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Enforcement and the Concept of Law

International law, many think, is not really law at all because it is not enforced. This Essay asks two philosophical questions about that claim. What do we mean by enforcement when we channel the intuition that enforcement is part of law's nature? And what is the place of enforcement in our concept of law? Enforcement, the Essay argues, is the activity by which a legally constituted power is applied to make the law's dictates actual; it is a matter of law's efficacy. Enforcement so conceived is constitutive of law's identity as law, but not strictly necessary to it because law is not the kind of thing that has strictly necessary features. Nor is enforcement sufficient to make a norm a law: the skepticism toward international law is not based on enforcement alone.

INTRODUCTION

An enduring question of both international law and jurisprudence is whether international law should *count* as law—whether it is, in John Austin's phrase, “law[] properly so called”¹—given the ways in which it is and is not enforced. The question has in recent years fallen out of favor among international lawyers,² but it endures for a reason. International law puts our sense of the nature of law under stress, and our philosophical choices in response to that stress expand or contract the set of norms that can rightly be said to legally bind us. The question, then, has both something fundamental to teach us and has consequences; no wonder it should have such a grip on the legal imagination, and no wonder that, fashionable or not, it has never really

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1. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 11 (Wilfrid E. Rumble ed., Cambridge Univ. Press 1995) (1832).
 2. See Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 *YALE L.J.* 252, 255 (2011).

faded from view. In the article to which this Essay is a response, *Outcasting*,³ Oona Hathaway and Scott Shapiro take up the question, and their answer—that exclusion from the benefits of social cooperation and membership, that is, *outcasting*, both constitutes a form of legal enforcement and characterizes much of international law—is an important and original insight. I think it is also true. There is more to celebrate than to criticize here.

Yet at the center of Hathaway and Shapiro's argument is an underspecified and, in my view, problematic conception of what legal enforcement is and why we care about it. The problems are not fatal; the trick is to repair them without losing what is best in the *outcasting* insight. For that, we need something *Outcasting* never gives us: an affirmative philosophical conception of legal enforcement. Part I, below, offers a conception of that kind. We need also to apply that conception to the *outcasting* thesis. Part II takes up that task.

What sets this inquiry into motion is the intuition that enforcement is in some sense necessary to legality—to law's character as law. Part III asks after that intuition's foundations. A last question is what lies beyond enforcement—what, if anything, the jurisprudential skepticism toward international law is based on once the enforcement issue is set aside or settled. Part IV, the concluding section, addresses that question.

I. WHAT ENFORCEMENT IS

Outcasting is an article about what should count as legal enforcement; its core is the claim that we should take a broad view of that concept. One would expect an article of that sort to include a philosophical account of legal enforcement, an explanation of what enforcement is and why, jurisprudentially, it matters. But the article does not go that route. It argues rather that, *whatever* one's conception of enforcement, it would be unreasonable to exclude *outcasting* from it, because, historically, *outcasting* has been the chief mechanism of enforcement in systems of normative regulation that indubitably qualify as law (outlawry in medieval Icelandic law and excommunication in classical canon law are the article's examples). That being so, the argument goes, it is also unreasonable to exclude international law, which also relies on *outcasting*, from the category of law, at least on enforcement grounds. The thinness of argument here is deliberate, pointed—the burden of producing an affirmative conception of enforcement is on those who disagree—and also impressive: part of Hathaway and Shapiro's achievement is to have found a way to respond to the question of whether

3. *Id.*

international law is sufficiently enforced to be law without having to subscribe to any comprehensive views as to either the nature of law or the nature of enforcement. But the achievement comes at a cost. One can be persuaded without being enlightened, and arguments of this sort have a peculiar way of leaving one at once convinced and unsatisfied, of trading illumination for vigor. So I'd like to try to fill in that missing philosophical center and say a few words here about the nature of enforcement in law.⁴

Three pieces of groundwork: First, the goal here is not to explain why enforcement matters pragmatically (which seems obvious) but why it matters jurisprudentially—why it figures in our conception of law's nature, as part of what makes law law rather than political advocacy or moral exhortation or whatever else. We're looking for a conception of enforcement that explains what we mean when we channel the intuition that enforcement is part of law's identity as law. Second, I'll assume for now that enforcement really is necessary to law's character as law. The jurisprudential literature on enforcement, though rich and substantial, is overwhelmingly focused on the question of whether enforcement is necessary,⁵ but it seems to me that the conceptually prior and undertheorized question is the one in view here: the question of what enforcement is. Third, in trying to work out a conception of enforcement, it would confuse matters to focus on the enforcement of norms that would not ordinarily be thought of as law in the first place. We should not criticize Hathaway and Shapiro's outcasting proposal with examples of, say, children "enforcing" the "law" against tattling by refusing to play at recess with the offender. The social outcasting in that case might not properly qualify as enforcement, but it's hard to tell because the norm against tattling probably isn't law in the first place. Better to imagine a norm that would satisfy one's conception of law on every other measure—duly established by a duly constituted political authority, adequately moral and rational and whatever else—and ask what sort of enforcement figures in making *that* norm something we could without reservation call law.

So what is legal enforcement? The place to start is with the fact that enforcement names an activity; it does not identify the end for which the activity is undertaken. There are some activities we might think of as ends in themselves—loving, perhaps, or learning. But enforcement is not one of those; it is not the sort of thing one values for its own sake. It is obviously teleological. To what end, then, is the activity of enforcement directed?

4. The argument here extends and develops one I began in Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law Is Law*, 78 *FORDHAM L. REV.* 2451, 2504-10 (2010).

5. See sources cited *infra* notes 31-39.

The answer, I think, is that enforcement aims to make the norms of law *actual*: it aims to make those norms obtain in the world. Part of what makes law law is that it brings something about; that is why law is not just another sort of talk (though it is a sort of talk, a kind of discourse). It's worth pausing for a moment to appreciate how philosophically remarkable this feature of law is. Think of the world for a moment as being cleaved between ideas in the broadest sense (concepts, norms, propositions) and states of affairs in the broadest sense (events, facts, realities). Law as law is a bridge between these two sides of the world—a bridge to the actual. It is this aspect of law, in a sense utterly obvious, that every humanities-major-gone-to-law-school channels when she says she wants to be “connected to the real world,” that she wants her work to “matter.” Law is *of* the real world—it matters—because it takes effect, and when we say that law as law must be enforced, we should take ourselves to be pointing to this demand for effect. We might call this law's *actuality condition*. Law must be such as to bring its dictates about in the world.

Yet though this link to the actual is necessary to our concept of enforcement, it cannot be the whole of it. In *The Little Prince*, there is a character who presumes to command the sun: he tells it to set at its appointed hour and it does.⁶ Would anyone say that his commands are “enforced?” Or imagine that the dictates of the law were in some case to come about by chance: a painting is stolen from a museum; a court orders it returned in a society in which such orders are routinely ignored; but a car carrying the painting happens to crash in just such a way that the painting is thrown back into the museum from which it came. Was the court's order “enforced?” The point is that it is not enough for the law's dictates merely to obtain. They must be *made* to obtain; they must obtain because they are backed by *power*. Power is a mechanism by which the law obtains, linked to the idea of actuality as a means to the end. Now, this is not power in a narrow sense (e.g., governmental power, the power to do violence, etc.). Some legal philosophers have fixated on sanctions, costs, or consequences as an identity-making feature of law,⁷ but this

6. ANTOINE DE SAINT-EXUPÉRY, *THE LITTLE PRINCE* 30-31 (Richard Howard trans., Harcourt Inc. 2000) (1943).

7. John Austin is the famous example: “Laws proper, or properly so called, are commands” issued by a “sovereign” to a “subject” and backed by “the power of affecting others with evil or pain.” AUSTIN, *supra* note 1, at 10, 19, 30. The classic rebuttal comes from H.L.A. Hart: “Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion.” H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 603 (1958). But my complaint is distinct from Hart's. His spoke to the need for a concept of obligation in a theory of law. I agree with that (everybody agrees with that), but I'm arguing here that Austin thought of law's power itself in an insufficiently teleological and excessively narrow way.

is doubly confused: first for ignoring or minimizing the goal to which sanctioning is directed—as if sanctioning were the kind of thing we could make sense of apart from its purpose!—and second for its too narrow conception of power itself. If Congress passed a statute creating a new consumer protection agency and one were created—money allocated, leaders selected, offices rented, etc.—the statute would certainly qualify as enforced, but sanctions would in no fundamental way be in view. The law’s power there is more like a power of action, in the same sense that a person’s capacity to bring her intentions into effect involves her individual powers of action. Power, in other words, should be understood broadly. We do better in this jurisprudential context to focus on the existence and purpose of the power than on the mechanisms by which it operates.⁸

This “actuality plus power” criterion is still incomplete. Imagine a case like the one above—a stolen painting, a toothless court order—but this time, rather than a car accident, there is an art lover who dearly loves the painting and who remonstrates with the thief to please return it, which he does, for she is a fine orator. That is a sort of power, but something still seems off-center in saying in such a case that the law was enforced. One could view the problem as the contingency in the thief’s compliance; he didn’t *have* to return the painting.⁹

8. There is a body of jurisprudential work that would effectively limit the power in view here to *coercive* power, to *force*. Hans Kelsen, for example, states that “[l]aw is an organization of force.” HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 21 (Anders Wedberg trans., 1945). Max Weber states that “[a]n order will be called . . . *law* if it is externally guaranteed by the probability that physical or psychological coercion will be applied by a *staff* of people in order to bring about compliance or avenge violation.” 1 MAX WEBER, *ECONOMY AND SOCIETY* 34 (1978) (1921-22). Joseph Raz and Scott Shapiro deny the point. JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 158 (1975) (“[Sanctions and force] do not represent a logical feature of our concept of law. . . . Is it possible for there to be a legal system in force which does not provide for sanctions or which does not authorize their enforcement by force? The answer seems to be that it is humanly impossible but logically possible.”); SCOTT J. SHAPIRO, *LEGALITY* 169 (2011) (“There is nothing unimaginable about a sanctionless legal system . . .”). The issues here are close and difficult. A major one, for example, is whether the law’s typically coercive character is a matter of conceptual necessity or a consequence of the contingent but perfectly inevitable fact that human beings will sometimes violate the law if not compelled to follow it. I’m uncertain of my own views here, but the consequences of deciding in coercion’s favor do not cut too deep. I’d simply have to add the condition that the law’s actuality-making power be coercive; the rest of my account would stand. For an extraordinary discussion of the coercion issue, see Grant Lamond, *Coercion and the Nature of Law*, 7 *LEGAL THEORY* 35 (2001) [hereinafter Lamond, *Nature of Law*]. Also helpful are Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 *U. RICH. L. REV.* 1195 (2008), and Grant Lamond, *Coercion*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 642 (Dennis Patterson ed., 2d ed. 2010).

9. This is the coercion issue again. See *supra* note 8.

But I don't think that's right, or at least, I don't think that's a complete answer. Even if the contingency in the thief's compliance were taken out of the hypothetical—if we imagine that the orator were really *very* persuasive, such that she could consistently motivate any thief to comply with her request—there would still be a problem, for one could not say that the *law* in that case had the power to make its dictates actual. The orator had that power, not the law. In other words, there are two contingent links between legal norm and end result in this case—one between the orator and the thief, the other between the orator and the law—and it is the latter that is really or at least mainly the problem. The power to make actual must be the *law's* power; the law's relationship to the power must be in the possessive. There's an old analogy in jurisprudence, not so common these days, between physical laws (laws of nature) and human laws. It might be helpful to think of that analogy here: the law's power must be such as to make of the law a sort of cause, which stands toward the actualization of its dictates as a cause stands toward its effects.

This last step is puzzling. Law is always in the possession of human beings. It cannot act on its own. So how can the power in question be the law's? The answer is that the exercise of power must itself be *legally constituted*. The office of a prosecutor, for example, is created by law to effectuate law. Thus when a prosecutor acts under the aegis of her office, her exercise of power is legally constituted; she is, so to speak, the hands of the law. But there is more to it than that, and to see the whole picture, I would like to borrow and modify a conceptual innovation that comes from Hathaway and Shapiro themselves (though they did not wield it in the service of constructing an affirmative conception of enforcement—an oversight, I think). I have in mind their category of “secondary enforcement rules”—rules that either require or permit “people other than the conduct rule violator to perform some harmful act on (or refrain from performing some beneficial act for) the conduct rule violator.”¹⁰

10. Hathaway & Shapiro, *supra* note 2, at 270-71. On Hathaway and Shapiro's conceptual scheme, conduct rules tell people what actions they are obligated to perform, permitted to perform, or prohibited from performing (e.g., “pay your income taxes”). A subset of conduct rules are enforcement rules, which in turn come in two types: primary and secondary. Primary enforcement rules are addressed to the conduct rule violator and require him to perform some costly duty or forgo some beneficial right (e.g., “having not paid your income tax, pay your backtaxes and a fine”). Secondary enforcement rules are addressed to third parties, and it is with these that third parties acquire rights or duties to act against the offender (e.g., “John Doe having not paid his income tax or backtaxes and a fine, Richard Roe is authorized to arrest him”). I'm uncomfortable with the category of primary enforcement rules. For one thing, if enforcement necessarily involves coercive power—an issue I left unresolved, *see supra* note 8—then primary enforcement rules are not enforcement rules at all: a person cannot coerce himself. They would in that case be a certain

Imagine that someone commits a crime. The rules authorizing police to arrest him, prosecutors to indict him, juries to convict him, wardens to imprison him, and on down the line are secondary enforcement rules. Those rules commonly apply to government officials (police, for example) and indeed sometimes establish enforcement officials as such (as with my example above of the office of the prosecutor),¹¹ but they can also apply to private citizens. When a sheriff formed a posse in common law England or the American West, the private citizens who served in the posse acted under a secondary enforcement rule. When the Catholic Church, having excommunicated someone under classical canon law, forbade lay Catholics from associating with that person, those lay Catholics acted under a secondary enforcement rule.¹² There are records of a feud settlement agreement in Renaissance Florence ordering the party who committed the original injury “to sally forth once every eight days, unarmed and unaccompanied, on the streets of Florence” and authorizing members of the family he had offended to strike him down.¹³ That authorization to the offended family qualifies as a secondary enforcement rule. The point is that enforcement in all such cases is grounded, directly or indirectly, in a legal norm; it is legally constituted. Not only are there costs that follow upon violating the law, but the costs themselves, or the authorities empowered to determine those costs, are specified by the law or the law’s agents. I think, then, that the category of secondary enforcement rules can

type of ordinary conduct rule (which strikes me as right). For another, primary enforcement rules, at least as express provisions of law, seem marginal and rare. I don’t think statutes commonly include, alongside their various rules of conduct and provisions for enforcement, additional rules stating that violators must, say, turn themselves in. Hathaway and Shapiro themselves state that there can be secondary enforcement rules without primary enforcement rules (what makes them “secondary,” one might say, is their relation to ordinary conduct rules, not their relation to primary enforcement rules). *See* Hathaway & Shapiro, *supra* note 2, at 271 n.49. I’ll therefore focus my account on secondary enforcement rules, which I suspect will prove to be the enduring category here, and a category that can more or less stand on its own. If I’m mistaken, the damage is easily repaired: one need only substitute “enforcement rules” where I use “secondary enforcement rules” in the discussion that follows.

11. Here I am probably modifying Hathaway and Shapiro’s category. They state that enforcement rules are a “subset of conduct rules,” Hathaway & Shapiro, *supra* note 2, at 270, which would seem to exclude the sort of power-conferring rules that establish prosecutorial offices and the like. *See* H.L.A. HART, *THE CONCEPT OF LAW* 27-33 (2d ed. 1994) (developing the concept of power-conferring rules). But the letter of Hathaway and Shapiro’s definition of secondary enforcement rules has room for the power-conferring rules I have in view, and it’s not a bad thing to engage creatively with their category.
12. *See* Hathaway & Shapiro, *supra* note 2, at 296.
13. THOMAS KUEHN, *LAW, FAMILY, & WOMEN: TOWARD A LEGAL ANTHROPOLOGY OF RENAISSANCE ITALY* 147 (1991).

serve as an excellent and maybe perfect explication of what it means for the law's actuality-making power to itself be legally constituted, to be the law's power. To qualify as legal enforcement, an exercise of power must be grounded in a secondary enforcement rule.¹⁴

In short, legal enforcement is the activity by which a legally constituted power is applied to make the law's dictates actual. This is an *efficacy*-based

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14. There are two possibilities foregone in this discussion, and for helping me to see them clearly, I'm grateful to David Luban and Daniel Markovits for their comments on this Essay.

One could argue that the power in question is the law's, not only when it is legally *constituted*, but also or alternatively when it is legally *motivated*. If the persuasive orator acted not from love of art, but from love of law, the argument goes, the power exercised should qualify as legal enforcement. This shift would open up the category of jurisprudentially valid legal enforcement to an array of informal actors and mechanisms, which has some practical attraction: weak states, undeveloped legal systems, and also the international system (which is in some ways like a weak state and an undeveloped legal system) could then more easily claim their edicts are enforced and therefore qualify as law. But I suspect that this motivational standard would prove to be jurisprudentially unmanageable and implausible. Is it legal enforcement if I don't want to eat lunch with a lawbreaker? Should it take away from the legal character of a prosecutor's work if he's motivated solely by a desire to get ahead and not at all by the law? Could the very same situation count as enforcement or not based on what is in the minds of the participants—an arrest in scenario A counting as enforcement when precisely the same arrest would not so count in scenario B because of a shift in the parties' motivations? To make this direction of thought work, one would at least have to draw some lines within the "motivated by law" category, and one would have to draw them in such a way as to maintain what is jurisprudentially the really crucial thing: that the power in view belongs to the law, that it be such as to make it reasonable to say: "It was the law that affected the world here."

Another possibility would be to focus on the legal subject's point of view, developing the distinction between merely *conforming* to law (behaving in accord with it for any number of reasons, including just chance or taste) and *complying* with law (behaving in accord with it *because* it is law, *for reasons* of law). On this argument, if the orator remonstrated with the thief or the thief returned the painting because of the law's reasons—if one or both of the two were complying and not merely conforming—the power exercised would qualify as legal enforcement. This is a less directly psychological measure of legal enforcement than the motivational one, and perhaps it could be less psychological still—if, for example, one focuses simply on whether the law *gives* a reason for complying, rather than on what reasons actually move the actors involved. But I still hesitate. It's difficult to keep a reason-based account separate from a motivational one, with all the psychological pitfalls associated with the latter. Moreover, regardless of whether we focus on psychology or not, this reason-based line of thought makes legal enforcement difficult to distinguish from legal obligation. The law's capacity to bind on the basis of reasons is paradigmatically a feature of its obligatory character, not its enforced character. The core issue here ought to be the issue of *power*; our aim in the enforcement context is to make sense of law's power. The issue of what reasons the law does and doesn't give just sounds in a different register. See discussion *infra* Part IV.

model of legal enforcement—enforcement *as* efficacy.¹⁵ Efficacy is a concept formed up from the sub-concepts of actuality and power; they are analytically linked to it in Kant’s sense, as part of the content of the concept.¹⁶ Efficacy is also a normatively weighted concept; it is a value. Law is efficacious when it has the power to make its norms obtain in the world.

II. OUTCASTING IS ENFORCEMENT ONLY IF . . .

I said earlier that working out a conception of enforcement is part of taking a strong argument—Hathaway and Shapiro’s strong argument—and making it an illuminating one. But the conception also has critical potential. We are now in a position to see some of what is best and worst in Hathaway and Shapiro’s analysis.

The article’s broad view of what enforcement is—a view focused, if implicitly, on the law’s power to make its dictates actual rather than on any particular mechanism by which it makes its dictates actual—is a major achievement. That broad view is what makes it possible to see outcasting as a form of legal enforcement. Of particular importance here is Hathaway and Shapiro’s attack on what they term the “Modern State Conception” of law: the view that enforcement can only be accomplished as modern states accomplish

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15. Others have also used the term “efficacy” in this connection, though they have handled the idea differently. See, e.g., HART, *supra* note 11, at 103-05, 294-95 (arguing that “a context of general efficacy” is “normally presupposed” by claims of legal validity, though “in special circumstances, such statements may be meaningful even if the system is no longer efficacious”); KELSEN, *supra* note 8, at 39-42, 118-22 (arguing that a system of norms must “on the whole, [be] efficacious” if any norm belonging to the system is to have legal validity); JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 93-95, 203-05 (1970) (arguing that the meaning of “efficacy” for a theory of law is unclear and that the principle that efficacy is required of law “is inadequate and should be abandoned”); Lamond, *Nature of Law*, *supra* note 8, at 45-50 (arguing that efficacy is a “prerequisite[] for the existence of legal systems,” but not necessarily part of the “nature of law,” and noting that “[t]he conditions for efficacy have not been very thoroughly investigated and are not well understood”). The closest thing I’ve found to the view laid out here is in Lon Fuller’s work, but his discussion arises in such a polemical context and goes by so fast that it’s hard to make much of it. In the course of attacking the view that “coercion” or “physical force” is necessary to law as law, he concedes that “a legal system, to be properly called such, has to achieve some minimum efficacy in practical affairs, whatever the basis of that efficacy.” LON L. FULLER, *THE MORALITY OF LAW* 108-10 (1964). But he then promptly declares that proposition “both unobjectionable and quite unexciting” and leaves it behind. *Id.*
16. See IMMANUEL KANT, *CRITIQUE OF PURE REASON* 140-41 (Paul Guyer & Allen W. Wood eds. & trans., 1998) (1781) (explaining that a judgment is analytic when it can be known through an analysis of our concepts, as an “illumination[] or clarification[] of that which is already thought in our concepts” or “contained” in our concepts).

it, with a monopoly on legitimate violence within a territory and governmental officials tasked with using violence as necessary to compel obedience—the view, in short, that enforcement *is* just what modern states *do*. *Outcasting* is an article with a target, and this updated Austinianism, this Modern State Conception, is it. Hathaway and Shapiro reject both the idea that enforcement must involve the use or threat of violence and the idea that enforcement must be accomplished by officials internal to the regime.¹⁷ They do so on the strength of their historical examples, but efficacy conception of enforcement in hand, we can see philosophically why this rejection is right, for the Modern State Conception fetishizes a mechanism by which the law is made efficacious rather than focusing on the end to which that mechanism is directed. An interesting and theoretically rich side effect of this rejection, as Hathaway and Shapiro highlight, is the prospect of legal enforcement that has teeth—exclusion from the benefits of social cooperation is no small thing—but that does not depend on violence. Modern views of law, and government generally, often center on violence; Weber, for example, defined the state by its “*monopoly of legitimate physical violence* within a certain territory.”¹⁸ Hathaway and Shapiro are subtly but deliberately tapping into an alternative tradition.

Yet there is a problem with the account of outcasting as Hathaway and Shapiro present it. It is a serious but reparable problem—one that goes to the flesh but not the bone. Let us turn to that problem now.

Broad though a proper conception of legal enforcement might be, it cannot be infinitely broad. Not just any consequences for violation whatsoever can qualify a normative system as a legal system. The problem with Hathaway and Shapiro’s insistence on a broad conception of enforcement is that they offer no principle of limitation, no principle for distinguishing enforcement of a legal sort from other kinds of sanction, cost, or consequence. And not only do they fail to offer such a principle, but—without ever quite saying so—they sometimes write as though no such principle were needed, as though any

17. I’ve proposed a very similar argument:

[T]he source of law’s causal power is, of course, usually a government, which stands over the citizen and puts its power of sanction behind its own commands. It’s easy to mistake this arrangement for enforcement itself and think that to have a governmental overlord is simply what enforcement means. This was Austin’s error But the arrangement on which Austin was fixated is only a *mechanism* by which the law’s imperatives become actual—a means where efficacy is the end—and the key to understanding how enforcement functions in international law is to see that it is not the only one.

Kleinfeld, *supra* note 4, at 2505-06.

18. MAX WEBER, *The Profession and Vocation of Politics*, in *POLITICAL WRITINGS* 309, 310-11 (Peter Lassman ed., Ronald Speirs trans., 1994) (1919).

sanction, cost, or consequence at all should qualify as enforcement of the kind that makes a norm a law. At one point, for example, in discussing the enforcement of the Supreme Court's order to Nixon to turn over the Watergate tapes, they argue that the threat of political "dishonor and public scorn" constituted enforcement of the order and add that voter disapproval could have enforced it as well ("Public law can be enforced at the ballot box . . .").¹⁹ I do not deny that dishonor, public scorn, getting voted out of office, and the like are serious and compliance-motivating costs. But they are not what people who take enforcement seriously as a component of law's nature mean, or should mean, when they speak of legal enforcement. The threat of unpopularity is not legal enforcement. There is a space between the narrowness of the Modern State Conception and this limitless breadth.

The challenge then is to identify a conception of enforcement that is broad but not too broad, that exacts consequences for wrongdoing but exacts them in a way we can recognize as legal in character. We want the porridge that Goldilocks chose. And we have it; Hathaway and Shapiro themselves provided it. The key is their category of "secondary enforcement rules." I argued earlier that, in order to reconstruct the idea of legal enforcement, we need not only for there to exist a power that will make the law's dictates actual, but also for that power to stand in a certain sort of relationship to the law: to be attributable to the law, to belong to it. I argued that the power belongs to the law in the appropriate sense when it is legally constituted, and that it is legally constituted when it is grounded in a secondary enforcement rule. This is a principle of limitation: it limits the range of *legal* enforcement from all mechanisms of efficacious power whatsoever to only those properly attributed to the law. And if we put this principle of limitation to the test—if we apply it to Hathaway and Shapiro's various examples—we will see that it picks out as law exactly the right things.

To start with, dishonor, public scorn, and getting voted out of office do not constitute legal enforcement on this "grounded in a secondary enforcement rule" test. If Nixon refused to turn over the Watergate tapes despite the Supreme Court's order and as a consequence was mocked or hated, that mockery and hatred would not qualify as enforcing the Supreme Court's order. But what *would* qualify as enforcement on this principle, crucially, is outlawry in medieval Iceland and excommunication in classical canon law—the historical examples on which *Outcasting's* argument depends. As Hathaway and Shapiro explain, Icelandic law "contained secondary enforcement rules": third parties were forbidden to harbor an outlaw or help one escape the country (at pain of

19. Hathaway & Shapiro, *supra* note 2, at 281.

being outlawed themselves) and were authorized to kill full outlaws with impunity (indeed, the prosecutor of the case was “obliged to kill him”).²⁰ Likewise, under classical canon law, those subjected to minor excommunication “could not receive the Eucharist, go to confession, be married, and so on” (i.e., secondary enforcement rules directed to priests, or “internal outcasting” in Hathaway and Shapiro’s terminology), and those subjected to major excommunication were persons “no one was permitted to talk, eat, or do business with” (i.e., secondary enforcement rules directed to the community, or “external outcasting”).²¹ That is, outcasting in both legal systems was itself a legally constituted exercise of power; wrongdoers did not just become unpopular.

The point holds for the great majority of Hathaway and Shapiro’s examples of outcasting in international law as well. The World Trade Organization, for example, enforces its edicts by outcasting: it uses a form of external outcasting in which a member state is authorized to retaliate for a trade barrier by erecting some (otherwise prohibited) trade barrier of its own against the offender. Is this form of outcasting mere contingency—maybe other countries just don’t want to do business with rule-breakers—or is it grounded in legal norms? The answer is the latter. The decisions of the WTO’s Dispute Settlement Body “are enforced through *authorized* retaliation by the aggrieved state party”; the adjudicator gives the victim state permission to engage in “*specific, approved, retaliatory trade measures.*”²² These permissions are secondary enforcement rules. Likewise, the World Health Organization uses a form of internal outcasting, Hathaway and Shapiro argue, in that members who refuse to pay their dues can lose their voting privileges and access to WHO services. This too is grounded in a secondary enforcement rule: the sanctions are specified in the WHO’s constitution.²³ And so it goes through one after another of Hathaway and Shapiro’s many examples of outcasting in international law.

Thus my proposed refinement of Hathaway and Shapiro’s position is this: outcasting counts as enforcement of a legal sort only if the outcasting is itself

20. *Id.* at 289.

21. *Id.* at 296.

22. *Id.* at 307 (emphasis added). External outcasting of this “authorized retaliation” sort can also be found in the international law of war, under the doctrine of “reprisals”—another example Hathaway and Shapiro could add to their quiver.

23. *Id.* at 306 (citing Constitution of the World Health Organization, art. 7, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185).

legally constituted, that is, grounded in a secondary enforcement rule. Not just any outcasting will do.²⁴

One more point is in order—this one not a point of correction, but of clarification and emphasis. What *Outcasting* essentially does is point out a mechanism that international law uses or could use to bring its norms to pass. It does not show that the mechanism is efficacious, i.e., that it gets the job done. *Outcasting* has almost nothing to say about the crucial matter of international law's power. Indeed, the article has a curiously refined, almost taxonomic quality: its focus is on properly categorizing the universe of enforcement mechanisms. The categories are both interesting and useful, but they do not answer the essential question. The core of the skepticism toward international law is not the belief that international law has no mechanisms of enforcement but the belief that international law does not *work*—that it does not have the power to bring the norms to which it is committed into existence, whatever its mechanisms of enforcement might be. To this question, *Outcasting* offers no answer. In a sense, the article doesn't show international law to be enforced at all; it only shows that if international law is enforced, the enforcement is done in a particular way.²⁵

This is a point of clarification and not a criticism because no one sees it more clearly than Hathaway and Shapiro themselves. They are at pains to emphasize that the ultimate question is whether international law “matter[s] in the way law must matter.”²⁶ The point of identifying the outcasting mechanism and of categorizing the various ways in which it operates is to “open up logical space that would otherwise not have been apparent,”²⁷ to shift

24. It may be that Hathaway and Shapiro would not disagree with this refinement. In discussing whether shaming in human rights contexts should qualify as outcasting, they write: “When such shaming is explicitly contemplated by the law for the purpose of encouraging states to follow the law, then it is an instance of outcasting.” *Id.* at 309. I agree with that, of course. If the issue here is how informal outcasting can be while still qualifying as *legal* enforcement, Hathaway and Shapiro seem to speak on both sides of it.

25. Actually, one could even question whether outcasting by itself—mere exclusion from the benefits of social cooperation and membership, without more—worked even in medieval Icelandic and classical canon law. Full outlaws in medieval Iceland were subject to death: prosecutors were obliged to kill them, other outlaws were encouraged to kill them, and everybody was allowed to kill them. *Id.* at 289. Excommunicants were referred to and punished by secular courts, at least in England. *Id.* at 297-98. Maybe it was these more conventional sanctions that made the Icelandic and Catholic legal systems effective, to the extent they were effective. Simple exclusion in any case seems less likely to be effective against states than it is against individuals, since states don't literally become lonely or, except in rare circumstances, desperate for social support.

26. *Id.* at 345.

27. *Id.*

attention “to how external enforcement works—and when and why it does not.”²⁸ In the end, Hathaway and Shapiro even rehabilitate the Modern State Conception. No longer is it merely an assumption of those blinkered by the present (that was always a straw man) but a rational if mistaken point of focus for those who care about the law’s mission in the world:

On the Modern State Conception, internal physical enforcement is necessary for a regime to be a legal system because what makes regimes worthy of respect—indeed morally indispensable in the modern world—is that they can accomplish certain tasks that no other comparable social institution can. Namely, they can wield and focus an enormous amount of physical force to ensure that people obey their demands.²⁹

To be a proponent of the Modern State Conception is not just to be naïve. At least some proponents believe that enforcement involves something like a modern state, not because they can’t imagine anything else, but because they can’t imagine anything else that would be *effective*, and effectiveness is just what they meant by enforcement in the first place. They might be wrong as to whether something else could work. But that has to be proven.

Outcasting is thus the first step in a research project, and the next step is empirical. As Hathaway and Shapiro put it (in my favorite line of the article): “Jurisprudence, then, can be an invaluable tool for empirical investigations of legal phenomena, for the former aims to uncover logical space often neglected by the latter.”³⁰ It is not unusual for the office of philosophy to be teeing up the right empirical question. This is one of those times.

III. IS ENFORCEMENT NECESSARY?

I have so far written under the assumption that enforcement is necessary to law being what it is. That assumption, in some form (the form too being in dispute), is actually among the most controversial claims in jurisprudence today. Joseph Raz³¹ and Scott Shapiro³² deny it. John Finnis,³³ Ronald

28. *Id.* at 347.

29. *Id.* at 345.

30. *Id.* at 257.

31. RAZ, *supra* note 8, at 158-59; RAZ, *supra* note 15, at 93-95, 203-05.

32. SHAPIRO, *supra* note 8, at 169.

Dworkin,³⁴ Hans Kelsen,³⁵ and Max Weber³⁶ defend it—as, by the way, does Alexander Hamilton.³⁷ H.L.A. Hart³⁸ and Lon Fuller³⁹ deny it in one sense, defend it in another. (The positions, interestingly, do not break down along familiar positivist/nonpositivist lines.) And Hathaway and Shapiro, it turns out, deny it in this very article: about twenty-five pages into a text set into motion by the proposition that enforcement is necessary for law to be law, we discover that they themselves think the proposition false, but will proceed as if it were true, because arguments to the contrary “are controversial and have failed to persuade many people.”⁴⁰ (This is odd, and one senses in it again that curious focus in their article on, above all, winning the argument—winning the argument even to the exclusion of illuminating the philosophical issues.) These are crowded waters for a brief review to wade into. And in addition, the question is so intrinsically difficult, requiring for its answer something close to a theory of law, that humility is another ground for caution.

What I would like to propose here is just one piece of an answer. One of Hart’s or perhaps Dworkin’s insights was that understanding the nature of law requires taking seriously the “internal point of view,” that is, the point of view of “a member of the group which accepts and uses [legal rules] as guides to conduct”—the point of view of a participant.⁴¹ To take up the internal point of

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33. JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 260-64, 266-70 (2d ed. 2011); *id.* at 266 (“Law needs to be coercive (primarily by way of punitive sanctions, secondarily by way of preventive interventions and restraints).”).
 34. RONALD DWORKIN, *LAW’S EMPIRE* 93 (1986) (structuring his account of the concept of law around the question of “when collective force is justified” given “individual rights and responsibilities”).
 35. KELSEN, *supra* note 8, at 21.
 36. WEBER, *supra* note 8, at 34.
 37. *THE FEDERALIST* NO. 15, at 110 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“It is essential to the idea of a law, that it be attended with a sanction; or, in other words, a penalty or punishment for disobedience. If there be no penalty annexed to disobedience, the resolutions or commands which pretend to be laws will, in fact, amount to nothing more than advice or recommendation.”).
 38. HART, *supra* note 11, at 103-05, 294-95 (arguing that “a context of general efficacy” is “normally presupposed” by claims of legal validity, though “in special circumstances, such statements may be meaningful even if the system is no longer efficacious”); *see also* Lamond, *Nature of Law*, *supra* note 8, at 35-36 (“Hart was concerned to show that coercion was not the key to understanding law and legal systems He did not claim that legal systems were not coercive, nor that coercion was not part of the nature of law.”).
 39. *See* FULLER, *supra* note 15, at 108-10.
 40. Hathaway & Shapiro, *supra* note 2, at 277.
 41. HART, *supra* note 11, at 89. Credit for this insight is tricky to parcel out. It’s traditionally given to Hart, who did introduce the term, but Shapiro argues powerfully that Hart meant

view is to scrutinize and value the lawyer's *experience* of law. On that level, the intuition that enforcement is part of law's nature is so fused with law as experienced, so much a part of how we think about what we're doing when we go to work in the morning, that I take us to have in the extraordinary power of the intuition a good reason for carving out a place for enforcement in the theory of law. We want our theories to make sense of experience. The challenge is to figure out *how* enforcement might figure in a theory of law. My proposal here goes to that issue.

The place to start is with the fact that no law is ever perfectly enforced. No law is such that its dictates are invariably made actual, or—if you do not accept the actuality condition—no law is such that force or sanctions are consistently applied on the law's behalf, nor such that anyone is consistently coerced by it, nor even such that these things are consistently threatened in any serious way. Whatever one's conception of enforcement, the law is never perfectly enforced. And yet law exists. Therefore enforcement cannot be strictly necessary. One might try to avoid this conclusion by speaking in potentialities: law is enforced when some power stands behind it which *could* make it actual, or simply when some power stands behind it which *could* impose a sanction for its violation.⁴² This is to turn away from the focus on actuality and lay all the emphasis on power, which I think is a mistake, as it misunderstands why we care about enforcement in the first place. But regardless, the argument still fails: there is no such power. People will break the law and get away with it under even the strongest governments. And yet law exists. One could try to avoid this conclusion yet again by speaking of enforcement in proportional, more-or-less terms, or in general, system-wide terms: law is enforced when its dictates are often or generally or substantially made actual, or when some power stands behind it which could often or generally or substantially make it actual, or at least these things are true at the level of the legal system if not the level of the individual rule.⁴³ But to say that is to admit that enforcement is not strictly

by it something other than what I am taking it (and others have taken it) to mean. See Scott J. Shapiro, *What Is the Internal Point of View?*, 75 *FORDHAM L. REV.* 1157, 1158-60 (2006). Dworkin, who identifies the internal point of view as a "participant's point of view," clearly intends the idea in the sense I'm using it. DWORKIN, *supra* note 34, at 13-14.

42. Austin arguably made this move. See AUSTIN, *supra* note 1, at 23 ("The truth is, that the magnitude of the eventual evil, and the magnitude of the chance of incurring it, are foreign to the matter in question. . . . [W]here there is the smallest chance of incurring the smallest evil, the expression of a wish amounts to a command, and, therefore, imposes a duty.").
43. Hart and Kelsen went this route, distinguishing noncompliance with a particular rule of the legal system from what Hart called "a general disregard of the rules of the system." HART, *supra* note 11, at 103; *id.* at 103-05, 294-95 (arguing that "a context of general efficacy" is "normally presupposed" by claims of legal validity, though "in special circumstances, such

necessary. Moreover, enforcement in actual legal systems is so spotty, even on a system-wide level and even in well-functioning states, that it may be unreasonable to insist on the strict necessity of enforcement at any level and in any sense.⁴⁴

We should not be surprised at this difficulty in making enforcement a digital, “yes or no” feature of law as law. We are here at the bridge to the actual; there is no perfection across this bridge. What we need is some way of thinking about legal enforcement as an identity feature of law that can accommodate its analog, “more or less” character.

I’d like to propose—and here I’m summarizing a much more extensive discussion in my own work on the status of international law, *Skeptical Internationalism: A Study of Whether International Law Is Law*⁴⁵—that law is not the kind of thing that has strictly necessary features. There are certain sorts of objects in the social world that are constituted in part by values, such that, when those values are absent, the thing simply ceases to be what it is. These are social objects with, let us say, a *normative constitution*. One might think, for example, that the institution of the family has something constitutively to do with love or commitment, such that when a group of people living together, related by blood and traveling under the name “family” in fact lack any such sense of love or commitment, those people are not really a family at all. They still exist physically as a group, but they lack the kind of teleological

statements may be meaningful even if the system is no longer efficacious”); Kelsen, *supra* note 8, at 39-42, 118-22 (arguing that a system of norms must “on the whole, [be] efficacious” if any norm belonging to the system is to have legal validity). The former, both thought, would not call the system’s legal character into question; the latter would or could.

44. The probability that someone who has committed a (nonvehicular) homicide will go to prison for it in American criminal law—state and federal taken together—is 44.7%; for a rape, it is 12%; for a robbery, 3.8%; for a burglary, 1.6%; and for an assault, larceny, or motor vehicle theft, less than 1%. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 459-61 (1997). Arrest and conviction rates are only slightly higher. This is not a picture in which enforcement is the norm at the level of the system. And yet law exists. Or consider: at least 47.1% of Americans over age twelve have illegally used drugs (mostly marijuana) at some point in their lives. Indeed, at least 8.9% had used drugs illegally in the month before they were surveyed. U.S. DEP’T OF HEALTH AND HUMAN SERV., RESULTS FROM THE 2010 NATIONAL SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NATIONAL FINDINGS 11-12 & tbl.1.1B (2010), available at <http://www.oas.samhsa.gov/NSDUH/2k10NSDUH/tabs/Section1to10.pdf>. I say “at least” because, given that the survey involved government officials going door-to-door to ask whether the residents had broken criminal law, these numbers are probably understated. This is not compliance on a system-wide level. And one wonders: what percentage of Americans have broken copyright law? How often are contracts breached? What proportion of those breaches give rise to legal action? Despite it all, law exists.

45. See Kleinfeld, *supra* note 4, at 2501-04, 2528-30.

organization⁴⁶ that serves to unify them under the designation “family.” Perhaps that example is sentimental, but then consider “democracy” or “art.” These too are social objects constituted in part by values—equality or meaningful beauty, let’s say—such that, to the extent those values are absent, the system of government purporting to be a democracy is not really a democracy at all, or the painting purporting to be art is not really art at all. And in fact, we talk this way in ordinary life: we say of the Supreme Court when it is at its most political, “Well, it wasn’t really a court there,” or of a marriage that still exists in form but has fallen apart in substance, “Well, that isn’t really a marriage.” The social world just seems to generate these sorts of mutually evaluative and descriptive ontological objects. My view is that law is one of those objects; law has a normative constitution.⁴⁷ The values that compose it are efficacy (that is, enforcement properly conceived), obligation grounded in legitimate authority, obligation grounded in moral rationality, and objectivity of such a kind that law can be meaningfully distinguished from politics.

One of the peculiar characteristics of objects with a normative constitution is that their very existence has an analog character.⁴⁸ Systems of government are not simply democratic or undemocratic, and they do not simply instantiate democratic values or fail to instantiate them. They are *more or less* democratic—they more or less exist *as* democracies—as the values we take to be constitutive of democracy are more or less present in them. Past some point we think the

46. The term comes from Christine Korsgaard, who explains at the level of metaphysics what it means for a thing’s “teleological organization” to give rise to constitutive “normative standards”—that is, “standards that apply to a thing simply in virtue of its being the kind of thing that it is”—and likewise what it means for an activity’s “directed” character to give rise to “constitutive principles” such that, “if you are not guided by the principle, you are not performing the activity at all.” CHRISTINE M. KORSGAARD, *SELF-CONSTITUTION: AGENCY, IDENTITY, AND INTEGRITY* 28, 32 (2009). As she remarks, “every object and activity is defined by certain standards that are both constitutive of it and normative for it. These standards are ones that the object or activity must at least try to meet, insofar as it is to be that object or activity at all.” *Id.* at 32. I’m not sure that *every* object and activity has this character, but I do think that social practices and institutions often or always do, and I mean the term “normative constitution” to get at these ideas.

47. This was also Fuller’s view, as I interpret him. Surely it was something like this he had in mind when, in his response to Hart, he described law as “an object of human striving” rather than “a datum projecting itself into human experience” and wrote: “If laws, even bad laws, have a claim to our respect, then law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark.” Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 632, 646 (1958).

48. *Id.* at 646 (“When we realize that order itself is something that must be worked for, it becomes apparent that the existence of a legal system, even a bad or evil legal system, is always a matter of degree.”).

government in question can or can't fairly be called a democracy, but one reaches that point by degrees, and there are borderline cases. And now we can start to see how enforcement might figure in our conception of law without being strictly necessary to it. Enforcement is one of the values whose presence contributes to a normative order being a legal order. But it need not be strictly necessary because none of the constitutive values of law need be strictly necessary. Is obligation based on legitimate authority strictly necessary? Custom has been a source of law, though it is not clearly obligatory on such grounds. What about obligation based on moral rationality? It's obvious that there is bad and stupid law that is still law, so long as it is not too bad or stupid or so long as the system is not too infected as a whole. What about objectivity? The Supreme Court makes decisions from time to time that seem almost purely political; we tend to regard those decisions as a little less law-like than others, but not so much as to fall out of the category of law altogether. And efficacy? The starting point for this discussion was that all law is imperfectly enforced. If law has a normative constitution, any of these criteria may be at low tide without the law or legal system in question wholly losing its legal character, and without the criterion losing its constitutive importance. What law cannot lack, consistent with being law at all, is too many of these values to too great an extent. A conception of law as normatively constituted is pluralistic and cumulative; it is a threshold conception.⁴⁹

This argument does not show enforcement to be strictly necessary for law to be law. It shows how enforcement can be constitutive of law without *having* to be strictly necessary for it. This is a sort of weak necessity. Enforcement as efficacy is constitutive of law's nature and properly asked of something that purports to be law. But it is not strictly necessary for legality.

IV. BEYOND ENFORCEMENT

Enforcement is almost always the first thing said when the question of international law's status as law comes up, but this is partly because the enforcement point is so immediately accessible, so ready-to-hand for a member of our legal culture struggling to make sense of her jurisprudential intuitions.

49. It's natural for Wittgenstein readers to draw the parallel here to his notion of "family resemblances"—the claim that many concepts (e.g., the concept of a "game") don't have necessary and sufficient conditions, but just attach to phenomena that are "*related* to one another in many different ways." See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 65-67 (G.E.M. Anscombe trans., 3d ed. 2001) (1953). I don't think the "family resemblance" and "normative constitution" ideas are all that similar, actually, but I do think Wittgenstein makes this kind of ontology philosophically respectable.

The point is like a vase into which we pour a felt philosophical unease, a way to channel elusive intuitions into familiar forms of words. Enforcement is not the only grounds for skepticism of international law's status as law, nor even necessarily the most important. What lies beyond enforcement?⁵⁰

Part of the answer is obligation. There is substantial consensus in contemporary jurisprudence that law as law, regardless of whether it is enforced, must be obligatory. The classic statement of the point is Hart's: "Law surely is not the gunman situation writ large, and legal order is surely not to be thus simply identified with compulsion."⁵¹ Law properly so called carries with it a sense of obligation—the thing in virtue of which the law *deserves* to be followed, the "ought" of law rather than the "must." Thus we turn from law's *actuality*, the core of enforcement, to law's *normativity*, the core of obligation. Is international law such as to put those to whom it applies under a duty to obey?

The unitary concept of legal obligation has split into two distinct strains in our jurisprudential tradition—I suspect because the tradition has seen such titanic battles between moralists and antimoralists.⁵² On one side are those, like Hart himself, who stress law's foundations in legitimate authority.⁵³ On the other side are those, like Fuller, who stress law's substantive morality and rationality.⁵⁴ This battle burns a little too hot in my view: the capacity to generate an obligation is what we are ultimately after here, and it seems clear enough that a norm might put us under a duty of obedience either because it is authoritative or because it is in the right. The battle is to some extent an artifact of thinking that law has necessary features rather than cumulative ones. In any case, the skepticism toward international law's status as law goes to both forms of obligation.

As to obligation based on legitimate authority, a serious debate has opened up, at least among American international lawyers, as to whether customary

50. My discussion again builds on the one in Kleinfeld, *supra* note 4, at 2510-27.

51. Hart, *supra* note 7, at 603.

52. Compare RONALD DWORKIN, JUSTICE IN ROBES 14 (2006) ("A proposition of law is true . . . if it flows from principles of personal and political morality that provide the best interpretation of the other propositions of law generally treated as true in contemporary legal practice."), with RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 91 (1999) ("This chapter is about the infection of legal theory by moral theory . . ."). See generally HART, *supra* note 11, at 185-86 ("Here we shall take Legal Positivism to mean the simple contention that it is in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so.").

53. See, e.g., Hart, *supra* note 7, at 603 (arguing that "rules specifying the essential lawmaking procedures" are "at the root of a legal system").

54. See, e.g., Fuller, *supra* note 47, at 645 ("Law, considered merely as order, contains, then, its own implicit morality.").

international law should qualify as law given its nonpositivist foundations.⁵⁵ And while treaty law has not been put similarly to doubt, the legitimacy of lawmaking and law-applying international institutions—like the United Nations Security Council, the General Assembly, the International Court of Justice, the International Criminal Court, and regional organizations like the European Union (all of which, incidentally, are grounded in treaty)—has been.⁵⁶ And the debates are not just scholarly ones. I'd guess that few Americans doubt Congress's right to make law for the country in constitutionally appropriate circumstances. How many would accept the UN making law binding upon the United States in any circumstances?

Turning to obligation based on moral rationality, I think the doubts, though less often voiced, may run deeper still. One has to listen around the edges of what is said. But with respect, for example, to the international law of war, there can be heard among the critics a fear that what purports to be law might so constrain a nation's ability to fight as to be a suicide pact, or at least foolishly utopian, and the further thought that law so morally unsound cannot obligate at all. From the other political direction, critics of, say, international trade law sometimes suggest that the system is so imbalanced in favor of wealthy countries as to be expropriation under cover of law. This sort of thought surfaces in the interstices of the Israel debate as well—on the one side, from those who think the UN's treatment of Israel to be so indecent as to diminish the normative force of the law the UN claims to apply, and on the other side, from those who think the UN's treatment of Israel to be so lenient (and lenient for no better reason than the U.S. veto) as to do the same. Behind the skepticism toward international law is an unspoken question, which sounds both in prudence and in jurisprudence: can we trust the international legal system to show the kind of moral good sense that it must show if we are to be duty-bound to follow it? Can we treat the system's claims as obligatory and still live with the results?

55. See, e.g., Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997). The debate has a technical side. Bradley and Goldsmith's foundational critique focused not exactly on whether international law is law, jurisprudentially speaking, but on whether it can serve as a source of legal authority in American federal courts post-*Erie*. Nonetheless, both that original article and the trajectory of debate since it was published reveal broader and more jurisprudential overtones.

56. See, e.g., JEREMY A. RABKIN, *LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES* 130 (2005) ("The price of the [European Union] project is that, along with national sovereignty, Europeans have also yielded up democratic constitutions.").

Apart from obligation and enforcement is one other – and I think one last – major ground for skepticism about international law’s identity as law. It has to do with law’s *objectivity*, that is, with the kinds of processes and reasoning that give law its moderately determinate character and that undergird the distinction between law and politics. The intuition, which I’d defend, is that law as law is to some extent objective. Its objectivity is not the hard stuff of formal logic or mathematics, where the answers are all true or false and there’s no need or room for judgment. Law’s objectivity is that of an argument any reasonable lawyer would think best and of a judicial impersonality that aspires to make judges “just the medium through which law speaks . . . the oracles of the law, in Blackstone’s phrase.”⁵⁷ Doubts about international law’s objectivity in this sense are a last ground for skepticism of its character as law.

The international legal system in operation has very much the look of politics, at least in big cases. Its texture is the texture of politics. When President Bush claims a legal right of preemptive self-defense against Iraq, or President Clinton claims a legal right to intervene in Serbia and Kosovo (a move which many legal experts have concluded was “illegal but, in the circumstances, the right thing to do”⁵⁸), or the ICJ rules that Israel must tear down the “wall” or “fence” (depending on which side you ask) that Israel had built along and through the West Bank,⁵⁹ international law comes across as the rationalizations that decency drapes over political will. The claims are both on the left and the right, but that very fact is part of the point. It’s like there is a knot of politics that international law purports to cut through, but can’t,⁶⁰ or maybe isn’t even trying to cut through; maybe international law is just part of the knot. It’s difficult to maintain a sense of international law as law when it functions in such a partisan and so discretionary a way.

I’m aware, of course, that even a hint of objectivism about the law and essentialism about the law/politics distinction runs counter to deep currents in contemporary legal thought. But I do not mean to suggest a rigid distinction between law and politics, as if the two were made of different substances, like history and physics. Law is frozen politics, the network of political settlements of the past that, having been integrated with other such settlements,

57. Richard A. Posner, *The Supreme Court, 2004 Term – Foreword: A Political Court*, 119 HARV. L. REV. 31, 76 (2005).

58. W. Michael Reisman, Editorial Comment, *Assessing Claims To Revise the Law of War*, 97 AM. J. INT’L L. 82, 89 (2003).

59. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), available at <http://www.icj-cij.org/docket/files/131/1671.pdf>.

60. I’m grateful to Jed Purdy for the image and phrase.

determinately answers a surprising number of questions and creates a backdrop from which we can snatch a little social peace out of what would otherwise be perpetual and limitless dispute. I also do not mean to suggest that every legal question has a right answer—only that many do and that, in the remainder, if we treat objectivity as an aspiration, if more determinacy in the next case is part of what makes for good legal work in this one, then objectivity becomes part of skillful legal craftsmanship, which is not a quixotic thing to aim for. What objectivity mainly requires is an extreme but not impossible degree of judicial self-restraint, which in ideal form would become a sort of judicial self-abnegation, or, if that is too much, a multiple empathy so inclusive that the judicial self would be dissolved in it. Finally, I submit that there is something cavalier about disdaining the aspiration to legal objectivity altogether. It is a false sophistication, which does not comport with the experience of most law most of the time and which robs law of its social function—to render our communal life a little more detached and decent, to give us a little shelter from the political struggle. Law at its best is a counterpolitical force.

International law inspires jurisprudential skepticism on multiple grounds, not just on grounds of enforcement—and even as to enforcement, Hathaway and Shapiro's outcasting thesis is only (and only purports to be) the conceptual beginnings of what must ultimately be an empirical defense. I don't mean to say that international law's opponents are in the right; in fact I think international law, in the right institutional setting, can be law in the fullest sense.⁶¹ My point is to clarify the yield of Hathaway and Shapiro's outcasting thesis. That thesis is a significant contribution. It at once enriches our concept of enforcement and illuminates the way in which international law functions. And it goes some distance to addressing the question of whether international law is really law. But the greater part of that question remains.

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61. See Kleinfeld, *supra* note 4.