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## Review Essay: 'Seeing Beyond the Limits of International Law,' Jack L. Goldsmith and Eric A. Posner, 'The Limits of International Law'

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## Book Review Essay

### Seeing Beyond the Limits of International Law

THE LIMITS OF INTERNATIONAL LAW, Jack L. Goldsmith<sup>†</sup> & Eric A. Posner.<sup>‡</sup>  
Oxford: Oxford University Press, 2005. Pp. 226. \$29.95.

Reviewed by Paul Schiff Berman<sup>\*</sup>

If the 1990s were for many a time of optimism about the efficacy of international law and legal institutions,<sup>1</sup> the first decade of the twenty-first century has brought a backlash, at least in the United States. The Bush administration's hostility to international law is well documented,<sup>2</sup> Republicans in Congress are decrying the mere citation of foreign or international sources in U.S. Supreme Court opinions,<sup>3</sup> and a cadre of international law scholars, seemingly motivated by concerns that international legal norms might pose undue limitations on state prerogatives or democratic processes, are arguing against the implementation of such norms domestically.<sup>4</sup> Even those who are inclined to be more sympathetic to

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<sup>\*</sup> Professor, University of Connecticut School of Law. This Essay benefited greatly from discussion at a session of the Amherst Reading Group in Law and Culture, held in June 2005. I am grateful to the participants in that session, particularly Sally Engle Merry and Susan Silbey, for many helpful ideas. In addition, I thank Anthony D'Amato, Laura A. Dickinson, Mark Drumbl, Robert W. Gordon, Sean Griffith, Janet Koven Levit, Hari Osofsky, Jeremy Paul, and Peter Siegelman for useful comments and suggestions, and I acknowledge the research assistance of Michelle Querijero.

1. See, e.g., Philippe Sands, *Of Turtles and Torturers: The Transformation of International Law*, 33 NYU J. INT'L L. & POL. 527, 536 (2001) (discussing legal decisions from the 1990s concerning human rights and trade and suggesting that these decisions have, "[i]n a way that was not necessarily predictable, . . . made a connection between international law and a broader set of values than those to which states have given express approval").

2. Indeed, the administration's official National Defense Strategy goes so far as to lump together the mere use of international "judicial processes" and the use of terrorism. According to the document, both are "strategies of the weak" that threaten "our strength as a nation state." U.S. DEP'T OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 6 (2005), available at <http://www.defenselink.mil/news/Apr2005/d20050408strategy.pdf>.

3. See American Justice for American Citizens Act, H.R. 4118, 108th Cong. § 3 (2004) (prohibiting the federal courts from employing the "constitution, laws, administrative rules, executive orders, directives, policies, or judicial decisions of any international organization or foreign state" (other than English common law) in interpreting the U.S. Constitution).

4. See, e.g., Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 103 (2000) (noting that within international institutions, "consent of the governed is still lacking, democratic legitimacy in the long run is still lacking"); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV.

international human rights law have purported to show, through quantitative analysis, that human rights treaties may not affect actual state behavior.<sup>5</sup>

Many of these attacks, however, misconceive the ways in which international law is most likely to operate. Because international law generally is not backed by coercive force, it of course does not literally bind state actors. Thus, if international law affects behavior at all, it does so far more subtly. For example, it may slowly change attitudes in large populations, effecting shifts in ideas of appropriate state behavior. In addition, international legal norms may well empower constituencies within a domestic polity and provide them with a language for influencing state policy, thereby affording them leverage that they would not otherwise have had at their disposal.

Such subtle processes may not, at least on the surface, seem to play a role in constraining state behavior. And they cannot necessarily be measured in immediately quantifiable ways. But, over time, we may see changes that are more profound than those brought about by an ephemeral coercive statute enacted by a legislature. Thus, if we want to study whether international law has real effects, we need to analyze these processes rather than limit our gaze to the question of whether international law binds states coercively.

It is for this reason that the latest addition to the international law backlash genre, *The Limits of International Law*, by Jack Goldsmith and Eric Posner,<sup>6</sup> is so disappointing. Tendentious and unpersuasive, the book deploys the simplifying assumptions of rational choice theory in an attempt to demonstrate that international law has no independent valence whatsoever. Rather, according to the authors, each state single-mindedly pursues its rational state interest and therefore obeys international legal norms only to the extent that such norms serve those pre-existing interests. Thus, they argue, international law is sometimes important, but only as a mechanism by which nation-states negotiate power, not as an independent limitation on the prerogatives of state governments.

Yet, while there is certainly much work still to be done to fully study the variety of ways in which international legal pronouncements might or might not affect the behavior of state and non-state actors, *The Limits of International Law* advances the discussion hardly at all. This is because, as with much rational choice analysis,<sup>7</sup> Goldsmith and Posner must start with a

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1557, 1595 (2003) (arguing that international delegations raise “delegation concerns” in much the same manner as the “delegation concerns at issue in domestic transfers of authority”); Viet D. Dinh, *Nationalism in the Age of Terror*, 56 FLA. L. REV. 867, 871–72 (2004) (characterizing international institutions and norms as threats to the modern nation-state).

5. See, e.g., Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2020–25 (2002) (arguing that signing human rights treaties does not correlate with increased human rights compliance).

6. JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

7. For a critique of rational choice analysis, see Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1545 (1998) (“Traditional law and economics is

series of assumptions that effectively clear away almost all of the ways in which international law and legal institutions are most likely to be effective.

First, they assume that state interests exist independently of the social context within which the interests are formed. But a policymaker's idea of what is in the state's interest is always and necessarily affected by ideas of appropriate action, and these ideas are likely to be shaped—even if unconsciously—by legal norms, including the norms of international law.<sup>8</sup> Moreover, such government officials, especially in a democracy, are at least somewhat responsive to popular opinion, and such opinion is also likely to be shaped by a variety of forces, again including the moral pull of international legal norms. As sociolegal scholars have long described, legal norms can effect changes in legal consciousness that in turn alter the categories of our thought, such that they help determine what we are likely to see as a viable policy option in the first place. Indeed, the particular brand of rational choice theory adopted by Goldsmith and Posner ignores even the insights of law and economics itself, which long ago adopted a framework that includes behavioral psychology within its analysis.<sup>9</sup>

Second, Goldsmith and Posner assume that, in any given setting, a state actually has a single, definable set of interests. Thus, even as rational choice theory has long been attacked for its reliance on the idea that *individuals* have unitary definable interests,<sup>10</sup> Goldsmith and Posner multiply the problem by asserting that entire *states* have such interests. Yet, given that states are made up of multiple bureaucrats with various spheres of authority, political ideologies, institutional loyalties, and interests that range from the goal of re-election, to the need to curry favor with particular interest groups, to the aim of career advancement, the idea that a state could have a single interest is simply unfathomable. And that is not even counting the myriad forces outside of government—NGOs, editorial writers, campaign contributors, political movements, and so on—that all exert influence on government actors and all may themselves be influenced by and may

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largely based on the standard assumptions of neoclassical economics. These assumptions are sometimes useful but often false.”). See also DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 11 (1994) (“Too often prescriptive conclusions . . . are floated on empirically dubious rational choice hypotheses.”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1060–70 (2000) (critiquing rational choice theory with evidence from the behavioral sciences).

8. As Andrew Moravcsik puts it: “Societal ideas, interests, and institutions influence state behavior by shaping state preferences, that is, the fundamental social purposes underlying the strategic calculations of governments.” Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 513 (1997).

9. See generally BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000) (containing contributions by law and economics scholars whose arguments are grounded in behavioral psychology principals).

10. See generally *id.* (providing numerous examples demonstrating that individual interests are variable, rather than static, and depend on context).

consciously deploy the norms of international law in order to press varying agendas.

Third, Goldsmith and Posner set their work in opposition to what they describe as “cosmopolitan theory,” which, they assert, “argues that states have a duty . . . to act on the basis of global rather than state welfare.”<sup>11</sup> Thus, they equate cosmopolitanism with a kind of utopian universalist utilitarianism. But cosmopolitanism is potentially a far more nuanced theory than that, providing a framework for recognizing multiple community affiliations and multiple norm-generating entities, only some of which map neatly onto the fixed territorial boundaries of the nation–state system.

As a result of their three radically simplifying assumptions, Goldsmith and Posner end up arguing against a straw man. Only the most diehard internationalists would suggest that a state already completely united behind both a set of interests and a strategy for attaining those interests will practice self-denial solely because that strategy contravenes international law. So, of course, if one starts from the premise that there are pre-existing unitary interests, it will be difficult to find examples where international legal norms appear to have any effect.

But it is ludicrous to assume that coercively preventing states from doing that which they have already decided to do is the only way of evaluating the efficacy of international law. Indeed, even in the domestic context, legal norms are effective largely because people imbibe those norms and adopt them as their own, not because a police officer stands behind the next corner waiting to pounce. And law’s impact is not found only in literal obedience to rules, but in the everyday categories of our discourse. When we casually refer to “private” property, “married” couples, the “rights” of people, and so on, we are adopting and deploying law’s power even if we are not aware of the fact. Thus, over time, what a state considers to be in its interest is likely to change, and those changes will often be at least partly the product of changes in legal consciousness, which is in turn shaped by international law. Moreover, various actors within the state bureaucracy (or those seeking to affect bureaucratic decisionmaking) will use international legal norms to craft political arguments within their own polities. Again, such arguments will, at least sometimes, effectively shift popular or political consensus.

Thus, whatever the limits of international law may be, the analytical framework Goldsmith and Posner construct will not help us find them. In this Book Review Essay, I first outline their argument and focus particularly on the crucial sets of assumptions they apply to their analysis. Then, drawing on sociolegal scholarship and actual examples of international law as it operates on the ground, I discuss two ways in which international law can have a significant impact, both of which are ignored by Goldsmith and

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11. GOLDSMITH & POSNER, *supra* note 6, at 14.

Posner. First, I explore the concept of legal consciousness and suggest that, over time, international law norms may alter what both governmental actors and larger populations view as “right,” “natural,” “just,” or “in their interest.” Second, I discuss various instances in which individual constituencies both within and outside of government have deployed international legal norms to gain leverage and affect state policy choices. Finally, I take on the distorted view of cosmopolitanism used by Goldsmith and Posner, and suggest that cosmopolitanism potentially offers a far more useful analytical lens for conceptualizing the ways in which multiple lawmaking communities construct, disseminate, and negotiate legal norms than the schematic simplifications of internationalized rational choice theory.

To some degree, of course, my analysis reprises old debates between international relations realism on the one hand and constructivism on the other. For decades realists have relied on the idea that states pursue unitary sets of interests (generally power and riches) and that international law is only instrumental.<sup>12</sup> Likewise, constructivists have long argued that interests cannot exist independently of social context and that international law plays a role in shaping the contexts in which interests arise.<sup>13</sup> Yet, apparently the

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12. See, e.g., EDWARD HALLETT CARR, *THE TWENTY YEARS' CRISIS, 1919–1939*, at 85–88 (Harper & Row 1964) (1939) (rejecting internationalism/cosmopolitanism and stating that the principles commonly invoked in international politics were “unconscious reflexions of national policy based on a particular interpretation of national interest at a particular time”); HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* 5 (5th ed. 1973) (noting that the “main signpost that helps political realism to find its way through the landscape of international politics is the concept of interest defined in terms of power”); KENNETH N. WALZ, *THEORY OF INTERNATIONAL POLITICS* 122 (1979) (arguing that “although states may be disposed to react to international constraints and incentives,” they do so only if such actions conform with the state’s internal interests); Robert H. Bork, *The Limits of “International Law,”* NAT’L INT., Winter 1989–1990, at 3 (arguing against the importance of international law); Francis A. Boyle, *The Irrelevance of International Law: The Schism Between International Law and International Politics*, 10 CAL. W. INT’L L.J. 193, 201 (1980) (arguing that World War II itself made clear that states cannot rely solely on international law to protect their interests).

13. See, e.g., MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* 3 (1996) (asserting that states’ interests “are shaped by internationally shared norms and values that structure and give meaning to international political life”); *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse et al., eds. 1999) (collecting essays on state internalization of international human rights norms); John Gerard Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT’L ORG. 855, 857–62 (1998) (tracing the roots of social constructivism to the work of Emile Durkheim and Max Weber); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT’L ORG. 391, 394 (1992) (stating his intention to develop “a constructivist argument...on behalf of the liberal claim that international institutions can transform state identities and interests”). The related discourse of transnational legal process has stressed the ways in which states internalize international norms into domestic law. See, e.g., Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996) (“As transnational actors interact, they create patterns of behavior and generate norms of external conduct which they in turn internalize.”); see also Harold Hongju Koh, *How Is International Human Rights Law Enforced?*, 74 IND. L.J. 1397, 1399 (1999) (contending that international human rights are enforced “through a transnational legal process of institutional interaction, interpretation of legal norms, and attempts to internalize those norms into domestic legal systems”); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2602 (1997) (reviewing ABRAM CHAYES & ANTONIA

battle must be joined once more. The vision of international law that Goldsmith and Posner espouse, though newly dressed up in the trappings of rational choice theory and econometric analysis, is at bottom just the same old realist vision. And as long as theorists continue to view international relations as merely a real-life version of the game of “Risk” or “Stratego,” devoid of sociological, psychological, or even political complexity, those who seek a more nuanced understanding of international law will need to respond.

### I. Rational Choice and International Law

The central thesis of *The Limits of International Law* is easily stated. According to Goldsmith and Posner, international legal norms, though sometimes useful to states in pursuing their own interests, have no actual constraining effect on states. The authors argue that states are never pulled into compliance with international law if such compliance would be contrary to the state’s interests. Instead, they suggest that state behavior is best captured by four game theoretic models describing how states strategically pursue their interests in various forms of cooperation and competition with each other. In this analysis, international law is seen only as a *product* of state interest and not as a *limit* on the pursuit of that interest. Significantly, though this claim purports to be merely descriptive—presenting a theory of how states actually behave in the world—the normative thrust of the book is difficult to miss. Goldsmith and Posner clearly believe that international law *should not* be treated as an independent check on state action, and their argument is squarely aimed at those, both within government and outside of it, who would view international law as a constraint. At bottom, therefore, Goldsmith and Posner seek to change attitudes about international law that they see as an unnecessary drag on the power of states.

Yet, like the economist in the old joke who, in order to open a can in the forest, must first assume a can opener, Goldsmith and Posner depend for their analysis almost entirely on a set of simplifying assumptions. Indeed, their principal argument about international law lacking constraining effect makes sense only if one buys into their simplified framework. To be sure, they rightly acknowledge those assumptions at the beginning of the book. However, mere acknowledgment of the assumptions cannot substitute for reasoned argument as to why those assumptions are justified. And here the justifications are cursory at best. This Part therefore discusses the assumptions at some length and then briefly outlines the basic trajectory of the argument that follows.

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HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995) and THOMAS M. FRANK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) (arguing that international law scholars need an “account of transnational legal process: the complex process of institutional interaction whereby global norms are not just debated and interpreted, but ultimately internalized by domestic legal systems”).

The crucial set of assumptions from which Goldsmith and Posner begin is contained in the statement that “states act rationally to further their interests.”<sup>14</sup> This phrase includes at least three simplifications that are intrinsic to the book’s analytical framework: (1) that state interests can arise independently of the international law context itself; (2) that a state could ever have a single identifiable interest; and (3) that states act rationally to further those interests. Yet, while properly acknowledging their assumptions, Goldsmith and Posner provide only the thinnest of justifications for employing them.

As to the first assumption, Goldsmith and Posner state baldly that they “take state interests at any particular time to be an unexplained given.”<sup>15</sup> However, as will be discussed further in Part II of this Book Review Essay, such an assumption ignores the processes by which states (or individuals) develop preferences or interests in the first place. Goldsmith and Posner concede that constructivists have long made this point by arguing that international legal norms and institutions influence not only conceptions of what is in the state’s interest, but also the cognitive categories through which the very idea of interests is viewed.<sup>16</sup> In addition, cognitive psychology<sup>17</sup> and even behavioral law and economics<sup>18</sup> acknowledge the need to study how interests arise.

In response, Goldsmith and Posner suggest first that such constructivist claims cannot be proved one way or the other.<sup>19</sup> It is unclear, however, what the authors would accept as proof in this regard. As we will see, there is a large body of sociolegal data demonstrating (or at least strongly suggesting)

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

15. *Id.* at 9.

16. *See id.* at 8–9 (acknowledging that constructivists seek to show that state interests can be influenced by international law and institutions).

17. For discussions using cognitive psychology to show how cognitive categories and narratives affect thought, see generally ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 9 (2000) (analyzing theories of categorization and noting that “categories are *made in the mind* and not found in the world”) (emphasis in original); STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE AND MIND* 105–06 (2001) (arguing that narrative “shape[s] our expectations and perceptions with respect to what we deem credible” and “standard legal scholarship is just a particularly powerful kind of rational argument”). Goldsmith and Posner acknowledge the challenge of cognitive psychology but only with regard to cognitive errors, GOLDSMITH & POSNER, *supra* note 6, at 8, not the idea that cognition is itself determined by the categories we use. Moreover, they dismiss cognitive psychology because it “has not yet produced a comprehensive theory of human (or state) behavior that can guide research in international law and relations.” *Id.* (citation omitted). In this statement, Goldsmith and Posner seem to elevate the imperatives of their normative analysis above the empirical question of whether their theory actually describes human behavior.

18. *See, e.g.*, BEHAVIORAL LAW AND ECONOMICS, *supra* note 9, at 10 (contending that a better understanding of how interests arise may lead to “better uses of law as an instrument of social ordering”).

19. *See* GOLDSMITH & POSNER, *supra* note 6, at 9 (acknowledging that, while they doubt the constructivist argument that international law and institutions can affect state interests, they “cannot prove the point”).

that legal norms become internalized as part of the categories of human thought. For example, when people think in terms of “human rights,” they are internalizing a set of philosophical and legal constructs, many of which are imbibed unconsciously. If true, this would certainly be an example of international law having an effect, regardless of whether such a process of norm-internalization can ever be proven. Thus, the use of the word “proof” here is a dodge. Of course such complex psychological and cognitive causation will be difficult, if not impossible, to prove definitively. But that does not mean that any view one may have about how interests arise is therefore equally correct. Accordingly, it is insufficient for Goldsmith and Posner to state that, since neither side can “prove” whether or not international legal norms affect conceptions of state interest, they can just move on as if no challenge to their framework had been made. Moreover, it should go without saying that there is nothing particularly “rigorous” or “empirical” about using game theory to speculate about how states act in certain situations, and so the implication that Goldsmith and Posner are somehow providing a more factually grounded account is unsupportable.

Even more surprisingly, Goldsmith and Posner write that, even if one *could* demonstrate that state interests are themselves constructed by reference to international law (an idea they call the “endogenization of the state’s interest”<sup>20</sup>), such an understanding of how interests arise would not necessarily “lead to a more powerful understanding of how states behave with respect to international law.”<sup>21</sup> Accordingly, they write, “[w]e provide our theory in the pages that follow, and we leave it to critics to decide whether constructivism provides a better theory of international law.”<sup>22</sup> Needless to say, this is not an argument at all. Rather, Goldsmith and Posner appear ready to ignore constructivism even if it could be proved to their satisfaction that the constructivist insights were correct.

Turning to their second assumption, Goldsmith and Posner start from the premise that the state can have a unitary set of interests independent of the multiple political players involved and their various personal and professional ambitions, desires, or aims. They acknowledge, however, that “[s]tate interests are not always easy to determine, because the state subsumes many institutions and individuals that obviously do not share identical preferences about outcomes.”<sup>23</sup> One would think that this fact alone would pose a major hurdle for the rational choice analysis Goldsmith and Posner wish to undertake. Indeed, public choice theory has long sought to show that any idea that a political body has a single “interest” or “intent” is

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20. *Id.* at 9.

21. *Id.*

22. *Id.*

23. *Id.* at 6.

misguided.<sup>24</sup> Yet Goldsmith and Posner respond with what is essentially a one-sentence throw away. Despite the difficulties inherent in determining a single state interest, they write: “Nonetheless, a state—especially one with well-ordered political institutions—can make coherent decisions based upon identifiable preferences, or interests, and it is natural and common to explain state action on the international plane in terms of the primary goal or goals the state seeks to achieve.”<sup>25</sup>

Again, this response provides no justification for their assumption whatsoever. After all, whether it is “common” to speak of a state having unitary interests is completely irrelevant; the question is whether it is accurate to do so. And as to whether speaking of state interests is “natural,” the statement is so vague that it has almost no content at all. Perhaps most importantly, what can it mean to say that a state makes “coherent decisions based upon identifiable preferences”? To take a particularly salient contemporary example, what was the “coherently” defined state interest in invading Iraq? To this day no such interest has been defined or produced, and the diverse actors involved undoubtedly had very different interests and objectives. Thus, some may have wanted to control access to Middle Eastern oil, others might have sought to establish a model democracy in the region, still others might have wanted to remove a threat to Israel, and conceivably some people might actually have believed the stated reason, that Saddam Hussein posed a military threat. At the same time, domestic political strategists within the administration might simply have been counting on (short-term) political gains from being at war. Accordingly, no account of the Iraq invasion would be even close to believable if it did not include the incoherent jumble of the players, as well as the various forces arrayed in opposition to the invasion: old-style realists, soft-power legalists and internationalists, peace activists, much of the military officer corps and intelligence community, and so on. In any event, the one sentence explanation Goldsmith and Posner provide to defend their focus on unitary state interests is woefully inadequate to justify such an important central premise of the book.

Finally, Goldsmith and Posner assume that, once a unitary interest is formulated, states then act rationally to pursue those interests, an implausible assumption (as the Iraq example makes clear) that fails to account for the complicated and highly *irrational* ways in which policy choices tend to be formulated and pursued. The authors do acknowledge that, in rational choice theory, “rationality is primarily an attribute of individuals, and even then

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24. See, e.g., WILLIAM A. NISKANEN, BUREAUCRACY: SERVANT OR MASTER? 22 (1973) (viewing bureaucrats as self-interested utility maximizers, motivated by such factors as “salary, perquisites of the office, public reputation, power, patronage, . . . and ease of managing the bureau”).

25. GOLDSMITH & POSNER, *supra* note 6, at 6.

only as an approximation,”<sup>26</sup> and they recognize doubts about whether “collectivities can have coherent preferences.”<sup>27</sup> But again, they brush the objection aside in one sentence: “[W]hen states exist, people have adopted institutions that ensure that governments choose generally consistent policies over time—policies that at a broad level can be said to reflect the state’s interest as we understand the term.”<sup>28</sup> Notice the fudge words here: “generally consistent,” “over time,” “at a broad level,” “can be said to reflect the state’s interest.” This obfuscation conceals a circularity of logic. Goldsmith and Posner are attempting to show that states pursue policies to further their interests, but here they are defining interests in terms of the policies pursued. Under this approach, we need only study what governments do and work backwards, assuming that such acts must have been in furtherance of interests we can discover after the fact.

In the end, Goldsmith and Posner appear to use purely instrumental justifications for sloughing off nearly all criticisms about their assumptions. They write that just as “[e]conomic theory has produced valuable insights based on its simplifying assumptions,” so too their theory “should be judged not on the ontological accuracy of its methodological assumptions, but on the extent to which it sheds light on problems of international law.”<sup>29</sup> The problem with this response, of course, is that if the theory’s ontological assumptions are false—for example, if conceptions of interests do indeed reflect in part prevailing legal norms and cognitive categories, and if states are collections of competing players, some of whom can be empowered by international law to pursue certain interests over others—then the theory, as elegant as it might be, is not explaining how the real world operates. Just as assuming a can opener won’t help open a real can in a real forest, neither can a set of incorrect assumptions about both human and state behavior be used to satisfactorily explain such state behavior in real life.

I have spent a seemingly disproportionate amount of time on the assumptions underlying *The Limits of International Law* because in the end nearly all of the analytical action is concealed within those assumptions. Once one adopts the book’s premises, then the rest of the authors’ argument—that state behavior is unconstrained by international law and is therefore best analyzed as a series of strategic games—becomes both obvious and obviously correct. *If* State A has a unitary interest in, say, maintaining its sovereign border, and *if* that interest precedes and is completely uninfluenced by international law norms about boundary disputes and any relevant limits on the prerogatives of sovereign states, then the question of whether State A attacks neighboring State B may indeed be determined based on game theory. The assumptions, therefore, are a crucial predicate to all that follows. Then,

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26. *Id.* at 8.

27. *Id.*

28. *Id.*

29. *Id.*

in the remainder of the book Goldsmith and Posner identify four possible game theoretic scenarios for interstate interaction—(1) coincidence of interest, (2) coordination, (3) cooperation, and (4) coercion—which they then use to explain nearly all interstate relations. Below I briefly summarize these scenarios.

According to Goldsmith and Posner, coincidence of interest occurs if, for example, neither of two states has any interest in encroaching on the other's territory.<sup>30</sup> Significantly, in the authors' vision, the state's interest cannot be influenced by a sense of obedience to international law norms or even by a sense of right behavior toward the other state. It must instead be the result of each state deciding independently that it is not in its interest to encroach, "without any regard to the action of the other state."<sup>31</sup> As a result, the border is left in place because neither state wants what the other has.

In contrast, a coordination game takes place if two states settle on a border and then respect the integrity of that border not because they are uninterested in seizing territory within the borders of the other, but because they believe that it is in their long-term interests to exist in a world in which borders are respected.<sup>32</sup> Goldsmith and Posner liken this to the rule that everyone drive on the right (or left) side of the street.<sup>33</sup> Without such an agreed-upon norm of behavior, chaos would ensue. Thus, coordination is distinguished from coincidence of interest because states restrain themselves in order to gain long-term benefits.

Closely related to (and in many cases indistinguishable from) coordination is cooperation. The authors identify cooperation as a kind of mutually assured destruction.<sup>34</sup> States refrain from encroaching based on mutual threats of retaliation. The fact that Goldsmith and Posner call such a system of mutual threats "cooperation" tells one quite a bit about their view of international relations. In any event, as with coordination, "states reciprocally refrain from activities . . . that would otherwise be in their immediate self-interest in order to reap larger medium- or long-term benefits."<sup>35</sup>

Finally, Goldsmith and Posner identify coercion. Here, the more powerful of the two states simply invades and establishes a new boundary or, more commonly, pressures a weaker state to accede to the policy wishes of the more powerful state. Thus, "[c]oercion results when a powerful state . . . forces weaker states to engage in acts that are contrary to their interests."<sup>36</sup>

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30. *Id.* at 12.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Goldsmith and Posner then attempt to explain relations between states using this framework. Essentially, they argue that states may use international legal norms as part of one of these games, but in those instances international law is merely a product of state interests, not a constraint upon them. According to the authors, “[i]nternational law emerges from states’ pursuit of self-interested policies on the international stage. . . . It is not a check on state self-interest; it is a product of state self-interest.”<sup>37</sup> This is not to say that they think international law is irrelevant; to the contrary, they suggest that states can employ various international regimes to further their interests. For example, treaties “can play an important role in helping states achieve mutually beneficial outcomes by clarifying what counts as cooperation or coordination in interstate interactions.”<sup>38</sup> But the bottom line for Goldsmith and Posner is that international law does not pull states into compliance contrary to their interests, and therefore international law will never have an independent valence. International law, they write, is always “limited by the configurations of state interests and the distribution of state power.”<sup>39</sup>

This is all well and good as far as it goes. Indeed, nearly everyone would agree that states pursue some conception of interests internationally and that if those interests are powerful enough, they may trump contrary international law norms. Similarly, there can be little doubt that economically and militarily powerful states have fewer constraints on their actions than others and so may be more able to violate international legal norms. To believe in international law as an independent force in international relations emphatically does not require that we jettison the idea of power or somehow assume that states will not act in a self-interested way. Thus, the four forms of interstate interaction identified by Goldsmith and Posner surely describe many encounters among states. Indeed, the fact that states rely on coincidence of interest, coordination, cooperation, and coercion to order international relations is sufficiently obvious that it is not entirely clear why they are worthy of such detailed categorization and explication.

Accordingly, nearly all international law scholars are likely to accept that states are not always (or even often) altruistic, that power matters in international relations, and that states use various degrees of cooperation and coercion in their interactions with each other. But it is a large leap from these rather uncontroversial propositions to the conclusion that Goldsmith and Posner reach: that international law has *no* independent constraining force. It is not surprising, of course, that Goldsmith and Posner would reach this conclusion because, as discussed above, they start from an extraordinarily limited vision of how international law might operate. They seem to be capable of conceiving of international law in two ways only:

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37. *Id.* at 13.

38. *Id.*

39. *Id.*

either as a purely external coercive force (picture an international police force hauling a state off to jail for violating international law norms) or as a non-force that is merely a mechanism for states to pursue pre-existing interests.

Given those two choices, most scholars would view the second as more accurate. But an analytical framework that can conceive only of those two choices is one that is already impoverished. The assumptions with which Goldsmith and Posner begin—that states are unitary rational actors pursuing pre-existing interests—guarantee that they will omit from their framework all of the ways in which international law is most likely to have significant impact. Accordingly, they do not consider the possibility that state actors, while pursuing their various cooperation and coercion games, are *influenced* by norms of international law that they have imbibed to such a degree that they have internalized them as their own. Nor does the book contemplate the complex ways in which various state and non-state actors might deploy the rhetorically persuasive power of international law to influence the way that states play these games. Thus, Goldsmith and Posner have first constructed a straw man version of international law—a lumbering positivist enforcer of international moral discipline—that almost no one believes exists and then dispatched this straw man to the dust bin while suggesting that they have therefore said something meaningful about the limits of international law.

The remainder of the book then attempts to “demonstrate” the limits of international law by looking at specific examples of state behavior. In particular, Goldsmith and Posner examine customary international law and essentially conclude that there is no such thing. Rather, they point to instances when states have not followed the so-called universal norms of customary law and suggest that the actual patterns of state behavior reflect the various bilateral games discussed above rather than obedience to customary international legal principles. Then they examine treaties, which they suggest are more effective than customary international law norms because treaties provide a forum to negotiate and establish what will count as coordination and cooperation among states. In addition, the various institutions associated with the ratification and monitoring of these treaties provide information that can contribute to this coordination and cooperation.

Yet, even with regard to treaties, they argue against the idea that such treaties have any normative force, outside of the willingness of states to back such treaties with coercive force. Thus, for example, Goldsmith and Posner acknowledge that the International Criminal Tribunal for the Former Yugoslavia (ICTY) has had some success in trying war criminals, including Slobodan Milosevic,<sup>40</sup> but they argue that “it was not the gravitational pull of the ICTY charter that lured these defendants to The Hague. Rather, it was NATO’s (and primarily American) military, diplomatic, and financial

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40. *Id.* at 116.

might.”<sup>41</sup> However, to the extent that part of the *reason* for the mobilization of this military, diplomatic, and financial might was the perception that Milosevic’s regime was violating international law, then it is difficult to see how this is an argument *against* international law’s force. Indeed, Goldsmith and Posner state that the United States has consistently threatened to withhold foreign aid to the successor regimes in the Balkans unless they turn over war criminals to the ICTY.<sup>42</sup> But while they seem to view this fact as evidence that international law has no effect,<sup>43</sup> it seems to me to prove just the opposite. Of course the mere creation of the ICTY by itself did not automatically cause war criminals to be sent there. And I suppose in the positivist world Goldsmith and Posner construct that means the Genocide Convention and the ICTY statute had no impact.<sup>44</sup> But it seems clear that international law at the very least affected the willingness of the United States to pursue the policies it did, which is a very significant impact. And that is not even counting the impact the ICTY may have had in Bosnia itself, strengthening the hands of the anti-Milosevic forces and helping to turn popular opinion against him. The trouble is that Goldsmith and Posner leave out the fact that the very existence of a treaty (or any international law norm) changes the bargaining power of both the states involved and the various actors within states who are trying to gain the upper hand in internal policy debates.

To be sure, Goldsmith and Posner argue that the existence of the treaty is not really what causes a state to engage in coercive action. Thus, they note that the U.S. intervened in the Balkans, where it had a strategic interest, but not in Africa, where it lacks strong strategic interests, or Saudi Arabia, China, or Russia, where its strategic interests conflict with insisting on compliance with human rights treaties.<sup>45</sup> But this only shows that a treaty (or any international law norm) is generally not the *sole* determining factor in weighing state action. And again, this is an argument against a straw man because no serious scholar has suggested that international law is *automatically* enforced regardless of other strategic factors. And of course sometimes (and shamefully) these other strategic interests will outweigh the imperative to enforce international law norms. But that is not the point. The real questions are these: (1) did the existence of flagrant human rights violations in the Balkans provide any type of impetus for NATO intervention (over and above any other strategic interests); and (2) did the existence of these human rights norms and the ICTY itself ultimately change the internal political dynamic within Bosnia? If the answer to both of those questions is

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41. *Id.*

42. *Id.*

43. *Id.* at 115–16.

44. *Id.* at 111, 116.

45. *Id.* at 117.

yes, and I think it is, then it is difficult to maintain the idea that international law is not having an important effect.

Thus, the authors' true normative intentions are unmasked. So long as policymakers, bureaucrats, and the general populace of a state *believe* that international law is important, there can be little doubt that such a belief system will have a real impact on state decisionmaking. As a result, the only way for the book's thesis about the limits of international law to become true is if enough people can first be persuaded that international law is unimportant. Goldsmith and Posner are certainly entitled to make this normative argument. But such an argument should not be buried within a supposedly descriptive account of how international law actually operates.

Finally, Goldsmith and Posner reject three supposed challenges to their theory. First, they argue that just because states frequently use the rhetoric of international law does not mean that they are actually motivated by a desire to comply with it.<sup>46</sup> Yet, though this is obviously true, it does not therefore mean that the rhetoric has no persuasive power over time. Second, they resist any suggestion that states have a moral obligation to comply with international law.<sup>47</sup> Instead, they contend that, unlike domestic law, international law cannot rely on theories of consent or democratic participation to justify obedience.<sup>48</sup> Moreover, international law has no independent enforcement agent. Yet, again they ignore the possibility that norms gain moral power through means other than positivist enforcers or democratic participation. And they fail to see that international law norms are part of a "world constitutive process" of norm contestation and development.<sup>49</sup> Thus, if a norm attracts enough adherents over time, it acquires a moral force because, as a sociological and psychological matter, people, including policymakers, view it as such. As a result, to say that there is no moral obligation to comply with international law is, as noted above, simply a normative argument that states *should not* pay attention to such norms. Third, Goldsmith and Posner argue against what they call "cosmopolitan theory" which supposedly suggests that states have a duty to act on the basis of global rather than state welfare.<sup>50</sup> Yet, as discussed in Part III, their account radically limits the scope of cosmopolitanism, which potentially offers a more nuanced understanding of international legal

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46. *Id.* at 165.

47. *Id.*

48. *Id.* at 191–93 (noting, for example, that when states enter treaties, the treaties bind a large number of people to policies to which they did not consent and about which they have not had an opportunity to exercise rights of democratic participation).

49. Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 254–55 (1967) (referring to a process by which interactions among communities create "reciprocal demands, expectations, identities, and operational patterns" which then lead to "specialized institutional practices" that have real force in "sustaining stable contact, or restoring severed relations").

50. GOLDSMITH & POSNER, *supra* note 6, at 165–66.

process—a far more nuanced understanding, in fact, than the one Goldsmith and Posner themselves put forth.

## II. The Power of International Law

As discussed in Part I, Goldsmith and Posner deny that international law has any independent power that would tend to pull a state toward compliance in opposition to that state's interests. But once we unpack the idea of a state interest, we recognize that conceptions of proper policy do not simply arise in a vacuum. Rather, they are developed by human beings operating with various sets of assumptions, ideas about justice, conceptions of global strategy, and beliefs about morality. These assumptions, ideas, and cognitive categories are themselves shaped in part by what sociolegal scholars have long termed *legal consciousness*.<sup>51</sup> Thus, the legal norms that are “in the air” at any given moment of history—including international law norms—may well affect how both policy makers and ordinary citizens think about the state's interests. In addition, given that any state policy decision is inevitably the result of a contest among various bureaucratic power centers, all of which are themselves influenced by outside pressure groups, lobbyists, NGOs, and the like, a more complex understanding of international law would need to explore ways in which international legal norms empower specific interests both within and without the state policy-making apparatus and provide arguments and leverage that they might not otherwise have had. Accordingly, this Part first applies scholarship on legal consciousness to international law. Then, it examines the ways in which international legal arguments are deployed by those seeking to influence state policy choices. In both sections, I provide examples of how international law's power manifests in actual settings.

### A. *International Legal Consciousness*

Goldsmith and Posner fall into the positivist trap of seeing law only as that which coercively forces individuals (or states) to do things that they do not want to do. Not surprisingly, their view de-emphasizes the efficacy of international legal norms, except for treaties entered into by nation-states, because such norms generally do not have coercive power to back them up. But coercive power is not the only way that law can have an effect, either domestically or internationally. Indeed, as Martha Finnemore has noted, “[s]ocially constructed rules, principles, norms of behavior, and shared beliefs may provide states, individuals, and other actors with understandings of what is important or valuable and what are effective and/or legitimate means of obtaining those valued goods.”<sup>52</sup> As a result, law has an impact not

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51. See *infra* subpart II(A).

52. FINNEMORE, *supra* note 13, at 15.

merely (or perhaps even primarily) because it keeps us from doing what we want. Rather, law changes what we want in the first place.

Yet, while constructivists have long made such arguments, they have not drawn on the extensive domestic sociolegal scholarship on legal consciousness. That is a shame because legal consciousness scholars have sought to study empirically just how it is that legal categories become reflected in ordinary discourse and thought. Indeed, such scholars have argued that law operates as much by influencing modes of thought as by determining conduct in any specific case.<sup>53</sup> It is a constitutive part of culture, shaping and determining social relations<sup>54</sup> and providing “a distinctive manner of imagining the real.”<sup>55</sup>

For example, “[l]ong before we ever think about going to a courtroom, we encounter landlords and tenants, husbands and wives, barkeeps and hotel guests—roles that already embed a variety of juridical notions.”<sup>56</sup> Indeed, we cannot escape the categories and discourses that law supplies.<sup>57</sup> These categories may include ideas of what is public and what is private, who is an employer and who is an employee, what precautions are “reasonable,” who has “rights,” and so on.<sup>58</sup> In short, “it is just about impossible to describe any

53. See, e.g., KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* 30–32 (1988) (examining “the role of legal ideology in structuring mass consciousness”); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* 45 (1998) (defining “legal consciousness” and arguing that “every time a person interprets some event in terms of legal concepts or terminology—whether to applaud or to criticize, whether to appropriate or to resist—legality is produced” and “repeated invocation of the law sustains its capacity to comprise social relations”); MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 7 (1994) (“*Legal (or rights) consciousness* . . . refers to the ongoing, dynamic process of constructing one’s understanding of, and relationship to, the social world through use of legal conventions and discourses.”); SALLY ENGLE MERRY, *GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS* 5 (1990) (arguing that “[l]egal consciousness is expressed by the act of going to court as well as by talk about rights and entitlements” and that such “[c]onsciousness develops through individual experiences”); Susan S. Silbey, *Making a Place for Cultural Analyses of Law*, 17 *LAW & SOC. INQUIRY* 39, 42 (1992) (noting that “law contributes to the articulation of meanings and values of daily life”).

54. See, e.g., *id.* at 41 (arguing that “law is a part of the cultural processes that actively contribute in the composition of social relations”).

55. CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY* 173 (1983).

56. Austin Sarat & Jonathan Simon, *Beyond Legal Realism? Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 *YALE J.L. & HUMAN.* 3, 20 (2001).

57. Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 105 (1984) (“[I]n actual historical societies, the law governing social relations—even when never invoked, alluded to, or even consciously much thought about—has been such a key element in the constitution of productive relations that it is difficult to see the value . . . of trying to describe those relations apart from law.”).

58. Indeed, according to Sarat and Kearns:

Perhaps the most stunning example of law’s constitutive powers is the willingness of persons to conceive of themselves as legal subjects, as the kind of beings the law implies they are—and needs them to be. Legal subjects think of themselves as competent, self-directing persons who, for example, enter bargained-for exchanges as free and equal agents.

set of ‘basic’ social practices without describing the legal relations among the people involved—legal relations that don’t simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship . . . .”<sup>59</sup>

Because legal categories and ideas suffuse social life,<sup>60</sup> scholars have studied both how people think about the law and the ways in which largely inchoate ideas about the law can affect decisions they make.<sup>61</sup> Sally Engle Merry observes legal consciousness in “the way people conceive of the ‘natural’ and normal way of doing things, their habitual patterns of talk and action, and their commonsense understanding of the world.”<sup>62</sup> These understandings are often taken for granted. This is because legal consciousness may be so much a part of an individual’s worldview that it is present even when law is seemingly absent from an understanding or construction of life events.<sup>63</sup> Thus, “[w]e are not merely the inert recipients of law’s external pressures. Rather, we have imbibed law’s images and meanings so that they seem our own.”<sup>64</sup> Law is an often unnoticed, but

Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in *LAW IN EVERYDAY LIFE* 21, 28 (Austin Sarat & Thomas R. Kearns eds., 1993).

59. Gordon, *supra* note 57, at 103.

60. See Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 *LAW & SOC. INQUIRY* 903, 907 (1996) (“Law and Society scholarship depicts the law as a culturally and structurally embedded social institution.”).

61. Indeed, various authors have explored the legal consciousness of average citizens. See, e.g., BUMILLER, *supra* note 53; EWICK & SILBEY, *supra* note 53; MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT* (1979); MCCANN, *supra* note 53; MERRY, *supra* note 53; BARBARA YNGVESSON, *VIRTUOUS CITIZENS, DISRUPTIVE SUBJECTS: ORDER AND COMPLAINT IN A NEW ENGLAND COURT* (1993); Patricia Ewick & Susan S. Silbey, *Conformity, Contestation, and Resistance: An Account of Legal Consciousness*, 26 *NEW ENG. L. REV.* 731 (1992); Laura Beth Nielsen, *Situating Legal Consciousness: Experiences and Attitudes of Ordinary Citizens about Law and Street Harassment*, 34 *LAW & SOC’Y REV.* 1055 (2000); Austin Sarat, “. . . *The Law Is All Over*”: *Power, Resistance, and the Legal Consciousness of the Welfare Poor*, 2 *YALE J. L. & HUMAN.* 343 (1990); Austin Sarat & William L. F. Felstiner, *Lawyers and Legal Consciousness: Law Talk in the Divorce Lawyer’s Office*, 98 *YALE L.J.* 1663 (1989).

62. MERRY, *supra* note 53, at 5; see also Gordon, *supra* note 57, at 101 (arguing that we should “treat legal forms as ideologies and rituals whose ‘effects’—effects that include people’s ways of sorting out social experience, giving it meaning, grading it as natural, just, and necessary or as contrived, unjust and subject to alteration—are in the realm of consciousness”); Sarat & Simon, *supra* note 56, at 19 (“Law is part of the everyday world, contributing powerfully to the apparently ‘stable, taken-for-granted quality of that world and to the generally shared sense that as things are, so must they be.’”) (quoting Sarat & Kearns, *supra* note 58, at 30)).

63. See David M. Trubeck, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575, 604 (1984) (“Law, like other aspects of belief systems, helps to define the role of an individual in society and the relations with others that make sense.”); see also JEAN COMAROFF, *BODY OF POWER, SPIRIT OF RESISTANCE: THE CULTURE AND HISTORY OF A SOUTH AFRICAN PEOPLE* 4–5 (1985) (arguing that consciousness is “embedded in the practical constitution of everyday life, part and parcel of the process whereby the subject is constructed by external sociocultural forms”).

64. Sarat & Kearns, *supra* note 58, at 29. See also Gordon, *supra* note 57, at 109 (“[T]he power exerted by a legal regime consists less in the force that it can bring to bear against violators of its

nevertheless crucial, presence in our ideas of what is fair, appropriate, or natural.<sup>65</sup>

This focus on law in everyday life<sup>66</sup> recognizes that people interpret their experiences by drawing on a collaboration of law and other social structures.<sup>67</sup> These interpretations may be widely varied and will, of course, depend partly on social class, prior contacts with the law, and political standing.<sup>68</sup> Nevertheless, legal consciousness constitutes an ongoing interaction between official norms as embodied in the common sense categories of daily life and each individual's ongoing participation in the process of constructing legality.<sup>69</sup> Accordingly, legal consciousness includes the ways in which individuals themselves deploy, transform, or subvert official legal understandings and thereby "construct" law on the ground.<sup>70</sup>

rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.”).

65. See Gordon, *supra* note 57, at 111 (“In short, the legal forms we use set limits on what we can imagine as practical options: Our desires and plans tend to be shaped out of the limited stock of forms available to us: The forms thus condition not just our power to get what we want but what we want (or think we can get) itself.”). Indeed, scholars have noted that people’s judgments about praise and blame will often match the corresponding legal categories, even when those people are not familiar in detail with legal rules and doctrines. See generally THE ALLOCATION OF RESPONSIBILITY 109, 155–58 (Max Gluckman ed., 1972) (collecting essays by multiple authors analyzing similarities between industrialized societies and primitive African tribes in terms of their legal systems and behavioral patterns).

66. See, e.g., LAW IN EVERYDAY LIFE (Austin Sarat & Thomas R. Kearns eds., 1993).

67. David M. Engel & Frank W. Munger, *Rights, Remembrance, and the Reconciliation of Difference*, 30 LAW & SOC’Y REV. 7, 14 (1996) (asserting that their “study points to the mutuality and inseparability of law, culture, identity and experience” and that “[l]aw is one of the elements that constitute the categories and routines of everyday life”); Sarat, *supra* note 61, at 346 (arguing that welfare recipients, for example, “use legal ideas to interpret and make sense of their relationship to the welfare bureaucracy even as they refine those ideas by making claims the meaning and moral content of which are often at variance with dominant understandings”).

68. See, e.g., Davina Cooper, *Local Government Legal Consciousness in the Shadow of Juridification*, 22 J. L. & SOC’Y 506, 510 (1995) (“[L]aw is understood experientially, in ways shaped by class, education, geography, and occupational positioning.”); Carroll Seron & Frank Munger, *Law and Inequality: Race, Gender . . . and, of Course, Class*, 22 ANN. REV. SOC. 187, 202 (1996) (asserting that “[t]he relationship between lawyers and the evolution of . . . the class system[] should be a prime area for continuing development of theory and research”).

69. “Legality” is defined as those meanings, sources of authority, and cultural practices that are in some sense legal although not necessarily approved or acknowledged by official law. The concept of legality offers the opportunity to consider “how, where and with what effect law is produced in and through commonplace social interactions . . . . How do our social roles and statuses, our relationships, our obligations, prerogatives, and responsibilities, our identities, and our behaviors bear the imprint of law?” EWICK & SILBEY, *supra* note 53, at 20. See also Sarat & Kearns, *supra* note 58, at 55. (“Law is continuously shaped and reshaped by the ways it is used, even as law’s constitutive power constrains patterns of usage.”).

70. See, e.g., Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 140 (2000) (reviewing PAUL KAHN, THE CULTURAL STUDY OF LAW (1999)) (“Contests over meaning in courts or communities . . . become occasions for [sociolegal scholars to observe] the play of power. Meanings that seem natural, or taken-for-granted, are described as hegemonic, but because the construction of meaning through law is, in fact, typically contested, scholars show the many ways in which resistance occurs.”) (citation omitted). For discussions of

We all take part in the construction of legal consciousness, even as we are also inevitably affected by the legal categories of the social structures around us.

Although a detailed discussion of the legal consciousness literature is beyond the scope of this Book Review Essay, it seems clear that when Goldsmith and Posner complain that the international law constructivist literature lacks “a mechanism for *how* moral and legal talk influences national behavior,”<sup>71</sup> legal consciousness scholarship provides part of an answer. And while it is difficult to definitively prove a direct causal link between a legal conception and an individual’s category of thought, that does not mean that such processes are not very powerful determinants of how we think.

Ironically, in another context Jack Goldsmith himself appears to have acknowledged the importance of changes in legal consciousness. In an article cowritten with Cass Sunstein, Goldsmith notes that the recent creation of military commissions to try alleged terrorists engendered a storm of protest even though President Roosevelt’s similar decision to create a military commission during World War II was widely praised.<sup>72</sup> The authors take up the task of trying to explain this difference in response. In the end, they suggest that one of the most important changes from World War II to today is “a massively strengthened commitment to individual rights, not only within the culture but within the legal system itself.”<sup>73</sup> For example, they note that in 1942 the country was much less libertarian in its outlook:

[R]estrictions on free speech did not produce a firestorm of public protest. Libelous speech was commonly regulated, without discernible public objection. . . . [P]ublic opposition to discrimination was far more tepid than it is today. Nor did the public insist on what we now take to be minimal procedural safeguards for the accused.<sup>74</sup>

Goldsmith and Sunstein do not delve into the question of what caused these shifts in social attitudes,<sup>75</sup> but it seems quite clear that changes in the framework of constitutional law had something to do with it. And we need not engage in unsolvable conundrums such as whether changes in attitudes lead to changes in law or vice versa to recognize that, at the very least, the changes in law reinforce shifts in societal perceptions, even among those who are not consciously aware of the actual legal doctrines they have imbibed. Thus, as discussed in more detail below, ordinary people are far

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these forms of resistance, see EWICK & SILBEY, *supra* note 53; Ewick & Silbey, *supra* note 61; MERRY, *supra* note 53; Yngvesson, *supra* note 61.

71. GOLDSMITH & POSNER, *supra* note 6, at 171.

72. Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 261–62 (2002).

73. *Id.* at 282.

74. *Id.*

75. *Id.*

more likely to frame their claims in rights terms after the so-called rights revolution of the Warren and Burger Court eras, than they would have in earlier periods of American history.

Although Goldsmith and Sunstein acknowledge changes in domestic law during the sixty years from Roosevelt's military commissions to today, they do not focus on the parallel "rights revolution" in international law. Since World War II, we have seen the large-scale development of international human rights treaties, conventions, declarations, courts, and institutions, along with their related monitoring bodies, NGO watchdog groups, and cause lawyers. While it is unclear, as Goldsmith and Sunstein point out, whether the military commissions are actually illegal under international law,<sup>76</sup> the crucial point is that all of this international norm development (along with the concurrent—and obviously related—rise in rights talk under the U.S. Constitution) is likely to have affected perceptions and intuitions about the propriety and wisdom of creating military commissions today. Likewise, it is striking that even the Bush administration was forced to pay lip service to the United Nations during the run-up to the invasion of Iraq, if only because U.S. popular opinion demanded it.<sup>77</sup> Indeed, various polls taken in February and March 2003 indicated that a sizable majority of Americans wanted the U.S. to work through the U.N.<sup>78</sup> This too is undoubtedly, in part, the result of changes in legal consciousness over the past sixty years about international legal institutions and international processes.

Other domestic examples help suggest ways in which legal norms change consciousness over time, even when the literal enforcement of the legal norm is lacking. Perhaps the most famous such instance is the U.S. Supreme Court's declaration in *Brown v. Board of Education*<sup>79</sup> that racially segregated schools were inherently unequal. This declaration had enormous

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76. See *id.* at 277–78 (describing the "possible illegality" of the Bush order).

77. See Ron Hutcherson, *Bush Acts to Rally the Nation for Iraq War*, PHILADELPHIA INQUIRER, Mar. 3, 2003, at A5 (noting that while Bush repeatedly said that he was prepared to go to war with or without U.N. backing, public approval for such a war turned to opposition "if the United States ha[d] to act without U.N. support" and that "[d]espite Bush's public disdain for polls, he and his advisers are keeping close watch on the national mood in the final countdown to war").

78. For example, one survey from February 2003 indicated that nearly 65% of Americans believed that it was at least "desirable" for the U.S. to get a fresh mandate from the United Nations before launching military action in Iraq. See Editorial, *Behind Bush & Blair*, INVESTOR'S BUS. DAILY, Feb. 24, 2003, at A18 (commenting on a recent IBD/TIPP Poll and observing that "34% [of Americans] insist on a U.N. mandate before we can go [into Iraq] and another 29% say that would be desirable, though not essential"). Likewise, 62% of those surveyed in a *Los Angeles Times* poll "said they would back a war effort endorsed by the U.N. Security Council" with only 55% supporting a "military action with some allied backing, but without U.N. concurrence." Mark Z. Barabak, *Showdown with Iraq; The Times Poll*, L.A. TIMES, Feb. 9, 2003, at A1. Even as late as March 13–16, 54% of Americans believed that the United States should first get a U.N. resolution to use force before attacking Iraq. THE PEW RESEARCH CENTER, AMERICA'S IMAGE FURTHER ERODES, EUROPEANS WANT WEAKER TIES 7 (2003), <http://people-press.org/reports/pdf/175.pdf>.

79. 347 U.S. 483 (1954).

importance as a statement of an assimilationist ideal, even though legally enforced segregation persisted for many years,<sup>80</sup> and de facto segregation still exists today.<sup>81</sup> Of course, some may justly believe that the mere statement of a norm is woefully insufficient when true enforcement is necessary, but that does not mean that the normative statements are not independently important.<sup>82</sup> Indeed, as Jeremy Waldron points out, *Brown's* "archetypal power is staggering: In the years since 1954 it has become an icon of the law's commitment to demolish the structures of de jure (and perhaps also de facto) segregation and to pursue and discredit forms of discrimination and badges of racial inferiority wherever they crop up in American law or public administration."<sup>83</sup> As one African-American man, serving in the Marines at the time, has stated:

On this momentous night of May 17, 1954, I felt that at last the government was willing to assert itself on behalf of first-class citizenship, even for Negroes. I experienced a sense of loyalty that I had never felt before. I was sure that this was the beginning of a new era of American democracy.<sup>84</sup>

Even though the federal government's commitment to ending segregation lagged over the next ten years,<sup>85</sup> the sentiments expressed by this man indicate the psychological effects of even a legal statement that is not enforced.

Moreover, while it is, of course, "impossible to gauge the specific consequences of any given court decision, given that such decisions occur

80. See PETER IRONS, *THE COURAGE OF THEIR CONVICTIONS* 109–10 (1988) ("The Supreme Court's refusal to set deadlines for desegregation invited Southern officials to invent foot-dragging tactics, and frustrated the NAACP lawyers who had struggled for years with cautious and often hostile federal judges, most of them closely tied to [the] local power structures.").

81. See generally, e.g., Nancy A. Denton, *The Persistence of Segregation: Links Between Residential Segregation and School Segregation*, 80 MINN. L. REV. 795 (1996) (arguing that school segregation remains high in large part because of high degrees of residential segregation).

82. Cf. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 111 (1977) (distinguishing between the "enactment force" and the "gravitational force" of precedents).

83. See Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1725 (2005); see also Jack M. Balkin, *Brown as Icon*, in *WHAT BROWN V. BOARD OF EDUCATION SHOULD HAVE SAID: THE NATION'S TOP LEGAL EXPERTS REWRITE AMERICA'S LANDMARK CIVIL RIGHTS DECISION* 3, 3–4 (Jack M. Balkin ed., 2001) (noting *Brown's* enduring iconic power in contemporary American culture and politics); Christopher E. Smith, *Law and Symbolism*, 1997 DET. C. L. REV. 935, 938 ("Although actual implementation of school desegregation took many years, the Supreme Court's decision [in *Brown*] constituted an important symbolic statement that could call attention to injustice, confer legitimacy upon civil rights activists, and encourage political mobilization against discrimination.").

84. THE EYES ON THE PRIZE CIVIL RIGHTS READER 36 (Clayborne Carson et al. eds., 1991).

85. See Sheryll D. Cashin, *The Civil Rights Act of 1964 and Coalition Politics*, 49 ST. LOUIS U. L.J. 1029, 1033–34 (2005) ("In the ten years between the Supreme Court's announcement of the *Brown* decision . . . and the passage of the [Civil Rights Act of 1964], virtually no progress was made in school desegregation.").

within a larger social context,”<sup>86</sup> *Brown* generated optimism within activists in the civil rights movement and helped provide them with an additional platform.<sup>87</sup> As one commenter has noted, “[o]ne of the major consequences of the *Brown* decision was that it was a catalyst for hope and mobilization, rousing the most vigorous and sustained movement for change ever mounted in the United States.”<sup>88</sup> Indeed, in the ten years following *Brown*, civil rights activity was extraordinary, culminating in the passage of the Civil Rights Act of 1964.<sup>89</sup> And while it is possible to debate the degree to which legal decisions such as *Brown* reflect societal change or help cause such change, there can be little doubt that *Brown* was, at the very least, an inspiration to other mobilizing groups, such as women, homosexuals, the elderly, and the disabled.<sup>90</sup>

Finally, the change in racial attitudes—at least as expressed in opinion polls—since *Brown* is extraordinary. In 1954, when the case was decided, 55% of Americans approved of the decision and 40% disapproved.<sup>91</sup> Forty years later, 87% approved and 11% disapproved.<sup>92</sup> Likewise, in 1942, 68% of the American public supported racially segregated schools; by 1985 that number had dropped to 7%.<sup>93</sup> And the decades since *Brown* have brought an American consensus in favor of equal access to jobs not only for African Americans but for all groups.<sup>94</sup> As one sociologist has observed, these changes have been “large, steady, and sweeping.”<sup>95</sup> Of course, such changes have not eradicated racism (though they may have pushed it underground), nor are they all directly attributable to *Brown*, but it seems clear that, whatever the combination of causes, there has been a shift in legal consciousness since the *Brown* decision.

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86. Margaret L. Andersen, *From Brown to Grutter: The Diverse Beneficiaries of Brown v. Board of Education*, 2004 U. ILL. L. REV. 1073, 1079.

87. *Id.* at 1079 (“Perhaps the most immediate consequence of the *Brown* decision was the optimism it generated, and the platform it created, for the mobilization of the Civil Rights Movement.”).

88. *Id.* at 1081. *But see* Michael J. Klarman, *Brown, Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 11 (1994) (finding little evidence of this effect and suggesting that *Brown* was a catalyst for the Civil Rights Act only because the decision pushed white southerners so far to the right that it provoked a national backlash).

89. Pub. L. No. 88-352, 78 Stat. 241 (1964).

90. Andersen, *supra* note 86, at 1081.

91. Julie Ray, *Reflections on the “Trouble in Little Rock,” Part II*, GALLUP POLL TUESDAY BRIEFING, Mar. 4, 2003, at 71.

92. *Id.* at 72.

93. Lawrence D. Bobo, *The Color Line, the Dilemma, and the Dream: Race Relations in America at the Close of the Twentieth Century*, in CIVIL RIGHTS AND SOCIAL WRONGS: BLACK-WHITE RELATIONS SINCE WORLD WAR II, at 31, 36 (John Higham ed., 1997).

94. *See* Daniel Yankelovich, *How Changes in the Economy Are Reshaping American Values*, in VALUES AND PUBLIC POLICY 16, 31–32 (Henry J. Aaron et al. eds., 1994) (“Unlike the America of the 1930s, the American public today accepts a pluralistic society in which women and minorities have access to equal opportunities with white males.”).

95. Bobo, *supra* note 93, at 38.

Similar changes can be seen elsewhere in domestic law. For example, prior to the enactment of laws protecting battered women, acts of domestic violence such as marital rape had not been viewed as serious social problems, let alone crimes.<sup>96</sup> Efforts to criminalize such behavior therefore symbolically indicated that the criminal justice system was beginning to take violence against women seriously.<sup>97</sup> Most importantly, wife abuse was moved out of the private sphere and into public awareness. Indeed, the mere idea that spousal abuse might actually be a crime rather than a private dispute is a significant change. Thus, the criminal justice system now incorporates, at least to some extent, feminist ideas about domestic violence into its standard understanding of violence between males and females.

Likewise, sexual harassment law has brought about large attitudinal shifts that go far beyond the literal legal requirements. For example, corporations responding to the threat of Title VII have introduced major institutional changes that have altered many aspects of workplace culture.<sup>98</sup> At the same time, male–female relations in the workplace now reflect internalized norms against sexual harassment.<sup>99</sup> One can dispute whether the impacts have been good or bad, but it is difficult to deny them altogether. And while feminists and religious conservatives may debate the wisdom of the no-fault divorce revolution,<sup>100</sup> neither side seriously disputes that the

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96. See SUSAN SCHECHTER, *WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT* 157–69 (1982) (chronicling difficulties women faced in convincing police to make arrests or in convincing courts to provide remedies in domestic violence cases). Indeed, for many years rape laws featured an exception that made it impossible for a husband to rape his wife. See, e.g., *Warren v. State*, 336 S.E.2d 221, 223 (Ga. 1985) (discussing common law theory that a husband could not be held criminally liable for raping his wife).

97. See Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen when Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 84 (2003) (arguing that "interventions such as arrest, prosecution and treatment" symbolically indicated "that the system was beginning to take violence against women seriously").

98. As Susan Sturm has noted:

Proactive lawyers (some plaintiffs', some management's) are spearheading the redesign of employment systems in companies concerned about the adequacy and legal vulnerability of their workplace practices. Civil rights-oriented lawyers are serving stints in newly-designed positions within companies that have embarked on major change initiatives. Workplace advocacy organizations are experimenting with interesting combinations of law, policy, organization, community development, training, and institutional redesign.

Susan Sturm, *Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 278.

99. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064 (2003) (arguing that "sexual harassment law, as envisioned by some feminist reformers and implemented by many human resource (HR) managers, has become an important justification for a neo-Taylorist project of suppressing sexuality and intimacy in the workplace").

100. Compare Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 86 (2004) (arguing that "the availability of free exit through no-fault divorce" is "a bedrock liberal value" that "stands for the right to withdraw or refuse to engage; it is the ability to dissociate, to cut oneself out of a relationship with other persons"), with Katherine Shaw Spatt, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 9

change in divorce laws has helped alter cultural attitudes about marriage and divorce over the past three decades.

It is true, as mentioned previously, that these various changes cannot ever be traced solely to changes in legal norms. Indeed, in all of these cases, the legal changes occurred alongside social and political changes, and disentangling which caused which would be an impossible (and fruitless) effort. Moreover, there are also instances when changes in law do not appear to have affected either actions or attitudes on the ground. Perhaps most famously, Stewart Macaulay's study of contractual relations seems to indicate that changes in contract law doctrine had no impact on the form contracts used all the time by repeat players in the manufacturing sector, who relied on more informal sanctions to encourage contract compliance and who never envisioned going to court over a contract dispute in any event.<sup>101</sup>

Because of these sorts of limitations, constructivism has sometimes been criticized for lacking analytical rigor, and it has not been very successful in developing a framework that would allow one to predict in advance when a legal regime is likely to shape attitudes, interests, and consciousness, and when it is not.<sup>102</sup> Indeed, Goldsmith and Posner would likely argue that the inability to predict when international law will affect state decisions and when it will not renders it useless as a tool for discussing international relations.

Yet there is no reason to sacrifice a richer understanding of empirical phenomena just because one wants the supposed clarity of a distortingly simplified framework. The mere fact that changes in legal consciousness are difficult to quantify and predict does not render them any less important in analyzing state behavior concerning international law. Indeed, there are simply too many instances when we do see state actors internalize the norms of international law to dismiss them as flukes or explain them away as mere strategic behavior. Perhaps the best-known example of a change in international legal consciousness concerns the very idea of crimes against humanity. At the time of the Nuremberg prosecutions, it was not at all clear that the pre-war atrocities committed by the German government against German citizens constituted an international crime punishable outside Germany itself.<sup>103</sup> Yet, the statute of the Nuremberg tribunal and the

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(2003) ("The repeal of the law of legal separation and the substitution of the procurement of divorce with relative ease affected the stability of marriage, not only as to its duration, but also as to its quality.").

101. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

102. See Ruggie, *supra* note 13, at 883 (acknowledging that constructivism "remains relatively poor at specifying its own scope conditions, the contexts within which its explanatory features can be expected to take effect").

103. See Diane F. Orentlicher, *Settling Accounts: The Duty to Punish Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2555 (1991) ("To the extent that they reached Nazi offenses against German nationals, the Nuremberg prosecutions represented a radical innovation in

decisions of the tribunal itself effectively established such a crime.<sup>104</sup> Then, subsequent to Nuremberg, almost every state for the first time voluntarily subjected itself to the Genocide Convention,<sup>105</sup> further enshrining the idea that individuals might have international rights against their own nation-states. Today, this idea is sufficiently well accepted that we commonly see international prosecutions for crimes against humanity committed within state borders,<sup>106</sup> and the International Criminal Court has jurisdiction over such crimes.<sup>107</sup> Significantly, though the U.S. has not ratified the International Criminal Court statute,<sup>108</sup> the basic idea of a crime against

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international law. With few and limited exceptions, international law had not previously addressed a state's treatment of its own citizens, much less imposed criminal sanctions for such conduct.”)

104. See Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, Art. 6(c) (establishing individual responsibility for crimes against humanity committed “before or during the war”) (emphasis added); International Military Tribunal, Opinion & Judgment, The Law Relating to War Crimes and Crimes Against Humanity, available at <http://www.yale.edu/lawweb/avalon/imt/proc/judlawre.htm>. At the time, this issue raised serious retroactivity concerns precisely because the statute was effectively establishing a new international crime. Accordingly, the Tribunal finessed this issue, interpreting the statute to give the Tribunal jurisdiction over only those crimes against humanity that were deemed sufficiently related to the other two crimes in the statute: crimes against peace and war crimes. See *id.* (“To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal.”).

105. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 2, S. Exec. Doc. O, 81-1, at 7 (1949), 78 U.N.T.S. 277, 280. For a list of ratifying countries, see <http://www.ohchr.org/english/countries/ratification/1.htm>.

106. See, e.g., Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 841–42 (2005) (considering the work of the International Criminal Tribunal for the Former Yugoslavia and noting that war crimes, crimes against humanity, and genocide “have been made subject to international jurisdiction, although some were committed domestically, reflecting radical developments in the construction of international criminal jurisdiction”).

107. Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999.

108. See <http://www.iccnw.org/countryinfo/worldsignsandratifications.html> (listing ratification history of the statute).

humanity under international law is no longer seriously in doubt,<sup>109</sup> signifying an important shift from World War II to the present day.<sup>110</sup>

In addition, there is evidence that even military officers, who might be supposed to resist any limits on their strategic behavior, may come to imbibe and espouse international norms. For example, in the U.S. military, every proposed bombing target is vetted by lawyers who work to ensure that the minimum possible collateral damage is created, in accordance with international law.<sup>111</sup> Likewise, military lawyers and current and former military officers have been among the loudest opponents of the Bush administration's lack of concern for abiding by the Geneva Conventions in detaining and interrogating terrorism suspects.<sup>112</sup> These acts are not

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109. For example, the U.S. supported the creation of the ICTY (International Criminal Tribunal for the Former Yugoslavia), see Wayne Sandholtz, *The Iraqi National Museum and International Law: A Duty to Protect*, 44 COLUM. J. INT'L L. 185, 204 (2005) ("The United States supported the creation of the ICTY and has contributed to its work, not least by providing experienced investigators and prosecutors to the ICTY Office of The Prosecutor."), whose enabling statute included crimes against humanity in its jurisdictional reach. Statute of the International Criminal Tribunal for the Former Yugoslavia art. 5, May 25, 1993, 32 I.L.M. 1192, 1193-94. In addition, U.S. courts have regularly recognized crimes against humanity as a violation of the Law of Nations that is cognizable under the Alien Tort Claims Act, 28 U.S.C. § 1350. See, e.g., Beth Stephens, *Sosa v. Alvarez-Machain: "The Door is Still Ajar" for Human Rights Litigation in U.S. Courts*, 70 BROOK. L. REV. 533, 537 & n.18 (2004) (noting U.S. cases interpreting the ATCA that have "recognized a small core of actionable human rights violations in addition to torture, including summary execution, disappearance, war crimes, *crimes against humanity*, slavery, and arbitrary detention") (emphasis added).

110. See, e.g., David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85, 86 (2004) ("The phrase 'crimes against humanity' has acquired enormous resonance in the legal and moral imaginations of the post-World War II world.").

111. SECRETARY OF THE AIR FORCE, AIR FORCE INSTRUCTION 13-1AOC, VOL. 3 § 8.4 (2005), available at <http://www.e-publishing.af.mil/pubfiles/af/13/afi13-1aocv3/afi13-1aocv3.pdf>.

112. For example, in six memoranda dated from February 5 to March 13, 2003, the Air Force, Army, Navy, and Marine Offices of the Judge Advocate General protested "extreme" interrogation techniques being permitted in the so-called war against terrorism. Memorandum from Jack L. Rives, Major Gen., U.S. Air Force, Deputy Judge Advocate Gen., to Air Force Gen. Counsel (Feb. 5, 2003), available at <http://balkin.blogspot.com/jag.memos.pdf>; Memorandum from Jack L. Rives, Major Gen., U.S. Air Force, Deputy Judge Advocate Gen., to Air Force Gen. Counsel (Feb. 6, 2003), available at <http://balkin.blogspot.com/jag.memos.pdf>; Memorandum from Michael F. Lohr, Rear Admiral, U.S. Navy, Judge Advocate Gen., to Air Force Gen. Counsel (Feb. 6, 2003), available at <http://balkin.blogspot.com/jag.memos.pdf>; Memorandum from Kevin M. Sandkuhler, Brigadier Gen., U.S. Marine Corps, Staff Judge Advocate to Commandant of the Marine Corps, to Air Force Gen. Counsel (Feb. 27, 2003), available at <http://balkin.blogspot.com/jag.memos.pdf>; Memorandum from Thomas J. Romig, Major Gen., U.S. Army, Judge Advocate Gen., to Air Force Gen. Counsel (Mar. 3, 2003), available at <http://balkin.blogspot.com/jag.memos.pdf>; Memorandum from Michael F. Lohr, Rear Admiral, U.S. Navy, Judge Advocate Gen., to Air Force Gen. Counsel (Mar. 13, 2003), available at <http://balkin.blogspot.com/jag.memos.pdf>. As Air Force Major General Jack Rives wrote in one of the memoranda:

[T]he use of the more extreme interrogation techniques simply is not how the U.S. armed forces have operated in recent history. We have taken the legal and moral "high-road" in the conduct of our military operations regardless of how others may operate. Our forces are trained in this legal and moral mindset beginning the day they enter active duty. It should be noted that law of armed conflict and code of conduct training have been mandated by Congress and emphasized since the Viet Nam conflict

explainable simply by suggesting that this is a “cooperation game” where military officers wish to obey international law solely to ensure that U.S. targets or captured soldiers in the future are treated similarly. Instead, it seems clear that these officials have internalized the values of international law and see them as part of what is required, both morally and strategically. Similarly, in the environmental context, we have seen multinational corporations supporting the Kyoto protocol on global climate change,<sup>113</sup> either because they want to take part in the growing international trade in pollution credits,<sup>114</sup> or because they seek future profits from investments in renewable energy.<sup>115</sup> Such activities suggest that corporations, through the mechanism of capitalist self-interest, have come to internalize (and seek profit from) an international environmental norm. Further, such norm internalization by nongovernmental entities can in turn influence governmental actors.

Finally, obedience to international legal norms, even if sometimes detrimental to state interests in the short term—because one is restrained from taking certain actions—may further state interests in the longer term by allowing the state to have legitimacy and a certain morally persuasive voice in the eyes of other states. Indeed, it is significant that Goldsmith and Posner almost entirely exclude so-called “soft law”<sup>116</sup> or “soft power”<sup>117</sup> from their

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when our POWs were subjected to torture by their captors. We need to consider the overall impact of approving extreme interrogation techniques as giving official approval and legal sanction to the application of interrogation techniques that U.S. forces have consistently been trained are unlawful.

Memorandum from Jack L. Rives, Major Gen., U.S. Air Force, Deputy Judge Advocate Gen., to Air Force Gen. Counsel (Feb. 5, 2003), *available at* <http://balkin.blogspot.com/jag.memos.pdf>.

113. Kyoto Protocol to the U.N. Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 22.

114. See Ricardo Bayon, *Trading Futures in Dirty Air: Here's a Market-Based Way to Fight Global Warming*, WASH. POST, Aug. 5, 2001, at B02 (arguing that President Bush should sign on to the Kyoto Protocol in part because the emerging market in pollution credits is poised to be extremely profitable); Jay Newton-Small & Jonathan D. Salant, *GM, DuPont Adapt to Kyoto Environmental Standards*, BLOOMBERG NEWS SERV., Nov. 15, 2004, *available at* <http://www.bloomberg.com/apps/news?pid=71000001&refer=us&sid=aSedVkbj0CwQ> (“Enron Corp., DuPont, American Express Power Co. and other U.S. companies urged Bush to salvage parts of the treaty, saying they viewed regulation as inevitable and they wanted credit for cutting their emissions.”); see also Marianne Lavelle, *A Shift in the Wind on Global Warming*, U.S. NEWS & WORLD REP., Mar. 19, 2001, at 39, 39 (“Many businesses active on global warming envision . . . a market-based trading system that would allow farmers and others who cut carbon emissions to get credits they could sell to carbon-emitting businesses. Perhaps that’s why traditional manufacturers . . . have joined forces with pro-regulatory groups like the Pew Center for Global Climate Change.”).

115. See William Drozdiak, *U.S. Firms Become “Green” Advocates: Global Warming Talks Near End*, WASH. POST, Nov. 24, 2000, at E1 (“Aidan Murphy, vice president at Shell International, says the Kyoto treaty has prompted the British-Dutch oil company to shift some of its focus away from petroleum toward alternative fuel sources.”).

116. For discussions of “soft law,” see, for example, Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 53 INT’L ORG. 421 (2000); Christine Chinkin, *Normative Development in the International Legal System*, in COMMITMENT AND COMPLIANCE:

analysis. Yet it is difficult to see how a state could hope to further its long-term interests without being able to convince others to follow certain policies simply through the power of persuasion and moral authority. The problem is that Goldsmith and Posner, because they simply assume a set of interests, provide no way of choosing between these short-term and longer-term interests. As Martha Finnemore has pointed out:

[I]t is all fine and well to assume that states want power, security, and wealth, but what kind of power? Power for what ends? What kind of security? What does security mean? How do you ensure or obtain it? Similarly, what kind of wealth? Wealth for whom? How do you obtain it?<sup>118</sup>

Goldsmith and Posner, like the neorealists and neoliberals before them, have no answer to these questions. And, even worse, their framework does not allow such questions to be raised.

To be sure, one can certainly find instances when international law does appear to envision itself as a coercive set of rules meant to constrain states. For example, the U.N. Charter lays out a use-of-force regime that is clearly intended to prevent states from engaging in certain belligerent acts.<sup>119</sup> And we can readily concede that states might sometimes refuse to follow such constraints—as with the Bush doctrine of preemptive war—though such refusal may carry severe consequences to the nonconforming state.<sup>120</sup> Thus, when Goldsmith and Posner argue that such international law regimes do not, in the end, stop states from pursuing their own interests, such a statement may be true in a certain limited category of cases.

But just as importantly, many aspects of the international normative order do not lend themselves to this type of framework. Indeed, by excluding soft law, Goldsmith and Posner limit their field of vision to the formal, state-centered international law regimes that are arguably playing a less and less important role in the transnational order.<sup>121</sup> Moreover, in many cases, it is not that the international regime is *constraining* states but that the

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THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL SYSTEM 21 (Dinah Shelton ed., 2000); Dinah Shelton, *Compliance with International Human Rights Soft Law*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS 9 (Edith Brown Weiss ed., 1997).

117. See, e.g., JOSEPH S. NYE, THE PARADOX OF AMERICAN POWER: WHY THE WORLD'S ONLY SUPERPOWER CAN'T GO IT ALONE 9 (2002) (defining soft power as “getting others to want what you want”).

118. FINNEMORE, *supra* note 13, at 1–2.

119. See U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

120. For example, other countries may withhold funds or manpower, and forging compromise on a host of other issues may become more difficult.

121. See Paul Schiff Berman, *From International Law to Law and Globalization*, 43 COLUM. J. TRANSNAT'L L. 485 (2005) (discussing this expansion of international law to include less formal transnational and international mechanisms).

international regime *creates the impetus for action* in the first place. For example:

Prior to the actions of UNESCO, most states, especially less developed countries, had no notion that they needed or wanted a state science bureaucracy. Similarly, European heads of state were not particularly concerned about treatment of the war wounded until Henri Dunant and the International Committee of the Red Cross made it an issue. Global poverty alleviation, while long considered desirable in the abstract, was not considered a pressing responsibility of states, particularly of developed states, until the World Bank under Robert McNamara made it a necessary part of development.<sup>122</sup>

Thus, the persuasive power of international norms caused states to develop interests they might not otherwise have had.

In each of these instances, international law is shaping the consciousness of state actors, not operating to constrain them from taking actions they would otherwise pursue. Similarly, as Thomas Berger argues, in Germany and Japan today, antimilitarism is as crucial to national identity as militarism was in the World War II era.<sup>123</sup> These are changes in the states' conceptions of their own interests, influenced by the international legal regime that Germany in particular has long championed. Again, the important impact of such international regimes has no place in the Goldsmith–Posner framework.

Indeed, Goldsmith and Posner go so far as to deny that the existence of a legal norm or agreement necessarily changes the constitutive terms of the relationships among nation–states. According to Goldsmith and Posner, even a treaty exerts no “normative pull.”<sup>124</sup> Rather, “[s]tates refrain from violating treaties (when they do) for the same basic reason they refrain from violating nonlegal agreements: because they fear retaliation from the other state or some kind of reputational loss, or because they fear a failure of coordination.”<sup>125</sup> But once Goldsmith and Posner acknowledge that reputational loss could factor into nation–state decisionmaking, they have essentially conceded that the treaty regime does indeed have a normative pull. This is because the potential reputational loss is made greater by the existence of the treaty regime itself. The treaty effectively alters the terms of the relationship among the parties and necessarily changes their bargaining positions. The same is true of customary international law. Once a norm is named a customary international law norm, then violation of that norm will have far more serious reputational costs. This is not to say that states will never violate such a customary norm, but rather that the naming of the norm

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122. FINNEMORE, *supra* note 13, at 12.

123. THOMAS U. BERGER, CULTURES OF ANTIMILITARISM: NATIONAL SECURITY IN GERMANY AND JAPAN 8–9 (1998).

124. GOLDSMITH & POSNER, *supra* note 6, at 90.

125. *Id.*

itself makes violating the norm that much more difficult without suffering consequences. Again, the international legal framework changes the constitutive relationship among nation–states.

Goldsmith and Posner respond by saying that such reputational costs do not amount to a true normative pull, and they liken a treaty to a nonbinding letter of intent, which they argue does not itself cause parties to follow its terms.<sup>126</sup> But, of course, that is precisely how seemingly nonbinding letters of intent *do* work. By stating an intent to do something, a party vastly increases the likelihood of doing it because the statement of the intent to be bound changes expectations of the parties and increases reputational costs for noncompliance.<sup>127</sup>

Thus, while the Goldsmith–Posner framework has the advantage of simplicity, we must be careful that simplicity does not devolve into oversimplification or simplemindedness. We need a richer account of how law actually operates, both domestically and internationally, than the positivist vision Goldsmith and Posner assume. We imbibe legal norms and cognitive categories even when we are not consciously aware of the norm in question. We are persuaded by legal norms even when those norms are not literally enforceable. We act in accordance with law because doing so has become habitual, not because we seek to avoid sanction. We conceive of our interrelations with others in terms of law because our long-term interests require that we do so, even when our short-term interest might seem to counsel otherwise. And the existence of a legal norm alters the constitutive terms of our relationships with others as well as the costs of noncompliance. All of these factors may be overcome in some circumstances. Indeed, people sometimes violate domestic law just as states sometimes violate international law. But in neither case does that mean that the law in question has no significant constraining force. And only by thinking more broadly about changes in legal consciousness and the complicated social, political, and psychological factors that enter into the conceptualization of state interests can we begin to understand how international law operates.

### *B. Multiple Constituencies and the Deployment of International Law*

As discussed previously, Goldsmith and Posner treat the state as a unitary “personality” with a single set of interests. But, of course, the real world is far more messy, with a vast number of constituencies both within the governmental bureaucracy and outside it. This cacophony of voices is

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126. *See id.* at 90–91.

127. *See, e.g.*, OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 100 (1991) (arguing that states tend to view the nonbinding agreements that they enter into in good faith as political or moral obligations upon which other states will rely and expect compliance); Peter M. Haas, *Why Comply, or Some Hypotheses in Search of an Analyst*, in INTERNATIONAL COMPLIANCE WITH NONBINDING ACCORDS, *supra* note 116, at 31, 33 (arguing that activities such as monitoring a state’s compliance with a nonbinding agreement and direct verification of compliance may induce that state to comply in order to avoid detection and potential criticism).

important both because it challenges the seductive simplicity of the vision offered by Goldsmith and Posner and because many of these voices, when advocating policy positions, can use the moral authority or persuasive power of international law norms for leverage. International law therefore becomes a tool of empowerment for particular actors. These actors deploy international law arguments strategically, and may gain more of a foothold for their views because of international law. As a result, international law has a significant impact in domestic foreign policy debates because it may change the relative power of different interest groups seeking to shape that policy.

For example, although the celebrated efforts of Spanish Judge Baltasar Garzón to try former Chilean leader Augusto Pinochet<sup>128</sup> were not literally “successful” because Pinochet was never extradited to Spain,<sup>129</sup> they strengthened the hands of human rights advocates within Chile itself and provided the impetus for a movement that led to a Chilean Supreme Court decision stripping Pinochet of his lifetime immunity.<sup>130</sup> Likewise, Spanish efforts to prosecute members of the Argentine military have bolstered

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128. Judge Garzón issued an arrest order based on allegations of kidnappings, torture, and planned disappearances of Chilean citizens and citizens of other countries. Spanish Request to Arrest General Pinochet, Oct. 16, 1998, *reprinted in* THE PINOCHET PAPERS: THE CASE OF AUGUSTO PINOCHET IN SPAIN AND BRITAIN 57–59 (Reed Brody & Michael Ratner eds., 2000) [hereinafter THE PINOCHET PAPERS]. See also Anne Swardson, *Pinochet, Pinochet Case Tries Spanish Legal Establishment*, WASH. POST, Oct. 22, 1998, at A27 (“As Chilean president from 1973 to 1990, Garzón’s arrest order said, Pinochet was ‘the leader of an international organization created . . . to conceive, develop and execute the systematic planning of illegal detentions [kidnappings], torture, forced relocations, assassinations and/or disappearances of numerous persons, including Argentines, Spaniards, Britons, Americans, Chileans and other nationalities.’”). On October 30, 1998, the Spanish National Court ruled unanimously that Spanish courts had jurisdiction over the matter based both on the principle of universal jurisdiction (that crimes against humanity can be tried anywhere at any time) and the passive personality principle of jurisdiction (that courts may try cases if their nationals are victims of crime, regardless of where the crime was committed). S Audiencia Nacional, Nov. 5, 1998 (No. 173/98), *reprinted in* THE PINOCHET PAPERS, *supra*, at 95, 95–107. For an English translation of the opinion, see THE PINOCHET PAPERS, *supra*, at 95, 95–107. The Office of the Special Prosecutor alleged that Spaniards living in Chile were among those killed under Pinochet’s rule. *Id.* at 106.

129. Pinochet was physically in Great Britain. The British House of Lords ultimately ruled that Pinochet was not entitled to head-of-state immunity for acts of torture and could be extradited to Spain. *Regina v. Bow St. Metro. Stipendiary Magistrate, Ex parte Pinochet* (No. 3), [2000] 1 A.C. 147, 204–05 (H.L. 1999) (appeal taken from Q.B. Div’l Ct.) (holding that the International Convention Against Torture, incorporated into United Kingdom law in 1988, prevented Pinochet from claiming head-of-state immunity after 1988, because the universal jurisdiction contemplated by the Convention is inconsistent with immunity for former heads of state). Nevertheless, the British government refused to extradite, citing Pinochet’s failing health. See Jack Straw, Sec’y of State Statement in the House of Commons (Mar. 2, 2000), *in* THE PINOCHET PAPERS, *supra* note 128, at 481, 482 (“[I]n the light of th[e] medical evidence . . . I . . . conclude[d] that no purpose would be served by continuing the Spanish extradition request.”). Pinochet was eventually returned to Chile.

130. See *Chile’s Top Court Strips Pinochet of Immunity*, N.Y. TIMES, Aug. 27, 2004, at A3 (“Chile’s Supreme Court stripped the former dictator Augusto Pinochet of immunity from prosecution in a notorious human rights case on Thursday, raising hopes of victims that he may finally face trial for abuses during his 17-year rule.”).

reformers within the Argentine government, most notably President Nestor Kirchner. In August 2003, Judge Garzón sought extradition from Argentina of dozens of Argentines for human rights abuses committed under the Argentine military government in the 1970s.<sup>131</sup> In addition, Garzón successfully sought extradition from Mexico of one former Argentine Navy lieutenant who was accused of murdering hundreds of people.<sup>132</sup> In the wake of Garzón's actions, realist observers complained that such transnational prosecutions were illegitimate because Argentina had previously conferred amnesty on those who had been involved in the period of military rule and therefore any prosecution would infringe on Argentina's sovereign "choice" to grant amnesty.<sup>133</sup>

But the amnesty decision was not simply a unitary choice made by some unified "state" of Argentina; it was a politically contested act that remained controversial within the country.<sup>134</sup> And the Spanish extradition request itself gave President Kirchner more leverage in his tug-of-war with the legal establishment over the amnesty laws. Just a month after Garzón's request, both houses of the Argentine Congress voted by large majorities to annul the laws.<sup>135</sup> Meanwhile the Spanish government decided that it would not make the formal extradition request to Argentina that Garzón sought, but it did so based primarily on the fact that Argentina had begun to scrap its amnesty laws and the accused would therefore be subject to domestic human rights prosecution.<sup>136</sup> President Kirchner therefore could use Spain's announcement to increase pressure on the Argentine Supreme Court to officially overturn the amnesty laws.<sup>137</sup>

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131. See Larry Rohter, *Argentine Congress Likely to Void "Dirty War" Amnesties*, N.Y. TIMES, Aug. 21, 2003, at A3 (recounting Garzón's extradition request).

132. Emma Daly, *Spanish Judge Sends Argentine to Prison on Genocide Charge*, N.Y. TIMES, June 30, 2003, at A3 ("In an unusual act of international judicial cooperation, and a victory for the Spanish judge Baltasar Garzón, Mexico's Supreme Court ruled this month that the former officer, Ricardo Miguel Cavallo, could be extradited to Spain for crimes reportedly committed in a third country, Argentina.")

133. See David B. Rivkin Jr. & Lee A. Casey, *Crimes Outside the World's Jurisdiction*, N.Y. TIMES, July 22, 2003, at A19 (noting that Argentina had granted amnesty to Cavallo and arguing that "Judge Garzón is essentially ignoring Argentina's own history and desires").

134. The Argentine army, for example, made known its desire for amnesty for human rights abuses through several revolts in the late 1980s. The Argentine Congress granted amnesty after one such uprising in 1987. See Joseph B. Treaster, *Argentine President Orders Troops To End Revolt*, N.Y. TIMES, Dec. 4, 1988, § 1, at 13 (describing an army revolt in Buenos Aires).

135. *Argentina's Day of Reckoning*, CHI. TRIB., Apr. 24, 2004, at C26.

136. Elizabeth Nash, *Garzón Blocked Over "Dirty War" Extraditions*, THE INDEPENDENT, Aug. 30, 2003, at 14; see also Al Goodman, *Spain Blocks Trials of Argentines*, CNN.COM, Aug. 29, 2003, <http://www.cnn.com/2003/WORLD/europe/08/29/spanish.argentina/index.html> (quoting the Spanish attorney for the victims saying that the Spanish government's decision sends a "powerful message" to Argentina's Supreme Court to overturn the amnesty laws).

137. See Héctor Tobar, *Judge Orders Officers Freed: The Argentine Military Men Accused of Rights Abuses in the '70s and '80s May Still Face Trials*, L.A. TIMES, Sept. 2, 2003, at A3 ("President Nestor Kirchner used Spain's announcement to increase pressure on the Argentine Supreme Court to overturn the amnesty laws that prohibit trying the men here.")

Finally, on June 14, 2005, the Argentine Supreme Court did in fact strike down the amnesty laws, thus clearing the way for domestic human rights prosecutions.<sup>138</sup> Not only was the pressure exerted by Spain instrumental in these efforts, but it is significant that the Argentine Court cited as legal precedent a 2001 decision of the Inter-American Court of Human Rights striking down a similar amnesty provision in Peru as incompatible with the American Convention on Human Rights and hence without legal effect.<sup>139</sup> So, in the end, the “sovereign” state of Argentina made political and legal choices to repeal the amnesty laws just as it had previously made choices to create them. But in this change of heart we can see the degree to which international legal pronouncements, even if they are without any literal constraining effect, may significantly alter the domestic political terrain.

Likewise, official international institutions, such as the U.N., can also pressure local bureaucracies, for example, by creating international commissions of inquiry concerning alleged atrocities, or by threatening prosecutions in international courts. Such declarations can empower reformers within local bureaucracies, who can then argue for institutional changes as a way of staving off international interference. For example, in the aftermath of the violence in East Timor that followed its vote for independence, there were grave concerns that the Indonesian government would not pursue human rights investigations of the military personnel allegedly responsible for the violence.<sup>140</sup> Thus, an International Commission of Inquiry was established, and U.N. officials warned that an international court might be necessary.<sup>141</sup> As with Chile and Argentina, such actions strengthened the hand of reformers within Indonesia, such as then-Attorney General Marzuki Darusman. With the specter of international action hanging over Indonesia, Darusman made several statements arguing that, for nationalist reasons, a hard-hitting Indonesian investigation was necessary in order to forestall an international takeover of the process.<sup>142</sup> Not

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138. Corte Suprema de Justicia [CSJN], 14/6/2005, “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad,” causa No. 17.768, S.1767.XXXVIII (Arg.). See also Press Release, Human Rights Watch, Argentina: Amnesty Laws Struck Down (June 14, 2005), available at <http://hrw.org/english/docs/2005/06/14/argent11119.htm>.

139. Corte Suprema de Justicia [CSJN], 14/6/2005, “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad,” causa No. 17.768, S.1767.XXXVIII (Arg.). See also Press Release, supra note 138.

140. See, e.g., Laura A. Dickinson, *The Dance of Complementarity: Relationships Among Domestic, International, and Transnational Accountability Mechanisms in East Timor and Indonesia*, in ACCOUNTABILITY FOR ATROCITIES: NATIONAL AND INTERNATIONAL RESPONSES 319, 358–61 (Jane E. Stromseth ed., 2003) (discussing ways in which international pressure on Indonesia in the period just after East Timor gained its independence strengthened the hand of reformers within the Indonesian government to push for robust domestic accountability mechanisms for atrocities committed during the period leading up to the independence vote).

141. *Id.* at 358–59.

142. See *id.* at 360 (documenting the response of the Indonesian government, which appointed an investigative team, identified priority cases, named suspects, and collected evidence).

surprisingly, when this international pressure dissipated after the terrorist attacks of September 11, 2001, so did the momentum to provide real accountability in Indonesia for the atrocities committed.<sup>143</sup> Thus, we can again see that international legal activity (or the lack of it) alters the domestic terrain.

Indeed, even in the United States, the Oklahoma Court of Criminal Appeals recently stayed an execution,<sup>144</sup> based in part on a prior decision of the International Court of Justice (ICJ) concerning the Vienna Convention on Diplomatic Relations,<sup>145</sup> despite the fact that the ICJ had no means of literally enforcing its decision in Oklahoma. Likewise, the Bush administration ultimately issued a directive that state courts should comply with the ICJ decision.<sup>146</sup> And in the trade context, although ad hoc tribunals convened under Chapter 11 of the North American Free Trade Agreement (NAFTA) have no authority to directly reverse the decisions of national courts or create formally binding precedent, Robert Ahdieh has argued that, over time, we may see the interactions between the NAFTA panels and national courts take on a dialectical quality that is neither the direct hierarchical review traditionally undertaken by appellate courts, nor simply the dialogue that often occurs under the doctrine of comity.<sup>147</sup> Instead, Ahdieh predicts that international courts are likely to exert an important influence even as the national courts retain formal independence, much as U.S. federal courts exercising habeas corpus jurisdiction may influence state court interpretations of U.S. constitutional norms in criminal cases.<sup>148</sup> In turn, the

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143. See *id.* at 364–66 (discussing the shifting priorities of the Bush administration following the 9/11 attacks and tracing the impact of outside pressure in efforts to hold individuals accountable for the violence in East Timor).

144. *Torres v. Oklahoma (Torres II)*, No. PCD-04-442 (Okla. Crim. App. May 13, 2004) (unpublished order) (order granting stay of execution and remanding case for evidentiary hearing).

145. *Id.* (Chapel, J., concurring) (stating his belief that the Oklahoma Court of Criminal Appeals was bound by the ICJ's decision in *Avena and Other Mexican Nationals* (Mexico v. United States), 2004 I.C.J. 128 (Mar. 31)). The same day the stay was granted, the governor of Oklahoma commuted the defendant's death sentence, stating in a press release: "I took into account the fact that the U.S. signed the 1963 Vienna Convention and is part of that treaty." Press Release, Office of Governor Brad Henry, Gov. Henry Grants Clemency to Death Row Inmate Torres (May 13, 2004) (on file with author), available at [http://www.governor.state.ok.us/display\\_article.php?article\\_id=301&article\\_type=1](http://www.governor.state.ok.us/display_article.php?article_id=301&article_type=1). The press release also stated that the Governor's office had been contacted by the U.S. State Department. *Id.*

146. Memorandum from President George W. Bush to Attorney General Alberto Gonzales (Feb. 28, 2005), available at <http://www.whitehouse.gov/news/releases/2005/02/20050228-18.html>. Of course, the administration also sought to undermine the ICJ by announcing its intention to withdraw from the Optional Protocol to the Vienna Convention, which gives the ICJ jurisdiction over disputes concerning the Convention. See Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A01. There can be little doubt, however, that the international court judgment at the very least changed the state of political and legal play concerning compliance with the Vienna Convention.

147. See Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029, 2032–34 (2004) (arguing that NAFTA tribunals and U.S. state courts operate in dialectical relationship to each other).

148. *Id.* at 2034.

decisions of national courts may also come to influence international tribunals. This dialectical relationship, if it emerges, will exist without an official hierarchical relationship based on coercive power.<sup>149</sup>

Finally, there can be little doubt that local actors, outside of official government bureaucracies or judicial institutions, can at times leverage international legal norms to press causes within their countries.<sup>150</sup> For example, as late as 1994, women in Hong Kong were unable to inherit land.<sup>151</sup> That year a group of rural indigenous women joined forces with urban women's groups to demand legal change. As detailed by Sally Engle Merry and Rachel E. Stern, "[t]he indigenous women slowly shifted from seeing their stories as individual kinship violations to broader examples of discrimination."<sup>152</sup> Ultimately, the women learned to protest these unjust customary laws in the language of international human rights and gender equality.<sup>153</sup> Having done so, they were successful at getting the inheritance rules overturned.<sup>154</sup> While we might regret the fact that these women were forced to "translate" their grievances into an internationally recognized language in order to be heard, the success of the movement in accessing political power surely attests to the strength and importance of the international law discourse.

This same story has been replicated numerous times around the world. Assisted by a global network of NGOs and activists, indigenous movements use international norms to influence local political or judicial actors. In June 2005, communities from across the Niger Delta filed a case in the Federal High Court of Nigeria against several oil companies to stop the practice of "gas flaring," which poses severe health risks and contributes to greenhouse gas emissions.<sup>155</sup> Though nominally brought under the Nigerian

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149. To be sure, Chapter 11 tribunals do have the power to issue damage awards that private litigants can then enforce against *federal* authorities, but there is no direct review of the state court decision nor any mechanism of coercive power that can be exercised against any *state* officials or judicial actors. See North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, art. 1135, 107 Stat. 2057, 32 I.L.M. 289, 605 (entered into force Jan. 1, 1994) (outlining remedies available under Chapter 11).

150. Of course, such local actors do not only "use" international law as "given" to them, but also, through their social movements, shape the international legal norms themselves. For an argument that human rights discourse has been fundamentally shaped by Third World resistance to development, see generally BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS, AND THIRD WORLD RESISTANCE (2003).

151. Sally Engle Merry & Rachel E. Stern, *The Female Inheritance Movement in Hong Kong: Theorizing the Local/Global Interface*, 46 CURRENT ANTHROPOLOGY 387, 387 (2005).

152. *Id.* at 399.

153. See *id.* at 390 (explaining the evolution of the Anti-Discrimination Female Indigenous Residents Committee from a group that perceived the prohibition of female inheritance as a personal wrong perpetrated by relatives to a group arguing that the male-only inheritance laws failed to comply with international agreements, such as the Convention on the Elimination of Discrimination Against Women and the International Covenant on Civil and Political Rights).

154. *Id.* at 394.

155. *Ghemre v. Shell Petroleum Dev. Co. Nig.*, Suit No. FHC/B/CS/153/2005. On November 14, 2005, the Federal High Court of Nigeria in Benin City ruled that Royal Dutch Shell, Chevron,

Constitution, the complaint explicitly references the African Charter on Human and People's Rights and argues for a right to a "clean, poison-free, pollution free and healthy environment."<sup>156</sup> Other environmental groups seek to have sites placed on UNESCO's World Heritage Committee list of protected sites so that they can then pressure their local governments to take steps to limit environmental damage to the sites.<sup>157</sup> Consumer groups organize worldwide boycotts on the rhetorical strength of rights discourse.<sup>158</sup> Meanwhile, many African countries, responding in part to pressure from international human rights activists, have recently enacted laws forbidding the practice known as female genital cutting.<sup>159</sup> And of course, it isn't only social movements that use the language and institutions of international law to access domestic power. Thus, transnational corporations have deployed the rhetoric of international free trade law and have used bodies such as the NAFTA tribunals or the World Trade Organization to avoid being subject to domestic regulation.<sup>160</sup>

Regardless of whether or not one thinks the proliferation and deployment of international norms in domestic political and legal debates is a

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Exxon Mobil, and other oil companies must end natural gas flaring in Nigeria, claiming that the practice was a waste and violated the local communities' constitutional rights to life and dignity. A copy of the judicial order is available at <http://www.climatelaw.org/media/media/gas.flaring.suit.nov2005/ni.shell.nov05.decision.pdf>.

156. Complaint at 4, *Gbemre v. Shell Petroleum Dev. Co. Nig.*, Suit No. FHC/B/CS/153/2005, available at <http://www.climatelaw.org/media/gas.flaring.suit/case.pleadings.20June2005.pdf>.

157. For example, the countries of Belize, Nepal, and Peru recently petitioned the World Heritage Committee to place the Belize Barrier Reef, Mount Everest, and Huarascan National Park on its list of World Heritage in Danger Sites, because of threats to the sites due to global climate change. See Press Release, Climate Justice, UNESCO Danger-Listing Petitions Presented (Nov. 17, 2004), available at <http://www.climatelaw.org/media/UNESCO.petitions.release>. "Danger-listing" is a legal mechanism under the Convention concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151, which requires State Parties to the Convention to take action to transmit World Heritage Sites to future generations.

158. See Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 480–82 (2002) (discussing such efforts). As *The Economist* has observed, "a multinational's failure to look like a good global citizen is increasingly expensive in a world where consumers and pressure groups can be quickly mobilised behind a cause." *Multinationals and Their Morals*, *ECONOMIST*, Dec. 2–8, 1995, at 18–19. For discussion of how noncompliance with entrenched international law norms may result in lost economic opportunities for subnational units, crucial to economic prosperity in a globalized economy, see Peter J. Spiro, *Globalization and the (Foreign Affairs) Constitution*, 63 OHIO ST. L.J. 649, 672–73 (2002), in which he outlines ways that consumers, non-governmental organizations, and states can pressure corporations to boycott investment and development in regions that fail to follow standards of international law.

159. Leigh A. Trueblood, *Female Genital Mutilation: A Discussion of International Human Rights Instruments, Cultural Sovereignty and Dominance Theory*, 28 DENV. J. INT'L L. & POL'Y 437, 464–65 (2000) (describing how the efforts of international organizations, NGOs, and other groups have led many countries, including Cameroon, Egypt, Kenya, Sudan, Burkina Faso, and Ivory Coast, to pass legislation against female genital cutting).

160. See, e.g., Benjamin W. Putnam, Note, *The Cross-Border Trucking Dispute: Finding a Way Out of the Conflict Between NAFTA and U.S. Environmental Law*, 82 TEXAS L. REV. 1287, 1307–08 (2004) (describing cases in which regulated entities cite NAFTA to avoid the requirements of domestic environmental laws).

good thing, it is difficult to deny the trend. Thus, the interaction between the international and the local cannot simply be viewed as Goldsmith and Posner view it: a state pursuing a single set of interests either completely constrained or completely unconstrained by international norms. Rather, as part of the multivalent, messy process by which various state constituencies vie to have their preferred policies adopted, international legal norms are a powerful tool. These norms provide a set of moral, rhetorical, and strategic arguments that may empower constituencies that might not otherwise have a voice, or they may be used by already powerful forces to protect their own interests. In any event, only by going beyond the simplistic model of the unitary state pursuing a single set of interests can we see the power of international law coursing below the surface.

### III. A Cosmopolitan Alternative

Goldsmith and Posner reject a cosmopolitan vision of international legal ordering, which they define as the requirement that states act based on global, rather than state, welfare. In conceptualizing cosmopolitanism in this way, they join other scholars on both the left and right in assuming that cosmopolitanism is equivalent to universalism.<sup>161</sup> Yet cosmopolitanism does not require a belief in a single global welfare or even a single universal set of governing norms, nor does it necessarily require that global welfare trump state welfare. Indeed, cosmopolitanism is not at all incompatible with the idea of nation-states, nor does it assume that the state is somehow unimportant. Thus, Goldsmith and Posner provide a caricatured vision of cosmopolitanism. This is a shame, because a more nuanced understanding of cosmopolitan theory offers a useful framework for conceptualizing the interplay of multiple actors in the transnational system we see operating today. Indeed, cosmopolitanism may in fact offer a more useful framework than the reductionist, state-centric vision Goldsmith and Posner offer.

Cosmopolitanism is a useful trope for conceptualizing the current period of interaction across territorial borders precisely because it recognizes that people have multiple affiliations, extending from the local to the global (and many nonterritorial affiliations as well). For example, Martha Nussbaum has stressed that cosmopolitanism does *not* require one to give up local identifications, which, she acknowledges, “can be a source of great richness

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161. See, e.g., Dinh, *supra* note 4, at 879 (“Rather than aspiring to *universal* cosmopolitanism, statelessness may well foster reversion to a selfish individualism.”) (emphasis added); see also Bruce Ackerman, *Rooted Cosmopolitanism*, 104 ETHICS 516, 534 (1994) (“If I were a European right now, I hope I would have the guts to stand up for rootless cosmopolitanism: forget this nationalistic claptrap, and let us build a world worthy of free and equal human beings.”); Anupam Chander, *Diaspora Bonds*, 76 N.Y.U. L. REV. 1005, 1046 (2001) (“The cosmopolitan model . . . dissolves the multirootedness of diasporas into a global identity.”).

in life.”<sup>162</sup> Rather, following the Stoics, she suggests that we think of ourselves as surrounded by a series of concentric circles:

The first one encircles the self, the next takes in the immediate family, then follows the extended family, then, in order, neighbors or local groups, fellow city-dwellers, and fellow countrymen—and we can easily add to this list groupings based on ethnic, linguistic, historical, professional, gender, or sexual identities. Outside all these circles is the largest one, humanity as a whole.<sup>163</sup>

Therefore, we need not relinquish special affiliations and identifications with the various groups of which we may feel a part.<sup>164</sup>

In this vision, people could be “cosmopolitan patriots,” accepting their responsibility to nurture the culture and politics of their home community, while at the same time recognizing that such cultural practices are always shifting, as people move from place to place or are increasingly affected by spatially distant actors.<sup>165</sup> “The result would be a world in which each local form of human life is the result of long-term and persistent processes of cultural hybridization—a world, in that respect, much like the world we live in now.”<sup>166</sup>

Thus, cosmopolitanism is emphatically not a model of international citizenship in the sense of international harmonization and standardization, but is instead a recognition of multiple refracted differences where people acknowledge links with the “other” without demanding assimilation or ostracism. Cosmopolitanism seeks “flexible citizenship,” in which people are permitted to shift identities amid a plurality of possible affiliations and allegiances, including nonterritorial communities.<sup>167</sup> The cosmopolitan worldview shifts back and forth from the rooted particularity of personal identity to the global possibility of multiple overlapping communities. “[I]nstead of an ideal of detachment, actually existing cosmopolitanism is a reality of (re)attachment, multiple attachment, or attachment at a distance.”<sup>168</sup>

A cosmopolitan conception of law, therefore, aims to capture a middle ground between strict territorialism on the one hand and expansive

162. Martha C. Nussbaum, *Patriotism and Cosmopolitanism*, in *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* 2, 9 (Joshua Cohen ed., 1996).

163. *Id.*

164. *See id.* (“We need not think of [local affiliations] as superficial, and we may think of our identity as constituted partly by them.”).

165. Kwame Anthony Appiah, *Cosmopolitan Patriots*, in *COSMOPOLITICS: THINKING AND FEELING BEYOND THE NATION* 91, 91–92 (Pheng Cheah & Bruce Robbins eds., 1998) [hereinafter *COSMOPOLITICS*].

166. *Id.* at 92.

167. *See* AIHWA ONG, *FLEXIBLE CITIZENSHIP: THE CULTURAL LOGICS OF TRANSNATIONALITY* 6 (1999) (describing how “the cultural logics of capitalist accumulation, travel, and displacement that induce subjects to respond fluidly and opportunistically to changing political-economic conditions” foster a form of transnationality she calls “flexible citizenship”).

168. Bruce Robbins, *Introduction Part I: Actually Existing Cosmopolitanism*, in *COSMOPOLITICS*, *supra* note 165, at 1, 3.

universalism on the other. A territorialist approach fails to account for the wide variety of community affiliations and social interactions that defy territorial boundaries. A more universalist perspective, by contrast, which seeks to imagine people as world citizens first and foremost, might seem to be a useful alternative. But such universalism tends to presuppose a world citizenry devoid of both particularist ties and normative discussion about the relative importance of such ties. Thus, universalism cuts off debate about the nature of overlapping communities just as surely as territorialism does.

A cosmopolitan conception, in contrast, makes no attempt to deny the multirooted nature of individuals within a variety of communities, both territorial and nonterritorial. Thus, although a cosmopolitan conception might acknowledge the potential importance of asserting universal norms in specific circumstances, it does not require a universalist belief in a single world community. As a result, cosmopolitanism offers a promising rubric for analyzing law in a world of diverse normative voices.

For example, with regard to jurisdiction, choice of law, and recognition of judgments, I have argued elsewhere that a cosmopolitan perspective would allow courts to look at the relevant community affiliation of the parties rather than undertake a formalist exercise in counting literal contacts with a territorial entity.<sup>169</sup> More broadly, cosmopolitanism allows us to conceptualize a broader practice that I call *jurispersuasion*, in which legal and quasi-legal actors assert jurisdiction and express norms even without literal enforcement power.<sup>170</sup> These actors draw on epistemic community affiliations to persuade others to enforce their judgments or normative statements. As constructivists have recognized, “[n]ormative claims become powerful and prevail by being persuasive; being persuasive means grounding claims in existing norms in ways that emphasize normative congruence and coherence.”<sup>171</sup> Cosmopolitanism, far more than rational choice theory, attempts to capture this multivalent process of norm development and persuasion across territorial borders.

Indeed, though the model of international cooperation among states that Goldsmith and Posner envision has a contractarian cast, their model is strictly that of a series of isolated *transactional* contracts: parties see a mutual interest in cooperating and thus agree to cooperate. This is a peculiarly thin model of contract, however, and it underestimates the ways in which new interests can grow out of the contracting process itself.

Drawing on the scholarly literature concerning *relational* contract, in contrast, we may come to see the agreement to cooperate as the first step in creating a contractors’ community that over time begins to develop new

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169. See Berman, *supra* note 158, at 322 (discussing jurisdiction); Paul Schiff Berman, *Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era*, 153 U. PA. L. REV. 1819, 1839–67 (discussing choice of law and recognition of judgments).

170. For further discussion of jurispersuasion, see Berman, *supra* note 121, at 533–38.

171. FINNEMORE, *supra* note 13, at 141.

norms of reciprocity and loyalty, along with a concomitant interest in fostering and protecting both the community itself and those emerging norms.<sup>172</sup> Thus, as transnational groups work together to cooperate and solve specific problems, staffs of personnel are created, and these staff members tend to be inculcated in the norms of the group and invested in maintaining relations with each other. As a result, transnational networks of government bureaucrats, trade-promoting groups, human rights NGOs, and the like form de facto cosmopolitan communities, affiliations of people who have come to see that the welfare of their state is interlinked with the welfare of others, and that evaluations of “utility” or “interest” are interdependent. This is an enlarged vision of where a state’s interest lies, organically evolved from agreements motivated by more short-term and immediate objectives.

Thus, cosmopolitanism need not be seen as a moral call to have states adopt global standards of well-being while denying state interest. To the contrary, cosmopolitanism recognizes the important historical and emotional pull of the state. In addition, it celebrates diverse normative orders in multiple communities and need not insist on homogenizing that diversity into one global culture or one international legal framework.

But state communities are not the only salient community affiliations people possess, and we need a framework to account for the multiple overlapping community assertions that regularly take place, particularly in an era of globalization. Whether we are talking about courts being influenced by other courts around the world, ethnic groups or transnational norm entrepreneurs asserting norms across territorial borders, the melding of legal norms that takes place in liminal areas, or the development of transnational non-state lawmaking, there can be little doubt that the state is only one community affiliation among many. And while a more detailed discussion of this cosmopolitan framework is beyond the scope of this brief Book Review Essay, it seems clear that any useful framework for understanding law on the world stage must examine these multiple voices. Cosmopolitanism permits, and encourages, such study, while the rational choice theory of Goldsmith and Posner reductively excludes all voices other than that of the unitary state.

#### IV. Conclusion

There remains much work to be done, of course, to analyze more fully the myriad ways that international legal norms may affect cognitive categories, conceptions of interests, domestic decisionmaking processes, and the creation of cosmopolitan communities. But such study will necessarily take place far beyond the limited vision of international law that Goldsmith

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172. See, e.g., Richard A. Epstein, *Takings, Commons, and Associations: Why the Telecommunications Act of 1996 Misfired*, 22 YALE J. REG. 315, 324 (2005) (noting that in relational contracts, virtually all daily decisions within the general parameters of the deal “are resolved in a continuous and ongoing relationship that depends on some high level of trust and cooperation”).

and Posner construct. By refusing at the outset even to consider the ways international law might affect state decisionmaking short of outright coercion, Goldsmith and Posner ensure that no possible role for international law will be found beyond simply as a tool for state self interest.

Thus, *The Limits of International Law* is not, in the end, a descriptive account of how international law works, but a normative vision advancing an ideology of international relations realism. Ironically, though Goldsmith and Posner refuse to recognize the ways international law may shape legal consciousness, they themselves are nevertheless attempting to affect legal consciousness in the United States. They fear that the moral force of international legal norms will galvanize opposition to state policies, so they wish to persuade readers that such force does not and should not exist.

But saying it does not make it so. State interests do not operate in isolation from social and psychological realities. Likewise, state interests are not unitary. They arise through complicated processes of norm generation and multivalent disputes over policy. As a result, the reductionist model of game theoretic interaction among states pursuing single interests in clearly defined contexts simply has no basis in the real world.

So, while no one would say that international law binds all states all the time, international legal norms are part of the context within which state decisions are made, and they provide a set of arguments for domestic constituencies to draw upon in advancing policies. Moreover, international cooperation and international norms create and foster epistemic communities, transnational groups who, over time, come to conceive of themselves as bound up with others across nation-state borders. These are the processes of cosmopolitan norm development that scholars must continue to study. But in order to do so, we must expand our vision of international law far beyond the limits that Goldsmith and Posner seek to impose.