PROMISE AGAINST PERIL: OF POWER, PURPOSE, AND PRINCIPLE IN INTERNATIONAL LAW

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I. INTRODUCTION: HARD TIMES FOR HARD WON IDEALS

The first decade of the new millennium was a bit hard on the rule of law—national and transnational law alike—in some quarters of the U.S. government. And as went those quarters of government, so went some quarters of the legal academy. These years were nearly as hard on another ideal, whose realization generally rides on that regularity and impartiality which the rule of law works to secure. I refer in this case to joint cooperative action among nations, as well as among sub-national governmental units within nations, in addressing such critical collective challenges as global terrorism, climate change, and financial fragility.

Examples on the government, as distinguished for now from the academic side of this sorry story abound. Some hiring and firing decisions taken by the U.S. Department of Justice in the early 2000s, for instance,

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now appear to have been taken with a view less to the effective administration of justice and combating of criminal threats than to party-political considerations—those of White House political director Karl Rove in particular. Rove’s aim, it now seems, was to secure unquestioning cooperation from U.S. Attorneys in a plan to taint Democratic political candidates with defendant status in meritless criminal investigations.1 A more late-Roman-Republican, or Soviet Communist Party, style departure from efficient governance under “law, not men” could scarcely be imagined. U.S. Attorneys were converted to function as Rove or Republican Party attorneys.

As Rove and his cronies targeted political adversaries at home, others in the White House moved illegally against Bush family enemies abroad. Most conspicuous here was the U.S. military’s being commandeered to invade, occupy, and replace the government of another nation-state, Iraq, without benefit either of United Nations (U.N.) authorization or of good faith appeal to any imminent—or even serious—threat posed to the United States or global order, as distinguished from George Walker’s “daddy.”2 It also now looks as though White House attorneys, apparently viewing domestic and transnational law much as Rove viewed the U.S. Department of Justice, abetted the issuance of these orders through bizarre new readings of operative legal standards.3

Now lest one be misunderstood, it should be acknowledged at once that it both was and is obvious that the Iraqi gangster-government of the time was itself far more contemptuous of law, not to mention the most minimal standards of human decency, than likely were any in the Bush

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2. The allusion is to George W. Bush’s apocryphal remark about Saddam Hussein’s having tried to kill his “daddy.” In fact Bush used the word “dad.” For more on the long, complex history of the Bush family feud with Hussein, for example, see Peter Baker, Conflicts Shaped Two Presidencies, WASH. POST. (Dec. 31, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/12/30/AR2006123000663.html (last visited Oct. 16, 2010).

White House. Hence few tears ought—or are apt—to be spilt for that
government’s functionaries, as distinguished from the legal and moral
standards to which they were indifferent if not hostile, when we look back
on these unhappy years. But pre–2003 Iraq had never been viewed as an
exemplar of rule of law ideals as had the United States, which, by showing
contempt for legality, could and did undermine legality.4

In this latter connection it was accordingly most unsettling of all to see
agents of the U.S. government, during the early 2000s, also beginning in
some cases to resemble the very criminals they had unlawfully acted more
or less unilaterally to depose. I allude to the emergence and now steady
accumulation of evidence that officers of the U.S. military and intelligence
services might, along with sundry mercenaries whose services they
apparently unlawfully retained, have engaged in illegal detentions,
“extraordinary renditions,” systematic prisoner abuse, extra-judicial
killings, and even torture.5 These actions, if taken by or with the approval
of U.S. government functionaries—including, once again, lawyers—will
likely be judged ultimately to have shown more contempt for domestic and
international law on the part of our own agents than virtually any action
taken since the nineteenth century by American custodians of this
quintessentially American ideal, the rule of law.

II. THE HARD TIMES AS MADE TO LOOK GOOD

Now where there is contempt for impartially applicable legal standards
and associated behavioral regularity, one generally also finds varyingly
vulgar, and sometimes sophistical if not quite sophisticated, attempts to
“rationalize” the contemptuous behavior in question. These attempts
typically take certain familiar forms, two of which are particularly often
encountered.

Exemplars of one such form, historically favored by “rogue,”
“brigand,” or “regime-challenging” states like the Soviet Union, Fascist
Italy, and Nazi Germany in the twentieth century, or Saddamite Iraq and
theocratic Iran in the early twenty-first century, question the operative
standards themselves. The “rogue” in these cases dismisses the salient rules
or principles as little more than calcified class or status advantages of one
sort or another, masquerading as universally applicable and impartially
administered law. The “rogue” might even dismiss the cognate ideals of

4. For example, witness Russia’s proffered justification of its 2008 invasion of Georgia,
South Ossetia Conflict FAQs, RIA NOVOSTI (Sept. 17, 2008), http://en.rian.ru/russia/20080917/
116929528.html (last visited Oct. 16, 2010).

5. See, e.g., Ali K. Soufan, What Torture Never Told Us, N.Y. TIMES, Sept. 6, 2009, at WK9,
impartiality, cooperation, and the rule of law themselves altogether, as little more than fantasy or delusion. "All is power," he might say, in a vaguely Nietzschean vein, "and the workings thereof. All else is ideological superstructure at best and mendacity at worst." We do not usually hear words like these from Americans, but read on.

Exemplars of another time-honored form of self-justification heard from law-breakers purport to show that alleged violations were not "really" legal violations at all. And it is this form that seems to have found particular favor among former U.S. government officials in connection with the infractions mentioned above. Members of the Bush administration whose names are now household words, for example, wrote certain now notorious memoranda purporting to show that deplored practices engaged in or authorized by American military and intelligence personnel did not count as torture under applicable statutes and international conventions. Other spokespeople for the administration, alluded to above, argued that the illegal invasion and occupation of Iraq was a legitimate act of "self-defense," in response to a "grave and gathering" threat, under international custom and convention. And still others maintain even today with straight faces that, since a president may legally dismiss all U.S. Attorneys at any time even for no reason, it cannot be violative of domestic legal standards to dismiss some such attorneys selectively for any reason.

 Attempted self-justifications of this second form, while often amusing or perhaps darkly comical, are usually less disturbing than those of the first form. For just as hypocrisy might be thought of as vice's tribute to virtue, so can "hail mary" attempts at self-justification, and frivolous claims of legality, at least be thought backhanded compliments paid law. And contempt for law taking the form of "rationalized" illegal behavior, even when exhibited by present-day functionaries of that first modern government framed with a view to the ideal of government under "law, not men," is at any rate just more familiar to us than is contempt for law taking the form of outright rejection of law. We see less extreme instances of this form of contempt, after all, all the time—notably among our own children in their more casuistic moments.


8. See, e.g., Lichtblau & Lipton, supra note 1.
It is presumably for reasons such as these that so many practitioners and scholars of international law—American and otherwise—reacted with consternation when two members of that institution through which law-governed societies often most carefully examine, critique, and work to improve themselves—the legal academy—published a book amidst the Bush years purporting to justify unilateralism and lawlessness of the sorts instanced above. For the justifying in this case took the form, not of the second—"it was actually lawful"—variety, but of the first—"there is no law here"—variety: the variety favored by "rogues." And in this case it was not simply government functionaries seeking a free hand, but legal scholars whose hands never were bound, who were doing the law-denying.

III. AN ATTEMPTED ASSIST FROM THE LEGAL ACADEMY

I refer of course to Jack Goldsmith and Eric Posner’s unfortunate Limits of International Law (Limits) published in 2005. Here a set of remarkably casual, pseudo-scientific proto-arguments purported to show, not that the Bush administration had in fact acted in keeping with transnational legal standards during its early years, but that transnational legality itself is in large part just epiphenomenal or mere bunk. We were told it amounted to a sort of ingeniously elaborate hoax, shimmering hologram-like over legitimately venal interactions among states, foisted upon leaders, lawyers, diplomats, and professors by those leaders, lawyers, diplomats, and professors themselves. And while one might have expected accusations this remarkable to be supported by some remarkably heavy new brand of methodological artillery, all that Goldsmith and Posner proffered in Limits was a thin sort of "dumbed-down" rendition of stale rational choice theory, the genuine article of which appeared to lie beyond their ken.

Now it is of course possible that the field of international law scholarship simply looked ripe for the taking by people of the Goldsmith and Posner persuasion—somewhat, perhaps, as the native populations of North America might have looked ripe for the conquering by guns, smallpox, and brightly colored beads as once brought to this continent by


10. See Limits of Their World, supra note 9, at 1720–23.

11. Id.

12. On the crudity and ultimate tautologousness of Goldsmith and Posner’s Cliff’s Notes style rational choice theory in comparison to proper rational choice theory, see Limits of Their World, supra note 9, at 1729–44, 1746–62, 1770–75.
European invaders of centuries past. For international law practice and scholarship had not yet been colonized, as had some fields of law, by those forms of rational choice and game-theoretic analysis long familiar to price theory, microeconomics, and even most government or "political science" faculties. And so anyone plausibly purporting to bring this putatively heavy equipment to bear for the first time on international law scholarship—as professors at the University of Chicago might be expected to be equipped to do—stood some chance of cowing or wowing the old-timers into submission.

The attempted beachhead in this instance failed, however, as the natives refused to be taken in. And this seems to have been principally because rather than gunpowder and contagious disease, the book quite transparently carried more in the way of shiny glass beads than real weaponry.

For one thing, it was clear that the authors themselves did not fully understand the "models"—as they called them—and methods that they purported to introduce. Nor, for that matter, had they apparently given much thought to what is meant by the word "law" in domestic or transnational contexts, or to what theories, qua theories, are meant to accomplish. Nor, relatedly, had the authors apparently bothered to consider what plausible meta-theoretic criteria of theoretic success might look like. These were troubling lacunae in a work that professed to break new theoretical ground. The ultimate upshot was that, notwithstanding the authors' repeated claims to be proffering a "better theory" of international law than could be had from the "traditional" scholars they never cited but incessantly slighted, the book never managed to present anything in the way of a theory at all. It struck the pose of the brash newcomer without ever managing to do much of anything, let alone anything new—a "Clay versus Liston" circa 1964, one might say, save without Clay's ever getting round to stepping into the ring.

For another thing, as an empirical rather than foundational matter, the authors of Limits did not appear to have spent much time learning the

13. See Limits of Their World, supra note 9, at 1729–39. See also infra Part XI.
14. See Limits of Their World, supra note 9, at 1723–29.
15. See id.
16. I am, of course, referring to the Muhammad Ali of the early 1960s, who then went by the name "Cassius Clay." Clay's incessant barrage of poetically rendered insults, wild predictions of glorious victory, and generally manic comportment in the weeks leading up to his first heavyweight bout with the then-reigning champ, Sonny Liston, led many to speculate that he was either bluffing or was so fearful as to have been led into suffering a sort of psychological breakdown—until he delivered the goods by knocking out Liston, twice. See, e.g., YouTube, http://www.youtube.com/watch?v=iyhqZNCf9pM&feature=related (last visited Oct. 16, 2010).
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details of the few international legal rules, principles, régimes, institutions and “case studies” to which they purported to “apply” their never completed proto-theory. Little of which they spoke proved recognizable to people familiar with international law, international institutions, recent events, or the historical record. Instead one found misshapen vignettes and pastiches apparently cobbled together and “photoshopped,” as it were, with no evident object but to lend post hoc plausibility to the book’s few purportedly empirical claims.17

But what was most damning of all in connection with Limits, in consequence of the foundational errors just enumerated, was its sheer sterility—both positive and normative sterility alike. The book was entirely empty as a would-be generator either of nontrivial descriptive hypotheses amenable to empirical investigation, or of a coherent empirical research agenda. It was likewise empty as would-be generator of prescriptive recommendations, usefully informed by empirics and coherent normative ideals, aimed at improving the global order and the lives of the people who must live with it. The book offered neither “hard facts,” nor “hard headed” understandings of facts derived through the medium of coherent theory, nor any realistic hope that the global community or its members might act to redeem. It offered only repetitive side-swipes at “traditional international law scholars” for their failure to realize what Goldsmith and Posner’s ersatz theoreticians purportedly could have told them at any time from the Creation on down to the present: that they were deluding themselves in believing or acting as though anything we might call “international law” could or ought to exert anything like “normative pull” upon anyone who acts in the name of a polity.18

In consequence of its theoretic vacuity, descriptive inaccuracy, and prescriptive sterility, Limits quickly found itself quarantined as if it were a strange new variety of antigen in the body of international law scholarship, with a fast-growing hedge of reviews and review essays playing the salutary role of antibodies.19 Some pointed out that there actually already was a very well developed international law and international relations literature informed by an understanding of rational choice and game

17. See Limits of Their World, supra note 9, at 1744–46, 1762–69.
theoretic modeling much more complete than that on display in Limits.\textsuperscript{20} These critics also pointed out that this literature, surprisingly un-cited by Limits, did not impugn the normativity, effectiveness, or longer term potential of international law at all, but in fact both endorsed it and offered means of improving it.\textsuperscript{21}

Some critics also observed that another very rich literature on international law, again strangely un-cited by Limits, supplemented unavoidably coarse-grained rational choice and game theoretic modeling with more fine-grained sociological modeling.\textsuperscript{22} They also noted that this literature rendered it all the more evident not only \emph{that} international law expresses and exerts normative force, but both \emph{how} it does so and how its influence is now steadily deepening even as it continues to widen.\textsuperscript{23} Finally, some reviewers pointed out the remarkable number of theoretic incoherencies, conceptual blunders, and plain factual inaccuracies vitiating Limits, to which I alluded a moment ago.\textsuperscript{24} The quarantining and curative work attracted by Limits, then, was happily thorough.

What had \emph{not} yet been done, however—up until now—was to step back, take stock, and begin afresh in comprehensively assessing the place, the performance, and above all the potential of international law as a once again rapidly developing mode of collective ordering at the start of a new century. I say “until now” because this is precisely what Mary Ellen O’Connell’s new monograph, \textit{The Power & Purpose of International Law} (\textit{Power & Purpose}), both sets out to accomplish and largely succeeds in accomplishing.\textsuperscript{25} The work would seem destined to fill—and fill admirably—the space left by Limits’ near immediate flameout, as the international legal scholar’s and practitioner’s state-of-the-art surveiv of our shared global project.

\textbf{IV. A PROPER HOUSE CLEANING: RECOVERING LAW, THE RULE OF LAW, AND LAW’S PRINCIPLED, PURPOSEFUL POWER}

\textit{Power & Purpose} earns plaudits in virtue of several mutually complementary characteristics in particular. The book manifests, first, a thorough familiarity with the actual workings—both as formally prescribed

\begin{thebibliography}{99}
\bibitem{20} See \textit{Limits of Their World}, supra note 9, at 1738–41.
\bibitem{21} \textit{Id.}
\bibitem{22} \textit{Id.}
\bibitem{23} See, e.g., \textit{id.} at 1741. The allusion is to the remarkable body of work by Goodman and Jinks cited therein, and subsequently extended by further work cited \textit{infra}.
\bibitem{24} See generally \textit{Limits of Their World}, supra note 9, at 1738.
\bibitem{25} Mary Ellen O’Connell, \textit{The Power and Purpose of International Law} 16 (2008).
\end{thebibliography}
and as practically executed—of those principal standards, regimes, and institutions through which orderly transnational cooperation and the international law to which that cooperation gives rise are effected. The book manifests, second, an equally thorough familiarity with the understandings of both past and contemporary scholars, practitioners, and scholar-practitioners of international law as to what it is they do, critique, and all the while work to improve. Both of these characteristics lend the book weight as a contribution, in its own right, to the further development of international law and its scholarship with a view to more fully realizing the purposes of these salutary and mutually complementary enterprises.

But what is most distinctive of all about Power & Purpose, in this reviewer’s estimation, is its simultaneously encyclopedic and synthetic grasp of the cohesive long term history of international law and its self-critical self-improvement through the interpretive work of scholar-practitioners. One comes away from reading the book with much more than admiration for Professor O’Connell’s impressive erudition. One comes away with a renewed sense of well-tempered hope for the world and its struggling inhabitants. For one sees in this work both how far the global rule of law and its self-improvement through self-critical practice have come, and how regularly the same dreary nay-saying and power-exalting that characterized Limits have been registered, and discarded, along the way. Transnational law’s “nattering nabobs of negativism”26—the likes of Hobbes, Machiavelli, Morgenthau, and a smattering of others over the centuries—turn out to be as old as transnational law itself, as well as a great deal more crude in their understanding of human action and aspiration.

V. NULLA LEGE SINE POENA? WE’VE HEARD IT BEFORE.27

Its pretensions to methodological novelty notwithstanding, Limits sought much of its purchase by trading on a very old, long-discredited canard. This was the idea, to put the point only marginally more crudely than Limits did, that because nothing like Tim LaHaye’s peculiar fantasies have yet been realized—there are no Blue Helmets in Black Helicopters yet bombing or shooting or clubbing Americans into submission—there is no international “law” worth the name.28 The conclusion follows on the

26. In honor of William Safire, a kind man recently deceased, who coined this phrase on behalf of then Vice President Spiro T. Agnew.

27. And we have heard it in spite of the fact that the maxim properly reads, “Nulla Poena Sine Lege.”

28. The allusion is to TIM LAHAYE & JERRY B. JENKINS, ARMAGEDDON (2003), wherein the Secretary General of the U.N. turns out to be the world-tyrannizing “Antichrist” who stars in the Biblical Book of Revelation, read by some “fundamentalists” as a literal forecast of life in the End
premise only in the thinking of those who hold wildly implausible, crabbed and clunky conceptions of “law”—conceptions that call to mind the Austinian picture of law as the “command” of a unitary sovereign backed-up by threat of physical violence that the sovereign is able to wield. Had they paused to consider what law actually consists in, Goldsmith and Posner, as well as their comparatively few predecessors in skepticism, might well have spared themselves a good bit of avoidable blunder.

Very few people, it turns out—particularly in the academy—hold to the clunky Austinian picture of law on reflection, and we learn in Power & Purpose that very few historically have. It also turns out, however, that the “no law without violence” idea nevertheless acts as a sort of hardy perennial weed—regularly gestured to by those who are blind to the order implicit in the garden, and just as regularly pulled out and put to the compost by those more careful gardeners who prevail in legal practice and scholarship. Power & Purpose is particularly learned, first, in its narrative account of the intellectual history of this familiar dialectic, and second, in its account of the dialectic’s interaction with actual law practice. Part I of the book is devoted primarily to the first account, Part II to the second, though the two Parts for good reason cross-refer. I shall accordingly by and large discuss them together, in tribute to that integration that Power & Purpose itself ultimately works.

With respect to the first story, Professor O’Connell reminds us over the course of Chapters One through Three that it has never been seriously denied by anyone—certainly not by international lawyers or legal scholars—that laws which do not merely describe physical events in the “laws of nature” sense, but prescribe human action in the “natural and positive law” sense, always implicate possible sanction. That is just part of what it is to say not only that something tends, as a positive matter, often to occur or be done, but that it is, as a normative matter, required to be done. For with any express or implied “ought” claim comes an understanding that action in contravention of the claim is an apt occasion for opprobrium. And opprobrium is something that tends generally to find some form of expression. The menu of such forms, for its part, is much

Times prior to Christ’s final return to reign over the earth. One reckons that, say, Dag Hammarskjold and some other Secretaries General might nearly have inclined graciously to thank LaHaye for the complimentary imputation of consequentiality to their office, even while disavowing any interest in clubbing anyone.


richer even within domestic legal systems than international law skeptics seem in general to have noticed.  

What the comparatively small number of Ockhamites, Hobbesians, Machiavellians, Autilians and their ilk over time seem with depressing regularity to have missed, we learn in Power & Purpose, is that manifest opprobrium always has taken both a great variety of forms and a great many varying degrees of force. Careful scholars, especially those with experience in transnational legal practice, have long known this; a few armchair nay-sayers have just as consistently missed it. Sanction, in short, comes both in many guises and in many intensities. The task for transnational lawyers and legal scholars has accordingly never been to announce the lack of an international police force, international Gestapo, or international Blackwater as if this were a discovery, but to seek more and better means of affording both fairer and more orderly modes of collective action—action taken under the rule of law—to persons and their various stratified, sub-global units of government worldwide than we have managed thus far.

Now, what such means for rendering collective action fairer and more orderly might we have? And what forms short of and additional to organized violence do law and law’s sanctions generally take? The variety of both, once you begin looking around, can be dazzling; and Power & Purpose should serve as a salutary indicator even for those who have already noticed. Sanctions, for their part, range from as little as a disappointed shake of the head or more forceful show of disgust, to piecemeal remonstrance or denunciation, to more systematic shaming or shunning or isolating, to ad hoc or more systematic material deprivations of various sorts and with varying degrees of severity, all the way on to physical restraint and the credible threat of outright physical violence or violence itself, be that in turn of a limited “surgical” nature or more. As Power & Purpose makes clear, this same variety of forms has always been with us not only in international legal sanctioning regimes, but in domestic ones too.

Practitioners and scholars of international law, for their part, just as practitioners and scholars of domestic law themselves not so long ago were, have long been aware of this great multiplicity of forms, while transnational actors have availed themselves, in various instances, of all of them. The principal difference between the domestic and international cases is simply that well coordinated sanctioning is more hard won in the latter case than in the former—just as it was in the domestic case itself in

31. In this connection, for example, see Limits of Their World, supra note 9, at 1756–57.
not so distant times, before the coalescence of localities into larger polities called “nation states” was complete.\textsuperscript{32}

Power & Purpose effectively drives this point home in parallel surveys of intellectual (Part I) and practical (Part II) legal history that commence with classical antiquity and run down to the present day.\textsuperscript{33} We are reminded that at least as early as the time of Aristotle—in fact, I would argue, that of the pre-Socratics\textsuperscript{34}—and proceeding through those of Cicero, Augustine, Aquinas, Bartolus, Belli, the Spanish Scholastics, Grotius, and more modern legal theorists such as Jellinek, Triepel, Oppenheim, Kelsen, Lauterpacht, Henkin, and even Hart—the dominant view among lawyers, judges, legal thinkers, and social theorists has been that there are standards very much in the nature of laws that bind even those who purport to be sovereigns. Two deeply connected features of such standards bear particular notice here. I shall call them the substantive and formal characteristics of these standards’ contents on the one hand, and the two senses in which these standards can be said to bind on the other.

VI. WHEN IS IT “LAW,” AND WHEN IS IT “RULE OF LAW?”

The substantive contents of the standards discussed in Power & Purpose have, unsurprisingly, typically tended to reflect the economic, social, and political characteristics of their times. Hence because, until fairly recently, interactions between citizens of different states tended largely to be limited to those between citizens acting as martial or diplomatic agents of states, and because most such interactions in past times concerned matters of dynastic succession and territorial jurisdiction, transnational legal standards used mainly to speak in such manner as to restrain state agents from employing coercive instrumentalities of state for any purposes that were not “just.” “Just causes” in these cases, for its part, meant either resistance to aggression—usually, resistance to attempts to upset settled territorial boundaries—or the restoration of some peaceful semblance of the status quo ante, or both.\textsuperscript{35}

By the same token, as interactions between citizens of different states in the modern era have steadily “thickened” and intensified to embrace indefinitely more sorts of transaction than invasion, war, and threats thereof, so has the variety of contents that make up transnational legal standards. As even the casual reader of newspapers, let alone the domestic

\begin{thebibliography}{9}
\bibitem{32} And in some cases, of course, even the latter coalescence is far from complete. The most conspicuous instance today is doubtless Afghanistan.

\bibitem{33} O'CONNELL, supra note 25, at 17–98, 151–368.

\bibitem{34} See, e.g., HOCKETT, supra note 29, at 62.

\bibitem{35} See, e.g., O'CONNELL, supra note 25, at 21–26.
\end{thebibliography}
or transnational legal practitioner now knows, there are transnationally operative legal standards that speak to everything from genocide to slavery to child labor to telecommunications to drug trafficking to money laundering to bank and financial regulation to trade restrictions to torture to—soon, one hopes—even carbon emissions and more. Thicker relating across borders just naturally gives rise to denser webs of agreed regularity and “ground rule”—law—operative across borders.

It is hardly surprising that as more and more previously local challenges spill across increasingly porous borders to become global challenges, the contents of transnational legal standards grow as well. The same phenomenon, after all, is familiar to Americans in their domestic capacity, who as their nation grew steadily more economically and socially integrated over the course of the late nineteenth and twentieth centuries, saw more and more erstwhile local or state concerns become state and federal concerns. And of course a counterpart such development is now well underway in Europe. Law tends to “federalize” as political localities themselves steadily integrate economically, socially, culturally, and ultimately even politically. What today we call “transnational” law would in many ways have embraced, only a bit more than two hundred years ago, much of what was legislated first in Philadelphia, then briefly in New York, and then finally in Washington, to the citizens of such disparate “states” as Massachusetts and South Carolina in the early American national period.

Now in what sense have such polity-straddling standards, notwithstanding their varying substantive contents and, relatedly, their rootedness in particular stages of economic, social, and political development, all been “law-like?” Here the answer is found less in the substantive contents of the legal standards, than in those formal characteristics constitutive of that elusive ideal known as the “rule of law.” What are those characteristics? Well, the two that I have repeatedly referenced above are impartiality and regularity, and it is time now that I should say why. What, then, do impartiality and regularity have to do with that evidently widely shared human ideal known as “the rule of law?”

36. As I wrote the first draft of this review essay, Ireland had just signed on to a streamlined new “constitution” of Europe known as the “Lisbon Treaty,” which came into force before year’s end. See, e.g., Ireland Back’s EU’s Lisbon Treaty, BBC NEWS, (Oct. 3, 2009), available at http://news.bbc.co.uk/2/hi/8288181.stm (last visited Oct. 16, 2010).

37. For evidence on the degree to which this ideal is—and long has been—widely shared in the human community, see Hockett, supra note 29, at 10.
VII. "HIGHER LAW," "NATURAL LAW," AND "THE MORAL LAW" AS CONSTITUTIVE OF THE PRINCIPLED RULE OF LAW

The role that impartiality and regularity play in constituting the rule of law ideal, and hence the contents of standards that can properly be called "laws," is best introduced by reference to that from which the rule of law typically is contradistinguished: that is, of course, the morally arbitrary "rule of men." We extol "governments of laws, not men." And there is a very good reason for this. The reason that the "rule of men" is found normatively wanting, I suggest, is that it entails acquiescence in a very simple and ultimately normatively unacceptable proposition: that is the proposition that some persons are simply entitled (in a seldom if ever critically considered sense of "entitled"), by dint of no more than hereditary or other unearned hence morally arbitrary status, to subordinate other persons' will to their own wills, while their own wills go unsubordinated to anything—principled or otherwise.

Where I am able to subordinate your will to mine without reference to any standard that binds both of our wills, I cannot properly be said even to prescribe action, let alone legally or legitimately prescribe action, to you at all. The proper word in such cases is not "prescription," but "conscription." The arbitrary commander conscripts the wills of others, and in so doing sets herself "above" and apart from those others—as if she were the deity as conceived by medieval voluntarists, answerable to nothing and no one. This is what is meant by a "government of men" as distinguished by a government of laws.

Now the realm in which the rule of law prevails, by contrast, is that in which all willing—including the willing of those who command—is done pursuant to principles. And the principles in question are principles that bind and/or bound the will of the commander as fully as they do the wills of the commanded. They are in that sense formally constitutive of the will of that commander, and accordingly render that will morally intelligible. Rather than as the voluntarist deity, those who will where the rule of law is operative will as does the natural lawyers' deity—the deity of Aquinas rather than Ockham. But now what is it to will pursuant to a principle, and hence to will with "legitimate"—the word of course is suggestive—prescriptive authority rather than merely conscriptive pretension?


39. Id.

Elsewhere I have suggested that the answer to this question is found in three forms of logical generality, which correspond to three "variables" opened by any imperatival utterance underwritten by a reason.\(^4\) It will be helpful briefly to reprise these forms of generality here. For they are constitutive, I believe, of all legitimate prescription as distinguished from arbitrary conscription, hence of all genuinely authoritative law. In that sense they are internal to our idea of law and our ideal of the "rule of law" themselves, whether the "law" we have in mind be considered domestically or transnationally—or for that matter even personally.

The first form of generality to which I refer, then, is what I call the "situational" generality of the reason that underwrites an imperatival utterance—the range of circumstances in which the reason would be implicated and the utterance thus apt. This form of generality, which is closely bound up with autonomy—literally, "self-legislation"—in action, is what makes a principled imperative of what would otherwise be a merely \(ad\ hoc\) decision to act or command; the sort of thing even very young, unreflective children and nonhuman animals can do or follow, respectively. This form of generality is also, accordingly, closely bound up with the "regularity" to which I have referred above—the root \textit{regula} here unsurprisingly being the same root we find in such words as "regulate" and even "reign" and "rule." Those who are fit legitimately to govern must first be fit to self-govern, and to self-govern is to self-regulate—to act upon reasons for action that are applicable in multiple circumstances. Such reasons are just what we call "principles." They bear situational generality.

The other two forms of generality to which I refer are jointly constitutive not simply of the "regularity" characteristic of all principles, but the "impartiality" characteristic of authoritative moral or ethical principles. One of these forms I call "recipient" generality. The other I call "beneficiary" generality. A reasoned imperative grows in respect of its recipient generality as the class of those who are putatively subject to it grows. It grows in respect of its beneficiary generality as the class of those on behalf of whose well-being it is putatively rendered grows. The maximal degree of generality in either case would be full universality—the kind of universality that renders the Golden Rule "golden."\(^4\) And the ideal of ethical impartiality, I believe, just is the ideal of universality along both of those dimensions—those of the recipient and beneficiary classes of imperatival utterances underwritten by \textit{bona fide} moral reasons. It is the

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\(^4\) See Paretians, supra note 38, at 420–42.

\(^4\) "Do unto others as you would they do unto you." The "you" here, naming recipients, means everyone. The "others," naming beneficiaries, means everyone too. The maximal degree of universality is that in which the recipient and beneficiary classes, embracing everyone, coincide. See id. at 432–40.
ideal pursuant to which all persons are equally subject to an imperative, and equally apt to benefit by everyone’s acting in conformity to it.

Now to say that a standard is a *bona fide* “legal” or “law-like” standard in the senses intended by thoughtful lawyers, I think, just is to say that it bears the three forms of prescriptive generality just sketched—hence that it bears the features of regularity and impartiality associated with those forms of generality. It is to say that the standard is uniformly applicable in all morally relevantly similar circumstances, is morally binding upon all who might find themselves in those circumstances, and works to the benefit of all who might be affected by those who act in those circumstances. In such cases the standard is in an apt sense “above” all of us, and we are all of us in this sense treated as moral “equals” under the standard in question. Putative rules that not only are posited as “positive laws” by persons purporting to bear the authority to posit them, but that also tend to be treated as legitimately authoritative by large numbers of people over time, are conspicuous in the degree to which they feature these three forms of generality. And we see here a link to the next question I said I would take up—that of the sense in which laws might “bind.”

So in what sense has the unbroken chain of legal as well as social theorists from Aristotle on down to the present, as surveyed by Professor O’Connell in Power & Purpose, taken law-like standards to bind even those who purport to be sovereigns? Well, as it happens, in both senses that we tend even today to take even domestic law to bind citizens—the senses of moral obligatoriness on the one hand and practical suasion on the other. As for the first, moral obligatoriness, this is a straightforward outgrowth of the formal features of prescriptive content just sketched. As putative standards attain to regularity and impartiality in the senses unpacked above—that is to say, as they come to bear situational, recipient, and beneficiary generality in high degree—they take on moral authority. It becomes not simply “bad form” to act inconsistently with them, but “bad” simpliciter. It becomes wrongful. For to act inconsistently with them is to act as if one were inherently “better than” or “more privileged” than others, rightfully entitled to conscript their wills or their equal entitlements. It is to take what is properly somebody else’s—her will, her body, her territory, or other entitlement—and treat it as if it were legitimately one’s own. The Golden Rule, as perhaps the most compactly general articulation of those features of universality characteristic of all morally obligatory standards, quickly throws into bold relief the sense in which that is so. And so it is presumably no surprise that the Golden Rule has both figured prominently in moral and natural law treatises through history, and formed a prototype for the Kantian “categorical imperative.”
Against this backdrop it is striking that the content of most transnational legal standards that we actually find both historically and today, a broad sampling of which are discussed through Part II of Power & Purpose, can straightforwardly be interpreted as initially halting, then gradually improving efforts made at prescribing action on the basis of reasons bearing the three forms of generality discussed above in high degree, hence as efforts at formulating legitimately binding obligations binding on all people—including those professing to be sovereigns, or agents acting in the name of sovereign peoples—worldwide. For of course no such stated norm ever has been claimed, even by the most cynical of political actors espousing or defending it, to be applicable only once, or binding only upon one or a few rather than all sovereigns, or to work for the benefit only of one or a few rather than all sovereigns. And by the same token most challenges to such norms have taken the form of claims to the effect that in fact they are merely ad hoc or do operate to the sole or disproportionate advantage of only one or a few privileged people. (That, recall, was noted above to be one form canonically taken by “rogue” challengers of international norms).

Insofar as transnational legal standards are to be faulted as falling short of the rule of law ideal, then, it can only be owing either to the plausibility of challenges like those just mentioned in particular instances, or to the plausibility of another form of challenge that I myself have adduced elsewhere: I mean the imperative that we ultimately improve international legal standards in keeping with the moral truth that all human beings bear equal rights to equal material opportunity to flourish. The ultimate subjects and beneficiaries of the impartiality and regularity ideals that constitute the rule of law ideal, in other words, are people, who ought—as they increasingly now do—gradually take their place alongside, and ultimately perhaps even replace, states as the proper subjects of transnational law. States, in other words, both ought and increasingly do serve principally as proxies for human persons in transnational law. And the task for international law is accordingly best viewed—and increasingly is viewed—as that of bringing a true rule of law first to those proxies, and ultimately to those on whose behalves the proxies themselves are meant to act. We cannot reach that rightful end state without interpreting and improving the present state in keeping with it.\footnote{This is the principal “positive” message of my \textit{Limits of Their World}, supra note 9, at 1720.}

In this sense, the enterprise that is transnational law is both best, and readily, seen as an effort, however initially halting it inevitably must be, at extending the enterprise that is domestic—first local, then “federal”—law
itself outward to the farthest reaches of all law’s inherently universalist aspirations. For domestic legal development too is quite clearly animated, as is manifest in its history, by the ultimate aim of vindicating the equal dignity and equal opportunity rights of all people. It is animated, that is, by something like “natural law,” “higher law,” or “moral law” ideals, as I will explain presently. And insofar as the national and transnational legal enterprises succeed, they simply succeed at formulating standards that already are binding, morally speaking, irrespective of how consistently people actually manage to behave morally and thus act in conformity with them, positively speaking. But more of this presently, when I turn briefly to some of the many examples from the actual practice of transnational law that Power & Purpose with admirable comprehensiveness adduces.

Now against this backdrop of bona fide law’s formal features, the close historical association that we find between the theory and practice of transnational law on the one hand, and those of “higher law,” “natural law,” and even Kantian or immediately pre-Kantian “moral law” on the other, is rendered immediately intelligible. Because the sources of transnational law have historically lacked any unitary earthly “focal point”—such as, say, a singular secular sovereign—from which they can be taken to proceed, transnational legal argumentation, be it in treatises, international negotiations, or courtrooms, has had to appeal directly and transparently to “higher law” or “first principles.” Domestic legal argumentation, as I will note presently, has in the last century or so come to enjoy the luxury of less direct or transparent such appeal—all while ultimately relying upon such appeal nonetheless.

In this light it is in no way surprising that transnational legal theorists and practitioners—the likes of Suarez, Grotius, and Wolff—have tended so often to be renowned ethicists as well as lawyers, while the best known skeptics of transnational law—the likes of Hobbes and Machiavelli—have tended to be notorious immoralists as well.44 The historical interplay between these pairs of associated tradition—the higher law/transnational law tradition on the one hand, the immoralist/transnational law skeptical tradition on the other—is a story that Power & Principle narrates with great sweep and verve. It is, in my estimation, one of the principal strengths of Part I of the book,45 though I believe the book would be even stronger had it drawn out a bit more explicitly the continuity between natural law in its

44. See, e.g., HOCKETT, supra note 29, passim.
45. See O’CONNELL, supra note 25, at 17–149.
final modern, Wolffian articulation on the one hand, and the Kantian "moral law" tradition rooted in Wolff's work itself on the other. 46

It also perhaps bears more notice even than Power & Principle affords us that the best legal arguments concerning domestic law typically also do what transnational legal arguments often have done. For those arguments typically aim to distill the sensible, salutary, morally worthwhile purposes that positive laws typically are meant to advance.47 Or they appeal to the ultimately more-than-merely-positited moral-political legitimacy of the lawmaking organ.48 Or they do both. And when they do so, they are of course doing more than merely pointing to documents with insignias or seals embossed on them. They are appealing to "first principles." They are appealing effectively to "higher law."49

All that actually differs as between the transnational and domestic cases, then, so far as canonical forms of argumentation are concerned, is that in the latter it is just a bit easier to make more wooden arguments as well as more thoughtful ones. For here one can also occasionally get by through appeal to that simple focal point known as the "sovereign" (as represented by the legislature), or to the putatively "plain meanings" of the words that the sovereign has employed in formulating the positive law, or again both. But it is only through absent-mindedness, facile shortsightedness, or cynicism that domestic lawyers can fail to note that lumpish arguments of that form rest ultimately upon more "first principle," "higher law" premises of the sort to which transnational lawyers must more often explicitly appeal. And it is only through the same shortcomings that anyone fails to note that transnational legal standards and processes also are rapidly gaining on their domestic counterparts where the conspicuous positive legal focal points—in this case treaties, tribunals, and regulatory bodies—that enable more wooden forms of argumentation are concerned.

So much, then, for now, for the moral obligatoriness aspect of law's bindingness. As for the practical suasion aspect of that bindingness, the story of transnational law's—that is, intergovernmentally formulated moral


48. See id.

49. See id. See also Limits of Their World, supra note 9, passim.
standards'—success in actually guiding action is, like that of domestic law’s, ultimately an empirical one. And this particular empirical story, involving as it does actual human behavior, is accordingly also a highly interpretive one. One must attend, in other words, not only to what those who have acted in the names of their states have done, but also to why they apparently have done what they have done.

Now as I documented elsewhere, Limits was spectacularly thin when it came to this empirical story, both in its simple narratival and in its interpretive aspects. And that was hardly surprising in view of the thin theoretical gruel that book offered, for the interpretive enterprise always rests on the theoretical one. In critiquing Limits on this score, I also highlighted the much richer theoretical and interpretive work done by other scholars of transnational law, especially in recent years, and called for more such work. It is accordingly with some delight that I turn now to the “case study” side of Power & Purpose’s contribution. For this aspect of the book is very rich indeed, and clearly reflective of the great wealth of actual experience Professor O’Connell has had not only as a theorist, but as a practicing transnational lawyer endowed with a particularly striking capacity for reflection upon her own practice.

VIII. CASES IN POINT: LAW’S PRINCIPLED, PURPOSEFUL POWER IN ACTION

Because Power & Purpose’s point of entry into transnational legal theory and practice is the nulla lege sine poena canard regularly floated by transnational law skeptics, its case studies understandably focus on instances in which transnational legal standards are enforced. Several features of this discussion, which occupies the second of the book’s two Parts, bear notice. One is its sheer breadth. The range of subject matters of the transnational standards in question—from economic relations to airspace regulation to terrorist-harboring and war—is itself testament to how many spheres of human activity have become the subject of transnational efforts at cooperation. Another is the great variety of forms that transnational efforts at enforcing transnational legal standards can take. From armed force to sanctions to lawsuits, sometimes pursued collectively or in collectively organized fora, and sometimes pursued individually or in domestic fora with collective authorization, the menu of means through which transnational standards are vindicated proves impressively rich.

50. O’CONNELL, supra note 25, at 151–368.
51. Id.
52. Id.
What is perhaps most noteworthy of all, however, is how transparently the substantive standards concerning all of these varied spheres of human activity, and the procedural standards governing all of the varied means of enforcing those substantive standards, manifest joint effort on the part of nation states to further a global rule of law bearing the “higher law”-rooted formal features discussed above. A conspicuous case in point is the evolution of transnational law governing the use of armed force by states. Power & Purpose notes that from the beginnings in natural law treatises on down through the codification of natural law principles in positive treaties, the aim of the law governing force has been to ensure that it only be employed justly.\(^\text{53}\)

Understanding of what justice requires in such cases has, unsurprisingly, developed from less to more plausible over time—just as have, for example, both transnational and domestic understandings of what justice requires in respect of inter-ethnic relations.\(^\text{54}\) And what this natural development has meant for war is a gradually developed appreciation, manifest increasingly in opinion and action alike, of two precepts. The first is that armed action must never be initiated; it may only be reactive, and in that sense justifiable by reference to something like what domestic lawyers routinely recognize as the “necessity” defense.\(^\text{55}\) The second is that such defensive action must always be narrowly tailored to doing no more than is required to restore the *status quo ante* to the armed aggression that instigates it; there must be “proportionality” between enforcement action on the one hand, and the injury that prompts enforcement on the other.\(^\text{56}\)

The source of these guidelines is of course Aristotelian ethical theory as developed by natural lawyers over the course of the medieval and early modern periods, a mode of thought in which the three forms of generality discussed above are conspicuous.\(^\text{57}\) The destination of those guidelines, for its part, Power & Purpose shows to have been a steadily strengthened sequence of treaties and tribunals, culminating most conspicuously in the U.N. Charter and the International Court of Justice, that codify and enforce them.\(^\text{58}\) Power & Purpose does not flinch from acknowledging that these standards often are honored as much in the breech—at least by individual states—as in conformity.\(^\text{59}\) But to claim that violation of law means no law,
it makes plain, is little more than to indulge a non sequitur. What matters are the linked facts: 1) action out of conformity with these norms no longer is generally considered legitimate; and 2) apparently in significant part for that very reason, states that used regularly to act as if "all is fair in diplomacy and war" no longer do so.

That there remains distance to travel does not undercut the claim that the journey is both directed, in keeping with familiar higher law principles, and well underway. And that latter observation is particularly well born out in the story, also told in Power & Purpose, of multilateral armed action taken by states, as distinguished from unilateral such actions.\textsuperscript{60} Gone, apparently, are the days in which coalitions of states join together to seize land or other resources from other states. In only two brief cases since the 1940s have such actions been so much as considered.\textsuperscript{61} And in those cases it is striking that, even though the attackers were in many ways "rogue" states, there was at least some basis at that time for taking their leaders to believe sincerely, if incorrectly, that it was their homeland that had been the object of ingress.\textsuperscript{62}

A story strikingly similar to that of the evolution of guidelines governing armed action is that of the evolution of guidelines governing retaliation against perceived wrongs falling short of attack or invasion. Rather as Chapters Four and Five of Power & Purpose respectively tell the unilateral and multilateral renditions of the tale of that first evolution, so do Chapters Six and Seven tell those of that of the second.\textsuperscript{63} Once again we learn that the standards that evolved here first emerged from the natural law tradition, then ultimately came to be codified in positive treaties enforceable either by multilateral organizations or in multilateral tribunals.\textsuperscript{64}

Moreover, we find that the same two basic substantive standards found in the armed action case—those of non-initiation and proportional response—figure prominently in the non-armed action case as well.\textsuperscript{65} The sorts of transaction covered by this area of transnational law of course come in many more flavors than do armed action. They include such matters as air transport arrangements, riparian rights, trade relations, diplomatic relations, action on the high seas, and all manner of other familiar human

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60. \textit{Id.} at 193–228.
61. \textit{Id.}
62. \textit{Id.}
63. O'C\textsc{ON}NELL, \textit{supra} note 25, at 153–228, 229–94.
64. \textit{Id.}
transaction. But what these all have saliently in common so far as our story is concerned is their consonance with the formal features characteristic of the rule of law reprised above.

Here too, in other words, as in the case of the law governing use of force, we find steady development from a world system subject to, though not always acting in conformity with, higher law principles, toward a world system increasingly acting in conformity to those same higher law principles as given positive expression in formal documents and formally constituted legal institutions. Against this backdrop, Power & Purpose's last two chapters afford a fitting wrap-up. For the story of these chapters is that of transnational legal standards increasingly finding effect through the actions of formal tribunals. Chapter Eight covers multilateral such tribunals, while Chapter Nine covers the role of transnational legal standards in domestic courts.

In one sense, the latter is a very old story, in that for centuries it has been common for national legal systems to incorporate “the Law of Nations” into the domestic law given effect in their courts. In another sense, however, this old story has been refreshed by the proliferation and steadily growing authority of international tribunals. For that latter development, by dint both of its affording more positive formality to international legal standards, and of its affording an impartial (as between nations) source of precedent in interpreting those standards, turns out to have suffused international law even as applied in domestic courts with additional vitality. And it is perhaps in this very symbiosis between rapidly developing international tribunals on the one hand, and domestic courts on the other, that lawyers will find their hopeful efforts on behalf of the development of a transnational rule of law most vindicated. For here we find the associated jurisdictional phenomena of “confederation” and “subsidiarity,” so long familiar first to the Netherlandish, Swiss, and American unions and now increasingly to the European, at long last actively on its way to our global polity.

IX. JUST SAY “NO”—AGAIN: THE NAY-SAYERS HAVE ANOTHER GO

While Power & Purpose affords a rich, broad, historically nuanced stocktaking of our grounds for optimism concerning the prospect of a robust global rule of law, it would have been sanguine to expect it to serve

66. Id. at 229–94.
67. Id. at 295–368.
68. For a summary of the history, see O’CONNELL, supra note 25, at 1–16, 327–68.
69. See id.
as the “last word” on this subject even for a very brief period. And as it happens, there is already out now a rejoinder of sorts from the nay-saying quarter. I refer in this case to Eric Posner’s Perils of Global Legalism (Perils), which serves in effect as postscript to the aforementioned Limits. In that capacity, the book does not offer much of anything new relative to—anything, as we might put it, “beyond the”—Limits. What it does do is subtly to shift the target of its skepticism—from global law, which was the subject of Limits, to what I am here calling the global “rule of law,” which is the subject of Power & Purpose. For the new book no longer disavows international law as such, so much as it repudiates something the author calls “international legalism,”71 and the latter, we will see, is described much as I have described the rule of law. It does bear noting, however, that the scholars at whom Perils takes aim, a few of them now finally named,72 appear to remain those who were targeted by Limits. They are established scholar-practitioners of transnational law who believe in their enterprise and its continuing development.

Before more fully explicating the subtle shift in targeting that occurs between Limits and Perils, let me first say a bit about why it is that I claim that the latter nevertheless offers little if anything new beyond Limits. The thrust of the story told in Limits, recall, was that what masquerades as international law is in fact epiphenomenal.73 International law was said to be no more than the outward form taken by behavioral regularities, devoid of independent “normative pull,” that emerge like holograms from transactions which occur mainly between pairs of states that always are acting to “maximize” their “interests.”74 The bilateral transactions in question, for their part, were represented as one-off affairs by the static “models” hurriedly sketched throughout Limits.75 Each of these characteristics of Limits’ story—“interests” and “maximization” taken for independent variables, and “models” and “case studies” that incorporated bilaterality and comparative statics while assuming-away multilaterality and ignoring the prospect of intertemporal dynamics—proved in the end to kill the book’s prospects as an advancement of knowledge or understanding.76

70. ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM (2009) [hereinafter PERILS].
71. See id. at 16–27.
72. More on these scholars presently.
73. See supra Part III.
74. See Limits of Their World, supra note 9, at 1729–39.
75. Id.
76. See supra Part III.
To begin with, the independent variable in the Limits story—"interests"—was never pinned down, in any of Limits’ putatively distinct "models" or "case studies." States’ "interests," unpacked without comment as states’ "preferences," were effectively imputed to states post hoc—indeed, ad hoc—after what those states actually did had been narrated, rather than antecedently on the basis of independent empirical evidence. This was old line "revealed preference" with a vengeance—the vengeance in this case having been wrought on the enterprise we call empirical explanation. What purported to be the independent variable, in other words, was not independently established, but instead was rendered entirely dependent on the outcomes they were meant with the theoretical apparatus to predict. And this, of course, deprived the "models" of any capacity to "explain" behavior. The putative "theory" was instead altogether tautologous or, to employ the more "plain vanilla" term leveled prodigiously by Limits and Perils alike at "traditional" scholars, "circular.

Second and relatedly, partly because "interest" was never determinately pinned down, the concept of "maximization" never found content in Limits either. Where we do not know what the maximandum is, we do not know precisely what "maximizing" consists in. That gap was exacerbated by Limits’ abstention from attending in any way to the matters of commensuration and aggregation. The authors sensibly asserted that states are at least in some sense understandable as groupings of persons, and then just as sensibly acknowledged that states’ citizens typically have many, often conflicting, interests. But to say these things and then say that you will simply assume that citizens’ interests—themselves never pinned down—are “aggregated in some way” by a state which then acts to “maximize” the resultant aggregandum, as Limits did, just is to relinquish the use of state “interest maximization” as an independently explanatory variable. So Limits effectively abandoned the project of empirically explaining anything before its attempt had even got underway, and yet the authors nevertheless proceeded on their merry way to purport to explain many things indeed, and to do so more effectively than the unnamed

77. See Limits of Their World, supra note 9, at 1729–39.
78. See id. at 1723–39.
79. See id.
80. See Limits of Their World, supra note 9, at 1723–29. See also supra Part III.
81. See Limits of Their World, supra note 9, at 1723–29. See also supra Part III.
82. See Limits of Their World, supra note 9, at 1723–29.
83. See id.
84. See id. at 1729–39.
“traditional” scholars of international law whose work they deemed “vague” and “conclusory.”

Third, while we are on the subject of “conclusoriness,” Limits’ claim that states tend to interact only bilaterally rather than multilaterally to create and conform to transnational legal standards was effectively assumed rather than proved in the work, notwithstanding the authors’ purporting to “show” this. The assumption came in the form of Limits’ “models,” all of which were in the nature of primitive two person games of the kind regularly encountered in undergraduate game theory texts. It has all too often proved apt to say, in connection with some pseudo-theories or proto-theories that masquerade as full theories, that when all you have is a hammer, everything looks like a nail. Limits afforded yet another such apt occasion for this adage by in effect filtering out, through the structure of its “models,” the very phenomena that Limits purported to “prove” not to be possible or to occur: multilateral cooperation in international lawmaking and regime-constituting. Moreover, almost as if prompted by a taste for self-subversion, the authors adduced as empirical “evidence” for their brief on behalf of bilaterality and against multilaterality the fact that regional—and emphatically multilateral—groupings like North American Free Trade Agreement and the European Union were proceeding alongside such global groupings as the General Agreement on Tariffs and Trade/World Trade Organization and the U.N. It will perhaps not be surprising that no argument was offered purporting to show that these regional groupings are in any sense subversive of, as distinguished from complementary to and in furtherance of, the gradual thickening of full global interlinkage.

Finally fourth, just as the bilateral structure of Limits’ primitive “models” blinkered the authors to multilaterality, so did the static nature of those primitive “models” blinker them to that which is most interesting and

85. Id. Imagine, for example, a polity all or nearly all of whose citizens believe in the project of an international rule of law, and who form preferences in keeping with that belief. Further, imagine that the government of this polity, which is democratic, easily aggregates these citizens’ norm-determined preferences, by dint of the unanimity, or near unanimity, that belief in a transnational rule of law enjoys in this polity (perhaps it is a Scandinavian polity). This would be a polity in which transnational law exerted what Goldsmith and Posner call “normative pull” upon citizens, and hence upon those citizens’ democratic government. The polity’s resultant actions taken in conformity with transnational law would both 1) fully conform to the “theory,” such as it is, that Limits proffers; and 2) flatly contradict what Goldsmith and Posner assert throughout Limits that their theory “predicts.” What makes that possible is not that Goldsmith and Posner’s “theory” was incoherent, but that it lacked independent variables and was accordingly tautologous, predictive of literally nothing at all.

86. See Limits of Their World, supra note 9, at 1723–29.
87. See Limits of Their World, supra note 9, at 1762–69.
88. Id.
important about the development of transnational law—its dynamic, evolutionary nature. This was particularly surprising, if for no other reason than that iterative, evolutionary norm-generation is a commonplace even in game theory texts of the sort that one would have assumed the authors of Limits to have read—at least those beyond the undergraduate level. But it also was surprising because the phenomena of “development” and “process” have for decades been among those attributes of transnational legality most regularly seized upon and critically examined by scholars and practitioners seeking to understand and improve transnational law.

Even the most carefully thinking of legal positivists, Herbert Hart, rested his own cautious compliments and hopes for international law on its character as a work in progress. It is also a commonplace among that most empirically sensitive of schools of transnational legal scholarship—the “New Haven School,” oddly never so much as mentioned in Limits or, now, Perils—that transnational law as we currently find it, replete as it is with norms rooted in practice and what lawyers forthrightly call “custom,” amounts to a “global constitutive process.” For a putative new “theory” of international law, then, to traffic in comparative statics and ignore dynamics was not only to engage in a strange sort of self-exile from actual practice and the actual world in all of its intertemporal richness, but to be bizarrely perverse.

X. NOT MUCH MORE TO SAY: THE PARTICULAR “PERILS” OF POSNER

Against this backdrop, in addition to that supplied above in discussion of Power & Purpose, Posner’s new Perils proves to be a bit depressingly “already said” in character. For the book in large measure makes the very same assertions as its predecessor, without making any attempt to fill the fatal lacunae just rehearsed. Reliance is still placed upon still undefined state “interests,” with no attempt to make a bona fide independent variable of this de facto dependent variable. The same holds of “maximization” as relied upon by Perils. There is no more attempt here than in Limits to

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89. See id. at 1720–23, 1729–39.
90. See, e.g., JÜRGEN WEIBULL, EVOLUTIONARY GAME THEORY xiii (1995); HERB GINTIS, GAME THEORY EVOLVING xxiii (2d ed. 2009).
91. See Limits of Their World, supra note 9, at 1720–23, 1729–39.
93. See Limits of Their World, supra note 9, at 1744–46.
94. See PERILS, supra note 70, at ix.
95. See id. at ix–xi, now couched in the idiom of cost-benefit analysis.
make sense of this term by reference to any method at all—let alone a plausible one—of commensurating and aggregating citizen or other sub-state "interests." Bilaterality, too, is once again simply assumed, in that most illustrative transactions that figure into the discussion are state-to-state. Dynamic interaction among multiple states, along with the evolution and development to which ongoing interaction gives rise, likewise is essentially ignored as in Limits, albeit with one exception: for we now find that one word that, with its cognates, is often associated with both domestic and transnational legal dynamics—"process"—should be considered an occasion for derision, as in "legalism loves procedures." There is, in fact, a very good reason that procedure—which I doubt anyone "loves" any more than they love constitutions that include due process clauses—figures prominently in transnational legal scholarship and practice, but of that in a moment as I turn now to the one thing that Perils does differently than Limits did.

In what sense, then, does Perils add value or disvalue as compared to Limits? Well, as I suggested, the only change that it introduces takes the form of a subtle shift of target. Now it is less international law that comes in for skepticism, than it is something the author calls "international legalism." What, you might ask, is that? Well, we are told, it is "a complicated and ambiguous concept, and any attempt to reduce it to a definition is hazardous." It's a bit, in other words, like "interests" and "maximization." But there are a few characteristic features that prove to be helpful in pinning it down. There are three in particular. One is the belief that "rules . . . issued in advance of the behavior they regulate," should "prevail over power." Another is the belief that nonpartisan judges should be those who apply rules, and that they should do so impartially. And finally, the third is that there should be well defined, regulative procedures that ensure that disputes are resolved fairly pursuant to the rules under which disputes are brought before judges. Thus characterized, "global legalism" is indubitably a transnationally operative "rule of law" as I characterized it above.

So what, you might now ask, is "perilous" about the ideal of a transnational rule of law? Perils is quite obscure about this. The closest one finds to a determinate answer is Madisonian in flavor: Perils tells us that law tends to be respected only when it is well formulated, widely

96. See id. at 20.
97. Id. at 19.
98. Id.
100. Id. at 20.
accepted, and well enforced. Since transnational institutions such as we have them thus far are imperfect in respect of their democratic nature, the clarity of their norms, the effectiveness of their enforcement, and the compliance of their subjects, the argument runs, transnational law will not tend to be respected. And that is in essence the whole of the main argument. There is also a subsidiary argument, to the effect that some matters are best handled by politics rather than law, which global legalists are said not to understand. I will briefly address each of these lines of argument in turn.

The first line of criticism amounts to a puzzling brief in at least two respects. First, we are never told why less than fully respected law is worse than no law at all, hence why transnational law’s not-yet-surmounted shortcomings should count as reasons to abandon work toward a more fully completed transnational rule of law. After all, the Madisonian argument against legislating ineffectual laws presupposed a legislature which also legislates effectual ones—a legislature which accordingly stands to lose something by over-legislating. Yet, part of Perils’ brief against “international legalism” is precisely the absence of any global legislature. It is accordingly obscure who it is that stands to lose something, and whom the author prefers not lose that thing, in the transnational case.

Second, the claim that transnational rule of law should not be pursued if it cannot be brought into being in one fell swoop would seem to imply that it should not be pursued or hoped for at all. For as anyone who is not blinkered by static rather than dynamic models will immediately understand, there is no place where some semblance of the rule of law can be found, that did not make its way there gradually, and haltingly, over time.

There is always ground to cover, in real time, on the road from brutish anarchy, to the rule of personal, familial, local, or national whim, to the domestic rule of law, on up to the transnational rule of law. And it is simply to lack an appreciation of how the world or any part of it works, not to say sense, to suggest that unless we can teleport to the ideal end state from where we now are, we should not attempt even to step toward or commence the journey en route to it. At least that is so if one cannot specify a sense in which half a loaf is worse than none; and Perils does not bother even to assert, let alone argue, that more multilaterality short of full universality is worse than no multilaterality or bilaterality. So we are once again left puzzling here, as we were with Limits, as to just what it is the author thinks we should do, or even not do. All we are left with is some

101. Id. at xii.
102. Id. at 28–39.
indication of whose putatively pious pronouncements we should smirk at. More on that matter in a moment.

The second subsidiary line of objection to a global rule of law found in Perils rides on the idea that some things are best left to “politics” or even “morality” rather than law.103 A claim of this form makes some sense. At least that is so in regard to some “inherently contestable” moral matters, within a domestic polity where the rule of law is well established, and there are clear lines of institutional distinction between morals and politics on the one hand, and law on the other. It makes sense, in other words, where lawmaking and law enforcement are sufficiently well regularized as to allow for an at least workaday form of positivism: a regime in which the positive law’s rootedness in moral vision and political decision can occasionally—for example, in cases other than “hard” cases—without harm be overlooked, and decisions rendered on the basis of cursory glances at statutory language or prior court opinions. It makes considerably less sense, however, where the rule of law has not yet been secured in that fashion, and where the distinctions among law, politics, and morals accordingly remain more porous—which is largely the situation in which we still find transnational law, as discussed above in connection with Power & Purpose.104

Perils’ appeal to those distinctions in arguing against a global rule of law is accordingly out of place. For the appeal’s actual appeal presupposes that a robust rule of law is already secured, and is thereafter apt only in respect of a limited class of charged moral disagreements not yet amenable to “legalization” and “judicialization.” Those who seek a more robust global rule of law—the scholars and practitioners unnamed but sniped at in Limits, and finally named in a few cases in Perils105—look forward in joyful hope to the day when it will actually make sense to debate whether this or that isolated moral controversy is yet ripe for judicial treatment or should instead be left with the legislative process or with individuals in their private capacities. That leaves one final thing to note in connection with Perils.

As suggested a moment ago, Perils does represent an advance on Limits in at least now naming a few of those “traditional” scholars whom we are meant to disregard. It sets its sites on Harold Koh, Anne-Marie Slaughter, and Kal Raustiala in particular.106 I will not tax the reader here with a repetition of the rich—and distinct—contributions of these authors,

103. Id. at 28–39, 76–78.
104. See supra Parts IV–VIII.
105. See infra Part X.
106. See, e.g., PERILS, supra note 70, at 41–42, 48–52, 72–76.
partly because of space constraints and partly because Perils levels by and large the same attack upon all three of them. What is their shared shortcoming, then? It is that their empirically rich accounts of the internal workings of diplomatic offices in the first case, and those of inter- regulatory networks among subnational units of state on the other, are "vague."\(^\text{107}\)

The meaning of "vague" as employed in these charges is, alas, a bit vague. As best I can tell, the word serves as a synonym for "empirically rich," hence "subtle." Or it serves as a shorthand mode of recognition that what "traditional" international law scholars like the Chayes', Koh, Raustalia, and Slaughter concern themselves with is not so much discrete acts of transnational norm-compliance as the transnational law-making, law-abiding, and hence order-establishing process.\(^\text{108}\) It is, in other words, to complain of attentions being paid to precisely that dynamic character of the evolving transnational rule of law which Limits ignored.\(^\text{109}\)

But this of course is hardly a complaint. Indeed it ought to be—and perhaps is—a source of envy. For to break open the "black box" of the state is precisely what is needed in order to arrive at a bona fide independent variable that we might independently establish and thus use in explaining a dependent variable—state action. And that is, of course, precisely what is most conspicuously lacking both in Limits and, alas, now in Perils as well, notwithstanding the lip service now abundantly paid in the latter to the "disaggregated state."\(^\text{110}\)

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107. See id. at 41, 71, 73–76 ("Too much methodological complexity renders prediction-making impossible."). I should note that it is gratifying to see the author at least addressing methodological questions head on—perhaps in response to Part I of Limits of Their World, supra note 9, at 1721, 1731 which took LIMITS to task for not doing so—but it is troubling to see how little care is taken to get methodological questions right.

108. See PERILS, supra note 70, at 74.

109. See supra Part III. See also PERILS, supra note 70, at 41, and associated text.

110. See, e.g., PERILS, supra note 70, at xiv, 40–44, 71–73, 78–79. Perhaps in response to the complaint about LIMITS' fetishization of "black-boxy Scrooge-states" in Limits of Their World, supra note 9, at 1722, 1731–32. If so, I note with some consternation, while on this matter of disaggregating the state to look inside of it, that Professor Posner still seems not to have noticed the remarkably rich empirical account of the "sociology" of state behavior provided in the still growing corpus of work by Goodman and Jinks. (The empirically rich work of the New Haven school, nowadays principally associated with Michael Reisman, still goes unnoticed as well). I cited a good bit of this in Limits of Their World, supra note 9, at 1731. Goodman and Jinks have continued to enrich the literature since then. See, e.g., RYAN GOODMAN & DEREK JINKS, SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW (2010); UNDERSTANDING SOCIAL ACTION, PROMOTING HUMAN RIGHTS (Ryan Goodman, Derek Jinks & Andrew K. Woods eds., 2010); HENRY J. STEINER, RYAN GOODMAN & PHILIP ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS vii (2d ed. 2000).
XI. CONCLUSION: FORWARD, WITH THE POWER OF PRINCIPLED PURPOSE, WE GO

It is time now that I conclude, at least for the present. As I write these words, global concentrations of atmospheric carbon, and with them global temperatures and sea levels, are in the process of rising. Massive dislocation of human populations as well as of cities and agriculture, not to mention of threatening flora and fauna, are predicted consequences.¹¹¹ Peak oil for its part appears to have been reached, while petroleum consumption—and with it, the likelihood of conflict over dwindling supplies—is rapidly rising, especially in nations with populations much larger by orders of magnitude than that of the United States.¹¹²

Meanwhile, global trade relations have gone into dramatic, and persistent imbalance, which in turn has led not only directly to mass unemployment in established industrial states, but also indirectly to yet more unemployment and additional threats—by fostering the amassing of huge surpluses of capital, directed by states and their sovereign wealth funds, in search of global rents.¹¹³ For that search now has fed into two massive credit bubbles in rapid succession, whose collapses have recently thrown the global finance economy, and with it the real economy, into disarray and slump.¹¹⁴

Unemployment rates, losses of health insurance and other determinants of personal security, toxic imports, and illegal but understandable attempts at cross-border migration have been steadily rising, and as they have risen, faith in economic globalization has correspondingly fallen.¹¹⁵ At the same time, global terror networks continue to expand operations, and weapons and other technologies of mass destruction appear


to be on the verge of further proliferation across borders—including in the direction of “rogue” elements.116

Call me a Cassandra if you like, but these developments strike me as what one might call “perilous.” But they are also addressable. To sensible people—not just legal scholars and practitioners—these addressable perils call out for joint cooperative action by all of the world’s inhabitants and those who act in their name. Such action never tends to be forthcoming save when explicitly justified by reference to impartial, generally applicable principles—the kinds of reasons that conduce to regularity and fairness in transnational relations.117 And that is to say that such action both requires, and amounts to, action taken toward and consistent with the realization of rule of law values.

The publication of Power & Purpose is accordingly to be celebrated at the stage of global development at which we now find ourselves. As for Perils—well, let us celebrate its publication as well. For it illustrates very nicely those very forms of snide nay-saying and cynical hopelessness that we must repudiate and step past if we are ever to get anywhere worth going. Professor Posner’s book is, in the final analysis, the very peril against which it purports to warn us, by dint of the futile solipsism and inaction it foments in the face of real perils. And Professor O’Connell’s book, happily, affords promise against precisely that peril.


117. See Limits of Their World, supra note 9, at 1770–90, 1774–75 (emphasis added), for fuller elaboration of this observation.