

A NEGATIVE PROOF OF INTERNATIONAL LAW

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I. INTRODUCTION

Important legal scholars have launched assaults against both the consequence and legitimacy of international law. These challenges are useful by way of testing international law's theoretical underpinnings, which, in the modern period at least, have never been very secure. With *The Limits of International Law*, Jack Goldsmith and Eric Posner have done a service to those who put more faith in international law as a meaningful quantity.¹ Especially in these the field's early renaissance years, understandings of international law should be considerably strengthened by the attack. Though I doubt the authors would thus conceive of their project, *The Limits of International Law* may ultimately serve the object of their skepticism.²

This is true even before one reaches the matter on the merits. Serious people do not waste their time on trifles. The fact that the likes of Goldsmith, Posner, and other respected scholars, along with prominent denizens of think tanks, the courts, and other policy-oriented institutions, are expending such efforts by way of refuting the efficacy and/or normativity of international law is by itself a barometer of its importance. One hardly found their Cold War

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

² In addition to the Essays in this symposium, the book has provoked other lengthy responses. See Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. (forthcoming 2006); Paul Schiff Berman, *Seeing Beyond the Limits of International Law*, 84 TEX. L. REV. (forthcoming 2006) (reviewing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005)); Andrew Guzman, *The Promise of International Law*, 92 VA. L. REV. (forthcoming 2006). As Hathaway and Lavinbuk note, "understanding where the book succeeds and where it falls short can help us chart a new agenda for international legal scholarship." Hathaway & Lavinbuk, *supra* (manuscript at 32). Several critiques have also been undertaken of Goldsmith and Posner's treatment of customary international law (previously published as a law review article). See, e.g., George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541 (2005); Edward T. Swaine, *Rational Custom*, 52 DUKE L.J. 599 (2002); Detlev F. Vagts, *International Relations Looks at Customary International Law: A Traditionalist's Defense*, 15 EUR. J. INT'L L. 1031 (2004).

counterparts behind equivalent undertakings; it simply was not worth it, so obvious was the marginalization of international law in the academy and on the ground. There is nothing worse than being ignored, and for many decades that was international law's fate. It might be too self-serving to say that today international law is the center of the action, academic and otherwise, but the fact that Goldsmith and Posner have turned their attention to international law, even as skeptics, is evidence that something important is going on here.

In this respect, their project (here and in other writings, and more or less in concert with an impressive group of fellow travelers) is a defensive one. As international law appears to gain traction, it must at all costs be explained away before entrenchment occurs. No doubt Posner and Goldsmith (though not always the others) are careful to hide their tracks with respect to any sort of political agenda, which they may or may not have, but surely the authors of *The Limits of International Law* are skeptical about, if not perhaps hostile to, international law.³ But that skepticism, shared of course by many others as part of the modern American tradition of international law exceptionalism, is itself being stressed. It is becoming increasingly difficult to reconcile a narrow conception of the place of international law with the broadening swath it is cutting through all areas of the law at all levels of decision making.

Lest I be mistaken for a breathless internationalist, let me make clear that I am not advocating international law as some sort of utopian regime. International law suffers the problems that all legal systems suffer, perhaps more, insofar as it is a system undergoing radical transformation. Those problems notwithstanding, it seems time to concede the reality of international law's greater relative profile and address such challenges (many of them foundational questions of institutional design) that arise as a result of the change. Denying the fact of the shift itself seems normatively problematic, a sort of see-no-evil approach under which the flaws of international legal power are ignored rather than grappled with. It is unlikely that *The Limits of International Law* will prove the skeptic's Alamo. But it is also unlikely to shore up the embattled anti-internationalist construct.

Which takes us from the sociology of international law to the merits. The critical task here is a difficult one; there is a certain slipperiness in the arguments of *The Limits of International Law*. Eschewing an openly dismissive take on international law, Goldsmith and Posner concede what they must without acknowledging any sort of retreat. The book shrugs in the face

³ For sustained arguments that the authors advance a submerged anti-internationalist agenda, see Berman, *supra* note 2; Hathaway & Lavinbuk, *supra* note 2.

of undeniable advances in the rule of international law. The primary strategy is to source those advances to something other than international law itself, or, more specifically, to something other than conduct undertaken out of a state's sense of legal obligation. But if Goldsmith and Posner are saying "so what?" to much of the recent history of international law, one might respond in kind to their analysis, much of which could apply to law of any stripe, including law clearly accepted as such. Moreover, Goldsmith and Posner miss much of the new international law game by restricting their analysis to traditional actors (namely, states) and traditional issues.

This Essay on *The Limits of International Law* will first argue that the rational interest of states in observing international law does nothing to diminish its consequence. Other forms of law are also more or less grounded in the rational action of their target actors, and most of what Goldsmith and Posner say about international law can be said of quotidian domestic law. States, as corporate actors, no doubt by and large comply with international law where it is in their interest to do so; the same can be said of corporations vis-à-vis domestic law and indeed in many cases of individuals as they calculate their own conduct. The Essay will then highlight the book's bracketing of actors other than states. By omitting any serious consideration of non-state actors from their analysis, Goldsmith and Posner are left with a partial understanding, at best, of the new international law dynamic. This bracketing is understandable, as it would be difficult to model the game of polymorphic actors that results. But NGOs and corporations are now independently consequential actors in the dynamic of international law, as an empirical matter, and so international law models must move to take account of them. Insofar as Goldsmith and Posner brush them aside, their analysis is at least incomplete.

The Limits of International Law succeeds at provocation, which is surely its intention. There is much useful material here, and many of its arguments are difficult to refute. But ultimately this analysis of international law is unlikely to carry the day. International law is here to stay, and relative to other forms of the law is of increasing consequence.

II. THE LIMITS OF INTERNATIONAL LAW, AND ANY OTHER LAW

If Goldsmith and Posner are largely dismissive of international law, they should be dismissive of other bodies of law as well, for many of their basic observations apply, more or less, to run-of-the-mine legal systems that the authors would surely accept as consequential. Compliance with ordinary

domestic legal regimes often reflects nothing more than the self-interested behavior of regulated entities. This stands true for individual conduct, although the compliance of individuals may be overdetermined, involving moral as well as material incentive structures. But the compliance of other legal persons, most notably corporations, can be explained entirely in terms of institutional self-interest. Thus, even if compliance with international law is amenable only to an interests-based explanation, that does not make it any less the law, nor does it necessarily bear on issues related to levels of compliance. In other words, even if Goldsmith and Posner are correct about states acting out of something other than a sense of legal obligation, international law may emerge as an increasingly robust regime for regulating the conduct of states and other actors.

There is something of a strawman in the repeated refrain that states never abide by international law because they perceive a legal obligation to do so.⁴ The target is grounded in the customary international law (CIL) rule of *opinio juris*, under which the practices of states will not rise to the level of law until states have acknowledged the practice to be required by international law. But just because the doctrine includes the formal requirement (to distinguish customary international law rules from practices reflecting pure coincidence of interest with no necessary interstate component, such as the judicial use of *res judicata*) does not mean that the efficacy of the resulting legal construct is contingent on that sense of obligation. As the authors acknowledge, the doctrinal proposition works from the anthropomorphization of states;⁵ states do not have feelings, and so cannot act with any particular motivations other than the motivations of the individuals and entities of which the state is composed. So the legal premise begins as a fiction. And even if *opinio juris* is an element in the establishment of CIL norms, it is not a necessary component to compliance with those norms once established.

Goldsmith and Posner themselves acknowledge that state conduct often comports with international law.⁶ But they explain away such conformity in terms other than compliance, most notably as the result of either coincidence of interest or of coercion. Here is where the analogies to ordinary forms of domestic law are readily presented. Take the criminal prohibition on murder. Most people refrain from murder not because the law prohibits it, but rather because they have no interest in committing it even aside from incentives

⁴ See GOLDSMITH & POSNER, *supra* note 1, at 39, 52, 53, 83.

⁵ *Id.* at 4-5.

⁶ *Id.* at 165.

created by the law. I do not murder a person that bumps into me on the sidewalk because I do not have anything to gain by it, and might have a lot to lose (ruined clothes, the possibility that my victim is actually highly trained in martial arts and will kill me before I kill him, the distrust of friends and acquaintances if they learn of the act, etc.), even if I address the proposition from an entirely amoral perspective. In other words, even if there were no law against murder, most people would not commit murder; their conduct conforms with the law, but there is no causal relation between the law and the behavior.

Of course there may be other contexts in which the law plays a consequential role in an individual's decision not to kill others. Again, assuming no moral constraints, there will be many scenarios in which (absent the law) it would be in an individual's interest to commit murder. Competition for love or money would present only the most obvious. In some cases the desire to kill would clearly outweigh any nonlegal and even moral incentives to desist from the conduct. Indeed, it would be the rare human being who has never fantasized about killing a rival or adversary. Where premeditated, murder could be undertaken so as to minimize other costs, especially the high risks otherwise associated with self-defense. But here of course incentives created by the law and its enforcement make a difference, and (in most cases) result in the nonoccurrence of the act. Of course, the decision not to commit murder may be overdetermined, insofar as there will also be strong moral, social, and other factors reinforcing the legal incentives not to engage in the conduct. But there surely are many instances in which it is only the law that stops a person from killing another.⁷

In such cases, the individual is conforming his behavior to the law not out of a sense of legal obligation, to use the Goldsmith-Posner refrain, but because of coercion or the threat thereof. It is the prospect of a twenty-years-to-life sentence alone that stands in the way of many murders, in which case conformity to the legal standard is undertaken merely out of rational self-interest. And yet that explanation for some significant measure of compliance with the law does not diminish our perception of it as such. This would seem all the more obvious with respect to certain crimes (*mala prohibita*) the punishment of which is not even considered to enjoy moral foundation, as well as with respect to corporate entities, who can hardly be said to act with moral motivations as such.⁸

⁷ Such is the assumption of economic perspectives on criminal law. See, e.g., Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193 (1985).

⁸ Goldsmith and Posner as much as acknowledge the latter, by analogizing state compliance

And so the fact that states conform to international law rules out of fear that they will otherwise face coercion is consistent with a robust legal system. Goldsmith and Posner's account of CIL includes several examples in which CIL rules are complied with in the face or wake of coercion.⁹ That such coercion occurs along the dimension of a legal rule, and not in some random fashion, evidences a regularity associated with law; the law (in all contexts) presents a line which if crossed presents the possibility of a coercive response. The book also strategically concedes that states may suffer reputational costs for treaty violations.¹⁰ The authors note that a reputation for violating treaties may vary according to type of treaty and that in some cases states may be served by having a reputation for not complying with international law. But these observations also have their cognates in the realm of domestic law. Businesses might be known to have a history of respecting some types of contractual obligations and not others. Individuals might in certain contexts benefit from a reputation for not complying with the law, as any casual student of the mob, or even just the neighborhood bully, would understand.¹¹

Of course, international law, and customary international law in particular, has mostly been enforced on a horizontal basis where ordinary domestic laws against crimes like murder are typically enforced by a superior institution, backed if necessary by the legitimized use of violence. That presents the Austinian argument against the existence of international law as such. And yet that model seems by now to have been pretty well refuted, unless such relegation of "law" to pyramidal structures is a matter of taxonomy only. It is clear that horizontally enforced systems can lead to behavioral regularities against the immediate self-interest of targeted entities, and that enforcement in such systems can be undertaken through means other than the use of force. At the microlevel, there is the law of the queue, enforced among individuals

with treaties to corporate compliance with contracts. See GOLDSMITH & POSNER, *supra* note 1, at 105.

⁹ See, e.g., *id.* at 50-51 (enforcement through coercion of neutrality rules); *id.* at 60 (enforcement through coercion of three-mile territorial sea limit); *id.* at 122 (enforcement through coercion of human rights norms).

¹⁰ See *id.* at 102-03. It is this and other unsystematic concessions which make the book's theory unfalsifiable. See Hathaway & Lavinbuk, *supra* note 2 (manuscript at 19). The theory conforms to prevailing conditions on the ground, but can only do so by introducing factors that themselves are not integral to the theory itself. As others note, for instance, the theory defines state interests in variable respects in a way that nullifies the utility of rational self-interest.

¹¹ For further critique, see Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379 (2006).

acting under no authority, textual, legal, or moral.¹² There is by now an advanced literature on the enforcement of social norms, which, even if not enjoying the force of law, are consequential to rationally self-interested actors.¹³

Where legal scholarship has thus recently moved to developing a continuum of law—including the traditional command-control form of regulation backed by the police power of the state but, more interestingly, extending the range to other regimes that systematically affect conduct, whether of public or private origin, and typically not implicating the use of force—Goldsmith and Posner seem wed to law/non-law dichotomies. The model here is limited further insofar as it fails to consider the consequentiality of norms in the international sphere, whether or not they qualify as law against formalist criteria.¹⁴ It is almost as if the rope gets pulled up on international law; now that our metrics of law have broadened, international law is held to the less generous (and less theoretically interesting) standards of an earlier era. Indeed, as domestic law scholars explore the uses of nontraditional tools to do work with respect to which old legal methods have fallen short, international law should emerge as a field with something to teach. Just because international law has traditionally employed horizontal mechanisms of enforcement and just because such enforcement has not always been consistently backed by the use of force does not necessarily detract from its salience as a regulator of behavior. And even if the social norms of international society are not themselves properly characterized as law, they may well morph into something that is, by way of addressing the possible pathologies of standards developed and enforced outside of collective public institutions.¹⁵

¹² See W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999).

¹³ See, e.g., ERIC A. POSNER, *LAW AND SOCIAL NORMS* (2000); ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992); Richard H. McAdams, *Groups Norms, Gossip, and Blackmail*, 144 U. PENN. L. REV. 2237 (1996).

¹⁴ See Norman & Trachtman, *supra* note 2, at 545 (“We might ask, however, whether CIL is different in structure from social norms in a domestic context.”). The omission is puzzling given Posner’s status as a leading commentator on the relationship of norms and law. See POSNER, *supra* note 13.

¹⁵ See POSNER, *supra* note 13, at 219 (arguing that law is better than social norms systems because, among other reasons, “[w]here pockets of powerful nonlegal enforcement remain, people feel uneasy”).

Of course there may be important empirical questions about whether international law, whatever its thresholds may be, actually reflects conduct on the ground. Two responses seem possible here. First, no system of law reflects or achieves perfect behavioral regularity. Even though all societies criminalize murder, one finds murderers in all societies.¹⁶ Second, most legal systems include elements that are not enforced at all, or which are not enforced as written. Domestic law regimes include a host of laws that fall in and out of desuetude, or the enforcement of which is contingent on temporal or locational factors; marijuana possession and immigration laws would present two of many examples. The enforcement of other laws may not match their literal terms, as in the case of roadway speed limits. Finally, the transaction costs of legal proceedings may pose a formidable barrier to bringing to bear the power of the state against noncompliers. The result is that all sorts of infractions (whether of public law or, perhaps even more notoriously, of private contractual obligations) go underenforced. And yet none of these deficiencies in domestic law systems give rise to any doubts about its overall efficacy.

And so highlighting non-conformity with international law rules is not enough by itself to refute their significance. International law does not enjoy perfect compliance, but nor does any other legal regime. Just because there are some governments (a dwindling number, one might add) that engage in torture does not mean that the international law norm prohibiting the practice is of no consequence. Just because Article 2(4) of the United Nations Charter has not ended the use of force does not rule out the possibility that, as with 65 m.p.h. speed limits, the provision has in fact constrained the use of force, at least at the margins;¹⁷ and even if the ban has had no effect on state behavior, it would not cast the whole international legal system into doubt. Of course, there will be some level of noncompliance at which such universal doubts would emerge; if I decided tomorrow to enact a system of law to which no one paid the attention, it would not be law just because I called it law. But that is an empirical case that Goldsmith and Posner have failed to make in anything more than an anecdotal fashion, and I suspect that they could not make the case if

¹⁶ Goldsmith and Posner assert that “[d]omestic law is enforced in well-ordered societies,” whereas “international law is not reliably enforced.” GOLDSMITH & POSNER, *supra* note 1, at 195. These are empirical observations unsupported by data. Even homicide laws are not enforced with any particular reliability; murder cases had only a 64% clearance rate in the United States in 2002. See BUREAU OF JUSTICE STATISTICS, <http://www.ojp.usdoj.gov/bjs/homicide/cleared.htm> (last visited Jan. 4, 2006).

¹⁷ *But see* Michael J. Glennon, *How International Rules Die*, 93 GEO. L.J. 939 (2005) (arguing that excessive violation of rule leads to complete freedom of action).

they attempted to do so systematically. It is also worth noting here that the coverage of international law has broadened in recent decades—something that anti-internationalists have generally decried, at least with respect to the rise of international human rights—which surely bears on the significance of international law generally, in much the same way that federal law has become more important as its substantive scope has extended to new fields.

Indeed, *The Limits of International Law* (in another concession) appears to recognize that the trendline points to increased conformity with international law rules. Thus Goldsmith and Posner acknowledge that human rights have improved on a global basis. Here, too, they dismiss the significance of international law as a causal factor, explaining the phenomenon in other terms, economic (increasing prosperity) and political (the fall of the Soviet Union).¹⁸ Leaving aside the rather glaring failure to contemplate the contribution of the hardening of human rights norms to the end of Communism, this line also fails to distinguish international law from domestic law. No doubt, the expansion of rights in the domestic context has been facilitated by rising standards of living as well as by political factors, and yet that circumstance has not been typically deployed to deny some role for law in the process. Perhaps it would be possible, then, to argue that law has in fact been epiphenomenal to the domestic expansion of rights, and a similar analysis might apply at the international level, but the point once again is that international law does not seem exceptional along this dimension. The law is unlikely ever to change anything by itself, but in that respect as well, international law is no different from its domestic equivalents.

At best, then, the focus of Goldsmith and Posner's critique is narrower than their tone would suggest. The bottom line is not that international law is not law (as they are careful to acknowledge in yet another concession).¹⁹ My point above is that international law is in fact not categorically distinct from other forms of law. The book is left taking its shots not against international law as such, but rather against those legal scholars who assert that states comply with international law out of a sense of legal obligation. It is true that the work of some notable scholars can be taken as saying as much, for example, those of the transnational legal process school. But even there the point is not as sharp as it might seem, nor necessarily distinctive of international law. Transnational legal process supposes an internalization of international law norms through iterative interactions in and through which international law

¹⁸ GOLDSMITH & POSNER, *supra* note 1, at 121.

¹⁹ *Id.* at 225.

emerges as a material quantity.²⁰ I think that transnational legal process theory has a difficult time explaining why international law gains traction at any particular point in time, and believe the model (along with the sibling constructivist school of international relations theory) may be flawed insofar as it fails to take interests into account.²¹ But the internalization phenomenon seems once again relatively easily demonstrated from parallel sequences in the domestic context. Corporate compliance with domestic law may mostly be a matter of calculated rational self-interest, but it may well be the case that many corporate officials would nonetheless conceive of such compliance as generated at least in part out of a sense of legal obligation. I would agree that this conception of compliance probably does not amount to much more than window dressing for the interest-based calculations, although it could tie in to the reputational consequences of lawbreaking for repeat players. But that again would not detract from the force of the law as such. If the only thing Goldsmith and Posner are taking down here is one among many conceptions of international law, the work is less ambitious than one takes away from a first read, as international law may well be sustainable on other accounts.

III. THE LIMITS OF INTERNATIONAL LAW, NON-STATE ACTORS SUBTRACTED

The bracketing of non-state actors presents perhaps a more serious flaw in this work. The proposition that states do not conform to international legal standards out of a sense of obligation may be accurate, even if it is a less interesting proposition than the authors make it out to be. But the model's state-centric premises undercut any remaining utility. The analysis may work when applied to the old world in which states dominated the international scene, and were, with few exceptions, the holders of all international power, legal and actual. In the contemporary world, non-state actors are in some contexts autonomous agents, and their independent powers are growing larger. These actors pose a tremendous challenge to the doctrine and theory of international law and international relations, and any model that fails to account for these new players will enjoy only limited application going forward.

²⁰ See, e.g., Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623, 643 (1998).

²¹ See Peter J. Spiro, *Disaggregating U.S. Interests in International Law*, 67 LAW & CONTEMP. PROBS. 195 (2004).

The Limits of International Law attempts to justify this omission, and then, apparently understanding the omission to be too glaring in the context of international human rights, attempts to explain away the role at least of nongovernmental organizations. The justification: “[I]nternational law addresses itself to states and, for the most part, not to individuals or other entities such as governments.”²² This is an odd move coming from scholars who otherwise vaunt international power over international law; Goldsmith and Posner are not otherwise inclined to accept international law shibboleths, and yet here they do exactly that. If actors other than states in fact garner power on the ground, then international law’s blind eyes should not supply an excuse for others to ignore those realities. The rationale, moreover, does not really even work on its own terms, as international law itself begins to take notice of actors other than states.²³ On this score, then, even from an interests/power perspective, international law appears to be ahead of the authors’ own game.

The nearly exclusive focus on state behavior and interaction explains the choice of case studies for the analysis of customary international law. Neutrality, the breadth of the territorial sea, ambassadorial immunity, and prize: while enjoying “prominence,”²⁴ at least three of the four (the territorial sea excluded) are musty old rules of little contemporary relevance or interest. They do a lot of work for Goldsmith and Posner, insofar as they more readily fit within simple games and were a matter of bilateral rather than multilateralized relations; these case studies lend themselves to the sort of stylized model that drives the book’s central conclusions. Insofar as international relations, in those contexts and in many others, was mostly about relations between states, perhaps Goldsmith and Posner’s applications have something to tell us about the evolution of traditional customary norms. But query whether they have much to teach about what is going on today. There appears to be, in other words, a serious selection error in the authors’ dataset. Far more useful—and difficult—would have been the application of their theory to more modern examples of custom. And yet those examples would perhaps have provided a less seamless fit, insofar as the dynamic may involve international organizations, transnational corporations, and nongovernmental organizations. Perhaps the authors could prove me wrong, but the analysis

²² GOLDSMITH & POSNER, *supra* note 1, at 5.

²³ See, e.g., NON-STATE ACTORS AS NEW SUBJECTS OF INTERNATIONAL LAW (Rainer Hofmann ed., 1998).

²⁴ GOLDSMITH & POSNER, *supra* note 1, at 45.

would be more persuasive on its face if it centered something other than antiquarian rules of the century before last.

When it comes to human rights, however, *The Limits of International Law* cannot credibly ignore nongovernmental organizations, so prominent have they become in that arena.²⁵ But it nonetheless attempts to brush NGOs aside, I believe unconvincingly. First, Goldsmith and Posner make the “nothing new” feint. This strategy, perhaps the best extended example of which is Stephen Krasner’s *Sovereignty: Organized Hypocrisy*, seeks to rebut assertions of change by highlighting historical examples of the putatively new phenomenon. In Krasner’s case, the project is to dispel arguments that sovereignty is in decline by trotting out the many ways in which sovereignty never amounted to a perfect edifice; in other words, sovereignty has always been leaky, and so the fact that it is also leaky now is uninteresting.²⁶ Goldsmith and Posner do this on a more limited scale in this context by noting historical examples of NGO influence, such as in efforts to end the slave trade.²⁷ But of course very few phenomena magically emerge without antecedents, and this case proves no

²⁵ Posner elsewhere dismisses NGOs as a force in the international legal arena, because “it is only in the context of human rights that the NGO theory has surface plausibility.” Eric A. Posner, *International Law and the Disaggregated State*, 32 FLA. ST. U. L. REV. 797, 816 (2005). That assertion ignores the clear possibility that NGOs are consequential players in, for instance, international environmental and intellectual property law. See, e.g., THOMAS PRINCEN & MATTHIAS FINGER, ENVIRONMENTAL NGOS IN WORLD POLITICS: LINKING THE LOCAL AND THE GLOBAL (1994); Kal Raustiala, *States, NGOs, and International Environmental Institutions*, 41 INT’L STUD. Q. 719 (1997); Susan K. Sell, *Multinational Corporations as Agents of Change: The Globalization of Intellectual Property Rights*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS 169 (A. Claire Cutler et al. eds., 1999). In any case, human rights represents perhaps the most important growth area in international law. Even if NGOs influenced only human rights, it would bear analysis, just as one would not dismiss the importance of the American Civil Liberties Union and other domestic NGOs insofar as their legal influence is limited to civil liberties and individual rights. Posner also notes that NGOs may not be active in all areas of international law; for example, “[t]here are no comparable NGOs that monitor compliance with the law of consular relations.” POSNER, *supra*, at 816. Once again, that is incorrect as a factual matter; there is a vigorous NGO presence on the question of consular notification requirements under Article 36 of the Vienna Convention on Consular Relations. See, e.g., Amnesty International, *USA: Another “Double Standard” on Consular Rights?*, Mar. 10, 2005, <http://web.amnesty.org/library/Index/engAMR510502005?open&of=ENG-USA>. Moreover, the fact that some areas of international law are not of concern to NGOs does not diminish their salience in areas in which they are engaged, in the same way that the importance of domestic public interest groups is hardly diminished by their nonpresence on questions relating to, say, enforcement of the Appointments Clause.

²⁶ See STEPHEN D. KRASNER, *SOVEREIGNTY: ORGANIZED HYPOCRISY* (1999).

²⁷ See GOLDSMITH & POSNER, *supra* note 1, at 125.

exception. The fact of historical continuities does not preclude the possibility of periodization. NGO activity in human rights has broadened in scope and participation, and has been largely transnationalized, whereas earlier NGO activity was undertaken almost exclusively along national lines. In those respects, the intuition that something new is going on here would seem sustainable.

Goldsmith and Posner also attempt to dismiss NGO activity as about something other than law. "It is the moral quality of the abusive acts," they argue, "not their legal quality, that leads to [NGO] human rights criticism."²⁸ The claim appears to be founded on the fact that NGOs will assert human rights treaty norms against states that are not parties to the relevant regimes. But even a casual glance at the websites and publications of the major international human rights groups shows serious attention to and guidance from international legal standards. Of course, NGOs are playing the role of advocates here, and so their claims will seek to press the envelope. In some cases pressing that envelope will incrementally contribute to changes in the law.²⁹ Human rights activism is not just or even primarily about moral outrage; increasingly, it is about legal advocacy. In this sense, it very much has "depended in [a] special way on international law."³⁰ International law, even as asserted in an aggressive yet credible fashion (including the assertion of treaty-generated norms against non-parties, by way of the late-modern phenomenon of instant custom³¹), gives human rights NGOs a legitimacy they would not enjoy were they arguing the merely moral. Others are better positioned to argue morality (religious institutions, for example), where the

²⁸ *Id.*

²⁹ For an interesting model of NGO participation in human rights norm creation, see ANNE-MARIE CLARK, *DIPLOMACY OF CONSCIENCE: AMNESTY INTERNATIONAL AND CHANGING HUMAN RIGHTS NORMS* (2001).

³⁰ GOLDSMITH & POSNER, *supra* note 1, at 125.

³¹ Or even not-so-instant custom. Goldsmith and Posner argue that the abandonment of torture as a state practice in Uruguay and Paraguay demonstrates the inconsequence of international law, because Uruguay had acceded to relevant human rights treaties where Paraguay had not; human rights law could not, in their view, thus explain the changed state conduct. *Id.* at 122. This account, however, does not consider that norms against torture had by that time been incorporated into customary international law, and could thus be brought to bear as a matter of international law against governments, even where they had failed to accept the legal obligation through treaty mechanisms. It is likewise clear (to dispatch Goldsmith and Posner's other such example) that international pressure against Argentina to desist from "disappearing" citizens in the 1970s and 1980s was framed as a matter of international law, Argentina's nonparticipation in formal human rights regimes notwithstanding.

law empowers in ostensibly neutral terms. We see the same dynamic in the domestic arena; in much the same fashion as domestic civil-rights NGOs will argue the law even if they may also be driven by moral motivations, international human rights NGOs use the law as a tool to advance their agenda, often quite successfully.

That success raises the question of non-state power. Although Goldsmith and Posner do not appear directly to confront this question, there is heavy implication here that NGOs merit consideration only insofar as their rhetoric and "moral commitments" translate into "domestic political pressure or pressure imposed by powerful foreign states," and that, again, any resulting changes in the behavior of states owe nothing to international law.³² But law in and of itself is never self-enforcing; law requires individuals to give it force. And it is not clear why (along the lines described above) law has to happen through the channel of legal institutions. As long as there is some level of causal conformity between behavior and the law, the mechanism of enforcement would seem irrelevant. If NGO advocacy is framed in legal terms, responsiveness among individuals and states to that advocacy should count as responsiveness to law.

Moreover, it is not clear that the premise of the two-level game continues to hold on the ground. NGO activity is not just about working through domestic channels to influence governments, so that they will in turn bring pressure to bear on offending states. Rather, the game has become increasingly transnationalized, so that NGOs hardly restrict themselves to their "home" governments, insofar as they can continue to be identified with any single state in the first place. Rather, NGOs will work all channels, attempting to advance their influence where they can, with multiple governments, in many cases with the offending states themselves.

The interesting question here is why NGO advocacy has any traction in changing the behavior of states and other actors, especially where it falls outside the domestic political framework. It could be the force of their ideas, in themselves and as translated into law. This is the answer of the constructivists. Ideas matter, and at some tipping point—resulting in a norm cascade—states perceive conformity with certain standards as a necessary element in their identity as states.³³ The problem with the constructivist paradigm is that it fails to explain why certain ideas gain hold at certain times,

³² *Id.* at 124-25.

³³ See, e.g., Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887 (1998).

why, for instance, the transnational human rights advocacy campaigns against repressive Latin American regimes (a model-making example for the constructivists³⁴) succeeded when they did.

On this score, I share Goldsmith and Posner's apparent skepticism that ideas by themselves will drive change among international actors.³⁵ But even if one accepts interest-based explanations of the new international dynamic,³⁶ NGOs are an important part of the picture, most evidently the large human rights groups, but also including those representing non-state communities of various descriptions.³⁷ NGOs now marshal power, backed by the sympathetic constituencies that they represent. In the face of dramatically multiplied transnational connection points, these constituencies can be mobilized against international actors of almost every description. With the ever-narrowing exception of truly retrograde political regimes (North Korea presenting perhaps the only obvious persistent example), governments now understand that such transnational networks can cause them material injury, most obviously by pulling the strings of the globalized economy. When NGOs talk, their constituencies listen and act; a government out of step with human rights norms now has to be concerned, at least, that NGO mobilization will result in lost trade and investment, with the attendant possibilities for destabilization. That is by no means to say that all states will cower before the demands of just any NGO. But it is by now clear that rational actor bad guys will have reason

³⁴ See MARGARET E. KECK & KATHYRN SIKKINK, *ACTIVISTS BEYOND BORDERS* 79-120 (1998).

³⁵ See Spiro, *supra* note 21.

³⁶ As Hathaway and Lavinbuk note, "Revisionism may need rationalism, but rationalism does not need revisionism." Hathaway & Lavinbuk, *supra* note 2 (manuscript at 16). Among the contributions to this symposium, those by Andrew Guzman and Kal Raustiala also use rational actor premises on the way to establishing a more robust international legal system than Goldsmith and Posner suggest, as do Greg Norman and Joel Trachtman in their important critique of the Goldsmith/Posner CIL model. Guzman, *supra* note 11; Kal Raustiala, *Refining The Limits of International Law*, 34 GA. J. INT'L & COMP. L. 423 (2006); Norman & Trachtman, *supra* note 2. Raustiala notes the role of private actors, but primarily as domestic constituencies working to influence state behavior. Otherwise, these critiques all apply a rationalist approach to a game in which states alone count as players.

³⁷ See GOLDSMITH & POSNER, *supra* note 1, at 109. Here one finds a related concession on Goldsmith and Posner's part, namely that citizens of states will care enough about co-religionists and co-ethnics located outside the state to motivate human rights initiatives on the part of the state. See *id.* This may or may not be consistent with rational choice-based IR theory; in any case, it is not clear why the observation should be limited to co-religionists and co-ethnics—why not the elderly, environmentalists, gays, children, the disabled, women, indigenous peoples, and other identity groups, all of whom are now organizing on a transnational basis?

to be responsive to the demands of NGOs in some cases, or ignore them at their peril.

This incidentally gives the lie to a recurring theme of *The Limits of International Law*, namely, that states are unlikely to put much on the line towards enforcing human rights norms in other states. From a simple rational choice perspective, it does not make much sense for states to expend significant resources where the payoff is low. (The observation would presumably apply with respect to the enforcement of any norm a violation of which poses low or diffuse costs outside the territory of the non-compliant state.) One can accept that proposition—and it is no doubt true that state enforcement of human rights regimes has been spotty at best, even with respect to egregious violations—and yet wonder if the picture it gives is not so incomplete as to be of very limited utility. Non-state actors are willing to expend sometimes quite substantial resources on monitoring and enforcing human rights norms, and they are sometimes (though not always) in a position to enhance compliance without assistance from other states. If non-state actors are now a part of international lawmaking and enforcement, as an empirical matter, they should have a place in the equation. Including them as independently consequential players would require a more complex model, perhaps exceedingly so (again, the two-level solution, in which non-state actors qualify as “domestic” actors, would no longer conform to the nature of their actual participation). The complexity would seem especially daunting insofar as the actors here are nonisomorphic entities of widely variable definition and capacity, pursuing qualitatively variable objectives.

The task becomes all the more challenging still once one confronts those contexts in which states get cut out of the picture altogether. As international law increasingly addresses such issues as human rights and the environment rather than matters of traditional state-to-state relations (such as those considered in Goldsmith and Posner’s case studies), there may be international norms that evolve, at least in part, through the interaction of non-state actors with each other, with no necessary role for the state.³⁸ This is true, most

³⁸ See, e.g., JOSEPH S. NYE, JR., THE PARADOX OF AMERICAN POWER 106 (2002) (describing “de facto governance” that results from interactions of non-state actors); John Gerard Ruggie, *Reconstituting the Global Public Domain – Issues, Actors, and Practices*, 10 EUR. J. INT’L REL. 499 (2004). There is also the growing role of such non-state actors as the International Organization for Standardization in global coordination games. Where Goldsmith and Posner assume that states solve coordination problems among themselves, see GOLDSMITH & POSNER, *supra* note 1, at 38, in fact it is now more often private transnational firms rather than states that drive technical standards setting, acting not through states but in an unmediated fashion among

notably, where corporate actors are the ultimate target of norm regimes. As offshoring diminishes state capacities to regulate corporate conduct, NGOs have devised mechanisms beyond traditional, public regulation by way of advancing agendas aimed at corporate behavior. NGOs can cause material harm to corporations, even more than to states; negative publicity from prominent organizations can take away from the bottom line. Hence the evident willingness on the part of corporations to come to the table with NGOs on workplace and other rights-related issues (respecting for example minimum wages, child labor, and health and safety issues), the result of which in turn has been the creation of increasingly refined codes of conduct.³⁹

Goldsmith and Posner would no doubt argue that whatever the significance of this activity, it is not law. But that would seem to be a formalist dodge—unsatisfying to anyone interested in the exercise of real power and the calculation of concrete interests—around the emergence of regimes that facilitate the creation and entrenchment of behavioral regularities on the ground. There is no institutional logic that precludes conceiving of these regimes as a form of law. The standards otherwise work against the interests of target entities, if not for the coercive powers of the enforcers. Human rights and labor rights groups, among others, may not have armies at their disposal, but they do have the capacity to monitor, and where necessary to inflict damage on profits and goodwill. Moreover, insofar as these regimes are codified and enjoy institutional homes, they cannot be dismissed as mere social norms, even assuming that were a persuasive analytical response to their emergence.

This is by no means intended to idealize these processes, NGOs, or non-state actors generally, which may be highly problematic along basic transparency and accountability metrics.⁴⁰ But it suggests their consequentiality, with which international legal theorists are appropriately grappling in matters of institutional design. And yet the Goldsmith-Posner perspective offers no insights into that phenomenon. Parsimony is a virtue in modeling, but only where it does not appreciably scale back a model's applicability. Goldsmith and Posner's analysis may be well taken as far as it goes, but in the wake of changing circumstances on the ground it may not go

themselves and through the market. See Liora Salter, *The Standards Regime for Communication and Information Technologies*, in PRIVATE AUTHORITY AND INTERNATIONAL AFFAIRS, *supra* note 25, at 97.

³⁹ See, e.g., Sean D. Murphy, *Taking Multilateral Corporate Codes of Conduct to the Next Level*, 43 COLUM. J. TRANSNAT'L L. 389 (2005).

⁴⁰ See Peter J. Spiro, *Accounting for NGOs*, 3 CHI. J. INT'L L. 161 (2002).

very far. As the action shifts from traditional interstate relations to a polycentric dynamic involving a spectrum of entities, a smaller slice of international law and relations will be amenable to their explanations.

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The Limits of International Law is a book more appropriate to another era. If it had been published, say, thirty years ago, it would have been far more difficult to take issue with its tone and conclusions, for that was a world in which international law was in fact a feeble quantity. But the likes of Goldsmith and Posner would not then have bothered to write this book. Only now that international law appears to be a growing force does it become necessary for the skeptics to mobilize. While Goldsmith and Posner may effectively recall the weakness of traditional international law constructs, the book does not even begin to address the new dynamic of international lawmaking. Responding to Goldsmith, Posner, and their fellow travellers may prove a detour from the project of unpacking that new dynamic and the challenges it presents. In the end, however, that project is likely to occupy international legal scholars through the coming generation, which will itself, perhaps, refute the central conclusions of *The Limits of International Law*.