1-1-2009

Can International Law Work? A Constructivist Expansion

Harlan G. Cohen
University of Georgia, hcohen@uga.edu

Repository Citation
Harlan G. Cohen, Can International Law Work? A Constructivist Expansion (2009), Available at: https://digitalcommons.law.uga.edu/fac_artchop/749

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Georgia Law. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Georgia Law. Please share how you have benefited from this access. For more information, please contact tstriepe@uga.edu.
Can International Law Work?
A Constructivist Expansion

Harlan Grant Cohen*

I. INTRODUCTION

The United States’ reputation regarding international law has recently come under a spotlight. Candidates to succeed George W. Bush as President campaigned on promises to “restore our reputation as a nation which respects international law, human rights, and civil liberties,”¹ and with his election, the burden of fulfilling those promises has since fallen on the new President, Barack Obama. “The outgoing administration has left an ‘immense’ weight of expectations on Barack Obama to restore the reputation of the U.S. around the world,” observed former British Prime Minister Tony Blair.² “He [Obama] is determined to restore the reputation of the U.S. internationally and he will seek to do this by having the U.S. behave lawfully.”³ For many, both in the United States and elsewhere in the world, these are solemn, important promises.

¹ Democrats Unfiltered: The Eight Candidates on America’s Place in the World, WASH. MONTHLY, July 1, 2007, at 38 (quoting Bill Richardson at the Center for Strategic and International Studies, February 8, 2007); see also Bill Richardson, A New Realism: A Realistic and Principled Foreign Policy, FOREIGN AFF., Jan-Feb. 2008, at 142 (“If America is to lead again, we need to remember this history and to rebuild our overextended military, revive our alliances, and restore our reputation as a nation that respects international law, human rights, and civil liberties.”).


³ The Burden of Great Expectations, NAT’L BUS. REV., Jan. 23, 2009; see also Ved Nanda, We Must Adhere to International Law, DENVER POST, Jan. 15, 2009, at B13 (“Unilateralism, exceptionalism and ‘preventive war’ options espoused by the Bush administration must be rejected to restore America’s credibility and reputation.”); Closing Guantánamo, SAN DIEGO UNION-TRIB., Nov. 16, 2008, at F2 (“[B]eginning the process of closing Guantánamo in the name of justice and to restore America’s tarnished human rights reputation must be a top priority for Obama.”).
But what do such promises really mean? How much of this is just talk—friendly, but empty rhetoric? Does the United States’ reputation for following or not following international law actually matter? For skeptics of international law, these words are at best, “cheap talk,” at worst, dangerous sentimentality. For these skeptics, international law is a myth; states follow it only when it happens to be in their interests. The only reputation the United States should want is one for resolve in pursuing its goals.

Some of these skeptics have turned to rational choice methods to prove their point. Casting aside the regular references states and international lawyers make to law and legal obligations—a practice often referred to as “law talk”—as unreliable and unscientific, these skeptics attempt to model the behavior of states as rational actors. Doing so, they argue, demonstrates the inherent weakness of international law. States appear to follow international law when it aligns with their interests but break it when it does not. Law plays no independent role in shaping the actions of states, and “law talk,” as ubiquitous as it may be, as real as it may seem to international lawyers, is no more than an illusion.

Andrew Guzman, himself a rationalist, takes these statements much more seriously. In *How International Law Works: A Rational Choice Theory*, Guzman’s important, elegant, and insightful new book, he develops a comprehensive rationalist response to the international law skeptics. Unlike the skeptics, Guzman takes “law talk” seriously. Rather than dismissing it, he seeks to understand and explain it. The result is an account of international law that is not only superior to that suggested by the skeptics from a rational-choice perspective, but more importantly, is able to explain aspects of the system that seem so important to international lawyers.

The key to this account is the concept of “Reputation.” Rather than dismissing the concept, as some other rationalists have done, Guzman seeks to

5. See id. at 13 (“[U]nder our theory, international law does not pull states toward compliance contrary to their interests.”).
7. See id. at 11 (observing that “[v]irtually every individual and state that participates in international dealings appears to take international law seriously, suggesting that the institution of law has some force”); id. at 98-100 (explaining law talk); id. at 142-47 (explaining soft law); id. at 194-201 (explaining opinio juris).
8. For the purposes of this review, I will use “Reputation” when referring to the mechanism Guzman develops in the book, and “reputation” when referring to its more general, ordinary meaning.
9. See GOLDSMITH & POSNER, supra note 4, at 102 (“First, scholars sometimes exaggerate the reputational costs of treaty noncompliance, thereby overstating the possibilities for interstate cooperation, especially multilateral cooperation. Second, scholars sometimes lean too heavily on a
understand how it might operate in game-theoretic terms. The result is the most important of his “Three R’s of Compliance”: Reciprocity, Retaliation, and Reputation. The reputational benefits of following agreements and the reputational harms of breaking them change the expected payoffs of specific state acts. When plugged into the complex, multiplayer, multiple-iteration games that define international relations, these changes can produce the “compliance pull” that international lawyers have long suggested. States concerned about their reputations may choose to comply even when violating an agreement might otherwise have been in their interests.

Building reputation into game-theoretic models of how states behave also explains the shape of different international agreements and the choices between different enforcement regimes. It allows for the formulation of a comprehensive theory of international law that includes treaties, soft law, customary international law, and norms. Perhaps most intriguingly, it helps explain opinio juris, the long-mysterious “psychological” element of customary international law. In so doing, it provides hope that some of the most intractable problems in interpreting customary international law can be solved.

All of this marks an extraordinary accomplishment, one rightfully worthy of praise. Guzman’s work is careful and thorough; the number of possible angles he considers is impressive. Guzman makes a powerful case that rational choice theory does support international law’s claims of legal force and can explain how international law works. But any project as broad and comprehensive as this one must raise certain questions and concerns. Although in many ways admirably modest, the book makes two broad claims, both succinctly laid out in the title itself. The first is that the account Guzman presents actually explains how international law works. The second is that this account can be understood solely in rational choice terms. Despite the many accomplishments of the book, both of these claims remain unproven.

This essay proceeds as follows. Part I explains Guzman’s theory in greater depth and lays out some of the greatest accomplishments of the book. Part II lays out three specific challenges to Guzman’s broadest claims. The first two of these question the inclusiveness of Guzman’s theory: How much of international law does this rational choice account actually explain? Part II(A) suggests that while Guzman’s reputation-based rational choice theory can explain many areas of international law, some, like human rights law, are difficult to understand in those terms. Reputational sanctions seem insufficient to explain either why states would follow human rights treaties or enter those agreements in the first

state’s reputational concern for complying with international law.”).

10. As Guzman explains, Reciprocity and Retaliation rely on Reputation in order to serve as effective enforcement mechanisms. See GUZMAN, supra note 6, at 48 (“To be effective, the threat of a retaliatory sanction must be credible, and that credibility depends in part on the threatening state’s reputation for punishing violators.”).

11. See id. at 41 (“Because international law increases the costs of a violation, it puts a thumb on the scale in favor of compliance . . . “).
place. At the same time, international practice seems to have evolved in recognition of these shortcomings, adopting types of agreements and methods of enforcement designed to leap over states and interact directly with individuals and other substate actors. Under such circumstances, the explanatory power of rational choice theory seems to run out; constructivist or liberal theories of international law designed to explain the flow of ideas through the international system or the relationship between international actors and domestic constituencies seem necessary.

Part II(B) raises a different inclusiveness challenge. As Guzman himself admits, his account is primarily concerned with "situations where cooperation is difficult."12 By contrast, in situations where states are already cooperating or eager to cooperate, "international law does no heavy lifting and might even be said to be superfluous."13 But this assessment is far from obvious and depends on initial assumptions about the purposes and mechanisms of international law. Many have argued that international law is less about the effect it has on present day calculations of state self-interest than about its long-term potential to reshape state conceptions of self-interest itself. Under this constructivist view, international law's real force is in its ability to reshape the discourse of the international community and state conceptions of what is possible and even desirable in international relations. International law is thus most powerful when it makes cooperation easy, when it makes international law seem almost superfluous. For Guzman, international law is most relevant when it changes the perceived costs and benefits of any particular state action. The constructivist view, by contrast, asserts that international law is most effective when it ceases to be part of the calculation at all, when the rules of international law become so deeply internalized that they are followed simply as a matter of course, as little-reflected-upon state self-interest. To assess whether Guzman's account actually explains international law, one must thus first determine where international law is doing most of its work. Are most international law rules followed as part of cost-benefit analysis "games" or as matters of nearly subconscious state habit?

Finally, Part II(C) looks more closely at Guzman's rational choice mechanism of Reputation. Guzman's theory, although perhaps reconcilable with liberal and constructivist ones,14 is meant to provide a comprehensive rational choice explanation for how international law works. Guzman is actually quite modest in his defense of rational choice methods, recognizing possible roles for other methods like liberal or constructivist theory.15 But Guzman does

---

12. Id. at 30.
13. Id. at 29.
14. See id. at 21 ("Institutionalism assumes that state preferences are given and fixed. One can think of liberalism and constructivism as theories that help us to understand how these preferences come about.").
15. See id. at 20 ("The most sensible approach when studying international law is to recognize that different approaches are suited to different tasks."); id. at 21 ("It is not the purpose of this book, however, to offer a defense of rational choice or to mount an attack on other methodologies. There
argue that rational choice assumptions provide more testable and falsifiable models than others and are "the most promising for the study of international law."  

His conception of Reputation, however, raises serious questions about whether such an approach is possible and whether rationalism really can provide predictions that liberalism and constructivism cannot. Guzman tries to frame Reputation in solely rational choice terms, as "judgments about an actor's past behavior used to predict future behavior," but the process he describes seems difficult to understand and the results difficult to predict without other theories that can explain, describe, and predict the actual content of any given state's reputation. In order to understand Reputation's effect on compliance decisions, one would want to know who within the state has a reputation for abiding by international law and who in the state cares about the state's reputation for abiding by international law. More importantly, one would want a theory of issue linkages—why state actions with regard to one international law rule, say genocide, will or will not have reputational effects on other areas of international cooperation, like trade or investment. For Reputation to serve as predictor of future compliance, states must first assign some value to specific rules and their violations. Why some violations will be seen as de minimis, while others worthy of sanction, cannot be explained without some theory as to how norms are transmitted through the international system and how they can shape state expectations. 

Part III suggests a way forward. The beauty of How International Law Works is that its deficiencies can quickly be redefined as strengths. Part III argues that in its current form, Guzman's account provides a compelling rational choice answer to the question: can international law work? The book solidly answers: yes. But Guzman's account can actually do much more. Part III argues that Guzman's Reputation-based account is much more than a rational choice theory. Rather, it is the beginning of a bridge between constructivist, liberal, and rational choice accounts. Guzman's concept of Reputation provides a vehicle for explaining how domestic concerns are translated into state-to-state relations and how states communicate normative concerns to each other. His account carries the seeds of a more comprehensive theory of international law is surely room within the study of international law for a multiplicity of methodologies.

16. Id. at 21 (explaining that "rational choice assumptions yield theory that is more parsimonious and predictions that are crisper and more falsifiable than is the case for alternative approaches." Elsewhere, I have suggested that falsifiability may not be the best touchstone for a theory of international law. See Harlan Grant Cohen, Historical American Approaches to International Law, 15 ILSA J. INT'L & COMP. L. 485, 498-99 (2009) (suggesting that constructivism may be better aligned with historical methods than social science ones).

17. GUZMAN, supra note 6, at 21.

18. Id. at 33.

19. How serious is the violation? Is the violation easy to forgive or a portent of many more violations to come? Does the violation suggest that the other state is unwilling to follow that rule, or dismissive of the international rule of law more generally?
that can integrate various branches of international law theory.

But Part III also argues that Guzman’s account provides only half the story. A fuller account of international law, this Part argues, must consider two different axes of international law: (1) the horizontal one that Guzman describes, in which states interact in a series of games and in which international law changes the costs and benefits of compliance, and (2) a vertical one, in which international law rules are internalized by states and taken off the negotiation table. Again here, Guzman’s account provides some interesting insights into this more general account. His conception of Reputation can help explain both how rules come to be internalized as well as the relationship between those that have already been internalized and those that are still being balanced against other state interests, a possible clue to the aforementioned mystery of issue linkage.

II.

THE RATIONALITY OF INTERNATIONAL LAW

Debates over international law’s status as law, and more specifically international law’s influence on state actions, seem like a constant feature of the international law landscape. Recently, an influential, though controversial, attack on international law’s force has come from rational choice theory. In their book, The Limits of International Law, Eric Posner and Jack Goldsmith argue that rational choice theory suggests that international law exerts no independent force on state actions. States appear to comply with international law when it otherwise serves their interests; when their underlying preferences no longer align with the international law rule, states quickly defy it.

How International Law Works is a compelling rejoinder to these claims.


22. See GOLDSMITH & POSNER, supra note 4, at 90 (“[W]e have explained the logic of treaties without reference to notions of “legality” or pacta sunt servanda or related concepts.”); id. at 108 (concluding that “modern multilateral human rights treaties have little exogenous influence on state behavior”).

23. See id. at 90.
Guzman does not seek simply to demonstrate that international law can be reconciled with rational choice theory. On the contrary, his ambition for *How International Law Works* is to use rational choice theory as the foundation for "a comprehensive and coherent theory that seeks to explain how [international law] works across its full spectrum." Among Guzman's goals are: to "explain[] how international law is able to affect state behavior despite a lack of coercive enforcement mechanisms," to explain international law's different sources—treaty, soft law, custom, and norms—"within a single framework," to explain the shape and form of international agreements, and possibly to explain patterns of compliance and non-compliance. The fact that the book is largely successful on these counts is an enormous triumph.

### A. Choosing Rational Choice

To develop his theory, Guzman chooses a rational choice methodology and rational choice assumptions over other possible options. He does so because he believes them "to be the most promising for the study of international law," yielding theory that is more parsimonious and predictions that are crisper and more falsifiable than is the case for alternative approaches. Among the assumptions he thus makes are that states are "rational, self-interested, and able to identify and pursue their interests," that "state preferences are given and fixed," that states "seek to maximize their own gains or payoffs," and like Posner and Goldsmith, he assumes that states "have no innate preference for complying with international law."

Although he clearly prefers this methodology, Guzman is quite fair in his

---


26. *Id.* at 9.

27. *Id.* at 9.

28. See *id.* at 119-81 (chapter on international agreements).

29. See, e.g., *id.* at 86-91 (discussing why reputation may or may not lead to compliance).

30. *Id.* at 21.

31. *Id.;* see *id.* at 17 ("Because the model is built on assumptions that make cooperation difficult, we can have greater confidence when the results suggest ways that cooperation can come about.").

32. *Id.* at 17.

33. *Id.* at 21.

34. *Id.* at 17.

35. *Id.;* see also GOLDSMITH & POSNER, *supra* note 4, at 10 (explaining reasons for excluding "a preference for complying with international law from the state's interest calculation"). Interestingly, however, Guzman's theory may actually explain how a general preference for compliance with international might come about. See *infra* notes 162-164 and accompanying text.
treatment of various competitors, accepting their explanatory power and usefulness in some situations. In some cases, those methodologies might even be reconciled with his own. As Guzman explains modestly, "[i]t is not the purpose of this book... to offer a defense of rational choice or to mount an attack on other methodologies." Two of the theories he considers for his analysis but rejects, constructivism and liberal theory, are nonetheless worth mentioning.

Liberal theories "open[] the black box of the state and consider[] the role of substate actors." Such theories suggest that "state interests are best understood as an aggregation and intermediation of individual interests. Sources of power and interests are found within and between states. International law is driven from the bottom up." Such theories are complementary to Guzman's approach; they can, for example, help explain how state preferences are formed. Guzman rejects these theories, however, because their concern with countless individual actors renders them too complex "to provide a predictive model of state behavior."

Constructivist theories "ask[] how norms evolve and how identities are constituted, analyzing, among other things, the role of identity in shaping political action and the mutually constitutive relationship between agents and structures." Such theories suggest that state interests and state identity are not constant but are instead "constructed" through legal rules, interaction with other states, and the activities of individuals and advocacy groups. International institutions can "influence the norms and attitudes of states," and "international agreements and rules can affect attitudes and beliefs." Guzman finds "appealing plausibility" in such accounts. Here too though, the theory is rejected because of its complexity. As Guzman explains, "Constructivist writers have to date not advanced a general model of state behavior. Until such a model

---

36. See GUZMAN, supra note 6, at 20 (noting that the rise of human rights "is difficult to explain without resort to changing norms and preferences" as described by constructivist theories).

37. See id. at 21 (noting that while "[b]oth liberalism and constructivism can be reconciled, at least partially, with an institutionalist approach," "[n]either liberalism nor constructivism can be reconciled with institutionalism in all instances").

38. Id. (noting also that "our understanding of international law can be further improved by serious inquiries using each of the aforementioned approaches").

39. Id. at 18.


41. See GUZMAN, supra note 6, at 21 ("One can think of liberalism and constructivism as theories that help us to understand how these preferences come about.").

42. Id. at 19 ("It is difficult, and perhaps impossible, to construct a general, tractable, and predictive liberal theory of policymaking in a single state, let alone one that also captures the interactions of many states.").


44. GUZMAN, supra note 6, at 19, 20.
exists, there is no way to use constructivism to study the full field of international law within a single framework."\textsuperscript{45}

\subsection*{B. The Value of Reputation}

Guzman's rational choice account starts by looking at the various "games" states play in international relations to see what influence international law might have on state actions. Guzman quickly disposes of a series of "easy" games—common interest, pure coordination, and battle of the sexes—where states have straightforward interest in cooperation.\textsuperscript{46} In these games, the payoffs from cooperation are higher than the payoffs of going it alone, and international agreements simply formalize cooperation that would likely have happened anyway.\textsuperscript{47} "[I]nternational law does no heavy lifting."\textsuperscript{48}

International law might do more work when states are engaged in a more difficult game, such as a Prisoner's Dilemma. Guzman uses the Anti-Ballistic Missile ("ABM") treaty between the United States and the Soviet Union as an example. A cooperative strategy—an arms control agreement—presents a better outcome for both states than competition—an arms race. But if one state defects and continues building weapons or developing ABM technology, the payoffs to that state will be much higher and the damage to the non-defecting state will be that much worse. As a result, in a single-turn game, the United States and Soviet Union will both choose to defect from the agreement; an arms race will be the dominant strategy.\textsuperscript{49}

\textsuperscript{45} Id. at 20.

\textsuperscript{46} Guzman uses the Warsaw Convention (Convention for the Unification of Certain Rules Relating to International Carriage By Air, Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11), which harmonizes air travel standards, as an example of such an easy game. See GUZMAN, supra note 6, at 26-27 ("In this and other coordination games, the players in the game (i.e., states) have an interest in coordination that trumps their interest in a particular outcome.").

\textsuperscript{47} Of course, the question then must be asked why states use treaties at all in these contexts. One important answer that Guzman suggests is that states may not know their counterpart's payoffs and may be unsure whether a game is actually a coordination game or something more problematic. See GUZMAN, supra note 6, at 27 ("One explanation for why [states] choose to [use more formal agreements] is that interactions that appear to be coordination games may in fact be some other type of game. States have an interest in certainty and predictability over time and may, therefore, want an agreement that will offer some assurance about how others will behave if the payoffs change at some future date."); id. at 28 ("[S]tates may use a formal agreement to address a coordination game if there is uncertainty with respect to payoffs. If a state is unsure about the payoffs facing another state, it may be concerned that what appears to be a coordination game may in fact be a more difficult-to-solve cooperation problem. Entering into a formal agreement may help to guard against that possibility."). Alternatively, the states in question may fear that what currently looks like a coordination game may develop into some other sort of game. See id. at 57 ("[I]f the game in question, though it looks like a coordination game, has some probability of becoming a prisoner's dilemma or some other game in which cooperation is more difficult, the states have an incentive to protect against that outcome.").

\textsuperscript{48} Id. at 29.

\textsuperscript{49} See id. at 31 ("This is a classic prisoner’s dilemma. Though mutual cooperation yields the highest total payoff, each party has an incentive to violate the agreement, regardless of what the
However, international law, in this case an ABM treaty, can lead to cooperation in multi-turn games where states are concerned about the future as well as the present. It does so through what Guzman calls the “three R’s,”\textsuperscript{50} Retaliation, Reciprocity, and Reputation. The impact of Retaliation on the payoffs of defection and cooperation is most obvious. If a state can sanction another state for violating an agreement, those sanctions may be sufficient to disincentivize defection. Reciprocity can lead to compliance where states care about the future benefits of the deal as well as the present ones. If a state values future cooperation highly enough, its counterpart’s ability to respond to a violation by withdrawing from an agreement should make the payoff of a one-time defection less attractive. In essence, the loss of future cooperation has to be added to the current payoffs of the defection. Together, they may make defection cost more than cooperation.

Reciprocity and Retaliation, however, will not always be viable options. In some cases, a violating state may not be interested in the future fruits of that particular bargain—either its preferences or payoffs have changed or the state may never have cared about the bargain in the first place—rendering Reciprocity ineffective. A state violating a human rights treaty may not be swayed by the threat that a treaty partner will do the same.\textsuperscript{51} Retaliation, on the other hand, is costly for the retaliating state. The costs of retaliating have to be worth the benefits of future cooperation in order to make it a viable recourse and deterrent.\textsuperscript{52}

Reputation, the cornerstone of Guzman’s theory, fills these gaps by linking one agreement to others, even with different counterparties. Guzman defines Reputation “as judgments about an actor’s past behavior used to predict future behavior.”\textsuperscript{53} A state’s reputation for compliance is an estimate of a state’s discount rate, the extent to which it values future payoffs over current payoffs. Reputation for compliance “is an estimate of the state’s true willingness to comply even when nonreputational payoffs favor violation.”\textsuperscript{54}

Such reputations have powerful effects on the payoffs of international agreements. A state with a good reputation for compliance will have an easier time finding partners for cooperative agreements. A partner state will be less concerned about defection and thus may require fewer concessions to conclude the agreement. A state with a bad reputation will find cooperation more difficult. Reputation thus carries real value for states, value that can be modeled

\textsuperscript{50} Id. at 33.

\textsuperscript{51} See id. at 45 (“Virtually every important human rights agreement, for example, must rely on an enforcement mechanism other than reciprocity.”).

\textsuperscript{52} See id. at 48 (“A state that imposes a sanction does so to build or protect a reputation for sanctioning those that fail to honor their obligations or possibly to end an ongoing violation. The state accepts a cost today in the hope of getting a larger benefit in the future.”).

\textsuperscript{53} Id. at 73.

\textsuperscript{54} Id.
into state-state relations.

When choosing to violate an agreement a state must consider not only the costs and benefits of that violation or the costs and benefits of violation on the continued force of that agreement, but also the cost and benefits of that violation on its reputation and, in turn, its ability to engage in other valuable cooperative arrangements in the future. A breach of an agreement may cost the violating state much more in the future gains of cooperation than it can gain through present violation of the rule. This change in payoffs becomes a powerful incentive for states to follow their agreements. Returning to the ABM treaty example, the Soviet Union's and United States' interest in future cooperation may change the payoffs enough to make arms control the dominant strategy. Reputation may even change a single-turn game into a multi-turn one, linking a state's willingness to comply with one agreement to its probability of complying with others.

Reputation can also make the threat of Retaliation more credible. If the future benefits of a reputation for retaliation (leading, one can assume, to greater cooperation) are large enough to outweigh the costs of actually retaliating, violating states may actually have something to fear.

Seeing compliance with international law as a function of a state's rational concern with its reputation and the relative payoffs associated with it, brings many of the features of the international system into focus. First, Reputation is no blunt tool. Different states will at different times have different reputations (perhaps even with different counterparties). This may change the likelihood of a particular violation. A state with a good reputation may be able to snatch the payoffs of a defection or two without too much damage to its reputation. A state with a bad reputation, at least one that cares about future cooperation, may be more cautious. Similarly, different compliance decisions will affect reputation differently. A state will generally get little benefit reputationally from following an agreement that states would otherwise expect it to follow. Compliance must seem hard for it to result in reputational gains. If

55. See id. at 38 ("[I]n any given period, each party is better off if it defects. Before choosing to violate the agreement, however, a state must consider the impact of defection on future payoffs. If violation generates future costs, these costs may be enough to bring about compliance.").

56. This still leaves collective action problems with retaliation in the multilateral context. See infra notes 81-83 and accompanying text.

57. See id. at 79-80 (discussing the Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161, a treaty with 187 members states that requires “that state parties designed as non-nuclear weapon states . . . , a category that includes all but five countries . . . , refrain from seeking nuclear weapons” and observing that “[b]ecause the nonreputational payoffs suggest that these states would behave consistently with the treaty obligations even if the treaty were not in existence, observer states have no reason to interpret compliance as any sort of positive signal about reputation.”). A state with no reputation for compliance, e.g. a newly independent state or a new regime, may want to ratify many easy to follow agreements to establish at least some positive reputation. See GUZMAN, supra note 6, at 90 ("Because observing states have only weak priors about the new state's willingness to comply with international legal obligations, each individual compliance decision has a larger impact on the new
CAN INTERNATIONAL LAW WORK?

Compliance looks too difficult, however, a violation may have less effect on a state's reputation. Such a violation will be easily compartmentalized and may not be seen as evidence of a lower general discount rate. Second, as this last point suggested, Reputation will not always provide enough of an incentive, enough of a change in payoffs, to engender compliance. Where the costs of compliance or benefits of non-compliance seem sufficiently high, Reputation will do little to stop violations. Thus, as Guzman suggests, when national security is at issue, when the very life of the state is in question, little compliance against perceived self-interest should be expected. Finally, Reputation can help explain the form of international agreements and the mechanisms states choose to include within them.

C. Taking International Lawyers Seriously

Perhaps the most valuable aspect of Guzman's theory is its ability to explain the intuitions and observations of international lawyers. Guzman, unlike Goldsmith and Posner, takes international lawyers seriously. Rather than trying to disprove widespread perceptions that international law matters, Guzman uses them as his starting point. His goal is to explain those perceptions rather than rebut them.

A good example is "law talk." States describe their international obligations in legal terms. States spend considerable resources arguing about the meaning and interpretation of those obligations. When they condemn other states for violations, they accuse them of acting unlawfully. As Guzman notes, international law skeptics chalk the endless law chatter up to "cheap talk."

Reputation, however, does a good job of explaining law talk. Reputation involves a great deal of uncertainty. For states to properly assess the payoffs of any given action they must understand what effect that action will have. States

---

58. See id. at 79 (observing that "[a]s long as all parties expect breach in the event of a war, there is no reason that past conduct consistent with this expectation would affect the negotiation").

59. See id. at 78 ("When entering into an agreement, states hope that both sides will comply, but they also recognize that a violation may occur. In fact, they recognize that under certain circumstances [such as war], violation is to be expected.").

60. See id. at 119-81 (chapter on international agreements). For Reputation to prove useful, states need actionable information about state compliance and violation. In areas where such information may be hard to come by, states may negotiate the inclusion of information-gathering mechanisms within the treaty regime. See id. at 97-98 (citing—as examples of such mechanisms—transparency requirements, measures to ensure ongoing communications, and reporting and monitoring requirements).

61. See id. at 11 ("The attitude of states and nonstate actors towards international law also provides evidence that the institution is important...Put simply, given that international law is an expensive proposition, why do states participate?").

62. Id. at 13; GOldSMITH & POSNER, supra note 4, at 174.
need to know whether their action will be interpreted as a violation and how seriously it will harm their reputations. As Guzman explains, states have both general reputations for compliance with international law and more specific reputations for compliance in specific areas. A state will want to know which reputation a violation will affect. Similarly, states hoping to deter violations have a strong incentive to make their views of obligations clear. This will be true both where states want to protect the “true” rule and where they want to encourage a new one. States will be able to get away with much more where rules are unclear because observing states will not know whether the violation involved a good faith disagreement over the rule or a general disdain for international commitments. Violating states will take less of a reputational hit because observing states will be uncertain about what the act predicts. Finally, states that want to violate the rule have every incentive to explain away their acts. If those states can convince others either that there was no violation or that they believed they were complying, they should be able to blunt any negative reputational effect.

NGOs can rationally be expected to argue for their preferred positions as well. Such an “effort is intended to generate greater consensus on human rights obligations and persuade at least some people that additional human rights norms should be considered legal obligations.” Their reports on human rights in various states can provide information necessary for other states to reassess those states’ reputation.

But How International Law Works’ reframing of customary international law (“CIL”), may be the book’s single greatest contribution. One of

63. See GUZMAN, supra note 6, at 101 (“The sensible answer to the question of whether states have one reputation or multiple reputations, given current understandings about reputation, is almost certainly ‘both.’”).

64. See id. at 99 (citing the U.S.’s efforts to influence the customary international law of expropriation by insisting on the “Hull Rule” standard).

65. See id. at 94 (“A good faith effort to comply indicates that the acting state sought to comply and its violation indicates a difference of interpretation. Had the contours of the law been clear, it may be that the state would have complied, in which case no reputational adjustment is called for. A state making a bad faith claim of compliance, on the other hand, knowingly violated the law and, in so doing, delivered a stronger signal about its willingness to do so.”).

66. See id.

67. See id. (“[T]he acting state may consider itself to be in violation of the law and be attempting to muddy the waters by claiming that its actions are permitted.”).

68. Id. at 99.

69. Elsewhere, I have suggested that projects such as these, that seek to explain how international works, can and should help us rethink the sources of international law. Harlan Grant Cohen, Finding International Law: Rethinking the Doctrine of Sources, 93 IOWA L. REV. 65, 97-98, 108-09 (2008). Although we need to be careful not to equate international law with compliance, we also do not want a doctrine of sources completely disconnected from actual practice. Id. at 72, 115. By explaining when and why states will treat rules as law, in this case, as a matter of changed payoffs, theories such as these can shine a spotlight on the actual criteria used by states to determine what counts as law in the international system.
Guzman’s goals is “to explain the various sources of international law within a single framework.” Accordingly, he attempts to rethink CIL in rational choice terms. The result is a version of CIL with fewer internal paradoxes than orthodox understandings and a theory of CIL more able to explain modern phenomenon like instant custom.

After running through the various critiques of traditional understandings of CIL based on consent, Guzman suggests a new definition based on rational choice. “CIL should be defined as those norms that, because they are considered to be law, affect state payoffs.” This definition recognizes the reality that over time states come to consider certain norms law and that the defining characteristic of the rules is not their form but their effect. More importantly, it explains compliance with CIL as a matter of the same three R’s as treaties. States will follow CIL where they worry that non-compliance will end reciprocal benefits (for example, in the treatment of diplomats), lead to retaliatory measures, or lead to reputational sanctions that hurt future cooperation opportunities. These reputational sanctions will be particularly potent if a CIL violation can affect a state’s more general reputation of compliance with international law, thus damaging treaty opportunities as well. As with treaties, states will comply with CIL where they expect compliance to add value or violations to hurt payoffs.

Perhaps most intriguingly, this new definition of CIL also helps reconfigure the traditional elements of CIL. CIL is defined not by a pattern of state practice supported by opinio juris, or a sense of legal obligation. Instead, opinio juris is
the central element. 77 How or why a norm comes to be seen as law is irrelevant; the key issue is that it is. State practice provides useful evidence that states consider a particular rule law, but it is merely evidence, not a constitutive element. Moreover, because CIL is concerned primarily with the effects of compliance and noncompliance on payoffs, it is the opinio juris of observing states rather than the acting state that matter. 78 States act on the basis of their prediction of how other states will react. The question they ask is whether other states will perceive an act as a legal violation worthy of sanction.

Guzman describes a number of current areas of controversy in CIL doctrine that this new theory helps explain, but perhaps the most interesting is “instant custom.” Particularly in the human rights context, debate has raged over the past decades over purported rules of CIL that are relatively new and have little support in traditional conceptions of state practice. Instead, proponents of these rules point to U.N. declarations and other statements by the international community. Such “instant custom,” problematic under traditional doctrine, is perfectly reasonable under Guzman’s theory. Since opinio juris is the only real element of CIL there’s no specific baking time required for a new rule to emerge. A rule can become CIL as quickly as states can perceive it as such. Moreover, the absence of state practice is untroubling. State practice would be useful information, but so might be U.N. declarations.

One of the strengths of How International Law Works is its thoroughness. Guzman carefully considers the effect of his approach in a wide variety of contexts and on innumerable doctrinal issues. It’s a testament to Guzman’s achievement that all of them cannot be considered here.

III.
DOES REPUTATION WORK?

As mentioned above, Guzman’s claims are in some ways admirably modest. Nonetheless, implicit in both the title and the book itself is a claim that this account can describe and explain the bulk of international law. This Part lays out three specific challenges to this claim: (1) that the account may have trouble explaining international practice in certain issue-areas like human rights, (2) that the account may take too narrow a view of the ways international law “works,” and (3) that the rational choice approach may be, on its own, insufficient to explain the force of Reputation or to create testable hypotheses of state action.

77. I reach a similar conclusion using a largely constructivist approach in Cohen, supra note 69, 110.
78. See GUZMAN, supra note 6, at 194.
A. Some International Law is Not So Inter-National

One initial question is how much of international law does Guzman's account really describe? As Guzman ably demonstrates, his rational choice model can very elegantly describe much of international trade, investment, and arms control law. But there are areas of international law and specific issues covered by treaty and custom that seem more difficult to square with the approach. Although these issues arise in a number of different areas, as will be discussed below, international human rights law provides a particularly good example of the problem inherent in this approach.

In some ways, Guzman's account is actually quite helpful in explaining international human rights law. As mentioned above, Guzman's account does a remarkable job of explaining CIL practice—one far better than any of the traditional approaches. Guzman's account also makes sense of the "law talk" practiced by both states and NGOs. Most of all, as Guzman notes, Reputation does a far better job of explaining agreements with regard to public goods, for example, human rights or environmental protection, than other accounts. As Guzman explains, in areas such as those, reciprocity cannot serve as a sanction, either morally or realistically—states cannot punish non-compliance with violations of their own. The prospect of retaliation is also unlikely to promote much compliance; where all states are harmed, none may have sufficient interest in incurring the costs of retaliatory measures. The reputational harm of violating such agreements, on the other hand, may serve as a legitimate and effective deterrent.

But in other ways, the presence and practice of international human rights law is something of a mystery. First, it is unclear why states would ever enter into such agreements in the first place. Under the book's theory, states should

79. See supra notes 68-75 and accompanying text.
80. See GUZMAN, supra note 6, at 99. See supra notes 62-67 and accompanying text for a fuller discussion.
81. See GUZMAN, supra note 6, at 68-69 (observing that neither reciprocity and retaliation "works especially well when the relevant issues involve public goods").
82. See id. at 64-66. If one state tortures its citizens in contravention of its ICCPR obligation, another state party to the convention will not torture its citizens in response. Such a response would be neither acceptable nor likely to influence the first state to stop its violation.
83. See id. at 66-68 (explaining that "only those states that impose the sanction (or threaten to do so) bear the cost of the sanction").
84. See id. at 68-69 ("Reputation can provide an incentive to comply with international obligations even when reciprocity and retaliation do not, because reputational sanctions require neither that states choose to impose costly sanctions in an effort to generate future compliance nor that reciprocal withdrawal of concessions is practical.").
85. CIL rules with regard to human rights are easier to explain. As Guzman points out, CIL rules emerge solely as predictions of the violations other states will sanction. See id. at 190 (defining CIL as "norms that, because they are considered to be law affect state payoffs"). Consent is thus irrelevant. Id. at 196 ("It is important to note that states cannot choose their beliefs; these are not policy variables that states can manipulate to achieve a desired outcome. Rather, a state's beliefs or
join treaties when they "are better off with the agreement than with any alternate arrangement." 86 This presents a bit of a puzzle with human rights treaties. A human rights compliant state that has a preference for human rights 87 certainly gains when other states ratify such treaties. It is unclear, however, what it gains from joining the treaty itself. It’s unlikely to be part of a trade with a human rights abusing state; why would Zimbabwe trade anything for the United Kingdom’s ratification of a human rights treaty? Nor can it gain much in reputation since it is already compliant with human rights. 88 Similarly, a human rights abusing state has little to gain for ratification—by definition, such a state has little interest in human rights—and much to lose from ratification—continued violations of human rights would now affect that state’s reputation for abiding by its agreements as well as for good behavior.

Moreover, to the extent states care about their reputations, human rights treaties look dangerous. Violating a human rights treaty should hurt a state’s reputation more than the same act done in absence of the treaty obligation. As discussed below, violating human rights treaties may also have reputational effects (sometimes unexpected) on other, unrelated areas of international law. 89 But in many cases, the “State,” the part of the state that negotiates and maintains international agreements, may have little ability to control human rights violations. Compliance with human rights obligations, along with obligations in other areas, requires the involvement of a myriad of actors, many of whom the “State” cannot control. Such compliance may require legislators to act, judges to affirm, local officials to enforce, and even private actors to acquiesce. This may pose significant compliance problems for weak states; a weak state may have little power, for example, to stop discrimination against women at the local level as required by the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”), particularly where such discrimination is culturally entrenched. But it is also true of stronger states: Brazil has come under fire for its courts’ refusal to abide by the Hague Convention on the Civil Aspects of International Child Abduction in individual cases, 90 and in the United States, the Executive Branch was powerless to require Texas police to give VCCR notice or to stop Texas from executing José Ernesto Medellín in violation of an ICJ judgment. 91 Why would a state ever agree to an

86. Id. at 121.
87. See id. at 20 (recognizing the emergence of human rights as a state preference).
88. The one exception might be where a new state has no reputation for international law at all. Ratifying treaties it can easily follow may be a step towards building a good reputation for treaty compliance more generally.
89. See infra notes 151-155 and accompanying text.
international treaty and its consequent effect on reputational costs and benefits, where the "State" has so little control over violations? Such a state would in essence be abdicating control over its reputation.

So why do states ratify human rights treaties? One possible answer is that violations beyond a state's control are discounted by other states—that they don't affect other state's expectations of compliance. This is hard though to square with the reality of human rights, where many of the violations the international community cares about most take place at the substate level. Another answer may be that states only hold other states to a due diligence standard. As long as the "State" does everything it can, it will get the reputational benefits of compliance.

While both of these answers blunt the danger in ratifying such agreements, neither explains the incentive to enter into them at all. A third possibility takes us out of the realm of rational choice, suggesting that human rights treaties are ratified with domestic constituencies rather than international partners in mind. Andrew Moravcsik has thus suggested that Western European states ratified human rights treaties following World War II in an attempt to constrain future leaders and to entrench certain rights against the revival of fascism or the expansion of communism. The same has been suggested about newly independent states or newly liberal regimes (for example, South Africa). Guzman does not reject such an account, but does seek to avoid it.

A final possible answer is that the ratification of human rights treaties should be construed as an act of compliance, perhaps with a pre-existing CIL obligation, rather than as the acceptance of a new obligation. Under such circumstances, failure to ratify may be seen as a violation of the existing rule, one that could harm a state's reputation. Alternatively, a new state may ratify to build a reputation for compliance. States could rationally conclude that violating the treaty makes them no worse off than violating the pre-existing rule; at the very least they may get some reputational bump from the very public act (far more so than violations) of ratification. Similarly, states that care about human rights might join a treaty in order to increase the normative pressure on other states to abide by the community norm and ratify. This account is completely reconcilable with Guzman's discussion of Reputation, but may

92. Andrew Moravcsik, The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe, 54 International Organizations 217 (2000). A Liberal account would also make more sense of Guzman's account of the opposition to a legally binding Universal Declaration of Human Rights. U.S. opposition is much easier to explain as the product of Jim Crow and fears of immediate domestic enforceability of a treaty under the Supremacy Clause than as a result of the reputational effects of possible violations. See Guzman, supra note 6, at 140-41.

93. See Guzman, supra note 6, at 128 ("[T]he decision to put such motivations aside is a pragmatic necessity.").

94. Cf. id. at 91 (discussing Ukraine's disavowal of nuclear status after the fall of the USSR).

require rethinking the relationship between treaties, custom, and norms. Under such an account, treaties no longer operate as agreements between states, but instead as oaths of fidelity to international norms. Far from being a lesser form of obligation, custom and norms may at times be the strongest, having deeper effects on state reputations and actually driving treaty ratifications.

A second problem in describing human rights treaties is that it is unclear how Reputation can effectively deter violations. At least as an initial matter, Reputation makes violations more costly to a state by making other states more skeptical of a violator state’s willingness to abide by that agreement and other similar ones. Violations make it more difficult for the violating state to conclude future agreements and gain future cooperation in that area. This works well if what we are discussing are trade or investment treaties—future treaties in those areas may be more valuable than any specific violation. But these incentives seem absent in the human rights context. Can the threat of withholding future human rights coordination from a state really deter it from torturing prisoners, muzzling reporters, or committing genocide? It seems unlikely that a human rights abusing state is particularly swayed by other states’ refusal to ratify future human rights treaties. The threat of excluding Sudan from a new human rights treaty if it fails to hand its president over to the International Criminal Court seems pretty empty. On the contrary, the world reaction to states that fail to follow human rights norms appears to be to encourage/pressure those states to sign more human rights agreements rather than fewer.

One response to this argument is that human rights treaties are not particularly effective: proof, perhaps, that in the absence of effective reputational sanctions international law does not work. This is certainly true to an extent, but as ineffective as human rights treaties are, it goes too far to say that no compliance takes place. One need look no further than the European human rights system to see that states will at times reshape their behavior in order to bring it in line with international human rights law. Although difficult

96. See Cohen, supra note 69, at 110 (2008) (defining the strength of an international rule not by its form but by how deeply it’s internalized or how legitimate it seems). A related argument would be that states ratify human rights agreements in order to partake in certain club goods. Here too though, ratification has little to do with the benefits of that treaty, rather than other cooperation to which it might be linked.

97. One might think that the pressure would be to ratify agreements with stronger monitoring or enforcement mechanisms—this would be in line with Guzman’s theory that states continually update their expectations of compliance—but in reality, the trend seems to be to encourage as wide a membership in such treaties as possible, allowing more reservations and making enforcement mechanisms optional.


to parse, anecdotal evidence from elsewhere in the world is visible as well.

Explaining this compliance thus requires something beyond a theory of state reputation for human rights. One possibility is a robust theory of linkages, one that explains when a state's violation of human rights will impact its reputation for international law more generally, that is, when censorship or ethnic cleansing will negatively impact a state's ability to do other things internationally, such as to cooperate on trade or attract foreign investment. Guzman describes such linkages, discussing how states may have different reputations for compliance and how some violations of international law may affect specific reputations while others will affect more general ones. One could imagine certain human rights violations, perhaps arbitrary police action, impacting a state's more general reputation for respecting the rule of law and accordingly changing other states' expectations of treaty compliance more generally. So too can one see how rogue states can commit violations egregious enough to destroy their reputations for international law entirely. But in general, defining Reputation as state expectations of future compliance seems unable to explain these linkages on its own. It is hard to see any direct or obvious relationship between a state's treatment of local dissent and its willingness to abide by a trade agreement. On the contrary, a strong-armed government at home may be better able to maintain credible control over its international obligations. This was arguably the case with Chile under Pinochet. Accordingly, to the extent that we do see linkages between human rights and other issue areas—admittedly, an open empirical question—explaining them would require a deeper theory regarding the normative

news/birth-registration-laws-facing-repeal-after-transgender-ruling-1290090.html ("If the Government does not challenge the declaration [of incompatibility with the European Convention on Human Rights] the State will change the country's birth registration regime to make it compatible with the Convention.").

100. See infra Part II(C), Part III.

101. See GUZMAN, supra note 6, at 100-06 ("When making a compliance decision a state will take into account the reputational impact of its actions across all issue areas, but will also recognize that the reputational sanctions will be largest in the areas closest to the one at issue.").


103. GUZMAN, supra note 6, 102.

104. See supra notes 89-91 and accompanying text.

105. See GUZMAN, supra note 6, at 103.

106. Downs and Jones have expressed skepticism that such reputational linkages across issue areas exist at all. See George W. Downs and Michael A. Jones, Reputation, Compliance, and International Law, 31 J. LEGAL STUD. 95, 107 (2002). They suggest that where states have responded to a violation in one area with actions in another, those actions are best viewed as a form of punishment or retaliation rather than a rational response to new information about the violating state's reputation. See id.
commitments of the international community, one that could explain why
different international rules carry more or less weight and why different
violations will be seen as more or less important.\textsuperscript{107}

The other possibility is a robust theory of domestic or substate enforcement
of human rights. Such a theory would move us away from rational-
institutionalist explanations towards liberal ones. Such a theory would look at
the domestic legal effect of international human rights treaties or the ways in
which international agreements can galvanize or empower domestic
constituencies.

Notably, such liberal theories have support in human rights practice and
treaty design. Human rights advocates seem well aware of the weaknesses of
state-to-state enforcement in that area. As a result, human rights treaties have
increasingly adopted mechanisms specifically directed as transnational advocacy
groups, domestic constituencies, and individual claimants. Granting individual
claimants a right to petition international bodies, as in the First Optional
Protocol to the ICCPR and the Human Rights Commission,\textsuperscript{108} is an obvious
example. But human rights treaties have adopted other more creative
mechanisms as well. CEDAW, for example, requires states to increase female
representation at both the domestic and international level.\textsuperscript{109} The hope is that
CEDAW can thereby become self-enforcing, empowering domestic
constituencies of women who will demand compliance from their governments
and societies.\textsuperscript{110} Similarly, many human rights treaties include reporting
regimes. Although similar, such regimes are distinct from monitoring regimes,
which Guzman describes as mechanisms for increasing information on
compliance and improving state calculations of reputation.\textsuperscript{111} Rather than
simply allowing states to monitor each other through inspections, reporting
regimes require states to inspect and explain themselves to an international body
and the international community. States prepare their own reports on the
progress of women's rights in their territory. The goal is to force states out of
passive inaction, to become conscious of their problems, and to engage with

\textsuperscript{107}. Cf. \textit{id.} at 102 ("The answer, of course, is that there is no answer. What constitutes an area
for this purpose [Reputation] will depend heavily on context."); \textit{id.} at 103 ("Notice that the acting
state cannot control the extent to which behavior in one area affects its reputation in other areas.").

\textsuperscript{108}. Optional Protocol to the International Covenant on Civil and Political Rights art. 2, \textit{opened

\textsuperscript{109}. Convention on the Elimination of All Forms of Discrimination against Women, \textit{adopted

\textsuperscript{110}. Cf. Harold Hongju Koh, \textit{Why America Should Ratify the Women's Rights Treaty
(CEDAW),} CASE W. RES. J. INT'L L. 263, 270 ("In such countries as Nepal, Japan, Tanzania,
Botswana, Sri Lanka, and Zambia, CEDAW has been empowering women around the globe to
change constitutions, pass new legislation, and influence court decisions.").

\textsuperscript{111}. See \textit{Guzman, supra} note 6, at 97-98 (describing monitoring requirements as one of the
strategies states use to promote more complete information and thus retain the compliance pull of
reputation); \textit{id.} at 133 (describing varying levels of effectiveness of monitoring provisions with
regard to border measures and human rights treaties).
CAN INTERNATIONAL LAW WORK?

them. Here too, the hope is of creating a domestic constituency, perhaps within a state's Foreign Ministry, responsible for preparing such reports and thus invested in those issues. Compliance with reporting regimes is imperfect, but nonetheless real.

The use of such mechanisms does not disprove the importance of Reputation in state-to-state international law games. It does, however, suggest that fully explaining international law practice may require other theories as well.

B. The Gravity of International Law

A second question is how well compliance games between states describe the work international law actually does. Guzman's rational choice theory provides a very elegant, and quite persuasive, account of how international law can exert "compliance pull" on states, reshaping their cost-benefit analyses, and incentivizing them to act differently than they otherwise would. In and of itself, this is an extraordinary achievement.

But in order to determine whether Guzman's theory explains how international law works, we first need an account of what kind of work law does. One type of work is exactly what Guzman describes here. Law solves various games between states—coordination games, prisoner's dilemmas, battle of the sexes games—by changing the payoffs of different state actions in favor of cooperation. Law makes non-compliance more expensive by raising the prospect of reputational sanctions and makes compliance more attractive by adding reputational value that can be cashed-in for later cooperation.

But this is only one view of what law does. In the book's account, international law operates either on a contract theory—law as a bargain between states—or on something like Holmes' bad-man theory, acting as a predictor

112. See Harold Hongju Koh, The 1998 Frankel Lecture: Bringing International Law Home, 35 Hous. L. Rev. 623, 648 (1998) ("Not infrequently, officials within governments or intergovernmental organizations become so committed to using their official positions to promote normative positions that they become far more than passive sponsors but, rather, complementary 'governmental norm entrepreneurs' in their own right."); id. at 651-52 (discussing "internal mechanisms" states institute "to help maintain their habitual compliance with internalized international norms"). Guzman sees these reporting mechanisms as weak forms of monitoring and a weaker mechanism than limiting reservations. See GUZMAN, supra note 6, at 141 (suggesting that a "much more rigorous and effective monitoring function" than self-reporting could be imagined). This assumes, however, that their primary purpose is in state-to-state sanctioning.

113. See GOLDSMITH & POSNER, supra note 4, at 120 (observing that "[m]ore than 70 percent of parties have overdue reports; at least 110 states have five or more overdue reports; about 25 percent have initial overdue reports; the mean length of time for an overdue report is five years; and most of these reports are pro forma descriptions of domestic law").


115. Oliver Wendell Holmes, Jr., The Path of the Law, 10 Harv. L. Rev. 457 (1897).
of the benefits of compliance and the punishment for non-compliance. What's missing is an account of what H.L.A. Hart describes as the "internal point of view." For many, law does something more than simply coerce compliance; law creates a sense of obligation to follow the rule. The difference between law and coercion, or between law and contract, is that it exerts an independent force on actors to follow the rule; actors follow the rule not because of its negative or positive outcomes, but because it is law. Others go even further, arguing that law is most effective when actors follow the rule almost as a matter of habit—the rule is internalized to the point that compliance and non-compliance are no longer considerations. Individuals drive on the correct side of the road, stop at red lights, or even wear seatbelts without generally considering the reasons for following the rule.

Various theorists, many of whom might be described as constructivist, have tried to apply these insights to international law. A good example of such a theory is Harold Koh's Transnational Legal Process. According to this theory, states come to comply with international law through a process of "interaction, interpretation, and internalization." The process begins when different international and domestic actors force interactions with one another—a diplomatic dispute, a court case, a public campaign—over proposed rules of international law. These interactions result in an interpretation of the rule in legislation, a court decision, an executive order, or bureaucratic regulations. Through this process, the rules become increasingly binding as a matter of domestic law, and adherence to these rules becomes increasingly commonplace and internalized. "Through this repeated cycle of interaction, interpretation, and internalization—the transnational legal process—international law acquires its 'stickiness,' and nations come to 'obey' out of perceived self-interest that becomes institutional habit."

A good example might be the training of militaries in the laws of war. States have spent centuries wrangling over the shape and content of the laws of war. Once adopted though, states often implement the rules through military codes and training. The military is trained in the rules, not the cost-benefit analysis behind them. Over time, the agreed-upon rules come to be followed out of habit and are seen as aspects of ethical soldiering. It should thus be no surprise that the uniformed military in the United States provided some of the

---

117. See Koh, supra note 112, at 629-33 (describing combination of four different compliance strategies used by regulators to enforce new seat belt norms).
120. Koh, supra note 113, at 626.
121. Koh, id. at 655. "By domesticating international rules, transnational legal process can spur internal acceptance even of previously taboo political principles." Id. at 643.
vocal opposition to Bush administration reinterpretations of those rules.\footnote{See, e.g., Simon Chesterman, \textit{The Spy Who Came in from the Cold War: Intelligence and International Law}, 27 \textit{Mich. J. Int'l L.} 1071, 1098 (2006) ("It is noteworthy, however, that these U.S. policies have been protested most strongly by the uniformed military... "); Tim Golden, \textit{Tough Justice: After Terror, a Secret Rewriting of Military Law}, N.Y. \textit{Times}, Oct. 24, 2004 ("Military lawyers were largely excluded from that process in the days after Sept. 11. They have since waged a long struggle to ensure that terrorist prosecutions meet what they say are basic standards of fairness."). One might also note how debates over torture in the United States resulted in interpretations of the rule by the Congress, \textit{see} the McCain Amendment 1977 to the Department of Defense Appropriations Act of 2006, which amendment became part of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. 10, 119 Stat. 2680, 2739-40 (2005) (declaring that "[n]o person in the custody or under the effective control of the Department of Defense... shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual or Intelligence Interrogation," and that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment"; defining "cruel, inhuman, or degrading treatment or punishment"), and by the Court, \textit{see} Hamdan v. Rumsfeld, 548 U.S. 557, 629-35 (2006), which then resulted in changes to the Army Field Manual, \textit{see} newly added Appendix M to the Army Field Manual, U.S. DEP'T OF ARMY, \textit{FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS} (Sept. 6 2006), \textit{available at} http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.}{122} \footnote{See, e.g., Simon Chesterman, \textit{The Spy Who Came in from the Cold War: Intelligence and International Law}, 27 \textit{Mich. J. Int'l L.} 1071, 1098 (2006) ("It is noteworthy, however, that these U.S. policies have been protested most strongly by the uniformed military... "); Tim Golden, \textit{Tough Justice: After Terror, a Secret Rewriting of Military Law}, N.Y. \textit{Times}, Oct. 24, 2004 ("Military lawyers were largely excluded from that process in the days after Sept. 11. They have since waged a long struggle to ensure that terrorist prosecutions meet what they say are basic standards of fairness."). One might also note how debates over torture in the United States resulted in interpretations of the rule by the Congress, \textit{see} the McCain Amendment 1977 to the Department of Defense Appropriations Act of 2006, which amendment became part of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. 10, 119 Stat. 2680, 2739-40 (2005) (declaring that "[n]o person in the custody or under the effective control of the Department of Defense... shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual or Intelligence Interrogation," and that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment"; defining "cruel, inhuman, or degrading treatment or punishment"), and by the Court, \textit{see} Hamdan v. Rumsfeld, 548 U.S. 557, 629-35 (2006), which then resulted in changes to the Army Field Manual, \textit{see} newly added Appendix M to the Army Field Manual, U.S. DEP'T OF ARMY, \textit{FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS} (Sept. 6 2006), \textit{available at} http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.}{123} \footnote{See, e.g., Simon Chesterman, \textit{The Spy Who Came in from the Cold War: Intelligence and International Law}, 27 \textit{Mich. J. Int'l L.} 1071, 1098 (2006) ("It is noteworthy, however, that these U.S. policies have been protested most strongly by the uniformed military... "); Tim Golden, \textit{Tough Justice: After Terror, a Secret Rewriting of Military Law}, N.Y. \textit{Times}, Oct. 24, 2004 ("Military lawyers were largely excluded from that process in the days after Sept. 11. They have since waged a long struggle to ensure that terrorist prosecutions meet what they say are basic standards of fairness."). One might also note how debates over torture in the United States resulted in interpretations of the rule by the Congress, \textit{see} the McCain Amendment 1977 to the Department of Defense Appropriations Act of 2006, which amendment became part of the Detainee Treatment Act of 2005, Pub. L. No. 109-148, Tit. 10, 119 Stat. 2680, 2739-40 (2005) (declaring that "[n]o person in the custody or under the effective control of the Department of Defense... shall be subject to any treatment or technique of interrogation not authorized by and listed in the United States Army Field Manual or Intelligence Interrogation," and that "[n]o individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment"; defining "cruel, inhuman, or degrading treatment or punishment"), and by the Court, \textit{see} Hamdan v. Rumsfeld, 548 U.S. 557, 629-35 (2006), which then resulted in changes to the Army Field Manual, \textit{see} newly added Appendix M to the Army Field Manual, U.S. DEP'T OF ARMY, \textit{FIELD MANUAL 2-22.3, HUMAN INTELLIGENCE COLLECTOR OPERATIONS} (Sept. 6 2006), \textit{available at} http://www.army.mil/institution/armypublicaffairs/pdf/fm2-22-3.pdf.}{124} \footnote{Id.}{125} \footnote{Id. at 30.}{125}

Although not part of his discussion, such a process actually seems like a natural outgrowth of Guzman's theory of Reputation. Where states are sufficiently concerned about their reputation in a particular area, they will have strong incentives to combat accidental non-compliance. They will want to enact the new international law rules into law, formalize them in regulations to be followed by the bureaucracy, and train officials and others to follow the rules as a matter of course. Over time, the rules may be followed with little reference to their original cost-benefit analysis. The rules may even reshape state preferences themselves, turning what was once a difficult game like a prisoner's dilemma into a simple coordination game.

But the success of such a process essentially removes it from Guzman's account. Guzman's account does not try to explain areas of international law where states already have a preference for cooperating and where states would arguably do so with or without an international agreement. In such cases, "international law does no heavy lifting and might even be said to be superfluous."\footnote{Guzman, \textit{supra} note 6, at 30.}{123} For Guzman, "International Law is only worthy of study if it does more."\footnote{Id.}{124} Instead, Guzman's focus is on "situations where cooperation is difficult."\footnote{Id. at 30.}{125}

This sort of focus makes sense from Guzman's rational choice perspective. Analyzing those areas where law seems to be changing the outcomes of games--where states act differently in the presence of law than their preferences would normally dictate--provides the crispest, clearest tests of international law's impact on state behavior. The problem is that while such an analysis may
demonstrate occasions when international law does work and may demonstrate to international law skeptics that international law can work, it's not at all clear that it demonstrates how international law works most often.

To the extent we believe that international law can change state preferences over time, a hypothesis with which Guzman would seem to agree, there are reasons to doubt that this rational choice story captures most of what international law does. First, as discussed above, once states agree on a particular rule, they have strong incentives to avoid accidental violation. One can thus assume that states will take whatever action they think necessary to encourage ordinary compliance with the rule. States are likely to take discretion over whether to follow the rule out of the hands of all but the most important of state officials. As a result, one should expect that during the normal life of the rule, the rule will simply be followed by those state agents who administer that area of state policy—customs collectors, for example—with little thought of noncompliance on their state's reputation.

Second, by focusing on those occasions in which cooperation is difficult, Guzman limits himself to those situations where the choice between two actions remains close. In many of those scenarios, an international law may change the payoffs of cooperation or defection, but not enough to guarantee compliance. As Guzman notes, this is certainly true for questions related to national security, where law's thumb on the scale on the side of compliance is met with a full fist of other concerns weighing in favor of noncompliance. But to an extent this is true of all difficult areas.

By contrast, where law has effected a change in state preferences themselves, the rule in question is no longer even being balanced; it has been taken off the table entirely. The rule is followed even where a cost-benefit analysis of compliance, if it were undertaken, might suggest against following the rule. It is reasonable to suspect that a great deal of compliance takes place this way, perhaps more compliance than in the scenarios Guzman discusses. Many rules of international law may be taken off the table for long periods of time in this way. The pluses and minuses of territorial conquest are rarely really considered. While states may consider violating individual treaty provisions, they rarely question the doctrine of *pacta sunt servanda* as a whole. During times of crisis, tactics like torture may get put back on the table, but for many

---

126. See *id.* at 20 ("It is surely true that norms matter in international relations and international law, and constructivism attempts to account for the fact that norms shift over time.").

127. Of course, this story can be reconciled with a rational choice model. States determine based on cost-benefit analysis that removing discretion in most cases is the better strategy. The point here is that that analysis is relatively removed from most actual instances of compliance. In general, this essay does not argue that these phenomena cannot be reconciled with rational choice. Instead, the argument is that these phenomena blur the line between rational choice and constructivism, perhaps suggesting that these forms of inquiry are more alike than different.

128. See GUZMAN, *supra* note 6, at 78 ("A state that has a powerful national security reason to violate an agreement . . . faces nonreputational payoffs that provide a strong incentive to ignore the commitment.").
states, it may normally not even be thought an option; the cost-benefit analysis of violating the rule will not really be considered.

Accordingly, one could argue that international law does more actual work in shaping easy games than hard ones. We could return here to the example of the law of war. The law of war requires states to distinguish between military and civilian targets and to minimize unnecessary civilian casualties. It seems reasonable to expect that this rule has more impact in shaping initial targeting choices and rules of engagement, in designating the types of weapons and munitions in ordinary use, and in subconsciously taking total war off the table as at least an initial option than it does in shaping decisions about whether and how to attack an apartment building sheltering terrorists. Guzman’s approach, by ignoring the former situations, may be systematically biased towards undercounting compliance and may fail to explain those situations in which compliance is most likely.

In a sense, Guzman’s theory deals with the surface or aboveground level of international law, where international law rules can be seen and evaluated as part of a cost-benefit analysis. What’s missing are those rules that are submerged beneath the surface and largely invisible. These rules exert an unseen gravitational pull on states and possibly on other rules still at the surface. Thus *pacta sunt servanda*, from beneath the surface, gives weight to treaties. As will be explained in Part III, this gravitational pull may also help explain the reputational linkages between different rules. Guzman’s theory does not explain this vast underworld of international law. As he admits, explaining how rules become submerged, how they exert force on states, and how they sometimes gurgle back up to the surface probably requires a constructivist or liberal theory, approaches he appreciates but would like to avoid. Depending on how vast this subterranean world is and the strength of its gravitational pull on states and other rules, this may signal serious limitations in a solely rational choice approach. That said, Guzman’s approach is not inconsistent with constructivist and liberal accounts of those submerged rules, and may, as

---

129. This is distinct from Guzman’s point that compliance is less likely in national security situations. *See id.* His argument there is that even where the law places a thumb on the scales in favor of compliance the balance will likely still weigh in favor of noncompliance as the most powerful of state interests—survival—is on the other side. *See id.* at 125 (“Faced with [a] ticking time bomb scenario, the decision as to whether to torture or not will surely not be made on the basis of the international legal commitment.”). The point here is that this pattern results when compliance with the international law rule has been placed on the debate for discussion. Where that rule has been subconsciously incorporated into state preferences, the option of noncompliance may not even be considered. In Part III, I will discuss further why some internalized rules return to the table for balancing.

130. *See GUZMAN, supra* note 6, at 20 (suggesting that constructivism “may be an important part of the explanation for broad changes in states behavior over time,” and that growing concern for human rights “is difficult to explain without resort to changing norms and preferences”).

131. *See id.* at 20 (“Though this book adopts institutionalist assumptions, I recognize the value of both liberal and constructivist approaches.”).

132. *See id.* at 21.
discussed in Part III, provide important clues to how they work. If Guzman were to fully embrace such approaches as complements to rational choice, his theory has the potential to be truly comprehensive.

C. Rational and Rationale

As explained above, Guzman’s goal is to “to advance a coherent and general theory of how international law influences state behavior,” using rational choice methods. Guzman chooses rational choice because it provides simpler, more testable models of state behavior. Although liberal and constructivist theory provide “appealing plausibility” in their account of international law and may provide “an accurate description of international law in at least some cases,” they are less amenable to creation of general, testable models of state behavior.

But can Guzman’s key mechanism, Reputation, really be explained in solely rational choice terms? It is important to note here what this question is not asking. Guzman is refreshingly modest in his ambitions for rational choice theory and magnanimous to proponents of rival theories. Guzman states quite clearly that this book is not meant as a defense of rational choice theory at the expense of others. It would, accordingly, be entirely unfair to criticize his account for its failure to embrace other theories. Others can write those books. The question asked here is different and more fundamental. Is Guzman’s account itself capable of explanation in solely rational choice terms? Does a rational choice conception of Reputation have enough substance, by itself, to explain how international law works, or is it too abstract to provide meaningful predictions of state behavior? By adopting a Reputation-based account, I will argue, Guzman has inched over the border between rational choice theory and constructivism. Filling out his account, developing models of state behavior that are crisp and falsifiable, may require embracing his new theoretical home as his own.

As explained above, Guzman defines “a state’s reputation for compliance with international law as judgments about an actor’s past response

133. See supra Part l.A.
134. GUZMAN, supra note 6, at 24.
135. Id. at 21 (choosing rational choice because it “yield[s] theory that is more parsimonious and predictions that are crisper and more falsifiable than is the case for alternative approaches.”).
136. Id. at 20.
137. See id. at 19 (diagnosing that “It is difficult, and perhaps impossible, to construct a general, tractable, and predictive liberal theory of policymaking in a single state, let alone one that also captures the interactions of many states.”); id. at 20 (explaining that “as is true with liberalism, this flexibility makes it difficult for constructivism to produce a general and tractable theory of state behavior. ...Until such a model exists, there is no way to use constructivism to study the full field of international law within a single framework.”).
138. Id. at 21.
139. See supra Part l.
to international law obligations used to predict future compliance with such obligations." The goal of Reputation is to capture a state’s discount rate with regard to a particular agreement, a particular area of international cooperation, and international law more generally. This is a complex process, many aspects of which How International Law Works explains well. Guzman explains why violations will affect different states’ reputations differently and why certain violations, like those during war, will be excused as aberrational.

But the most complex element of this process is that it involves a great deal of mindreading on the part of states. Reputation might be described as a second-person, rather than first-person, view. States considering a particular act must consider how other states will react; states reacting to a perceived violation must figure out what that violation means to the violating state.

It is hard to imagine how any of this can be done solely through rational choice. States do not have perfect knowledge of their counterparts’ preferences. Deciding what an action will mean to a state requires first determining the normative commitments of that state and the larger international community. A violation that seems technical and de minimis to one state may seem fundamental to another. As Guzman admits, states may have little idea what actions mean to other actors and may thus have little control over their reputations. This explains the phenomenon of “law talk” between states and NGOs: States and others use such talk to either signal their own normative commitments or to shape those of others. Law talk is designed to give reputational meaning to particular acts. Such a process seems to take us out of

140. GUZMAN, supra note 6, at 73.
141. See id. at 78-79 (“Though the [Kyoto] Protocol does not provide an exception for national emergencies, countries recognize when they sign any agreement that there are circumstances in which compliance will not be forthcoming. . . . If military conflict or severe domestic unrest explains why a potential signatory breached a similar obligation in the past, will this fact hamper its ability to participate today? As long as all parties expect breach in the event of a war, there is no reason that past conduct consistent with this expectation would affect the negotiation. In effect, the agreement has an implicit exception in the event of war.”).
142. Is rendition to torture from outside of U.S. territory a technical violation, see Summary Record of the 2380th Meeting, Consideration of Reports Under Article 40 of the ICCPR, Dialogue between the Human Rights Committee and the Delegation of the USA, ¶ 10, U.N. Doc. CCPR/C/SR.2380 (July 27, 2006) (quoting U.S. delegation explaining that the “delegation found it difficult to accept that the conjunction in the phrase ‘within its territory and subject to its jurisdiction’ could be interpreted as meaning ‘and/or’. That was particularly implausible given that the Covenant negotiators had rejected the proposal to substitute the word ‘or’ for ‘and,’” and “respectfully disagree[ing] with the Committee’s conclusion that article 7 of the Covenant contained a non-refoulement obligation with respect to torture and cruel, inhuman or degrading treatment or punishment. That conclusion went well beyond the language of article 7 and the scope of the non-refoulement provision contained in article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”), that can be excused or something that raises more serious questions about U.S. compliance more generally?
143. See GUZMAN, supra note 6, at 103-04.
144. See supra Part I.C.
145. See GUZMAN, supra note 6, at 98-99.
the territory of rational choice and into that of constructivism. Reputation forces states into what looks like a constructivist dialogue, as they try to discern and shape the normative regime under which their actions will be judged. In fact, states considering the normative commitments of other states and adapting their acts accordingly might be the definition of constructivist norm internalization.

Liberal theory seems similarly necessary to this mindreading. In determining the meaning of a particular state’s acts, observing states must determine those acts’ position within the first state’s domestic politics. Given what other states know about a particular state’s political system, do violations seem likely to be repeated? A single expropriation of foreign property by Canada may be explained away as aberrational, while the same expropriation by Venezuela under a populist-nationalist president may be seen as an omen of things to come.

Medellin provides a useful illustration of the questions states must ask. What should states make of Texas’ failure to provide consular notice as required by the VCCR or its refusal to abide by the ICJ judgment in Avena? What should states make of the U.S. Supreme Court’s treatment of the ICJ and international obligations or the President’s memorandum ordering Texas to comply? Whose position matters for predicting future compliance? Is the incident aberrational or an indication of a larger popular American exceptionalism dangerous for American obligations? Answering these questions requires states to develop their own theories about the impact of American domestic politics and political structure.

146. At the outset, any prediction of a state’s discount rate seems to require some estimation of the stability and perception of international commitments in domestic politics. Is the state unstable and prone to fits of populist or nationalist rage? Does a separation of powers within that state cabin the effects of such rage?

147. Cf. GUZMAN, supra note 6, at 102 (“A violation of a fisheries treaty may signal both that the state is relatively unconcerned about harm to fishing stocks and that there is little domestic support for environmental measures more generally.”).


150. That these considerations matter can be seen in the design of state constitutions. Democracies may place treatymaking in less democratic branches or choose to make treaties self-executing in order to assuage concerns about the state’s ability to abide by agreements in the face of populist pressure. A state with a questionable judiciary may grant jurisdiction over international disputes to a more specialized, trustworthy body. See U.S. CONST. art. III, § 2, cl. 8 (“In all Cases affecting Ambassadors . . . the supreme Court shall have original Jurisdiction.”); U.S.T.R., 2005 NAT’L TRADE ESTIMATE REP. ON FOREIGN TRADE BARRIERS 125-26, available at http://www.ustr.gov/Document_Library/Reports_Publications/2005/2005_NTE_Report/Section_Ind ex.html (noting that China in its WTO accession agreement “committed to establish tribunals for the review of all administrative actions relating to the implementation of trade-related laws, regulations, judicial decisions and administrative rulings”; but, cautioning that “[d]espite initial enthusiasm, foreign observers have grown increasingly skeptical of the China International Economic and Trade Arbitration Commission (CIETAC) as a forum for the arbitration of trade disputes”). All of these are done, in part, to convince other states of the strength of its commitment.
In essence, Reputation seems to throw all three theories into the hopper. States make reasoned decisions meant to further state interests, but ones necessarily inflected with normative commitment and by domestic politics. Reputation thus blurs the line between the three theories, even suggesting that they do not exist. Constructivist and liberal theory become the natural continuation of Guzman’s rational choice assumptions, not an unwelcome addition to them. A solely rational choice approach seems to capture only part of Reputation’s operation.

The problem with a solely rational choice approach becomes most apparent in Guzman’s discussion of linkages. Guzman observes that states will have both a general reputation for compliance with international law as well as multiple interrelated reputations for compliance with specific rules or with specific areas of international obligation. The reputational effect of some violations will be cabined to that issue area alone; other violations will have broader effects. “[S]ufficiently egregious violations in a few areas are often enough to compromise a state’s reputation across the board.” As Guzman recognizes, potential linkages between areas or between certain issues and states’ more general reputation for living up to its commitments, have “important implications.” But without some constructivist or liberal theory, it’s hard to figure out where such linkages will form. On paper, many commitments look alike, but as Guzman recognizes, some will be treated as more important than others. Which issues will be seen as important, which violations egregious enough to impact a state’s overall reputation, seems dependent on the normative commitments of the observing states. Whereas one might be able to use a violation in one area of international law to learn more about the violating state’s discount rate in that area, the connections between different areas are far less obvious. No simple calculus can explain why a sufficiently egregious human rights violation would affect a state’s reputation for trade agreements.

The difficulty modeling these situations, determining how violations will actually affect state reputations, raises questions about whether the rational choice method Guzman chooses really does lead to crisper, more predictive models than constructive or liberal approaches. Hints of this problem are visible in Guzman’s caveat about the real-world examples used in the book. These “examples should be taken simply as illustrations,” and not as “proof of the

Guzman hints that he might be ready to incorporate such considerations into his model. See GUZMAN, supra note 6, at 73 (observing that a state’s discount rate may depend on “the domestic politics of the state (e.g., the extent to which domestic political structures make violation of international law difficult or costly)).

151. See GUZMAN, supra note 6, at 101.
152. Id. at 102.
153. Id. at 104.
154. A frustration Guzman seems to share, see id. at 102 (“The answer . . . is that there is no answer.”) and 103 (“[T]he acting state cannot control the extent to which its behavior in one area affects its reputation in other areas.”).
claim being made."\textsuperscript{155} One might argue that in each case some other underlying factors affected the payoffs of states and that the particular influence at issue in the discussion was not an important factor.\textsuperscript{156} This is because the account here is largely theoretical, and a more "formal investigation" would be required in order to understand how it applies to real-world scenarios. In essence, the examples used in the book are merely hypothetical. They demonstrate how Reputation \textit{can} lead to compliance. The real question, however, is whether a solely rational choice account can create anything more than hypothetical models—whether a rational choice model can actually predict real-world results.

An illustrative example is Guzman's discussion of the decision to make the Universal Declaration of Human Rights ("UDHR") non-binding.\textsuperscript{157} Guzman argues that the U.S. could rationally have chosen not to make the UDHR a treaty out of concern for the reputational effects of non-compliance. This certainly sounds like a reasonable explanation. The problem is that history suggests a different answer. It is well-documented that domestic opposition to a binding UDHR, mostly from Southern segregationists worried about the future of Jim Crow laws, played a significant, if not the most significant, role in the U.S. position.\textsuperscript{158} Here, the abstract concept of Reputation predicts the U.S. position, but only by ignoring where that position actually came from. One can put this another way: Had domestic opposition proven weaker, the postwar human rights movement might have won the day and the United States might have supported a binding agreement much as the Europeans did.\textsuperscript{159} Nothing about the U.S.'s reputational concerns would have changed—Guzman's account would still predict that the U.S would oppose a binding treaty—but in this case the prediction would prove wrong.

Again the problem seems to be that rational choice theory explains how and when international law \textit{can} work; it does not work as well in explaining how international law actually does work in concrete situations. Answering that question seems to require more. Constructivist and liberal accounts seem necessary parts of the equation.

\textsuperscript{155} Id. at 22.

\textsuperscript{156} Id.

\textsuperscript{157} See id. at 140-41.

\textsuperscript{158} See, e.g., Rhonda Copelon, \textit{The Indivisible Framework of International Human Rights: Bringing It Home}, in \textit{The Politics of Law: A Progressive Critique} 223 (David Kairys ed., 3d ed. 1998) ("In 1947 and 1951, petitions were filed with the United Nations documenting and challenging de jure racial segregation, racial violence, and the status of African Americans in the United States. While these initiatives contributed to the formal repudiation of school segregation in the Eisenhower administration and the Supreme Court, the cold war and Southern opposition to racial equality produced a rightwing backlash against international accountability that continues to the present."). Thank you to Daniel Tilley for making this point.

\textsuperscript{159} ... in the form of the European Convention on Human Rights, adopted in 1950.
Where do we go from here? If *How International Law Works* is limited by its commitment to rational choice methods, what might a more comprehensive approach to international law look like? The beauty of Guzman’s Reputation-based account is that it is in many ways capacious enough to incorporate constructivist and liberal elements. Loosening the rational choice assumptions of the book can go a long way towards taking the account from one that explains how international law *can* work to one that explains how international law actually *does* work. Guzman’s account creates a template for a hybrid rationalist-constructivist-liberal account, one broader, more rigorous, and more descriptive of reality than any of the approaches are on their own. Reputation, far from simply saving rational choice from the international law skeptics, becomes something far more powerful: the first ingredient in a more unified theory of how international law works.

A more comprehensive model of how international law works would start by looking at international law as a function of actions along two different axes. *How International Law Works* considers the horizontal one: how international law works as an external constraint on state action, changing the payoffs of cooperative and non-cooperative behavior. Along this axis, states are actively choosing between compliance and non-compliance with a particular agreement. International law, with its ability to bring reciprocity, retaliation, and reputation to bear, operates as an additional factor incentivizing compliance—in some cases, incentivizing compliance enough to overcome states’ normal preference for violation.

But international law operates along another, vertical axis as well. Over time, states can be expected to internalize certain rules of international law. Cooperation is valuable to states, and states should want to avoid accidental violations that might put that cooperation unnecessarily at risk. States thus have every incentive to make compliance ordinary and habitual. The law of war

160. In fact, Reputation seems to demonstrate that lines between rational choice, constructivism, and liberal theory are misdrawn. Far from being different theories, they appear to be parts of the same one. Constructivism is a natural extension of rational choice logic.

161. This is to be distinguished from “the” comprehensive model. As noted above, see generally *supra* Part II(B) and in particular notes 119-121 and accompanying text, international law does many different things. This short section does not attempt to identify all of them (not that it could) and accordingly cannot suggest a model that encompasses all of them. Instead, this section merely suggests a broader model that can begin incorporating some of the specific issues discussed above.

162. That part of the state responsible for treaties and diplomacy might be expected to be particularly careful in this regard. One might thus expect the U.S. State Department to develop an institutional bias towards following treaties and other laws; one might expect its professionals to develop a generalized preference for compliance.
example above\textsuperscript{163} is illustrative. In order to avoid accidental violations, states will incorporate the rules of international humanitarian law into military training and field manuals, and they may involve lawyers in sensitive decisionmaking. Over time, one should expect compliance with many of the rules to become habitual. During a wide array of military activities, violations of the rule will not even be considered. The law no longer changes incentives, no longer shapes decisions between compliance and noncompliance. Instead it invisibly takes the choice off the table entirely. Noncompliance is never really considered. One might expect some rules, perhaps those protecting civilians, to begin to seem normatively or morally desirable. In Guzman's terms, the rule itself, rather than the payoffs of cooperation, becomes a state preference. Further, the more widely a particular rule is internalized, the more egregious its violation will seem. A violation of such a deeply internalized rule may signal a general disdain for international commitments and the rule of law rather than a discrete, excusable, one-time choice.\textsuperscript{164}

A more comprehensive theory of how international law works should seek to explain action along both these axes: both how international law can steer conscious state choices between different acts and how rules of international law are internalized, changing the sets of choices states see. Returning to the metaphor above,\textsuperscript{165} such a theory seeks to explain the geology of international law. It seeks to understand the geography and topography of the surface—those choices and laws states see and act upon. It is this landscape of international relations that \textit{How International law Works} attempts to map. But a comprehensive theory would also try to understand the law’s operation below the surface—how the increasing weight of certain rules pulls them slowly under ground, where their exact nature and force remain largely hidden. These subterranean rules exert a special gravity on states, drawing them, almost unconsciously, toward certain actions and preferences.

Sometimes, submerged rules may gurgle back up to the surface. The prohibition on torture presents a useful example. As has become apparent in recent debates, the legal prohibition on torture has a difficult time (as a practical matter) outweighing concerns of state security when subjected to a cost-benefit analysis. Instead, where the prohibition on torture seems to have most force is as a submerged rule. The prohibition is so deeply internalized that, at least

\textsuperscript{163} See supra text accompanying note 122.

\textsuperscript{164} This process might thus be analogized to Lawrence Kohlberg's stages of moral development. See \textit{Lawrence Kohlberg, Essays on Moral Development: The Philosophy of Moral Development} (1981). According to this theory, individuals move from obeying rules out of a fear of coercion, to following them out of a fear of condemnation or a desire to conform, to following them out of a sense of duty to the community, to following them out of an internal sense of right behavior. See \textit{id. passim}; see also Roger Alford, \textit{The Moral Stages of Why Nations Obey International Law}, available at http://opiniojuris.org/2008/02/28/the-moral-stages-of-why-nations-obey-international-law/#comments. Thank you to Dan Bodansky for reminding me of this point.

\textsuperscript{165} See supra notes 133-136 and accompanying text.
during normal times, the option of torturing a prisoner really is not considered. Catastrophic events, however, can like tremors disturb the geology of international rules; once submerged rules may again surface. September 11th thus appears to have made the balancing of whether or not to torture seem a viable and visible choice to many.  

These two axes or regions are also related. As Guzman recognizes, even at the surface, different rules carry more or less weight. A violation of one rule might be excused as technical and unworthy of sanction; the violation of another may be important enough to harm a state's general reputation for international law compliance. The gravitational pull of those submerged rules helps explain these differences.

In earlier work, I suggested that rules come to be treated as international law in two different ways. First, some rules are themselves internalized by international actors. Some of these rules are substantive—states may internalize a prohibition on genocide or slavery. Others may look more procedural—they may explain what counts as a binding agreement, what evidence is needed to legitimate a customary practice as law, or dictate when such an agreement must be followed. \textit{Pacta sunt servanda} would seem to fall into this category. A second category of rules treated as international law builds on this first one. Rules in this category are treated as law because they meet the standard of internalized lawmaking or process rules. Thus with regard to human rights, some human rights may be treated as international law because those rights have simply been internalized, while others may be treated as international law because they're embodied in a document that meets internalized standards legitimacy. These are not one-or-the other choices: We might see some states treat a rule (for example, prohibiting certain acts in war) as law because the rule has been deeply internalized and other states (where that same rule has not yet been internalized) treat the rule as law because it is embodied in a treaty adopted through legitimate process (the Geneva Conventions). Moreover, the two categories are fluid: A rule not yet fully internalized may be given extra

\begin{itemize}
\item 166. Obviously, as suggested here, this story is much more complicated, with different actors reacting differently to the same stimuli. While the prohibition on torture was internalized by many, it was not by all, and while September 11th may have changed some opinions on its acceptability, others, including many in the uniformed military, stood fast.
\item 167. \textit{See} GUZMAN, \textit{supra} note 6, at 85 ("[M]inor violations, such as missing a reporting deadline, are unlikely to be viewed as a serious breach and, therefore, are unlikely to lead to significant reputational sanctions.").
\item 168. \textit{See id.} (suggesting "a refusal to allow inspection of nuclear reactors under the [Non-Proliferation Treaty]" as an example of "a serious breach of a state's commitments and will generate a strong reputational reaction").
\item 170. Such standards might include the determinacy of the rule or the amount and depth of negotiation that took place. \textit{See id.} at 106-07, 111-13 (discussing these and other factors indicating a rule's legitimacy).
\end{itemize}
legitimacy by process, and a rule initially treated as law because it was created through legitimate process, may over time be internalized.

Under this theory, rules on the horizontal axis, rules shaping state choices at the surface of international relations, gain their force from the internalized rules lurking beneath the surface. A violation of a treaty, for example, might be deemed more serious than violation of a soft law rule because of the internalized nature of *pacta sunt servanda*. Similarly, a violation of one provision will be seen as egregious while violation of another merely technical, based on how deeply internalized the rules described have become.

Thus, this helps explain something that Guzman leaves murky: the relative reputational valence of different rules. The more habitual compliance with the rule and the more often the rule is unselfconsciously professed, the more unthinkable the violation of the rule will become. Ethnic cleansing might ruin a state’s general reputation for compliance because of the internalized nature of that prohibition. Where rule of law norms have been internalized, a state’s refusal to abide by its own court’s judgments under a treaty may harm a state’s reputation more than its violation of a specific trade provision. Those rules most deeply and widely internalized, along with those backed by the strongest notions of legitimate process, will have the deepest and broadest impact on reputation.

Fully understanding the horizontal axis, the current landscape of international relations, thus requires a better understanding of the forces at work below and the process by which rules drop beneath the surface. Although *How International Law Works* seems primarily concerned with mapping the surface rather than plumbing the depths, its insights are considerably broader. The book’s machinery can be usefully repurposed to explore both how rules are internalized and the relationship between invisible internalized rules and visible incentivizing ones.

How norms are internalized seems like a paradigmatic example of a constructivist question beyond the scope of *How International Law Works*’ rationalist approach. Yet perhaps demonstrating the instability of the boundary between these two theories, *How International Law Works* provides considerable insights into this question. First, as discussed above, Guzman’s theory actually seems to predict the internalization of legal rules. Given the value of Reputation to states and the unacceptable costs of accidental violation, states have every incentive to make compliance habitual and nondiscretionary. States should not want its agents or other substate actors picking and choosing when to put the states’ reputation on the line. One should thus expect international obligations to be passed into law (where possible), for diplomats, soldiers, and bureaucrats to be trained in the relevant international legal rules,

---

171. See supra notes 142-146 and accompanying text; GUZMAN, supra note 6, at 84-85 ("Because this book takes a theoretical approach ... there is no way to provide an estimate of the magnitude of reputational sanctions.").

172. See supra text following note 121; supra note 164 and accompanying text.
and for states to place international lawyers in roles where they can advise the state on what the rule requires. It should be unsurprising if these processes eventually lead to a bias towards compliance or a normative preference for international rules within these various groups. Reputation thus provides a rational explanation for the transformation of rules into non-rational preferences.

Second, How International Law Works helps explain norm transfer and internalization through its discussion of law talk and mindreading. For Guzman, Reputation is a prediction about a state’s likelihood of complying in the future based on an assessment of prior acts. Making this prediction requires some mindreading about the state-in-question’s view of its obligations and their relative importance as well as the state-in-question’s motives. More importantly, a state eager to protect its reputation needs to know how other states will react to specific acts. Will they be seen as violations? Will those violations be seen as technical, excusable, or egregious? Will those violations impact only its reputation in that area or in others as well? A state eager to protect its reputation must discern the normative commitments of its counterparts; such a state must discern the weight others assign to various different rules. In essence, a state must read the minds of its counterparts.

This, as Guzman recognizes, is no easy task. As explained above, “law talk” attempts to fill the informational gap. States and NGOs try to influence each other’s perceptions, to provide “information” about the meaning of different acts. They make arguments about the meaning, scope, and importance of particular rules. Guzman’s emphasis is on states’ supply of information to either make Reputation more effective or to reduce the reputational sanctions of a potential action. But as Guzman observes, “[w]hen states make informational claims, of course, the goal is not always to simply share truthful information with others.” Moreover, he notes that NGOs use such “law talk” “to push the frontier of human rights law and expand the legal rules to include more types of conduct.” One should expect states to do the same, to try to spread the preferences of their domestic constituencies and their normative commitments about international behavior through legal claims and condemnations. At the same time, states eager to protect their reputations should be interested in these statements; they provide clues as to how their acts will be received. If the act is less important than the predicted effect on their reputations, they should be

173. Non-rational in the sense that the preferences become givens and are no longer subjected to rational balancing.
174. See supra notes 62-68, 142-146 and accompanying text.
175. Id.
176. GUZMAN, supra note 6, at 99.
177. Id. at 98.
178. Id. at 99.
179. Cf. id. (discussing strong state rhetoric on expropriations).
expected to adjust their behavior in light of the expressed preferences of other states. In this way, norms can be transmitted from domestic constituencies through their elected officials and NGOs and received by other states. Reputation might thus explain one aspect of how the normative preferences of the international community change.\textsuperscript{180}

Most of all, Reputation makes sense of the relationship between the two axes discussed above. As Guzman discusses,\textsuperscript{181} different violations will have different impacts on state reputation. Some violations will be excused or understood. Others will damage the state’s reputation in a particular area of cooperation, while still others will damage a state’s general reputation for compliance. Guzman largely leaves open the question of when reputational effects will be “compartmentalized” and when they will have broader “spillover” effects into other areas. Defining an “area” itself is difficult and “heavily [dependant] on context,”\textsuperscript{182} and an “acting state cannot control the extent to which its behavior in one area affects its reputation in other areas.”\textsuperscript{183}

This reticence seems driven by the rational choice method of the book. The best answer that method seems to give is that an act will have spillover effects when other states would rationally conclude that the act predicts broader noncompliance. Why states would so conclude, however, seems to require a constructivist inquiry into the normative commitments of states and how they form.

In fact, however, Reputation provides an intriguing tool for studying the shape of these normative commitments. Violations of specific rules will mean different things depending on how other states perceive the rule in question. If the rule is perceived as a merely technical one, the reputational effects may be easily compartmentalized. If, however, the rule is seen as particularly important, a core rule within international public order, its violation should have broad effects on the violating state’s general reputation for compliance. We can thus measure and test the normative commitments of particular states or the international community by modeling the reputational effects of different violations within different normative worlds. If certain human rights violations have spillover effects into other areas of international reputation, we can presume that the international community has adopted a particularly strong commitment to those norms and places special weight on obedience to them. On the other hand, if those human rights violations seem to affect only human

\textsuperscript{180} See id. at 20. It should be noted here that norm internalization does not imply or require persuasion. States and other actors do not need to be persuaded of the wisdom or desirability of the rule. All they need to internalize is that the commitment is held by some and that the rule is treated as law. See Cohen, supra note 69, at 114 (“What is required is an internalization of how the rule is treated within the system, not an acceptance of values underlying it.”).

\textsuperscript{181} See GUZMAN, supra note 6, at 85 (“The relative importance of an international legal obligation affects the reputational consequences of violating it.”).

\textsuperscript{182} Id. at 102.

\textsuperscript{183} Id. at 103.
rights reputations or, perhaps, are excused altogether, we might presume that the normative importance of human rights remains uncertain.\textsuperscript{184} If instead violations of trade commitments have the broadest spillover effects, then those commitments can be presumed central to the normative preferences of the community of states. In essence, Reputation provides a method for testing the shape of the normative community. Some constructivist inquiries will still be best served by other approaches—historical, anthropological, sociological, or philosophical.\textsuperscript{185} But Reputation can provide constructivism with at least some testable, falsifiable hypotheses—hypotheses some have suggested could not be found.\textsuperscript{186}

*How International Law Works* argues that international law can work as a matter of rational choice. Its implications, however, are much broader. *How International Law Works* provides the seeds of a more comprehensive theory of how international law *does* works, one that incorporates insights from rational choice, constructivism, and liberal theory.

V. CONCLUSION

*How International Law Works* is an important work. Andrew Guzman has successfully shifted the starting point for inquiries into how and when international law operates, answering many questions that had previously been debated and focusing attention on ones that remain open. His elegant, careful, and thorough application of rational choice methods to the study of international law make *How International Law Works* a must-read for anyone interested in studying either the mechanisms of international law or when and why states comply with it.

\textsuperscript{184} This analysis would allow comparison between different human rights rules and provide some measure of their weight relative to each other. Genocide might have spillover effects that the right to education may not. Violations of civil and political rights might have more impact than violations of social and cultural ones.

\textsuperscript{185} See Cohen, *supra* note 16. International law may gain force through other means, which cannot be adequately captured by this game theoretic model.

\textsuperscript{186} See *supra* notes 39-47 and accompanying text.