

ROBIN BRADLEY KAR

Outcasting, Globalization, and the Emergence of International Law

This Essay argues that we have been undergoing a profound sociocultural transformation over the last several centuries, which relates to the emergence of international law. This transformation is every bit as fundamental as those we once went through when transitioning from hunter-gatherer forms of life (which did not yet have legal systems or engage a distinctive sense of legal obligation) to more sedentary forms of agricultural life (with larger population densities, incipient domestic legal institutions, and—ultimately—an emergent distinction between morality and law). The primary mechanism that has been supporting this transformation is “outcasting”—as Oona Hathaway and Scott Shapiro have recently defined the term in their Yale Law Journal article of the same name. This Essay argues that outcasting provides the evolutionary stability conditions for a distinctive and emergent sense of international legal obligation in us. This shared sense of obligation is one of the basic preconditions for a genuine de facto system of international law—a fact that has important normative implications for how to evaluate international law.

INTRODUCTION

We clearly live in special times. Our age is the proverbial age of globalization, information, and communication. We are also the recent inheritors of the industrial, technological, and computer revolutions; of modern markets, which have become increasingly globalized over time; of an Internet that allows us to share ideas with people from around the world and mobilize action from our very homes (and even cell phones); and of a special family of forms of political organization, which consist of constitutional democracies with the rule of law and which have increasingly begun to dominate the world scene. These forces have all been coming together to make

the world appear much smaller (and much more familiar and interactive) than it ever could have appeared to our ancestors. But we have also grown up in this world, with its specific legal, social, political, and technological arrangements. Having spent our formative years within it, we are significantly acculturated to it. It is, accordingly, much more natural for us than for our ancestors to begin thinking in terms of a global world order, with a genuinely international community and an emergent system of international law.

We all know that something big—and seemingly unprecedented—is happening on the world scene. But we have failed to understand critical aspects of this transformation, and—in my view—this is due in large part to three more basic failures: first, our failure to appreciate certain critical dimensions to the philosophical question whether international law is law; second, our failure to appreciate how our natural sense of obligation functions, and the sociocultural conditions under which a new and distinctive sense of international legal obligation can arise and function in our lives; and, third, our failure to recognize the distinctive and pervasive role that outcasting (as that phenomenon has been introduced and described by Oona Hathaway and Scott Shapiro in their recent article of the same name¹) plays in international law as a functional substitute for physical sanctioning in domestic law.

My purpose in this Essay is to argue for these claims, in part to urge a broader focus for contemporary international legal scholarship and in part to draw attention to the type of transformation that I believe we may be going through at the present moment.

For reasons that I will explain in this Essay, I believe that we may be undergoing a transformation that is every bit as fundamental as those that we once went through when first transitioning from hunter-gatherer forms of life (which did not yet have legal systems or engage a distinctive sense of legal obligation²) to more sedentary forms of agricultural living with larger

1. Oona Hathaway & Scott J. Shapiro, *Outcasting: Enforcement in Domestic and International Law*, 121 YALE L.J. 252 (2011).

2. See Richard B. Lee & Richard Daly, *Foragers and Others*, in THE CAMBRIDGE ENCYCLOPEDIA OF HUNTERS AND GATHERERS 1, 1 (Richard B. Lee & Richard Daly eds., 1999) (“Hunter-gatherers are generally peoples who have lived until recently without the overarching discipline imposed by the state. They have lived in relatively small groups, without centralized authority, standing armies, or bureaucratic systems. Yet the evidence indicates that they have lived together surprisingly well, solving their problems among themselves largely without recourse to authority figures and without a particular propensity for violence.”); Richard B. Lee & Irven Devore, *Problems in the Study of Hunters and Gatherers*, in MAN THE HUNTER 3, 3 (Richard B. Lee & Irven Devore eds., 1968) (“Cultural Man has been on earth for some 2,000,000 years; for over 99 per cent of this period he has lived as a hunter-gatherer.”).

population densities, incipient domestic legal institutions, and—ultimately—an emergent distinction between morality and law.³ We are so used to where we are today, however, that we sometimes forget what it took to get us here, and it can be especially difficult to see what is happening when we are right in the midst of such a process. I have nevertheless made some recent efforts to reconstruct that earlier process, and my examinations suggest that the transformation was not likely based in reasoning alone, but rather emerged as part of a larger set of sociocultural and linguistic developments among a small handful of cultural traditions at first. These developments began the transition in the ancient world and then caused it to spread thereafter to many other regions.⁴ The relevant processes appear to have involved the slow coevolution of a specific and reciprocally reinforcing set of institutions and practical attitudes within these pioneering cultural traditions, which were sufficient to maintain distinctively new legal orders—along with a distinctive and emergent sense of domestic legal obligation to animate them—in equilibrium.⁵

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3. I have described these processes in detail in Robin Bradley Kar, *The Eastern Origins of Western Law and Western Civilization: New Arguments for a Changed Understanding of Who We Are and How We Got Here*, 2012 U. ILL. L. REV. (forthcoming) (on file with author) [hereinafter Kar, *Origins*]. See also JARED DIAMOND, *GUNS, GERMS, AND STEEL: THE FATES OF HUMAN SOCIETIES* (1997) (offering a panoramic description of these processes in human prehistory).
 4. See Kar, *Origins*, *supra* note 3, at 227, 234-51; see also DIAMOND, *supra* note 3, at 104-30 (describing the spread of agriculture to other areas after it first arose and the concomitant spread of forms of emergent social complexity); Grahame Clark, *Primitive Man as Hunter, Fisher, Forager, and Farmer*, in *THE ORIGINS OF CIVILIZATION* 14, 14 (P.R.S. Moorey ed., 1979) (“[N]o society depending exclusively on hunting and foraging has ever entered upon the wider experience of civilization. And the converse is no less true. All those who share in the consciousness of civilized existence have up to the present depended in the last resort on the cultivation of crops and/or the maintenance of animal herds.”); Douglas J. Kennett & Bruce Winterhalder, *Behavioral Ecology and the Transition from Hunting and Gathering to Agriculture*, in *BEHAVIORAL ECOLOGY AND THE TRANSITION TO AGRICULTURE* 1, 2 (Douglas J. Kennett & Bruce Winterhalder eds., 2006) (“At present it appears as if at least six independent regions of the world were the primary loci of domestication and emergent agriculture . . .”).
 5. See Robin Bradley Kar, *The Deep Structure of Law and Morality*, 84 TEX. L. REV. 877, 902-19 (2006) [hereinafter Kar, *Deep Structure*] (describing the instability of a sense of obligation absent these secondary stabilizing mechanisms, and then deriving the account of evolutionary stability conditions that would need to coevolve to produce an emergent sense of obligation). For a discussion of the more distinctive functions of law and morality, and the more recent emergence of law to resolve a larger and more recent class of social contract problems, see Robin Bradley Kar, *The Two Faces of Morality: How Evolutionary Theory Can Both Vindicate and Debunk Morality*, in *EVOLUTION AND MORALITY: NOMOS LII* (forthcoming 2012) [hereinafter Kar, *Two Faces*] (manuscript at 72-74), available at http://ssrn.com/abstract_id=1834965.

Over the last several centuries, an analogous transformation has—in my view—been taking place with respect to the emergence of international law. More specifically, I believe that the phenomena that Hathaway and Shapiro have recently called “outcasting” have been coevolving with, and helping to produce the emergence and stability of, a distinctive set of practical attitudes in us. These practical attitudes have, in turn, begun to infuse us with a special sense of international legal obligation, which is capable of animating both those same outcasting practices and an emergent international legal order. Although this process is not yet complete, it would appear to be picking up steam, and—given its importance to increasingly vital forms of social relations in our contemporary world—we need to understand this transformation better. To do so, we will need to expand the focus of current international legal scholarship in several critical ways.

In Part I, I will employ contemporary devices in metaethics⁶ to isolate a critical dimension of the question whether international law is law. Although some people take this question to be intractable,⁷ an analogue of it could have been asked of domestic law when domestic legal systems first began to emerge, and that earlier question would have undoubtedly seemed (and probably also have been) intractable for significant periods of time. In many regions of the world, the domestic version of this question nevertheless admits of a clear answer now,⁸ and I therefore want to get a better sense of what might have

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6. “Metaethics is the attempt to understand the metaphysical, epistemological, semantic, and psychological[] presuppositions and commitments of moral thought, talk, and practice.” Geoff Sayre-McCord, *Metaethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Aug. 29, 2008), <http://plato.stanford.edu/archives/fall2008/entries/metaethics>; see also Stephen Darwall, Allan Gibbard & Peter Railton, *Toward Fin de siècle Ethics: Some Trends*, in MORAL DISCOURSE AND PRACTICE: SOME PHILOSOPHICAL APPROACHES 3, 7 (1997) (“We use this term broadly, not assuming that one can avoid normative commitments in doing metaethics and not restricting metaethics to the analysis of moral language; we include under ‘metaethics’ studies of the justification and justifiability of ethical claims as well as their meaning, and also the metaphysics and epistemology of morals, and like matters.”).
 7. H.L.A. Hart, for example, called international law a “doubtful case” of a legal system. H.L.A. HART, *THE CONCEPT OF LAW* 3 (2d ed. 1994) (“Primitive law and international law are the foremost of such doubtful cases, and it is notorious that many find that there are reasons, though usually not conclusive ones, for denying the propriety of the now conventional use of the word ‘law’ in these cases. The existence of these questionable or challengeable cases has indeed given rise to a prolonged and somewhat sterile controversy”); see also Hathaway & Shapiro, *supra* note 1, at 255 (quoting different contemporary international scholars deeming the question whether international law is law as “futile,” “tired,” and a “chestnut of a question”).
 8. H.L.A. Hart thus contrasts the “questionable” cases of international law and primitive law with the “clear standard cases constituted by the legal systems of modern states, which no one in his senses doubts are legal systems.” HART, *supra* note 7, at 3.

been at issue between sincere disputants to that question. Examinations of this kind can help clarify the factors needed to produce an affirmative answer, not only in the case of domestic but also in the case of international law.

The metaethical discussions in Part I will isolate one distinctive dimension of the question whether international law is law, which is an inherently normative dimension because it relates to the perceived *obligatoriness* of law. I will argue that once we understand this normative dimension to the question, along with the specific type of practical authority that is at issue between its sincere disputants, we will see that we are committed to a particular justificatory strategy for evaluating the content of international law. I will call this strategy a “practical authority-based” strategy, because it begins with a characterization of the specific type of practical authority that is at issue and then proceeds to inquire into the circumstances in which a claim to that special kind of authority might be true or warranted. Because I will be deriving these conclusions from very general features of the perceived authority of law, the strategy I describe should be understood as applying to the evaluation of law in any form.

A close examination of these issues will therefore show why it may be appropriate to import certain familiar forms of evaluation from one domain where law has uncontroversially emerged (namely, the domestic arena) to another where it appears to be emerging (namely, the international arena). The examination will also place important restrictions on the precise forms of evaluation that should be deemed appropriate in both cases and will caution against the uncritical application of consequentialist standards to evaluate international law. Because important normative consequences like these can follow from the very *meaning* of the question whether international law is law, my arguments in Part I will establish a distinctive and underappreciated reason for treating this question as vital to the contemporary study of international law.

In Part II, I will then turn from the normative to the purely descriptive dimension of the question whether international law is law. With regard to this second issue, I will argue that *Outcasting* should be understood as giving us the critical resources needed to assess—as a matter of purely descriptive fact—how and why international law has recently been emerging as a genuine system of *de facto* legal obligations, which therefore invites the particular form of evaluation outlined in Part I. To support these claims, I will, however, need to recast some of Hathaway and Shapiro’s recent work and embed some of their main findings within a more general (but purely naturalistic) account of the

origins and evolutionary stability conditions for an emergent sense of obligation in us.⁹

Because many of my arguments in Part II will relate to the purely descriptive question whether international law is law, the correct answer to this question cannot directly address the normative question isolated in Part I.¹⁰ These two dimensions to the question need to be distinguished, and my arguments in Parts I and II should be understood as seeking to offer distinct contributions to two distinct issues.

Part III will nevertheless end by combining these two sets of contributions to suggest that there is an important *indirect* relationship between the two

9. For a similar account, which I will extend here to the international context, see Kar, *Deep Structure*, *supra* note 5.

10. The most famous discussion of this issue arises in David Hume's work in *A Treatise of Human Nature*. Hume famously says:

In every system of morality, which I have hitherto met with, I have always remark'd, that the author proceeds for some time in the ordinary ways of reasoning, and establishes the being of a God, or makes observations concerning human affairs; when all of a sudden I am surpriz'd to find, that instead of the usual copulations of propositions, *is*, and *is not*, I meet with no proposition that is not connected with an *ought*, or an *ought not*. This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, 'tis necessary that it shou'd be observ'd and explain'd; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation can be a deduction from others, which are entirely different from it.

DAVID HUME, *A TREATISE OF HUMAN NATURE* 469 (L.A. Selby-Biggie ed., P.H. Nidditch ed. 2d ed., Oxford Univ. Press 2d ed. 1978) (1739). Hume's discussion in this passage has sometimes been interpreted as suggesting that one "cannot derive an 'ought' from an 'is.'" John Searle, *How To Derive an "Ought" from an "Is,"* 73 *PHIL. REV.* 43, 43 (1974) ("This thesis, . . . while not as clear as it might be, is at least clear in broad outline: there is a class of statements of facts which is logically distinct from a class of statements of value. . . . Put in more contemporary terminology, no set of *descriptive* statements can entail an *evaluative* statement without the addition of at least one evaluative premise. To believe otherwise is to commit what has been called the naturalistic fallacy."). But I think it is better to read Hume, in part, simply as describing a fact about human reasoning—namely, that we often begin with purely descriptive statements and then infer normative conclusions. The passage should also be read as pointing out—correctly—that this inference cannot be secured by logic alone, but I do not read Hume as foreclosing the possibility that there may be other methods of validating these inferences. I am therefore inclined to read Hume narrowly, as noting that one cannot *logically* deduce a normative conclusion from a purely descriptive statement of facts, while leaving open the possibility of more sophisticated ways to relate the relationships between certain classes of normative and descriptive statements. Indeed, while I say in the main text that the questions in Part II cannot "directly" address the questions in Part I, I also later develop a number of more complex relations between these two classes of statements that are—in my view—very important to understand.

questions. When law exists in a group (as matter of purely descriptive fact), that group should be understood as having emerged from a distinctive type of sociocultural process with a changed set of practical attitudes and perceptions, which not only animate a distinctive and characteristically legal form of life (along with the specific social institutions needed to maintain that new legal order in equilibrium) but also do so by inclining most of the relevant group members to perceive their legal system as obligatory.¹¹ Whether enough people share the right kind of perceptions and practical attitudes to stabilize a *de facto* legal order will therefore be one question – the answer to which will depend on where these people are in the relevant processes of transformation, as a matter of purely descriptive fact. But once these people have emerged from such a process, the question whether they are *right* about their normative perceptions will be a separate question – the answer to which will depend on whether the content of their emergent law can be justified in the special manners outlined in Part I.

The upshot will be that we need to understand the question whether international law is law as having several distinct layers, which can nevertheless interact with one another in ways that are complex and potentially scaffolding. In the final analysis, whether international law is law – in the fullest sense of the word – will therefore depend largely on *us*, and on whether we are able to develop and maintain the right kinds of reciprocally reinforcing institutions and practical attitudes. These are questions that should draw the attention of international legal scholarship, but they have not yet done so in the precise form in which I will be presenting them.

Although it may not yet be obvious from this roadmap, my thoughts on these topics have been significantly prompted by Hathaway and Shapiro's recent work in *Outcasting*, which, in my view, puts its finger on a phenomenon that should fundamentally shift our understanding of international law and how it needs to be studied. Indeed, this Essay should be read alongside *Outcasting* because it not only draws upon some of the central claims made in that article but also argues for an even broader set of implications that should follow – thereby clarifying its larger importance. Before entering into my main line of argument, I therefore want to introduce three main aspects of the *Outcasting* article, which I will be relying on as background in many of my discussions. With regard to each aspect, I will also highlight several important but subtle differences between Hathaway and Shapiro's project in *Outcasting*

11. See generally Kar, *Deep Structure*, *supra* note 5, at 902-03 (describing the highly characteristic form of human social life that is animated by a sense of obligation).

and mine here—both to prevent confusion and to clarify what is novel about the contributions of this Essay.

The first aspect of the Hathaway-Shapiro project that I want to highlight relates to their views about the relevant subject matter for international legal scholarship. In *Outcasting*, Hathaway and Shapiro are interested in establishing that the philosophical question whether international law is law has continued vitality and importance for the field¹²—and I obviously share that goal here. This question has, however, recently gone fallow,¹³ and many international legal scholars currently take the primary organizing principle of their field to be the more instrumental (or causal-explanatory) question of how well international law does in influencing state behavior.¹⁴ In trying to revive the philosophical question, Hathaway, Shapiro, and I are therefore all bucking a significant trend. Hathaway and Shapiro are, however, primarily interested (at least in *Outcasting*) in bringing attention to a specific dimension of the philosophical question: whether international law fits the correct but purely descriptive philosophical account of what law is. This is an important dimension to the question, and—as noted above—I will seek to offer several novel contributions to its resolution in Part II. Still, I will be using Part I to highlight a different dimension to the philosophical question, which is neglected even in *Outcasting*, because—as indicated above—it is *normative*.

When I use the term “normative” in reference to this question, I mean two things: first, that some disputants to the underlying question take its resolution to have a specific class of practical consequences, which are characteristic of obligation; and second, that a proper understanding of the nature of these practical consequences will invite a specific method for evaluating the content of international law—as will be described in Part I. In the course of making these arguments, I will also explain why this shift will not require abandonment of the basic legal positivist project, which seeks to articulate a correct but purely descriptive account of what law is.¹⁵ Indeed, part

12. See Hathaway & Shapiro, *supra* note 1, at 256-57.

13. See *id.* at 255-57.

14. *Id.* at 255 (noting that a number of international law scholars have recently agreed that the philosophical question whether international law is law is sterile and that “the more interesting question—indeed, the proper organizing question of the field—is, ‘how well does international law do in its effort to influence state behavior’” (quoting Andrew T. Guzman, *Rethinking International Law as Law*, 103 AM. SOC’Y INT’L L. PROC. 155, 156 (2009))).

15. John Austin has famously described legal positivism: “The *existence* of law is one thing: its *merits* and *demerits* another. Whether a law *be* is one inquiry: whether it *ought* to be, or whether it agree with a given or assumed test, is another and a distinct inquiry.” JOHN AUSTIN, *THE PROVIDENCE OF JURISPRUDENCE DETERMINED* 258 (London, John Murray

of my larger argument will be that features of the correct descriptive account of what law is will commit us to a specific practical authority-based method of evaluating the content of international law.¹⁶

The second aspect of the Hathaway-Shapiro project that I want to highlight as background relates to the question of what is the correct philosophical but purely descriptive account of law. On this issue, Hathaway and Shapiro argue against what they call the “Modern State Conception” of law, which maintains that “a regime counts as a legal one only if it seeks to affect behavior in the manner that modern states do: it must enjoy a monopoly over the use of physical force and employ this monopoly to enforce its rules.”¹⁷ The Modern State Conception thus requires legal systems to “(1) possess *internal* enforcement mechanisms (2) that use the threat and exercise of *physical force*.”¹⁸ Drawing on a number of examples from medieval Icelandic law, canon law, and our current systems of cooperative federalism,¹⁹ Hathaway and Shapiro observe that some social systems, which intuitively appear to be legal systems, have enforced their rules through the use of “outcasting,” which has sometimes been externalized instead. The authors define outcasting as the denial of benefits of social cooperation or membership to disobedient parties; and, unlike physical sanctioning, it is nonviolent.²⁰ When outcasting is externalized, it is carried out by entities that are not parts of a relevant legal bureaucracy.²¹ Based on their examples of outcasting in phenomena that they intuitively take to be law, Hathaway and Shapiro’s suggestion is that we should understand certain instances of outcasting (whether internalized or externalized) in the international arena as playing the same functional role as internalized physical sanctioning in the domestic arena: both are equally capable of supplying the conditions needed for there to be a *de facto* system of

1832). H.L.A. Hart has similarly described his version of legal positivism as “*descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law.” HART, *supra* note 7, at 240. Scott Shapiro has described legal positivism’s central claim a bit differently. He has said that legal positivists assert that “all legal facts are ultimately determined by social facts alone,” and that “claims about the existence or content of a legal system must ultimately be established by referring to what people think, intend, claim, say, or do.” SCOTT J. SHAPIRO, *LEGALITY* 27 (2011).

16. Jules Coleman has recently argued for a similar proposition. Jules Coleman, *The Architecture of Jurisprudence*, 121 *YALE L.J.* 2, 41-53 (2011).
17. Hathaway & Shapiro, *supra* note 1, at 268-69.
18. *Id.* at 269.
19. *See id.* at 284-302.
20. *Id.* at 258.
21. *Id.*

law.²² It follows that we should reject the Modern State Conception of law and appreciate that international law is (or is at least emerging as) a genuine system of de facto law.²³

With respect to this second aspect of *Outcasting*, I agree with Hathaway and Shapiro's main conclusions but will be offering a different—and, in my view, much more secure—foundation for them. Rather than relying on intuitions about whether particular regimes are or are not genuine instances of law, which—as this method is presented in *Outcasting*—are best understood as resting on contestable conceptual judgments about the nature of law, I will be arguing from a general (and purely empirical) account of the origins, functions, and evolutionary stability conditions for an emergent sense of obligation in us. I have developed this account in *The Deep Structure of Law and Morality*,²⁴ and the account is relevant to the existence of law because legal systems are (as a matter of purely descriptive fact) animated in large part by a shared sense of obligation. In this Essay, I will extend my account of obligation from *The Deep Structure* to show how both outcasting and physical sanctioning can, in the appropriate circumstances, provide the relevant evolutionary stability conditions for an emergent sense of obligation in us²⁵ and thereby support the emergence of either domestic or international legal systems. Based on this extension, I will argue that the existence of pervasive practices of outcasting in the international arena should be understood as providing evidential (but *not* conceptual or merely intuitive) support for the existence of an emergent system of international law. Not only will this form of argumentation provide a firmer foundation for some of Hathaway and Shapiro's intuitions, but it will also lead to a richer and more accurate understanding of the relationship between outcasting and the emergence of international law.

The third and final aspect of the Hathaway-Shapiro project that I want to introduce as background relates to the purely descriptive (but nonjurisprudential) aspects of *Outcasting*. These are the parts of the article that aim to describe the current state of our international legal institutions, but without necessarily taking a stand on whether they amount to genuine instances of law.²⁶ On this third issue, Hathaway and Shapiro argue that outcasting is now the most common and pervasive enforcement mechanism

22. *Id.* at 257-58.

23. *Id.* at 258.

24. Kar, *Deep Structure*, *supra* note 5.

25. *See id.* at 909-19.

26. *See* Hathaway & Shapiro, *supra* note 1, at 308-44.

employed in the international arena, such that we cannot really understand international law without understanding outcasting: “What we see is that, time and again, international legal institutions use others (usually states) to enforce their rules, and they typically deploy outcasting—denying individuals the benefits of social cooperation—rather than physical force.”²⁷

In my view, this third part of *Outcasting* is a large part of what makes the article a potential game changer: by developing a comprehensive and detailed picture of the international landscape, which identifies the many and varied ways that outcasting currently supports a broad range of international legal standards (and in ways that are at least highly reminiscent of a functioning legal regime), this work has the power to change the way that we see and study international law. With regard to this final aspect of the Hathaway-Shapiro project, I will suggest that we nevertheless need to expand our descriptive focus just a bit if we want to understand the true relationship between outcasting and the recent emergence of international law. In particular—and for reasons that I will explain more fully in Part II below—we need to remember that the relative benefits of international cooperation, when compared to its absence, have been increasing at an almost exponential rate over the last few centuries, due in large part to the richer sets of developments described at the very beginning of this Essay. As a result, these relative benefits have become qualitatively, and not just quantitatively, different from any known in the prior course of human history or prehistory.

Changes like this do not come about often, but an analogous change did once take place (albeit on a smaller scale) when we first transitioned from hunter-gatherer forms of life to more sedentary living,²⁸ with much higher population densities and much larger forms of social cooperation, shortly after the rise of agriculture.²⁹ These earlier changes vastly increased the relative

27. *Id.* at 302.

28. See, e.g., Lee & Daly, *supra* note 2, at 1 (noting that “virtually all humanity lived as hunters and gatherers” until about 12,000 years ago); Mark Nesbitt, *Agriculture*, in *THE OXFORD COMPANION TO ARCHAEOLOGY* 19, 19–20 (Brian M. Fagan et al. eds., 1996) (“Ethnographic and archaeological evidence shows that the appearance of agricultural systems is usually linked to the appearance of sedentary villages. . . . [G]enerally . . . the introduction of agriculture is linked to an increase in population and in the number and size of sedentary villages.”).

29. See, e.g., WILLIAM H. MCNEILL, *THE RISE OF THE WEST: A HISTORY OF THE HUMAN COMMUNITY* 6 (photo. reprint 1991) (1963) (“On the analogy of hunting peoples who have survived to the present, it is likely that Paleolithic men lived in small groups of not more than twenty to sixty persons. Such communities may well have been migratory, returning to their caves or other fixed shelter for only part of the year.”); Lee & Daly, *supra* note 2, at 3

benefits of certain newly emerging forms of social cooperation, which went well beyond the confines of the hunter-gatherer band and which involved problems of scale that we had never yet successfully managed in our natural history as a species.³⁰ These changes were also critical for the slow emergence of the first domestic legal systems within that small handful of cultural traditions that pioneered this transition in the ancient world. But the arrow of causation worked in both directions in that earlier transformation: these cultural traditions should be understood as having supported the emergence of a distinctive sense of legal obligation in us in large part *because and insofar as* this sense was well adapted to resolve a specific class of cooperative problems that our native moral senses apparently could not on their own.³¹

Much as in that earlier case, I will be suggesting that the more recent set of (radical and unprecedented) changes that we have been witnessing on the world scene have been proving critical for the emergence of international law. And much as in that earlier case, I will be suggesting that the emergence of international law has been playing its own critical and reciprocal causal role in supporting a slow revolution in contemporary forms of human social life. By expanding our descriptive focus in this final way, we will therefore be able to understand better why outcasting has begun to play such an important role in supporting the emergence of international law, even though it never has (nor could have) played that role for most of human history and prehistory. We will also be able to obtain a better understanding of why—as I like to put it—the once intractable philosophical question of whether international law is law is beginning to yield a clearer affirmative answer.

This is not the time to ignore the question whether international law is law, but rather to revive it, in all of its many and scaffolding dimensions.

(“The basic unit of social organization of most (but not all) hunting and gathering peoples is the *band*, a small-scale nomadic group of fifteen to fifty people related by kinship.”).

30. See Brian Hayden, *A New Overview of Domestication*, in *LAST HUNTERS, FIRST FARMERS: NEW PERSPECTIVES ON THE PREHISTORIC TRANSITION TO AGRICULTURE* 273, 277-81 (T. Douglas Price & Anne Birgitte Gebauer eds., 1995) (discussing the relationship between domestication and agriculture); Kennett & Winterhalder, *supra* note 4, at 1-2 (“Hunter-gatherers live at roughly 0.1/km²; rice agriculturalists in Java at 1,000/ km²; a ten-thousand-fold difference. There were an estimated ten million humans in the world on the eve of food production; now over six billion people live on this planet, an increase of 600% in only ten millennia.” (citation omitted)).
31. See Kar, *Deep Structure*, *supra* note 5, at 940-41.

I. ON THE NORMATIVE MEANING OF THE QUESTION OF WHETHER INTERNATIONAL LAW IS LAW

Let us begin by taking a closer look at the question whether international law is law. Although many people in the field of international legal scholarship have expressed frustration with this question,³² I believe that there is a particular aspect of it, which—due in large part to the recent set of historical developments discussed at the very start of this Essay—has gained critical importance for our understanding of international law and how it should be evaluated. Hathaway and Shapiro also believe that “whether international law is law matters a great deal,”³³ but their explanation of this contention does not yet touch on the particular aspect of the question that I have in mind. My goal in this first Part is thus to isolate this special dimension to the question and explain why it is so important that we give it more sustained attention.

I will be arguing that there are, in effect, implicitly normative dimensions to this age-old philosophical question, which are inherent in its very *meaning*; and, moreover, that once these normative dimensions are better understood, we will see that sincere disputants to this question take a specific class of practical implications to follow from its resolution. An affirmative answer to the underlying question will therefore commit us to a specific method of evaluating international law. As noted above, I will call this method a “practical authority-based” method of evaluation, because it begins with a characterization of the special type of practical authority that is at issue and then proceeds to examine the conditions under which any claim to this special type of practical authority might be warranted or true. Use of this method will show why it is appropriate to import certain familiar forms of evaluation from the domestic to the international legal context, and it will place important constraints on the forms of evaluation that are appropriate in both contexts. It will also warn against the uncritical application of consequentialist standards of evaluation to international law.

If features of the meaning of the philosophical question whether international law is law can have important normative consequences like these, then international legal scholarship needs to begin engaging more directly with those literatures in normative theory that undertake practical authority-based investigations. It cannot remain so narrowly focused on descriptive and causal-explanatory issues, as is its typical tendency today.

32. Hathaway & Shapiro, *supra* note 1, at 255.

33. *Id.*

A. Moore's Insight

As I mentioned in the Introduction, I will begin by drawing on contemporary devices in metaethics to isolate a critical dimension to the question whether international law is law. The term “metaethics” refers to any investigation into the meaning of concepts or questions with a normative dimension,³⁴ and modern discussions in metaethics trace their roots back to G.E. Moore’s influential investigations, at the start of the twentieth century, into the concept “good.”³⁵ In articulating his now famous “open question argument,” Moore observed that, for any proposed naturalistic definition³⁶ of “good” that one might entertain, we can meaningfully ask whether those states of affairs that fit this naturalistic definition really *are good*.³⁷ For example, if one were to propose that a particular state of affairs is “good” for an individual just in case it maximally conduces to her informed preference satisfaction, then we might still meaningfully ask: if this person were to get her informed preferences maximally satisfied, would this really always be *good* for her? The right answer to this question may or may not be yes, but—and this was Moore’s point—the question itself appears pregnant with meaning. This fact should appear strange on its face because, if the naturalistic definition under discussion were in fact to capture the meaning of “good,” then we should be able to replace the term “good” with the definition, in which case we would have really been asking the following question: if this person were to get her informed preferences maximally satisfied, would this person really get her informed preferences maximally satisfied? This latter question appears neither open nor pregnant with meaning: it is instead both trivial and closed. We can answer it in the affirmative (with, perhaps, a yawn), but we will have learned nothing of substance in the process. Our initial question, by contrast, not only appears meaningful but also raises a question of obvious human importance.

34. See, e.g., Darwall et al., *supra* note 6, at 7 (describing the term “metaethics” as centrally including “the analysis of moral language,” as well as “studies of the justification and justifiability of ethical claims as well as their meaning, and also the metaphysics and epistemology of morals, and like matters”).

35. GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* § 13 (1903); see also Darwall et al., *supra* note 6, at 3 (introducing the topic of metaethics as involving a “controversy initiated by G.E. Moore’s *Principia Ethica*”).

36. By a “naturalistic” definition, I mean a definition that does not employ any normative or evaluative terminology and that instead aims to identify some type of phenomenon in the natural world.

37. MOORE, *supra* note 35, § 13.

Moore—rightly in my view—took the openness of questions like the first one to imply that the meaning of “good” cannot be reduced to any purely naturalistic definition,³⁸ and others have subsequently extended open question type arguments to a broad range of other normative concepts.³⁹ Although there is still a lively debate over what further consequences to draw from Moore’s observations (which I will discuss below), the accumulated evidence now suggests both that normative concepts tend to differ from purely descriptive concepts in systematic ways and that we can discern some of these differences with open question type tests.⁴⁰ Contemporary metaethics has, in fact, been one of the most productive and flourishing fields in philosophy within the last fifty or so years, and we have made enormous advances in our understanding of normative concepts over the last century.⁴¹

B. Using Moore’s Insight To Isolate a Normative Dimension to the International Law Question

Let us therefore see if we can extend the underlying insights of open question arguments to the legal context. Here, I want to move from the concept “good” to the concept “law” and try to use certain Moorean insights to isolate a distinctive dimension to the question whether international law is law.

I begin by asking the reader to imagine two good citizens in a just domestic legal regime—Pro and Con—who accept all of the nonmoral and nonevaluative facts identified by Hathaway and Shapiro, including all of the examples of outcasting and all of their descriptions of how outcasting functions to enforce various international legal standards. In doing so, we should recognize that both outcasting and physical sanctioning can be defined in purely naturalistic terms and that the purely descriptive (but nonjurisprudential) aspects of *Outcasting* can therefore all be stated in purely naturalistic terms. We should also recognize the point of this exercise. I am not suggesting that we accept these descriptions as true because they necessarily are true—although I do, as noted earlier, believe them to be largely true. Rather, my point is to isolate a distinctive type of question that we might pursue in reference to a world so

38. *See id.*

39. *See* Darwall et al., *supra* note 6, at 4 (noting that open question arguments have “bulked . . . large in ethics” and that the openness of Moore’s questions has turned out to apply not just to “good” but to a range of other normative concepts).

40. *See id.*

41. *Id.* at 5-35 (describing the period of “Great Expansion” in metaethics as beginning in the 1950s and then describing the rich set of metaethical debates that have begun to develop subsequently).

described. Let us therefore imagine, in addition, that Pro and Con know and agree on all of the other purely descriptive (but nonjurisprudential) facts about their world.

Next, I ask the reader to imagine Pro asserting, and Con denying, that these facts about the international landscape amount to genuine instances of *law*. My threshold contention is that we can make sense of this debate in precisely the same way that we can make sense of open questions that employ concepts that are uncontroversially normative in nature. When we do this, we are in effect taking Pro and Con to be defending different answers to a single question, over which they substantively disagree. It is the perceived meaningfulness of this disagreement (to both us and them), along with its relation to a single question, which establishes the openness of the question in Moore's sense. Our task will thus be to see if we can assign an interpretation to this question, which illuminates the type of issue that Pro and Con might be debating.

Given my framing of this thought experiment, it should be clear that we cannot understand Pro and Con as engaging in a purely (or even in a partially) factual debate about any state of the world, because both parties are correctly assuming the very same facts. It should also be clear that neither proponents of the Modern State Conception of law nor Hathaway and Shapiro can hope to settle this kind of dispute by simply defining the term "law" to favor their preferred naturalistic categorization. To do so would be to render the debate merely semantic and thus trivial and not open. Many scholars who are frustrated with the question of whether international law is law may be frustrated because they cannot discern any further meaningful question that might be in play. Still, an equally important benefit of thought experiments like these is that they can help us abstract away from a range of other questions that may bear on whether international law is law but are more clearly semantic, futile, or empirical.

So what should we make of the openness of our remaining question? Moore himself thought that, because concepts like "good" cannot be defined in purely naturalistic terms, they must be defined in terms of nonnatural properties⁴²—which can seem downright mysterious.⁴³ One certainly has the right to ask of such properties: where might they exist (if not in the natural world) and how might we ever know anything about them or settle any

42. MOORE, *supra* note 35, § 13.

43. J.L. Mackie has famously charged that moral properties, so construed, would have to be "queer" properties. J.L. MACKIE, *ETHICS: INVENTING RIGHT AND WRONG* 38 (1977).

debates over them?⁴⁴ In any event, these additional conclusions that Moore tried to draw from his use of open question arguments have been roundly criticized in the subsequent literature as relying on certain outdated assumptions about conceptual transparency and analytic truth, among other things.⁴⁵ The intuitiveness of his basic observations has nevertheless persisted, and so an important task in contemporary metaethics has been to try to provide a more cogent explanation of the openness of questions that contain normative concepts.⁴⁶ In what follows, I will describe the explanation that I favor and then apply it to our question about international law.

C. Obligation (with Its Special Practical Authority) as the Driving Force

The explanation that I favor is one that has been gaining increasing support among many of the world's leading metaethicists: the relevant normative concepts have a conceptual (and therefore necessary) link to the guidance of action.⁴⁷ This is a link that cannot be logically secured by any purely naturalistic statement of facts, because it is a practical link, which is conceptually tied to reasons for action, rather than a theoretical link, which articulates a necessary relation between two sets of facts about the natural world.⁴⁸ In offering this last explanation, I am using the terms "theoretical"

44. For the classical statement of these arguments, see *id.*; and see also GILBERT HARMAN, *THE NATURE OF MORALITY* 3-10 (1977), which argues that moral properties, so construed, cannot be real because they cannot play any causal role in producing our experiences or beliefs.

45. See Darwall et al., *supra* note 6, at 3 ("Moore's accident-prone deployment of his famous 'open question argument' in defending his claims [that good cannot be defined in naturalistic or metaphysical terms] made appeal to a now defunct intuitionistic Platonism, and involved assumptions about the transparency of concepts and obviousness of analytic truth that were seen (eventually, by Moore himself) to lead inescapably to the 'paradox of analysis.'").

46. *Id.* at 4 (arguing that, in response to the phenomena that Moore has identified, "one should articulate a philosophical explanation of why" these questions might appear open in Moore's sense).

47. *E.g.*, *id.* ("Here is one such explanation. Attributions of goodness appear to have a conceptual link with the guidance of action, a link exploited whenever we gloss the open question 'Is *P* really good?' as 'Is it clear that, other things equal, we really ought to, or must, devote ourselves to bringing about *P*?' Our confidence that the openness of the open question does not depend upon any error or oversight may stem from our seeming ability to imagine, for any naturalistic property *R*, clear-headed beings who would fail to find appropriate reason or motive to action in the mere fact that *R* obtains (or is seen to be in the offing).").

48. *Id.* ("Given this imaginative possibility, it has not been *logically* secured that *P* is action-guiding (even if, as a matter of fact, we all do find *R* psychologically compelling). And this

and “practical” in some of their most common philosophical senses, under which a claim will be called “theoretical” insofar as purports to state some fact about the world,⁴⁹ and “practical” insofar as it purports to identify some reason for action.⁵⁰ I am also relying on the insight that no mere statement of facts about the world (or about what is, as a matter of purely descriptive fact) can logically entail a conclusion about what ought to be (or about what one ought to do, as a matter of practical reason).⁵¹ If—as I am suggesting—certain normative concepts are necessarily tied to reasons for action, and if reasons for action cannot be logically derived from any bald statement of natural fact, then we should be unsurprised that our attempts to define these normative concepts in purely naturalistic terms have failed to capture important aspects of their meaning.

By looking at things from this angle, we can now see how the debate between Pro and Con might have just such a normative dimension to it. As H.L.A. Hart has famously observed, “The most prominent general feature of law at all times and places is that its existence means that certain kinds of human conduct are no longer optional, but in *some* sense obligatory.”⁵² One perfectly intelligible issue that Pro and Con might be debating is thus whether the international law that exists in their world is genuinely obligatory in the way that they, as good citizens in a just domestic legal system, take their domestic law to be. But what sense is this? When I stipulate that Pro and Con are good citizens in a just domestic legal regime, I mean to suggest that they accept the authority of their domestic law. In doing so, they also take their domestic law to give rise to obligations that are genuine, in two related senses. First, they take its obligations to have a conceptual (and hence necessary) link to the guidance of action. It is this fact that explains the openness of their underlying debate. Second, they take their domestic legal obligations to have a

absence of a logical or conceptual link to action shows us exactly where there is room to ask, intelligibly, whether *R* really is good.” (footnote omitted)).

49. See R. Jay Wallace, *Practical Reason*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Nov. 6, 2008), <http://plato.stanford.edu/archives/sum2009/practical-reason> (distinguishing theoretical from practical reason and suggesting that theoretical reflection reasons about “questions of explanation and prediction”).

50. *Id.* (“Practical reason defines a distinctive standpoint of reflection. When agents deliberate about action, they think about themselves and their situation in characteristic ways. . . . Practical reason . . . takes a distinctively normative question as its starting point. It typically asks, of a set of alternatives for action none of which has yet been performed, what one ought to do, or what it would be best to do. It is thus concerned not with matters of fact and their explanation, but with matters of value, of what it would be desirable to do.”).

51. See *supra* note 10.

52. HART, *supra* note 7, at 6.

reason-giving force that is independent of its sanctions. This second point actually follows from the first, once the following fact is acknowledged: legal sanctions depend for their reason-giving force on the contingent (and thus nonnecessary) desires of most individuals to avoid the relevant sanctions. Hence, the reason-giving force of legal sanctions is *not* conceptually tied to the existence of legal obligations in the same way that the reasons debated by Pro and Con are. Whatever disputes Pro and Con may have over the status of international law, they both take their domestic legal obligations to be intrinsically motivating.

Returning to the discussion at hand, Pro and Con might thus be construed as meaningfully debating whether to view their world as containing genuine international legal obligations in the above sense. The alternative—which Con favors—would be to view their world as containing nothing more than a complex set of institutions at the international level, which influence various states (or other relevant actors) with the threat of outcasting. Put simply, Pro and Con want to know whether their world contains international law—or only international politics.

In construing the debate between Pro and Con in this way for now, I should emphasize that I am *not* claiming that this is the only meaningful issue that they might be pursuing when they ask if their world contains international law. As an initial matter, I have suggested that I will be shifting gears in Part II to focus on a distinct and purely descriptive dimension that their debate might take on. Hence, it should be clear that I do not want to foreclose further inquiries of that kind. Moreover, obligations can arise not only in law but also in many other areas of our lives, like morality, religion, family, work, friendship, and even love. By focusing on this particular aspect of the dispute between Pro and Con, I am therefore intentionally asking the reader to focus on one aspect of the question whether international law is law while bracketing others. My point is just that we can construe Pro and Con as meaningfully querying the obligatory status of international law but at a level of generality that does not yet distinguish international legal obligations from many other important forms of obligation.

D. Some Differences Between the Practical Authority of the Good and the Obligatory

We are now focusing on a particular aspect of the question whether international law is law, by construing Pro and Con as debating whether their world contains international legal standards that are genuinely obligatory. I have, moreover, chosen to focus on this particular aspect of the debate between Pro and Con, at this particular level of generality, for a specific reason. In what

follows, I will argue that obligations purport to have a special form of practical authority to them, which is different in kind from the practical authority that facts about the human good claim on their own. Hence, even if we were to know all of the normative facts about the human good, and even if we were to know all of the purely descriptive facts about the world (including all of the causal-explanatory facts about how best to produce any purportedly good states of affairs), we would still not yet know the appropriate relationship between this combined set of facts and the forms of justification most relevant to international law.

We might—of course—simply *assume* that the right relationship must be one of purely causal production, with each person's good counting equally, as consequentialist theorists typically suggest.⁵³ By “consequentialist” I mean a form of justification that begins with an account of the good, which it construes as a property that different states of affairs can either have or lack, and then proposes that we evaluate the law solely in terms of its capacity to produce these good states of affairs (or minimize bad ones). The questionable status of international law can make it difficult to know what standards are most applicable to its evaluation, but a number of international legal scholars have begun to assume the applicability of consequentialist standards.⁵⁴ Without more, however, this proposition is nothing more than an assumption, because it cannot be logically derived from any purely descriptive statement of facts about the world. Nor can it be derived (at least in any straightforward or automatic way) from a complete understanding of all of the normative facts about the human good, if—as I will be suggesting in what follows—facts about the good purport to have a fundamentally different form of practical authority to them than do facts about obligations, and if—as I will also be suggesting in what follows—the special practical authority of obligations cannot be derived merely from considerations of the human good along with the means for its production. Indeed, I will be suggesting that the special practical authority of

53. See generally Walter Sinnott-Armstrong, *Consequentialism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 27, 2011), <http://plato.stanford.edu/archives/win2011/consequentialism>.

54. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that international law is simply the product of nation states pursuing their self interest on the international stage and that international law creates no obligations apart from those that arise from the pursuit of self-interest); Eugene Kontorovich, *The Inefficiency of Universal Jurisdiction*, 2008 U. ILL. L. REV. 389 (arguing against universal jurisdiction on consequentialist grounds and instead using efficiency-based analysis); Jide Nzelibe, *The Case Against Reforming the WTO Enforcement Mechanism*, 2008 U. ILL. L. REV. 319 (employing consequentialist reasoning, in the form of cost-benefit analysis, to produce normative recommendations concerning the WTO's enforcement mechanism).

obligations ultimately poses a series of challenges to direct application of consequentialist standards to international law.

Let us therefore take a closer look at some of the different practical consequences that we typically take to follow from judgments that employ the concepts “good” and “obligation,” respectively. When someone sincerely believes that something is good, it is most natural to view this person as believing that there are ordinary reasons—all other things being equal—to bring about the relevant state of affairs.⁵⁵ This person will also typically view these reasons as having what philosophers call an “agent-neutral” form of practical authority.⁵⁶ A reason is “agent-neutral”—in the relevant sense—if it arises from a standard that gives all agents the same aim.⁵⁷ To illustrate, consider the case of murder. If murder is an intrinsically bad state of affairs—as I assume that it is—then we all have reasons stemming from the badness of murder to prevent and minimize it. These reasons are, however, all of the same kind, and they purport to give us all the exact same fundamental aim (namely to prevent and minimize murder). Hence—as strange as it might sound—we can *all* sometimes have reasons *of this particular kind* to engage in murder ourselves if by doing so we could prevent others from murdering two or more people.⁵⁸ This follows from the badness of murder and—more specifically—from its agent-neutral form. A consequentialist theory of evaluation that begins with the correct assumption that murder is bad can therefore commit us to the conclusion that we ought to murder in these special circumstances.

But obligations purport to have a very different form of practical authority. When someone sincerely believes that he or she is under an obligation to do something, it is more natural to view this person as believing that he or she has what philosophers call an “agent-centered” reason to perform that action. A reason is “agent-centered” if—unlike an agent-neutral reason—it arises from a standard that can give different aims to different agents.⁵⁹ Returning to our example of murder, an obligation not to murder would typically be viewed as agent-centered in the present sense, because it tasks each person with the goal of ensuring that *he or she* not murder (even if sometimes by doing so he or she

55. For a good discussion of these features of our judgment about the good, see STEPHEN DARWALL, *THE SECOND PERSON STANDPOINT* 5-7, 126-30 (2006).

56. *Id.* at 5-6 & n.9.

57. See, e.g., DEREK PARFIT, *REASONS AND PERSONS* 54-55 (1986).

58. See, e.g., ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 73 (1993); PARFIT, *supra* note 57, at 54-55.

59. See, e.g., ANDERSON, *supra* note 58, at 73; PARFIT, *supra* note 57, at 54-55.

could prevent others from murdering two or more people).⁶⁰ But this means that an obligation not to murder will *not* give us reasons to murder in those special circumstances in which a consequentialist standard of action can. Considerations like these suggest that obligations cannot easily be grounded in consequentialist considerations alone.⁶¹

We also typically take obligations to have what philosophers call a “categorical” form of practical authority.⁶² This thought can be usefully broken down into three further ones: specifically, we take the authority of obligations (1) to arise independently of considerations of our own good; (2) to override, or exclude, a number of reasons that arise solely from consideration of our own good; and (3) to reflect a standard with some generality of application – if not to all humans then to all who fall within a certain describable class, or in certain describable circumstances.⁶³ To illustrate with the case of murder, we typically take the obligation not to murder (1) to arise from considerations that are not simply reducible to those of our own personal good and the means to its production – including any reasons that might arise from our desire to avoid sanctions; (2) to trump certain reasons to murder that might stem from considerations of personal good; and (3) to apply equally to all humans.

In fact, an obligation not to murder can constrain not only the pursuit of our personal good but also the pursuit of the human good impartially assessed. The reason for this is as follows: if an obligation not to murder has a form of practical authority that is agent-centered, then – for reasons already

60. See, e.g., SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* 80 (1994) (explaining that a theory will contain an agent-centered restriction if “there is some restriction S, such that it is at least sometimes permissible to violate S in circumstances where doing so would prevent a still greater number of equally weighty violations of S, and would have no other morally relevant consequences”).

61. See, e.g., Richard B. Brandt, *Toward a Credible Form of Utilitarianism*, in *MORALITY AND THE LANGUAGE OF CONDUCT* (Hector-Neri Castañeda & George Nakhnikian eds., 1965), reprinted in *CONSEQUENTIALISM* 207, 209 (Stephen Darwall ed., 2003) (describing the agent-centered features of obligation as a problem for act-consequentialist theories that seek to account for common sense perceptions of obligation); Stephen Darwall, *Agent-Centered Restrictions from the Inside Out*, in *DEONTOLOGY* 112, 112 (Stephen Darwall ed., 2003) (discussing how agent-centered restrictions give different agents different aims and seeking a nonconsequentialist foundation for them in practical reason).

62. DARWALL, *supra* note 55, at 26 (“The most familiar characterization of moral obligations’ purported normative force is in terms of their putatively *categorical* character, their purporting to be what Kant . . . called ‘categorical imperatives.’”).

63. See David Brink, *Kantian Rationalism: Inescapability, Authority and Supremacy*, in *ETHICS AND PRACTICAL REASON* 255, 255-67, 280-87 (Garrett Cullity & Berys Gaut eds., 1997). Brink labels these three characteristic features of moral obligation their “inescapability,” their “authority,” and their “supremacy.” *Id.* at 255.

discussed—its practical authority is different from, and can produce recommendations that are sometimes inconsistent with, the consequentialist reasons stemming from murder’s intrinsic badness. But we can now add that—insofar as the obligation not to murder is also categorical—it can also *override* some of the consequentialist reasons stemming from murder’s intrinsic badness by *requiring* each of us not to murder (even in some of those special circumstances where we might thereby prevent others from murdering two or more people). An obligation not to murder thus purports to give rise to some recommendations that are not only logically underivable from, but also logically inconsistent with, those that would stem from the intrinsic badness of murder along with the best means to minimize it.

In addition, even if facts about the human good were to generate deep and weighty reasons for us to pursue the human good impartially assessed (as I assume that they do), this would not mean that we have an *obligation* to pursue that end directly. This can be seen from the following fact: we typically take the direct and selfless pursuit of the human good, impartially assessed, to be something that is supererogatory (or something that goes above and beyond the call of duty).⁶⁴ Although actions of this kind can be morally admirable, and although people who perform them with consistency are often striking to the moral imagination, the moral worth of these actions is thus logically consistent with the absence of an obligation to act this way in our lives.⁶⁵

Finally, there is a specific interpersonal aspect of obligation that I want to highlight, because it reflects yet another dimension of its practical authority that cannot be reduced to facts about the human good and the means to its production. These are features that Stephen Darwall has recently referred to as their “second-personal” features: we typically take obligations to give some other person or group the standing to demand compliance, and—relatedly—we typically view breaches of obligations to warrant certain hostile or critical forms of reaction.⁶⁶ These can include informal reactions such as resentment and blame, but can also include more formal reactions such as physical sanctioning (or—to foreshadow later discussions—perhaps certain organized forms of outcasting).⁶⁷ The obligation not to murder, for example, does not just reflect

64. See David Heyd, *Supererogation*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Sept. 27, 2011), <http://plato.stanford.edu/entries/supererogation>.

65. See *id.*

66. See generally DARWALL, *supra* note 55, at 26–28.

67. The reactions I have in mind here all typically engage what Peter Strawson has called the “reactive attitudes,” which include emotions like resentment and guilt. P.F. Strawson, *Freedom and Resentment*, in *STUDIES IN THE PHILOSOPHY OF THOUGHT AND ACTION* 71, 76 (P.F. Strawson ed., 1968). Hence, there is an aspect of our perceptions of obligation that

the fact that murder is bad and give us reasons to minimize it: it also gives us each the standing to demand that others not murder us, and it warrants certain specific forms of hostile reaction—such as resentment, punishment, and blame—toward those who murder. The tie between the obligation not to murder and the warrant for reactions like these is conceptual, and therefore does not depend on the causal capacity of these reactions to minimize murder.

If by “obligation” we mean to focus on requirements with the special practical authority that legal obligations typically purport to have, then I do not take the above descriptions to be particularly controversial. The term “obligation” has, however, obviously been used in many different ways, by many different people, and in many different contexts.⁶⁸ In order to avoid semantic controversies, let me therefore just stipulate that, at least when Pro and Con dispute whether international law is law, *they* are disputing whether

involves reasons to feel certain emotions, which, in turn, tend to fund our reactions to various breaches.

68. In the case of morality, in particular, it is not uncommon to use the term “moral obligation” to refer to a somewhat broader class of phenomena, which need not give anyone the practical authority to demand anything of anyone else but which nevertheless place categorical demands on us to act. See, e.g., Christine M. Korsgaard, *Autonomy and the Second Person Within: A Commentary on Stephen Darwall’s The Second Person Standpoint*, 118 ETHICS 8, 8-16 (2007); see also T.M. SCANLON, WHAT WE OWE TO EACH OTHER 6-7 (2000) (noting that in ordinary speech, people sometimes use the term “moral criticism” to refer to a wide range of objections that some people raise to various forms of behavior or conduct, which are not breaches of what we owe to one another, and that the term “obligation” is also sometimes used more narrowly to refer to “requirements arising from specific actions or undertakings”). Theorists in the virtue ethics tradition have also rightly emphasized that morality (or at least ethics) includes a much broader range of normative phenomena, which cannot be reduced to the model of obligation. See, e.g., BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 174-75 (1985). For example, courage—like patience—may well be a virtue, even if there is no obligation to be courageous. There are, however, no meaningful analogues to these broader phenomena in the law: absent the law giving some person or group the standing to demand compliance, it will make little sense to say that a legal obligation exists. And while ethics is broad, many who have criticized modern moral theory for focusing too narrowly on the concept of obligation have suggested that, in doing so, modern moral theory has been focusing on the law-like dimensions to morality to the exclusion of the rest. For example, in *Modern Moral Philosophy*—which is one of the classic pieces in philosophy to wage this criticism—G.E.M. Anscombe complains that modern moral philosophy has become narrowly focused on a concept of obligation that represents a law conception of ethics. See G.E.M. Anscombe, *Modern Moral Philosophy*, 33 PHIL. 1, 5 (1958) (“The ordinary (and quite indispensable) terms ‘should,’ ‘needs,’ ‘ought,’ ‘must’—acquired this special sense by being equated in the relevant contexts with ‘is obliged,’ or ‘is bound,’ or ‘is required to,’ in the sense in which one can be obliged or bound by law, or something can be required by law.”). For obvious reasons, that same criticism cannot apply to the law, and I therefore take the domain of obligation that I have been describing to identify the place where morality and law most plausibly intersect.

their world contains international legal obligations with the special practical authority just described. They are—in other words—disputing whether the facts in their world give rise to reasons to comply with international law that are agent-centered, categorical, and second-personal.⁶⁹

E. The Normative Punchline: Practical Authority-Based Forms of Justification

And now for the normative punchline. Because of the specific type of practical authority that obligations purport to have, the appropriate way to evaluate international law will depend upon the correct outcome of a very specific set of debates within normative theory, which aim to articulate the conditions under which this particular form of practical authority might be real. I call investigations of this kind “practical authority-based” investigations, because they begin with the characterization of a specific form of practical authority (here, of obligation) and then use this characterization to derive restrictions on the truth conditions of any claims about reasons or requirements that are said to possess this special practical authority. If Pro is right, and Con is wrong, then their world must contain a set of international laws that can be justified using a practical authority-based form of justification of this kind. The relevant form of justification must also begin with the right characterization of the special practical authority that is at issue between Pro and Con. For reasons already discussed, this disputed form of practical authority is agent-centered, categorical, and second-personal.

Three important consequences follow. Consider, first, the fact that, because of the questionable status of international law, it has often proven difficult to determine the standards that are most applicable to its evaluation. The problem is, in fact, even broader. In *The Problem of Global Justice*, Thomas Nagel has put the broad point as follows:

We do not live in a just world. This may be the least controversial claim one could make in political theory. But it is much less clear what, if anything, justice on a world scale might mean, or what the hope for justice should lead us to want in the domain of international or global institutions, and in the policies of states that are in a position to affect the world order.

69. The facts of their world cannot give rise to such reasons by logic alone, for reasons already discussed. Pro and Con might nevertheless *take* the facts of their world to warrant different practical conclusions, thereby revealing their acceptance of different forms of normative implication, which cannot be reduced to logical implication.

By comparison with the perplexing and undeveloped state of this subject, domestic political theory is very well understood, with multiple highly developed theories offering alternative solutions to well-defined problems. By contrast, concepts and theories of global justice are in the early stages of formation, and it is not clear what the main questions are, let alone the main possible answers.⁷⁰

If, however, Pro is right and Con is wrong, then both the domestic and international law of their world will have a form of practical authority that is identical in many respects. Absent some further relevant difference between international and domestic law, we should therefore be able to import many of the same forms of evaluation that apply in the case of domestic law to international law. We should, in other words, be able to criticize international law in terms of its justice, and we should be able to draw upon many of the theories of justice that have been developed in the domestic context as a useful starting point. This argument does not settle the broader questions of international justice that Nagel has raised about how to evaluate other international institutions, policies, and relations, but it does offer a clear route forward with respect to the evaluation of international *law*.

Second, there is the further question as to what precisely the relevant practical authority-based investigations would recommend with regard to the content of international law. Given the space limits in an Essay like this, and given the obvious complexity of the underlying issues, I cannot engage inquiries of this kind here. I do, however, hope to have established a more preliminary point: because of the special practical authority that legal obligations purport to have, it will be very difficult to justify certain aspects of international law from within a purely consequentialist framework. Hence if Pro is right, and Con is wrong, then the international legal standards that operate in their world must almost certainly be justifiable using a form of reasoning that pictures the relationship between facts about the human good and the appropriate standards for human action in terms that cannot be reduced to those of causal production. It follows that we cannot uncritically assume that consequentialist standards of evaluation are applicable to international law. International legal scholars must instead begin to engage those literatures in normative theory that aim to determine what the relevant kinds of practical authority-based forms of justification would recommend with respect to the content of international law.⁷¹

70. Thomas Nagel, *The Problem of Global Justice*, 33 PHIL. & PUB. AFF. 113, 113 (2005).

71. I myself believe that the relevant debates in the secondary literature tend to favor a so-called “contractualist” form of evaluation, over a consequentialist form of evaluation, but my point

Third, by arguing that a close examination of the meaning of the question whether international law is law can reveal that we are committed to a specific strategy for evaluating its content, I hope to have illustrated a distinctive set of reasons why pursuit of this question is still critical for the field of international legal scholarship. The reasons I have identified go beyond those illustrated in *Outcasting*, but there is still an important relationship between the present inquiries and those in *Outcasting*. In Part II, I will be arguing that robust practices of outcasting in the international arena provide the sociocultural conditions for an emergent sense of international legal obligation in us. Because this sense of obligation inclines us to take international law as having the special practical authority discussed thus far, it is facts about outcasting that will ultimately establish our commitment to these particular normative conclusions. This is one of the ways in which Hathaway and Shapiro's recent work should—in my view—be understood as having an even broader set of consequences for international law than are apparent from their formal presentation of their views.

II. ON THE DEEP STRUCTURE OF OBLIGATION AND THE EMERGENCE OF INTERNATIONAL LAW—AS A PURELY DESCRIPTIVE MATTER

For all that has been said thus far, we still do not know whether Pro or Con is right about their world: we still do not know whether their world contains a genuine system of international legal obligations. By the end of this Essay, I would like to try to settle their dispute, but I have thus far focused on a single dimension of it, which is inherently normative in the senses identified in Part I. It should be clear that the larger debate between Pro and Con cannot be settled on normative grounds alone, however, because the law is a social institution, and social institutions may or may not exist at different times and in different regions of the world. Legal obligations can only plausibly exist as part of a suitably stable set of social practices.

Part of the larger debate between Pro and Con will therefore have to involve the purely descriptive question whether their world contains a system

here is just to recommend deeper engagement with these literatures. For extended investigations that engage in what I am calling practical authority-based investigations, see, for example, DARWALL, *supra* note 55, which argues from second-personal features of obligation to a specific test for their content; IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Allen W. Wood trans., Yale Univ. Press 2002) (1785), which argues from the categorical authority of certain moral requirements to a test for their content; and SCANLON, *supra* note 68, which argues from a presumed form of moral motivation that we perceive to give rise to normative facts about what we owe to one another to a specific test for the content of these reasons.

of de facto international law—*given the correct but purely descriptive philosophical account of what law is*. In this Part, I will focus on this purely descriptive aspect of the debate. I will not try to offer a complete theory of the nature of law, because that project would go well beyond the scope of an Essay like this. I will, however, assume that, in order for a stable system of law to arise and persist in the natural world, a sufficient number of people must accept the authority of the law, and must respond to its directives as giving rise to genuine obligations, to maintain the system in equilibrium.⁷² A sufficient number of people must—in other words—be endowed with the special set of practical attitudes that were at issue between Pro and Con in Part I.

With this assumption in the background, I will be arguing that one of the primary *mechanisms* for the emergence of these special practical attitudes is the type of normative debate that Pro and Con are engaged in. And I will be arguing that the robust practices of outcasting that Hathaway and Shapiro have recently identified in the international arena provide the relevant *evolutionary stability conditions* for these special practical attitudes. These two claims should be understood as purely descriptive claims. Together, they aim to describe the sociocultural conditions under which a new and distinctive sense of international legal obligation might arise and persist in our lives. They therefore describe the sociocultural conditions needed for the emergence of a genuine de facto system of international law.

To make some of these arguments, I will—as noted in the Introduction—need to extend the account of obligation that I developed in *The Deep Structure of Law and Morality*⁷³ to the international context. This extension will allow me to place some of Hathaway and Shapiro’s main claims in *Outcasting* (including their rejection of the Modern State Conception of law) onto a much firmer foundation. The extension will also allow me to articulate a more detailed and accurate account of the relationship between outcasting and the emergence of international law, and thereby improve our understanding of both of these phenomena in a number of critical ways.

72. I am stating this assumption in general enough terms that it can be specified in many different ways, and the assumption should therefore be relatively uncontroversial. I will also give the assumption further motivation below.

73. Kar, *Deep Structure*, *supra* note 5.

A. *Some Threshold Points About Legal Positivism and the Relationship Between the Normative and the Descriptive*

We have now distinguished two dimensions to the philosophical question whether international law is law, one normative and one purely descriptive. Before continuing, I want to make a few threshold comments about the way I picture the relationship between the normative issues discussed in Part I and the arguments I will be developing in Part II. Although I have called an important dimension of the debate between Pro and Con “normative,” and although I have suggested that the question whether international law is law has an irreducibly normative dimension to it, none of my arguments thus far should be understood as undermining the basic project of legal positivism, which aims to articulate a purely descriptive account of what law is.⁷⁴

One way to understand a core part of this project is that it aims to articulate a purely descriptive account of the existence conditions of law, where law is understood as a complex type of social system that can exist (but that obviously has not always existed) in the natural world.⁷⁵ In my view, this project can indeed be carried out successfully, but the correct descriptive account will need to make reference to a very specific dimension of our human psychology— which H.L.A. Hart has called the “internal point of view,”⁷⁶ and which animates an important and highly recognizable form of human social life and social interaction.

Hart himself used the term “internal point of view” to refer to the perspective that participants in a system take up when they take certain rules or obligations to have the authority that we typically associate with rules or obligations.⁷⁷ He also believed that we could offer a purely naturalistic *description* of the internal point of view without taking up that point of view. I share that belief, and a good portion of Part I can, in fact, be understood as trying to do just that: it offered a description of some of the practical implications that we take to arise from obligations, where the truth value of that description was independent of our acceptance of any obligations. It should be noted, in this regard, that some of my descriptions of these practical implications went beyond those offered by Hart, and that my descriptions were also limited to the phenomenon of obligation (as opposed to rules). A good portion of Part I can nevertheless be understood as seeking to develop a fuller

74. See sources cited *supra* note 15.

75. See, e.g., SHAPIRO, *supra* note 15, at 27-32.

76. See HART, *supra* note 7, at 98.

77. See *id.*

and more contemporary description of an important aspect of what Hart would have called the “internal point of view” with respect to *obligations*.⁷⁸ Rather than undermining the project of legal positivism, many of my arguments in Part I should therefore be understood as offering positive contributions to it.

We are, in fact, in a much better position today than Hart was to describe many features of our sense of obligation—not only in terms of the practical implications that we take to arise from obligations, as described in Part I, but also in terms of the natural origins, structure, and function of our sense of obligation. In the remainder of this Part, I want to focus attention on the latter part of this descriptive project. The arguments below should nevertheless be understood as both consistent with, and partly dependent upon, the descriptions already offered in Part I. My goal, in what follows, will thus be to develop a more comprehensive (but still purely descriptive) account of the psychology of obligation, which harmonizes the aforementioned facts about the perceived practical authority of obligation with an additional set of proposals concerning the natural origins, structure, and function of our sense of obligation.

B. Describing Normative Debate and Its Function (Without Settling It)

Given the above facts, it would be nice to find a way to distinguish clearly between those “normative” dimensions to the debate between Pro and Con that we can describe in purely naturalistic terms—and which might therefore have a direct relationship to the purely descriptive question whether their world contains a de facto system of international legal obligations—and those aspects of their debate that are more irreducibly “normative.” We can do this by accepting all of the above descriptions of our perceptions of obligation, as outlined in Part I, while bracketing the question whether these perceptions are ever warranted or true. We could then continue to investigate our psychology

78. The one major exception to my discussion in Part I that would not apply to legal positivism would be my arguments about the forms of justification that are most relevant to determining whether our perceptions of obligation are warranted or true. In developing those arguments, I was, however, not at all trying to deny the possibility of articulating a purely descriptive account of obligation or a purely descriptive account of law that makes essential reference to it. My point was just that, once we appreciate certain features of the psychology that actually go into our sense of obligation and that breathe life into our moral and legal practices (all as a matter of descriptive fact), we will see that they commit us to a specific form of justification when deciding whether our perceptions of obligation are warranted or true. These are arguments that I believe Hart could have accepted, without abandoning legal positivism—although the arguments themselves draw on contemporary devices that were unavailable to Hart.

of obligation, and how it functions in our lives, from a purely naturalistic perspective.

This should be easy enough to do in the case of Pro and Con, because both might simply be unaware of the relevance of practical authority-based investigations at a foundational level to the irreducibly normative dimension of their dispute. Let me therefore stipulate that—for the remainder of Part II—Pro and Con are indeed unaware of these normative facts. Their debate would still be open and meaningful to them, in the sense tracked by Moorean open question style arguments. We have, moreover, now explained the open texture of their debate by suggesting that both Pro and Con take its resolution to have certain specific practical consequences. This claim is a purely descriptive claim about their psychologies. Hence, in disagreeing, Pro and Con can now be understood as, in effect, expressing (and also prescribing or recommending) fundamentally different attitudes toward the international legal standards in their world⁷⁹: Pro takes these standards to have the authority of genuine obligations and hopes to convert Con to her view, but Con can only see politics and incentives and hopes to get Pro to see things his way instead.

Notice that if Pro were to change Con's mind, then Con would leave this debate with a different set of practical attitudes, which would incline Con to live differently in the world. But the same would be true if Con were to convert Pro to *his* point of view. In what follows, I will suggest that certain forms of normative discussion can, in fact, provide an important mechanism for the emergence of the special practical attitudes needed to sustain a genuine *de facto* system of international law—in part because one of the natural functions of normative discussion is to produce coordination in our practical attitudes in a specific set of circumstances.⁸⁰

79. In saying this, I am, in effect, offering an expressivist account of the meaning (or of at least an important dimension of the meaning) of these relevant concepts relating to obligation. When seeking to account for the meaning of certain normative terms, expressivism represents a particular strategy, or pattern of analysis, which begins with the characterization of a particular type of psychological state that we are *in* when we have certain normative beliefs, and then analyzes the meaning of these normative terms as *expressive* of that psychological state but *not* as asserting that one is in that state. Allan Gibbard—who is one of the leading contemporary expressivists—has, for example, proposed an expressivist analysis of our judgments of rationality as follows: “To call something rational is not to attribute some particular property to that thing—not even the property of being permitted by accepted norms. . . . We explain the term by saying what state of mind it expresses.” ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT* 8 (1990); *see also id.* at 45-58.

80. For some relevant descriptive discussions of normative debate and its role in our lives, see Kar, *Deep Structure*, *supra* note 5, at 934-41, which discusses the essential contestability of

So let us take a closer look at the remaining debate between Pro and Con. In taking themselves to be meaningfully disagreeing, both are taking their views to require the revision of one or the other's attitudes toward international law—even though, by assumption, neither perceives the true normative grounds for settling their dispute. So what typically happens in circumstances like these, as a matter of purely descriptive fact? Do we always have to await the correct fundamental philosophical account of a particular subject matter, or correct foundational normative theory, to get started, or to leave these disputes with a resolution? How sad and debilitating *that* would be! And how exactly could our ancestors, and theirs before them—going all the way back to early hunter-gatherer life—ever have handled normative disputes of this kind with any kind of confidence? When domestic law first began to emerge, similar debates must have taken place between the analogues of Pro and Con of the ancient world. It will therefore make sense to ask what kinds of factors might have helped to produce an emerging consensus on the views of ancient Pro over ancient Con.

One answer to these last questions lies in recent psychological research, which suggests that, at least in the context of discussions with people with whom we identify as relevant friends or allies, we often leave these kinds of normative exchanges with more agreement than we began—even if we cannot find a basis for that agreement in reasons that either antecedently accepted.⁸¹ This can happen in the case of adults, who are peers, but it also happens in another critical context in human life: that of child rearing (where every human spends his or her formative years). If, for example, Pro were a mother and Con her young child, then—whether she realizes it or not—Pro might be endowing Con with a portfolio of practical attitudes that have worked well enough in her life to enable her to reach parenthood, and are thus pretty good candidates for working well in Con's life too. Naturally, this portfolio of practical attitudes will tend to be very different if Pro is a hunter-gatherer than if Pro is one of us. It is therefore noteworthy that we modern people (at least in the West and in many parts of the developed and some parts of the developing world) typically take ourselves to be subject to certain forms of legal obligation that have no real analogue in traditional hunter-gatherer life. We therefore have a special set of practical attitudes that hunter-gatherers typically lack.⁸²

some normative concepts as related to the biological need for coordination in our normative views, and the likely role of normative discussion to help produce it.

81. See Jonathan Haidt, *The Emotional Dog and Its Rational Tail: A Social Intuitionist Approach to Moral Judgment*, 108 PSYCHOL. REV. 814, 820 (2001).

82. See, e.g., Lee & Daly, *supra* note 2, at 1.

To understand how the special practical attitudes that go into a sense of domestic legal obligation might have first emerged in our lives, it will help to remember three things. First, it was only with the evolution of the specific human capacities for culture and language that we were able to expand out of a fixed natural habitat (where chimpanzees and bonobos, our closest relatives,⁸³ still remain) to colonize the globe, where we have displayed a much broader range of forms of life than is typical for most species (who lack anything but the most rudimentary forms of culture and language).⁸⁴ Second, one of the most distinctive features of human life is the radically extended period of child rearing that occurs in our species compared to every other species in existence (and probably ever in existence), and during which time both cultural and linguistic traditions are typically passed from generation to generation.⁸⁵ And third, it is only in the most recent (and extraordinarily thin) slice of our natural history as a species that we developed the technology of agriculture and began transitioning away from hunter-gatherer forms of life into more sedentary agricultural settlements, with larger population densities and incipient legal traditions.⁸⁶ In making this slow and relatively recent transition, we effectively generated one of the most distinctive habitats ever to have existed in human life: large-scale societies with the rule of law. But we have also been creating and transmitting some of the special practical attitudes needed to sustain these emergent legal systems.

The ability to transmit culturally local forms of life is thus one of the most distinctive and natural forms of human life, and this capacity would appear to have been critical to the first emergence of domestic law. One way to determine just how critical these processes might have been is to start with the following

83. See, e.g., Yukimaru Sugiyama, *Social Characteristics and Socialization of Wild Chimpanzees*, in *PRIMATE SOCIALIZATION* 145, 145-46 (Frank E. Poirier ed., 1972).

84. See, e.g., WILLIAM A. HAVILAND, *HUMAN EVOLUTION AND PREHISTORY* 134 (1979) (“[A]s cultural adaptation became more efficient, human populations began to spread geographically and to inhabit new and even harsh environments. . . . [C]ultural equipment and techniques are capable of rapid change, whereas biological change takes many generations to accomplish.”).

85. See, e.g., NANCY MINUGH-PURVIS & KEN MCNAMARA, *HUMAN EVOLUTION THROUGH DEVELOPMENTAL CHANGE* 250-51 (2002) (“The *uniquely human pattern of life history* includes the following traits[:]. . . long gestation[,]. . . precocious neurological development at birth[,]. . . slow development with long childhood[,]. . . delayed reproduction[,]. . . enormous parental investment in few offspring[,]. . . [and] long life span.” (emphasis added) (citations omitted)).

86. See, e.g., Lee & Daly, *supra* note 2, at 1 (“Until 12,000 years ago virtually all humanity lived as hunters and gatherers.”). Indeed, as recently as 1500 AD, hunter-gatherers “occupied fully one third of the globe, including all of Australia and most of North America, as well as large tracts of South American, Africa, and northeast Asia.” Lee & Devore, *supra* note 2, at 1-2.

observation: the types of cultural traditions and portfolios of practical attitudes that are typically passed down from generation to generation through processes of normative discussion are transmitted through many of the same processes by which we acquire our native languages. We should therefore be able to infer certain relevant patterns of cultural transmission from certain better-known patterns of linguistic transmission. If—as I am suggesting—the practical attitudes that sustain legal systems have been passed down in large part through sociocultural processes that engage normative discussion during a critical period in our psychological development, then we should be able to detect strong correlations between linguistic and legal traditions. But if the relevant practical attitudes can simply be exported to other cultures, or adopted by other traditions without engaging these special mechanisms, then we should see little such correlation.

Recently, I have engaged in the kind of analysis needed to answer these last questions,⁸⁷ and my research suggests that normative discussion has likely played a critical role in the emergence of legal systems. There is now a wealth of evidence to suggest that, prior to the development of agriculture, and before we humans had ever emerged from hunter-gatherer forms of life, the world was colonized by small groups of people who spoke languages that would have fallen into an extraordinarily diverse number of language families—and would have thus represented cultural-linguistic traditions with phylogenetic relations too ancient to reconstruct using known methods of historical linguistics.⁸⁸ We might usefully think of these as independent linguistic traditions. With respect to large-scale civilizations, Peter Turchin—who is a leading expert on the dynamics of state formation—has also produced a list of all of the preindustrial mega-empires ever to have existed in world history.⁸⁹ The emergence of large-scale civilizations tends to correlate with the emergence of law, and I have therefore broken Turchin's list down by the native languages spoken by the populations in these mega-empires. Turchin's data suggest that there have only been sixty-two preindustrial mega-empires ever to have existed anywhere in the world, and my linguistic analyses suggest that all but three have been among groups that fall into one of only *four language families*: Indo-European,

87. See Kar, *Origins*, *supra* note 3.

88. See *id.* at 143–60; see also Malcolm Ross, *Clues to the Linguistic Situation in Near Oceania Before Agriculture*, in *THE LANGUAGES OF HUNTER-GATHERERS: GLOBAL AND HISTORICAL PERSPECTIVES* (forthcoming) (manuscript at 1) (on file with author) (providing extensive evidence of extreme linguistic diversity among pre-agricultural groups in Near Oceania).

89. See Peter Turchin, *A Theory for Formation of Large Empires*, 4 J. GLOBAL HIST. 191, 202–03 (2009).

Afro-Asiatic, Sino-Tibetan, and Altaic.⁹⁰ This is a truly extraordinary number, especially when compared to the vast number of distinct linguistic traditions that once populated the world—and even when compared to the number that still exist.⁹¹ These facts suggest that, at least prior to the Industrial Revolution, almost all of the groups that have been able to transition to large-scale societies with the rule of law are culturally descended from a very small handful of sociocultural and linguistic traditions.

So what is it about these sociocultural traditions that might help allow for the emergence of law? Notice, first, that each of these sociocultural traditions represents an unbroken chain of social contact by which some of the first groups to transition from hunter-gatherer into more complex forms of life were able to pass along certain specific cultural traditions, along with certain specific portfolios of practical attitudes, to their progeny. Many of these transmissions would have occurred during a critical period of each generation's psychological development, within each of these cultural traditions, and would have helped to transmit the culturally local forms of social life needed to sustain these emerging forms of social complexity. Notice, moreover, that normative discussion must have been operating within each of these sociocultural traditions all along, where it would have presumably played its ordinary role, by helping to produce coordinated practical attitudes toward many aspects of life—including many emerging social institutions like the law. It is, finally, just these face-to-face processes of normative exchange, which tend to arise internal to the evolution of different groups' communal forms of life, that are missing from many other, more external processes of cultural transmission. These facts suggest that certain processes of normative discussion, which operate in part during a critical period of our psychological development, have likely been playing an important but underappreciated role in the emergence and stability of legal systems.

The psychological research also suggests that we will have to understand these processes as operating (at least in part, and at least in some circumstances) through a form of practical conversion.⁹² I use the term "conversion" to distinguish these processes from purely reason-based persuasion, but I do not mean to suggest either that these processes have been

90. See Kar, *Origins*, *supra* note 3, at Section IV.C & figs.14 & 15.

91. *Ethnologue* lists 111 language families and 45 additional isolates, which amounts to a total of 156 relevant linguistic traditions. *ETHNOLOGUE: LANGUAGES OF THE WORLD* 26-32 & tbls.4 & 5 (M. Paul Lewis ed., 16th ed. 2009). This number does not include 1 constructed language, 77 creoles, 126 deaf sign languages, 19 mixed languages, and 38 unclassified languages. *Id.*

92. Cf. Haidt, *supra* note 81, at 820 (explaining that rationality plays a much smaller role in moral judgments than we sometimes assume).

devoid of reasoning or that they are somehow diminished by this label. Our specifically human dispositions to convert others in some circumstances, along with our specific human receptivity to conversion, have apparently been working well enough for us over the course of our natural history as a species. The proof of that is that we are still here. Hence, even if these processes of conversion are not based solely in reason, we should be able to understand them as having a kind of practical vindication to them: they have apparently been functioning well enough to generate coordination over many of the practical attitudes needed for us to live well in a broad range of circumstances within our natural history as a species.⁹³

For all of the above reasons, we can understand the kinds of normative discussions that Pro and Con are engaged in as serving a particular natural function, by helping to coordinate our practical attitudes toward many different aspects of life. We can also understand normative discussion as an important mechanism by which certain critical attitudes toward the law might be transmitted from generation to generation. When viewed from this angle, Hathaway and Shapiro's work in *Outcasting* can, in fact, be understood as an important *piece* of the relevant normative discussion of our time. To the extent that it produces new converts, we can—in other words—understand it as *contributing* to the emergence of international law—and not just as describing it.

C. *The Nature of Law and the Deep Structure of Obligation*

It is one thing to describe the natural function of normative discussion, but quite another to identify the natural function of the practical attitudes that are exchanged in specific instances of normative debate—such as the debate between Pro and Con. Although normative discussion might play a role in the emergence of certain practical attitudes in particular cases, there is, moreover,

93. In *The Two Faces of Morality*, I elaborated further on this idea that our capacities for normative judgment may have a form of practical vindication to them that arises in part from the nature and function of normative discussion but cannot be reduced to reasoning processes alone. The idea—which I had already begun to develop in *The Deep Structure*—is that, given the natural function of our sense of obligation to allow us to resolve social contract problems flexibly, our natural sense of obligation appears to have some tendency to track resolutions to changing social contract problems, as a matter of descriptive fact. This fact can thus provide these capacities with a specific form of practical vindication: they may be working well enough to help us get to the right answers to certain problems of social cooperation, even if the way we get there is not reducible to any reasons that we have antecedently accepted, and even if our capacities for normative judgment also serve other illegitimate natural functions. See Kar, *Two Faces*, *supra* note 5, at 1-3.

still a further question as to what might stabilize a sense of obligation within a sufficiently broad range of a population to sustain a genuine de facto legal system. In order to understand more fully how a distinctive system of international law might emerge and remain stable in the natural world, we will therefore need to examine more closely the psychological attitudes that animate legal systems.

As noted above, I will ultimately be arguing that the robust practices of outcasting that Hathaway and Shapiro have recently identified in the international arena provide the relevant *evolutionary stability conditions* for a new and distinctive sense of international legal obligation in us. In order to support this claim, I will, however, need to embed some of their discussions within a more general account of the natural origins, structure, and function of our sense of obligation. I have developed the relevant account in *The Deep Structure of Law and Morality*.⁹⁴ Because this prior work is focused on the phenomenon of obligation, it is framed at a particular level of generality, which should help us distinguish systems of (moral and legal) obligation from systems of incentive. The account does not, on the other hand, address the distinction between law and morality.⁹⁵ In my view, Hart's account of this further distinction works well enough for most purposes.⁹⁶ Given recent developments in a range of cognate fields, Hart's understanding of our sense of obligation is,

94. Kar, *Deep Structure*, *supra* note 5.

95. See *id.* at 881-82 (explaining why "[t]he domain of obligation is . . . the place where morality and law most plausibly intersect"). In *The Deep Structure*, I do, however, gesture toward some of the relevant distinctions between law and morality. *Id.* at 940-41. I also develop a fuller account of the relevant distinction, both in the following text and in Kar, *Two Faces*, *supra* note 5, at 72-73.

96. Hart distinguishes law from morality by suggesting that legal systems involve a specific blend of what he calls primary rules (which are rules that lay direct claims on our conduct) and secondary rules (which allow us to change the content of certain primary rules). The specific secondary rules that he thinks are characteristic of law are what he calls rules of change, rules of adjudication, and rules of recognition. See HART, *supra* note 7, at 94-98. He places the following two conditions on the existence of law:

On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.

Id. at 116. Although I accept these aspects of Hart's work and think they are helpful for most purposes of distinguishing law from morality, I will suggest in Subsection II.D.1 below that there is a particular dimension to this distinction that Hart was not able to explain, and I will offer an account of that further distinction in a way that will help clarify important, purely descriptive distinctions between law and morality.

however, seriously outdated and needs to be revised to take account of more contemporary findings about human psychology and about the meanings of the special normative terminology that morality and law share. One of my aims in *The Deep Structure* was, in fact, to develop a purely naturalistic account of the psychology of obligation that is more sensitive to these contemporary developments and thereby contribute to a more contemporary positivist account of what law is.

In the remainder of this Part, I will be drawing upon, and extending, this prior account of obligation to address the purely descriptive dimension to the debate between Pro and Con. In this Section, I will introduce the most basic features of the account. My purpose will be to present just enough background to extend the account to the international context. In the next Section, I will then develop the basic account in three additional ways, which will prove especially relevant to this extension. In the final Section, I will draw out a number of important consequences of the account for our understanding of outcasting and its relationship to the emergence of international law.

In *The Deep Structure*, I essentially drew upon and extended certain recent developments in evolutionary theory and evolutionary game theory, and then harmonized them with a much broader range of contemporary findings from a diverse range of other cognate fields, to argue that we have a specific class of psychological attitudes, which have a distinctive structure and natural function, and which go into our natural sense of obligation.⁹⁷ I have called these psychological attitudes “obligata,” in part to clarify their role in constituting our natural sense of obligation.⁹⁸ Obligata—as I use the term—are also comprised of a portfolio or bundle of distinct psychological phenomena, which come together to serve a single natural function—much like the obligato accompaniments of a larger musical performance.⁹⁹ This fact provides a second reason for my use of the term “obligata” to name these psychological phenomena. My basic argument in *The Deep Structure* is that obligata incline us to participate in a specific and highly recognizable form of social life, and that they are the attitudes that “breathe life into our moral and legal practices.”¹⁰⁰ The structural features of obligata can therefore be understood as analogues, in

97. Kar, *Deep Structure*, *supra* note 5.

98. *Id.* at 878-79.

99. *Id.* at 902-03.

100. *Id.* at 879.

the moral and legal domain, of what Noam Chomsky has referred to as the “universal grammar” of language.¹⁰¹

As they appear in us, obligata are a specific portfolio of belief-like states, motivations to follow rules (with some generality of application), reciprocally conditioned expectations of and attitudes toward other persons and their actions, inclinations to make demands of one another (and to take ourselves to have the standing to make such demands and to respond with excuse and justification), and certain second-order reactive attitudes (such as impartial anger, resentment, and guilt) toward breaches of the relevant standards.¹⁰² Obligata also tend to attach us to standards that we take to have an agent-centered, categorical, and second-personal form to them.¹⁰³ Obligata therefore incline us to believe that we have reasons to act that have the precise special practical authority described in Part I.

In *The Deep Structure*, I suggested that obligata are the attitudes we express when we use the special normative terminology that is common to morality and law: terms like right, obligation, excuse, justification, standing, and the like. Obligata should therefore be understood as the very same psychological attitudes that Pro has been expressing in her debate with Con, but that Con does not yet share, at least in relation to the international legal standards of their world. For reasons discussed in the last Section, obligata are therefore responsive to normative discussion, in ways that sometimes allow these processes to produce coordination over our sense of obligation and its content—even if the relevant consensus cannot be derived from reasons that the relevant participants in the normative discussion antecedently accepted.¹⁰⁴

One of the central arguments in *The Deep Structure* is that obligata should be understood as having a very specific natural function—namely, “to allow us to resolve social contract problems flexibly.”¹⁰⁵ I base this claim in part on a broad range of accumulated evidence, drawn from a wide range of cognate fields, that helps fill out a descriptive understanding of how our sense of obligation functions.¹⁰⁶ But I also base this claim in part on an argument from

101. See NOAM CHOMSKY, REFLECTIONS ON LANGUAGE 29-30 (1975) (defining “universal grammar”).

102. Kar, *Deep Structure*, *supra* note 5.

103. *Id.* at 880-83, 894-901, 902-30.

104. For a description of how some of these processes of normative discussion appear to function, see GIBBARD, *supra* note 79, at 64-80; Haidt, *supra* note 81, at 819-25; and Kar, *Deep Structure*, *supra* note 5, at 934-41.

105. Kar, *Deep Structure*, *supra* note 5, at 878 (footnote omitted).

106. See *infra* notes 143-145 and accompanying text.

inference to the best explanation: *The Deep Structure* argues throughout that the natural function I am proposing provides the best explanation for the fullest range of practical consequences that we take to flow from perceived obligations, along with the fullest range of other universal (or near universal) features of our sense of obligation that we see in the psychological and ethnographic record.¹⁰⁷

107. See generally Kar, *Deep Structure*, *supra* note 5 (employing this special form of argumentation throughout the article).

Because I have claimed that my work in *The Deep Structure* contributes to a purely descriptive understanding of the nature of law, and because that is the nature of the question we are addressing here, I should also emphasize that there is nothing about the functional claims in *The Deep Structure* that is inconsistent with the basic project of legal positivism. When I say that the natural function of our sense of obligation is to allow us to resolve social contract problems flexibly, I am using the term “natural function” in the way an evolutionary biologist would. See Colin Allen, *Teleological Notions in Biology*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (May 18, 2003), <http://plato.stanford.edu/archives/win2009/entries/teleology-biology> (“Accounts of biological function which refer to natural selection typically have the form that *a trait’s function or functions causally explain the existence or maintenance of that trait in a given population via the mechanism of natural selection.*”). Claims about natural function, so construed, are purely causal-historical claims: a particular trait, or feature of our evolved makeup, will be said to have a particular natural function to cause *F* just in case that trait regularly caused *F* in the relevant environment of evolutionary adaptation of a group or species and just in case that fact explains the proliferation of the trait within the relevant ancestral population. See Kar, *Two Faces*, *supra* note 5, at 14. It is in this sense that the natural function (or at least *a* natural function) of the human heart is to pump blood, and the natural function (or at least *a* natural function) of the human eye is to allow us to see. Causal-historical claims are, however, purely naturalistic claims, and an account of law that makes reference to obligata would therefore still qualify as a form of legal positivism. *Id.* Causal-historical claims are also logically consistent with different (indeed many different) uses—or nonnatural functions—of a trait either today or in our natural history. For example, we can use human hearts and human eyes for other purposes (and undoubtedly have in some circumstances). See *id.* at 24. Still, if these other uses, along with their standard consequences, play no role in explaining the emergence and proliferation of hearts or eyes in ancestral populations through selective processes, then they are not part of the heart’s natural function—in the biologist’s sense. Claims about natural function are also compatible with a trait’s having other natural functions or serving its identified natural function only imperfectly.

I have also been careful to define a “social contract problem” in purely naturalistic terms—by reference to facts like the relative benefits that would arise for each member of a group if all (or nearly all) were to act in conformity with a particular standard that would resolve a standing problem of cooperation. Hence, a purely descriptive account of law that makes reference to obligata—here construed as a bundle of specific psychological phenomena that give rise to a sense of obligation and the natural function of which is to allow us to resolve social contract problems flexibly—would still qualify as a form of legal positivism.

But there is another argument in *The Deep Structure* that I want to discuss in more detail, because it leads to an account of the general evolutionary stability conditions for a sense of obligation in us, and because this account will prove especially important later in this Essay. The argument I have in mind begins with the observation that there is a potential problem with my claim that the natural function of our sense of obligation is to allow us to resolve social contract problems flexibly. Social contract problems arise any time each member of a group could do better (as assessed in terms of his or her personal welfare) by following a rule on the condition that all (or a majority of) others were similarly motivated, but could do better still if all (or a majority of) others were so motivated while he or she was motivated to pursue only his or her own personal welfare. If we assume – plausibly – that our capacities to promote our personal welfare are adaptations, then the promotion of personal welfare will also correlate with the promotion of reproductive success. Hence, organisms that began from this kind of starting point would do better in terms of reproductive success if they all had the capacities to resolve these social contract problems than if none did. In the right circumstances, natural selection might therefore favor the production of shared capacities that function to motivate us by certain rules, which in fact resolve social contract problems, independently of our sense of personal welfare.

A potential problem for this contention nevertheless arises from the fact that social contract problems have the underlying game-theoretic structure of an n -person prisoner's dilemma.¹⁰⁸ Given this game-theoretic structure, any decisions to cooperate (i.e., to follow the rules of the social contract) will be “strictly dominated” by the selfish alternative (i.e., by the decision not to follow the rules) – to use the language of rational choice theory.¹⁰⁹ (To say that these decisions will be “strictly dominated,” in the language of rational choice theory, is to say that, regardless of what others do, each would do better in terms of his or her own personal welfare *not* to follow the rules.¹¹⁰) Because we have stipulated that the standard of personal welfare under discussion here correlates with reproductive success, this means that the capacities described thus far would also be “evolutionarily altruistic”: they would regularly dispose us to act in ways that conduce to the reproductive benefits of some other

108. Kar, *Deep Structure*, *supra* note 5, at 910.

109. *Id.*

110. Rational choice theorists call a strategy “strictly dominated” if it is “never as good as another feasible strategy, whatever the other player does.” Bruce Lyons, *Game Theory*, in SHAUN HARGRAVES HEAP ET AL., *THE THEORY OF CHOICE: A CRITICAL GUIDE* 93, 98 (1992). Acting in accordance with a cooperative equilibrium in a prisoner's dilemma is strictly dominated in this sense. *Id.*

organisms at some cost to our own.¹¹¹ Traits that are evolutionarily altruistic are, however, not evolutionarily stable: within any given population, they are subject to subversion from within by other traits that are more evolutionarily selfish.¹¹² These more selfish traits would give each of their bearers reproductive advantages relative to the evolutionary altruists in the population, even if all would do better if all were evolutionary altruists than if none were. As so far described, the psychological capacities to resolve social contract problems under discussion here should therefore be evolutionarily unstable—which should count against the empirical plausibility of my basic proposal.

Rather than viewing considerations like these to be automatically disqualifying, however, one might notice that they can be used to derive a set of concrete empirical predictions that should accompany the current proposal and that might therefore be used to test it in a much more direct and concrete manner. We now know enough about the evolution of altruism that we can articulate the general conditions under which capacities with seemingly evolutionarily altruistic properties can arise and remain evolutionarily stable in nature.¹¹³ If we call organisms with seemingly evolutionarily altruistic traits “cooperators,” and those that lack these traits “non-cooperators,” then the philosopher and evolutionary game theorist, Bryan Skyrms, has observed that *positive correlation* among cooperators is the general feature that allows all of the

111. For an orthodox definition of “evolutionary altruism,” see ELLIOT SOBER, FROM A BIOLOGICAL POINT OF VIEW: ESSAYS IN EVOLUTIONARY PHILOSOPHY 8 (1994) (“In evolutionary biology . . . , the concept [of evolutionary altruism] is applied to behaviors that enhance the fitness of others at expense to self.”).

112. See, e.g., Samir Okasha, *Biological Altruism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 28, 2008), <http://plato.stanford.edu/archives/win2009/entries/altruism-biological> (noting the use of the term and describing the phenomenon to which it refers).

113. We have, for example, now identified a number of discrete processes that can, in principle, allow for the evolution of traits with seemingly evolutionarily altruistic properties. See Kar, *Deep Structure*, *supra* note 5, at 913 (“These are the processes of kin selection, identification and discrimination, certain highly specific forms of geographical clustering forced by external circumstances, reciprocal altruism and, arguably, certain forms of so-called ‘nonnaïve’ group selection (that ultimately depend upon mechanisms like highly specific forms of geographical clustering or identification and discrimination).”). See generally DOUGLAS J. FUTUYMA, *EVOLUTIONARY BIOLOGY* 595 (3d ed. 1998) (describing the relevant processes of kin selection, and its operation on *inclusive* fitness); *id.* at Glossary (defining “inclusive fitness” as “[t]he fitness of a gene or genotype measured by its effect on survival and reproduction *both of the organism bearing it, and of the genes, identical by descent, borne by the organism’s relatives*”); Philip Kitcher, *The Evolution of Human Altruism*, 90 J. PHIL. 497 (1993) (describing the relevant processes of identification and discrimination).

mechanisms that we currently understand to produce traits with seemingly evolutionarily altruistic properties.¹¹⁴

In *The Deep Structure*, I have argued that the *reason* positive correlation captures something important in the evolutionary dynamics is, however, that it helps to ensure that any benefits of the cooperative enterprises that are produced by evolutionarily altruistic traits flow primarily to other cooperators within a population.¹¹⁵ A positive correlation is, in fact, sufficient to allow for the evolution of altruism only if the increased benefits that cooperators obtain from their cooperative effort due to the positive correlation are larger than both the costs involved with cooperating and the benefits, if any, that noncooperators also obtain from the cooperative enterprise. But this suggests that what is fundamental is not the positive correlation itself but rather this relational property concerning the distributions of evolutionary costs and cooperative benefits among cooperators and noncooperators. Where this distribution is not guaranteed by kin-selective forces or by mechanisms external to the group, a basic evolutionary stability condition for these capacities is thus that the cooperators must share internal psychological mechanisms that function to identify and to exclude noncooperators from the benefits of the cooperative enterprises. This occurs either by preventing sufficient cooperative benefits from flowing to noncooperators or by engaging in precommitted acts of punishment that will make noncooperation sufficiently costly. A natural capacity to resolve social contract problems could—in other words—remain evolutionarily stable if failures to cooperate were to trigger emotions or other powerful impulses that would function to identify and exclude noncooperators from the benefits of the social contract. And this means that the present proposal—which suggests that the natural function of our sense of obligation is to allow us to resolve social contract problems flexibly—will ultimately *gain* empirical plausibility to the degree that we can find evidence of second-order psychological phenomena like these bound up with our sense of obligation.

As I have discussed in more detail elsewhere, we do see just these sorts of second-order psychological mechanisms in the relevant places in our lives.

114. See BRIAN SKYRMS, *EVOLUTION OF THE SOCIAL CONTRACT* 61 (1996) (arguing that correlated interactions frequently occur in biological situations and that, as a result, such correlations can reinforce altruistic cooperation strategies and the emergence of evolutionary altruism in the biological world); see also Brian Skyrms, *Darwin Meets The Logic of Decision: Correlation in Evolutionary Game Theory*, 61 *PHIL. SCI.* 503 (1994) (drawing connections between the proper treatment of positive correlation in evolutionary game theory and recent philosophical discussions of the theory of rational choice).

115. See Kar, *Deep Structure*, *supra* note 5, at 914.

Examples include the moral reactive attitudes (such as resentment and impartial anger), which tend to accompany our sense of moral violation;¹¹⁶ the cross-cultural reactions that anthropologists and psychologists have documented to the breach of informal communal norms (which can include ridicule, ostracism, physical sanctioning, exile, and sometimes even group killings of norm violators);¹¹⁷ the way the law responds to the breach of legal obligations;¹¹⁸ and the behavior of many other social creatures that appear to have solved the evolutionary problem of cooperation and that encounter relevant instances of species-typical noncooperation.¹¹⁹ Given that our natural sense of obligation also attaches us to rules that often require some self-sacrifice, that the rules in question often reflect plausible resolutions to social contract problems, and that we take these rules to have a certain generality and overriding authority to them (independent of our sense of personal welfare), these facts should therefore give some real empirical plausibility to the claim that the natural function of our sense of obligation is to allow us to resolve social contract problems of some kind.

D. Three Additional Features of Our Sense of Obligation

Having described some of the basic features of my prior account of obligation, I now want to make explicit three features that were mostly implicit in *The Deep Structure* but that will be particularly important for its extension to the international context. I will be suggesting that obligata are, *first*, multiply instantiable (and indeed often multiply instantiated) in us, in ways that can, *second*, give rise to conflicting perceptions of practical authority. At any given time, the obligata that arise in our lives are also, *third*, naturally open-ended, such that different senses of obligation can sometimes emerge and decay in our lives.

Many of the structural features of obligata that were discussed in the last Section should be understood as hard-wired, in the sense of being produced by the forces of natural selection. An understanding of these three additional features of obligata will, however, help us understand how—given the specific

116. In *The Deep Structure*, I discuss these (and related) phenomena, their pervasiveness, and their relation to the present account of obligation. See *id.* at 914-16.

117. *Id.* at 916-17.

118. See, e.g., HART, *supra* note 7, at 91-96 (discussing hostile and critical reactions as an implicit feature of the internal point of view in reaction to breaches of a perceived legal obligation).

119. See, e.g., FRANS DE WAAL, GOOD NATURED: THE ORIGINS OF RIGHT AND WRONG IN HUMANS AND OTHER ANIMALS 75-78 (1996) (discussing primate reactions to various forms of deception).

moral psychologies that we have been endowed with by natural selection—a distinctive sense of international legal obligation might nevertheless emerge and remain stable in our lives through more local processes of cultural evolution.

i. Multiple Instantiability and the Thesis of Legal Parallelism

Beginning with multiple instantiability, it is important to recognize that, while I have sometimes described obligata in terms of their psychological instantiations in us, I have always defined them in purely functional terms.¹²⁰ One feature of phenomena that have been functionally defined is that they can be multiply instantiated,¹²¹ and evolutionary processes can in fact produce multiple phenomena with identical natural functions.¹²² It is thus perfectly possible—both logically and empirically—for us to have more than one natural sense of obligation that functions in our lives. When Hart insisted that judges sometimes take legal obligations to be genuine obligations, without necessarily

120. See Kar, *Deep Structure*, *supra* note 5, at 878-79, 902-03.

121. See Janet Levin, *Functionalism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Apr. 6, 2009), <http://plato.stanford.edu/archives/sum2010/entries/functionalism> (“Functionalism in the philosophy of mind is the doctrine that what makes something a mental state of a particular type does not depend on its internal constitution, but rather on the way it functions, or the role it plays, in the system of which it is a part.”). A theory that identifies a mental state in purely functional terms is therefore compatible with creatures with very different physical constitutions having the same mental states, or with different, more highly specified, phenomena playing the same functional role in different areas of our lives. See *id.* For example, guilt and shame may play similar functional roles in supporting a genuine system of obligation, even though they are attitudes that can be distinguished on other purely naturalistic grounds. Later, I will consider the conditions under which outcasting and physical sanctioning might play the same functional roles in supporting the emergence of a *de facto* system of legal obligations, even though they are distinct phenomena in another sense. In offering the present account of obligation, and the particular functional characterizations that I give, I am not arguing for functionalism in any broad sense within the philosophy of mind. I am merely identifying a psychological phenomenon by its natural function, which allows me to apply these facts about multiple instantiation, or multiple realization, to the specific topics addressed here.

122. See Kar, *Two Faces*, *supra* note 5, at 72 (“From an evolutionary standpoint, there is . . . nothing about the processes of natural selection that would foreclose the logical possibility of our having more than one set of adaptations that serve [the] same natural function. . . . Attitudes that are defined functionally can, moreover, be multiply instantiated. Hence, it is logically possible for us to have more than one natural sense of obligation, each of which functions in many identical ways, by appearing to us to have precisely the same set of practical implications.”).

thinking that they are moral obligations,¹²³ he was—in my view—assuming just this kind of possibility. Given his positivist leanings, he must have also been assuming that one could produce a purely naturalistic account of the relevant distinction between our senses of moral and legal obligation.

Unfortunately, it has proven incredibly difficult to draw this distinction because, when we sincerely take ourselves to be under a legal obligation, we typically take it to have many of the very same practical consequences that would arise if we were under a moral obligation: namely, that the law gives rise to reasons that are agent-centered, categorical, and second-personal.¹²⁴ The most straightforward explanation of these identical practical perceptions is that we must be in the same psychological state when we believe ourselves to be under a genuine moral or legal obligation.¹²⁵ Our sense of moral obligation can, moreover, feel primary, and hence it is also natural to think that when someone believes she is under a genuine legal obligation to do something, she must believe that she is under a moral obligation to perform that action. Elsewhere, I have called this view the thesis of “moral semantic foundationalism,” because it analyzes the meaning of the term “genuine obligation” in our thoughts about legal obligation as synonymous with the meaning of “moral obligation”—and thereby reduces the meaning of the former to that of the latter.¹²⁶ If moral semantic foundationalism were true, then we could not ask about the sociocultural conditions under which a new and distinctive sense of international legal obligation might arise in our lives. It would also make little sense to ask whether the robust practices of outcasting that Hathaway and Shapiro have identified in the international arena might provide the evolutionary stability conditions for a new and distinctive sense of international legal obligation in us. Instead, we would have to limit our attention to the question of when our native sense of moral obligation (which

123. See H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE* [hereinafter *ESSAYS ON BENTHAM*] 243, 266 (1982).

124. Indeed, one of the authors of *Outcasting*—Scott Shapiro—has explicitly made arguments of this kind. In *Legality*, Shapiro says:

We can see that Hart’s attempt to distinguish the legal from the moral is seriously flawed. For once we focus on the role that legal judgments and claims play in social life, it becomes hard to deny that they are constituted not only by normative concepts and terms, but by moral ones as well. . . . For if legal judgments are normative judgments, they must be moral judgments as well.

SHAPIRO, *supra* note 15, at 115. For a similar view, see Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 *OXFORD J. LEGAL STUD.* 123, 130-31 (1984).

125. I am indebted to Michael Moore for conversations that have helped me to understand this dimension of the pull toward moral semantic foundationalism.

126. Kar, *Two Faces*, *supra* note 5, at 70-71.

is presumably quite stable, independently of any practices of outcasting in the international arena) might attach itself to international legal standards.

The thesis of moral semantic foundationalism has obvious attractions – the most important of which is that it has often seemed difficult to articulate a logically possible (let alone a plausible or compelling) alternative. My account of obligation from *The Deep Structure* will, however, now allow us to articulate just such a clear and plausible alternative. I call the view “Legal Parallelism,”¹²⁷ because it asserts – in its purely descriptive dimension – that law and morality have deep structural parallels (including a number of identical perceived practical consequences, as elaborated in Part I) not because they engage the *same* psychological attitudes, which go into our familiar sense of moral obligation, but rather because they engage psychological attitudes with the *same natural function*. These psychological attitudes are obligata, and they share the natural function of allowing us to resolve social contract problems flexibly. As noted above, one of the central arguments in *The Deep Structure* is that this shared natural function explains the identical practical implications that we take to arise from moral and legal obligations.

Legal Parallelism nevertheless asserts that morality and law engage different classes of obligata, which are better or worse suited to different classes of social contract problems. It therefore offers a purely naturalistic account of how to distinguish between these two different senses of obligation – even though they are perceived as having identical practical consequences. Elsewhere, I have put these points as follows:

[O]ur sense of moral obligation is best adapted to allow us to resolve the most common and recurrent social contract problems that we faced throughout our environment of evolutionary adaptation, which were with other members of a relatively small and independent group with whom we spent most of our lives. Our sense of legal obligation is, by contrast, better suited to allow us to resolve the types of social contract problems that arise in much larger groups, with moral views that are uncoordinated. The reason for this is as follows: our sense of legal obligation is bound up with a shared social psychology that naturally inclines us to defer to a smaller group of officials to determine the content of what the law requires, and that allows these officials to learn a shared and technical form of legal judgment, and to engage in a specialized form of official interaction, that tends to produce coordinated legal content. The law can therefore produce coordination

127. *Id.* at 72-77.

over legal content in much larger groups of people, who cannot all engage in persistent and stable, face to face discussions with one another.¹²⁸

Legal Parallelism also has a semantic dimension: it analyzes our relevant beliefs about moral and legal obligations as expressive of obligata. This semantic dimension can therefore explain why law and morality would share a special normative terminology, even if the normative judgments that we express with one class of obligata do not logically entail judgments expressive of another. Legal Parallelism thus offers a competing explanation of the very same facts that might otherwise lead someone to favor moral semantic foundationalism.

At the same time, however, Legal Parallelism can also account for some of the psychological and semantic facts that Hart has observed and that were mentioned at the beginning of this Section. These relate to the apparent possibility of a judge expressing belief in the existence of a genuine legal obligation (which she accepts as a committed participant in the relevant legal system and which she therefore accepts as carrying with it certain practical consequences that are typical of obligation) without her having to believe, or be construed as saying, that there is a corresponding moral obligation. For example, Hart has observed:

[A]t least where the law is clearly settled and determinate, judges, in speaking of the subject's legal duty, may mean to speak in a technically confined way. They speak as judges, from within a legal institution which they are committed as judges to maintain, in order to draw attention to what by way of action is "owed" by the subject, that is, may legally be demanded or exacted from him. Judges may combine with this, moral judgment and exhortation especially when they approve of the content of specific laws, but this is not a necessary implication of their statements of the subject's legal duty.¹²⁹

He has also observed that "when judges or others make committed statements of legal obligation it is not the case that they must necessarily believe or pretend to believe that they are referring to a species of moral obligation."¹³⁰ Before one has engaged in philosophical theorizing, observations like these would appear undeniable, but the thesis of moral semantic foundationalism has often made their denial seem necessary. By offering a clear and plausible

128. *Id.* at 73.

129. HART, *supra* note 123, at 266.

130. H.L.A. HART, *Legal Duty and Obligation*, in *ESSAYS ON BENTHAM*, *supra* note 123, at 153, 161.

alternative to moral semantic foundationalism, Legal Parallelism can thus resuscitate a neglected element of the legal positivist's claim to be able to separate law from morality, which finds support in a number of commonplace psychological and semantic observations like these.

Finally, unlike moral semantic foundationalism, Legal Parallelism does not merely observe certain similarities between the types of practical authority that moral and legal obligations purport to have, but rather offers an explanation for why these different senses of obligation—along with the identical special normative terminology that we use to express them—have the specific structural features that they do. Because moral semantic foundationalism offers no real explanation of these facts, Legal Parallelism is the better explanation of the similarities between these two classes of judgments. The explanation I am offering here is, moreover, rooted in a much broader range of contemporary facts, drawn from a much broader array of cognate fields, than the thesis of moral semantic foundationalism.¹³¹ Together, these facts thus combine to lend the current proposal added plausibility.

For all of these reasons, I favor Legal Parallelism over moral semantic foundationalism. This thesis is, moreover, particularly important for present purposes because it opens up a distinctive possibility with respect to the emergence of international law. It suggests that a sense of international legal obligation can in principle arise in our lives as a *distinctive* sense, which operates as a third sense, in parallel with our senses of moral and domestic legal obligation. The thesis of Legal Parallelism will therefore allow us to begin inquiring into the evolutionary stability conditions for this distinctive sense of international legal obligation, and begin asking whether the robust practices of outcasting that Hathaway and Shapiro have identified in the international arena might serve that special function. We can—in other words—begin to ask these questions without reducing them to ones concerning the conditions under which our sense of moral obligation might attach itself to international legal standards.

Of course, the thesis of Legal Parallelism also depends on the proposition that obligata can be multiply instantiated in us. This proposition is supported not only by the above considerations about the relationship between morality and law, and not only by the basic nature of functional definitions, but also by a much broader range of phenomena in our lives. We would appear to have not just *two* but *many* distinctive senses of obligation, which sometimes arise in our lives in response to a much larger set of social contract problems that we encounter. The psychological mechanisms that animate friendship and love

131. See *infra* notes 143-145 and accompanying text.

can, for example, be understood as partly resolving two-person social contract problems in evolutionary time. It is therefore noteworthy that these phenomena are commonly constituted in part by a sense of obligation that finds expression in the very same special normative terminology common to morality and law. When we are wronged in love, or by a friend, we will often say (and we will often take ourselves to have the authority and standing to say): “You had no *right* to treat me that way!” We will often feel resentment toward the wrongdoer, or guilt if we have done wrong, and we will often respond to such charges with excuse or justification. In a similar vein, we often take the demands that we place on one another in these relationships to have the special practical authority to override, or exclude, at least some reasons that arise from considerations of our private welfare. And we clearly take the reasons that arise from friendship and love to be agent-centered: the obligations that arise with our particular friendship and love relations are not appropriately met by neglecting these relations to promote two or more other such relations between persons with whom we have no personal relation. Anyone who fails to recognize this fact will miss one of the central points of friendship and love.

Similar points hold for many other forms of association that are different from both the whole of humanity (which is the most plausible domain for moral obligation) and the state (which is the most plausible domain for domestic legal obligation). Obligations that are neither moral nor legal can arise quite naturally in our interactions with others as parts of teams, confederations, bands, religions, ethnicities, professional organizations, joint projects, and even criminal or terrorist organizations—to name a few. Elsewhere, I have even suggested that primitive obligata arise in the lives of many social animals, which have solved the evolutionary problem of cooperation.¹³² Facts like these suggest that obligata are not only multiply instantiable in principle but also multiply instantiated in social animals like us.

ii. *The Conflicting Demands of Obligation*

My second point is that, while it would be nice if all of these competing senses of obligation were always perfectly harmonious and internally consistent with one another, they are not. In *Why Everyone (Else) Is a Hypocrite*,¹³³ the evolutionary psychologist Robert Kurzban has described in marvelous detail

¹³². See Kar, *Deep Structure*, *supra* note 5, at 920-21.

¹³³. ROBERT KURZBAN, *WHY EVERYONE (ELSE) IS A HYPOCRITE: EVOLUTION AND THE MODULAR MIND* (2010).

many of the different ways that our evolved psychologies (which can be viewed as containing a large portfolio of psychological adaptations that serve a broad range of different natural functions) often pull us in different directions and lead to inconsistency.

This is not always true in the case of our sense of obligation, and there are—of course—also times when our different senses of obligation harmonize perfectly. I will say that two senses of obligation “harmonize perfectly” if one always makes room, at the level of content, for the demands of the other, thereby relieving us of any possibility of a perceived inconsistency between their demands. For example, one person’s sense of religious obligation might contain an exception clause—as it were—for situations in which the law requires religious tolerance; and this fact might help to harmonize that person’s senses of legal and religious obligation.

But we all know that people do not always think this way, and a second person’s religious views might not contain that kind of exception clause. Insofar as the law still demands religious toleration, and still purports to be authoritative, it will thus purport to override this second person’s religious views in some cases and sometimes prohibit what this person’s religion might require. Unlike our first person, this second person might therefore end up feeling the tug of competing demands. If so, then when this second person is forced to act, her actions will exhibit the relative respect that she accords to these two different forms of community (namely, church and state). She will be breaching her ties to one community, while cementing her ties to another—even if these two communities significantly overlap. Conflicts like these can obviously be grueling, and we are not relieved of them by logic alone; the relations we breach when we resolve them in one way or another can also sometimes be repaired, but that process can take work.

These facts about potential conflict are important for the present discussion because they raise the very real possibility that, as a sense of international obligation emerges in our lives, it may or may not harmonize well with certain preexisting senses of moral and domestic legal obligation. We should also recognize that the sociocultural conditions needed for the emergence of a stable and distinctive sense of international legal obligation, sufficient to animate a genuine *de facto* international legal system, need not include the endorsement of international law by either morality or domestic law.

iii. The Open-Ended Nature of Our Sense of Obligation

The third point that I would like to make here is that our capacities to share a sense of obligation would appear to be *open-ended*, in ways that allow for distinctive senses of obligation to arise and decay in our lives. This fact should

already be clear from my examples of love, friendship, and religion. For better or worse—and sometime both—these phenomena sometimes come and go in our lives.

More to the point for present purposes, this open-ended aspect of our sense of obligation would appear to be critical to the emergence of *law*. We are—I think—all so used to life within the modern state, with its rule of law, and with a citizenry that shares a relatively stable set of attitudes of respect for law, that we can forget what a recent phenomenon this is in comparison to our larger natural history as a species.¹³⁴ For the vast majority of our natural history as anatomically modern humans (i.e., from approximately 160,000 years ago until about 9500 years ago), we lived primarily in small hunter-gatherer bands,¹³⁵ with members who were highly dependent upon one another for their livelihoods and who had a sense of obligation that did not yet distinguish clearly between moral, legal, and religious obligations.¹³⁶ It was, moreover, only after the rise of agriculture (beginning in the Fertile Crescent approximately 9500 years ago and then at later points in several other parts of the world), and only after the transition to more sedentary forms of living, with higher population densities, that we begin to see a robust emerging distinction between legal and moral systems in some parts of the world.

These transitions were some of the most fundamental ones in the natural history of our species, in part because they allowed for the development of much larger food surpluses, much larger population densities, and much greater divisions of labor and social complexity. They also required the resolution of social contract problems that were much larger in scale and that—I have argued—were not, in fact, resolvable by our sense of moral obligation on

134. See Lee & Devore, *supra* note 2, at 3.

135. See Lee & Daly, *supra* note 2, at 1-2 (noting that “virtually all humanity lived as hunters and gatherers” until about 12,000 years ago).

136. A number of theorists have commented on the relative economic self-sufficiency of ancient hunter-gatherers and have used this as a criterion to distinguish “genuine” living hunter-gatherers, who might plausibly resemble our ancient ancestors, from groups that are merely “marginalised dependants.” See, e.g., Robert H. Layton, *Hunter-Gatherers, Their Neighbours and the Nation State*, in *HUNTER-GATHERERS: AN INTERDISCIPLINARY PERSPECTIVE* 292, 292-93 (Catherine Panter-Brick, Robert H. Layton & Peter Rowley-Conwy eds., 2001); Lee & Daly, *supra* note 2, at 1 (“Hunter-gatherers are generally peoples who have lived until recently without the overarching discipline imposed by the state. They have lived in relatively small groups, without centralized authority, standing armies, or bureaucratic systems. Yet the evidence indicates that they have lived together surprisingly well, solving their problems among themselves largely without recourse to authority figures and without a particular propensity for violence.”).

its own.¹³⁷ Fortunately, the possibility of increased divisions of labor and surplus, which were made possible by these larger geopolitical developments, allowed for the emergence of those specific types of bureaucracies that are needed to sustain a functioning government with a distinctive system of domestic law. And as we know from *Outcasting*, the typical method of law enforcement used by these states, at least in their more advanced incarnations, has been physical sanctioning by bureaucratic mechanisms internal to the state.¹³⁸ Domestic law has thus emerged to do what morality cannot: by engaging a distinctive and emergent sense of domestic legal obligation – which is stabilized primarily by practices of internalized physical sanctioning – domestic law now allows us to engage in a culturally local but highly structured form of social life, which fosters cooperation among populations that greatly exceed the numbers typical of a hunter-gatherer band.

It is the open-ended nature of obligata that once allowed for the emergence of a new and distinctive sense of domestic legal obligation, through a process that involved the slow coevolution of a specific and reciprocally reinforcing set of institutions and practical attitudes that are capable of animating and stabilizing domestic legal systems.¹³⁹ In understanding the conditions under which international law might now emerge, *as a third and distinctive system parallel to both morality and domestic law*, we therefore need to take a closer look at the conditions under which a new and distinctive sense of international legal obligation might emerge through similar processes.

137. Kar, *Two Faces*, *supra* note 5, at 72-73.

138. Hathaway & Shapiro, *supra* note 1, at 257 (noting that the Modern State Conception errs in part because it focuses on the way that legal standards are typically enforced *by modern states*: namely, through the threat and exercise of physical force and violence, at the hands of a legal bureaucracy internal to the state).

139. The fact that these processes must have involved the coevolution of perceptions of obligation along with the secondary practices needed to stabilize them in equilibrium should be clear from *The Deep Structure*. See Kar, *Deep Structure*, *supra* note 5, at 902-19 (describing the instability of a sense of obligation absent these secondary stabilizing mechanisms, and then deriving the account of evolutionary stability conditions that would need to coevolve to produce an emergent sense of obligation). For a discussion of the more distinctive functions of law and morality, and the more recent emergence of law to resolve a larger and more recent class of social contract problems, see Kar, *Two Faces*, *supra* note 5, at 72-74. Finally, for an extensive reconstruction of some of the more concrete sociolinguistic processes of evolution that gave rise to our present legal traditions, see Kar, *Origins*, *supra* note 3, at Parts II-III, Section IV.A, Section IV.D.

E. Outcasting and Its True Relevance to the Emergence of International Law

We are now in a position to apply the account of obligation developed in *The Deep Structure*, and further elaborated here, to the purely descriptive aspect of the debate between Pro and Con. This part of their debate involves the question whether their world contains a genuine de facto system of international law, given the correct but purely descriptive philosophical account of what law is. Although I have indicated that I will not try to offer a complete theory of the nature of law in this context, I have also suggested that one of the basic existence conditions for a genuine de facto system of international law is that a sufficient number of people have a sense of international legal obligation to maintain an international legal regime in equilibrium. I have also suggested that I agree with Hathaway and Shapiro's basic contention that physical sanctioning should not be understood as a necessary condition for the existence of law, and that outcasting can sometimes play the same role in supporting the existence conditions of international law that physical sanctioning typically does with respect to domestic law. Hathaway and Shapiro, however, rest their contentions primarily on certain contestable intuitions about the legal status of certain social regimes—including, most prominently, those of medieval Icelandic law, Roman Catholic canon law, and modern systems of cooperative federalism. In this Section, I will take a very different tack. I will embed some of Hathaway and Shapiro's main discussions of outcasting within the more general (but still purely naturalistic) account of obligation that was introduced in prior Sections, and then use the results of this synthesis to develop a distinctive and more detailed account of the relationship between outcasting and the emergence of international law.

As a first point of entry into these topics, the critical point to recognize is the following: if the account of obligation developed in this Essay is correct, then robust practices of outcasting in the international arena are precisely the right kind of phenomena to provide the evolutionary stability conditions for an emergent sense of international legal obligation in us. On the present view, the natural function of this emergent sense would be to allow us to resolve a distinctive class of social contract problems, which have begun to arise on a globalized scale—much as our sense of domestic legal obligation once emerged to resolve a distinctive class of social contract problems that were much larger than those characteristic of a hunter-gatherer band. If we define “cooperators” as people who are intrinsically motivated by international legal standards, then the account of obligation in *The Deep Structure* will, moreover, now allow us to state the general evolutionary stability conditions for a distinctive sense of international legal obligation to arise and persist in our lives. The basic

requirement is that, bound up with the psychological attitudes that give rise to intrinsic motivations on the part of cooperators to comply with international law, these cooperators must have certain second-order psychological attitudes, with a specific natural function. These second-order attitudes must function to “identify and exclude noncooperators from the benefits of the cooperative enterprise, either by preventing sufficient cooperative benefits from flowing to noncooperators or by engaging in precommitted and costly acts of punishment that will make noncooperation sufficiently costly.”¹⁴⁰

Given these facts, it should now be clear how outcasting might serve this precise function. Outcasting has been defined as the denial of the benefits of social cooperation or membership to disobedient parties.¹⁴¹ In the appropriate circumstances, certain practices of outcasting might therefore function to identify and exclude noncooperators (in the sense of those who breach international legal standards) from the benefits of emerging forms of international cooperation. To the extent that it does so, outcasting will provide the precise evolutionary stability conditions needed for a distinctive sense of international legal obligation to arise and persist in our lives.

This account of outcasting therefore supports a distinctive way of picturing the relationship between outcasting and the existence of international law. I have been suggesting that a shared sense of international legal obligation is a basic precondition for the existence of a genuine *de facto* system of international law. Insofar as outcasting provides the relevant evolutionary stability conditions for an emergent sense of international legal obligation in us, the existence of pervasive practices of outcasting in the international arena should therefore be understood—in my view—as providing evidential (but *not* conceptual or merely intuitive) support for the existence of an emergent system of international law. I therefore agree with Hathaway and Shapiro’s rejection of the Modern State Conception of law, and with their proposal that outcasting can sometimes play the same functional role in providing the existence conditions for international law that physical sanctioning typically does with respect to domestic law. But I reach these conclusions on very different grounds, and these different forms of argumentation have different, larger scale implications.

For example, one advantage of the present form of argumentation, at least in the present context, is that it does not rely on any contestable intuitions about the legal status of various regimes. It rests instead on verifiable empirical claims, which are not only theoretically motivated by contemporary

¹⁴⁰. Kar, *Deep Structure*, *supra* note 5, at 914.

¹⁴¹. Hathaway & Shapiro, *supra* note 1, at 258.

developments in evolutionary psychology and evolutionary game theory¹⁴² but are further supported by a broad range of contemporary findings from an even wider range of cognate fields.¹⁴³ The present account therefore places some of Hathaway and Shapiro's central claims about the existence of international law on a much firmer and more empirical foundation. In my view, and for reasons discussed in Part I, the only relevant conceptual requirement that we should place on the existence of international law is—moreover—that most of the relevant participants in the regime must take outcasting or its functional equivalent to be *warranted* in response to the breach of an international legal obligation.¹⁴⁴ This condition can sometimes be met (though perhaps not very stably) without any real threat of outcasting; and it can often be met in practice without very much actual outcasting or actions motivated by its threat.¹⁴⁵

A second advantage of the present form of argumentation is that we can now obtain a better understanding of precisely when and why (as opposed to just asserting *that*) outcasting might play the same functional role in supporting a system of genuine de facto international legal obligations that physical sanctioning often does in relation to domestic law. Given the above account of the evolutionary stability conditions for a sense of obligation, outcasting and physical sanctioning should be understood as capable of playing the relevant functional role when, but only when, they make noncooperation in a relevant legal system sufficiently costly relative to its alternative. What needs

142. See Kar, *Deep Structure*, *supra* note 5, at 904-05.

143. See, e.g., *id.* at 877-78 (describing evidence from the surface grammar of our talk about moral and legal obligations); *id.* at 885-86 (discussing the body of evidence relating to certain universal—or near-universal—features of our moral psychologies).

144. I say this because—as noted above—part of the deep structure of our sense of obligation is a sense that certain hostile reactions to breaches are warranted. See *id.* at 917. Insofar as a sufficiently shared sense of obligation to maintain a legal system in equilibrium is a necessary feature of law, a sufficiently shared set of these perceptions will also be an ineliminable feature of law—and one that flows from the conceptual connections between law, legal obligations, and these kinds of perceptions of warrant.

145. For law to exist, a group must share a sufficiently stable sense of obligation to maintain the legal system in equilibrium. As noted, this shared sense will necessarily involve perceptions that breaches of the relevant standards warrant certain forms of hostile or critical reaction. See *id.* But a stable legal system could nevertheless exist independent of much actual outcasting or actions motivated by its threat. Indeed, as a system of obligation becomes more stabilized, the *intrinsic* motivations that go into our sense of obligation should play an increasingly important role in producing action in conformity with the relevant standards—thereby making the threat of these reactions decreasingly important to the motivations of the group that actually explain members' behavior. See *id.* at 902-03 (noting that intrinsic motivation to act in accordance with a standard is an essential feature of our human sense of obligation).

to be maintained (by either outcasting or physical sanctioning) is, in other words, a specific relationship between the relative costs and benefits of being a cooperater, as opposed to being a noncooperater, within the relevant system of obligations. Within the context of a functioning modern state—with well-developed bureaucracies, police officials, and courts, and with legal requirements that are directed primarily at individual citizens, who have far less power than that of the state—physical sanctioning by the state often maintains this relationship perfectly well. But physical sanctioning is not always a live option, and it is not always needed so long as something else—such as robust practices of outcasting—serves the same function.

Given the nature of this function, we can, moreover, now see how the capacity of outcasting to serve it will depend critically on the advantages of international cooperation, relative to its absence. For many of the reasons described at the very start of this Essay, the relative advantages of international cooperation have been increasing at an almost exponential rate over the last several centuries. Because outcasting's capacity to support an emergent sense of international legal obligation depends on its capacity to render noncooperation sufficiently costly relative to its alternative, we can therefore conclude that this capacity must have also been increasing, and in a roughly proportional manner, along with those larger changes in the world scene. The present account can therefore explain why outcasting has begun to play such an important role in the emergence of international law over the last several centuries, even though it never played that role (nor could have) for the greater part of our history and prehistory. This is a fact that might otherwise seem puzzling based only on the official views presented in *Outcasting*, but it is a fact that is—in my view—critical to a full appreciation of the relationship between outcasting and the emergence of international law.

Thus far, I have been focusing on how the account of obligation developed in this Essay can improve our understanding of the relationship between outcasting and the emergence of international law in a number of ways that relate primarily to certain jurisprudential questions about the nature and existence of international law. I should note, however, that the present account of obligation can also contribute to the more orthodox question that has concerned many traditional international legal scholars: how well international law does in affecting state behavior.¹⁴⁶ To the extent that a genuine *de facto* system of international law is animated by *obligata*, and to the extent that *obligata* incline us to participate in a highly recognizable form of human social life (though now on a globalized scale) that is characterized by perceptions of

146. See *supra* note 14.

obligation, we will—in my view—not be able to address this traditional question fully without examining the ways that obligata motivate behavior. These psychological attitudes involve intrinsic forms of motivation, and they dispose us to engage in certain highly structured forms of social life that cannot be reduced to expressions of our instrumental reason. These attitudes can also be studied in their own terms: we can, for example, inquire into the conditions under which obligata tend to flourish or decay, or into the specific ways they tend to structure our social interactions. A closer look into questions like these, including the specific role that robust practices of outcasting can play in stabilizing a system of intrinsic motivations to comply with international legal standards, should therefore contribute even to the more traditional questions that concern many international legal scholars. Of particular interest is the following fact: the present account suggests that outcasting should be understood as influencing state behavior through at least two distinct and mutually reinforcing mechanisms. In the right circumstances, outcasting can not only produce instrumental reasons for compliance with international legal standards (by creating credible threats of harm for noncompliance), but it can also provide the evolutionary stability conditions for a distinctive set of intrinsic motivations to comply.

The present account can, finally, help us situate the specific phenomena of outcasting that Hathaway and Shapiro have identified in the international arena within a larger framework, which will help to clarify the relationship between these phenomena and a much broader range of normative phenomena in our lives. If we expand our focus from legal obligations to obligations more generally, we will see that outcasting is, for example, anything but an outlier phenomenon. In hunter-gatherer bands, breaches of perceived obligations are often met with a series of escalating reactions, from informal ones (like gossip and shaming) to physical ones (like stoning and killing) to various forms of exile and exclusion from the band.¹⁴⁷ During the greater part of our natural history as a species, inclusion within a cooperative hunter-gatherer band would have been critical to our survival, and exile or exclusion would have therefore functioned to identify and exclude noncooperating members of a band from the most important cooperative benefits then known to man. These last reactions should therefore be understood as one of the original forms of outcasting, or what we might call primal outcasting. Reactions like these still exist, in fact, and function in many analogous ways in our informal relations with one another. In friendship, love, and religion—all of which (one would hope) engage an intrinsic sense of motivation—primal outcasting plays a

¹⁴⁷ See *supra* note 117 and accompanying text.

critical role in the emergence and decay of vital forms of human cooperation. Facts like these can establish the centrality of outcasting in many areas of our normative practices.

With respect to our more formal legal relations, Hathaway and Shapiro have outlined several examples of outcasting in the cases of medieval Icelandic law, canon law, and our present system of cooperative federalism.¹⁴⁸ These examples are, however, either highly rarified or narrow and technical, and I think we can now see the phenomenon as arising even in certain less controversial and more central areas of modern private law. Consider, for example, the following fact: while the breach of a contract often gives rise to a right to expectation damages (which are in turn backed by the coercive power of the state), a material breach also justifies nonperformance by the victim of the breach.¹⁴⁹ Nonperformance can be understood as effectively outcasting the breaching party from any further benefits of the private exchange, and it is thus a form of outcasting that functions right at the heart of one of the most uncontroversial, important, and commonplace areas of modern private law.

By embedding the discussions in *Outcasting* within the more general account of obligation that I first developed in *The Deep Structure*, and have elaborated in several key ways here, I therefore hope to have produced a much richer and more refined understanding of both outcasting and its relationship to the emergence of international law. The account is largely consistent with the main claims defended in *Outcasting*, and—in fact—it should place several of Hathaway and Shapiro’s central claims on a much firmer and more empirical foundation. But the account should have also improved our understanding of both phenomena in a number of other important ways, and these additional insights give the present account independent value.

III. SETTLING THE DEBATE BETWEEN PRO AND CON

Let us now return to the debate between Pro and Con, not in any narrow sense, but in the full sense that incorporates all of the dimensions to the question isolated in different Sections above. Let us ask whether international law is law in all of its interacting dimensions.

In Part II, I began with a recognition that, while Part I isolated an important normative dimension to the question whether the international law in their world is genuine law (in the sense of being genuinely obligatory), the larger debate between Pro and Con could not be settled on normative grounds

¹⁴⁸. Hathaway & Shapiro, *supra* note 1, at 284-302.

¹⁴⁹. See RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

alone, because law is a social institution and legal obligations can only exist as part of a suitably stable set of social practices. That fact prompted us to look more closely at the purely descriptive aspect of their debate, which relates to whether their world contains a genuine *de facto* system of international law. But it should be equally clear that inquiries of this latter kind cannot directly answer the first question that Pro and Con were debating, because they take their question to have necessary practical implications, whereas no purely descriptive statement of facts can have necessary practical implications. I have therefore consistently stated that the irreducibly normative and the purely descriptive dimensions to the debate between Pro and Con are logically separable. I have, however, also indicated a number of relationships between these two types of inquiries. It is now time to see if we can bring these discussions together to see how the different dimensions to the broader question whether international law is law might relate.

In this final Part, I will be arguing that—despite the logical distinctions between the irreducibly normative and the purely descriptive aspects of this question—there is still an indirect but highly illuminating way in which we can understand the relationship between these two issues. Based on the above arguments, we can conclude that international law has—as a matter of purely descriptive fact—recently been emerging as a genuine and distinctive system of *de facto* obligations, which are animated by an increasingly shared and stable sense of international legal obligation. If Pro and Con were debating this issue during almost any part of our long history or prehistory (and hence before the larger set of recent transformations that I described at the beginning of this Essay and that have been picking up steam over the last several centuries to help stabilize the emergence of international law), then we should therefore predict that Pro would have been in a distinct minority. Given the nature of these exchanges, Pro and Con would have likely tried to give reasons for their views, and Pro might have even won out in a particular exchange—even if she could not produce reasons that Con antecedently accepted. If so, then she might have converted one Con to her view, and Con might have been added to the minority who took the international legal standards of the time to give rise to genuine obligations. Exchanges like these would have been happening everywhere around the world, however, and would have exhibited their ordinary human tendencies toward conversion in all those cases as well. The relevant evolutionary stability conditions needed to stabilize a shared sense of international legal obligation in the larger population would have also been missing. These larger tendencies would have therefore tended to produce a fairly broad and stable consensus that, despite the outcome of any particular exchange, Con was right and Pro wrong.

When I read some of the early and highly skeptical philosophical discussions of the status of international law from prior eras, I sometimes understand them as—at least in part—giving voice to just such a dominant view of their time. As Hathaway and Shapiro have observed, John Austin—for example—explicitly rejects the legal status of international law on the following grounds:

[T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author . . . [T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate the maxims generally received and respected.¹⁵⁰

One way of viewing Austin's explanation here is as reflecting an incorrect descriptive account of law, which calls his underlying conclusions about the status of international law into question—and Hathaway and Shapiro have argued as much.¹⁵¹ Given that Austin wrote in 1832, however, we might also understand him as in part expressing the majority view of his time, which would have been reflected in a widely shared set of practical attitudes toward international legal standards as lacking any genuinely obligatory force. Given this consensus, and given the fact that it would have reflected an absence of the types of practical attitudes needed to animate a genuine *de facto* system of international law, Austin may have therefore been right that international law did not exist at the time, given the correct and purely descriptive account of what law is. He may have been right, even if he explained his belief on incorrect grounds. This interpretation would therefore help to explain why his view was so influential among his contemporaries, even though many of them disagreed with his explicit reasoning.¹⁵²

Of course, consensus on a view is not necessarily a reason to accept it. With regard to the specific types of views that express *obligata* and that animate a distinctive form of human social life, consensus can, however, be understood as a sign, of sorts, that Con's view—along with the practical attitudes it expressed—was probably working better in human life at the time than Pro's. Indeed, this was probably true for most of our natural history as a species, and

150. Hathaway & Shapiro, *supra* note 1, at 262 (quoting AUSTIN, *supra* note 15, at 208).

151. *See id.* at 261-308.

152. *See id.* at 263-64 (collecting citations to relevant thinkers of the time).

although Austin wrote at a time when things were probably just starting to change, it would have made much less sense to live in his time as if part of a distinctive international community with a genuine system of international law than it does today. Hence, we can also make a kind of practical sense of these larger historical patterns of conversion, which have—until very recently—been tipping the balance toward Con’s view and maintaining it in equilibrium.

This particular kind of consensus is also special because it expresses obligata. To the extent that a broad consensus has existed over Con’s view, for most of our natural history as a species, this consensus would have therefore entailed that there have, in fact, also *been* insufficient people with a shared sense of international legal obligation to animate a genuine *de facto* system of international law. Hence, the Cons of the world have also been right for most of this time, given the correct but purely descriptive account of what law is. They have been right even if they have been unaware of what that account is. Austin’s views can, in other words, be understood as just one instance of this larger phenomenon.

If, on the other hand, Pro and Con are understood as debating this question today—or even more so in the future—then we should predict that Con will increasingly be in the minority. At some point in the not-so-distant future, Con will, in fact, almost certainly have to be one of those people, whom we all know, with very odd practical views. Perhaps Con is a psychopath, who does not take anything to give rise to genuine obligations.¹⁵³ Or perhaps Con is a philosopher, with a special theory of what law is (which excludes international law from its purview)¹⁵⁴ or with a special theory of metaethics (which renders all of our normative claims systematically erroneous)¹⁵⁵—but also with a correspondingly poor grip on how to live in the world. Or Con may just be a little bit old-fashioned, like many of our recent ancestors, who—we tend to think—just do not seem to get it with regard to so many of the obvious ways that the world works. We should therefore predict that Pro—along with most of the rest of the people in Pro’s world—will probably not waste too

153. See Kar, *Deep Structure*, *supra* note 5, at 889 (“[S]tudies [of psychopaths] suggest that psychopaths often have perfectly functioning capacities of many kinds, and that what they lack is a discrete bundle of interrelated psychological phenomena that should be familiar from our moral and legal practices. For example, they are (i) less capable of feeling certain characteristic moral emotions like remorse, shame, and guilt; (ii) less capable of empathy and role-taking; and (iii) less capable of perceiving what the rest of us take to be the distinctive authority or compelling nature of law and morality.” (footnotes omitted)).

154. People who maintain the Modern State Conception of law in the future may well end up falling into this category.

155. See, e.g., MACKIE, *supra* note 43 (developing an “error theory” of our moral judgments, which suggests that they are all systematically false).

much of her precious time engaging Con's substantive views. The Pros of the world will—after all—need to carry on with the business of life, and their particular portfolio of practical attitudes (endowed to them in part in their formative years, and then developed and sustained in equilibrium by many exchanges with other Pros) will have left them much better prepared for this task than these skeptics of international law.

Once again, an emerging consensus that Pro's view is right is not exactly a reason to accept it, but, once again, it can be understood as a sign, of sorts, that an important transformation has been taking place on the world stage. The fact that Pro's views are winning out in the modern world suggests—in my view—that they are beginning to work better in human life than Con's. Once again, we can therefore begin to make practical sense of these larger patterns of conversion, which are beginning to tip the balance toward Pro's view, and maintain it in equilibrium. We can also begin to understand why—as I noted at the very start of this Essay—it is becoming increasingly natural for us to think in terms of a global world order, with a genuinely international community and an emergent system of international law.

Because this emerging consensus is expressive of *obligata*, which animate a distinctive form of human social life, we can also understand this consensus as entailing that—for the first time in our natural history as a species—a shared sense of international obligation sufficient to animate a genuine system of international law really is emerging in human life. Pro's view—as nicely expressed in articles like *Outcasting*—is therefore becoming true, even if it is construed as making nothing more than a purely descriptive claim about the existence of international law and even if the explicit reasoning that we use to support the view is sometimes faulty in some regards.

At the end of the day, Pro's fuller view is, however, much more than just a view about the existence of a genuine system of *de facto* international law. For reasons discussed in Part I, Pro also takes her view to have a special set of practical implications, which cannot be logically derived from any such purely descriptive claims about the existence of international law, or from any unadorned considerations of the good and its means of production. Pro's view thus contains a special form of *endorsement* of international law, and an acceptance of its special practical authority. In expressing this view, she can also be understood as prescribing or recommending that others share that practical endorsement. Pro may be right to endorse the international law that exists in her world, even if she does not know the true normative grounds for this endorsement at the most foundational level. Whether she is *in fact* right will nevertheless depend, at the most foundational level, upon whether the international law that actually exists in Pro's world meets the practical authority-based form of justification discussed in Part I. Hence, normative

inquiries of this kind should be viewed as central to the mission of international legal scholarship, rather than as peripheral to its current causal-explanatory focus.

In my view, the robust practices of outcasting that Hathaway and Shapiro have recently identified in the international arena therefore establish both that international law has been emerging as a genuine system of de facto law, and that we are committed to a specific practical authority-based method of justification when evaluating it. The emergence of international law—which has been taking place in earnest over the last several centuries—has undoubtedly been a highly imperfect process—both on the normative and on the descriptive side. But we need not be completely passive in the face of these transformations. If we learn to understand them better, then we can begin to play a more active and effective role in perfecting these transformations along both dimensions.

CONCLUSION

If I am right about the arguments in this Essay, then we live in special times indeed. We are right in the midst of a profound sociocultural transformation, which has been producing a fundamental change in our practical attitudes toward international law. Over the last several centuries, this transformation has culminated in the sociocultural conditions needed for the emergence and stability of a distinctive sense of international legal obligation in our lives—and one that is increasingly capable of animating a distinctive system of international law. As a result, some of our basic forms of human social life and interaction are changing.

A transformation on this global scale is in one sense unprecedented, but it is also highly reminiscent of a much more familiar and highly fateful revolution that occurred many millennia ago in our natural history as a species. This is the revolution by which we transitioned from hunter-gatherer forms of life to more sedentary living—with higher population densities and incipient legal traditions—shortly after the development of agriculture. In my view, our present transformation will likely prove every bit as fundamental within our natural history as a species; but to understand it more fully, we will need to expand the focus of international legal scholarship to include a more probing and interdisciplinary look at these very special forms of sociocultural transformation. We will also need to recognize the critical role that outcasting can play in supporting them.

Robin Bradley Kar is a Professor of Law and Philosophy at the University of Illinois College of Law. He would like to thank the editors of The Yale Law

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