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Letter from the Chair

In my last letter, I wrote that I would be stepping down as Chair at our annual business meeting. This was not to be. Our Vice-Chair, Jianming Shen, did promise to take over next year. The meeting itself was the best attended since our inaugural meeting several years ago.

It was the sense of the meeting that we do one thing very well, and that we should continue to do it. That one thing is publication of *International Legal Theory*. Tim Sellers and Francesco Parisi will continue as editors. I will repeat their plea that all members of our Interest Group consider sending their scholarly efforts especially work that is in an early stage of development and only lightly documented to the editors for vetting in *ILT*. Members who are intrigued by the draft material enclosed with this or any future issue of *ILT* should also consider writing up their reactions for publication.

Our collective commitment to scholarly exchange through these pages ultimately depends on individual members who are willing to participate in this exchange. That it has worked this well is a credit to our editors and quite a number of others. Let that number increase. Some one at the meeting suggested that *ILT* should be distributed to research libraries. We will need to consult with the Society about an ISSN number and copyright issues, but, given the quality and relevance of this one thing that we do, it seems like a good idea.

When the Society's Executive Director, Charlotte Ku, later convened a meeting of interest group chairs, I was gratified to learn that, in her opinion, we are one of the great success stories among the Society's twenty-odd interest groups. Charlotte's meeting was the first of its kind, at least during my tenure as Chair. Headquarter support for the Society's interest groups has languished of late, but Charlotte and her staff made it clear that this will change. At our business meeting, there was much interest expressed in constructing a list of member's e-mail addresses, presumably to be accessed through the Society's home page. It was also clear that no one present knew how to do the job. A number of chairs asked about this very matter at the later meeting. Headquarters is definitely committed to providing all the help that we will need.

I have to admit that it took me quite a while to warm to e-mail and the internet, and I still cannot use them to fullest advantage. Nevertheless, I have become convinced that electronic communication is an important medium for the kind of scholarly exchange that our group is committed to. In due course, we may make ILT available on-line. For the foreseeable future, however, we will continue to publish ILT on paper and make it available to every member of the Group. With paper in front of us, we can always get in touch electronically.

As it happens, I will be teaching at Ritsumeikan University in Kyoto, Japan, by the time you read this letter. I will be there until the end of the year. Nevertheless, you can reach me through my stateside e-mail address: onufn@fiu.edu.

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The Rule of Law in International Relations

No inquiry into international norms can get very far without an understanding of international law and its place in the international order. But international law is not a single, coherent practice or institution; like other kinds of law, it is a miscellaneous aggregate of rules, principles, ideals, procedures, policies, decisions, commands, recommendations, agreements, customs, precedents, and other normative elements. The international legal system serves a variety of purposes and reflects a diversity of conceptions of international order. For these reasons, the concept of international law is ill-defined and ambiguous. But there is, within the confusion of practices we call "international law," an unambiguous and coherent conception of international order: the idea of the international system as an international society constituted and regulated by a common body of non-instrumental laws. In this conception, states recognize themselves to be fellow members of this international society and fellow subjects of this common international law. Though they may question the desirability of the laws, they acknowledge their authority. And though their relations may alternate between cooperation and conflict, they recognize one another as independent agents. What this means, fundamentally, is that a state is barred from coercively using other states for its own purposes. This mutual respect does not rule out all coercion, but it does limit it in ways that remain controversial to preserving the independence of states and upholding the laws that define that independence.

We can, then, identify two distinct modes of international association, one a relationship on the basis of non-instrumental laws governing the transactions of independent, formally equal legal subjects, the other a relationship based on force in which "the powerful do what they can and the weak suffer what they must" (Thucydides). These modes are not particular international orders; they are abstract alternatives realized to some extent in any international order. They reflect the fundamental categories, law and force, in terms of which politics has been theorized for as long as there have been political theorists. The contrast between civility and barbarism, law and force, is a recurring theme in Thucydides'

history. Aristotle distinguishes the polis from despotic regimes in similar terms: a polis is as legal association of citizens, despotism a coercive association between master and slaves. But because the rules by which masters coerce slaves are sometimes called "laws," we have somehow to resolve the ambiguity that arises when the word "law" is used in this comprehensive manner. One way in which theorists have attempted to do this is through the idea of the rule of law. When we want to distinguish what I am calling a legal relationship, a relationship of fellow subjects, from a despotic relationship, a relationship in which the strong use the weak, we sometimes speak not of "law," which ambiguously covers both, but "the rule of law."

My aim in this paper is to theorize this idea of "the rule of law" as it applies to international relations. (For the sake of simplicity, I ignore the fact that entities other than states are sometimes considered to be subjects of international law.) Something important is lost, I believe, when we fail to distinguish relations between states as members of an international society, with rights and duties under its common rules, from relations between states as powers deterring, compelling, and in other ways bargaining with one another on the basis of their relative power. Both kinds of relationship exist in any actual international order, but this does not mean that they cannot be distinguished analytically. And it is important that they be distinguished because the place of law is different in each mode. Where the rule of law is the mode of relationship, international. Law is understood as a constraint on the use of power, where the relationship is one of power, laws are instruments used by those who possess power to control those who do not.

One way of distinguishing these two modes of interpersonal and international relationship is to identify relationship in terms of rules as a moral relationship and to identify the kind of law that governs this relationship with morality. This is the way followed by the tradition of "natural law." Natural law is conventionally understood as an alternative to "legal positivism," which in turn is sometimes understood as holding that law rests on effective enforcement, not morality, and therefore that any effective system of rules, no matter how immoral, must be counted as law. The idea of the rule of law allows us to distinguish law and force as modes of association without relying on this conventional understanding of natural and positive law. To put it differently, the idea of the rule of law makes it possible to distinguish the two modes within legal positivism as well as within natural law. If this is correct, then the debate between natural law and legal positivism, as it is conventionally understood, is misconceived. Law, natural or positive, is a mode of association on the basis of rules of a certain kind, non-instrumental rules constituting and regulating a relationship of "fellow subjects" (Friedman 1998). In the circumstances of international relations, the rule of law identifies an abstract mode of relationship between states in terms of non-instrumental laws, only sometimes or incompletely or ambiguously actualized, and it excludes relations based on of force and, by extension, the use of rules to implement, rather than to constrain, relations based on force. International law as it exists includes rules of the latter sort instrumental rules but these parts of international law do not express, and are in fact antithetical to, the rule of law.

To make these conclusions intelligible, never mind plausible, is not an easy task. I will begin by considering how this particular debate is related to other, possibly more familiar, debates about the character and purpose of international law. Next, I will consider how association in terms of law has been understood within the traditions of natural law and legal positivism, and explain the implications of these alternative understandings for international law. Finally, with this as a foundation, I will explain how the rule of law in international relations can be defined and defended in a way that draws upon both traditions. The discussion is intended to clarify a persistent ambiguity in our understanding of international law and international norms generally.

Historical Background

Much of the recent literature on international norms that will be familiar to political scientists emerges from the continuing debate over the limits of realism. During the 1970s, critics argued that by focusing on relations between states, realism neglects the equally important realm of "transnational relations." In the 80s they argued that in its preoccupation with power and conflict, realism fails to see how cooperation can be sustained by "international regimes." And in the 90s critics have gone even further to argue that the interests and even the very identities of international actors, interests and identities that realist theorizing takes as given, are themselves a product of relations among these actors. This "social constructivism," as it is called, is bringing the study of international norms back toward several traditions of inquiry outside the main stream of American political science. Without going into detail, let me simply point to the established field of international law, the English school of historical and philosophical inquiry into international society, and the emerging literature of international ethics. All three of these traditions put international norms at the center of their concerns. All are sensitive to the way in which these norms shape the identity of those to whom they apply. And all, it should be noticed, seek an interpretive rather than naturalistic understanding of norms and their place in the international order.

It has been suggested that different fields concerned with the study of international norms are converging on the problem of understanding the conditions of compliance with international norms (Slaughter 1993, 221; Keohane 1997), but this is to frame the question rather narrowly. We might more profitably ask how a decentralized normative order, such as the international legal system or an international regime, can sustain itself in the absence of institutions for making and applying rules. An earlier version of this question led to the emergence, in the seventeenth century, to the modern understanding of international law. Hugo Grotius, for example, is concerned with the question of how there can be law among persons or states confronting one another outside any coercive legal order, civil or divine. Here the problem is conceived not immediately as one of compliance but as an epistemological problem: in the absence of a higher authority to declare the law, how can those who are supposed to be governed by it know what the law requires of them? The premise underlying this question is that there cannot be obligations unless there is someone to prescribe them.

The epistemological question affects both divine and human law. It affects divine law because there are disagreements regarding the proper interpretations of the laws made by God. If religious authorities disagree about the content of divine law and about the proper method of interpreting that law, how can we know what our obligations are under this law? Similar problems arise within human law, both within and between states. Within states, disagreements over the meaning of the laws lead to challenges to legal authority and then to civil war. And between states there is no superior authority to declare the law, with the result that states remain, in relation to one another, in the mode of force, not law.

The idea of natural law is sometimes said to provide a way around these difficulties. Natural law, as understood by Grotius, Pufendorf, and other post-scholastic natural-law theorists, is a system of moral precepts delimiting the rights and obligations of individual and collective persons in their relations with one another. According to these theorists, the epistemological question is solved because natural law can be known apart from its declaration by a superior authority. Its obligations can be discovered through reasoning and therefore independently of revelation, proclamation, or legislation.

What implications does this solution to the epistemological question have for the problem of compliance? Because natural law is binding even if it is not enforced, the natural law tradition assumes that reasonable people don't need to be compelled to act as they know they ought to act. It assumes that once we know what our moral duties are, we will be motivated to fulfill them. Now this solution will not impress political scientists for whom a desire not merely to appear but actually to be just is not among the "causal pathways" along which international norms influence state action. But there is more to the traditional solution than meets the eye. First, although compliance motivated by a desire to behave justly will not be perfect, enforcement or other mechanisms that seek to exploit prudential motives are not perfectly effective in securing compliance, either. Second, compliance is in any case secondary to knowing what precepts we ought to comply with. What concerns the classical natural law moralists and their modem descendants, who hope for civil and international orders based on "respect for persons," "human rights," "justice," etc. is compliance not with whatever norms happen to be in place but with norms that are morally defensible. Much of international law as it exists at a given historical moment consists of normative regimes imposed (or, more benignly, "stabilized") by a hegemonic power or powers. Why is it so important that there be compliance with its norms? A regime may facilitate cooperation for undesirable or even unjust ends. If a regime is unjust, perhaps it should be resisted! The real problem of compliance, from a moral point of view, is compliance with norms that are morally justified. The preoccupation with compliance in mainstream American international relations theory may reflect ideological as well as theoretical concerns: neo-realism rationalizes American hegemony.

Preoccupation with "the compliance problem" can lead one down a blind alley for another reason. Inquiry focused on this problem often rests on the assumption that to understand compliance is to provide an explanation in terms of underlying causal processes. But the kind of understanding sought by moralists, lawyers, political theorists, historians, and others concerned with the content and meaning of norms must be distinguished from the content-independent explanations sought by social scientists working within naturalist explanatory paradigms. The interpretive and naturalist approaches to inquiry are not different perspectives ("optics") on the same phenomenon but distinct kinds of understanding, each constituting a universe of discourse resting on its own assumptions and postulating its own criteria of reality and truth. These understandings are separated by an unbridgeable logical gap. On one side is the domain of intentionally, on the other the domain of natural causation. In law and ethics we are concerned with intentional phenomena involving ideas, beliefs, desires, judgments, choices, actions, practices, and the like and therefore with the interpretation of meaning. We cannot translate statements about intentional phenomena into statements of non-intentional phenomena without losing something in the translation. Propositions concerning the natural causal processes underlying thinking may explain the biochemistry of thinking but they cannot explain the ideas that are being thought. Such propositions have nothing to say about the content, meaning, significance, or truth of these ideas. Such explanations are categorically irrelevant to understanding human behavior as intelligent choice and action, and therefore irrelevant to the discussion of the moral character of international norms.

Questions about the moral character of international law are not limited to questions that are themselves moral. The effort to distinguish a regime of law from a regime of force may have moral significance, but it can also be understood as a philosophical effort to distinguish alternative conceptions of human conduct, not an effort to judge particular actions within the framework of a body of norms already presumed to be valid. The former answers a theoretical, the latter a practical question. While the two questions are always intertwined and often hard to distinguish, they can be abstracted analytically from discussions of international law and its place in the international order. A good place to begin an inquiry into alternative understandings of law is with the tradition of natural law, because this tradition is particularly concerned with the moral rightness of laws and legal institutions.

Natural Law

The idea of natural law begins with Stoicism, a tradition of thought that emerged in Greece after the Macedonian conquest in response to the decay of the polis as a form of political life. As interpreted by Cicero and other Romans (most of the original Greek texts having been lost), Stoic ideas became part of the intellectual inheritance of modem Europe.

Central to Stoicism is the idea of an eternal and immutable law governing all movement and change in the universe (the "cosmos"). This law is both divine and natural, and the order it establishes is a rational order that can, in principle, be understood by human intelligence. Human beings are part of a rationally ordered universe and their conduct is therefore governed by this universal law, "natural law." But because they can choose to obey or disobey natural law, we must think of it as setting a standard for guiding and judging conduct. And because of their shared character as rational beings whose potential, and therefore essence, is to be rational all human beings are citizens of a single, ideal community: a "cosmopolis" or universal community whose law is this ration ally- knowable natural law. The Stoics did not deny that every person is also a citizen or subject of some particular state with rights and duties under the laws of that state. Their point is that human beings have rights and duties as members of the cosmopolis that are distinct from those they enjoy as citizens of a polis, and that they have a law to guide them, even if they are not citizens of any polis.

For the Stoics, the cosmopolis is an ideal model for these lesser, man-made cities, kingdoms, and empires. Such states may be considered "just" in so far as they are true copies of the cosmopolis (the argument here draws on Plato). The idea of the cosmopolis and the law of nature provides a universal criterion by which to determine *the* justice or injustice of local human laws and institutions. Here, surely, is the source of the modem idea of natural law as the standard for measuring the moral rightness of positive law. In the tradition that springs from these Stoic ideas, morality is not a system of laws or customs, actual or possible, that is practiced by or urged upon some community of human beings. It is a standard according to which all such systems are to be judged and by which every human being should live regardless of the laws and customs of his community.

For the Stoics, this morality is "the true and divine law" that is willed by the gods as well as required by reason. But the idea of divine will is incidental to morality understood as natural law. The Stoics argued that the content of natural

law, though divine, can be discovered without directly invoking the will of the gods. Adopting this Stoic principle, Judaism and Christianity came to distinguish between a divine law that is binding on all human beings as rational agents and divine commands addressed to the members of particular communities, for example, to Christians or Jews. A problem in Jewish and Christian ethics is therefore to distinguish the commandments obligating only believers from those obligating all human beings. When Grotius set out in 1603 to answer the question of by what right the Dutch might make war on their rivals in the East Indies, he wanted a universal answer, one based on principles that applied to any state. He therefore did not look to the Christian bible any more than to, say, Dutch law. Scripture does not contain universal law: the law revealed to the Hebrews is law only for them, and Christian doctrine is divine advice about how to lead a more Christian life, not a set of divine commands to be obeyed as law by all human beings. Much of what Jews and Christians assert to be "moral," then, is (on this view) required of those who wish to live a full Jewish or Christian life, not a requirement of morality understood, as it is in the tradition of natural law, as a set of precepts binding on all human beings as rational creatures, precepts that can in principle be known, not because they have been specially revealed, but through the use of reason.

In the later Stoic tradition, "nature" means reason and nothing more. The law of nature applies to human beings because of their nature as rational beings, and not because what some people think it forbids, like contraception, is "against nature" (Donagan 1977, 6). The expression "natural law" is unfortunate because it invites this kind of misunderstanding, and also because the word "nature" obscures the categorical gap, mentioned earlier, between the realm of intelligent thought and action and that of not-intelligent processes, between the intentional world of human action and the extensional world of natural processes (Weinreb 1987). Because morality is part of the former realm, it is confusing to identify it with a name that also evokes the latter. But no name can forestall misunderstanding. Seeking to avoid some of the connotations that have accrued to the words "natural law," some theorists have revived the Stoic expression *koinos nomos,* which they translate as "common morality." The problem with this expression is that it is easily misinterpreted as identifying moral precepts that are universally observed, although the theorists are concerned only with precepts that can in principle be understood by all human beings and that are binding on all. The failure to distinguish universally acknowledged principles *(ius gentium)* from universally binding principles *(ius naturae)* has led to recurrent confusion in ethics (and international ethics) throughout the centuries.

As the preceding sketch of ancient Stoicism suggests, natural law is a system of precepts appropriate for persons whose familiar way of life is crumbling and who are seeking a guide to the good life in these circumstances. The appeal of Stoicism is strongest in situations that reproduce the circumstance of third century Greece circumstances in which a traditional morality and a traditional politics are put into question. Perhaps the most obvious example of natural law today is the idea of "human rights," rights that belong to every human being regardless of the "polis" to which he or she belongs.

One important strand of natural law thinking runs from Aquinas through the Spanish neo-scholastics of the sixteenth and seventeenth centuries. It is a strand picked up again in our own time by John Finnis and other theorists of "the new natural law" (Finnis 1980, 1996; Boyle 1992). Another, equally important, strand of natural law thinking can be found in the works of Grotius, Hobbes, Pufendorf, Locke, and the eighteenth-century Scottish moral philosophers (Haakonssen 1996). In each of these traditions natural law or common morality is more than a set of precepts; it is a system and much effort has gone into analyzing its systematic character. qu inas, for example, can be understood as systematizing the insights of his predecessors. Grotius, in his unpublished manuscript on the law of prize, derives a system of natural law from a set of primitive assumptions ("rules") and principles ("laws"). This system, parts of which Grotius borrowed from Suarez and other neo-scholastics, defines the school of natural law in the seventeenth and eighteenth centuries. Two particularly influential versions of this structure are those of Pufendorf, who understood it, and Vattel, who did not. But the most powerful theoretical reconstruction of natural law (apart from Aquinas's) is Kant's.

According to Kant, what unites the precepts of common morality into a coherent system is a single fundamental principle: act always so that you respect every human being, yourself or another, as being a rational creature. In other words: it is impermissible not to so respect every human being. This principle, a variant of "the Golden Rule," yields a system of precepts that are "categorical," that is, independent of contingencies. They are not "hypothetical" precepts like "if you want to be healthy, get some exercise regularly."

The precepts of common morality that are consistent with this fundamental principle can be classified in various ways. We can, for example, distinguish between precepts of duty to oneself and precepts of duty to others. We must also distinguish between principles that guide conduct and those that assign responsibility. The first concern the permissibility of actions: what sorts of things we may or may not do. The second concern the culpability of acts considered subjectively: what sorts of things we can be held responsible for, given our character as agents. We are responsible only for actions done as rational beings, that is, for voluntary acts. And we are responsible not only for what we do but for what we intend to do. Principles of the first kind are invoked to justify an act, principles of the second kind to excuse an agent from blame for an act that is recognized as unjustified.

The natural law tradition attaches particular importance to the distinction between precepts forbidding actions that violate the principle of respect and those requiring us bring about good outcomes, if we can (that is, between absolute or "perfect" and contingent or "imperfect" duties). Moral conduct means choosing, acting, and judging within a constraining framework of principles that are independent of consequential considerations. This does not mean that agents cannot be concerned with consequences, or that there is no obligation to try to bring them about. What it does mean is that bringing about such consequences is not the ultimate criterion of right and wrong in conduct. We can seek to bring about good outcomes for ourselves and others, but only by morally permissible actions. It is this priority of principles forbidding wrong over injunctions to produce good ends that distinguishes natural law as a moral system. Unlike consequentialist theories, which appeal to good outcomes to rationalize the violation of moral prohibitions, natural law must insist on the priority of its prohibitions. Because its fundamental principle categorically forbids violating the respect owed to human beings as rational, natural law must condemn any action or practice that would violate that respect (Donagan 1977, 154). This reasoning is sometimes distilled into a formula like "the end does not justify the means" or "evil is not to be done that good may come." However one puts it, the bottom line is that the prohibitory precepts of common morality are absolute; they may not be violated for the sake of promoting the good of one's own self or of others.

Natural law thinking has many implications for international relations. If what is right and wrong is independent of the moral beliefs and practices of this or that community, for example, then there is a direct challenge to cultural

relativism. Acts that violate common morality cannot be justified on the grounds that morality is culturally specific. Natural law thus provides a way of arguing for human rights against the practices of particular communities. Communal autonomy must be respected but it does not justify violating the moral rights of either outsiders or members of the community. Or again, since there is, according to common morality, a positive duty of beneficence, our duties to foreigners are not limited to nonintervention or even to humanitarian intervention when human rights are violated. We are in addition obligated to help in various ways when the inhabitants of foreign countries require it, provided we can do so without ourselves violating basic moral rights. Of course, it is not always clear how one gets from general principles to concrete applications. This is the problem of casuistry (case ethics) and practical reasoning generally a large topic that I cannot discuss here.

From this discussion of natural law we can see that the word "law" has acquired a number of distinct meanings in the course of its long career. It can mean principles of natural order, like those of Aristotelian teleology or the causal laws of modem physics. It can mean principles of human conduct, rules to be obeyed or disobeyed as a matter of conscious or intelligent choice by human agents. And it can mean rules deliberately enacted within particular human communities: law made and applied by human beings which reflects not universal reason but contingent will. Natural law, then, is no longer a theory of "law" as we have come to understand that word, but of "morality." But the systematic structure of common morality, as theorized in the natural law tradition, can help us distinguish the rule of law from other modes of association identified by the name "law."

Legal Positivism

To understand the idea of positive law, it is helpful to consider the contexts within which the expressions "positive law" and "legal positivism" are used. Given my purposes in this paper, an appropriate place to start is with the context provided by the exploration in early modern Europe of how natural law might be actualized both within and between states, for this is the period during which the modern European international system and the modern idea of international law emerged.

The ancient idea of law as a rule decreed ("posited") by a superior, human or divine, acquired new significance in debates about supreme legal authority ("sovereignty") in the emerging territorial states of early modem Europe. The modern view that authentic law, "law properly so called," is positive law springs from the judgment, widely shared in the late sixteenth century, that because religious disagreements were unlikely ever to be decisively resolved, theologically or philosophically, a way had to be found to prevent these disagreements from turning into civil war. And this view, cogently argued by Thomas Hobbes, was that an authoritative and effective sovereign power was required to manage the consequences of religious disagreement. Where there are differences over the interpretation of law, there can only be law where there is an authoritative procedure for choosing among interpretations and making the authoritative interpretation stick. Law means a single agreed system of law, a common law within which persons holding different religious beliefs and believing themselves to be guided by different divine laws might coexist.

At the core of "legal positivism," then, is the view that authentic law is law enacted by a superior but this-worldly authority, a sovereign law-maker. Since reason and revelation each generate a diversity of competing "laws," a choice among them must be made by some one person or assembly (the "sovereign") who is authorized to make this choice. Authentic law results when a sovereign declares a putative obligation to be law. Law, in other words, is created by an authoritative act of will. In time it came to be seen that sovereignty could be a property not only of a person or an assembly but of the larger community from whose will a monarch or legislature derived its authority ("popular sovereignty"), or even of the procedures, no matter how complicated, by which lawmakers were chosen and laws were validated. From the theory that law is the command of the sovereign, legal positivism evolved into the theory that law is particular kind of social practice, one that is distinct from other practices (like morality, religion, etiquette, games, etc.) in which conduct-governing rules are discerned and used. Contemporary legal positivism distinguishes law from morality or custom by the presence of authoritative procedures for recognizing and applying rules, as in H. L. A. Hart's theory of law as a "union of primary and secondary rules" (Hart 1961).

Clearly, defining law as the command of a sovereign creates a problem for international law. Hobbes, for example, concludes that law is possible only within a state and that relations between states are relations of force, not law. For if by law we mean enacted law, international law, which is not in any straightforward sense enacted, fails to meet the criterion. International law is not law but "positive morality" (Austin 1955). One response to such doubts about whether international law is really law is to argue that there is a sense, intelligible if not straightforward, in which international law is enacted. It is enacted by an imaginary collective sovereign which comes into being when the actual sovereigns of the world are in agreement. This is Christian Wolff's theory of the supreme state *(civitas maximus),* according to which all states taken together must be imagined to hold a kind of sovereignty over each state taken individually (Wolff 1934, Pro: sects. 7-21). Wolff here offers a version of what international lawyers later called the "consent theory," according to which authentic international law is composed of rules to which states have given their consent. Because no sovereign can submit to the commands of another, international law is binding only by consent. Civil law is a sovereign's will expressed internally in legislation, international law this will expressed externally through explicit agreement with other sovereigns (treaties) or by tacit agreement (custom).

Most positivist theory today rejects the view that international law is binding on a state only by its own consent, and rightly so, since one must postulate antecedently-authoritative rules of international law to explain how the consent of states can come to be binding (Nardin 1983, 9495, 210-20). Applied to international relations, the broader conception of legal positivism (that law is social practice distinct from morality, religion, and other practices) yields the view that international law rests on the customary practice of states and on their agreements with one another. As an autonomous normative system, its rules are determined by examining evidence drawn from practice and not by reasoning directly from the principles of natural law. This conception of international law, which can be found in seventeenth-century works like Samuel Rachel's *Dissertation on the Lazy of Nature and of Nations* (1676), had by end of the eighteenth century become the standard view of international lawyers. Because it had its source in concrete state practice, not abstract reason, the law of nations could and should be distinguished from natural law.

There is disagreement, then, within the positivist tradition about whether international law is really law. Some argue that international law is deficient because there is no legislative body to enact laws, no judges to apply them in

particular disputes, or no power to compel obedience. Because of these deficiencies, the institutions for authoritatively declaring and applying international rules are so rudimentary as to preclude the possibility of an international legal order. Foreign policy, for these skeptical realists, takes place in a realm of power, not law, and must be guided by prudence, not principle. Other legal positivists are confident that legal order can exist without such institutions. For them, the criterion of law lies in the reasonably consistent, reliable, and impartial application of common rules, not in the particular institutions by which this is accomplished. And they argue that the rules of international society are applied in ways that meet the criterion.

The tradition is agreed, however, in holding that the validity and obligatory character of legal rules is determined according to procedures that are internal to the legal system. Law, properly so called, is a set of rules distinguishable from revealed divine law, from rational morality (natural law), and from the accepted moral beliefs and practices of a given society. The content of particular legal and moral systems may overlap, and some legal systems may explicitly incorporate moral principles, but the authenticity of legal rules as law does not depend on their correspondence to moral principles. Nor does it depend, as utilitarians, realists, and other instrumentalists sometimes argue, on their consequential desirability. As John Austin (1955, 184) put it, "the existence of law is one thing; its merit or demerit another."

A recurring objection to legal positivism is that in defining law as a body of rules divorced from morality, it begs the question that a legal theory is supposed to answer, which is how human beings can live justly together. Those who see natural law not only as a source of moral guidance but a source of law argue that positive law that deviates from natural law is not really law: "As Augustine says, 'that which is not just seems to be no law at all.' . . . Consequently, every human law has just so much of the nature of law as it is derived from the law of nature" (Aquinas, ST I-II, q. 95, a. 2). To deal adequately with this objection, legal positivism must distinguish law from the mere exercise of power. What positivism needs, in other words, is not merely a definition of law but a conception of legality that is distinct from effective rule. The idea of the rule of law can be understood as a solution to this problem within positivist legal theory.

The Rule of Law

Because the rule of law is itself a contested concept, it cannot without further clarification be used to resolve disputes about the meaning of law. The concept is often presented as a list of criteria for evaluating a legal order: there should be no secret or retrospective laws, no obligations other than those imposed by law, no arbitrary exemptions or private laws, etc. (Fuller 1969, 39; see also Raz 1979, 214-19, and Solum 1994, 12122). But such a list is of little value, theoretically speaking, unless it rests on a coherent account of the place of law in social order. The rule of law, as an analytical concept, belongs to the effort to distinguish one particular kind of order from the diversity of orders collected under the name "law." In the tradition of political theorizing that is concerned with this project, the rule of law is understood to be a moral practice augmented by institutions for declaring and using its rules. Understood in this way, the rule of law can be seen as reflecting the concerns of both natural law theory and legal positivism.

From the perspective of natural law, the point of having a legal system is to realize the ideal of a moral relationship among human beings in the contingent circumstances of actual communities. Furthermore, if the purpose of law is to get people to behave morally, moral limits must be imposed on the conduct of public officials as well as on that of ordinary citizens. And this means imposing moral limits on ordinary lawmaking as well as on the arbitrary, extralegal use of political power. For the natural law tradition, the rule of law expresses the inherently moral character of authentic law and the superiority of morality to mere positive law.

From the standpoint of legal positivism, however, it seems clear that a legal system can serve the purpose of institutionalizing a moral relationship only if the obligations it imposes are determined by its own internal criteria of authenticity. Law is as an invention designed to remedy the inability of moralities to settle disputes about the interpretation of rules by providing agreed procedures for determining their meaning and thereby distinguishing rules that are valid as law from those that are not. Such procedures make it possible to establish the validity or authenticity of a disputed rule in a given system in the face of disagreements regarding its moral rightness or consequential desirability. Whether a rule is morally justified may remain in dispute, but the moral question has been separated from the question of legal validity. (A legal system can include moral considerations among the criteria used to determine the validity of legal rules, but in that case such considerations have been incorporated into the law and are no longer external. On this point, see Coleman and Leiter (1996, 243) and the literature cited therein.) From the standpoint of legal positivism, then, natural law is deficient as a theory of law because it cannot distinguish the validity of a rule as law from its moral rightness. In transforming a body of moral rules into a system of effective law, the first problem is not securing compliance with the rules but, as Grotius saw, of knowing what the rules are, of establishing authentic law.

In an association governed by the rule of law, laws retain their moral quality as rules regulating the coexistence of individual or collective persons, each pursuing its own self-chosen goals, by prescribing obligations to be observed in that pursuit. Like the categorical precepts of common morality, the laws of a community governed by the rule of law are rules, not commands. And they are non-instrumental rules on the basis of which persons are associated, not instrumental devices for securing the satisfaction of particular, substantive satisfactions. Non-instrumental rules are concerned with the propriety of actions, not their usefulness in achieving particular outcomes. The authority of such rules rests on their validity as law, as determined by the procedures a legal system provides for determining this validity, not on their instrumental value. That is why an association whose government is conceived as an instrument for achieving collective goals by issuing orders cannot be said to be an association based on the rule of law. The rule of law thus provides an alternative, within positivism, to the view that any expression of sovereign will counts as law.

Emphasizing the non-instrumental character of law does not entirely resolve the problem of the relationship between morality and law, however. For where the non-instrumental principles for judging conduct are both moral and legal, it is not clear what justice requires where moral and legal considerations are in tension with one another. Bargaining and cooperation are not forbidden but they are constrained by non-instrumental rules of international coexistence.

Some in the positivist tradition, following Hobbes, have argued that the justice of a law is nothing other than its validity as law. But because it makes law the sole standard of justice, this argument leaves little room for moral criticism: whatever is legally valid is also just. But we need not accept Hobbes's conclusion on this point. We can, along with Hart and other recent positivists, distinguish the justice, the moral rightness, of a law from its validity as law (Hart 1983; Oakeshott, 1983). Doing so makes room for the moral criticism of law. But it also keeps moral criticism separate from

legal interpretation. On this view, the justice of a law is unrelated to the procedure by which it was made. A just law, here, is not one that has been properly enacted but one that is proper to have been enacted.

To avoid subverting the rule of law, moral criticism of positive law must draw on principles of justice that are already recognized, at least in part, within the legal system being criticized. If we identify justice with universal moral standards unrelated to the legal culture of a community, as some theories of natural law do, justice becomes an alternative to law. The effect of this identification is to subvert the rule of law because it results in two distinct standards of conduct, positive law and natural justice. A legal order can avoid being forced to choose between law and justice only if it already embodies the moral standards that are used to criticize it. An appropriate standard by which to evaluate the justice of a particular legal rule is therefore one that is already intimated by the system of which that rule is a part. Such a standard, which reflects a concern with the internal coherence of a legal system, rules out, as a practical criterion for determining the justice or injustice of particular laws, that they should conform to universal moral principles. The frequent invocation of such principles as an alternative to law is a sign not of the flourishing of the rule of law but of its decay (Oakeshott 1983, 40-44).

What are the implications of this understanding of the rule of law for international relations? The rule of law, as a mode of association between states, cannot be identified with international law as it exists. That law is a mixture of instrumental commands and agreements, on the one hand, and non-instrumental rules and procedures, on the other. Like any other actual legal order, international law contains instrumental rules intended to facilitate pursuing particular purposes, producing particular outcomes, and conferring benefits on particular beneficiaries. But these instrumental rules are intrusions of interest and power into the rule of law. The rule of law in international relations is concerned with regulating the coexistence of members of the community with one another.

Furthermore, if the rule of law is to be the basis of international relations, the moral considerations used in the criticism of international law must be restricted to those springing from an understanding of the customs and usages of international society. Criticism of international law that reflects a concern for sustaining the rule of law will draw on principles that are sensitive to the kinds of obligations that are appropriately imposed by international law, given its particular character as a system of law. It will avoid the temptation to import into international discourse abstract conceptions of justice that are incompatible with, and likely to subvert, the basic principles of international law.

The idea of the rule of law is a delicate construction designed to avoid the extremes of legal positivism, which makes legality itself the criterion of justice, and natural law, which makes justice into a criterion of legality. Against positivism, it denies that skepticism regarding moral claims must end in the conclusion that justice can have no meaning apart from law. Against natural law, it reminds us that legal order is grounded on recognition of the authority of laws, not on independent judgments of their justice or injustice. Law can supply a community's need for common rules only where it is valid or authentic law, that is, where its authority is established independently of its consequential desirability or moral rightness. The rules of international law should have moral content and they are subject to moral criticism, but their authority as law does not rest on moral criteria (Nardin 1998).

The idea of law is on the defensive within as well as between states. All law has been eroded by skepticism regarding the foundations, religious or rational, of moral knowledge. Modern thought and practice does not leave much room for belief in law as an authoritative constraint on human activity. It sees law as an instrument of human purposes, as a set of tools or techniques for getting things done. This is not law as it was once understood: as a law constraining the pursuit of all human purposes.

Skepticism regarding this conception of law goes beyond the man-made laws of the modern state, positive law. It also undermines the idea of morality as a body of higher law, natural law. In the context of the problem of sustaining moral conduct in the absence of secure epistemological foundations, then, international law is in trouble not because of its alleged defects as law but because it has come, like other kinds of law, to be seen as an instrument of human purposes rather than as a constraint on the pursuit of purposes. The idea of the rule of law can be understood, in this context, as a way of restating, in a modern idiom, the proposition that it is authoritative non-instrumental rules of coexistence, not instrumental rules of cooperation on the basis of relative power, that distinguishes a moral international society from a despotic anarchy of unequal powers. Of course, the rule of law may be even further from being realized between states than it is within them. Even so, it remains relevant as a tool for helping us to understand the actual and potential role of norms in the international order.

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“The Rule of Law in International Relations: Myth or Machination?”

Nardin premises his paper, "The Rule of Law International Relations" on the idea that the rule of law in its international conceptualization depends on a blending of both natural law a legal positivism. Nardin defines natural law in classic context as that which depends on moral for the source of law; legal positivism depends the concept of law based on enforcement of a type of law (and not mere morality). He theorizes also that, "where the rule of law is the mode relationship, international law is understood a constraint on the use of power; where the relationship is one of power, laws are instruments used by those who possess power to control those who do not" (Nardin at 2).

While I agree with much of Nardin's scholarship, I remain unconvinced that the rule of law as it applies to international order and to international law conveys the idea of states bound together by a common goal or by esprit de corps and not by something darker, namely their survival and well-being--which is heightened by their participating amicably with other nations in things like commerce. The rule of law does not blithely blend the erstwhile contradictory traditions of positivism and natural law together; instead, it only provides a facade for the internal machinations of individual states struggling to gain every advantage possible and manipulating decisions of the international tribunal.

Nardin's point about the difference between a despotic system and a system wherein states work side by side as comrades is too simplistic; there are often times where nations or states may not have the polarity of 'strong vs. weak’ but there are definitely are advantages which accrue to states vis a vis another state by virtue of its prowess in commerce, domestic relations, or peace keeping (an ironic upper hand) which enable it to garner the best in that particular arena without per se dominating the other state. Israel exemplifies this distinction: it comprises a nation w hardly dominates the world in terms of commerce or force, but which nonetheless is able to shape large portion of the world's agenda through it’s alliances and links with other states. If other states were to oppose it, they would find that although the state of Israel did not per se dominate them, it nonetheless exerted sufficient force to broker transactions accruing to its benefit and to effectively block any operations which would jeopardize both its affluence in international politics and its domestic growth. To say that the relationships that exist between states are either those of mutually independent states or the strong dominating the weak is to grossly underestimate the niceties of the relationship dynamic that exists between any two parties and which often times takes the form of "senior partner/ junior partner" or "CEO and top executives" versus the overly simplistic dominated and dominator.

Based on the distinctions stated above, Nardin's analysis works successfully when he mentions states as members of an international community. This notion of community inherently implies solidarity, camaraderie, and an esprit de corps that should characterize an effective system. (By "system," I refer to its more scientific definition--the idea of a conglomeration of parts utilized to coordinate a single task, ie. the immune system). The international community exemplifies what the rule of law, in my understanding, is supposed to stand for, namely the idea that laws are instruments of control. This also shows followers of law how a successful system can bind countries together in pursuit of a common goal, such as world peace and successful commercial and economic relationships among states.

However, Nardin's idea that "where the rule of law is the mode of relationship, international law is understood as a constraint on the use of power" (Nardin at 2) is again, overly simplistic. Although international law can in one sense be viewed as a constraint on nation-states, states, and nations, it also can be seen as a fluid enabler: because it enables states to achieve more than what they would if they existed solely as states, it propels forward the statuses of individual states, rather than constraining all of them. Israel again illustrates this point; although the rule of international law can be seen as a constraint on individually more oppressive states not to ever again wreak the horrors of the Holocaust, by

specifically proscribing these senseless acts of violence, the rule of law as illustrated in its international component has raised Israel to a level of safety and thus enabled it to achieve all it is capable of in the international community. Because any successful system will elevate those that adhere to its precepts and follow its rules, the rule of intentional law could thus serve not as a check on rambunctious nations but as a leveler of the playing field.

Of course, one might wonder if this links with the traditional notions of self-determination that have accompanied writings on international law since time immemorial; if a state has to be protected in order to survive, is this fundamental violation of Darwinism appropriate? Or is the role of international law, expressed through the rule of law as enabler, "better" than a so-called natural system of governance whereby the strong will automatically trump the weak? If one looks at foreign aid packages and subsidies that many Third World nations receive (from the United States, for example), one sees that clearly the stronger believe in helping the weak (although not necessarily for the altruistic reasons these nations profess). So therefore the system of international law would seem enabling when one might argue that it should be more pragmatic (in the tradition of "Give a man a fish every day and he will be fed for a day, teach him how to fish and he will never go hungry").

This question segues nicely into the main point of Nardin's article, which is that law, whether it is conceived of as natural (coming from the divine law of men in the Grotius tradition) or positivistic (stemming from the fact that it is law because it is enforced and followed), comprises a mode of association on the basis of rules of a certain kind, namely non instrumental rules constituting and regarding a relationship of "fellow subjects." However, Nardin's conclusion that these rules which are instrumental are seen as rules which implement, rather than constrain, relations based on force cannot be true. To have a system whose base components do not have the authority to implement rules which flow seamlessly from the original database of mores and proscriptions would in effect be only a nullity; in other words, in order for any system to function effectively, its baser components would not only be constrained by the central unit, but be allowed to implement rules in accordance with the central unit to govern themselves. Here is where Nardin's analysis fails--for to say otherwise would suppose a system of international governance where the states had no autonomy, even to supplement the sovereign entity's rules. This would be in effect a tyranny of the worse kind.

The idea behind the realm of international law or the rule of law and its components in the international arena presents us immediately with a non sequitur. For in order to have a perfect society, many followers of the Western school of equality would choose a democracy. However, the idea of a democracy is antithetical to the norms of "natural law," one of the guiding lights in the field of international law. Because a democracy could never be wholly representative and might indeed inure significantly to the advantage of larger states (and conversely to minorities who manage to manipulate the agenda before the governing international body, due to the public choice phenomena of both "path manipulation" and "rent seeking"), a body which seeks to hand down the law to a group of international actors will always fall prey to claims of illegality, duress, obstruction of justice and the like. It will never be completely democratic or completely insulated from the wishes of its subjects. However, setting aside the obvious flaws endemic in an enterprise' which seeks to govern entities which are governed only at their consent, the fundamental tenet of natural law that certain policies should be applied across the board-like human rights-does present a savory picture of a gracious and omniscient lawgiver enabling all states to lie down like the proverbial lamb and lion. Pretty as this picture may be, however, this natural law bedrock neglects the fact that if, in order to be governed by a cosmopolitan body, states have to give their consent, then their consent in effect cuts off any of their rights to appeal unsavory decisions by the governing body. If, in effect, a human rights violation is what the international council deems it to be, then doesn't this place an anomalous amount of power in the hands of the international tribunal? To put in another way, if the international council is the final say on what constitutes a human rights violation, then where are their sources of proscriptions to come from? If in one country, killing another is an egregious violation of human rights, then what rejoinder do the pro-choice advocates give to those who derive from the Bible the commandment "Thou shall not kill?" If they give the common scientific explanation that life begins only many weeks after conception, does this negate the passionate convictions of the Christian right that they are committing murder? Nevertheless, abortion is legal in many countries because it is seen as the final intrusion by the state into the lives of its citizens. It illustrates the difficulties endemic in a system of international law: if the minds of the governed harbor ideas which range all across the board, then who is to say what ultimately constitutes "right?"

If the rule of law, as Nardin posits, reflects a moral practice augmented by institutions for declaring and using its rules, then Nardin's link between the bedrock premises of natural law which provide the core of international law and the principles of enforcement at the heart of legal positivism which support them seems logically intact. However, his comment that, "A legal system can serve the purpose of institutionalizing a moral relationship only if the obligations it imposes are determined by its own internal criteria of authenticity," (Nardin at 10) seems circular: if the governing body of international law derives its sovereignty from the states, then isn't it at the same time ruled by them much more harshly than, for example, the United States' legislative bodies which derive their power from their constituents? This is because no rule fashioned by a governing body of international law is binding on any other countries except those who are specifically involved in the decision [(Article 38.2 of the Statute of the International Court of justice, quoted in Simpson and Fox, International Arbitration, (1959))].

The main problem I have with Nardin's analysis of the mating of legal positivism and natural law which neatly form the rule of law stems from the fact that the authority of non-instrumental rules (rules that are designed to implement the proper actions and implement the standards by which propriety is to be judged) should in many cases be subverted to the commercial functioning of nations and the best means to achieve the outcome of a global, well-harmonized economy. I err obviously more on the side of legal positivism in this case, for to fathom a sense of "right" and wrong' seems a Herculean task for a fledgling enterprise to undertake. While there should be a moral bastion of propriety, I remain unconvinced that an international tribunal comprises this entity. Inasmuch as any decision of the International Court of justice remains impotent (by virtue of the fact that it only applies to the specific countries which are involved and which triggered the decision), the international rule of law ends at the gates of only the parties involved and therefore cannot comprise the global arbiter that Nardin would like to see.

Nardin's distinction between law and justice shores up his point nicely, but still begs the question: if one can have a system without justice, then does it matter if there are laws to implement rules? And if laws do not serve justice between members of the international community as a whole (and address foregoing concerns rather than just rectifying past errors), then how can the international community receive "justice" (if it cannot even depend on "law?") If as, Nardin premises, the rule of law is contradictory to international law because the former is concerned with regulating the

coexistence of members of the community with one another, then I agree with him that moral considerations should not be used in fashioning and understanding the "rule of law." However, although different names may be used for implementing human desires, these have always been both the law and the rule behind the law.

As much as the law should represent something higher than man's aspirations, and perhaps should represent the highest point of his being which reaches toward the Deity (since most of the countries in the world believe in a "higher being") and towards his better and more loving self, it nonetheless represents his machinations to achieve his commercial, economic, and pragmatic ends. Who is to say that international law should represent anything higher than what mankind is? And how can "authoritative non-instrumental rules of co-existence" cover the internal abscesses that comprise man's inner scheming toward his own self-gratification, at any cost to others?

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Natural Law and Economic Efficiency

In *The Rule of law in International Relations,* author Terry Nardin discusses the failings of both natural and positive law theories in dealing with the non-binding and diffuse nature of international law. For Nardin, positivism and other instrumental theories are based solely on outcomes and, therefore, have legal power without moral authority. In contrast naturalism possesses only moral authority, but lacks the power of enforcement.

From these observations, Nardin's article poses a challenging question, namely is a just and moral international legal system possible in the absence of a binding legal authority? In response to this question, a system of instrumental legal rules consistent with a natural law principle may be one solution. More precisely, a legal system based on rules of economic efficiency could address this problem if firmly grounded in a principle of natural law.

Kant Revisited: Natural Law as a Starting Point

To explore this possibility, it is worth revisiting Immanuel Kant's notion of natural law and its application to public international law. As Nardin notes, Kant based his concept of natural law on a variant of the Golden Rule: "It is impermissible to not respect every human being." When Kant's principle of natural law is applied to international public law, "every human being" could be read as every state."

From Kant's natural law principle, rules and modes of behavior consistent with that principle evolve, which might be characterized as "instrumental." In the author's paradigm, these rules are set forth in specific terms of how states will act, but must conform with the higher, noninstrumental natural law rule. Thus, the resulting international legal system has two tiers. The first tier, based on a universal concept of natural law, establishes a framework for the second tier, composed of instrumental rules for state interaction. In keeping with the author's notion of rule of law, first tier laws constrain "noninstrumental rules of international coexistence."

Economic Efficiency: Second-Tier Instrumental Rules

Principles of economic efficiency may be thought of as second-tier instrumental rules based on Kant's natural law principle. In a broad sense, this formulation is very attractive for an international legal system, since the objective is for both sides to arrive at an efficient solution, not to determine causation or blame through a binding adjudicator. Of critical importance to economic efficiency is the ability of states to bargain freely, unencumbered by high transactions costs or negative externalities. If left to their own devices, parties can resolve many disputes by agreeing to mutually beneficial solutions to compensate for costs born by both parties. In the interest of economic efficiency under the Coase Theorem, the issue is not who caused the harm, but how to mitigate the costs of the harm. (R-H. Coase, *The Problem of Social Cost,* 3 J.L. & Econ. 1, 13 (1960)). This voluntary aspect of Coasian bargaining lends itself to an international legal system, which is composed of non-binding laws.

Kant's Golden Rule, if thought of as a jus cogens of public international law, establishes some important rules for applying economic efficiency principles to the international order. First and foremost Kant's Golden Rule supports the fundamental rule of reciprocity. In fact, the reciprocity rule is the embodiment of Kant's "do unto others" maxim of natural law. Fearing retaliation in kind from other states, a state is compelled to honor its treaty obligations and is discouraged from employing a double standard when opposing a custom. Moreover, the reciprocity rule also applies to the stated policies of states, thus strengthening and legitimizing articulation. In this way, reciprocity promotes the broader objective of economic efficiency while closely following the constraints on state interaction imposed by natural law,

Second, a reciprocity rule initiates asymmetry in bargaining power between states. Thus, states are prevented from operating in a positivist or realist realm where "might makes right." Coercive force against a weaker state is a violation of Kant's Golden Rule and places all remaining states on guard. Through the rule of reciprocity, the transgressor can expect to pay a high price for its actions either through retaliation in kind or through economic and political isolation. In this way, economic efficiency is preserved in a manner consistent with Kant's natural law principle.

Finally, Kant's natural law principle facilitates bargaining between states, another critical feature of economic efficiency, particularly Kaldor-Hicks efficiency. Bargaining is difficult to accomplish if the parties do not start from a point of mutual respect for the other's position. A system that does not call for mutual respect will denigrate the bargaining process or render it completely unworkable. Because Kant's natural law principle compels states to respect one another, bargaining can proceed, resulting in benefits to both sides (barring high transactions costs).

To illustrate this point, one can analogize from a private law property dispute. In circumstances where transactions costs are small, Coasian bargaining will arrive at an efficient solution for both parties through the bargaining process, regardless of which party originally maintains the property right. Left to their own devices, the parties can resolve their dispute in a mutually beneficial way. So too, states can be expected to arrive at a mutually beneficial solution provided transactions costs are small.

One additional factor' however, must be present in both cases for Coasian bargaining to prevail. The bargaining parties or states must behave rationally, that is their primary objective and overriding motivation must be to secure an equitable resolution to the dispute. When parties have other strong motivations or agendas, the bargaining process is skewed and a mutually beneficial solution is not always allainable. In a private law civil dispute, personal dislike for the other party will cloud one's judgment, forcing the dispute into court. In much the same way, ethnic rivalry, religious differences, and other exogenous factors cloud or color the judgment of state actors, making a mutually beneficial and peaceful resolution to an international dispute impossible.

This returns us to Kant's fundamental principle of natural law. Under Kant's Golden Rule, state actors begin from a point of mutual respect. If states recognize Kant's formulation as jus cogens, social and political differences that would otherwise sabotage the bargaining process cannot be sustained. The premise of mutual respect between states goes a long way to mitigate erogenous factors that would otherwise impede free bargaining.

Transactions Costs and Externalities in International Law

One of the primary questions of international law remains unanswered: what serves as a binding force of law when Coasian bargaining, in its purest form, fails? Even in a world of reciprocity and mutual respect among states, transactions costs and externalities can end the bargaining process. When this occurs between private parties, civil courts become the ultimate adjudicator and judges craft a binding resolution to the dispute by assigning either property or liability rights. (See Guido Calabresi and A. Douglas Melmed, *Property Rules, Liability Rules and Inalienability:* One View from the Cathedral, 85 Hav. L. Rev. 1089, (1972)).

In contrast to private law disputes, international law has no supreme authority. States choose to recognize or disregard rules of international law, even jus cogens rules such as Kant's natural law principle. Unlike parties in a private law setting, states cannot rely on a supreme authority with binding force to adjudicate unresolved disputes. Rather, international law must rely on other processes and mechanisms to overcome negative externalities, transactions costs and other impediments to Coasian bargaining. Under such circumstances, can negative externalities and high transactions costs be averted in the absence of a binding international legal authority? While an in depth inquiry into this question is beyond the scope of this comment, some preliminary thoughts may be useful.

At first glance, it appears that without any supreme and binding adjudicatory body, international law cannot possibly overcome externalities and transactions costswhich skew the bargaining process. From this perspective, international law has a clear and, perhaps, fatal Raw that is not present in the private law system. However, a variety of mechanisms and strategies peculiar to the international setting may be highly effective in overcoming these problems.

In the latter half of the twentieth century, several important trends have sharply reduced high costs for information throughout the world. Reduced transactions costs for information are particularly important, since accurate and timely information is critical to an international reciprocity rule, which, in turn, is critical to a system of economic efficiency. Various international organizations, such as Amnesty International and Green Peace, have become clearinghouses for information concerning human rights violations and environmental damage throughout the world. State supported organizations, such as the United Nations, perform similar services. These organizations help to spread relatively accurate information about state actors throughout the international community at a low cost.

But the most important trend in reducing transactions costs for information remains technology itself. In addition to radio and television, personal video cameras and computers have resulted in an explosion of inexpensive information. Private videos of state-sanctioned human rights violations, for example, have found their way on to televisions throughout the world, thanks to a world-wide satellite communication network. What once was local is fast becoming global. In fact, the information problem has shifted from too little to too much accessible data.

With the end of the Cold War, highly sophisticated intelligence and reconnaissance technology is now being marketed to states throughout the world. Multilateral treaties, such as Open Skies, also facilitate exchange of information and transparency for all states. This information may reduce other harmful externalities (e.g., pollution) by identifying transgressor states, thus setting the stage for Coasian bargaining between states.-

This international legal system based on economic efficiency and subject to Kant's natural law principle is not without its failings. However, the idea does appear to address at least some of the problems that plague international law. Based on current trends in technology, transactions costs and negative externalities are becoming less of a problem in the international arena, leaving more room for symmetrical voluntary bargaining among states. At the current pace of development, technology and other mechanisms may reduce all externalities to a negligible level. If these trends continue, the need for a single authoritative legal force in the international arena may be significantly reduced.

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Consent Protects States Against Interest and Power

Terry Nardin puts forth an intriguing proposal that international law should embody solely noninstrumental rules and that this conception, called the "rule of law," should govern international relations. In putting forth this theory, Nardin aptly describes some shortcomings of natural and positive theories of law, while also proposing the establishment of a system based upon non-instrumental rules. Nardin’s article, however, suffers from three main shortcomings. First he overlooks the extent to which international law is already a blend of natural and positive rules. Second, he does not sufficiently justify his selection of non-instrumentality as the moral code to govern international law. Third, he neglects the extent to which international law already manages some of the problems he identifies through consensual mechanisms in the formation of international law.

Modern International Law is a Balance of Moral and Positive Legal Rules

In his discussion of international law, Nardin illustrates well the deficiencies of both natural and positive law theories. However, in his discussion of the relation of these theories to international law, he does not recognize how existing international law responds to these deficiencies. It is true that natural law theories neglect the necessary role of authority in establishing order in propounding laws, while positivism neglects the essential place of morality in the legitimacy of law. Nardin seeks to "avoid the extremes" of these views in his conception of the Rule of Law (Nardin at 15). Nardin does not recognize, however, the extent to which modem international law already incorporates a balance of natural (including moral) and positive elements.

The primary sources of international law: custom, treaties, general principles and ius cogens, are a mixture of moral and positive sources. For example, ius cogens provides an important natural law source for international law. Ius *cogens* rules supersede other sources and provide a check against the unfettered will of states. In fact other sources find their foundation partially in natural law. Thus, the binding nature of treaties is based on the ius *cogens* maxim, *pacta sunt servanda.* Nonetheless, ius cogens principles make up only a small part of international law. Most public international law is in the form of treaties, customary rules, and general principles.

Treaties, being explicit agreements between nominally independent sovereigns, have the most positive law features. It may be true that a strict positivist will refuse to accept any form of modem international law as being true law, because of the lack of a superior sovereign to give and enforce the law. Still, treaties are acts between sovereigns and the benefits of reciprocal treatment and the threat of retaliation provide some measure enforcement. They therefor have some of the trappings of positive law.

Similarly, custom results from the actual expression of a rule in a practice, coupled with the belief in its binding nature. The formation of custom, like treaties, involves positive elements that states can observe. Practices that form the basis of a customary rule are observable by other states and involve positive behavior of the state. As with treaties custom requires the consent (or at least acquiescence) of the sovereign state for a rule to bind that state. This system of formation protects the liberty of the subjects of international law. Finally, to the extent that morality prefers consent over imposition of rules, custom and treaties preserve morality in the law.

Another source of law, general principles, can also be seen as resulting from the positive acts of sovereigns. International law derives general principles from the internal rules of sovereign states. When these rules have sufficient commonality across a state they become a binding source on states as well. Thus, general principles are often called a non-consensual source. But, to the extent that a given state has contributed to the formation of the principle by adopting an analogous rule in its own territory, it can be seen to have consented to it as well. Additionally, a rule that is widespread enough to be seen as a general principle of international law, is also likely to embody the general morality of mankind.

The modern international law that emerges from these sources embodies both natural law and positive elements, which reinforce one another. From this discussion we see that the “Rule of Law” adds little to our current understanding of international law as a balance of moral and positive elements. Demonstrating this balance, however, was not the apparent purpose of the author.

Nardin's Conception of Morality and His Opposition to Instrumental Rules

Nardin's real aim in advocating his concept of the Rule of Law is to attack what he calls "instrumental" legal rules in international law. A serious defect of the paper is the author's failure to adequately support his selection of non-instrumentality as his standard of morality in international law. The author gives us no persuasive reason why we should adopt this view of non-instrumental morality and use it to invalidate treaties and the decisions of international organizations. Even if this principle is one of natural law, it should be subject to rational examination, but little is provided for the reader.

The rationale for the author's view is important because, if I read his paper correctly, the "rule of law" would abrogate most international organizations as well as most treaties. The author states that "an association whose government is conceived as an instrument for achieving collective goals by issuing orders cannot be said to be an association based on the rule of law." (Nardin at 15) Of course, as Nardin recognizes, his view of instrumentality would mean that most national laws are not based on the rule of law. (1d.) More to the point Nardin's concept of non-instrumentality seems to directly attack the legitimacy of international organizations such as the United Nations, that on occasion, issue orders to members states. In the same vein, Nardin's view also attacks the legitimacy of agreements between states that are instrumental in character, thus denying the legitimacy of many treaties.

The paper certainly would have benefited from some concrete examples of what the author means by instrumental rules. We might then better grasp the extent of the problem as Nardin sees it, as well as how revolutionary his proposition is. Nonetheless, we can observe that the author sees as immoral any law that permits one state to order another to act or one in which states are treated as means to ends. His targets seem to be international organizations and treaties, which Nardin sees as being prone to "intrusions of interest and power." (Nardin at 15) Conversely, Nardin sees custom and usage as the only legitimate sources of moral considerations in international law. (Id.)

Nardin's advocacy of a non-instrumental legal regime might strike some as naive or at least unrealistic. Whatever the merits of such a criticism the real problem with Nardin's concept of the rule of law is that it obscures the manner in which existing international law, including treaty law, protects against the sort of dangers of power and influence that concern Nardin.

Consent Requirements in the Formation of International Law Provide Protection Against "Interest and Power"

In his attempt to find a more moral system, Nardin might be ignoring aspects of modem international law that already serve to alleviate his concerns about power. Nardin appears to be very concerned that international law, at least in some instances, produces a system "in which the powerful do what they want and the weaker suffer what they must.'" Nardin's solution is to make instrumental rules illegitimate. In order to abide by this requirement that laws be wholly non-instrumental, states would have to scrap much of their existing structure of international agreements and organizations. This extreme result appears unnecessary when one considers the protections states already have that are inherent in the processes of forming international law.

Both custom and treaty law depend upon consent (for custom, at least the lack of objection) before a state becomes bound by a rule. The formation of international custom as Nardin recognizes, provides protection to states. Not only must there be a general practice coupled with a recognition of obligatoriness, but a state may opt out of a given rule by objecting to it. A state retains the power of consent over customary rules that bind it. Likewise, states retain the power of consent over their own treaty obligations, and may even keep reservations to portions of treaties, which they do sign.

Where consent is required for a rule to become binding, economists expect that the resulting rule will be benefit all parties, or at least not harm them. (Pareto efficiency) At least in theory, we can be confident that states will only become bound by custom and treaties that benefit or at least do not harm them.

Of course, this emphasis on the outcome of rules is antithetical to Nardin's conception of the "rule of law.' I discuss the role of consent only to demonstrate that some of Nardin's goals, such as creating a system in which "independent, formally equal legal subjects" coexist is already established in present international law. Nonetheless, Nardin continues to object to the creation of associations that utilize instrumental rules. This implicit criticism of international organizations necessarily discounts the role of consent in the formation of the treaties establishing these organizations. As with all treaties, signatories have the right to consent and do not become bound absent their affirmative act (or in the case of custom-generating treaties, their acquiescence to the resulting custom).

In most legal systems, a requirement of consent to become bound by a law would be regarded as a substantial protection of liberty, if not of the highest moral quality. At the very least we can expect that states will be less subject to becoming unwilling instruments in international relations where their consent is a prerequisite to the law. Finally, if we were to view delegation of instrumental enforcement powers for agreements as morally unsound, we must also call into question most civil law as well.

If the author is really concerned with the quality of consent, that is a different issue. Nardin worries that powerful states can coerce weaker states into accepting unfavorable treaty terms or to acquiesce in unfavorable custom, he is raising a problem apart from the validity of agreements generally. As in contract law, in cases of coercion or duress, states retain the usual defenses of defects of consent in the formation of customary as well as treaty law.

Conclusion

Nardin's proposal, though thought provoking, would require a radical restructuring of international agreements. Such a restructuring of the basic system is unwarranted, given the protections available to states under existing rules of law formation, and the insufficiently supported notion that only non-instrumental rules are moral.

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Nardin's Rule of Law

Professor Terry Nardin in "The Rule of Law 'in International Relations" attempts to explain how the rule of law in international relations can be defined and upheld based upon the traditions of both natural law and legal positivism. It is difficult to analyze how a decentralized normative order, such as the international legal system, can maintain and perpetuate itself in the absence of institutions which create and enforce rules. The theories of natural law and legal positivism by themselves do not provide adequate answers to this dilemma. Instead, a theory avoiding the extremes of natural law and legal positivism and utilizing the best of both legal traditions must be advanced. The theory of the rule of law is a method of showing that "it is authoritative noninstrumental rules of coexistence, not instrumental rules of cooperation on the basis of relative power, that distinguishes a moral international society from a despotic anarchy of unequal powers." Thus, the rule of law can be interpreted as a moral practice augmented by institutions for declaring and using its rules; this understanding reflects the concerns of both natural law theory and legal positivism. This Comment refutes the significance of natural law in the development of an international order in which States coexist. Specifically, the basic desire of self-preservation as an individual and as a collective continues to be the driving force behind international order. Natural law and common morality has little or no role in the real world as it has existed for years currently exists. Instead, Professor Nardin should expand his discussion of legal positivism to support the notion that international law exists and justify its existence and its form.

Professor Nardin and Natural Law

With respect to Professor Nardin's discussion on natural law, he might have had a stronger argument based on theories of natural law as advanced by Vattel: the law of "nature" based on the "actual" rather than the "ideal" nature of the human being. (Stone, Julius, Legal Controls of International conflict (1954)) Instead, Professor Nardin relies on Kant and describes the natural law tradition as a system of rules for guiding human conduct or actions, i.e., precepts of common morality. The central theme of these rules is based on principles that one must always act in such a way that respects every human being as a rational creature. Natural law imposes a duty to refrain from doing wrong versus a duty to bring positive outcomes. As applied to international law, what is right or wrong is independent of the moral beliefs and practices of any specific community. That is, although communal autonomy must be respected, it does not justify violating the common moral rights of any human being. This view assumes that every human being is aware or and endorses the same non-community specific standards of common morality and rules of natural law.

There are a number of weaknesses in Professor Nardin's treatment of natural law. First Professor Nardin recognizes the difficulty with the role of morality (and of natural law) in international law. He explains that although rules of international law have moral content and are subject to moral criticism their authority as law should not rest on moral criteria. It is difficult to imagine how States can integrate moral content into rules of international law without also, at least in part, judging the authority of such laws without moral criteria one cannot separate morality from the theory of natural law as envisioned by Vitoria, Grotius, and Pufendorf Vitoria, for example, in his discussion of the "just war", explained: only a war which rights a "wrong received" is just and such "wrongs" occur when one sovereign state violates a natural-law-based norm guaranteeing something to another state. (Kennedy, David, *Primitive Legal Scholarship,* 27 Harv. Int'l L.J. 1 1986)) Vitoria appeared to base his definition of what is "just' on moral standards which were recognized and accepted by all States. Similarly, Grotius based the law of nations on natural law as a universal order binding all men as individuals and as communities. The dominant conception of the "nature" of a thing was its ideal nature, what a creature is in its fullest development. (Stone 1954) This thought assumed that all human beings were aware of a concept of some "better" life and strove for that "better" life based on certain basic moral principles. Natural law is purportedly universal in that it applies to all human beings and is neither time-specific nor place-specific. (D'Amato, Anthony, Pillar *"Counts " as Law,* in Nicholas G. Onuf (ed.), Law-Making in the Global Community 83 (Durham: Carolina Academic Press, 1982))

Second, there are a number of basic problems with Professor Nardin's use of natural law as any justification or foundation of international law. One problem is its origin. From where did natural law arise and how do human beings recognize its existence and agree to be bound by it? Natural law presumes that there is a set of rules of laws universally accepted by all human beings. As described by Grotius, ""s set of laws would obtain even if there were no God, or if human affairs did not concern God, insisting ... on the sufficiency of the psychological drive of sociability (appetitus societatis) as foundation for natural law." (Stone 1954)

On a more basic level, how does one know that what one is experiencing or observing is a rule of natural law? Professor Nardin explains that natural law reflects "intelligent thought and action" and not "non-interigent processes"; it reflects the "intentional world of human action" and not the "extensional world of natural processes." This explanation is lacking. Natural law rests on principles that such law is a product of certain principles inherently recognized by human beings individually or human beings in a social setting. If Professor Nardin meant to define natural law as the product of intelligent human decision, how would one define such "intelligent thought and action?" Not all intelligent thoughts and actions result in acceptable effects and not all acceptable effects result from intelligent thought and action. What would be the measure of intelligent thought and action? Who would be the appropriate being to reveal the results of intelligent thought and action? The leaders of the world collective, the leaders of the individual communities of the world, or the individuals themselves? One could not determine what rules of natural law are acceptable by and inherently binding on each individual; nor could one attribute the views of a leader to those of his or her subjects.

Another difficulty with natural law is its bindingness. Natural law, described as a set of rules manifesting itself through an intentional act or duty to refrain from doing wrong, implies that an effective enforcement mechanism, other than enforcement by use of force by the more powerful, exists. Non-acceptance or non-recognition of a certain rule of natural law is contrary to the inherent quality of natural law to justify rules of international law since natural law presumably reflects a set of laws that the international law community recognizes (though not necessarily adopt and follow it) as such. Professor Nardin does not explain whether and how rules in natural law are recognized by members of the international community. One potential enforcement mechanism is something based on natural human processes, i.e., rules in natural law would be recognized by all (though not necessarily followed by all). Professor Nardin, however, emphasizes that natural law is a product of intelligent thoughts and actions, not non-intelligent or instinctive processes. It is not clear what is left of natural law if its focus on the principles of morality and human instinct is separated from the basic natural law theory.

Finally, presumably referred to as support for the existence of natural law, Professor Nardin cites the idea of human rights - rights that belong to every human being regardless of the community to which that person belongs - as the most obvious example of natural law. Though classic international law scholars did not discuss "human rights" as such, the natural law justification for such rights paved the way for the development of the modem human rights theory. (D'Amato 1982) Professor Nardin seems to focus on the rights and obligations of individual humans towards each other; a stronger case, however, could be based on the rights and obligations of states towards each other (Janis 1984) A human rights theory based on individual rights would be too difficult for this would better tie in the more basic and broader theory of self-preservation. Rather than focus on specific human rights (e.g., women's and children's rights, political rights), it might be easier to prove every individual's and collective's desire for self-preservation. This would rid the need to justify non-action in certain situations in which, under Professor's theories of natural rights and human rights, may require the action on the part of third states or the international community in general to intervene. For example, in a situation involving genocide in a small country, neighboring states need not intervene based on the need to inject their concept of "human rights" into that country; rather, these states may intervene when the actions of that state threaten these neighboring states (economically, environmentally, socially, etc.).

Professor Nardin and Positive Law

Professor Nardin also raises a number of issues regarding legal positivism. He asserts that legal positivists believe that developing moral philosophy may be reflected in international law through custom and treaties. Legal positivism proposes that practice among States may create moral standards that eventually become accepted in the international community. Moreover, "[c]ontemporary legal positivism distinguishes law from morality or custom by the presence of authoritative procedures for recognizing and applying rules. " The classic positivist method did not assert that "international law should never concern itself with the promotion of moral values." (Oppenheim, Lassa, The Science of International Law.- Its Task and Method, 2 Am. J. of Int'l Law (1908)) Rather, legal positivism should be the means by which international society should progress toward the "final cause" of the need for international legal relations: the preservation of peace among nations to the greatest degree possible under given circumstances. (Oppenheim. 1908) This idea of the preservation of peace among nations relates back to this Comment's earlier discussion of self-preservation: Instead of progressing toward some vague goal of common morality, the international legal system is premised on self-preservation, as reflected in international treaties and custom.

Professor Nardin also touches upon the issue of whether international law is really law. The binding nature of international legal rules is determined by "procedures that are internal to the legal system." He correctly notes that "the authenticity of legal rules as law does not depend on their correspondence to moral principles." A common morality inherently recognized by all individuals or collectives within the international society does not exist. Rather, the focus should be on the common "goal" of members of the international legal society in self-preservation. States enter into mutual agreements and tacitly agree to certain customs and practices in order to preserve peace and, ultimately, their existence in society. Self-preservation is not as ambiguous a concept as morality. Furthermore, given the common goal of self-preservation rather than common morality (over which disagreement is likely to arise as to its validity and bindingness), strong, centralized enforcement mechanisms or rigid procedures for codifying generally accepted principles are also unnecessary. Thus, Professor Nardin would be better able to respond to the recurring objection to legal positivism "that positive law that deviates from natural law is not reallv law" and "that which is not just seems to be no law at all." The legality of international law should not and could not rely on moral principles.

Conclusion

In conclusion, natural law, even as a basic theory or as one underlying principle among many principles, cannot justify the existence or creation of international rules, nor effectively confront issues associated with international relations, Such issues include the acquisition of territory, demarcation of boundaries, diplomatic privileges and immunities, rules concerning treaty negotiation and interpretation, and principles concerning the initiation and conduct of war. Professor Nardin recognizes the weaknesses of natural law when he states: "From the perspective of natural law, the point of ha%-in, a legal system is to realize the ideal of a moral relationship among human beings in the contingent circumstances of actual communities." (emphasis provided) Natural law as a basis for international law can only exist in an ideal world where all States recognize similar moral goals; such a world, at present, does not exist. Professor Nardin would be better off strengthening his analysis of the rule of law and its role in the international legal system by focusing on the merits of legal positivism. To preserve the role of morality in the international community and the development of the rule of law, the legal theory could be used to advance the notion that the international treaties, customs, other tools of the international legal system reflect developing moral standards. Moral standards, however, should not be used to justify the international legal system.

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Examining "The Rule of Law"

This paper serves as a critique of Terry Nardin's theory, the rule of law, as it applies to international law. I will begin with a brief reiteration of how Nardin presents this characterization of law with respect to the existing notions of natural law and legal positivism. Following will be a look at how Nardin's theory may be compared and contrasted with international relations and how useful the rule of law may be as an alternative to the existing sources of international law.

From Natural Law and Legal Positivism

According to Nardin the rule of law falls somewhere between the theories of natural law and legal positivism. It takes from each of these ideas the aspects of law formation which appeal to our sense of justice and to our notions of what makes a law valid as a vehicle for coercion. As it is widely understood, natural law is based upon the premise that within each human being there is but one set of universal moral principles to guide our conduct with others. These principles are all that may be considered when determining the validity of a law, according to the naturalist. The positivist does not rule out that laws may contain moral precepts. But apart from the procedures a legal system employs to create and enforce laws, there is no validity in law.

Consistent with the naturalists' point of view, the rule of law holds that the authenticity of law is grounded in its inherently moral character, morality being superior to "mere positive law" (Nardin 1997). With regards to positive law, the rule of law recognizes the need for laws to be implemented through the procedures of a legal system in order to achieve the goal of enforcing morality (Nardin 1997). The rule of law, then, seems to be a theory which derives rules from moral principles (as they are understood by a consensus of society), and declares them as law through the procedures of a legal body, which then enforces the rules as such. It is "a moral practice augmented by institutions of declaring and using its rules" (Nardin 1997).

The rule of law states that the validity of laws are "determined by the procedures a legal system provides for determining this validity" (Nardin 1997). I believe one crucial disparity of the rule of law is exactly this assertion. While the validity of laws may rest on a legal system's declaration of such validity, Nardin's description of the rule of law suggests no guidelines for the procedures that are to be taken when determining the validity. Indeed the rule of law asserts a strong moral component to this determination. But as I understand the position taken by Nardin, the judgment of validity is to be completely separate from considerations of a laws' moral quality once the law is in the hands of the legal system at work. It seems the rule of law would be willing to accept any procedures which declare laws valid and from any system or institution which takes part in legislation and enforcement. What are the guarantees that the moral ingredient of a law would remain intact after it has passed through the cogs of a legislative machine? For obvious reasons this cannot be the stopping point for any theory of law.

In Re International Law

In my view, the rule of law is only applicable as a descriptive tool for certain sources of international law. The principles of ius cogens are arguably the only sources which reflect the common beliefs of all states for what is inherently right in international relations. General customs have objectors, special customs and treaties are only binding on the states who are involved in the formation of those laws. But a universal moral ideology is the prerequisite for law formation according to the rule of law, and there are probably very few, if any, principles of ius cogens upon which every state believes to be morally just. I've neither the knowledge or material capabilities to test such a hypothesis. Though if I may at least be given this assumption, I would argue that the rule of law is by no means useful for any scholarly

understanding of international law, save for the few principles of ius cogens upon which all states agree to be morally right.

Nardin concedes that "the rule of law ... cannot be identified with international law as it exists" (Nardin 1997). Obviously I agree on this point but for reasons different than Nardin gives. He uses a distinction between instrumental and noninstrumental rules to explain the differences between the rule of law and existing international law. The instrumental rules of international law are merely means to an end "intended to facilitate pursuing particular purposes, producing particular outcomes, and conferring benefits on particular beneficiaries" (Nardin 1997). It is suggested that these laws are only created to ensure the functional relations among states and not for any other reason (Nardin 1997). Rules created on the basis of the rule of law, however, would be solely non-instrumental in nature, ends in and of themselves derived from a morality which all states accept as just (Nardin 1997).

I believe this particular distinction between rules of international law and those created by a system employing the rule of law is really no distinction at all. At least this is so for our discussion comparing these two forms of law. Whether they are created with specific goals and uses in mind or simply derived from a common morality, all rules are instrumental to something. Those born from a legal system which practices the rule of law are still instrumental to the enforcement of a society's moral beliefs. How the rule of law differs from international law as it exists may be better explained in light of the impossibility of the rule of law as being the mode through which rules of international law are created.

Nardin recognizes that on the international level it is incorrect to examine the justice or injustice of one states' domestic laws using moral principles which are shared universally in the international community (Nardin 1997). The principles of justice used as standards to judge laws would have been drawn from a different pool of morality. Individual states have their own moral rules, derived from either religious beliefs or other sources, which guide their relations with other states. Again, I would argue that there are very few moral principles which are agreed upon by every state and which can be designated as universal. Completely worldwide moral principles which Nardin discusses as a starting point for the rule of law are very limited indeed. Nardin maintains that the difference between the rule of law and international law as it exists in one of instrumentality of laws. While it may not be feasible, though at least conceivable, that this difference could be reconciled through time, a more important distinction between the two is the fact that states' moral principles are so unique and diversified as to render the rule of law all but meaningless in international relations. For there seems to be no convergence of opposing sets of moralities that exist in the world anywhere in the future. If the rule of law derives its laws from a morality that is universal and then enforces these rules through the procedures of a legal institution, from what set of moral principles would international laws originate? Because a universally accepted morality is very limited among nations, the few laws which could be considered valid under the rule of law are certainly not sufficient to effectively guide international relations.

On paper the rule of law is very appealing to our internal sense of what would be just and valid laws. And if the world did share one set of moral principles, what a better place it would be. But since this is not the case and never will be, the rule of law is entirely inapplicable as a means of understanding or altering the formation of international laws.

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The Rule of Law and Ius Cogens

In "The Rule of Law in International Relations," Professor Terry Nardin uses the notion of the rule of law to mediate between the theories of positive and natural law. In the international context the positivist view would label as law those customary practices and direct agreements of states that effectively bind their behavior. To know what law is, a positivist observes agreements, practices, and evidence about states' beliefs in the binding nature of practices (opinio iuris). From these observations, positive legal theory deduces the actual rules of international law; their existence and validity are internally determined, and seen as independent from their desirability on consequentialist or moral grounds. On the other hand, natural law theory claims that law is to be "found" or directly reasoned from the principles of natural law. This natural law is an absolute standard that can be found through reason and used to judge man-made laws. Thus, a natural law theorist would reject some international laws accepted by positive legal theorists: though agreed to by states or binding as customary rules, these laws violate the absolute standard of natural law. They are simply "instruments used by those who possess power to control those who do not" (Nardin, p.2). Nardin reasons that the concept of "rule of law" reconciles these two views by adding a criterion of legitimacy that extreme positivist theory lacks. To be valid not merely as actual law but as a part of the "rule of law" a legal rule must be in accordance with the understanding of justice and morality of international society.

The aim of this comment is to identify ius cogens with the rule of law. Ius cogens embodies the notion of an international moral and social norm, that is superior to customary an treaty as a source of international law. It has been described as an "international public order potent enough to in validate some norms that particular states might otherwise establish for themselves" (Mark Janis, An Introduction to International Law 53). In Articles 53 and 64 of the Vienna Convention on the Law of Treaties, the principle of ius cogens is called a "peremptory norm of general international law". The Vienna convention states that such a norm voids a treaty that opposes it whether the treaty was concluded before or after the development of the norm. General norms of international law are closer in spirit to customary law than to treaty law, but ius cogens *is* above customary law; once a peremptory norm of international law is in place, states cannot abrogate it by the development of a contrary customary rule, unless that rule is itself a new principle of ius cogens.

Thus, ius cogens acts as a set of meta-rules that govern the formation of international law through its most common sources, international customary law (both general and specific) and international treaties. This meta-rule serves something of the same purpose of constitutional law within national legal systems. Constitutions limit the exercise of democracy, so that a certain set of basic rights of each individual cannot be violated by the majority's enactment of any law or measure. Similarly, peremptory norms of international law protect the autonomy of states (and of persons within states, through human rights components of ius cogens) from the tyranny of the majority.

In the area of treaty law, ius cogens helps to limit successful agreements between states in several useful ways. For example, treaties entered into by political force, rather than for the sake of the parties, mutual advantage, will have trouble passing the filter of ius cogens. A treaty accomplished by political or military force is likely to violate an international norm of "non-aggression except in cases of clear and just cause" (which could be the other state's own violation of a norm of international law, e.g. kidnapping and torturing citizens of another country). Similarly, treaties imposing unacceptable externalities on third parties are likely to trip on a peremptory norn of international law, such as respect for the sovereignty of all states, including non-party states. Also, a treaty that violates basic human rights, whether of citizens of states that are parties to the treaty or of nonparty states, may be invalidated by principles of ius cogens. The Third Restatement of Foreign Relations Law of the United States takes the position that certain basic human rights of all individuals comprise a peremptory norm of international law capable of voiding contradictory treaties. In addition, the principle of reciprocity, arguably a principle of ius cogens, *is* employed in the Vienna Convention (Article 2 1 (1)(b)) to preclude unilateral treaty exceptions that may be accepted by some states due to unjust political pressures. No matter how powerful, a state taking exceptions to certain treaty provisions must itself be subject to the same exceptions.

In the realm of customary international law formation, we also benefit from the principles of ius cogens, that act as meta-rules to restrict the strategies states may follow. In the very formation of customary law, the element of *opinio iuris* indicates the belief of states that their behavior is not mere convenience, but is somehow dictated by a customary international legal obligation. Thus, we may argue that a customary practice clearly violating a norm of *ius cogens* cannot acquire the necessary *opinio iuris* element in order to rise to the level of opposability. If the practice clearly violates a known peremptory norm of international law, states presumably would follow the practice for their own convenience or due to foreign pressures, but not out of a belief that the practice is a true international legal obligation. A more specific example of the usefulness of a meta-rule in customary law formation is again the principle of reciprocity in the absence of a binding law or agreement. In the classic prisoner's dilemma game that characterizes many situations of international interaction (e.g. policies towards common resource usage or intellectual property protection), the restriction of reciprocity, coupled with repeated play, disciplines players' strategies to exclude the most Pareto-inferior outcomes (Francesco Parisi, "Customary Law", Palgrave Dictionary of Economic Terms, 1998).

Thus, ius cogens as described here serves two main purposes. It introduces a moral criterion to international law, satisfying part of the desire of natural legal theory. In addition, it acts as a set of meta-rules that excludes many undesirable agreements between states and facilitates more efficient customary law formation. However, the formation of such international social norms is has not been explained properly. Indeed, economics as a science of human behavior has not explained the formation of social and moral norms at the level of individuals, let alone societies, nations, or the world. In the Vienna Convention, Article 64 clearly indicates that such peremptory international norms can develop. Two hundred years ago slavery was not opposed by a peremptory international norms, but now it is one of the clearest precepts of ius cogens. So how did that and other norms develop, and is their development a process exogenous to law? In other words, does law at the national and international level somehow contribute over time to the formation of future peremptory international norms? Answering this question in full may be unattainable, but I believe the endeavor would be a most needful and interesting research program.

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Justice and the Rule of Law in International Relations

No inquiry into international law, and its place in the international order, can get very far (or make much sense) without a theory of what law is, and what makes the law worthwhile. Mine is this: that the central element of law in every legal system what makes law "law" as distinct from other systems of rules or coercion is law's claim to codify justice. All laws and legal systems claim to realize justice. Rules that do not claim justice cannot claim to be laws (Sellers 1992A). This is not to say that all laws are just, but rather that all legal systems claim to be just, or to realize justice better than other available systems for mediating conflicts and regulating human society.

Applied to international relations this means that international norms always claim to be just, when they seek recognition as "law" to govern the actions of states (or other international persons or behavior). For example, a hegemonic power might seek to impose its own worldview as "law" on other, less-powerful states, but in doing so would also claim to be enforcing "justice", which is to say, enforcing norms that ought to be obeyed, without coercion. Such norms may not be just. But they must claim to be. The frank imposition of unjust norms on subservient populations would not be law, without the claim of justice to support it.

The Rule of Law

The rule of law is the system, much praised since antiquity, in which the *"imperia legum potentiora est quam hominum"* "the rule of law is greater than the rule of men." The value of this method of government as advocated by Aristotle, Livy and their successors in Italy, England, France and the United States of America depends on the assumption that law serves justice, which is to say the common good of all those subject to its regulation (Sellers 2000). If the law serves justice, then the rule of law realizes justice, while rule by the will of individual men or women would serve private interests, against the common good of the community as a whole.

The value and desirability of the rule of law depends entirely upon its efficacy in securing justice. While all law claims to be just, not all laws actually always are. One could easily imagine a legal regime in which laws claiming to be just in fact systematically advanced the unjust ends of a ruling elite or hegemon. This makes the actual success of any legal system's service to justice the only effective measure of its value and binding force on any supposed subjects of its legal control. Unjust legal systems do not deserve deference, although prudence may dictate circumspection in defying their power, so long as they enforce their will (Sellers 1992B).

The rule of law secures predictability even in unjust regimes, by providing known regulations in advance. When laws rule, and not men, people can plan their actions, based on the law's known provisions, whether these are just or not.

Since laws always claim to be just, the identification and application of law may tend to soften the rule of even very unjust regimes. By seeking to present their edicts as "law", and therefore deserving of respect, even despots and oligarchs must claim concern for the general welfare and common good of the people. This may encourage or at least allow some judges and others to apply the law more justly than insincere and self-seeking legislators ever in fact intended.

The Natural Law

Let us call the law that actually would be just in a given situation the "natural law." The natural law is the law that all legal systems claim to seek and impose, though few will ever really do so. Some may claim quite simply with Thomas Hobbes that natural law requires no more than to know your superior's will, and to follow it. This claim, like all other assertions that any system of norms be recognized as "law", amounts to an assertion of justice. Thomas Hobbes defined "justice" as whatever your sovereign desires (short of self-immolation) (Sellers, 1998). Few other theorists would be so bold, but anyone who speaks of "law" makes an implicit assumption that the system in question claims to realize the natural justice that all law necessarily claims to serve.

The actual validity (Sellers 1992A) and legitimate authority (Sellers 1992B) of any system of law depend on that system's usefulness in discovering and enforcing the natural law of any given situation. Supposed standards of international law (for example) deserve deference and obedience only to the extent that they either actually implement the natural law or (and this is the important point) represent a system of legislation more likely to realize the natural law than would unregulated conflicts, in which every individual simply decided for his or herself what the natural law requires to be done.

International law differs from most other law in that its content is relatively unsettled. Most legal systems have widely accepted mechanisms for determining what law requires, when different views conflict. International law has no obvious legislature, judiciary or executive power. This means in many cases that disputes over issues in international law provoke direct appeals to natural law, because the mediating institutions that would settle disputes about the content of natural law are weak, missing or controversial. If international law is "the law of nature applied to nations" (as all law is, or claims to be) then the direct study of nature (i.e. human nature and needs) will be the best method for finding what international law requires, when other methods fail.

The Positive Law

Legal systems exist to preclude the necessity of direct appeals to natural law in resolving disputes. Given human self-interest, self-righteousness, and the natural capacity for self-deception, perceptions of the natural law will often (perhaps usually) vary, whenever conflicts arise. Legal systems and the rule of law offer objective methods for determining what the natural law requires, so that one claimant can defer to the other, without trying the relative accuracy of their perceptions with violence or battle (which the weaker or unluckier party will lose, whatever the actual merits of the claim). Legal systems produce "positive law" to clarify the content of natural law when different perceptions of justice collide.

Not all positive law will actually embody the natural law of the case, although positive law will always claim to do so. In fact, positive law may be mistaken, unjust and unfair. If so the legal system has failed, on its own terms, because all legal systems claim to find justice. The natural measure of any legal system's value, validity and worthiness to be obeyed is its efficacy in doing what it claims to do realizing the justice of the case. If a legal system finds and enforces the just result better than would have happened in the absence of that legal regime, then its rule deserves deference, until a better system can be found to take its place.

The binding force and public interest of the "positive law" of international relations depends entirely upon its ability to implement a just world order to resolve international conflicts and controversies. Different proposed sources of law should be evaluated according to their usefulness in finding and maintaining a just would order, or as just a world as will be possible, given the circumstances. This requires taking into account the world order that already prevails, to the extent that one does, If, for example, widely recognized positive law already exists in the form of "international custom" or treaties, then this "law," and the system that supports it as "law" must endorse it as "just". Whether such international "law" deserves deference will depend on whether this claim to establish justice is actually true (or not).

Conclusion

International law, like all law, claims to codify justice. Codifying justice is desirable because it precludes or settles conflicts, and prevents the imposition of unjust desires by one state or person on another. The rule of law keeps those with power honest, by guiding their activities to serve the common good, not their own private interests or desires. This only works so long as good law rules. Not all laws serve justice as well as they claim to. The greater this gap between "natural" and "positive" law, the less the validity or legitimacy of the legal system in question, and the less it deserves to be obeyed.

International "law" is unusually vague in prescribing its positive laws. Debates about the content of international law often reduce to conflicts about natural law, or different possible conflicting sources of positive law, which may yield different results. Real benefits will follow when states establish a just system of positive law to resolve their international conflicts. No such system fully governs every conflict (yet). Until it does states and scholars should seek to encourage the development of just institutions of international adjudication (Sellers 1996), without relinquishing their direct commitment to natural law and justice. Those charged with interpreting international law should remember that all law claims to be "just" and frame their decisions accordingly, to secure the eventual rule of law in international relations.

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