or “epistemic communities” of substate regulators, academics, and affiliates of nongovernmental organizations, and (b) the “disaggregated state” whose officials belong to those “communities.” See generally CHAYES & CHAYES, *supra* note 5, at 250–70 (on nongovernmental organizations); SLAUGHTER, *supra* note 5, at 36–64 (on regulators); Raustiala, *supra* note 5, *passim* (discussing the role networks play in international cooperation).

147. GOLDSMITH & POSNER, *supra* note 4, at 84. Coercion and coincidence now largely drop from view.

148. *Id.* at 85. This all comes as something of a surprise. In Part 1 of *The Limits*, the authors did not argue that CIL was weak as a result of ambiguity. See *supra* notes 104–05 and accompanying text. The authors also did not argue that states maintained strong interests either in strengthening CIL or in clarifying it. I leave this curious discontinuity between the authors’ treatments of CIL and treaty law to the side for present purposes.

149. Shadows are not “weak” or “strong.”

memoranda of bilateral understanding—"you scratch my back, I'll scratch yours" affairs.

The suggestion that explicit agreements might clarify custom of course is not novel, and our authors acknowledge that.<sup>150</sup> What will be unique to our authors, then, will be, first, as with their account of CIL, the attempt again to prune away "the normative element"; and second, again as in the treatment of custom, the attempt to portray the law as being bilateral in character. Ironically, these two intimately related, distinguishing marks of Goldsmith and Posner's theory are precisely what get them into trouble.

Consider first the authors' handling of multilaterality.<sup>151</sup> Their account of CIL, recall, is as a sort of ersatz-universal, ersatz-prescriptive shadow cast by what "really" are discreet *pairs* of merely self-aggrandizing states interacting. An obvious empirical challenge to such an account is the universality or near-universality that norms must claim if they are to be designated "custom" at all. Our authors attempted to address that challenge, we observed, essentially by impugning the empirical premise. First they attempted to erode the hard-definitional contours of behavioral regularity claims,<sup>152</sup> in effect suggesting doubts ringing obliquely of Wittgensteinian-by-way-of-Kripkean "rule skepticism."<sup>153</sup> Second they accused traditionalists of deploying corroborative evidence of regularity selectively.<sup>154</sup> Finally, they selectively deployed what they took for some contrary evidence of their own.<sup>155</sup>

But this strategy cannot even pretend to work in respect of treaties or treaty-based international institutions. For in those cases universality of signature is both (a) all that is required for the norm that concerns us to purport to be multilaterally bind-

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150. See GOLDSMITH & POSNER, *supra* note 4, at 83–84.

151. See *id.* at 85–88.

152. See *id.* at 85–86.

153. See SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE: AN ELEMENTARY EXPOSITION (1982) (taking Wittgenstein for having shown that rules do not determine the ranges of their own applications, hence that workable rules presuppose normative communities which fix rules' applicability ranges simply through contingently common behavioral usage). Saul Kripke is rebutted on exegetical and other grounds by G.P. BAKER & P.M.S. HACKER, SKEPTICISM, RULES AND LANGUAGE (1984), as well as by others. An excellent discussion of the appropriation of Kripke by legal scholars is found in BRIAN BIX, LAW, LANGUAGE, AND LEGAL DETERMINACY 36–62 (1993).

154. See GOLDSMITH & POSNER, *supra* note 4, at 86–87.

155. See *id.* at 87–88.

ing, and (b) readily verified as present. How, then, are we to account for the existence of expressly multilateral formal agreements purporting to carry the force of law, while also claiming that such agreements “really” are no more than interpretive adjuncts clarifying the precise terms of fundamentally norm-free, bilateral, self-aggrandizing state behavior?

Sometimes, I think, it is best to conclude that “a cigar is just a cigar.”<sup>156</sup> The most intuitively plausible, non-Ptolmeic explanation for the existence of multilateral agreements codifying legal norms of appropriate behavior surely would be that states’ officials either (a) wish to endow reasonably well-defined norms of appropriate behavior with international legal force, (b) wish to join in a universally agreed intention or aspiration that such norms steadily, even if gradually, *take on* effectively “enforceable” force, (c) wish to *appear* to harbor such wishes, or (d) hold some combination of these wishes. Under any such scenario, both the norm’s multilaterality and its normativity would be either forehandedly (in the first two circumstances) or backhandedly (in the third circumstance) acknowledged. And so normativity itself, understood as a derivative claim<sup>157</sup> upon official conscience, and multilaterality, understood as the norm’s universality as to all signatories, would figure critically into any intelligible interpretation of the practice of treating.

Normativity cannot discharge the appointed function in our authors’ account, however. For the latter must, if indefinitely elastic state “interest” is to stand as a real and complete alternative to *opinio juris*, banish law-answerable conscience and normativity as ethical bindingness altogether. Nor can multilaterality, for its part, play the appointed role, since our authors are committed to bilaterality as the exclusive interstate relational mode. And so a cigar must “really” be, or “mean,” something other than a cigar in our authors’ unrecognizable world, something hidden not only to traditional scholars, but also to treaty-negotiating, -signing, -invoking, and -enforcing agents themselves. It will be up to our authors to reveal for us the “secret meanings” of our own actions.

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156. This remark has been attributed to Freud as his response to certain Freudians having taken psychoanalysis a bit far. See JOHN BARTLETT, *FAMILIAR QUOTATIONS: A COLLECTION OF PASSAGES, PHRASES, AND PROVERBS TRACED TO THEIR SOURCES IN ANCIENT AND MODERN LITERATURE* 608 (Justin Kaplan, ed., 17th ed. 2002) (attributing this quotation to Freud).

157. By “derivative claim,” I mean a claim upon the official via the claim’s binding the state in whose name the official acts.

Goldsmith and Posner candidly grope for a means of simultaneously laying bare the “real” meaning of treaties, while accounting for treaties’ apparent normativity and self-professed multilaterality. “What, then, is the point of multilateral treaty regimes?” they ask.<sup>158</sup> “We argue that these regimes have an implicit two-step logic: in step 1, states come together and negotiate common terms; in step 2, states cooperate (or not) in pairs . . . .”<sup>159</sup>

But simply having “a two-step logic”<sup>160</sup> of course does not address the question that Goldsmith and Posner have set themselves. We remain left to wonder why “states come together and negotiate common terms”<sup>161</sup> in the *first* place if, as the authors’ account both here and in Part 1 has it, all of states’ “interest”-invoking dealings “really” are bilateral in nature. But leave this to one side for just a moment (we’ll come back to it), for what Goldsmith and Posner appear to have in mind by way of an answer to the puzzlingly persistent multilaterality challenge emerges from their attempt to grapple with the other mystery that afflicts their account of treaty law, that of puzzlingly persistent normativity.

Normativity’s recalcitrance in Goldsmith and Posner’s world appears most starkly in their theory’s remarkable incapacity to account for the presence of two distinct kinds of practice in which the authors explicitly recognize states to engage. Recall that states make not only agreements that explicitly purport to carry the force of law, but also another class of agreements that explicitly purport to do what our authors claim “really” to be the implicit purpose of all formal agreements, including treaties—*viz.*, to clarify intentions and thus the terms of cooperation.<sup>162</sup> If states themselves already are explicitly aware of the function that Goldsmith and Posner claim to be implicit in all legal agreements, and if states act explicitly to discharge that nonlegal function in explicitly nonlegal agreements (which states expressly distinguish from treaties), then again, why are there *legal* agreements—treaties—at all, even bilaterally, let alone multilaterally?

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158. GOLDSMITH & POSNER, *supra* note 4, at 87.

159. *Id.* (emphasis omitted).

160. *Id.*

161. *Id.*

162. *See id.* at 84–85.

Here our authors assay “three basic answers.”<sup>163</sup> These turn out in each case either to fare no better than the earlier-proffered explanation for multilaterality, or covertly to import normativity back into the explanatory picture. The first basic answer is that “treaties [unlike nonlegal agreements] usually require legislative consent, a process that conveys important information about state preferences for the treaty.”<sup>164</sup> The “information” that Goldsmith and Posner have in mind appears to have mainly to do with the degree to which the legislature of a treaty partner holds “policy preferences” in favor of the treaty’s terms.<sup>165</sup>

This “basic answer” appears, once one thinks about it, heroic. For one thing, the practice of treating long antedates the crystallization of a global norm acknowledging the propriety of democratic governance. It accordingly antedates the existence of independent legislatures, and such legislatures’ roles in domestic treaty approval. For another thing, that norm is hardly yet fulsomely honored throughout the world, notwithstanding the authors’ claim that “[i]n most states, the legislature must consent to most agreements before they can be binding under international law.”<sup>166</sup> And to the degree that legislatures act as “rubber stamps” to executives, the value added in respect of commitment-information by their treaty-stamping is proportionally diminished. Finally, if all that is wanted is real “information” about truly consequential “policy preferences,” there are means considerably less taxing than waiting for legislative scheduling, hearings, and debates over agreements purporting to bind with the force of law.

Perhaps realizing that they have a problem here, Goldsmith and Posner subtly turn to a particular *form* of information purportedly conveyed by legislative involvement in treaty making: “legislative consent,” they observe, citing one institutionalist,<sup>167</sup> “can serve as a commitment that is separate from

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163. *Id.* at 91.

164. *Id.*

165. *See id.* at 91–95.

166. *Id.* at 91.

167. *Id.* at 93 (citing LISA MARTIN, DEMOCRATIC COMMITMENTS: LEGISLATURES AND INTERNATIONAL COOPERATION (2000)). Institutionalists apparently are among the traditionalists with whom Goldsmith and Posner are in disagreement, though less stark disagreement than with international lawyers who do not employ RCT. Institutionalists define themselves partly by contrast to the realists and neorealists with whom Goldsmith and Posner purport to be in fuller sympathy. They do so by declining to endogenize international re-

the commitment that the executive alone makes.”<sup>168</sup> Moreover, “the legislative consent process can send a credible signal about the *president’s* degree of commitment.”<sup>169</sup> And, finally, to the degree that treaties are made part of domestic law and become enforceable in domestic courts, treaties yet further commit states to abiding by their terms.<sup>170</sup>

But now what are we to make of this special form of “information conveyance” upon which Goldsmith and Posner fall back? What is this “commitment,” as distinguished from the mere “policy preference” to which it is proffered as an alternative, if not *normative*? And what is the “signaling” of “information” concerning “commitment” to what purports to be a rule governing behavior, as distinguished from information concerning a “preference” for that form of behavior, if not formal agreement to be *bound*?

Goldsmith and Posner appear obliquely to perceive the problem here and thus seek to disclaim the association, abruptly noting by way of apparent afterthought that “[i]t is important to note that [the calculus by which treaties are chosen over nonlegal agreements] can be described without reference to the concept of normativity.”<sup>171</sup> But the authors themselves certainly do not so describe things, offering, as they do, no more on the matter than the quoted conclusory denial. Nor do they indicate means by which they think anyone *might* do so. They might think that they have managed to do so by incanting the would-be normatively colorless word “information” repeatedly over the previous few pages. But they make critical use of the concept of *commitment* in endeavoring to explain what, if anything, in the way of “information” can be *conveyed* better by treaty than by nonbinding memorandum. And, at least in the absence of hostage exchange or some analogue thereto, it is only *normativity* that distinguishes commitment from mere *announcement*.<sup>172</sup>

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gimes and institutions as epiphenomenal. See, e.g., Robert O. Keohane & Lisa L. Martin, *Institutional Theory, Endogeneity, and Delegation*, Paper prepared for “Progress in International Relations Theory: A Collaborative Assessment and Application of Imke Lakatos’s Methodology of Scientific Research Programs” at Scottsdale, AZ (Jan. 15–16, 1999) (on file with the author).

168. GOLDSMITH & POSNER, *supra* note 4 at 93.

169. *Id.*

170. See *id.* at 94.

171. *Id.* at 95.

172. See, e.g., OLIVER E. WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 75–76, 124–29, 134–37 (1996) (describing the significance of hostage exchange

We might draw the point out thus: Imagine that I say “I do” at my own wedding ceremony. The “I do” certainly imparts information, but what information? It informs witnesses that I am invoking the practice by which one binds oneself in matrimony. The “I do” is not merely informative, but also performative; and the fact of the performance here, by which I bring myself under the obligation, is itself the “information” that is conveyed. The latter, that is to say, is devoid of any salient content “apart from the concept of normativity.” There is no interesting information absent the obligation.

As if to acknowledge the difficulty here, Goldsmith and Posner offer, by way of a putative third reason to choose treaties over nonlegal agreements a state’s purported desire “to convey the *seriousness* of [its] commitment to the agreement.”<sup>173</sup> But this is of course simply to repeat the original error. For what is it for a commitment to be “more serious”? Our authors invoke here an analogy that comes naturally to mind, but, alas, it is one that they have earlier expressly disavowed—that to contract.<sup>174</sup> A “legalized contract” amounts to “a more serious commitment” than a letter of intent or handshake, Goldsmith and Posner report, “because it is enforceable in court.”<sup>175</sup> But that is of course to say that the agreement is effectively binding and treated as binding. And it is to suggest that there is some justificatory basis underlying the greater degree of seriousness inhering in the more binding form of agreement. But what might that basis be?

What renders a contract a “more serious commitment” under domestic law than a letter of intent, the authors have earlier acknowledged, is that violations of the former are “subject to reliable sanctions by independent third parties.”<sup>176</sup> We might of course quarrel with the characterization of contract, involving as it does yet again our authors’ characteristic penchant for replacing—rather than complementing—individual conscience and a shared sense of decency with something more reminiscent of whippings or Skinnerian electrical shocks. But for present purposes, our authors’ problem runs deeper: they already have disavowed the contract analogy to treaties<sup>177</sup> precisely be-

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as a means of credibly committing).

173. GOLDSMITH & POSNER, *supra* note 4, at 98 (emphasis added).

174. *See supra* note 138 and accompanying text.

175. GOLDSMITH & POSNER, *supra* note 4, at 98.

176. *Id.* at 90.

177. *See id.* at 98.

cause, they claim, there is no third-party sanction on the international plane.<sup>178</sup> So there just is no remaining basis—no root, source, or backup—for the “greater degree of seriousness” or “strength of . . . commitment”<sup>179</sup> that Goldsmith and Posner now say is supposed to attach to treaties relative to nonlegal agreements in their normatively emptied world. And we still require some such basis if we are to account for *states*’ routinely *drawing* the distinction.

Goldsmith and Posner appear to think that they can supply the needed basis simply by reciting, at this point, yet another magic word (like “information” before), now novelly labeling a treaty’s greater seriousness “purely a convention.”<sup>180</sup> That’s not very satisfying.<sup>181</sup> For what *are* this “convention” and this “seriousness,” and what *content* can those words carry that might be described “without reference to the concept of *normativity*”? If I tell you, “one nod means that I mean what I say, and two nods mean that I *really* mean what I say,” I am assuredly proposing something that looks like a signaling convention. But what work is the “really” doing here? And what then is the content of the “convention”?

If we acknowledge normativity as “traditionalists” do, the answer is both simple and obvious: the convention amounts to a standard means by which to invoke the practice of treating—of promising between nations—a practice which gives rise to obligations. It is accordingly a means of subjecting oneself to a norm for the benefit of—typically in return for reciprocal subjection undertaken by—another. Recurring to the wedding analogy invoked earlier, saying “I do” and placing the ring on the other’s finger indeed constitute conventions by which I signal greater seriousness than would be signaled were I merrily to say, “with these petals I thee wed,” dropping flowers happily upon the head of my beloved while the two of us go skipping through the park. But what renders the former, conventional act “more serious” than the latter, whimsical act is precisely *that* it is the one which invokes the ineluctably normative commitment that is the vow. The “seriousness” is parasitic on the normativity; there is nothing else to ground it.

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178. *Id.* at 90. That claim is not strictly correct either, but I leave the error to the side for now.

179. *Id.* at 99.

180. *Id.* at 98.

181. Perhaps we are punning again, now not upon “case,” but upon the synonymy between “convention” and “treaty.”

In sum, then, there just is no “here” here in our authors’ attempt to account for states’ distinguishing between treaties and nonlegal agreements via a putatively norm-free “convention.” The convention of signaling “serious commitment” or an intention to be bound will be intelligible as such, and thus workable as a convention bearing performative significance hence salient informative content, only against a prior backdrop of normativity—the normativity that ineluctably attends commitment.<sup>182</sup>

Now it is of course a commonplace that domestic law, including the law of contract, is more reliably, uniformly, and impartially enforceable than is international law, and that contracts accordingly might afford parties some greater certainty in collaborating, planning their affairs, and providing for their futures than treaties do states. That is indeed the principal reason that Goldsmith and Posner offer for disavowing the contract analogy before they avow it.<sup>183</sup> But it is nearly as well-recognized—save, perhaps, by some Skinnerians and war-planners—that were uniformed personnel, jails, and court-rooms alone all that stood between persons and venality (or worse), we should all be inhabiting a most venal world—domestically as well as internationally—indeed. And so plausible interpreters of domestic legality endeavor to integrate accounts of the empirical functioning of law with accounts of the roles of less formal custom, norms, normativity, shame, conscience, and decency in human life. That is what “conventional” scholars of international law do as well, as they attend both to what fills the gaps left by nonomnipresent, uniformed punishment-administerers in the global community, and to the processes by which *more regularized* norm-observance and—enforcement *develop*.<sup>184</sup> There appears to be no more mechanico-intuitively plausible or variable-wise parsimonious

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182. On the background conditions presupposed by successful conventions that solve coordination problems, and on the relations between normativity and convention, see DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY 97–100 (1969).

183. See *supra* note 138 and accompanying text.

184. See H.L.A. HART, THE CONCEPT OF LAW 208–31 (lithographic reprint 1963) (1961) (describing the international legal system as amounting to a horizontally enforced legal system, albeit one at a primitive stage of development); see also Goodman & Jinks, *supra* note 34, at 1753–65 (arguing that state domestic policies are a reflection of globally legitimated agendas); Goodman & Jinks, *How To Influence States*, *supra* note 100, at 646–56 (asserting that states are influenced by global norms through an acculturation process).

way to do that save by some either overt or covert “reference to . . . normativity.” Traditionalists’ such references, thankfully, are both transparent and suggestive of further empirical research. Goldsmith and Posner’s, so far as I can discern, are occult and dead-ended.

Our authors’ remaining proffered reason for states’ choosing treaties over nonlegal agreements is to “take advantage of the interpretive rules that apply to treaties” as codified in the Vienna Convention on the Law of Treaties.<sup>185</sup> The claim is cognate with the familiar observation that default rules such as those found in contract law, state corporations codes, and the like help to scale-economize on contract-completion costs in the domestic sphere.<sup>186</sup> As with our authors’ earlier attempts to reduce treaties’ normativity to vacuous “information,” then vacuous “convention,” however, the present would-be explanation likewise places the cart before the horse. “Interpretive rules” become necessary among nations only once there is some commonly employed form of written agreement apart from memoranda of understanding (since the latter are themselves sets of *bilaterally agreed* interpretive rules). And the only such commonly employed form of agreement is the treaty, which as we have noted memorializes something freighted with irreducibly normative significance—mutual commitment. So default rules exist to facilitate mutual committing—contracting or treating. Committing, contracting, and treating do not take place in order to afford opportunities to use default rules.

From their attempts to explain states’ choices as between treaties and nonlegal agreements on nonnormative grounds, our authors next turn to endeavoring to explain state *compliance* with treaties on nonnormative grounds. Goldsmith and Posner first draw a putative distinction between what they label “two schools” of thought about compliance—those who attribute compliance to “instrumental” reasons and those who attribute compliance to “noninstrumental” reasons.<sup>187</sup> But this distinction, like the pseudo-concept of “instrumental rational-

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185. GOLDSMITH & POSNER, *supra* note 4, at 95. To locate the convention, see Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

186. See, e.g., Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89–90 (1989) (describing arguments that default rules economize transaction costs).

187. GOLDSMITH & POSNER, *supra* note 4, at 100.

ity” itself, is entirely otiose.<sup>188</sup> There simply is nothing “noninstrumental” in any interesting sense about normativity, norm-observance, or norm-enforcement, particularly when “interests” are left altogether unspecified as Goldsmith and Posner have left them. The question always is *what* one “instrumentally” pursues—good of self, good of others, good of world legal order, etc.—in complying with or acting to vindicate a treaty’s provisions, not *whether* one “instrumentally” pursues something in doing so. So what Goldsmith and Posner appear actually to mean to say here is, as in their treatment of custom, that states’ objects in conforming to or vindicating treaty provisions are better understood “without reference to the concept of normativity” or “normative pull.” But once again they provide no such better understanding at all.

The “instrumentalist” school of accounting for treaty compliance, Goldsmith and Posner report, posits that “states comply with treaties when it is in their rational self-interest to do so, and not otherwise.”<sup>189</sup> “Interest” here is, as in Part 1, still left unspecified. But for reasons adduced in the previous paragraph we must take it for excluding interests in the good of others, the good of global order, or norms. Now “[w]ithin the rational choice school,” in turn, “two types of explanation are given for compliance: retaliation and reputation.”<sup>190</sup> “The simplest explanation for why a state might comply with a treaty,” Goldsmith and Posner report, “is that it fears retaliation or some other failure of cooperation or coordination if it does not.”<sup>191</sup> The authors briefly elaborate with a familiar scenario in which two states agree not to overfish and each refrains from

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188. Is there any concept of rationality that is *not* understood by reference to the suitability of chosen means to stated ends? The only candidate of which I am aware would be a so-called “rationality of ends.” *E.g.*, HENRY S. RICHARDSON, PRACTICAL REASONING ABOUT FINAL ENDS (1994). But even this implicitly imports an “end beyond the ends,” so to speak, relative to which those “ends” are means. Typically this end is labeled “human flourishing,” or “the good life” itself. *See id.*; *see also* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 23, 67, 87, 219–21. (1992); *cf.* ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 186 (Am. ed., Univ. of Notre Dame Press 1981) (1981) (on virtues as means conducing to broader human ends such as Aristotle’s “the good life for man”).

189. GOLDSMITH & POSNER, *supra* note 4, at 100.

190. *Id.* The “rational choice school” appears simply to be another name for what the authors are calling the “instrumentalist” school. The authors parenthetically note that some “noninstrumentalist” scholars invoke reputational arguments as well. *Id.*

191. *Id.*

overfishing because it fears that its doing so will lead the other to overfish.<sup>192</sup> Then follows another brief and familiar scenario in which two states agree upon standards for wireless communication from which neither subsequently departs because there is little point in doing so.<sup>193</sup>

The first scenario, which admits of a role for retaliation or at any rate cooperative breakdown, no more excludes normative attitudes, ethicality, legality, or efficacy than the existence of a neighborhood police force renders laws against theft from or dumping upon the lawn of my neighbor ethically nonbinding, ethical attitude-inoffensive, or ineffective. So it affords no basis upon which to claim to be offering a useful alternative account of treaty-compliance to that offered by “noninstrumentalists,” i.e., norm-respecters.

The second scenario, not requiring a role for retaliation, might not require a role for normativity, though this point can certainly be argued.<sup>194</sup> But our authors say nothing about what portion of treaty regimes are of this purely coordinative type in any event. Hence we would have no idea whether anything of significance has been or can be said about the prospects for banishing normativity from treaty law per our authors’ intentions even were we to concede the point. In view of the obvious point that many—if not indeed most—treaties actually are not of that purely and merely coordinative type, then, Goldsmith and Posner’s first instrumentalist school of treaty compliance does not appear to be significantly at odds with normativity at all.

“The second instrumental approach to treaty compliance,” according to Goldsmith and Posner, “concerns reputation.”<sup>195</sup> “Reputation,” in turn, “refers to other states’ beliefs about the

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192. *Id.*

193. *Id.* at 100–01.

194. *See, e.g.*, ROBERT B. BRANDOM, MAKING IT EXPLICIT: REASONING, REPRESENTING, AND DISCURSIVE COMMITMENT (1994) (concerning the ineluctable normativity of those forms of coordination and communication which are reasoning, cognition, and communication themselves); *see also* KRIPKE, *supra* note 153; LEWIS, *supra* note 182. Cognate recognition is found, of course, throughout the writings of Kant, Frege, and Wittgenstein, whose works inform Brandom’s. *See, e.g.*, GOTTLOB FREGE, POSTHUMOUS WRITINGS 1–146 (H. Hermes et al. trans. 1979); IMMANUEL KANT, CRITIQUE OF PURE REASON (Norman Kemp Smith trans., MacMillan & Co. 1929) (1781); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1953); LUDWIG WITTGENSTEIN, REMARKS ON THE FOUNDATIONS OF MATHEMATICS (G.H. von Wright et al., trans., 1st M.I.T. paperback ed. 1967) (1956).

195. GOLDSMITH & POSNER, *supra* note 4, at 101.

likelihood that the state in question will comply with a treaty.”<sup>196</sup> As with retaliation (and earlier, CIL), then, Goldsmith and Posner apparently wish to, and believe that they can, strip reputation of any normative *attitudinal* element. Reputation would be reduced to a probability measure, just as retaliation in the “first instrumentalist approach” was putatively reduced to a mechanical operation uninflected by evaluative opinion, and just as commitment, per Goldsmith and Posner’s earlier attempt to account for treaties as distinguished from nonlegal agreements, was purportedly reduced to “information.” But the attempt to replace norm-words—“commitment,” “obligation,” “seriousness”—with would-be normatively colorless counterparts—“information,” “channeling,” “mere convention”—proves no less vainly incantatory here than it was before.

Goldsmith and Posner once again appear to realize obliquely that they have a problem: “the reputation argument must be made with care,” they caution.<sup>197</sup> For, among other things, “there are methodological reasons for resisting the assumption that states [even *do*] incur a reputational cost when ever they violate a treaty.”<sup>198</sup> The “methodological reasons,” specified by reference to the book’s Introduction, appear to have to do with the link that I have just discussed between reputation and *normativity*. The idea of a “reputational cost” is scarcely intelligible save against a background condition of normativity. Our authors appear vaguely to appreciate this connection, and since they seek to banish normativity, they are uncomfortable with reputation. The problem, of course, is that there is a *cognate* link between normativity and *retaliation*, so our authors should be uncomfortable with that one as well.

If we wish to add nuance to a norm-inflected retaliation-based or reputation-based account of treaty compliance, we must consider the “surface” or “interface” (forgive me) between states along which they interact—i.e., the persons through whom states act and the institutional roles that those persons discharge. This is precisely what more subtle scholars of international law compliance have done.<sup>199</sup> In the influential ac-

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196. *Id.*

197. *Id.* at 102.

198. *Id.* at 103.

199. See, e.g., Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997); see also Goodman & Jinks, *How To Influence States*, *supra* note 100; Goodman & Jinks, *International Law and State So-*

count of former Assistant Secretary of State Dean Koh, for example, states delegate responsibility for their interstate interactions to agencies and the personnel who run them, and the latter accordingly concern themselves with the norms governing interstate interaction. That continually iterated participation in the interstate system naturally generates habits of compliance with, and even personal internalization (into conscience) of, the relevant norms on the part of the persons through whom the agencies, on behalf of their states, act.

Goldsmith and Posner's response to the intuitively plausible internalization hypothesis as at least part of a satisfactory explanatory mechanism for treaty compliance is curious. First they remark in conclusory fashion that "[t]here is little empirical evidence for this view,"<sup>200</sup> though no evidence is actually mentioned and no contrary evidence is offered.<sup>201</sup> Then comes an innuendo to the effect that such internalization as occurs might be simply a matter of "bureaucratic self-serving[ness]" and thus an agency cost.<sup>202</sup> Again we are offered no reason why we should suppose this and again we receive no explanation as to what would be *intelligible* as a "cost" to our state or its leaders.<sup>203</sup> Compounding the problem, Goldsmith and Posner next (again in conclusory fashion) report that "bureaucratic compliance [with treaties] is based on aggregate cost-benefit analy-

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*cialization*, *supra* note 100; Goodman & Jinks, *supra* note 34.

200. GOLDSMITH & POSNER, *supra* note 4, at 104.

201. We are simply advised to see an unpublished manuscript held by one of the authors. *Id.* (citing Eric A. Posner & John Yoo, A Theory of International Adjudication (2004) (unpublished manuscript)).

202. *See id.* at 104–06.

203. Presumably no executive agency will comply with a treaty against the orders of the state's executive. And since Goldsmith and Posner have from the outset announced that leaders' interests will be a proxy for state interests, it is left altogether obscure how compliance ever could diverge from interest, hence occasion any agency cost. If, on the other hand, Goldsmith and Posner mean here to relax their identification of state interest with leadership interest, then we will require some alternative state welfare functional by reference to which agency slack and cost-imposition might be rendered intelligible. It is for familiar Arrovian reasons a bit doubtful that such a functional will be forthcoming, but until Goldsmith and Posner take at least a stab the phrase "agency cost" here will be devoid of content.

There is also an intriguing irony in the authors' suggestion here. For Dean Koh is not the only author with first-hand knowledge of the internal workings of outward-looking bureaucracies. Professor Goldsmith himself has enjoyed such access. He has been lauded precisely for correcting rank lawlessness on the part of those in charge of whom he was placed. *See* Posting of Marty Lederman to Balkanization, <http://balkin.blogspot.com/2005/09/silver-linings-or-strange-but-true.html> (Sept. 21, 2005, 18:08).

sis.”<sup>204</sup> Again no evidence is offered, nor are we provided any intelligible picture of what such a cost-benefit analysis either does or would look like—what count as costs, what as benefits, how these are commensurated, how probabilities or discount rates are derived and applied to alternative long-term outcome projections, etc. There is not so much as an interview with a “bureaucrat” cited here.

Finally come “two other points” that “cut against the bureaucratic internalization thesis.”<sup>205</sup> “First, there is no reason to think that international law compliance will always be the top priority for an agency.”<sup>206</sup> “Second, and relatedly, different bureaucracies with different institutional interests might have very different attitudes toward compliance with the same treaty.”<sup>207</sup> The first “point” is simply unresponsive. The internalization thesis no more purports to hold universally (or to hold that compliance is “the top priority”) than theories of childhood norm-internalization and socialization purport to hold the existence of sociopaths, crimes, or lesser personal shortcomings impossible (or to hold that norm-obedience is always “the top priority”). The second “point” is unresponsive in a manner reminiscent of the first, and in addition ironic. For if the authors mean to suggest that it is more often the case that agencies diverge in their “interests” in respect of treaties than not (which is what they must suggest if they wish to hold the internalization thesis more often false than true), then one must wonder how states can intelligibly bear interests at all, which of course they must if our authors’ alternative, interest-grounded theory is even to get off of the ground. If divergent preferences of diverse agencies cannot be plausibly aggregated, can those of the immeasurably more diverse constituencies who constitute states?

## 2. Applied

From their theoretical discussion of treaty law Goldsmith and Posner turn to two would-be corroborative case studies—human rights and trade law. It is curious that there are only two, particularly given the degree to which we shall see that the four proffered models of Part 1 are admitted to break down

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204. GOLDSMITH & POSNER, *supra* note 4, at 105.

205. *Id.*

206. *Id.*

207. *Id.*

in these cases. What proves most interesting, however, is the degree to which the studies corroborate the suspicion that arose in connection with the treaty law theory as elaborated just above: Goldsmith and Posner's professedly "alternative account" of treaty law and international law more generally, if it generates any empirical predictions at all, does not generate any such predictions at variance with those generated by what the authors call "traditional" understandings of international law.

Take, for example, the farthest point in the direction of generality at which we might have anticipated conflict—the question of what actuates state action *vis-à-vis* other states in the first instance. Goldsmith and Posner throughout their book have apparently wished us to take them for contradicting a traditionalist answer to that question grounded in "normative pull," as putatively contradistinguished from state "self-interest" pursuit. And indeed, as we observed earlier, the authors *must* construe state "interest" as excluding normative pull if they wish actually to be claiming something that traditionalists do not.<sup>208</sup>

But now consider what our authors observe about *human rights* "preferences": "people who live in one state care about the well-being of coreligionists, coethnics, and conationals living in other states, and this concern can translate into governmental interest and action."<sup>209</sup> Moreover, people also might be "concerned about the well-being of persons in other states with whom they *lack* ties of religion, ethnicity or citizenship."<sup>210</sup> So it seems we are not, after all, to take Goldsmith and Posner for disagreeing with those whom they label "traditionalists" on the matter of normativity as such, at least not if normativity be understood as a conscientious other-regardingness capable of coexisting with prudence.

But in what other sense, then, are we to understand the normativity or normative pull with which Goldsmith and Posner claim to quarrel? Perhaps it has something to do with

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208. See *supra* notes 187–89 and accompanying text. Otherwise we have nothing more than Hobbes's (possibly apocryphal) reconciliation of his professed philosophical egoism with being caught giving alms to a beggar (he is reported to have said that he remained an egoist who happened to derive satisfaction from giving to others). See AUBREY'S BRIEF LIVES 157 (Oliver Lawson Dick ed., 1960). That reply of course renders "egoism," in the context of the utterance, little more than an ugly word for altruism.

209. GOLDSMITH & POSNER, *supra* note 4, at 109.

210. *Id.* at 110 (emphasis added).

“mak[ing] a fetish” of international law, which Goldsmith and Posner remark that liberal states caring about human rights in other states do not do.<sup>211</sup> It is not clear what the authors mean here, but presumably they have in mind the treatment of international law as possessed of an authority that is altogether independent of its ethical propriety. If so, then with respect to their claim as an empirical description of liberal state behavior, there appears to be evidence on either side. And no “traditional” scholar would deny this, since all seem to agree that states sometimes, but do not always, comply with their international obligations.<sup>212</sup> If, on the other hand, the fetishism jibe is intended more as a back-handed prescription that the authors are *recommending* for states—e.g., that states teleologically interpret international law pursuant to a vision of some good that the law is meant to advance, then I shall find occasion to agree with them in Part IV. But again there is no monolithic and continuing “tradition” that argues consistently against this.

At the lower level of generality and abstraction that is direct observation of *discrete state actions* implicating human rights norms, Goldsmith and Posner again do not appear actually to disagree with any named or adequately identified “traditionalist.” Thus, for example, the only traditionalist international law scholars whom the authors name in connection with the empirics of human rights treaty accession and compliance have found no significant positive correlation between the two behaviors.<sup>213</sup> That suggests, of course, that traditionalists do not “make a fetish” even of human rights treaties in particular, let alone international law in general. In so far as one can speak of a monolithic “tradition” at all, then, it probably is more apt to say that traditionalists view human rights treaties not as interval one efficient causes of uniform interval two effects, but rather as simultaneously consolidating and aspirational agreement-specifying steps in an *ongoing process* of increasingly exacting and effective global evolution toward decency in the treatment of human persons endowed with fundamental rights. Such treaties record what has been achieved

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211. *Id.* at 134.

212. A familiar example is Henkin’s oft-quoted adage, “It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.” LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 47 (2d ed. 1979) (emphasis omitted).

213. Specifically, Goldsmith and Posner reference Linda Camp Keith and Oona Hathaway. GOLDSMITH & POSNER, *supra* note 4, at 120–21.

in respect of agreement as to what constitutes “the standard of civilization,”<sup>214</sup> and what we are striving to achieve further in the way of living up to that standard. And this is to say that there is symbiosis here just as we observed there to be with custom, while Goldsmith and Posner’s attachment to static analysis occludes vision here as it did there.

Goldsmith and Posner appear to recognize something like this set of observations, not only in Part 3 of the book, to which we turn presently, but here in Part 2. For they observe (again with admirable candor accompanied by a curious lack of embarrassment) that the very constitutive models that structure their account *hollow out* in the case of global human rights.<sup>215</sup> Thus, cooperation and coercion abruptly are noted to be “functionally identical” in the human rights context.<sup>216</sup> Cooperation itself, in turn, is observed to be both “thin”<sup>217</sup> and difficult to distinguish from coincidence of interest, since as they have observed earlier, states actually have altogether other-regarding and law-regarding interests in the manners in which other states treat their own citizens.<sup>218</sup> Finally, coordination is found to be “thin” as well, since there is so little to coordinate upon when the matter at hand concerns not the facilitation of network activity, but the provision of basic rights upon which most people seem to agree in principle.<sup>219</sup>

Hence, we observe the circumstance in which the entire apparatus of one’s theory breaks down in the face of one of the but two case studies to which one applies the theory, and in which the one point on which the theory to now has professed to differ with alternatives—the matter of self-regarding versus other- or law-regarding preferences—has effectively been conceded. A natural reaction in this circumstance might have been to *abandon* the proffered theory and commence participation in the shared project of pushing global development further along in the direction of respect for human rights. It is altogether mysterious why the authors have not taken that step.

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214. *Id.* at 128.

215. *See id.* at 111–19 (discussing the coercion, cooperation, and coincidence of interest models in the context of human rights).

216. *Id.* at 118.

217. *Id.* at 115.

218. *Id.* (regarding Helsinki Accords).

219. For the one respect in which the authors find that human rights treaties might facilitate coordination, see *id.* at 130–31.

Goldsmith and Posner's treatment of global trade law, like that of human rights law, is beset by multiple difficulties. Considerations of space regrettably do not permit plenary discussion, so I shall confine myself to the challenges raised by the two principal factors that we have seen challenging Goldsmith and Posner on human rights treaties. The authors' interrelated hopes to reduce multilaterality to bilaterality, and to reduce normativity to purportedly nonnormative information, again lead them into conceptual confusion and error.

The "logic" of trade-barrier reduction is, according to Goldsmith and Posner, once again "that of the [bilateral] prisoner's dilemma."<sup>220</sup> Each of two states opens trade in a good produced by the other state's dominant industry, provided that the other state behaves symmetrically.<sup>221</sup> In this circumstance, the authors recognize, they once again need not rely upon their "other explanations of international law—coincidence of interest, coordination, and coercion"—at all.<sup>222</sup> The earlier elaboration of those models accordingly strikes us once again as puzzling.

But a more formidable mystery arises here—namely, the manifestly *multilateral* nature of trade treaty *development*, at least since the mid-twentieth century. Goldsmith and Posner at first candidly recognize that the multilateral global trade regime, as it has developed since GATT,<sup>223</sup> does not vindicate their preference for explaining all cooperation as reductively bilateral: "Bilateral trade agreements . . . cannot exploit the entire potential surplus from international trade."<sup>224</sup> To make this concession is of course again to abandon a centrally defining feature of Goldsmith and Posner's theory of international law—that it all can be accounted for via the authors' four bilateral "models." Perhaps yet again uncomfortable with the apparent tension, then, Goldsmith and Posner quickly undertake to take back what they have given: several pages later they remind us that, since GATT's nondiscrimination principle is "an effort to solve a *multilateral* prisoner's dilemma . . . [their] prediction is

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220. *Id.* at 139.

221. Note that state interest is accordingly identified with sectional interest, the empirical plausibility and ethical propriety of which identification is dubious to say the least. *See infra* Part IV.

222. GOLDSMITH & POSNER, *supra* note 4, at 139.

223. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

224. GOLDSMITH & POSNER, *supra* note 4, at 145.

that it would likely fail.”<sup>225</sup> And so it has, they report.<sup>226</sup> But now note how: “Although states do not explicitly violate the rule, they circumvent it easily by creating preferential trading areas under Article XXIV, of which there are hundreds.”<sup>227</sup>

And what is a preferential trading area (PTA)? It is *another multilateral* trade regime, the best known of which probably are the EU and NAFTA, which is now under consideration for expansion into a full “Free Trade Area of the Americas.” And such PTAs, of course, as the authors acknowledge, are authorized by the multilateral GATT itself.<sup>228</sup>

Goldsmith and Posner’s surprising treatment of trade multilaterality comes pursuant to a more general “theory of GATT.”<sup>229</sup> It is in the elaboration of that more general theory that we encounter the second problem raised by Goldsmith and Posner’s reductionism. The problem stems from yet another attempt to reduce normativity to putatively norm-stripped “information.” It appears most acutely in the authors’ treatment of GATT adjudication.

“To understand the GATT adjudication system,” Goldsmith and Posner announce, we can usefully begin—yet again—“by conceiving the trade system as a large number of bilateral relationships.”<sup>230</sup> But since bilateral treating and dispute resolving were typical *before* GATT, the question for a “theory of GATT” becomes “[w]hat did the GATT adjudication system *add*?”<sup>231</sup> Our authors’ initial answer is “[n]othing more than this: it created a protocol for requesting a tribunal that would have an institutional relationship with prior tribunals, including a collective memory or jurisprudence.”<sup>232</sup> But this answer will simply beg the question until we are offered an explanation as to why “collective memory or jurisprudence” themselves might be thought desirable.

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225. *Id.* at 149 (emphasis added).

226. *Id.* (noting that their “prediction appears to be correct”).

227. *Id.*

228. The authors say more, but do not address this peculiarity of their argument from bilateralism. Nor do they offer an explanation for the authorization of PTAs by GATT itself. I think that a better way of looking at the matter is my above proposal hypothesizing: more variable functional relations between changes in the number of players and supposed likelihoods. *See supra* note 115 and accompanying text.

229. GOLDSMITH & POSNER, *supra* note 4, at 144–58.

230. *Id.* at 153.

231. *Id.* (emphasis added).

232. *Id.*

The answer to the “why collective memory?” question, in turn, upon which Goldsmith and Posner appear to light without quite *seeing* it as such, is that it affords the basis for *neutrality* on the part of the adjudicator.<sup>233</sup> Neutrality in turn affords procedural capacity to afford “consistent[] divi[sion of] the surplus”<sup>234</sup> generated by trade—a desideratum that the authors neither explicate nor justify. But at least a weak form of explication, as well as justification, is obvious, though to state it is in effect to repudiate the theory offered by our authors: a more or less consistent division of the surplus must be discernible by parties over time if the regime is to function and continue. For parties tend either to exit, or indeed to engage in forthrightly Pareto-damaging behaviors, in response to feelings of indignation occasioned by “games” that they perceive as systematically unfair.<sup>235</sup> So fairness from case to case is critical to the regime’s perceived legitimacy and continued operation. And multilaterality, unsurprisingly—by dint of its association with impartiality and objectivity—plays a critical role in *assuring* that fairness.<sup>236</sup>

Goldsmith and Posner again attempt—it is not clear how consciously—to obscure the difficulty posed here by the puzzling persistence of normativity. They do so by once again adverting to their characteristic strategy of systematically replacing, in their descriptions, normativity-redolent words with more would-be normatively colorless terms sounding in coordination or information.<sup>237</sup> Hence we find, in their attempts to account for the manifest multilaterality of GATT adjudication as

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233. *See id.*

234. *Id.*

235. *See, e.g.,* Alvin E. Roth, *Bargaining Experiments*, in HANDBOOK OF EXPERIMENTAL ECONOMICS 253 (John H. Kagel & Alvin E. Roth eds., 1995). *See generally* Raymond Fisman et al., Pareto Damaging Behaviors (May 15, 2005) (unpublished manuscript, on file with author) (discussing and introducing new concepts and a test relating to Pareto-damaging behaviors). The literature here is vast. A suitable beginning bibliography is found in Roth, *supra*, at 342–48.

236. “Unsurprisingly” in view of its resonance with impartiality—“*considering all sides*” and “*taking no sides*” go hand in hand. Note that this means that global multilaterality and normativity go hand in hand, which in turn explains in part why Goldsmith and Posner are hostile both to normativity and to multilaterality. It is salutary to recall, in this connection, the weakness of their affirmative argument for bilaterality discussed *supra* note 115 and accompanying text.

237. Communication and coordination are suffused with normativity. *See* BRANDOM, *supra* note 194; KRIPKE, *supra* note 153; LEWIS, *supra* note 182.

such, profuse employment of such locutions as “cooperation,” “information,” “focal point,” “higher-quality decisions,” “reputation for impartiality,” and so on.<sup>238</sup> But the cited information and coordination afforded by impartial GATT adjudication, of course, just is information concerning compliance with, and facilitating coordination around, a compelling *norm*—that of fairness. And it is exceedingly obscure what “quality” and “correctness” here could mean without implicit appeal to that norm.

Similar problems beset Goldsmith and Posner’s discussion of “WTO innovations”<sup>239</sup>—the changes wrought through the Uruguay Round of GATT negotiations twelve years ago.<sup>240</sup> On Goldsmith and Posner’s view, if states comply with WTO decisions more enthusiastically than they did with GATT panel decisions, it is “because WTO decisions are better.”<sup>241</sup> Indeed. And “better” here means fairer still, hence exerting of more “normative pull.”

#### IV. THE LIMITS DEFENDED—AND SOME HOPE RESTORED

Goldsmith and Posner devote Part 3 of *The Limits* to what they call “external challenges to [their] theory and analyz[ing] the theory’s normative implications.”<sup>242</sup> The external challenges come respectively from those who observe (a) that the theory is inconsistent with the rhetorical practices of states; (b) that Goldsmith and Posner’s positive account of international law simply speaks past that law’s normative claim upon states and officials; and (c) that whatever the appropriate positive theory or normative content of international law, “states should . . . enter treaties and provide aid that would increase global welfare.”<sup>243</sup> As for the analysis of the theory’s normative implications, this proves never forthcoming.<sup>244</sup> But Goldsmith and

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238. See GOLDSMITH & POSNER, *supra* note 4, at 154.

239. See *id.* at 158–60.

240. See *generally* General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125 (demonstrating the effects of the Uruguay Round of GATT negotiations).

241. GOLDSMITH & POSNER, *supra* note 4, at 160.

242. *Id.* at 165.

243. *Id.* at 165–66.

244. As we shall see, the replies to external challenges prove to be at best tenuously, if at all, related to Goldsmith and Posner’s positive theory. And no normative implications of the latter ever end up being drawn, let alone analyzed. At most, then, the arguments in this part of *The Limits* and those of

Posner do nonetheless commit themselves in effect to some normative positions, which perhaps are in some way indebted to their “positive theory,” in addressing some of the external challenges.<sup>245</sup> And those positions, I think, can be taken seriously and built upon.

A. CHEAP LIES, INSULTS, AND SILLINESS: *THE LIMITS ON INTERNATIONAL LEGAL IDIOM*

Our authors’ answer to the first external challenge is what they call “[a] theory of international rhetoric.”<sup>246</sup> This theory turns out to be positive rather than normative in character, and quite independent of the positive theory elaborated in Parts 1 and 2. What it appears to be meant to explain is how it can be that, though states in fact—per the account of Parts 1 and 2—act simply to “maximize their [non-other- and non-law-regarding] interests”<sup>247</sup> in their (generally bilateral) interactions with one another, and in so doing establish behavioral regularities that merely resemble “laws” of the sort that exert “normative pull,” state *officials* (as well as others, including legal scholars) nevertheless employ the *language* of “normative pull”— i.e., of law and of morals—both in the formal agreements that crystallize, formalize, or codify their preferred behavioral regularities and in the justifications that they offer of challenged behavior.

Initially it is obscure why Goldsmith and Posner should think there to be any need of a separate account of international legal rhetoric. For if their earlier treatments of customary and treaty law had been successful, there would be nothing left to explain. It is central to those earlier accounts, recall, that though most of us might think that there is something warranting the word “law” exerting “normative pull” upon states, officials and perhaps citizens, there “really” is not. Hence any among us who think otherwise simply mistake a sort of shadow for the object which has cast the shadow. And if it is true that

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Parts 1 and 2 share a penchant for concealing normativity in “information speak” and a cognate lack of regard for international legal normativity. But the latter, in its nonpositivist stance toward international law, has the effect of opening the door to the project of moralizing international law. I take up this project in Parts IV.B and IV.C, *infra*. Goldsmith and Posner, perhaps inadvertently, supply a helpful springboard into a line of forthrightly normative thinking that they do not thus far appear to have countenanced.

245. See GOLDSMITH & POSNER, *supra* note 4, at 167–224.

246. *Id.* at 167.

247. See *id.* at 169.

we are deluding ourselves in this way about international legality, then little mystery remains as to why the *language* of legality might be encountered in our discourse about international relations. That language is simply the idiomatic correlate of our delusion.

Nevertheless, Goldsmith and Posner now proffer another “positive theory.”<sup>248</sup> They begin by asking under what conditions states will “talk” at all.<sup>249</sup> In a two-state, zero-sum game—a situation of “pure conflict”—we are told, any statement made by one state will be assumed by the other to be intended to injure it, so there will be no point in “talking” at all.<sup>250</sup> Likewise, if relations between states amount to a “positive-sum” game and there is “full information” on the part of each state of the other state’s “characteristics and strategies,” talk will “either be rejected as inconsistent with known information or ignored as superfluous.”<sup>251</sup> So talk will be sensibly purposive only in “positive-sum” games with incomplete information about “characteristics and strategies.”<sup>252</sup>

Noticeably lacking here is a view of “talk” as anything *but* “information conveyance.” It is as though language and linguistic behavior comprised only declarative sentences—“we have cats”—and perhaps occasional ejaculations—“ouch”—intended either to impart to the recipient something that she did not know before or to induce her into thinking that she now knows something that is there to be known and was not known before. Talk does *not* figure into, say, “thinking aloud,” or *joint* thinking aloud—shared-purposive interactive communication or deliberation geared toward arrival at some suitable, shared understanding of what is worth jointly pursuing and how to pursue it. States might sometimes cooperate (again, observing Marquis of Queensbury Rules), but not in thinking or planning, or, therefore, in speaking. Here is the discursive counterpart of Goldsmith and Posner’s Parts 1 and 2 attachment to statics.<sup>253</sup>

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248. *Id.* at 172.

249. *Id.*

250. *Id.*

251. *Id.*

252. *See id.*

253. The failure to consider “talk” as an ongoing dialogue moving gradually to shared ends and means is of a piece with the earlier failure to consider international norms as emerging from interest- and ideals-inflected behavior at one point, constraining or guiding or informing behavior at another point. *See supra* note 71 and accompanying text.

All of this being the case, our authors' account of international rhetoric proceeds straightforwardly as a brief set of stories in which all that vary are (a) the sorts of "opportunities for mutual gain" enjoyed by pairs of states and (b) comparative quanta of information possessed by states about each other's "payoffs" and "strategies."<sup>254</sup> So, of course, states often wish to enjoy reputations for cooperativeness.<sup>255</sup> And it is better to announce that you are cooperative than to announce that you are not, even though talk is cheap to the talker and hence discounted by the listener.<sup>256</sup> For "a state that failed to send this weak signal would reveal that it belongs to the bad type."<sup>257</sup> "Coordination games," in turn, afford yet more obvious payoffs to cheap talk.<sup>258</sup> Such talk "solves a coordination problem by picking out one of multiple equilibria."<sup>259</sup>

Cheap talk also proceeds, on some occasions, with a view to nonofficial audiences.<sup>260</sup> Pursuant to one model of such talk, nonofficial domestic audiences are rationally ignorant relative to a foreign-official audience.<sup>261</sup> Domestic officials can accordingly have things both ways by (a) making concessions to a foreign power that attends more carefully to results than to talk, while simultaneously (b) "talking tough" to satisfy domestic constituents who attend more to talk than to deeds.<sup>262</sup>

The second model of cheap talk for domestic consumption is that of offensive speech, which "can commit a leader to a particular audience by alienating competing audiences."<sup>263</sup> As this kind of talk has been abundant in the United States over the past fifteen years or so, there is little need to discuss it at length. It is curious, however, that both this and the other model of cheap talk for domestic consumption come in connec-

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254. GOLDSMITH & POSNER, *supra* note 4, at 172.

255. *See id.*

256. *See id.* at 174.

257. *Id.* So would-be cooperative states are a bit like birds, frogs, or insects out looking for mates. If an animal is searching for a mate and has a decent voice and attractive features, and if it is common for animals of the same species to flaunt those characteristics, then the animal might as well show them off. Otherwise, the animal will be branded as belonging to "the bad type."

258. *Id.* at 175.

259. *Id.*

260. *Id.* at 178.

261. *Id.*

262. *Id.* We are offered no theory accounting for how it might ever be in a state's interest to concede things to other states while misleading a citizenry apparently possessed of contrary preferences.

263. *Id.* at 179.

tion with a putative explanation for use by state leaders of law-redolent discourse in a world in which law is claimed to be really endogenous (lacking in normative pull). For most if not all of the “tough talk” that we hear—including that cited by Goldsmith and Posner—is not suffused with legality at all, but rather seems almost to celebrate the *defiance* of international norms.<sup>264</sup>

Cheap talk by states intended for foreign nonofficial audience consumption is, according to Goldsmith and Posner, prompted by motives similar to those that actuate talk for other audiences.<sup>265</sup> It is all about either misleading others or credibly showing others that you are on their side by gratuitously alienating their enemies.<sup>266</sup> So cheap state-talk is, for the most part, a matter of lies and insults. But once again, then, the account offered here seems addressed not to international legal talk so much as it is simply to readily discounted cheap talk. So we still require an explanation of why states’ talk should be suffused with legality, as distinguished from cheapness. How to account for *that*? Well,

a kind of empty happy talk is common in the international arena just as it is in other areas of life; it is largely a ceremonial usage designed to enable the speaker to assert policies and goals without overtly admitting that he or she is acting for a purpose to which others might object.<sup>267</sup>

But this two-adjective theory of international legalese immediately raises additional puzzles for our twenty-first century Messrs. Rochefoucauld:<sup>268</sup> First, wouldn’t the years of wrangling over particular terms of treaties grow just impossibly tedious if it were all just a matter of “empty happy talk”? And second, why should a state wish to engage in “empty happy talk” simply to avoid overtly admitting that it is acting for an objectionable purpose, if there were no real objectionability—i.e., normativity—at all? Once again, I suggest, it will be more intuitively plausible, parsimonious, and empirically explanatory here simply to acknowledge the cigar’s being a cigar. Officials use norm-inflected legal language because there just *is*, in fact, varying weak or strong “normative pull”—pull away

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264. Indeed, such contempt for legality often seems to be part of what *renders* the talk “tough,” rather than, say, law-cognizantly indignant.

265. GOLDSMITH & POSNER, *supra* note 4, at 179–80.

266. *Id.* at 180.

267. *Id.*

268. If the allusion is found obscure, please see FRANÇOIS DE LA ROCHE-FOUCAULD, *MAXIMS* (Leonard Tancock trans., 1967) (1665).

from acting for norm-offendingly objectionable purposes.

Goldsmith and Posner concede this point, in effect, in what amounts to their rejoinder to it: they announce that states wish to make clear that they do not employ “high discount rate[s]”—i.e., that states wish to make plain that they do not live for the moment or, therefore, lack in a decent respect for the opinions of humankind, that they are not “of the bad type.”<sup>269</sup> One way to do that, of course, would be simply to *say* that they care about the longer-term, rather than simply the short-term political gains of present officeholders.<sup>270</sup> But “[i]n fact,” Goldsmith and Posner observe, state “practice is more subtle: states invoke ideals.”<sup>271</sup> “The language of cooperation is the language of obligation . . . .”<sup>272</sup> But the question, recall, was: why would *that* be? The “more subtle” practice is precisely what we are waiting for Goldsmith and Posner to explain away in their would-be plenary purge of normativity.<sup>273</sup>

Rather than explaining this, Goldsmith and Posner proffer an interesting, if unsurprising, conjecture about what the *basis* of obligation to which a state appeals typically will be. Such appeals will “occur at the lowest level of abstraction consistent with the characteristics of the intended audience.”<sup>274</sup> So, for example, a fifteenth-century Christian state might appeal to (fifteenth-century) Christian values in seeking to persuade another such state of the propriety of some action, while appealing instead to Abrahamic religious values in seeking to persuade a Muslim state. And so on.

But now here is where things become interesting—much more interesting than our authors appear to appreciate: Goldsmith and Posner acknowledge that as history proceeds to the

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269. GOLDSMITH & POSNER, *supra* note 4, at 181.

270. An interesting question would be why existing officeholders would ever wish to say any such thing *truthfully* on behalf of a state and its future generations, if those officeholders were to be as self-regarding as the authors appear to take states to be.

271. GOLDSMITH & POSNER, *supra* note 4, at 181.

272. *Id.* at 183.

273. Goldsmith and Posner observe at another point that it would be “artificial” to attempt to avoid speaking in terms of ideals, or at any rate norms, in these contexts. *Id.* at 184. But of course, even if that were true, which is doubtful in view of the ready availability of interest-speak since at least the fifth century BCE, the question would be why it would be artificial, why the more “natural” mode of speech has come to be the ideal-suffused, and how this could ever have come to be absent normative pull. *See, e.g., id.* at 167.

274. *Id.* at 182. The authors appear to mean not “abstraction,” but “generality.”

present, it becomes possible and desirable for an ever greater number of states to cooperate and communicate.<sup>275</sup> And value-laden communications must accordingly appeal to values that are more widely shared—more nearly universal—than those shared only by one insular people or cluster of such peoples.<sup>276</sup> So the language of international justification becomes, naturally enough, the language of *international* (including “transnational”) law and morality.<sup>277</sup> But to recognize this, as Goldsmith and Posner are right to do, just is to recognize the depth and pervasiveness of “normative pull.”

B. FLICKERING IMBECILE STATES: *THE LIMITS* ON INTERNATIONAL LAW'S MORALITY

Goldsmith and Posner devote the last two chapters of their book to what they label two “external challenges” to the account of Parts 1 and 2. Here the issue is not how best to explain apparently norm-infused communicative behavior positively, but how best to respond normatively to a forthrightly normative set of claims. These are the claims that states (a) should obey international law, and (b) should engage with other states in salutary international lawmaking. If those normative claims are correct, then Goldsmith and Posner in Parts 1 and 2, as well as in Chapter 6, at best will have done no more than to demonstrate the wickedness or fatuity—the dishonesty, offensiveness, and/or “empty happy talk[ativity]”—of states and officials. It will then be open to traditionalists to argue that the thing for our authors to do now is to get on board with those who urge states' officials to mend their lawless and hypocritical ways. Goldsmith and Posner, I think to their credit, acknowledge this claim and undertake to answer it. The result is, ironically, the best material in the book—though still, we shall see, in need of repair.

Our authors devote Chapter 7 to answering what they call the “assumption . . . that states have a moral obligation to comply with international law.”<sup>278</sup> They attack this “assumption” from several angles.<sup>279</sup> Their first tack is to question whether states or other collectivities really can bear moral obligations at

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275. *Id.*

276. *See id.*

277. *See id.* at 182–83.

278. *Id.* at 185.

279. *See id.* at 185–203.

all.<sup>280</sup> One might, on the one hand, view collective agents as bearing obligations at least in a derivative sense—for example, through their serving as proxies for the (somehow) aggregated, jointly shared, or distributed obligations of the citizens whose agents they are. The problem with predicating state moral obligations on that derivative view, however, according to Goldsmith and Posner, would be that it leaves international law's moral claim upon states "vulnerable to the births and deaths of individuals, migrations, the dissolution and redefinition of groups, and ambiguity about the representativeness of political institutions. States would flicker, and so would their obligations to treaties and rules of customary international law."<sup>281</sup>

The alternative to viewing states as agents of individuals and derivatively bearing the moral obligations of individuals, according to Goldsmith and Posner, is simply to take what we might call the fetishist route: it is to view the state itself as an object of moral concern, somehow *directly* bearing moral rights and obligations.<sup>282</sup> This is "the more common view" according to Goldsmith and Posner,<sup>283</sup> and "henceforth [will be their] assumption" as well.<sup>284</sup> It is, after all, "the assumption of international law," which "purports to bind states, not individuals."<sup>285</sup>

This putative assumption actually is misleading as a matter of normative sourcing; international lawyers seldom if ever have spoken of moral, as distinguished from legal, obligation at all.<sup>286</sup> The assumption also is outdated (like all the state interest talk in Parts 1 and 2) as a matter of normative subject; for as we have now several times noted, the undiluted state-centric view of international law is well on the wane. But the assumption proves a convenient one for Goldsmith and Posner to make. Once it is made, it becomes trivially easy to question the

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280. *Id.* at 186–89.

281. *Id.* at 189.

282. It is of course equally fetishistic to view the state as directly bearing interests. Its interests must be derivative upon its citizens' interests (not merely upon its leaders' interests), as surely as its ethical obligations and immunities must be derivative upon those of its citizens.

283. GOLDSMITH & POSNER, *supra* note 4, at 187.

284. *Id.* at 189.

285. *Id.*; *see also id.* at 3–5.

286. International law does not purport to hold states directly subject to moral obligations, only legal ones. It would certainly be possible, and I suspect that it is indeed the inchoate understanding of most international lawyers, to think of states as being derivatively owed and owing ethical obligations, which obligations in turn find imperfect expression in direct legal obligations.

ethical compellingness of international law. For ethics by definition directly bind only the individuals whom we have now left behind in favor of states as the subjects of obligation, at best binding states in but the derivative manner that the authors have definitionally eschewed. Notwithstanding the unsurprising ease with which Goldsmith and Posner prove able to cut down the strawman that they have thus constructed, however, their observations prove interesting in ways that they do not appear to have anticipated.

So, how can states bear moral, as distinguished from legal, obligations to comply with international law? Goldsmith and Posner inquire.<sup>287</sup> “The most common explanation . . . is that they have consented to it.”<sup>288</sup> But that claim, the authors point out, just is not generally true as an empirical matter.<sup>289</sup> New states are, as it were, born into putative international legal obligations to which they have *not* consented.<sup>290</sup> And “even *old* states are bound by customary international law that they played no role in creating.”<sup>291</sup>

On the other hand, our authors acknowledge, states do consent at least to *treaties*, and “so one might want to argue at least that states have a moral obligation to comply with [that source of law].”<sup>292</sup> Goldsmith and Posner’s reply to this argument is surprising, in effect simply a retraction of the earlier avowal that they will accept the putative premise that states are directly rather than derivatively morally obligated by international law:<sup>293</sup> “a state . . . is not an agent whose well-being demands moral consideration.”<sup>294</sup> States do not formulate Rawlsian “life plans.”<sup>295</sup> Nor are they capable of enjoying well-

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287. GOLDSMITH & POSNER, *supra* note 4, at 185–89.

288. *Id.* at 189.

289. *Id.* at 189–90.

290. *See id.* at 189.

291. *Id.*

292. *Id.* at 190.

293. *Id.* at 189.

294. *Id.* In its context, this observation is a non sequitur. I shall ignore another sense, raised by this and the next several observations, in which Goldsmith and Posner’s argument might be thought a non sequitur—namely that a claim that a corporate entity cannot be the beneficiary of ethical concern does not suffice to sustain the claim that it cannot nonetheless be the bearer of ethical duty absent some argument for symmetry as between beneficiary and bearer status. In most, though assuredly not all cases, I think that such symmetry can be established.

295. *Id.* at 191.

being or “experienc[ing] welfare or utility”<sup>296</sup>—even if, per Parts 1 and 2, they somehow manage to harbor interests. And finally, again (repeating their earlier Heraclitean flickering observation), states cannot bear moral obligations because there is a sense in which they do not even exist (save over infinitesimally brief intervals): “When a state at time 1 promises that it will act in a certain way at time 2, the state at time 1 is committing a different entity, the state at time 2, which might be as different from the state at time 1 as Mary is from John.”<sup>297</sup>

In the context in which it appears, of course, this argument is simply a howler. It springs from the most elementary of category errors. The commonsense criterion of a state’s identity has never been a function of the identities of its citizens at an instant, any more than the criterion of Mary’s or John’s identities has ever been a function of the identities of the cells, molecules, atoms, electrons, or whatever that can be found along or beneath their skins at an instant. Certainly this has never been the way in which states have been individuated by international law—that set of practices and discourses whose assumptions Goldsmith and Posner have announced both at the start of their book<sup>298</sup> and again for present purposes to be their own.<sup>299</sup>

The real point, then, of Goldsmith and Posner’s response to the state-as-morally-obligated-by-international-law thesis is that it is a category error *ab initio* to attempt to convert states’ international legal obligations into anyone’s (or anything’s) moral obligations *until* we have provided some account that relates states back to the only intelligible subjects of moral concern and obligation: individual human beings. (The same, of course, both could and should have been said of state interests in Parts 1 and 2 of the book. A state can bear interests only to the extent that its citizens bear interests, and for a state *legitimately to advance* interests it must, in its policy determinations, legitimately aggregate those citizens’ legitimate interests—not simply their or their representatives’ preferences.<sup>300</sup>)

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296. *Id.* at 193.

297. *Id.* at 190.

298. *See id.* at 4–5.

299. *See id.* at 189.

300. Individuals’ preferences (e.g., those of eugenicists for exterminating genetic “bad types”) can also of course be illegitimate. And officials’ preferences are illegitimate if their preferences do not properly aggregate and reflect the citizens’ legitimate preferences.

So what Goldsmith and Posner ought to be doing—here, in Part 3, and throughout their book—is grappling with the problem of legitimating the international law that they rightfully decline to fetishize, by rendering it both derivable from and answerable to a plausible interpersonal ethic.<sup>301</sup>

The present review is presumably not the place to attempt fully to perform that work of integration. But we can at least (a) indicate how easy the work can be in most cases and (b) sketch in broad outline the means by which to do it in the few hard cases that might be anticipated. Recall first the challenge that Goldsmith and Posner appear to think faces the project of tying international legal obligation to individual moral obligation:<sup>302</sup> States flicker, in the sense that they are constituted by different sets of persons (citizens) at different instants.<sup>303</sup> That in turn might appear to entail that any attempt to treat states as derivatively morally obligated (and protected) by reference to their citizenries will involve connecting-lines that are constantly being severed and thus left in need of reconnection. How might such reconnecting be done?

First note, as Goldsmith and Posner appear not to note, that many obligations owed to and by individuals inhere independently of any *particular* person's deeds, characteristics, or even existence. Thus, for example, it is morally wrong deliberately to take innocent human life—*any* innocent human life.<sup>304</sup> That means that innocent human lives are morally protected—endowed with rights—against such taking, and that anyone who acts—either on her own or in concert of one kind or another with others—is morally obligated to refrain from such taking. That in turn entails that states, which amount to one means by which individuals act in concert and which indeed act only *through* always morally obligated individuals (“offi-

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301. It is only in so far as that can be done, I suspect, that states can be said in a derivative sense to bear moral obligations to abide by international law.

302. As noted before, Goldsmith and Posner do not frame the problem this way; they frame it as the problem of establishing a moral obligation on the part of states to comply with international law. But I have argued that this problem is simply an aspect of the more general task of relating state-centered legal obligation back to person-centered ethical obligation.

303. See GOLDSMITH & POSNER, *supra* note 4, at 190.

304. I do not intend here to exclude reckless or negligent taking of innocent life from moral culpability. I simply state here what I take for the easiest case for expository purposes.

cials”),<sup>305</sup> are (derivatively) prohibited from such life-taking. These obligations obtain irrespective of any states’ “Johns” or “Marys” at any given instant. Nothing here “flickers” in any relevant sense, and there is accordingly no difficulty in finding a moral, as well as a legal, obligation not to act inconsistently with any international legal rule that “codifies” the moral principle.

The more such principles that we identify (e.g., every human adult enjoys a right to equal political voice, every human child enjoys a right to equal long-term economic opportunity, etc.) the more the putative “problem” of connecting person-centered ethics to state-centered international law recedes. It becomes straightforward, in principle, to relate international law back to, and to imbue it with, basic human decency, hence to lend it legitimate normative pull—the sort of pull which, when ignored, occasions our appropriate disgust and sanction.<sup>306</sup> I think that there are many such principles with which to imbue international law.

Next, consider ethical obligations that *do* arise by dint of particular individuals’ characteristics. Many believe, for example, that persons born with certain handicaps, diseases, and other disadvantages through no fault of their own are owed special solicitude by others who are not thus disadvantaged—particularly, perhaps, by those who are blessed, owing to no particular virtuous or value-adding actions that they undertake, with equal and opposite advantages, so to speak. In this case, there will indeed occur some flickering among states over time: in one decade one state might include more very disadvantaged than very advantaged citizens, while another state is oppositely situated; and in another decade, these states’ relative compositions might be reversed.

But now note that flickering here presents no special challenge to the project of connecting international law to interpersonal ethics. Were we to construct some form of international social insurance arrangement analogous to those found in many societies, for example, nothing in principle would prevent our arranging for states with disproportionately well-endowed citizens to transfer assistance funds to states with dispropor-

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305. That is, Nuremberg defenses (“I was only doing my job as a Nazi official”) are ethically excluded.

306. To the degree that we refrain from suffusing international law with such decency even when we are able, I am as pleased as Goldsmith and Posner to deny, or at any rate to discount, its moral compellingness.

tionately under endowed citizens. And both the directions of transfer and the amounts transferred could flicker more or less in tandem with the states' handicapped populations over time.<sup>307</sup> The international legal norms which constituted that arrangement would be in harmony with the ordinary human morality that counsels this form of mutual assistance.

Finally, consider the one class of cases for which flickering might, in some cases, look to present the project of harmonizing international law and human decency with a challenge: cases in which obligations and protections arise not by dint of human beings' bearing fundamental rights, or by dint of their bearing certain characteristics for which they are not responsible, but cases in which obligations and protections are indeed tied to or modulated by characteristics, or deeds, for which persons are responsible.<sup>308</sup> The first thing to note here is that even in this class, the fact of flickering will seldom amount to a problem. We can draw this point out most effectively by partitioning the class into subclasses.

First, in cases where the only moral significance of actions for which individuals are responsible is to nullify or attenuate the moral claims that they could otherwise make upon others (e.g., by rendering them no longer innocent per our first earlier

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307. I abstract for present purposes from such matters as state policies that affect citizens' health endowments (for example pollution and population policies), which policies presumably would have to be addressed by any actual global social insurance contract. Again, the point here is to keep the example as simple as possible for purposes of schematizing yet another class of cases in which flickering, even while now relevant to the project of moralizing international law (because it determines the magnitude and flow of possible moral obligations between states), does not obstruct that project. I have discussed one possible form of international social insurance. See, e.g., Robert Hockett, *Just Insurance Through Global Macro-Hedging: Information, Distributive Equity, Efficiency and New Markets for Systemic-Income-Risk-Pricing and Systemic-Income-Risk-Trading in a "New Economy,"* 25 U. PA. J. INT'L ECON. L. 107 (2004); see also Robert Hockett, *From "Mission-Creep" to Gestalt-Switch: Justice, Finance, the IFT's, and the Intended Beneficiaries of Globalization,* 98 AM. SOC. INT'L L. PROC. 69, 71–75 (2004) [hereinafter Hockett, *From "Mission-Creep" to Gestalt-Switch*]; Robert Hockett, *Three (Potential) Pillars of Transnational Economic Justice: The Bretton Woods Institutions as Guarantors of Global Equal Treatment and Market Completion,* 36 METAPHILOSOPHY 93, 95–105 (2005) [hereinafter Hockett, *Pillars of Transnational Economic Justice*]; Robert Hockett, *Whose Ownership? Which Society?,* 27 CARDOZO L. REV. 101, 185–200 (2005) [hereinafter Hockett, *Whose Ownership?*].

308. In this class, I think, the relevant characteristics will themselves be in critical measure the products of deeds. So, for example, if one behaves violently and does so repeatedly, one accordingly becomes more prone to violence as habits of restraint diminish.

class of cases, or no longer faultlessly handicapped or under-endowed per our second earlier class of cases), flickering will be no more problematic (or even pertinent) here than it was in those cases.

Second, take the subclass of cases in which actions or characteristics for which individuals are in some sense responsible do render flickering potentially germane. This subclass seems to involve only two kinds of obligation: the contract-like kind that arises from a particular kind of promising behavior, and the tort-like kind that arises from a particular kind of illegitimate cost-occasioning or cost-externalizing behavior:<sup>309</sup> The individuals who constitute state *A* at time 1 ( $t_1$ ) collectively promise the individuals who constitute state *B* at that time to perform or refrain from, at time 2 ( $t_2$ ), some course of action of a particular type—namely, the type that is not antecedently required or prohibited by ethical principles binding upon all agents irrespective of their consent:<sup>310</sup> contract. Or, the former individuals collectively engage in some form of behavior that violates such an antecedent requirement: tort. Under what circumstances will the new state *A* at  $t_2$ , though legally bound according either to the international legal principle *pacta sunt servanda* or to the principle of respect for state integrity, be morally bound (in a manner derivative of its citizens' moral obligations) to perform or refrain or to compensate?

The question is not difficult to answer. First note that, at least in the case of sufficiently large and democratic states in which substantial majorities have agreed either directly to the promise or action itself, or to be represented by those who have promised or acted on their behalves, it will seem more appropriate to flip the question: we should ask instead under what circumstances the new state *A* at  $t_2$  might not be morally bound. For in such cases, there will not be flickering in respect

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309. Illegitimacy—indeed, the concept of ethically salient externalization itself—of course rides here upon a conception of justice, an account of the appropriate baseline distribution of costs. To impose an “externality” is to force another to bear one’s own just allotment of burdens. The standard Kaldor-Hicksian understanding of externality as occasioning a falling short of an otherwise attainable social aggregate of wealth is ethically uninteresting. See, e.g., Hockett, *From “Mission-Creep” to Gestalt-Switch*, *supra* note 307, at 71; Hockett, *Pillars of Transnational Economic Justice*, *supra* note 307, at 95–105; Hockett, *Whose Ownership?*, *supra* note 307, at 150–53.

310. The qualifier is critical. In its absence, the antecedently required acts belong in one or the other of the earlier, considered classes one and two, and the promise itself is accordingly irrelevant.

of the agreement or action in question so much as there will be a gradual, low-amplitude, molasses-like *potential* for changed aggregate state attitude toward the agreement or action. And in that case, it will seem appropriate to demand of the claimant of changed state attitude that she or he point to some reason to expect the probability of an aggregate “yes” vote at  $t_2$  to depart from the actual frequency (over the voting population) of the “yes” vote at  $t_1$ .

Next, note that the most reasonable answer to our new flipped question would seem to be: (a) for contract-like and tort-like cases alike, when state  $A$  at  $t_1$  is undemocratic; (b) for contract-like cases alone, when circumstances (apart from the attitudes of state  $A$ 's citizens)<sup>311</sup> upon which the agreement was predicated have changed in a manner not anticipated by the parties or contemplated in the agreement; perhaps (c) for contract-like and tort-like cases, and generally for shorter intervals 2–1, when only a very slim majority in a democratic state  $A$  at  $t_1$  has (directly or via representatives) approved the agreement or action and things turn around by  $t_2$ ; or, perhaps (d) generally for lengthier intervals 2–1, when the population of  $A$  by  $t_2$  has indeed substantially turned over relative to  $t_1$  and does not consent to the agreement or ratify the action.<sup>312</sup>

Now consider whether the problematicity that would afflict an attempt to hold state  $A$  morally obligated at  $t_2$  under circumstances (a) through (d) need afflict the international *legal* system's treatment of the state's obligations under such circumstances: case (b), of course, already is accommodated under the Vienna Convention on the Law of Treaties, in a manner analogous to that in which its private law counterpart typically is treated in domestic contract doctrines.<sup>313</sup> Case (a), for its part, appears to be coverable by the now rapidly developing international norm in favor of democratic governance.<sup>314</sup> It seems straightforward enough, as a legal matter, either to hold undemocratic leaders accountable for breach of treaties that they undertake and that their subsequently democratic states de-

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311. The reason for this parenthetical will be plain after cases (c) and (d) are characterized.

312. I explain the reason for the “perhaps” in connection with cases (c) and (d) after the next paragraph.

313. See Vienna Convention on the Law of Treaties, *supra* note 185, at 339–41.

314. See, e.g., DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 97 (offering an excellent collection of scholarly interpretations of democratic governance).

nounce, or to hold states that treat with undemocratic regimes estopped from laying claims against those regimes' democratic successors, or both.<sup>315</sup>

Cases (c) and (d) are only a bit more difficult. In (c), the state is readily analogized to a mental incompetent or schizophrenic. Neither common morality nor domestic law in contemporary societies holds such persons responsible. And both hold those who would enter into binding agreements with such unfortunate persons to do so at their voluntarily undertaken peril, while holding those who are tortiously injured by such persons to be the least inappropriate bearers of risk of such injury absent either insurance or some other party charged with the responsibility of controlling the incompetent. It would not be a stretch for international law to hold likewise.<sup>316</sup>

Case (d), for its part, is readily analogized to case (b), and it would not appear too much to develop international law in such manner as to accommodate it. In both of these last two cases, moreover, the problem would not seem likely to afflict most treaties or actions, only those comparatively few in respect of which majority approval has been very slight and/or weak. So yet again, even in the very small subclass of cases in which states' flickering populational identities can even be so much as implicated by the project of moralizing international law, that flickering does not appear to amount to a significant or likely to be oft-encountered impediment.

I think that the law-moralizing project that I have just suggested also can be brought to bear in assessing Goldsmith and Posner's final consideration in Chapter 7—that of “Morality and International Legal *Change*.”<sup>317</sup> The extension is straightforward, so I leave it to one side in consideration of space constraints.

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315. Surely this would amount to appropriate adoption of a “general principle[] of law” per Article 38(1)(c) of the International Court of Justice Statute. See ICJ Statute, *supra* note 86, art. 38, para. 1. This is a source of international law, recall, that is ignored by our authors. It might also counsel instituting another form of global insurance.

316. Again, this would amount to a “general principle[] of law,” per Article 38(1)(c) of the International Court of Justice Statute. See ICJ Statute, *supra* note 86, art. 38, para. 1.

317. GOLDSMITH & POSNER, *supra* note 4, at 197 (emphasis added).

C. STATE IMBECILITY REDUX: *THE LIMITS* ON INTERNATIONAL ENGAGEMENT'S MORALITY

While Goldsmith and Posner's Chapter 7 purports to "analyze[] a state's moral duty to comply with international law," their final chapter is devoted to "analyz[ing] the state's moral duty to enter into treaties and to take other related forms of international action in the first place."<sup>318</sup> At first, it appears that Goldsmith and Posner will once again argue against "[m]ainstream international law" scholars, who they say "contend[] that states . . . should be more other-regarding."<sup>319</sup> But it quickly grows apparent that our authors' real interlocutors in this chapter will be certain contributors to "the philosophical literature"—evidently because, in contrast to the international legal literature, the philosophic "examines or defends the ascription of strong cosmopolitan duties to the United States and other liberal democracies."<sup>320</sup>

The thrust of Goldsmith and Posner's argument against the cosmopolitan philosophers is an attempt to level at them, as a group, an analogue to the argument that Goldsmith and Posner tell us some of them level at others of them. Cosmopolitans, our authors report, "seek[] to enhance attachments and duties to the community of all human beings, regardless of national or local affiliation," on the ground that "every human being's life is equally valuable, regardless of group or national membership."<sup>321</sup> But that desideratum as thus stated leaves unspecified the principal *bearer(s)* of "cosmopolitan duty." So, for example, we may ask whether it is better-off individuals who owe such duties, institutions that owe them, or both.<sup>322</sup>

"Institutionalist cosmopolitans," Goldsmith and Posner observe, unsurprisingly take institutions for the primary cosmopolitan duty-bearers, owing to the presence of certain limitations that constrain individual action.<sup>323</sup> "[I]nstitutions are better at collecting and processing information,"<sup>324</sup> "they have 'power' and efficacy and thus 'can alter mass behavior,'"<sup>325</sup> and

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318. *Id.* at 205.

319. *Id.*

320. *Id.* at 206.

321. *Id.*

322. *See id.* at 207. In the latter case, of course, we will often ask the follow-up question, "Which institutions?"

323. *See id.*

324. *Id.*

325. *Id.* (quoting Michael J. Green, *Institutional Responsibility for Global*

“they can better spread the costs of action.”<sup>326</sup> Human persons, by contrast, face biological and psychological limits, require “space . . . to flourish without regard to the demands of morality,” face “severe collective action hurdles,” and “cannot be expected to comply with obligations that are so strong that others will not do their fair share.”<sup>327</sup>

Our authors argue that limitations “akin to the biological, moral, and psychological” constraints upon individual action likewise limit the plausible ascribability of “strong cosmopolitan duties to liberal democratic governments.”<sup>328</sup> So, first, Goldsmith and Posner explain, states are “large[]” and “diverse,” and “members of [such] pluralistic societies vary significantly in their commitments to charity.”<sup>329</sup> Moreover, “[e]ven strongly cosmopolitan-minded citizens can differ sharply about the appropriate focus of cosmopolitan charity”—supporters of Israel and supporters of the Palestinians, for example, potentially “cancel one another out.”<sup>330</sup> Second, “the state does not organize itself for the purpose of engaging in acts of cosmopolitan charity.”<sup>331</sup> Third, “solidarity and altruism depend to some degree on (physical, cultural, or familial) proximity.”<sup>332</sup>

At first blush, this might all ring quite plausible in a folksy sort of way. “Charity begins at home,” after all, and only heroes devote their full lives to the poor and the suffering even at home, let alone elsewhere. We can’t all be saints, can we? But a little more thought quickly exposes the remarkable battery of interrelated confusions and illicit slides that jointly constitute our authors’ argument here.

First, while it is commonsensical enough to suggest that “can” limits “should,”<sup>333</sup> “can” *easily* limits “should” rather less, if at all. It has never been a metaethical attribute of ethical obligations that they be dischargeable effortlessly. Ethics would be pointless in the absence of demands.

But now in this connection note, second, that Goldsmith and Posner speak exclusively (and indeed surprisingly) in

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*Problems*, 30 PHIL. TOPICS 79, 85–86 (2002)).

326. *Id.*

327. *Id.* at 208.

328. *Id.* at 209.

329. *Id.* at 210–11.

330. *Id.* at 211.

331. *Id.*

332. *Id.* at 212.

333. *Id.* at 219.

terms of supererogatory moral concepts such as “charity,” sometimes “solidarity,” or “altruism,” as if those they label “cosmopolitans” were advocating simply that states behave as Mr. Rogers, Rin Tin Tin, or Mother Theresa. That covertly and quite falsely tars cosmopolitans with the brush of implausibility—as if they were advocating nonobligatory heroism of the sort that might engage the “ought”-limited-by-“can” concern. And of course it stacks the deck in favor of our authors’ argument for reining in our expectations, since heroism would indeed be rather more to ask of agents than is decency. But global ethicists do *not* typically argue from supererogatory charity or saintly heroism. (Neither, of course, do supporters of Israel or of Palestinian Arabs.) They draw attention instead to obligatory justice—to basic human rights as distinguished from importuned favors or warm, fuzzy feelings. That, in turn, deprives Goldsmith and Posner’s “limits of charity” argument of all traction; the clutch simply never engages.

Our authors might reply that it will nonetheless be difficult to induce democratic states into *doing* justice, like charity, to foreigners if their constituents do not *care* about justice or foreigners. But this takes us, via the observation just above about easy “can’s” not limiting “ought,” to yet another trouble with Goldsmith and Posner’s line of argument: this is the matter of the cosmopolitans’ audience. Few if any global justice advocates urge that states, any more than individuals, simply work unilaterally—and again, therefore, heroically—to right all the wrongs of the world.<sup>334</sup> Even less do they urge that states act in such manner in deliberate disregard of citizens’ purportedly static exogenous “preferences” to the contrary. Rather, advocates of a more just world order argue in favor of joint action by *all* states, and by individuals and intermediating institutions *within* states—according to what forms of beneficial change each is best situated to effect—to conceive, design, and gradually develop institutional arrangements more in keeping

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334. The only such of whom I know are utilitarians, perhaps most notably Peter Singer—ironically, the principal ethicist of globalization cited by Goldsmith and Posner. But it is not accurate to label utilitarians or any other maximizers as “justice advocates.” See Hockett, *From “Mission-Creep” to Gestalt-Switch*, *supra* note 307; Hockett, *Pillars of Transnational Economic Justice*, *supra* note 307; Hockett, *Whose Ownership?*, *supra* note 307. It is much easier to discredit (and argue for “flourishing space” against) aggregationists—who are both fetishist and, often, heroism demanding—than it is to discredit those who advocate equal opportunity, or a decent starting gate, or resource minimum for all.

with an ethic of equal worth among all human beings than are the arrangements we currently find.<sup>335</sup> The former are arrangements that will afford something closer to equal protection against basic rights violations, and equal opportunity to build worthwhile lives through the exercise of responsible value-adding effort, to all of the world's inhabitants than do current arrangements. They also, presumably, are arrangements that will facilitate cooperative action that is *geared* toward that end, as well as joint deliberation over time—not simply “information conveyance”—about *means* toward that end. Such deliberation not only will produce better and more broadly acceptable ideas about such means, but also will facilitate more widespread appreciation of the compellingness of the ends themselves.<sup>336</sup>

Such weaknesses as might inhere in this advocacy inhere only in the want thus far, I believe, of (a) a well-articulated, psychologically, social-scientifically, and institutionally informed “blueprint” for such arrangements, and (b) an adequate menu of alternative sequenced plans of implementation. *This* is the task that lies ahead for us all if we would live and flourish together on a shrinking, warming, and worryingly weaponized planet. It is a task that will have to involve lawyers, psychologists, social scientists, and ethicists alike, as found among the world's citizenries at large, in governments, in NGOs, and in the academy. For ethicists are particularly adept at uncovering the justice-significance of particular consequences likely to be wrought by particular social and institutional relations. The social scientists are likewise adept in respect of determining what alternative institutional and social arrangements are likely in macro to be attainable, and to yield what consequences; while the lawyers and psychologists can best tell us how, more in micro, institutions, their personnel and the people they affect, in addition to institutional “path dependence,” actually operate and constrain feasible choice. People with these complementary understandings must actually *talk* to one another about the

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335. Again, bettering *process*, not Scrooge-state *statics*.

336. The role of deliberation in salutarily melding endogenous preferences themselves is well considered. *See, e.g.*, CARLOS SANTIAGO NINO, *THE CONSTITUTION OF DELIBERATIVE DEMOCRACY* (1996); *see also* *DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS* (Harold Hongju Koh & Ronald C. Slye eds., 1999) (collecting essays inspired by Nino). There is a much larger literature on deliberation and endogenous preferences, of course, in particular the work of Fishkin, Gutman, Habermas, and Sunstein, but in the interest of space I confine myself here to but dropping the names.

project at hand, all the way through. It is a matter of symbiosis right from the beginning—from conceiving, to planning, to implementing. Goldsmith and Posner, who appear to have at least some grounding in more than one of the requisite disciplines, are well-situated to contribute to this critical effort instead of effectively championing complacency with stale and static-stuck “models” tautologously “modeling” and thereby legitimating mere Scrooges writ large. What is preventing them? Certainly nothing, least of all the claims made in this book, prevents *us*.

### CONCLUSION

We have covered much ground here, maybe too much, in what might have amounted to overmuch detail. But *The Limits* will surely elicit much heated debate, and it seems fitting that at least one review consider the book both on its own terms and in plenary fashion. The book also, I think, in a particularly helpful way sums up much that was wrong in old-style state-fetishism, undefined interest-appeal, and ultimately corrupting power-celebration—wrong conceptually, wrong empirically, and wrong ethically. It thus affords fitting occasion for wholesale autopsy, then final interment, of that moribund tradition—as well as, symmetrically, for point-for-point notice of the more hopeful developments that now gather over its grave.

It just will not do, in this time and place, to pretend that anything of a transnational nature is explained when actions are said to proceed from the rational choices of unanalyzed states seeking to maximize decency-indifferent and otherwise undefined interests. Much less will it do, then, to pretend that any “limits” on what people of good will, acting in concert through states and through other institutions, can accomplish might be limned by any such putatively positive account. We should make no mistake here: Goldsmith and Posner to this point are *choosing* their limits, as well as their warrantless stories of others as limited—or warped—in the ways they purport to describe. That choice is not just ill-prompted, ill-conceived, ill-informed, and ill-justified; it is just ill, and in need of real cure.

I wish, then, to end with a proposal I think better prompted, conceived, informed, and justified than the book I have been reviewing. Let all of us, including Goldsmith, Posner, and others blessed with their gifts, set ourselves to the task of moving ahead toward a world justly governed, under the rule of

just law. Let us think through what that will require be conferred upon, and expected of, the world's inhabitants. Let us also inquire, in constructive spirit, what we must do to get there. Let us ask what limits really constrain or direct us, and what limits now can be pushed; hence, what requirements of justice are presently attainable and in what degree, in view of the complex and fine-grained natures of well-meaning persons, institutions, and societies, and of the ways in which these natures develop through self-conscious, self-constructive, and self-amending effort. And as we do this, let us engage in those acts of construction and reconstruction themselves, which actions are underway even as we purport to be "merely describing" human affairs, and which actions accordingly can further inform our theorizing itself—even as they edge us all the while closer to the goal that both prompts and lends meaning to our efforts.