



School of Law  
UNIVERSITY OF GEORGIA

Digital Commons @ University of Georgia  
School of Law

---

Scholarly Works

Faculty Scholarship

---

1-1-2006

## International Law in Black and White

Daniel M. Bodansky

University of Georgia School of Law, [bodansky@uga.edu](mailto:bodansky@uga.edu)



---

### Repository Citation

Daniel M. Bodansky, *International Law in Black and White* (2006),  
Available at: [https://digitalcommons.law.uga.edu/fac\\_artchop/220](https://digitalcommons.law.uga.edu/fac_artchop/220)

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ University of Georgia School of Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ University of Georgia School of Law. [Please share how you have benefited from this access](#)  
For more information, please contact [tstriepe@uga.edu](mailto:tstriepe@uga.edu).

# INTERNATIONAL LAW IN BLACK AND WHITE

*Daniel Bodansky\**

## I. INTRODUCTION

Is the study of international law an art or a science? Can the role of international law be explained by general rules, with predictive value? Or does it require the exercise of judgment, in order to account for the richness and complexity of international life? Traditionally, international lawyers have gravitated to the latter view, analyzing issues in an essentially ad hoc and eclectic manner. In their controversial new book, *The Limits of International Law*,<sup>1</sup> Jack Goldsmith and Eric Posner argue forcefully for a more scientific approach, relying on the methodology known as “rational choice theory.” The book makes many specific claims about the limits of international law. But its ambition to develop an overarching theory of international law, which reduces the role played by international law to a few simple explanatory models, is perhaps its most distinctive feature.

In his work on the sociology of law, Max Weber identified three complementary perspectives on law, which he called the dogmatic, the ethical and the sociological:<sup>2</sup>

- The *dogmatic* (or as we would now say, “doctrinal”) perspective takes law as a given—a dogma, as Weber put it—and seeks to ascertain what it says. It focuses on doctrinal questions: Did the invasion of Iraq violate the U.N. Charter? Does the treatment by the United States of detainees at Guantanamo violate customary and treaty obligations prohibiting torture? Does international law prohibit significant transboundary pollution, or require states to take precautionary actions against potentially irreversible threats to the environment?

---

\* Robert and Emily Woodruff Chair of International Law, University of Georgia School of Law. This Essay was presented at a symposium on *The Limits of International Law*, University of Georgia Law School, October 28-29, 2005.

<sup>1</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

<sup>2</sup> ANTHONY T. KRONMAN, *MAX WEBER* 7-14 (1983).

- The *ethical* perspective, in contrast, steps outside the law and asks, what ought the law to be? Weber's characterization of this as the "ethical" perspective suggests that the normative standpoint from which we evaluate law is that of morality. But, viewed more broadly, this perspective could encompass other normative standards such as efficiency or order.
- Finally, the *sociological* perspectives interrogates law not from a normative but from an explanatory standpoint. It asks causal questions about why legal rules emerge and what effects, if any, they have on behavior.

Although international lawyers often speculate or make implicit assumptions about the causes and effects of international law, and although they frequently advance normative arguments for particular legal rules, I think it is fair to say that, traditionally, international law scholarship has been largely doctrinal—or as Weber would say, dogmatic—in its orientation. Most of the leading treatises on international law, if they address issues of explanation at all, relegate them to an introductory chapter about whether international law is really "law."<sup>3</sup> And the explanations typically given for how international law arises and influences state behavior have been unsystematic and conjectural. Writers posit a host of causal factors, with little, if any, attempt to investigate the actual effects of international law or its relative importance in influencing behavior as compared with other factors such as power or self-interest.<sup>4</sup> Most international lawyers instead focus on the content of international law. Indeed, even when they have a normative agenda, they often couch their prescriptive arguments about what the law *should* be as doctrinal claims about the law actually *is*.<sup>5</sup>

In recent years, international law has begun to awaken from its dogmatic slumber.<sup>6</sup> The principal catalyst has been the introduction of social scientific approaches that focus on issues of explanation. *The Limits of International*

---

<sup>3</sup> See, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (6th ed. 2003); MARK W. JANIS, *AN INTRODUCTION TO INTERNATIONAL LAW* (4th ed. 2003); MALCOLM N. SHAW, *INTERNATIONAL LAW* (5th ed. 2003).

<sup>4</sup> See, e.g., LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979); Oscar Schachter, *Towards a Theory of International Obligations*, 8 VA. J. INT'L L. 300 (1968).

<sup>5</sup> For a notable exception, see TERRY NARDIN, *LAW, MORALITY AND THE RELATIONS OF STATES* (1983).

<sup>6</sup> Cf. IMMANUEL KANT, *PROLEGOMENA TO ANY FUTURE METAPHYSICS* (1950) (describing how Hume awakened Kant from his dogmatic slumber).

*Law* is the latest contribution to this now burgeoning literature. In general, it has little interest in doctrinal questions per se. And, except in the last two chapters, its arguments are not ostensibly normative (although they have an important normative implication, since if international law has little potential to constrain state behavior, then we have little reason to try to develop it). Instead, *Limits* focuses on explanatory issues: Why do rules of behavior for states emerge (or not emerge)? Is international law merely epiphenomenal, reflecting behavioral regularities that have other causes? Or does it sometimes play an independent causal role, and if so, when and why?

The turn to explanatory issues opens up the possibility of a more scientific approach to the study of international law. At least among Anglo-American lawyers, few since the days of Langdell believe that doctrinal questions can be answered scientifically. But explanatory issues are amenable to scientific study. Hypotheses can be developed and then tested against the empirical evidence. This is the methodology that Goldsmith and Posner propound in *The Limits of International Law*.

The development and testing of explanatory hypotheses about the role of international law is not, in itself, unique to Goldsmith and Posner's study. Others working at the intersection of international relations and international law use the same methodology.<sup>7</sup> Nor is the causal model that they employ original. Indeed, for those focusing on explanatory issues in international law, rational choice theory—and, in particular game theory—has become the paradigm *de jour*. Instead, what makes *Limits* unusual is its ambition to develop a general theory of international law, covering the entire range of sources and subjects—custom as well as treaties, human rights as well as trade law. It puts forward rational choice theory not merely as one among several explanatory models, but rather as the exclusive model, which can account generally for both the development and influence of international law.

Whether one likes Goldsmith and Posner's approach or not, it has two notable virtues: it poses important questions and it offers provocative answers. Provocative ideas are often wrong, but they have the benefit of stimulating debate, shaking people out of their dogmatic assumptions. And this has been exactly the effect of Goldsmith and Posner's work. Already, their skeptical claims about the role of customary international law have stimulated a range

---

<sup>7</sup> See, e.g., *Symposium on Legalization and World Politics*, 54 INT'L ORG. 385 (2000); COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM (Dinah Shelton ed., 2000).

of responses, some from a traditional international law perspective;<sup>8</sup> others using the same rational choice methodology that they employ.<sup>9</sup> The result has been to reinvigorate the study of custom.

This brief Essay will begin by discussing what, I think, is uncontroversial in *Limits*, then try to isolate its distinctive and controversial claims, and end with a brief appraisal of its approach on both substantive and methodological grounds.

## II. LIMITS AND CONVENTIONAL WISDOM

*Limits* seeks to establish its revisionist credentials by sharply contrasting its approach with that of “mainstream” or “traditional” international lawyers, who are portrayed as uncritical believers in the normative force of international law. Yet it rarely identifies any actual international lawyer who holds the views that it describes as “mainstream.” In fact, I think many international lawyers—while rejecting the book’s more extreme claims—would not fundamentally disagree with either its rationalist methodology or its skeptical attitude.

At least in part, *Limits* reaches different answers from mainstream scholarship because it asks different questions. In discussing custom, for example, Goldsmith and Posner criticize traditional analyses for not being able to explain why custom arises and changes, and why states do or do not comply.<sup>10</sup> But most accounts of custom do not focus on explanation; instead, they seek to determine which norms meet the tests of valid custom. At first glance, this may not be apparent, since discussions of custom are usually framed in terms of the “sources” of international law. But when international lawyers speak of “sources,” they usually refer not to the causes of a customary rule, but rather to the conditions of its legal validity. The difference between the traditional approach and that of Goldsmith and Posner reflects the difference between the doctrinal and explanatory perspectives that I noted earlier. International lawyers typically operate as actors within the realm of international law, engaging in exegesis of legal texts; they view international law from the inside, as participants in the legal process. International relations

---

<sup>8</sup> Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defense*, 15 EUR. J. INT'L L. 1031 (2004).

<sup>9</sup> George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 599 (2002).

<sup>10</sup> GOLDSMITH & POSNER, *supra* note 1, at 25.

theorists, in contrast, look at international law from the outside, as a phenomenon to be explained. The two perspectives, at least in principle, are complementary rather than conflicting.

To the extent that international lawyers do consider explanatory questions, most start from many of the same premises as Goldsmith and Posner:

- first, that, broadly speaking, states can be said to have interests, which they rationally pursue;
- second, that the rules of international law to a significant degree reflect the interests of states;<sup>11</sup>
- third, that state interests play an important role not only in the creation of international law, but also in determining whether states comply;<sup>12</sup>
- fourth, that states often assert “changing and inconsistent readings of . . . international law, consistent with their interests,”<sup>13</sup>
- finally, that power also plays a significant role both in the development and enforcement of international law.<sup>14</sup>

*Limits* often suggests that international lawyers focus exclusively on noninstrumental accounts of state behavior—that international lawyers are as one-dimensionally normative as *Limits* is one-dimensionally instrumental.<sup>15</sup>

---

<sup>11</sup> See, e.g., ANTONIO CASSESE, INTERNATIONAL LAW 6 (2002) (“[W]hen making law, settling disputes, or enforcing the law, States do not act in the interest and on behalf of the international community; they do not fulfil an obligation, but primarily pursue their own interests.”).

<sup>12</sup> HENKIN, *supra* note 4, at 50 (analyzing compliance with international law in terms of the costs and benefits of observance versus violation); OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 5-9 (1995).

<sup>13</sup> GOLDSMITH & POSNER, *supra* note 1, at 63.

<sup>14</sup> See, e.g., CHARLES DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 149 (1957) (comparing development of custom to gradual formation of a road across vacant land, in which some users mark the soil more deeply with their footprints, “either because of their weight, which is to say their power in this world, or because their interests bring them more frequently this way”). Indeed, international law has often been described as the handmaiden of power. DAVID HUNTER, JAMES SALZMAN & DURWOOD ZAEKE, INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 273 (2d ed. 2001) (describing international law as “the handmaiden of power, following rather than leading, facilitating rather than constraining”).

<sup>15</sup> For example, they assume that the old GATT dispute settlement system must have been a “puzzle for traditional international lawyers’ thinking,” since it cannot be explained *solely* in terms of states’ preference for complying with international law. GOLDSMITH & POSNER, *supra*

In reality, most international lawyers see the world in a multi-dimensional way. They recognize the role not just of norms, but of interests and power in shaping state behavior. Inadvertently, *Limits* itself recognizes this, by citing traditional lawyers in support of its instrumental explanations. For example, in discussing the putative norm protecting coastal fishing vessels from seizure during time of war, Goldsmith and Posner quote extensively from the 1924 British treatise on international law by William Hall, which they say, "gets the logic of the fishing vessels exemption rule exactly right"<sup>16</sup>—although they add, somewhat gratuitously, that Hall did so "perhaps inadvertently," presumably in order to square his apparent acuity with their portrayal of international lawyers as narrowly normative.

International lawyers also display a much wider variety of views about the effectiveness of international law in constraining state behavior than Goldsmith and Posner's account suggests. Some are true believers, to be sure; but many are skeptics, who, I think, would find much in *Limits* unexceptionable. Posner and Goldsmith, for example, argue that compliance with international law does not demonstrate that international law constrains state behavior, since compliance may simply reflect a coincidence of interests. In other words, it may simply reflect what states would have done otherwise. This is, of course, true, but hardly novel. Indeed, in international environmental law, it has become almost commonplace to distinguish between the concepts of "compliance" and "effectiveness."

A skeptical attitude is, in my view, particularly appropriate with respect to claims about customary international law.<sup>17</sup> As Goldsmith and Posner show, even the venerable case of *Paquete Habana*—often seen as an exemplar of the customary law methodology—rests on limited evidence, much of it inconsistent or of dubious value.<sup>18</sup> For me, the difficulties of ascertaining custom first became apparent when I was a junior attorney at the Department of State, and was asked to investigate whether customary international law prohibits the juvenile death penalty. In an effort to ascertain state practice, we sent a cable to all U.S. embassies worldwide, asking them about local law and practice on the death penalty. What is more, we enlisted the assistance of the comparative law division of the Library of Congress for a comprehensive

---

note 1, at 152. But, of course, no international lawyers in his or her right mind thinks that states are concerned solely about legal compliance.

<sup>16</sup> GOLDSMITH & POSNER, *supra* note 1, at 76.

<sup>17</sup> See Daniel Bodansky, *Customary (and Not So Customary) International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 105 (1995).

<sup>18</sup> 175 U.S. 677 (1900).

survey of national legislation. But, as we, perhaps, should have expected, much of what we got back was of little use—isolated snippets on national legislation, with little information about actual practice; statements that no juveniles had been executed in recent years, with no indication as to whether there had been any cases in which the juvenile execution issue had been raised; decisions not to impose the death penalty on juveniles, with no evidence of *opinio juris*. In the end, even after an extraordinary effort to ascertain state practice, my conclusion was that little could be said about whether there was consistent and uniform state practice on the juvenile death penalty, backed up by a sense of legal obligation. Similarly skeptical conclusions about custom are not uncommon among international lawyers. More than twenty years ago, no less an authority than Judge Robert Jennings, President of the International Court of Justice, wrote, “most of what we perversely persist in calling customary international law is not only *not* customary law; it does not even faintly resemble customary law.”<sup>19</sup>

### III. APPRAISING THE DISTINCTIVE CLAIMS OF LIMITS

What makes *Limits* controversial, then, is neither its instrumentalist approach nor its skeptical attitude per se, but rather the extremes to which it pushes both of these features. According to Goldsmith and Posner, state interests are not merely one among several explanatory factors; they are the “sole determinants” of state behavior.<sup>20</sup> And, as a result, international law is not merely limited in its effectiveness; it has no “exogenous effect on state behavior.”<sup>21</sup>

Interestingly, in making these arguments, Goldsmith and Posner come to exactly the opposite conclusion from neoconservative critics of international law such as Robert Bork and Charles Krauthammer, who contend that international law is often contrary to U.S. self-interest and worry that U.S. policymakers will give undue credence to it.<sup>22</sup> In doing so, Bork and

---

<sup>19</sup> Robert Y. Jennings, *The Identification of International Law*, in INTERNATIONAL LAW: TEACHING AND PRACTICE 3, 5 (Bin Cheng ed., 1982) (emphasis in original). For similar sentiments by two leading scholars on international human rights law (one of whom now sits as a judge on the International Court of Justice), see Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 AUSTRL. Y.B. INT'L L. 82 (1992).

<sup>20</sup> GOLDSMITH & POSNER, *supra* note 1, at 39.

<sup>21</sup> *Id.* at 43.

<sup>22</sup> Robert Bork, *The Limits of International Law*, NAT'L INT., Winter 1989/1990, at 1-10;



Krauthammer buy into the “usual view”—which Goldsmith and Posner reject—that “international law is a check on state interests, causing a state to behave in a way contrary to its interests.”<sup>23</sup> In Goldsmith and Posner’s view, this gets things backwards. “The causal relationship between international law and state interests runs in the opposite direction,” they argue. “International law emerges from states’ pursuit of self-interested policies on the international stage. International law is, in this sense, *endogenous* to state interests. It is not a check on state self-interest; it is a product of state self-interest.”<sup>24</sup> As a result, there would seem to be no danger that policymakers will adopt what George Kennan once disparagingly described as the “legalistic-moralistic” approach to international relations.<sup>25</sup>

The relentlessly instrumentalist approach of *Limits* raises two fundamental questions, which I will consider in turn. First, is an exclusively instrumentalist account of state behavior compatible with international law *qua* law? Second, do Goldsmith and Posner present a convincing case for pursuing their approach to the exclusion of others? In particular, does their theory have methodological advantages over noninstrumental approaches?

#### A. *Self-Interest and Legal Obligation*

Although Goldsmith and Posner acknowledge that international law is a “real phenomenon,” they draw a sharp contrast between acting out of self-interest and acting out of a sense of legal obligation. This raises the question: Does their rational choice theory of international law leave any room for international law to operate as law?

In considering the relationship of self-interest to legal obligation, it is important to distinguish between two very different issues: first, why states develop international rules, and second, why they comply with (or violate) those rules? Goldsmith and Posner do not clearly separate these questions because they think the answer to both is the same: Calculations of rational self-interest determine decisions by states about compliance as well as legal development. But there is no reason, *a priori*, to suppose that the explanation of lawmaking and compliance is the same. For example, states might negotiate

---

Charles Krauthammer, *The Curse of Legalism: International Law? It's Purely Advisory*, 201 NEW REPUBLIC 44 (Nov. 6, 1989).

<sup>23</sup> GOLDSMITH & POSNER, *supra* note 1, at 13.

<sup>24</sup> *Id.*

<sup>25</sup> GEORGE F. KENNAN, *AMERICAN DIPLOMACY* 95 (pbk ed. 1970).

a treaty based on their perceived self-interest, as Goldsmith and Posner argue, but then continue to comply even when their self-interest changes because they feel this is the “right” thing to do, or because of domestic political or legal factors.

From the standpoint of a traditional international lawyer, much more is at stake with respect to the issue of compliance than lawmaking. In general, international law does not concern itself with the question of why states negotiate treaties or engage in behavior that helps create customary norms. Mainstream international law is thus compatible with virtually any explanatory approach—purely instrumental accounts along the lines that Goldsmith and Posner elaborate; realist approaches that emphasize the role of power;<sup>26</sup> and constructivist accounts that focus on the role of ideas, values and learning. But for international law to matter, for it to be a reality rather than merely epiphenomenal, it must exert some independent influence on state behavior; it must have some effect on compliance.

At times, Goldsmith and Posner seem to suggest that international law, as such, exerts no independent influence. “A state’s compliance . . . has nothing to do with acting from a sense of legal obligation,” they argue; it is determined solely by rational calculations of self-interest.<sup>27</sup> “States do not act in accordance with a rule that they feel obliged to follow; they act because it is in their interest to do so. The rule does not cause the states’ behavior; it reflects their behavior.”<sup>28</sup> The assumption here seems to be that self-interest and a sense of legal obligation offer two mutually exclusive accounts of state behavior.

But this reflects an unduly cramped view of what it means to act out of a sense of legal obligation. Acting out of a sense of legal obligation requires merely that a rule is entrenched—that states take the rule as a reason for action independent from the reasons that led them to adopt the rule in the first place.<sup>29</sup> The idea was nicely expressed in a poster I once saw showing Isaac Newton sitting beneath the apple tree, with an apple just beginning to fall. The poster proclaimed at the bottom, “Gravity: It’s not just a good idea. It’s the law!” Of course, with gravity, its status as “law” adds nothing to its force—that is the

---

<sup>26</sup> Although if a treaty results from fraud, corruption or coercion, then this deprives the theory of any legal effect. Vienna Convention on the Law of Treaties arts. 49-52, May 22, 1969, 1155 U.N.T.S. 331.

<sup>27</sup> GOLDSMITH & POSNER, *supra* note 1, at 39.

<sup>28</sup> *Id.*

<sup>29</sup> See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* (1993).

joke. But the joke depends on our understanding the term, "law," not merely in terms of physical regularities, but in a second legal sense, as providing a reason for action in and of itself, because of its status as "law." Like the law of gravity, an international law may be adopted by states because they consider it a good idea. But once adopted, its legal force does not depend on states continuing to accept the rule as a good idea; its status as law constitutes an independent reason for action.

Just as mainstream international law is neutral as to why states develop international rules, it is also neutral as to why states might accept international rules as reasons for action. Goldsmith and Posner seem to assume that the only possible basis of legal obligation is morality. The idea that states obey international law out of a sense of legal obligation, they argue, "reduce[s] to the idea that a state is drawn toward compliance with international law because compliance is the morally right or legitimate thing to do."<sup>30</sup> But a sense of legal obligation can have other bases than morality.<sup>31</sup> It does not depend on states having pure transcendental wills, obeying international law simply because that is the right thing to do, without regard to consequences. Instead, actors might accept rules as reasons for action based on prudential grounds. Hobbes, for example, suggests that individuals have a long-term self-interest in the maintenance of order, which serves as a basis for legal compliance. Similarly, international lawyers have attempted to explain compliance with international legal obligations instrumentally—in terms of reputational factors, for example, or states' long-term self-interest in a functioning legal system.

Do Goldsmith and Posner accept the possibility of an instrumental account of legal compliance? Do they agree that states may accept international rules as reasons for action based on self-interest? Their argument is unclear on this

---

<sup>30</sup> GOLDSMITH & POSNER, *supra* note 1, at 15. Goldsmith and Posner advance both descriptive and normative arguments against this theory of legal compliance. Descriptively, they deny that states, even when acting consistently with international law, are influenced by moral considerations as opposed to self-interest. Normatively, they argue that states have no moral duty to comply with international law. Although Goldsmith and Posner evidently believe their descriptive and normative arguments to be mutually reinforcing, the normative argument tends to undercut the credibility of the descriptive claim. For, if their descriptive claim is true—that states never comply with international law for moral reasons—then their normative argument is beside the point. That they nevertheless advance it, in essence as an argument in the alternative against the moral force of international law, suggests both a lack confidence in their descriptive claim and a polemical agenda that may cloud the objectivity of their descriptive analysis.

<sup>31</sup> See generally A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); Leslie Green, *Law and Obligations*, in *OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* (Jules Coleman & Scott Shapiro eds., 2002).

point. They say that “states comply with [international law] when it is in their rational self-interest to do so, and not otherwise.”<sup>32</sup> But this statement contains a fundamental ambiguity about whether the calculation of self-interest remains the same before and after the development of a legal rule. To the extent that the existence of a legal rule changes a state’s calculation of self-interest, by providing it with an additional interest to do what the rule directs (or to retaliate against others for failing to do so), then the rule has an effect and is not merely epiphenomenal.

At times, Goldsmith and Posner seem to deny this possibility, for example, when claiming that customary international law is not an “exogenous influence on state behavior.”<sup>33</sup> But this statement can be read in a more limited way, as merely a corollary of their earlier argument that international law is a product of—and hence endogenous to—state interests.<sup>34</sup> On this reading, international law cannot be an exogenous influence on state behavior for the simple reason that it has already been made endogenous.

Given Goldsmith and Posner’s reluctance to face this issue squarely, any conclusions regarding their views must remain tentative. But I think the book as a whole leaves room for international law to play a distinctively legal role. Despite its claim to exclude from its analysis “a preference for complying with international law,”<sup>35</sup> *Limits* does not appear to reject the possibility that a legal rule may change a state’s calculation of self-interest. It downplays reputational factors, for example, but does not deny their existence.<sup>36</sup> Yes, *Limits* is skeptical about the role of international law—as its title suggests, very strongly so. But it acknowledges that international law plays a causal role by communicating information about the strength of a state’s commitment, what counts as cooperation, and so forth. As the authors recognize, in some subject areas, such as diplomatic immunity law, compliance with customary rules is very high, even when violations of those rules would be in a state’s short-term self-interest.<sup>37</sup> If this reading is correct, the issue is not whether, on a purely instrumental account, international law can be consequential, but rather, how much difference it makes and in what contexts.

---

<sup>32</sup> GOLDSMITH & POSNER, *supra* note 1, at 100.

<sup>33</sup> *Id.* at 43.

<sup>34</sup> *Id.* at 13.

<sup>35</sup> *Id.* at 9.

<sup>36</sup> *Id.* at 102 (“Both [retaliation and reputation stories] are consistent with rational choice premises.”).

<sup>37</sup> *Id.* at 55.

*B. A Scientific Methodology of International Law?*

In his classic nineteenth century fantasy, *Flatland*, Edwin Abbot portrays a world of only two dimensions, whose inhabitants are unable to comprehend the arrival of a stranger from the three-dimensional world of spaceland.<sup>38</sup> Reading *Limits* often brought to mind *Flatland*, for *Limits* gives a similarly flattened account of international law, reduced to the dimensions of self-interest and, to a subsidiary extent, power. Or, to change the metaphor, *Limits* depicts a world of black and white, with few shades of gray, much less of color. In the very simple model of international law it elaborates, unitary states rationally pursue their self-interest. Gone from this account are the innumerable features that give richness and texture to international affairs—domestic politics, nongovernmental groups, intergovernmental organizations, leaders, ideas and ideology. Gone too are the normative accounts of state behavior dear to international lawyers, which focus on noninstrumental factors such as morality and legitimacy.

Although *Limits* has been criticized for the incompleteness of its initial assumptions—for instance, that states are not the only important actors, that they are not unitary actors, and that they do not always behave rationally—the simplified model of state behavior depicted in *Limits* is not, in itself, problematic. A hallmark of the scientific method is abstraction from reality. Few scientific models fully take account of the complexities of the real world—that is why so much effort is necessary in the laboratory to create ideal conditions in which to test a theory. If Galileo had indeed dropped a cannon ball and a much lighter musket ball from the Leaning Tower of Pisa, the musket ball would have dropped slightly more slowly due to air resistance. The abstraction of Goldsmith and Posner's theory does not distinguish it from, say, Newton's law of gravity, which does not take into account friction.

In science, the rationale for simplification is methodological. In order to develop testable hypotheses, we need to isolate different causal factors. Simplification requires abstracting from reality, but has a significant payoff, namely, scientific rigor. So long as we distinguish between simplifying assumptions and reality—so long as we do not confuse flatland with spaceland—then there is no problem.

In *Limits*, however, it is not always clear that Goldsmith and Posner do maintain this distinction—and that is what, I think, undermines their account

---

<sup>38</sup> EDWIN ABBOTT, *FLATLAND: A ROMANCE OF MANY DIMENSIONS* (Little Brown 1939) (1890).

of international law. True, they describe their theory modestly at times, as a “pragmatic tool” to “organize our ideas and intuitions and to clarify assumptions.”<sup>39</sup> As they acknowledge: “No theory predicts all phenomena with perfect accuracy. And we do not deny that states act irrationally, because their leaders make mistakes, because of institutional failures, and so forth.”<sup>40</sup> But, despite these qualifications, the book has more hegemonic aims. It seeks not simply to provide an instrumental account of international law, but to exclude noninstrumental approaches as methodologically deficient.<sup>41</sup> And it attempts not merely to explain particular features of international law, but to develop a comprehensive theory that can account for the entire range of international legal phenomena.<sup>42</sup>

In relentlessly focusing on a single explanatory factor, Goldsmith and Posner remind one more of international relations theorists than of international lawyers. International relations scholars tend to subscribe to a particular theory; they are realists, or institutionalists, or constructivists, but seldom all three. International lawyers, by contrast, typically take a more eclectic approach, drawing on a variety of methodologies and theories as the occasion suits. Power, interests, ideology, domestic politics may all figure into their accounts of the international legal process. I first encountered the difference between the two mindsets many years ago, when participating in a program populated by international relations scholars. I was perplexed, at the time, by the imperative the political scientists felt to adopt a single theory, and asked why they could not simply draw the best from each, since each appeared to contain an element of the truth. The response was always the same: an eclectic approach would be unrigorous and unscientific, a view that Goldsmith and Posner evidently share.<sup>43</sup>

The claim to scientific rigor deserves careful consideration. How should we appraise it? Are there good methodological reasons to exclude normative factors from our explanatory toolbox, as Goldsmith and Posner argue? What are the putative benefits of Goldsmith and Posner’s methodology and what are the costs?

Three virtues often associated with the scientific method are falsifiability, predictive value, and empiricism. Let us consider each of these in turn.

---

<sup>39</sup> GOLDSMITH & POSNER, *supra* note 1, at 7.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 10 (arguing that a preference for complying with international law should be excluded for methodological reasons).

<sup>42</sup> *Id.* at 17 (“Ours is a comprehensive analysis of international law.”).

<sup>43</sup> *Id.* at 9-10.

Goldsmith and Posner themselves propose a test of falsifiability for their theory.<sup>44</sup> But their theory has sufficient play in the joints that falsification is no easy matter. Apparently contrary evidence can always be explained away. The European Convention on Human Rights, for example, seems highly effective, contrary to Goldsmith and Posner's claim that "modern human rights treaties have had no significant impact on human rights protection."<sup>45</sup> But they dismiss this as a *sui generis* result, resulting from regional integration rather than international law.<sup>46</sup> Or they note that the "only rigorous empirical" study of GATT dispute resolution comes to the conclusion that states "care about complying with GATT rulings," but then proceed to find various faults with the study.<sup>47</sup> For critics, the difficulty of falsifying rational choice theory represents a serious indictment. But modern philosophy of science teaches that scientific theories, in general, cannot be falsified in any straightforward way. At the extreme, contrary evidence can always be dismissed as "experimental error."<sup>48</sup> In the web of our beliefs, we practice what the philosopher, Willard van Orman Quine, has called a "principle of minimum mutilation."<sup>49</sup> When evidence appears to falsify a theory, we first try to make adjustments at the margins, rather than change our core beliefs. Ptolemy added epicycle upon epicycle to explain the planetary motions, in order to preserve his core belief that the planetary bodies revolved in circular orbits, just as Goldsmith and Posner propose successive refinements to preserve their core belief in rational choice. Theories are not generally falsified by disproving particular propositions; they are displaced as a whole when a better theory comes along.<sup>50</sup>

Perhaps a better measure of scientific theories than falsifiability is predictive value. Generally, this is the payoff for abstraction in science: It yields interesting predictions. It tells us things we would not otherwise have expected: Maxwell's theory of electromagnetism predicts the existence of electromagnetic waves; Newton's theory of gravity predicts that feathers and

---

<sup>44</sup> *Id.* at 10.

<sup>45</sup> *Id.* at 121.

<sup>46</sup> *Id.* at 126.

<sup>47</sup> *Id.* at 156-57.

<sup>48</sup> For example, in his oil-drop experiment to determine the charge of the electron, for which he won a Nobel Prize, Robert Millikan apparently discarded experimental results that did not fit his theory, on the grounds that they must have involved instrumental errors. See GERALD HOLTON, *THE SCIENTIFIC IMAGINATION* 25 (1978).

<sup>49</sup> Willard van Orman Quine, *Two Dogmas of Belief*, in *FROM A LOGICAL POINT OF VIEW* (1953); see also WILLARD VAN ORMAN QUINE, *THE WEB OF BELIEF* (2d ed. 1978).

<sup>50</sup> THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (3d ed. 1996) (discussing the role of anomalies in ultimately producing a "paradigm shift").

cannon balls will fall at the same rate in a vacuum, regardless of their mass; Adam Smith's theory of the invisible hand predicts that the competitive, egoistic behavior of individuals can produce collectively desirable results, through the operation of the market; and trade theory predicts that lowering tariff barriers will generally make a state better off, regardless of what other countries do. Common sense would not lead us to expect any of these things; they are all non-intuitive or even counterintuitive. In my view, one of the disappointments of *Limits* is that it yields relatively few such novel or unexpected predictions. In the field of diplomatic immunities, for example, it predicts that rogue states are more likely to violate rules than civilized states,<sup>51</sup> and that states are more likely to violate international law when the stakes are high.<sup>52</sup> Similarly, with respect to the law of war, the theory predicts that states will make an exemption to the general rule prohibiting seizure of coastal fishing vessels, if the fishing vessel serves a military purpose.<sup>53</sup> But far from being unexpected, these predictions are exactly what one would have anticipated, even if one had never heard of rational choice theory.

A final virtue often associated with science is empiricism. Although *Limits* does not yield a rich trove of predictions, does it at least have significant empirical support? The answer is uncertain. For despite occasional claims by Goldsmith and Posner that *Limits* is empirical in nature, its empiricism is quite thin. In general, its approach might more accurately be characterized as conceptual. The structure of its arguments tends to take the following form: suppose that one state has preference *x* and another state preference *y*, then this is what we would expect to happen. But whether actual states in the real world actually have these preferences, and whether, when they do, the results are what the book predicts are questions not systematically addressed.

Of course, Goldsmith and Posner do claim to test their conceptual analysis on the basis of a number of case studies. But even accepting Goldsmith and Posner's versions of these case studies,<sup>54</sup> they are essentially anecdotal in nature. And even when Goldsmith and Posner discuss actual rather than purely hypothetical states, their identification of state interests remains largely

---

<sup>51</sup> GOLDSMITH & POSNER, *supra* note 1, at 57.

<sup>52</sup> *Id.* at 58.

<sup>53</sup> *Id.* at 75-76 (in commenting on the exemption allowing seizure of a fishing vessel when it serves a military purpose, Goldsmith and Posner proclaim in triumph, this is "just the sort of exemption our theory would predict").

<sup>54</sup> See David M. Golove, *Leaving Customary International Law Where It Is: Goldsmith and Posner's The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 333 (2006) (challenging the historical account provided in *Limits* of the "free ships, free goods" rule).



conjectural. For example, in discussing British and French practice in the nineteenth century, they say that Britain and France “might” both have had an interest in seizing each other’s fishing vessels, but that “perhaps” they would have been better off if they had saved their money for other purposes.<sup>55</sup> These are not empirical statements; they are conjectures. If one did a concordance of the verbs used in *Limits*, I suspect that “might” would appear near the top of the list.

In describing the methodology of *Limits* as conceptual rather than empirical, I do not mean to disparage the book or suggest it is without value. Despite its shortcomings, it succeeds admirably in its goal of providing “a simple but plausible descriptive account”<sup>56</sup> of various international regimes. Although the configurations of state interests and power that it elaborates—coincidence of interests, coordination, cooperation and coercion—are familiar to international relations theorists,<sup>57</sup> Goldsmith and Posner deserve credit for articulating them in a clear and coherent manner, thereby making them accessible to a wide audience of international lawyers. Whether one agrees with the particular way in which they apply game theory to analyze particular issues, their discussion of customary international law amply demonstrates the value of rational choice analysis. Not only does it help illuminate particular issues, it offers a progressive research agenda, one of the hallmarks of the scientific method.<sup>58</sup>

But while I have little doubt that rational choice theory represents, to a significant degree, the future of international legal scholarship, it does not tell the whole story. It helps us understand certain features of international law, but not others—it comes at a cost, which we might broadly call “reality.” Consider, for example, the failure by the U.S. to ratify the U.N. Convention on the Law of the Sea (UNCLOS). UNCLOS is currently supported by the Bush Administration, a large majority of the Senate, the Defense Department, and most segments of industry. It was reported on favorably by the Senate Foreign Relations Committee. But, as of December 2005, the Senate had not voted on

---

<sup>55</sup> GOLDSMITH & POSNER, *supra* note 1, at 76.

<sup>56</sup> *Id.* at 10; *see also id.* at 13.

<sup>57</sup> *See, e.g.*, ARTHUR A. STEIN, WHY STATES COOPERATE: CIRCUMSTANCE AND CHOICE IN INTERNATIONAL RELATIONS (1993); SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING (2003).

<sup>58</sup> *See, e.g.*, Imre Lakatos, *Falsification and the Methodology of Scientific Research Programmes*, in CRITICISM AND THE GROWTH OF SCIENTIFIC KNOWLEDGE 91 (Imre Lakatos & Alan Musgrave eds., 1970); LARRY LAUDAN, PROGRESS AND ITS PROBLEMS: TOWARDS A THEORY OF SCIENTIFIC GROWTH (1977).

advice and consent to ratification due to a “hold” put on the treaty by a handful of senators. Here, it makes little sense to think of the United States as a unitary actor, rationally pursuing its self-interest. Instead, the failure to ratify UNCLOS is the result of domestic politics, which could easily change—for example, if elections resulted in new Senate leadership less deferential to the senators who are blocking the treaty. To understand these twists and turns, we need the methodology of history, not political science.

Consider similarly the growing role of both international and domestic tribunals.<sup>59</sup> State interests might be able to provide an explanation for why states establish international tribunals in the first place and comply with their decisions, or why they give domestic courts authority to apply international law. But it is difficult to explain the actual practice of international tribunals such as the WTO Appellate Body, or the British House of Lords in the *Pinochet* case,<sup>60</sup> in purely instrumental terms. The most parsimonious way to account for the behavior of most if not all tribunals is in terms, not of state interests, but of legal rules and legal reasoning.

Where Goldsmith and Posner get into trouble is in mistaking their simplifying assumptions for reality. This happens at both the micro and macro levels. Sometimes, in a move reminiscent of President Reagan’s occasional confusion of movies and reality, Goldsmith and Posner start by expounding a hypothetical, then later treat the hypothetical as a statement about the real world. For example, they posit a CEO who follows contract law out of self-interest rather than a preference to comply with the law. Then, on the basis of this hypothetical, they draw an empirical conclusion, claiming that “this is surely the case for international law as well.”<sup>61</sup> Similarly, after speculating about the possible views of different U.S. agencies on compliance (using the verbs “may” or “might” seven times), they then draw the factual conclusion that bureaucracies in reality “have competing preferences” and that, “when bureaucracies differ on compliance issues, the compliance view does not always prevail.”<sup>62</sup> In doing so, they transmute speculations about what “may” be the case into declarative statements about what “is” the case; they confuse plausible conjectures with empirical truths.

---

<sup>59</sup> Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

<sup>60</sup> See PHILIPPE SANDS, *LAWLESS WORLD* (2005).

<sup>61</sup> GOLDSMITH & POSNER, *supra* note 1, at 105.

<sup>62</sup> *Id.* at 106.

The same problem occurs at the macro level, in their rejection of noninstrumental accounts of international law. The fact that we can plausibly understand some international rules in terms of unitary states acting rationally to further their interests does not mean that states are the only relevant actors or that interests are the only relevant motivation. Goldsmith and Posner admit that whether states care about compliance with international law is an empirical question, which they “do not purport to resolve.”<sup>63</sup> Instead, they criticize reliance on noninstrumental factors on methodological grounds, claiming that “the assumption of a tendency towards compliance [with international law] has little if any explanatory value.”<sup>64</sup> But this seems plainly false. I promise my daughter that I will take her to the zoo on a particular day—a day that unbeknownst to me is Super Bowl Sunday. I believe that I should keep my promises, if possible. I take her to the zoo, even though this means foregoing a Super Bowl party to which I have been invited. In what sense does my normative belief in the importance of keeping promises have “little if any explanatory value”? To be sure, it does not explain why I sometimes break my promises. Nor does it exclude the possibility that instrumental factors may also play a role—for example, my desire to “look good” to my daughter and others. So it does not offer a full account of my behavior with respect to promises. But this is not the same as saying that it lacks explanatory value. Goldsmith and Posner’s argument assumes that normative factors are like intelligent design, which is inferred from the complexity of life and hence cannot explain that complexity in a noncircular way.<sup>65</sup> But to the extent that we have empirical evidence that, on actual international law issues, important state actors are influenced by a logic of appropriateness as well as a logic of consequences, and that these actors influence the state’s decisions, there is no methodological reason to exclude this noninstrumental account.

How important a factor in explaining state behavior is the preference for compliance with international law? In the best selling book *Freakonomics*, the authors note that people comply with the moral norm against stealing 87% of the time, even in the absence of any enforcement.<sup>66</sup> They attribute this to the moral sentiments, which Adam Smith wrote about more than 200 years ago.

---

<sup>63</sup> *Id.* at 10.

<sup>64</sup> *Id.* at 15.

<sup>65</sup> For that matter, rational choice theory has the same problem: to the extent it infers preferences from behavior, then using those preferences to explain behavior is circular.

<sup>66</sup> STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 50-51 (2005).

But if people indeed have moral sentiments, as I think our experience of everyday life confirms, then why should these stop at the water's edge? Why should they play no role in decisions by governmental actors about international affairs? In recent years, significant efforts have been made to address the various factors that contribute to compliance with international law, although assessing their relative importance has proved exceedingly difficult.<sup>67</sup> My own limited experience is that, in international environmental regimes, U.S. officials take compliance quite seriously, and are unwilling to join a treaty unless they know exactly how the United States will be able to fulfil its obligations.<sup>68</sup> But, of course, in other areas, for example, payment of United Nations dues, U.S. compliance with international law has been poor.

The institutions with the most obvious preference to comply with international law are those responsible for dispute settlement: courts, arbitral tribunals, WTO panels, and so forth. Although judicial decision making involves many factors, not all of which are necessarily legal in nature (a judge's politics, for example, or country of nationality), I do not think it is possible to understand judicial behavior absent an assumption that judges are trying to apply the law. So, as international tribunals proliferate and become more influential, the preference for compliance with international law will gain in importance.

The reductionist quality of Goldsmith and Posner's account makes it particularly inappropriate for the practitioner of international law, who, unlike the theorist, operates in the real world, and therefore needs to try to account for the full range of causal factors that influence the behavior of states and other international actors. The theory is of relatively little value, pragmatically, in helping us think through actual issues.

Consider, for example, the problem of global warming. Climate change has been subjected to considerable analysis in the manner that *Limits* suggests, as a multi-party prisoner's dilemma. This is fine insofar as it goes. But Goldsmith and Posner's approach stops just at the point where things get interesting. Although in the long run, climate change may be a prisoner's dilemma game, in the short term it is difficult to understand the issue in these terms. On the one hand, some actors are pushing ahead with action to combat climate change, such as the European Union, the state of California, a large

---

<sup>67</sup> Shelton, *supra* note 7.

<sup>68</sup> For example, the President has been unwilling to ratify the Basel Convention on Transboundary Movements of Hazardous Wastes, despite Senate consent, because Congress has been unable to enact implementing legislation.

number of cities, and businesses such as British Petroleum and General Electric, even though their actions are not being reciprocated by others, and even though they fail to constitute a "minimum viable coalition," in the parlance of game theory. On the other hand, the United States under President Bush opposes such action not just by itself, but by others as well. It is not trying to free ride, as game theory would predict; rather, it is trying to stop the bus altogether.

To understand all of this, we need to explore an issue that *Limits* leaves to one side, as exogenous to its theory, namely how preferences form and change. And to do this, we need to bring in a variety of causal factors that are outside Goldsmith and Posner's model—leadership, domestic politics, and even the role of values. For if one asks officials in northeastern states of the United States why they are spearheading a regional initiative to cap CO<sub>2</sub> emissions, the answer they most often give is, because it is the right thing to do.

The simple model set forth in *Limits* does no better in helping us assess the potential international responses to climate change. In what forum should negotiations proceed? What types of commitments should be used? How can we restructure incentives through institutional design in order to promote compliance? The simple game theoretic models that Goldsmith and Posner elaborate do not even begin to address these more complex issues of institutional design.<sup>69</sup>

In the end, *Limits* makes a convincing case that rational choice theory can help us better understand the development and effectiveness of international law. But it provides no compelling reason why noninstrumental factors might not also play a role. It presents a flattened picture of the world, drained of texture and nuance and color. It illustrates that to understand international law we need not only science, but also art.

---

<sup>69</sup> For a more sophisticated application of game theory to international environmental issues, see BARRETT, *supra* note 57.