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The Jurisprudence of Sanctions in International Law

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Mary Ellen O'Connell, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement* (Oxford Univ. Press 2008) 391 pages, ISBN 9780195368949.

I. INTRODUCTION

With the arrival of the "post-post-Cold War" comes renewed assaults on international law, challenging classic restraints in the use of force and asking some old questions:

- Why should any state comply with a rule of international law if it is not rationally in the national interest of that state to do so?
- Do states and their officials (and individuals) really owe a binding obligation to comply with international law? Why?
- For international law to be valid, must available sanctions work to induce compliance?

These practical questions mirror a sentiment especially popular in the United States: international law does not count as law because it cannot be enforced. Many lawyers as well as the general public are skeptical about international law, and the media's obsession with sanctions is ubiquitous. When North Korea fires rockets over Japan or Iran continues developing nuclear weapon capabilities, the first likely question is "What sanctions will be imposed?"

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Mary Ellen O'Connell (Robert and Marion Short Professor of Law at Notre Dame Law School) takes up these questions in her impressive new book, *The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement.*[1] In reality, the availability and use of various sanctions is extensive in relations among states, playing a role in treaty regimes, bilateral agreements, and customary international law. In other words, it is normal state behavior to comply with international law in institutional practice and expect to be subject to some kind of sanctions if noncompliant. O'Connell examines enforcement in history, theory, and practice, advancing a normative theory of international law for controlling the use of major and minor coercion for the common good of humankind. That is no small achievement!

O'Connell brings excellent scholarly background and experience to her work. She is among the best scholars of international law, having lived, studied, and taught in the United States, the United Kingdom, and Germany. She has authored numerous books and articles for a wide variety of domestic and international academic journals. Notably, she has written extensively on the use of force in international law.

When the *Human Rights Quarterly* invited me to review this book, we agreed to an extended article where I might explore some jurisprudential issues more deeply than a normal book review would allow. This review article will look first at the importance of sanctions then seek to understand the author's narrative as a whole before offering personal jurisprudential reflections.

II. SANCTIONS

A. As Key to Jurisprudence

John Austin, the famous legal positivist of the nineteenth century, wrote that the idea of command with sanctions "is the *key* to the sciences of jurisprudence and morals."[2] For Austin, legal rules are commands of a political superior to a political inferior backed by threat of coercive sanctions. Legal obligations are only predictions that the threatened sanctions will be carried out, a gauge of political effectiveness without regard to morality, justice, or social convention.[3] By this analytic definition, international law is mere

1. Mary Ellen O'Connell, The Power and Purpose of International Law: Insights from the Theory and Practice of Enforcement (2008).
2. John Austin, The Province of Jurisprudence Determined 13 (Prometheus Books 2000) (1832).
3. *See* Scott J. Shapiro, *The Bad Man and the Internal Point of View*, *in* The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr. 197 (Steven J. Burton ed., 2000) (rejecting Holmes' bad man theory of law as prophecy of what courts will do).

"positive morality" or commands posited by those without political superiority over other sovereign powers (the analogy in domestic law would be opinion—norms of conduct proposed by an academic, social, or religious group). In addition, without effective control and authorization of sanctions, customary rules and agreements among sovereign states are imperfect law—those commands posited by agreement among those with political authority but without effective sanctions. In Austin's tradition, international rules of conduct become genuine legal rules only when incorporated in the municipal law of an independent state with the coercive power to enforce them effectively.

Austin's idea of the role of coercive sanctions clearly separates positive law from moral obligation. It distinguishes threats of earthly sanctions for violating secular law posited by human beings from threats of spiritual sanctions for violating moral or religious law. Later, in the early twentieth century, legal positivist Hans Kelsen, Austrian legal scholar from the Universities of Vienna, Cologne, Geneva, and Prague, drew on Austin's secular jurisprudence to create a comprehensive normative theory of positive law. For Kelsen, international law's primitive legal order is valid because it authorizes decentralized coercive sanctions of war or reprisals that ought to be applied to international delicts (wrongs). Kelsen's theory also unifies all national legal orders into one normative international system, as Austin's does not.[4]

In the tradition of Austin (who drew on Thomas Hobbes and Jeremy Bentham) and Kelsen, most early positive law theories are sanctions-based. In 1961, H.L.A. Hart published *The Concept of Law*, rejecting a sanctions-based approach. For Hart, binding legal obligations arise from acceptance of rules as law from the internal point of view through practice, not from predictions of probable behavior produced by threats of coercion. Hart similarly considers international law to be customary rules accepted as binding law by a "community" of states whose officials are engaged in its practice, showing an internal practical attitude of rule-acceptance and not merely fear of coercion. Numerous other scholars followed Hart in rejecting sanctions-based theories, including Louis Henkin in his 1968 work *How Nations Behave*. Henkin writes that international law is obeyed because it is accepted as authoritative by the community of states engaged in its practice. During the Cold War, other contemporary scholars joined in focusing on voluntary compliance and diplomatic negotiation and less on coercion.

In her work, O'Connell also rejects purely sanction-based theories of international law even though sanctions are the focal point of her normative theory. First, she argues that legal positivism cannot be separated so easily from natural law and social facts. People accept law and comply with it for

4. Hans Kelsen, General Theory of Law & State 35, 38, 171, 328, 338–40 (Anders Wedberg trans., Transaction Publishers 2006) (1949).

many reasons, not just from threats or a psychological fear of threats. She then looks at the practical reality of the international legal process: sanctions are available mainly to deter free-riding and aid compliance with rules of international law, since we usually follow them for other reasons.

O'Connell continues: people believe in law as they believe in higher things, and she corroborates that belief by observing empirically the effect international law has in concrete relations among states.[5] Sanctions signal that we take seriously international norms that obligate nations to comply.[6] Isn't signaling belief in law, however, merely an indication that we should follow some natural law in disguise? One might think so, but describing the belief as an attitude toward purposeful social behavior that "ought" to be practiced does not mask the signal in myth, superstition, or metaphysics. The chord she strikes about belief in international law resonates, even for natural law skeptics, because it is accepted through community practice aided by sanctions, especially in an era of continuous crisis and uncertainty.

Still, O'Connell's main orientation is from natural law. She begins by reviewing scholarship on the use of force in the natural law tradition from Aristotle, Cicero, Augustine, Aquinas, and Grotius. She then aligns it with positive international law in two significant respects: 1) while countries comply with international law for many reasons, they collectively authorize or regulate coercive sanctions for noncompliance; 2) through international law and procedure, the "community" of states also seeks to control the use of force among nations not only to maintain peace and security but also to support other high purposes such as prosperity and protecting human rights and the environment. In effect, O'Connell adds social and human purpose to a formal concept Kelsen first advanced analytically in his pure theory a half-century ago: The use of force is either a wrong or a sanction.[7]

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5. *See* Beth A. Simmons, Book Review, 103 Am. J. Int'l L. 388, 391 (2009) (challenging this claim to empiricism because "evidence of the impact of legal rules and justifications on behavior is not systematically adduced").
6. Sanctions as signals, like legal directives as "speech-acts," may be seen as part of a broad dynamic process of law called integrative jurisprudence or law as action, important in O'Connell's international legal process theory. *See* Jerome Hall, Foundations of Jurisprudence 164 (1973). Hall devotes a full chapter to a critique of sanctions and concepts of law. *Id.* at 101–41.
7. Kelsen defines the concept of "sanction" broadly:

> [T]he concept of sanction may be extended to include all coercive acts established by the legal order, if the word is to express merely that the legal order reacts with this action against socially undesirable circumstances and qualifies in this way the circumstances as undesirable. This, indeed is the common characteristic of all coercive actions commanded or authorized by legal orders. The concept of "sanction," understood in this broadest sense, then, the force monopoly of the legal community, may be formulated by the alternative: "The use of force of man against man is either a delict or a sanction."

Hans Kelsen, Pure Theory of Law 41–42 (Max Knight trans., 2d German ed. 1967); *see also* Hans Kelsen, *Sanctions in International Law Under the Charter of the United Nations*, 31 Iowa L. Rev. 499 (1946).

To illustrate this basic concept in human terms, consider the tactics of interrogating prisoners captured in the "war against terror" and transferred to black sites where coercive "alternative methods" of interrogation are used, all under the direct control of the US chain of command,[8] approved at the highest political levels.[9] This kind of interrogation is highly specialized and psychological coercion. For both Kelsen and O'Connell such interrogations would be either lawful coercion as part of a wider sanction of forcible countermeasures responding proportionately to illegal acts of terrorism against the United States[10] or torture, a delict in violation of customary international law, treaties, and statutes.

In a situation of irregular, asymmetrical armed conflict, neither O'Connell nor Kelsen would likely see some anarchic state of nature beyond law, as some political realists might presuppose. Instead, it is more likely that while such interrogations would be seen as flowing from a broad, lawful exercise of force as self-defense (as in Afghanistan) they might also be specific delicts, possibly wrongful coercion under the law of armed conflict and subject to lawful sanctions. In fact, O'Connell has called for the investigation of such specialized use of force as possible violations.[11]

B. The Validity of Norms

O'Connell believes that positive law theories do not adequately account for human experience with law as part of a beneficial social order. She believes that the natural law tradition over the centuries developed substantive limitations to positive law. Loosely, in traditional versions of natural law theory, an unjust posited law in conflict with the history and moral traditions of a legal community or the common good is not valid law (Aristotle says an unjust law is "no law"), but contemporary versions look to practical reasonableness in applying unchanging principles for the good of human beings in a community.[12] More interestingly, some natural law scholars argue that if a

8. Mark Danner, Op-Ed., *Tales from Torture's Dark World*, N.Y. Times, 15 Mar. 2009, at WK13; Mark Danner, *US Torture: Voices from the Black Sites*, N.Y. Rev. Books, 9 Apr. 2009. *See* discussion on torture memos *infra* Section III.A.3.
9. Scott Shane & Mark Mazzetti, *In Adopting Harsh Tactics, No Inquiry into Their Past Use*, N.Y. Times, 22 Apr. 2009, at A1.
10. *See* Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 Am. J. Int'l L. 715 (2008).
11. Scott Horton, *Six Questions for Mary Ellen O'Connell on the Power of International Law*, Harpers Mag. Online, 6 Dec. 2008, *available at* http://www.harpers.org/archive/2008/12/hbc-90003966.
12. John Finnis, Natural Law and Natural Rights 351–66 (1980); Lloyd L. Weinreb, Natural Law and Justice (1987) (natural law is an ontological theory that does not separate law from morality). Another version, "naturalism" makes "philosophical theorizing continuous with

certain delict violates the moral intentions of the legal order, a sanction *must be* applied.[13] In positive law, the justness or moral rightness of a law made according to a legal order has nothing to do with its validity.

O'Connell's natural law orientation is consequently in tension with the positive law tradition of Hobbes, Bentham, and Austin. For them, validity of law derives from supreme power made effective by threats and use of force. In the early twentieth-century Continental Europe, ideas about coercive sanctions abound, appearing not only in the pure norm theory of Kelsen[14] from Austria but also in the pure power theory of Carl Schmitt[15] in Germany. Our concepts about the validity of international law draw from both natural law and positive law, but today rely more heavily on positive law. O'Connell relies on both natural and positive law as well, arguing that peremptory norms of *jus cogens* (derived from natural law) limit positive law-making power.

In a famous example, the extermination orders authorized by positive law and issued in Hitler's Third Reich would be valid in the views of both Kelsen and Schmitt, even though they were odious and unjust, because they were appropriately issued under procedures of the legal order legitimately in place. For O'Connell, peremptory norms of *jus cogens* incorporate substantive norms from the Nuremburg war crimes trials. These norms would invalidate, on behalf of the international community of states as a whole, any otherwise legal orders for genocide or crimes against humanity and allow sanctions that would not be possible if those orders were valid. This view persuades in practice better than in theory.

British legal philosopher Hart changed the above concepts of legal validity in positive law.[16] He said coercive sanctions are not required for a concept of binding legal obligation. Law is binding when customary rules habitually followed are accepted as law by a community in which it is practiced (including by the international community of states), not when it is shoved down our throats by coercion.[17] After Hart, the validity of positive

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and dependent upon scientific theorizing" with normative naturalists focusing on goals to regulate practice through norms or standards. Brian Leiter, Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy 33-46 (2006). For evaluation of an earlier view of naturalism, see Hans Kelsen, *A "Dynamic" Theory of Natural Law*, *in* What Is Justice?: Justice, Law, and Politics in the Mirror of Science: Collected Essays 174 (1957).

13. A. Javier Treviño, *Introduction* to Kelsen, General Theory of Law & State, *supra* note 4, at xxiv.
14. Kelsen, Pure Theory of Law, *supra* note 7, at 41–42.
15. Carl Schmitt, The Concept of the Political (George Schwab trans., expanded ed. 2007).
16. H.L.A. Hart, The Concept of Law (2d ed. 1994).
17. For a full development of Hart's view from the inside in international law practice, see Aaron Fichtelberg, Law at the Vanishing Point: A Philosophical Analysis of International Law 121 (2008). ". . . [I]nternational law is legitimate because the professional communities that use it [international lawyers and those in the know] acknowledge that it is legitimate in both their actions and their words." *Id.* at 205.

international law is not seen as depending entirely on threats of coercive sanctions, though they remain important for other reasons.[18] "[M]orally iniquitous rules may still be law" but choices of compliance may have to be made in extreme cases of evil.[19] In his book, *Of War and Law*, David Kennedy also finds theories of legal validity in international law seriously wanting. Validity of norms, he thinks, should depend on whether they are persuasive to the community of professionals not whether they are backed by sanctions—certainly closer to Hart's view of validity than those of either Austin or Kelsen.[20]

C. Role of Sanctions Today

O'Connell's work covers "both a history of ideas about the role of sanctions in international law and an overview of the actual use of sanctions in the enforcement of international law."[21] She adapts from Kelsen and Hart her own positive law position on the role of potential coercive sanctions in international law:

> Sanctions are the signal of a legal rule and distinguish legal rules from moral, social, and other kinds of rules. Every international legal rule has a potential sanction. It is the simple existence of the potential sanction that is central to the pedigree of the rule—not that rule violations are always and effectively sanctioned. In no legal system are all rule violations always sanctioned. Domestic systems are not held to such a standard. International law need not be either. So long as sanctions exist and support widespread law compliance, international law is a legal system worthy of the name. International law's sanctions are in the form of armed measures, countermeasures, and judicial measures. These are used regularly and support compliance by bringing an end to and remedying non-compliance and by demonstrating the international community's seriousness about its rules. These are the rules that are subject to coercive sanction for non-compliance.[22]

While O'Connell's book is about sanctions in international law, she believes that sanctions are not the core of international law. For O'Connell, the power and authority of international law

> is not the sanction *per se*, but the international community's acceptance of law regardless of sanctions. Sanctions play a role in signaling and reinforcing acceptance, but we fundamentally accept the binding power of international

18. Hart, *supra* note 16, at 33–38, 198–200, 216–20.
19. *Id.* at 212.
20. David Kennedy, Of War and Law 91–93 (2006).
21. O'Connell, *supra* note 1, at 369.
22. *Id.*

> law for the same reason we accept all law as binding. Our acceptance of law is part of a tradition of belief in higher things.[23]

O'Connell thinks most people and countries comply with law because of that unifying belief. It can be observed by noticing what people and countries—through their leaders—actually do, not only by what they say they do. Human beings often act collectively, motivated by altruism, greed, religious belief, fear, and vengeance as well as purely rational self-interest. It is only recently that we have given serious attention to genetic tendencies from evolutionary biology and psychology that promote group survival, including an acceptance and belief in authority and law as tools of social cooperation in a frequently hostile world.[24]

O'Connell sees a rejuvenated international law emerging in global society in an integrated theory of legal positivism and the natural law tradition, one "that revives the best of what has come before, adapted to the needs of the international community today."[25] She is idealistic, inspired perhaps by a religious tradition, and fervent in her desire for secular international law to support "not the hegemony of a few, but the flourishing of all humanity."[26]

III. ENFORCEMENT THEORY: O'CONNELL'S NARRATIVE

A large part of O'Connell's book is dedicated to elaborating the history of enforcement of international law. She artfully demonstrates how leaders of states and elites gradually institute legal control over the use of force for legitimate purposes: promoting "peace, respect for human rights, prosperity, and the protection of the natural environment."[27] O'Connell distills these almost-universal aspirations from history, contemporary demands, and state practice and behavior. The first part of the book is an external view of a history of enforcement theories whose assumptions shift with upheavals in power arrangements and human consciousness. The second part moves inside to observe patterns of actual practice and doctrine used to induce compliance with international law through unilateral and collective measures, countermeasures, and legal processes in domestic and international courts or administrative bodies.

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23. *Id.* at 16.
24. For these versions of naturalism, see John O'Manique, The Origins of Justice: The Evolution of Morality, Human Rights, and Law (2003); Edward O. Wilson, Sociobiology: The New Synthesis (2000); Steven Pinker, The Blank Slate: The Modern Denial of Human Nature (2002).
25. O'Connell, *supra* note 1, at 16.
26. *Id.*
27. *Id.* at 370.

A. The Story of Enforcement Theories

The story of international enforcement is about "the evolving scholarship on the role of sanctions in giving power to international law."[28] O'Connell writes on the tension between the positive and natural law conceptions for using force while examining the historical contexts that have shaped the institutions of modern international law and relations. Chapters on classical enforcement theory, compliance theory, and new classical enforcement theory show the meandering relationship of law to coercive power over time.

1. Classical Enforcement Theory

Classical theory begins with Augustine's simple idea borrowed from Greek Stoicism and Roman law: a just war may be fought either for peace or to punish unjust violence, called "Just War for Peace" by O'Connell.[29] She traces its historic influence from ancient Roman law through the Holy Roman Empire (from Charlemagne to the end of the Thirty Years' War) as well as from the philosophical Aquinas who argues that the secular positive law is limited by natural law (recognized by God-implanted human reason). Later, other scholars expand just war principles to include self-help, reprisals, and any necessary and proportional use of armed force. A number of just causes develop in ideas of scholastics such as Francisco de Vitoria, Francisco Suárez, and Alberico Gentili, just as princes and kings begin to assert the justice of their own claims. The concept of positive law bounded by natural law is the model O'Connell later adapts for contemporary *jus cogens,* an unchanging peremptory norm of higher law that limits positive law. The concept of *jus cogens* has played an increasingly significant role in the courts, she argues, as well as in state practice and decision. It is also a substantive ground for O'Connell's normative synthesis of theory and practice.

In the second period, "Law over Nations,"[30] the narrative shows how law gains authority over nations as they begin to take on centralized functions and autonomy. After the Reformation, Hugo Grotius writes his law of war and peace, applying it universally and secularizing natural law. Published as states begin to organize the first collective peace-keeping agreements following the Thirty Years' War, Grotius' work conceives a unified legal order for Europe, binding individuals, sovereigns, and all states. Grotius' ideas limit the use of force to correcting wrongs, not vengeance, and emphasize righting wrongs through peaceful means. Both concepts pass into the conscience of European civilization as if a natural ordering of the world. Enlightenment scholars (Christian Wolff, Samuel von Pufendorf, Cornelis van Bynkershoek,

28. *Id.* at 16.
29. *Id.* at 21–26.
30. *Id.* at 26–33.

and Immanuel Kant) begin to describe the law of nations as independent of equal sovereigns who have their own subjective interpretations.

The rise of national sovereignty and the increase of secular state power during the Enlightenment bring Emmerich de Vattel to advance a theory of voluntary cooperation between equal sovereigns in enforcement of peace and customary conduct between nations. Vattel treats states as if they have natural rights as individuals in a social contract. In this third phase of O'Connell's enforcement narrative, "Sovereigns over Law,"[31] Vattel adapts and applies Grotius' ideas to the issues of voluntary compliance with treaties and custom with a particular focus on the states' self-interest through consent. Except for necessary law of nature that orders the state system itself (also a precursor of *jus cogens*), sovereigns make international law. But no state may judge another or question the legality of war between equal states or their resort to reprisals. Principles of neutrality, restraint, and just war considerations are left to the conscience and wisdom of sovereigns. These independent sovereign states form alliances to keep peace and to limit measures short of war to reprisals for wrongs, keeping war as the ultimate sanction for serious conflicts.

After European wars always come various congresses (Vienna, Paris, and Berlin) meant to reestablish peace in a concert of shifting European alliances. Scholars and thinkers begin to ask how law might bind a sovereign state more effectively. Natural law may be vague, reactionary, and full of superstition, but it is still invoked as moral justification for the binding nature of positive sources of custom and treaty. It affects what states do. The powerful nineteenth-century legal positivism of Jeremy Bentham and John Austin responds by defining with great clarity how law depends upon a monopoly of force in the state. By this definition, morality and natural law are eliminated entirely from the calculation of legal authority unless backed by sanction from a political superior. Since international law lacks any central enforcement, Austin's definition dismisses international law as imperfect and mere "positive morality."

National interests clearly prevail over the law of nations when the first multilateral treaty-based restraints on resort to war fail during World War I and the waning of colonial empires. The new League of Nations tries to reintroduce collective sanctions as a means of keeping peace and resolving disputes by arbitration. War as an instrument of national policy is outlawed in the Kellogg-Briand pact. Yet a conference on disarmament fails, and preeminent legal scholar Schmitt writes that Germany should not be dominated by the Anglo-American interpretation of the restraints of international law, for they maintain the status quo and keep Germany from rearming and in a weak condition. The cult of sovereignty that places the state above the law

31. *Id.* at 33–48.

finds positive international law impotent to restrain rising dictators. Schmitt advises the Nazi regime "to give up the fictions of legality and to recognize law's dependence on the decisions of the powerful."[32] World War II is brought on by appeasing Hitler, in the view of many who believe only counterforce, not law, restrains aggressive power! This historic moment helps convince twenty-first century neoconservatives that the restraints of international law signal weakness.

It is at this crucial point in her narrative that O'Connell introduces Kelsen, Schmitt's great rival. In the fourth period for classical enforcement theory, "Law over Sovereigns,"[33] she tells of Kelsen's influence on European and American efforts to subordinate states to legal order. "In refining the command/sanction paradigm of law, Kelsen revives basic Grotian concepts of a unified legal system with law superior to various communities and containing sanctions for violations in the form of war and reprisals."[34] For Kelsen, these sanctions are authorized in international law under norms ultimately grounded in a presupposed *Grundnorm* or "basic norm."[35] Force may be a legitimate response to an unlawful war (the Just War Doctrine has survived in various international agreements), but hard positivist scholars such as Lessa Oppenheim argue that war cannot be regulated even if reprisals may be.

The question for Kelsen is who decides that the law has been broken, and who then executes the sanctions of reprisals or war. He concludes that conceptually, the evolution of an international court system, beginning with an international court of justice and decentralized courts, would best decide both who is responsible (officials and individuals) and what sanctions an executive should apply. This approach, also urged by others such as Hersch Lauterpacht, finds some support in the new UN Charter, although the Security Council is given the basic enforcement responsibility in maintaining international peace and security. After the Cold War, the evolution of international courts and tribunals accelerates, and a new International Criminal Court is established. O'Connell describes transnational practice before these courts in her last chapter where she revives Kelsen's unified theory of international law—long discounted by American scholars—without dwelling on the old incorporation controversies of monism or dualism.[36]

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32. Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960, at 239 (2002).
33. O'Connell, *supra* note 1, at 48–55.
34. *Id.* at 48.
35. *See* discussion on Kelsen's importance to O'Connell *infra* Section IV.A.
36. *See* Armin von Bogdandy, *Pluralism, Direct Effect, and the Ultimate Say: On the Relationship Between International and Domestic Constitutional Law*, 6 Int'l J. Const. L. 397, 400 (2008) (noting that "from a scholarly perspective, [these controversies] are intellectual zombies of another time and should be laid to rest, or 'deconstructed.' The general understanding of the relationship between international law and domestic law should be placed on another conceptual basis.").

2. A Shift Towards Compliance Theory

If law is to rule over sovereign countries, how is it to be enforced against them except by war? After World War II, the Austinian idea that states are like people and comply with law only because they are obliged by coercion shoves aside Grotius, Lauterpacht, and Kelsen in favor of Hans Morgenthau and political realism. "[S]tates, like men, lust for power," Morgenthau believes, and "international law cannot constrain the forceful pursuit of power."[37] Theorists respond with differing views of why nations comply or ought to comply. In explaining this little-understood shift, O'Connell clarifies why at least a generation of legal scholars has dismissed the idea of binding international law entirely.

As O'Connell's section title crisply puts it, there is "No Law Without Sanctions"[38] for the era of the Cold War. The impotence of UN enforcement during the Cold War convinces many scholars to question why anyone should take international law seriously. Enforcement of Article 2(4) of the UN Charter, which prohibits the threat or use of force against another state except in cases of self-defense, becomes unlikely in the face of a veto by any of the five permanent members of the Security Council. If collective enforcement measures are out of the question to restore international peace and security or in the face of aggression, then the treaty provisions mean nothing and we revert to primitive measures of self-help.[39]

Without enforcement, the cynics and realists claim there is no real law, dismissing Kelsen and Lauterpacht's optimism. Dangerous conditions of world politics, as Martti Koskenniemi reflected, "made it imperative that decision-makers be freed from formal rules or dogmatic moral principles that tied their hands when prudence and innovation—Morgenthau's 'wisdom'—were called for."[40] Kenneth Waltz and other realists entirely dismiss international law, leaving foreign relations as the unilateral pursuit of national interests through military and other power, unrestricted except by power alliances and *raison d'état*. Legal theorists in the United States begin to exclude international law from serious domestic debate about foreign policy, and some law schools stopped teaching it. Civil rights and other movements already

37. O'Connell, *supra* note 1, at 59 (citing Christoph Frei, Hans J. Morgenthau: An Intellectual Biography (2001)); *see* Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 Am. J. Int'l L. 260 (1940) (critical of high expectations people had for international law).
38. O'Connell, *supra* note 1, at 62.
39. *Id.* at 167–68 (citing Thomas Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 Am. J. Int'l L. 809, 809 (1970) (a bi-polar block of the two superpowers will police compliance apart from Charter Article 2(4), which is dead); Michael J. Glennon, *How War Left the Law Behind*, N.Y. Times, 21 Nov. 2002, at A37 (reconfirming its death)). Henkin responds to Franck in Louis Henkin, *The Reports of the Death of Article 2(4) Are Greatly Exaggerated*, 65 Am. J. Int'l L. 544 (1971).
40. Koskenniemi, *supra* note 32, at 471.

wary of superpower politics combined with anti-Vietnam War sentiments move scholarship in an entirely different direction, ultimately accommodating realist values and prudent policy without any sanctions.

O'Connell calls this shift in theory "Law Compliance"[41] referring to scholarship that seeks "to make international law appear relevant to policymakers again."[42] At Yale, Harold Lasswell, Myres McDougal, and their associates (Michael Reisman, Rosalyn Higgins, Oscar Schachter, Richard Falk, Burns Weston, and Ved Nanda, among many others) delink "the creation of law from traditional formal sources and processes."[43] They do the same with the sanction by broadening what counts as sanctions[44] and look "to the behavioral sciences—psychology, sociology, and anthropology, as well as political theory—to reconceptualize international law."[45] The New Haven School aims at promoting human dignity in the world,[46] but according to Oscar Schachter (who abandons the group during the Vietnam War) it only blurs the line between policy, politics, and law and makes "evident [its] promotion of US interests [without] . . . apology for obviously unlawful US actions."[47] Schachter later joins scholars Henkin, Philip Jessup, Wolfgang Friedman, and Oliver Lissitzyn at Columbia to preserve international law's relevance to policymakers. They address the function of international law to meet the changing needs of international society, but see limits to what counts as law in ways that the New Haven School does not.

In 1968 Henkin writes his influential book, *Why Nations Behave* as a response to Hans Morgenthau who, with Hitler's legal theorist Schmitt, thinks international law too weak to command respect without force.[48] Morgenthau's skepticism and "outright hostility toward international law"[49] has a profound impact in the United States, especially for the realist school of international relations during the Cold War. Henkin, who saw combat in World War II, has an entirely different point of view. For him, international law does not depend upon coercive sanction for its pedigree. It "depends on acceptance and compliance far more than sanctions."[50] Policymakers gain greater practical advantages from relying on it daily and more realistically than they do

41. O'Connell, *supra* note 1, at 68–91.
42. *Id.* at 68.
43. *Id.* at 69.
44. W. Michael Reisman, *Sanctions and Enforcement, in* The Future of the International Legal Order: Conflict Management 273 (Cyril E. Black & Richard A. Falk eds., 1971).
45. O'Connell, *supra* note 1, at 68.
46. For a full account of McDougal's contribution to international law scholarship and why lawyers, especially legal realists, rejected his policy-oriented jurisprudence, see Neil Duxbury, Patterns of American Jurisprudence 191–203 (1995).
47. O'Connell, *supra* note 1, at 70.
48. Hans J. Morgenthau, Politics Among Nations: The Struggle for Power and Peace (1948).
49. O'Connell, *supra* note 1, at 60.
50. *Id.*

from following the realists, he argues. He takes "the focus off the sanction and" places "it squarely on actual compliance with international law."[51]

O'Connell attributes Henkin's advance in positive law analysis to his adoption of H.L.A. Hart's conception of international law. For Hart, international law is a body of primary rules of customs, practices, and agreements among states accepted as law by the international community. In other words, both elites and officials within international communities of states decide from the internal point of view to accept customary practices as law through compliance. Moral considerations from conscience, habitual behavior, and primitive sanctions—even national interests—might influence these primary rules of obligation in Hart's view, but they are only incidental to accepting longstanding conventional practices that have a pull on the tendency of nations toward compliance. His is a descriptive theory, but with normative connotations.

British scholar and judge on the International Court of Justice, Sir Gerald Fitzmaurice, believes sanctions are counterproductive, because "breaking old norms is often requisite to the development of new ones."[52] US scholars—Roger Fisher, Thomas Franck, Abram Chayes, and Anne-Marie Slaughter, among others—contribute work on why nations comply with international law without coercion. Harold Koh argues that international sanctions have teeth but that internalization in national court decisions will further compliance in other countries as well.[53]

American legal realism, conceived at Columbia in the 1920s, had attacked rule-formalism of the common law. By the time legal realism migrated to Yale, McDougal was moving far beyond its anti-formalist critique; in their 1943 article McDougal and Lasswell outline a comprehensive, value-oriented approach as a reaction to the instrumentalism inherent in legal realism.[54] Their article comes at a time when Hitler is using legality as an instrument of national policy. O'Connell neither mentions legal realism, nor does she distinguish legal from political realism (this distinction will be more apparent when we later examine the legal process school).[55] While American legal realists show little interest in international law, international critical realists such as James Boyle and Anthony Carty do, and they use a similar method

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51. *Id.* at 71.
52. *Id.* at 80 (citing Gerald Fitzmaurice, *The Future of Public International Law, in* Livre du Centenaire, Annuaire de L'Institut de Droit International 299 (1973)).
53. Harold Koh, *Review Essay: Why Do Nations Obey International Law?*, 106 Yale L.J. 2599, 2639 (1997).
54. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest,* 52 Yale L.J. 203 (1943).
55. *Cf.* Gregory Shaffer, A Call for a New Legal Realism in International Law: The Need for Method, Melvin C. Steen Lecture, Univ. of Minn. School of Law (11 Nov. 2008), *available at* http://www.law.umn.edu/uploads/Wa/TO/WaTONeKyHM4RWJNL4WSXrQ/NLR-paper-minnesota-speech.pdf.

to critically probe into the language of violence and power concealed in sovereignty.[56]

By minimizing the role of sanctions, however, Henkin and his colleagues open the door to confusion. A counter-idea begins to form: nations are like people and will comply with law without being coerced because they accept conventional practices as norms they should follow as social beings. This sociological jurisprudence in international law relies upon robust scholarship from Roscoe Pound and scholars from Scandinavia and continental Europe. Patterns of conduct might be simply a description of self-interested behavior that states and individuals would pursue whether required by law or not. This sub-plot in O'Connell's narrative introduces new voices from critical legal theorists (off-shoots of earlier legal realism) and from Africa and Asia who tend to agree with traditional political realists but for different reasons. They argue that international law conceals in sovereignty the use of force to perpetuate powerful interests in established regimes of injustice through violence and inequality.

After the Cold War, even positive, reform-minded, and constructive scholars want to wrest international law "away from traditional state leaders and into the hands of communities of all kinds."[57] They argue that these communities ought to participate in making law, and that leaders of states should be held accountable as individuals through sanctions for acting with impunity in torturing, persecuting, and killing their own people to suppress dissent or eliminate religious and ethnic minorities. Many in the reformist movements want "sanctions applied to make clear that what they had created was law."[58] Cut loose from formalist presuppositions of established bases of power, these new international law scholars call upon "states and organizations to comply with rules even when they had not developed through international law's formal sources and were not subject to sanction."[59] Such creative "soft law" with a bite might be made "by a broad range of actors, even those without law-making capacity under international law and by those who had no standing to shape sanctions."[60] International human rights groups are among the most active. They were particularly influential in creating the new International Criminal Court and continue to act as eyes, ears, and brain and to promote it in the face of skepticism from the world's

56. James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 Harv. Int'l L.J. 327 (1985); Anthony Carty, The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs (1986); Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 Euro. J. Int'l L. 66 (1991).
57. O'Connell, *supra* note 1, at 61.
58. *Id.*
59. O'Connell, *supra* note 1, at 90–91.
60. *Id.* at 91

most populous countries, China, India, Russia, and the United States who withhold ratification or accession.

In O'Connell's words, these activists want "International Law without Sovereigns," a theme from Kelsen but without his kind of sanctions.[61] "New stream" scholars, such as Carty, Kennedy, and Koskenniemi question the entire project of traditional international law scholarship as too liberally optimistic, serving "no purpose but its abuse for the ideological purposes of the strong."[62] They are associated with postmodern literature from the 1990s, which seriously tries to undermine foundational "meta-narratives" in international law and even law itself. They are "new stream" scholars because they abruptly redirect their stream of scholarship into different channels of interdisciplinary thinking and language for an emerging global society not exclusively controlled by sovereign states.[63]

In the United States, a deep unease and distrust settles in. The Left is wary that sovereign states will remain passive in the face of genocidal violence in Africa, the Balkans and elsewhere or will abuse power by wars of aggression and other acts of impunity. The Right fears that appeasement and foreign infection of the courts undermine national sovereignty and US exceptionalism as well as global free markets. Soon enough, influential associations, corporations, NGOs, and activists of all kinds want to interpret international law to support agendas important to them. The Left wants to penetrate sovereignty to protect human rights. The Right wants to penetrate sovereignty to protect the institutions of contract and property necessary for a global free market. These ideologies continue to weaken the legal foundations of territorial sovereignty until Iraq (supported by the United States) goes to war with Iran in the 1980s and then invades Kuwait as the Cold War is ending. Policy elites realize that they need effective state power, even US power, to maintain a new world order, end wars of aggression and gross violations of human rights, and protect national security, the environment, and global markets. President George H.W. Bush draws a line in the sand, and the UN Security Council agrees. The boundaries of the concept of territorial sovereignty harden while the realities of global interpenetration continue to expand.

Criticism of international law's foundational pillars inflames strong scholarly reaction. Human rights activists know that the protection of fundamental human rights is not likely to happen without enforcement power being exercised through measures more effective than by resolutions of the

61. *Id.* at 91–98.
62. Andreas L. Paulus, *International Law After Postmodernism: Towards Renewal or Decline of International Law?*, 14 Leiden J. Int'l L. 727, 729 (2001).
63. David Kennedy, *A New Stream of International Law Scholarship*, 7 Wisc. Int'l L.J. 1 (1988); Marrti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (1989); *see* Fichtelberg, *supra* note 17, at 24–26.

United Nations. In the view of critics, there will be no compliance without powerful sanctions, which are necessary even if it means sanctions are taken unilaterally—without the Security Council's approval. These critics justify unilateral force against genocide or unilateral humanitarian intervention without UN Security Council authorization—Indian seizure of Goa from the Portuguese, intervention to prevent genocide in Bangladesh in the 1960s, US and NATO bombing in the former Yugoslavia, enforcement measures to prevent humanitarian outrages in Kosovo and the Balkans, and more forceful action than approved by the Security Council for Rwanda, Darfur, and the Democratic Republic of the Congo in Africa.

O'Connell cautions that neither unilateral humanitarian intervention nor preemptive intervention may be justified without Security Council authorization, except in self-defense.[64] She also takes issue with the idea that Article 2(4) of the UN Charter is dead, as proclaimed by Thomas Franck and Michael Glennon. Intervention is a double-edged sword—if unilateral humanitarian intervention for particularly brutal genocide or ethnic cleansing overrides constraints on the unilateral use of force, why should we take seriously the same UN Charter limitations on invading Iraq after 9/11 to rid the world of a tyrant or to comply with prohibitions in treaties and laws against torture and war crimes? When the political independence and territorial integrity of a nation is so easily penetrated for one righteous cause, why use restraint in other causes thought to be quite as morally justifiable?

3. New Classical Enforcement Theory

O'Connell is prescient in her chapter "New Classical Enforcement Theory" in recognizing that analytic positivism, economic analysis of law, and rational choice theory have introduced new lines of inquiry within the realist tradition. They reassert a more muscular role for international law as a tool, one closely related to American exceptionalism and neoconservative political ideology. This tool, influenced by Schmitt and Leo Strauss, concentrates on subordinating international law to national power, security, and morality. This is a return to an old explanation that individuals and states comply with international law (if they do at all) only because of self-interest and effective sovereign power.

When non-state terrorist tactics and other threats spread after the Cold War, the George W. Bush administration uses the doctrine of preemptive action and the "war on terror" to broaden executive foreign relations pow-

64. O'Connell, *supra* note 1, at 179–81 (taking issue with Richard Lillich's position that unilateral humanitarian intervention in the face of UN inaction finds precedent in earlier customary international law and underlying Charter values); *see* Humanitarian Intervention and the United Nations (Richard B. Lillich ed., 1973). For a comprehensive review as of 1996, see Sean D. Murphy, Humanitarian Intervention: The United Nations in an Evolving World Order (1996).

ers, beyond even those espoused by early realists. Neoconservative theorists and their legal apologists reformulate executive power in practice, ironically returning to an earlier view of sovereign power. Their vision, however, relies on a hegemonic mood of a unitary superpower more in line with Strauss than with Morgenthau. O'Connell names this shift "No Law without Sanctions Redux."[65]

Even after the Obama administration takes office in 2009, former Secretary of Homeland Security Michael Chertoff, also a former federal judge, invokes the hardened boundary theory of sovereignty, as if protection of sovereignty is the main obligation derived from state practice under the law of nations. Chertoff writes in *Foreign Affairs* that international law obligates responsible officials to maintain the protective shell of sovereignty. He continues what will become a relentless counterattack on international lawyers and scholars:

> In recent years, international lawyers and scholars have sought to subordinate established U.S. laws and even U.S. constitutional provisions to international legal mandates and "customary" international law—in which "custom" is not traditionally interpreted, as being based on the actual practices of states, but instead is dictated by the policy preferences of foreign judges or, worse yet, international scholars and academics.[66]

Humanitarian obligations for the conduct of armed conflict—the Geneva Conventions, the laws of war, and laws or treaties outlawing torture—must yield to vital national security interests of the United States in its irregular "war on terror," even if habitually followed in most cases. In O'Connell's narrative, this US override does not begin to recede until a preponderance of legal opinion in the United States and the international community rejects justifications for noncompliance or pretexts of compliance.

Within two days of taking office—well after O'Connell's book comes out—President Barack Obama begins issuing executive orders that signal a change back to conventional practice. He announces a time schedule to close the Guantánamo Bay Detention Camp (although use of military commissions is retained), releases the infamous torture memos, and prospectively ends any practice of torture.[67] The new administration also applies a conventional coercive countermeasure (sanction) to free a US sea captain from illegal

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65. O'Connell, *supra* note 1, at 105–31.
66. Michael Chertoff, *The Responsibility To Contain: Protecting Sovereignty Under International Law*, Foreign Aff., Jan./Feb. 2009, at 130, 131. For a formalist view clearly separating external compliance with international law from its force in internal domestic law, see Michael Stokes Paulson, *The Constitutional Power To Interpret International Law*, 118 Yale L.J. 1772 (2009).
67. *See* Jack Goldsmith, *The Cheney Fallacy*, New Republic Online, 18 May 2009 (Obama mostly continues Bush's later policies to maintain war powers with minor changes), *available at* http://www.tnr.com/politics/story.html?id=1e733cac-c273-48e5-9140-80443ed1f5e2.

capture by pirates on the high seas off Somalia: Navy SEALs expertly shoot and kill the pirates who threaten his life.

In this next section, O'Connell takes aim at the rationalism of Jack Goldsmith and Eric Posner presented in *The Limits of International Law*[68] and the ideas of neoconservative intellectual cohorts, such as Charles Krauthammer. For O'Connell, their assertions that nations do not follow international law unless in their own interests or coerced are historically and empirically inadequate, mistaken in facts and premises, too abstractly shortsighted, and not nearly as comprehensive a critique of the limitations of international law as they claim.[69] To their credit, Goldsmith and Posner ask their theory to be judged "on the extent to which it sheds light on the problems of international law."[70] It does shed light, but O'Connell judges that light severely—"every major assumption and simplification is questionable and must throw doubt on the results."[71] She believes the "central target of their book" is Henkin's empirical thesis "that most states comply with most of their international obligations most of the time."[72]

Goldsmith and Posner argue that Henkin's observation is misleading. They set out to show that compliance for Henkin can be explained by motives and inducements from rational choice methodology quite apart from the law. O'Connell disagrees. It is Henkin who observes the empirical reality of compliance with international law among states, she writes in a point by point refutation, not the narrow rational choice model drawn from abstract economic theory of maximizing individual utility. It may be, concludes her critique, "that US elites will seize on the *Limits of International Law* to justify noncompliance with international law."[73] The purpose behind her lengthy criticism of their book, she asserts, is to dissuade US elites from taking that path.[74] For their part, Goldsmith and Posner dismiss much international law scholarship as a product of a moralistic/legalistic mind set, much as George Kennan and Hans Morgenthau did decades ago. According to Goldsmith and Posner, leaders might think "they are under the spell of a legalistic ideology" or "make unrealistic assumptions about the enforceability of international law . . . certainly not a firm foundation for international law."[75] They continue:

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68. Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005). For debate on the thesis, see Symposium, *The Limits of International Law*, 34 Ga. J. Int'l & Comp. L. 253 (2006).
69. O'Connell devotes most of chapter 3, "New Classical Enforcement Theory" to repudiating Goldsmith and Posner. O'Connell, *supra* note 1, at 105–31.
70. Goldsmith & Posner, *supra* note 68, at 8.
71. O'Connell, *supra* note 1, at 108.
72. *Id.* at 107.
73. *Id.* at 130.
74. *Id.* (citing Edward Swaine, *Restoring and (Risking) Interest in International Law*, 100 Am. J. Int'l L. 259, 265 n.9 (2006) (reviewing Goldsmith & Posner, *supra* note 68)).
75. Goldsmith & Posner, *supra* note 68, at 202.

> The more plausible view is that efficacious international law is built up out of rational self-interest . . . . It is politics, but a special kind of politics, one that relies heavily on precedent, tradition, interpretation, and other practices and concepts familiar from domestic law. On this view, international law can be binding and robust, but only when it is rational for states to comply with it.[76]

The Bush administration recruits lawyers, however, who write legal opinions after the terrorist attacks on the twin towers and Pentagon to justify the use of force at odds with traditional international law. For O'Connell:

> It turned out, however, not to be so easy to push aside international law. US leaders did not simply order torture, abuse, and invasion. They requested legal advice first, receiving long and detailed memos. The only legal arguments that could be found to support some of these policies were clearly implausible. By 2004, these implausible arguments were being reported in the press. Courts, governments around the world, international organizations, scholars, and others began to subject the analysis to withering criticism.[77]

When we read the top secret "torture memos" signed by Jay S. Bybee and Stephen G. Bradbury (released on 16 April 2009),[78] we cannot help remembering Schmitt's appraisal that the League of Nations' failure confirmed the primacy of the political over "an illusory science of international law" and led to the Nazi takeover of the Weimar Republic and aggressive war in Europe. Schmitt writes: "[I]n general jurists could be only auxiliary agents of secondary importance, and the well-known lament 'that one only calls upon jurists for opinions that affirm the thinking of those in political power' was not surprising."[79] When Goldsmith succeeds John Yoo and Bybee as head of the Office of Legal Counsel, he withdraws certain memos defining torture and other work, finding the work "legally flawed," "incautious," "aggressive," using "questionable statutory interpretations," and "clumsy definitional arbitrage."[80]

Investigations into professional ethics of the lawyers, including Bybee, Bradbury, and Yoo, are underway even before the Bush Administration leaves office. Preliminary conclusions from the inquiry first surface in February 2009, anticipating recommendations for bar association disciplinary action to be considered for Bybee and Yoo. There are calls for sanctions: dismissal from positions, criminal investigations, and even prosecutions for war crimes.

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76. *Id.*
77. O'Connell, *supra* note 1, at 102–03.
78. Carrie Johnson & Julie Tate, *New Interrogation Details Emerge; As It Releases Justice Dept. Memos, Administration Reassures CIA Questioners*, Wash. Post, 17 Apr. 2009, at A1.
79. Carl Schmitt, The *Nomos* of the Earth in the International Law of the *Jus Publicum Europaeum* 243 (G.L. Ulmen trans., 2006).
80. Jack Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 145, 151, 169 (2007); O'Connell, *supra* note 1, at 103 n.18.

Yale law professor Bruce Ackerman and the *New York Times* editorial page both urge impeachment of Bybee now sitting as a federal court of appeals judge. As legal opinions are released (some memos in opposition from the State Department might have been suppressed), they show the depth of ideological commitment to subordinating international law to executive power.[81] A Spanish Court claiming universal jurisdiction opens an investigation of six former US officials for giving a green light to alleged torture of Spanish nationals while prisoners at Guantánamo Bay Detention Camp, citing the 1984 Torture Convention.[82] Simultaneously, the Obama administration refuses to investigate officers who relied in good faith on orders given under the legal opinions, but leaves open the possible investigation of top officials and lawyers.[83]

Reported violations of international law, apparently calculated from national security interests, hit the public belief in the rule of law very hard. Every question involves the use of language about coercion, whether lawful as sanctions or unlawful as delicts. It is important to understand that international law is a language of practice of insiders, including policymakers, diplomats, and international lawyers, who work within standards of profession ethics. It is highly beneficial to policy officers to use the language of international law practice to signal the scope or justification for using force in order to avoid misunderstanding and perhaps even to dissemble. Whether or not scholars study actions taken as a branch of politics or as part of normative theory of international law, the signaling is operational fact among professionals who talk across borders. This is the point O'Connell makes in her detailed empirical study of categories of international enforcement practice. She reads Goldsmith and Posner as wishing to signal very little normative power from US practice:

> If the United States does not wish to comply with international law, there is no normative basis for arguing that it should. . . . [T]he book critiques the very foundation of international law, giving the impression it is simply not binding law. A policymaker reading the book might well conclude that compliance with international law, such as the 1949 Geneva Conventions or the Convention against Torture, is optional, especially after reading their statement toward the end of the book that international law has no moral authority, and "[t]his should make clear that we cannot condemn a state merely for violating international law."[84]

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81. Mark Mazzetti & Scott Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, N.Y. Times, 17 Apr. 2009, at A1.
82. Marlise Simons, *Spanish Court Weighs Criminal Inquiry on Torture for 6 Bush-Era Officials*, N.Y. Times, 29 Mar. 2009, at A6.
83. Mazetti & Shane, *Memos Spell Out Brutal C.I.A. Mode of Interrogation*, *supra* note 81.
84. O'Connell, *supra* note 1, at 104.

There are official insiders, too, who do not accept the obligations of international law. Like Justice Holmes' bad man, they prophesy on how to avoid sanctions for noncompliance. Their assumptions about international law come from Austin and Schmitt. They are based on predictions of the effectiveness of power and force. Unless accepted and enforced as part of a national political order, international law does not exist in their view. Global or universal law is but a projection of municipal law.

Why then is O'Connell so hopeful about restoring classical restraint? What limits a sovereign power from using force to project its own political views of compliance with what it calls international law? "For Kelsen, Henkin, and Thomas Franck," she writes, "the ultimate authority of international law—its power—is founded, as is the authority of all law, in belief."[85] This reiteration of belief in the higher purposes of law is learned from accumulated unwritten human experience by all peoples. Through the international legal process, O'Connell believes, the full normative power and authority is brought to bear on all states by its representatives engaged in ongoing practice aided by sanctions. This is the centerpiece of a jurisprudence of sanctions she summarizes in the section named "International Law: Natural Law, Positive Law, Process."

As tensions heighten in the post-Cold War era between the remaining superpower and the forces of globalization, O'Connell sees troublesome quandaries in international law scholarship. She adopts the term, "law's quandary" from a contemporary lament by legal philosopher Steven Smith to describe the problem.[86] Smith's quandary returns to the old questions of nihilists and anarchists about whether law even exists. The questions continue: Why does or ought law wield normative authority to order and influence behavior? Why should anyone decide to obey law for reasons other than self-interest or coercion? Why does law "bind"? Is this quandary about law one of science, subjective belief, or metaphysics, Smith asks. International law's quandary, for O'Connell, is the same as law's quandary for Smith, who ultimately asks if maybe we don't really accept law as binding because we believe in it as a matter of practice and faith, a kind of substitute for the loss of belief in God?[87] Taking issue with the "anything goes" philosophy, O'Connell accepts a human component of belief in the authority of a law beyond positive law that she thinks is observable and persuasive in practice among many old and new participants and communities worldwide.

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85. *Id.* at 132.
86. Steven D. Smith, Law's Quandary (2004).
87. "[I]t seems that lawyers and law professors . . . avow belief *in the practice*, that is but not in *the metaphysical premises that seem necessary to support the practice*." *Id.* at 164.

B. Enforcement Practice—The Internal Point of View

In the second half of her narrative—more than half the book—O'Connell moves inside the purposeful practice of states, "the internal point of view" from Hart's concept aided by the sanctions' signal of law as action.[88] To reiterate, the language of sanctions signals seriousness and depth of the commitment of the community of states as a whole to comply with international law:

> International law's sanctions are in the form of armed measures, countermeasures, and judicial measures. These are used regularly and support compliance by bringing an end to and remedying non-compliance and by demonstrating the international community's seriousness about its rules. These are the rules that are subject to coercive sanction for non-compliance.[89]

My essay deals mainly with the theory and jurisprudence of sanctions and does not attempt more than perfunctory treatment of the technical doctrines of the law of state responsibility and patterns of practice in using sanctions. They deserve much more analysis and discussion by international law scholars. In organizing these categories, O'Connell presents a comprehensive summary of a clear array of sanctions available and used professionally. They complete her thesis that international law's authority and power are rooted in what nations do and the signals they give to achieve their intentions in sanctions with all the analytic tools required.[90]

O'Connell approaches this survey of enforcement practice from the viewpoint "that the sanctions of armed force and countermeasures be applied in compliance with law to enforce the law and for no other purpose. It is for just such control of force that law came to be instituted in communities, including the international one."[91]

Two chapters summarize unilateral armed measures and collective armed measures available to state officials and international organizations to maintain international peace and security or in support of legitimate national interests. Two chapters discuss unilateral and collective countermeasures available to officials to signal proportionate responses to prior wrongs. The last two chapters provide details of international court enforcement and national court enforcement practice to complete her thesis. Here are some highpoints and a synopsis:

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88. *See* Hall, s*upra* note 6.
89. O'Connell, *supra* note 1, at 369.
90. *Id.* at 327–66 (Chapter 9 provides a thorough discussion of contemporary state practice of national court enforcement of diverse rules of international law from jurisdiction to public and private international law enforcement practices).
91. *Id.* at 149.

Bringing force under the control of positive law begins in the era of absolute sovereignty during the nineteenth century when the just war doctrine was abandoned. States started to regulate particular uses of force—ending privateering, humanizing conduct of land warfare, and developing rules governing neutrality and reprisals. After the two world wars, we enter a new era of the United Nations Charter, which in Article 2(4) prohibits the use or threat of force against another state except self-defense in response to an armed attack in Article 51.

O'Connell's position is that a unilateral armed measure of self-defense is enforcement responding to an armed attack until the Security Council can act. She agrees with Henkin that the clarity and sharpness of the Charter's normative structure should not be diluted to sanction unilateral use of force beyond the Charter's immediate purpose. Proposed measures such as humanitarian intervention or preemption of threats should not be considered as legal exceptions to the Charter norms. She lists four conditions extracted from ICJ decisions and state practice for using major force on the territory of another state: "1) a significant armed attack is occurring or has occurred; 2) the response is aimed at the armed attacker or those responsible for the attack; 3) the response is necessary to defense; [and] 4) the response is proportional in the circumstances."[92] She agrees with many that the US response to terrorist attacks that began against US embassies and interests abroad in the 1990s was initially legitimate self-defense. After 9/11, attacking training camps in Afghanistan followed by NATO ground operations also was legitimate self-defense under these conditions. Invading Iraq was not.

O'Connell covers most of the enforcement and peacekeeping directives of the Security Council, its failures and its increasing caution in undertaking enforcement measures or directing sanctions. These actions are all well-reported. When pre-invasion sanctions against Iraq and others against Haiti cause serious harm to innocent populations, something not considered earlier, an urgent question is presented—is the Security Council limited by principles of general international law, such as necessity and proportionality, in the measures of enforcement it takes? Are the limitations only those that might be interpreted from the Charter itself or might they arise from external sources of general law or *jus cogens*? International legal scholars disagree. O'Connell argues that in authorizing sanctions, the Security Council is bound by the Charter, by customary international law, and certainly by the norms of fundamental human rights law. The jurisprudential question is similar—whether the sanctions of positive international law determined under the Charter are bounded by a nonconsensual unwritten *jus cogens* norm.

92. *Id.* at 171.

O'Connell's sweeping narrative deserves to be appreciated for more than its elegance and architectural style. It should be seen as a synthesis of theoretical traditions through dynamic interdisciplinary legal process understood as a whole. To peg the work as proceeding from transcendental meta-theory, flawed empiricism, a cramped natural law style, or a manichaean world-view, as one commentator does in a discussion, does not give the work what it is due, in my opinion.[93]

IV. REFLECTIONS ON THE JURISPRUDENCE OF SANCTIONS

O'Connell's narrative viewed as a whole definitely stimulates the legal imagination. Her integration of positive law, natural law, and international legal process over time to regulate sanctions in international law invites deeper reflection. The last half of my essay considers some presuppositions that buttress this architecture: themes of transcendence (Kelsen's *Grundnorm* for normative unity in positive international law) and immanence (inner substantive content of *jus cogens* from natural law); naturalist ideas of social convention from the empiricism of David Hume and Hart when approaching enforcement practice from an inward point of view; and a fresh look at the significance of the Hart-Fuller debate for international legal process jurisprudence.

A. *Grundnorm* and *Jus Cogens*

Kelsen—along with Grotius and Lauterpacht—plays an unusual role in O'Connell's narrative. As the world witnessed the failure of the League of Nations and the birth of the United Nations, Kelsen offered a unified normative theory of positive international law, with sanctions enforced through courts and in state practice. O'Connell's revival of classic enforcement theory seems to draw on Kelsen and his presupposed *Grundnorm* and on *jus cogens* for substantive guidance. Kelsen's *Grundnorm* is normative without substantive content, but O'Connell is convinced that the peremptory

93. I am surprised, and not entirely happy, with the way in which *The Power and Purpose of International Law* moves, first, from a meta-theory of international law (that it must be grounded transcendentally, and not in the tradition of British empiricism that eventually leads (as one of Stendhal's priests remarked in *The Red and the Black*) from Hume to utilitarianism renamed 'rational choice'); second, to a highly specific normative theory of international law that is not simply a natural law theory, but a natural law theory with so very, very many specific normative and methodological commitments, ranging from norm formation to enforcement to sanction; and finally to what I can only call a distinctly Manichaean view of the world of the individual figures of international law, good guys and bad guys.

Kenneth Anderson, The Prophetic Tradition of International Law and My Concerns About the Book's Manichaeism, Opinio Juris Posting (20 Nov. 2008), *available at* http://opiniojuris.org/2008/11/20/the-prophetic-tradition-of-international-law-and-my-concerns-about-the-books-manichaeism/.

norm *jus cogens* does have normative content that constrains positive law in practice. Her symbols of integration thus evoke both Kelsen's pure theory of positive law with its normative hierarchy governed by a supreme norm (*Grundnorm*) but lacking content and the concept *jus cogens*, which draws upon unwritten natural law for its substantive content that limits otherwise valid positive law.

1. Kelsen's Transcendent Unifying Norm

American legal scholars know about Kelsen's *Grundnorm*, but many are unfamiliar with the details of Kelsen's pure theory of law or his theory of international law. Long ago they rejected Kelsen's *a priori* analytical positivism as impenetrable and inaccessible, especially for the Langdellian case method of professional training still with us. But Kelsen's complex work rewards all who pursue it, and his theory remains influential today in continental Europe and in many countries. I studied Kelsen's theory in the 1950's with Edgar Bodenheimer, who knew Kelsen as an older compatriot Jewish refugee from Germany. My study of Kelsen along with Roman law served me well when joining the Legal Adviser's Office of the Department of State.

Grounded in neo-Kantian premises, the pure theory of law is precise, systematic, and logically rigorous while also abstract and dense. Fundamental to Kelsen's system of law is an assumption of a basic norm accepted by a substantial proportion of society—a kind of first constitution called the *Grundnorm*—that validates specific legal orders and norm-creation. The reason for the validity of international law is this basic norm.[94] By analogy to Kant, Kelsen relies upon a transcendental-logical condition of mind in interpreting the objective validity of law by reference to a presupposed basic norm:

> Kant asks: "How is it possible to interpret without a metaphysical hypothesis, the facts perceived by our senses, in the laws of nature formulated by natural science?" In the same way, the Pure Theory of Law asks: "How is it possible to interpret without recourse to meta-legal authorities, like God or nature, the

94 [T]he reason for the validity of international law, its basic norm, is a norm which institutes custom as a law-creating fact—the norm that states ought to behave as states customarily behave in their mutual relations.

This norm, however, cannot itself be created by custom. A statement to the contrary would be the same logical fallacy as the statement that nature authorizes nature, or God authorizes God to issue commands. The norm authorizing state custom to create law binding upon the states can only be a norm presupposed by those who interpret the mutual relations of states not as mere power relations but as legal relations, as obligations, rights, and responsibilities; by those, again, who consider the acts of the states as legal or illegal, that is to say, as relations regulated by a valid legal order. It is a hypothesis—the condition—under which such an interpretation is possible. This hypothesis, the basic norm of international law, is, in the last analysis, also the reason for the validity of the national legal orders.

KELSEN, WHAT IS JUSTICE, *supra* note 12, at 265.

> subjective meaning of certain facts as a system of objectively valid legal norms describable in rules of law?"[95]

Kelsen's logic seems tautological. O'Connell's approach begins more simply. She first gives a general answer for law's validity from a human perspective: it "is found in the belief in the binding force of customary law."[96] O'Connell also maintains that Kelsen's ultimate G*rundnorm* is itself ultimately grounded in belief. Aren't concepts of mind and belief both meta-theories? Human concepts of mind are presuppositions surely as convincing to Kelsen as O'Connell's beliefs in extra-consensual human experience from natural law are for her.[97] O'Connell knows of Kelsen's strong rejection of "any suggestion that he relied on natural law," and she thinks that "his ultimate reliance on belief seems far more akin to naturalism than positivism."[98]

Regarding naturalism, Kelsen admits the relevance of sociology and ethics to the lawmaking process and to the content of laws, but his theory does not evaluate content, instead measuring legal validity in tandem with compliance or noncompliance with norms whose substantive content depends on a law-creating legislative act. The legal order in a first constitution is conditioned on general effectiveness, so despite the purity of his presupposed *Grundnorm,* Kelsen ultimately adapts his theory to maintain a connection with the political world that might suggest naturalism. After a violent revolution, for example, a new regime replaces one legal order with another one, often explained by the naturalism of social or political science and process of struggle. O'Connell may perceive Kelsen's presupposed *Grundnorm* as a meta-norm involving human consciousness understood by belief in conceptual order, not by purely naturalist neuroscience.

A more pragmatic strain in Kelsen, however, is discovered by the erudite Richard Posner of the United States Court of Appeals for the Seventh Circuit. Posner was not at all familiar with Kelsen's writings until he gave a lecture in Vienna on law and economics. Later, he came to "argue that Kelsen's positivism is the law side of pragmatic liberalism."[99] Further, Posner finds that Kelsen answers for him why a judge has authority to make new law under the court's jurisdiction to decide a case in instances where the law is unsettled. Under Kelsen's theory, a judge has judicial power to de-

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95. Kelsen, Pure Theory of Law, *supra* note 7, at 202.
96. O'Connell, *supra* note 1, at 48.
97. I do not read O'Connell as first accepting a transcendental meta-theory of international law then moving on to a complex natural law theory, ignoring Hume's empiricism, as asserted by Anderson, *supra* note 93. In my view she attempts a synthesis, not a choice, and implies naturalism that might include Hume's tradition, as my reflections consider.
98. O'Connell, *supra* note 1, at 48 n.149 (citing Kelsen, *The Natural Law Doctrine Before the Tribunal of Science, in* What Is Justice?, *supra* note 12, at 144).
99. Richard A. Posner, Law, Pragmatism, and Democracy 251 (2003).

cide a case by logical application of valid law. Legal validity depends upon adherence to a legal order of transcendent normative quality, meaning that for noncompliance with such a norm, a sanction ought to be applied by officials under court directive. Where the positive law is unsettled, however, that power to decide the case is still within the court's jurisdiction, and the judge's duty includes power to fashion a rule as if a legislator in deciding the case. Positive law theory has long accepted this narrow role for a judge in exceptional cases to achieve an equitable result.[100] The judge has discretion to draw on all helpful policy sources in making new law to decide the case, even consequentialism, economic theory, and international custom.[101] This kind of discretion would provide some support for O'Connell's new international legal process in domestic courts, but there is no guarantee that a pragmatic utilitarian judge like Posner disconnected from formalism would necessarily move in the purposeful directions that her insights into the power and authority of international law, including *jus cogens*, require.

2. Jus Cogens: Peremptory Substantive Norms

O'Connell notes the skeptical attitude towards the doctrine of *jus cogens* when it is introduced in the UN treaty on treaties, since anything reviving the subjectivity of natural law is suspect. But new post-Cold War interest in the Grotian tradition rejuvenates *jus cogens* as a peremptory norm to limit positive law, she argues: "Natural law theory contains an explanation of those limits. In international law, positive law rules are ultimately limited by *jus cogens* norms."[102]

As O'Connell is clearly aware, Kelsen recognizes early the difficulty of maintaining the principle that natural law might invalidate positive law:

> If the positive law is, as all followers of the natural-law doctrine assert, valid only so far as it corresponds to the natural law, any norm created by custom or stipulated by a human legislator which is contrary to the law of nature must be considered null and void. This is the inevitable consequence of the theory which admits the possibility of positive law as a normative system inferior to natural law. The extent to which a writer abides by this consequence is a test of his sincerity. Very few stand this test. Some philosophers avoid the test by

100. This law-creating role of a positive law judge is at the heart of the controversy between H.L.A. Hart and his former student Ronald Dworkin, for whom there is never a gap nor an indeterminate rule for a judge, who always should find a best answer in the moral history and legal practice of a society, a modern version of natural law. *See* Hart, *supra* note 16, at 272–76, 306; Ronald Dworkin, Justice in Robes 140–86 (2006).

101. Posner's pragmatism also draws the wrath of Ronald Dworkin in a chapter called *Darwin's New Bulldog*. "'Darwinian pragmatism' . . . is, at bottom, a substantive and noninstrumentalist moral attitude, because it presupposes that certain kinds of human lives and certain states of human societies [noninterventionist quietism] are intrinsically superior to others. Dworkin, Justice in Robes, *supra* note 100, at 92.

102. O'Connell, *supra* note 1, at 132.

> proving that a conflict between positive and natural law is impossible. Thus Hobbes maintains that positive law can never be against reason, and that means against the law of nature.[103]

Here, Kelsen distinguishes between a search for truth in a pure normative unity (his neo-Kantian conception) and political myth pretending that the state's positive law is always compatible with the law of nature in the reason of state.[104] "[I]n the fight for the realization of interests, the natural-law doctrine might be considered as useful. . . . Lies are permissible if they are useful to the government," as Plato maintained in *The Laws*.[105] They allow rulers to deceive through myth meant to convince the people to believe that they are acting justly if they, for example, "liberate" Iraq from Saddam Hussein's tyranny and crimes against humanity, take out his weapons of mass destruction, bring freedom and democracy to the Iraqi people—all under a natural law banner of a just preemptive war for peace. "That the natural-law doctrine, as it pretends, is able to determine in an objective way what is just, is a lie; but those who consider it useful may make use of it as of a useful lie."[106]

Historically, the notion of a peremptory norm may not have come, as O'Connell suggests, from Vattel's distinction between voluntary positive law from consent of states (*jus dispositivum*) and necessary law from nature (*jus necessitatus),* but instead from a European revival of a Roman law conception of imperial power. This power of Roman imperialism would override private law intruding upon interests of empire (or church). One can see from this history what makes the peremptory norm concept attractive. When ancient Christianity was adopted as the state religion by Roman emperors aided by bishops, for example, they found in the gospel justification to issue decrees overriding customs and practices contrary to the Christian values now merged with imperial power. Early emperors and bishops disciplined straying Christian sects (such as the Donatists, who used violence against Orthodox Christians to enforce purity of the Nicene Creed). O'Connell considers this history and argues that unjust use of force and unwavering protection for fundamental human rights are now accepted as peremptory norms from which no derogation is permitted. Relatively few peremptory norms are of the highest importance and quality, however, which limits the scope of any general limitations.

A couple of decades ago I argued in a lengthy and skeptical article that *jus cogens* was ultimately a unifying concept to guard the fundamental inter-

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103. Kelsen, What Is Justice, *supra* note 12, at 144.
104. *Id.* at 172–73.
105. *Id.* at 173.
106. *Id.*

ests of international society as a whole.[107] In revisiting both this article and a later post-Cold War analysis of *jus cogens* in decisions of federal courts,[108] I can see the appeal of O'Connell's use of an unwritten *jus cogens* concept alongside Kelsen's positive law *Grundnorm* at work in international process methodology.[109] This coupling from the perspective of O'Connell's sanctions jurisprudence offers a revision of classic international law at a time when global society faces insecurity and an uncertain future. The best of natural law's concern for human conscience within a positive law system of order has a reasonable chance to hold in check the most unconscionable abuses of power within the states system through a decentralized but coordinated process.

The view from self-consciousness is a view from the inside, a subjective inner belief, spirit, or humanity that is independent of the will of any sovereign power, a modern Hegelian view.[110] The sanction and the unifying norm from Kelsen operate in an external reality and unite inner consciousness with an external ordering norm in practical decision. According to O'Connell, the content of the *jus cogens* norm is being worked out in practice through this kind of dynamic legal process, which for her is neither arbitrary nor tautological. The *jus cogens* concept may originate in the authority of the natural law tradition but its content emerges out of the process of applying positive law within the changing structure of the states system. O'Connell explains:

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107. Gordon A. Christenson, Jus Cogens*: Guarding Interests Fundamental to International Society*, 28 Va. J. Int'l L. 585 (1988). For consideration of *jus cogens* as a public order norm, see Gordon A. Christenson, *The World Court and* Jus Cogens, 81 Am. J. Int'l L. 93 (1987).

108. Gordon A. Christenson, *Federal Courts and World Civil Society*, 2 J. Transn'l L. & Pol'y 405, 482–93 (1997) (moving federal courts "toward the craft of transnational litigation" to integrate public and private international law).

109. *But see* Georg Schwarzenberger, *International* Jus Cogens*?*, 43 Texas L. Rev. 455, 477–78 (1965).

> The rise of legal rules which bind without agreement between the parties affected and which override any contradictory agreement presupposes one of two things: the existence of authorities believed to be endowed with supernatural powers (as when lawyer-priests administered *jus sacrum*), or a centralized worldly power which would refuse to compound at least offenses directed against itself or the community at large. This is the crucial point at which criminal law and *jus cogens* emerge.
>
> Unorganized international society lacks such lawyer-priests or any centralized authority with overriding *potestas*.

Id. at 467. In his treatise, Schwarzenberger explains that "jus cogens, as distinct from jus dispositivum, presupposes the existence of an effective de jure order, which has at its disposal legislative and judicial machinery, able to formulate rules of public policy, and, in the last resort, can rely on overwhelming physical force." Georg Schwarzenberger, A Manual of International Law 29–30 (1967).

110. *See* William E. Conklin, Hegel's Laws: The Legitimacy of a Modern Legal Order 294 (2008) ("international legal consciousness derives from the peremptory norms of a presupposed structure that is independent of the arbitrary will of each state").

> Although positive law theory explains much of international law, it is inadequate for explaining the basis of legal authority. It is also inadequate to explain the ultimate limits on positive law.
>
> Natural law theory contains an explanation of those limits. In international law, positive law rules are ultimately limited by *jus cogens* norms. These norms cannot be changed through positive law methods and must, therefore, be explained by a theory outside the positive law. Natural law provides such a theory. Natural law theory is problematic not in the establishment of law's authority of higher principle but in the more precise delineation of the higher principles. The classic problem associated with natural law is, Who decides? How do we avoid the natural law answer being the subjective opinion of any one person—scholar, judge, world leader? Contemporary natural law theorists have responded to this problem, especially through the concept of the common good as an objective anchor for the search for natural law principles. A different or additional response is offered here, looking to legal process theory.[111]

The obvious danger is that a super-norm in practice depends upon the subjective view of some superior power like a Roman emperor, a subversive power like early Christianity, or even the non-state umma of Islam, in order to have peremptory effect it desires when enforced. That question causes us to face the Hobbesian notion that the norm's content should come from those with sufficient political power to give it effect. If coercion, however, is no longer the precondition for a valid norm, as Hart and Henkin each argue, then the peremptory nature of a *jus cogens* norm is not external compulsion from coercion by the most powerful sovereigns but an inner compulsion from self-consciousness, perhaps as Hegel showed. When unconscionable acts of injustice are exposed and shock human conscience, it is now reasonable to argue the doctrine in court and blog or tweet on the internet condemning those who authorize or commit such atrocities in a legal process in sovereign space. There are no guarantees, but at least a transcendent ordering norm now conceptually presupposes the trump of peremptory substantive norms over a conflicting brutal positive law and may be enforced with sanctions authorized in an open process.

B. International Legal Process Jurisprudence

Who decides and by what process is a crucial component for compliance with international law and sanctions for noncompliance. O'Connell looks to the main legal process theorists to unmask the danger of subjective preferences concealed in these decisions. In legal process jurisprudence, functional purpose is gleaned from many sources and subjective discretion is limited in

111. O'Connell, *supra* note 1, at 132.

institutions by professional practice.[112] When the legal process school was begun at Harvard by Lon Fuller and continued by Henry M. Hart, Jr. and Albert M. Sacks with their mimeographed materials,[113] it sought to displace three theories inadequate for the times after the atrocities of World War II: 1) the moral neutrality and doctrinal formalism of positivism, 2) the "law is policy" movement, and 3) the indeterminism of legal realism. Legal process thinkers see law as a purposeful, functional, institution-based decision process. Legal realism is anti-formalist private law jurisprudence. Policy-oriented jurisprudence goes a step beyond to train lawyers in creating and interpreting public law. The legal process school parallels them both and was highly successful in the United States for several generations of scholars.

According to Neil Duxbury, "[i]nternational law held little appeal for so-called legal realists."[114] But the process of international law attracted Roger Fisher, Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld, who concentrated on clarifying the decision process[115] and narrowing conflicts within it to minimize coercion as the main reason for nations to comply with international law.[116] Harold Koh, who is now Legal Adviser at the Department of State, brought the method into a post-Cold War era with human and economic rights gaining equal importance in a transnational legal process of decision.[117]

The early process theorists tend to deemphasize sanctions in the same way that Hart's concept of positive law with binding legal obligations through community acceptance of international law practice deemphasizes sanctions. An exception is McDougal, Lasswell, and Reisman, who maintain sanctions in their value-oriented approach to international law because power to implement policies in support of human dignity is a base value without which no values could be achieved. In O'Connell's view, the New Haven School fails not because its use of sanctions is flawed, but because its comprehensive policy language does not easily distinguish law from politics. All

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112. Mary Ellen O'Connell, *New International Legal Process*, 93 Am J. Int'l L. 334 (1999).
113. Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law (William N. Eskridge, Jr. & Philip P. Frickey eds., 2001).
114. Duxbury, *supra* note 45, at 200.
115. Roger Fisher, Points of Choice (1978) (clarifying the role of law in shaping goals, attaining power, defining and achieving "victory," and choosing among inconsistent goals).
116. Abram Chayes, Thomas Ehrlich & Andreas F. Lowenfeld, International Legal Process: Materials for an Introductory Course (1968).
117. Harold Kongju Koh, *Transnational Public Law Litigation*, 100 Yale L.J. 2347, 2379 n.167 (1991). US courts, however, do not treat human and economic rights with the same assumptions in decisions. They have applied customary international law involving economic rights without explicit statutory incorporation but resist applying customary international human rights law as federal law unless authorized by statute. Gordon A. Christenson, *Customary International Human Rights Law in Domestic Court Decisions*, 25 Ga. J. Int'l & Comp. L. 225 (1995/96); Christenson, *Federal Courts and World Civil Society*, *supra* note 108, at 435–44.

law is politics, say critical legal theorists, but McDougal never went that far. He often said that while all law is policy, not all policy is law.

O'Connell's view of the new legal process is closer to that of Koh, who is influenced by the New Haven School but without the complex social science language. Fusion of natural law with positive law through an integrating legal process, however, requires a response to Kennedy's penchant criticism that international legal process jurisprudence remains disembodied from foreign policy by reason of twentieth-century abhorrence of raw power. For that reason Kennedy believes it does not achieve what is needed, which is a truly interdisciplinary integration of social science, economic power, military force, and values. He doubts whether the new mainstream "transnational-legal process-liberals" whose discipline he calls a twentieth-century project, is adequate for the task of integrating law with global economic power, military power, and political power in twenty-first-century scholarship.[118] Kennedy's integrating task is a "new stream" interdisciplinary process for engaging mainstream political realists.

Rather than using sanctions as tests of legal validity, O'Connell's synthesis of theory and practice offers sanctions jurisprudence as language signals. This practice seems in line with Kennedy's thinking that international law should find better language from the professions of law, politics, economics, and war in specific situations.[119] I think O'Connell's international legal process with traditional language from sanctions practice achieves this goal more effectively because it is reformulated within a classic tradition most lawyers and policymakers understand. O'Connell's method, like Fuller's, is naturalistic in allowing extra-positive law sources of expertise. In new legal process jurisprudence, inner subjective consciousness from new participants informs the hermeneutics of normative decisions when external reality demands finely tuned or measured sanctions for noncompliance with accepted rules. These decisions may be coordinated in matrix form across established institutions. Signals from patterns of practice classified in the sanction category of measures, countermeasures, and adjudication convey seriousness and need for compliance with reasonable rules. O'Connell's idea of sanctions as signals to communicate the seriousness of compliance and engagement in a process of decision seems at least as effective for the next generation of scholars as Kennedy's new-stream attempt to speak a new interdisciplinary language.

One might think that Kelsen would be central as well to O'Connell's legal process jurisprudence in enforcing international law through courts. He clearly distinguishes between static and dynamic law in his *Pure Theory*

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118. David Kennedy, *The Twentieth-Century Discipline of International Law in the United States*, *in* Looking Back at Law's Century 386, 419–33 (Austin Sarat, Bryant Garth & Robert A. Kagan eds., 2002).

119. *See* Kennedy, Of War and Law, *supra* note 20.

of Law with a limited law-creating role for a judge in domestic and international courts, as Judge Posner concludes. Also, through *desuetudo*, a law no longer observed in practice nor enforced effectively may be considered no longer worth applying in domestic and international processes of decision.[120] Kelsen's *desuetudo* is another connection of legal process to changing reality. Pure power theorists following Schmitt believe that only effective political power, the mythical sovereign "who decides on the exception,"[121] not judicial authority, will determine the content of a rule of international law and whether it should be applied or changed without being disembodied in legalisms. International law will have to change, for example, to accommodate the phenomenon of asymmetrical, non-territorial war with its random threats of violence to innocent civilian populations and countermeasures with collateral civilian damage. New rules of engagement may develop for countermeasures and for detention and treatment of prisoners in this kind of armed conflict. Some judges and law enforcement communities already are engaged with political authorities in transnational practice to adjust international conventions by moving through "sovereignty" as Kelsen does conceptually.

In his *Political Theology*, Schmitt writes,

> Kelsen solved the problem of the concept of sovereignty by negating it. The result of his deduction is that "the concept of sovereignty must be radically repressed." This is in fact the old liberal negation of the state vis-à-vis law and the disregard of the independent problem of the realization of law [that] . . . . it is not the state but law that is sovereign.[122]

Legal realism and the American legal process school also reject absolutist abstractions, for law jobs are mixed, functional, concrete, and human. Whoever has jurisdiction has power to make an exception. The legal process of decisions involving important policy questions of the use of transnational coercion cannot escape the expertise of professionals who make decisions and exceptions within established institutional settings. Ultimately, judges and administrative officials do create new rules; they narrow or broaden interpretation whether directly or by fictions to fill gaps or meet new or unexpected contingencies in concrete cases. Who has power to decide the exceptional in an institutional setting is a process question for both domestic law and international law. Every nominee for a vacancy on the US Supreme Court is challenged to apply—but not to make—law, yet judges, neo-formalists, and consequentialists, nudge their interpretations of law in ideological directions incrementally when there are ambiguities to settle.

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120. Kelsen, General Theory of Law & State, *supra* note 4, at 119–20, 173.
121. Carl Schmitt, Political Theology: Four Chapters on the Concept of Sovereignty 5 (George Schwab trans., 1985) (1922).
122. *Id.* at 21.

In his own way, even Schmitt might agree, for he stands firmly against an abstract rule of law. An abstract, pure legal norm does not decide cases. Human decision-makers do. The closer O'Connell draws to the decision process of lawyers, judges, and officials for the practice side of her human thesis, the more she moves towards Schmitt's critique of Kelsen's normative purity. And when Judge Posner turns to Kelsen in support of delegated judicial power to make law as a legislator might, free of any substantive limitations, he invites Dworkin's fury in calling him *Darwin's New Bulldog*, a disengaged pragmatic utilitarian.[123] There is much irony in either approach. We might now catch a glimpse of what Kennedy is driving at when he opposes an international legal process standing apart from human political reality.

There is no better example of O'Connell's view of interdisciplinary scholarship than to revisit the famous Hart-Fuller debates she mentions in support of her legal process jurisprudence. These take place in the *Harvard Law Review* following Hart's 1957 Holmes lectures on legal positivism during his visit that year at Harvard.[124] Hart was mildly interested in the legal process project of Hart and Sacks (Julius Stone of sociological jurisprudence fame also visited that year), but not enough to divert him from his work at Oxford in linguistic philosophy and analytical positivism. He does not think highly of US legal education and spends the year working on his own concept of law. It is widely thought that Fuller fails in his attack on legal positivism, but a fresh look at Fuller's work suggests otherwise, something quite important for O'Connell's view of legal process.[125]

Fuller is determined to align his secular moral with his procedural concerns, just as O'Connell is today. He holds that form is inseparable from substance and thus helps to shape outcomes. For the debate with Hart, the fact that procedural forms often are shaped by values implies the analytically dubious proposition that means and ends, is and ought, are inseparable even in the face of Hume's skepticism and Hart's separation of valid law from morality or justice. Nonetheless, Fuller uses this proposition in the debate with the persuasive insight that certain procedural forms may produce outcomes of preferred values or that failure to respect certain procedural forms will produce unique moral wrongs.[126] He is of course objecting to the legal

123. Ronald Dworkin, *Darwin's New Bulldog*, 111 Harv. L. Rev. (1998), *reprinted in* Dworkin, Justice in Robes, *supra* note 100, at 76.

124. *See* H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630 (1958).

125. Parts of Fuller's important *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353 (1978), published after his death in 1978, were presented to the American Society of International Law in 1960. Lon L. Fuller, *Adjudication and the Rule of Law*, 54 Am. Soc'y Int'l L. Proc. 1 (1960).

126. Lon L. Fuller, The Morality of Law 152–86 (rev. ed. 1969).

theory by which the Nazis might escape culpability because their positive law is valid law. Law is law. This reasoning leads Fuller to overstate a claim that complying with certain procedural tenets entails an "inner morality of law" that tends to "work the law pure" in a substantive sense. In the context of the debate, this reduction of his insights to equating fact and value in process undersells his own arguments and invites "philosophical contempt." It is a turning point where American legal positivism becomes the dominant approach in professional training and scholarship in US schools.

O'Connell plainly sees that there is more to Fuller's process than that. If we view Hart's concept of obligation in positive international law from within Fuller's larger empirical attention to the content-shaping power of transnational enforcement procedures, which is O'Connell's thesis, then a secular and human natural law is possible to help regulate major coercion. Hart's biographer, Nicola Lacey, revisits the debate after reading all of Fuller's correspondence for the first time. "Fuller's interest in institutions, along with his interest in economic and social theory and in anthropology, gave him a keen sense of the way in which institutional forms enhanced certain kinds of governance,"[127] she writes, a sense only crudely expressed in the debate. Lacey's review brings out the viewpoint of Fuller's most original interventions in legal scholarship. These are not purely philosophical "but rather in a broader socio-legal and interdisciplinary interpretation of legal institutions and processes."[128] The letters reveal his interest in the influence of extra-legal as well as legal norms on legal decision making such as complex treaty negotiations. His preoccupation with different kinds of institutional procedures for different purposes leads him into public choice and game theory. He corresponds with James Buchanan and Gordon Tullock in 1964 showing grave concern for the moral dimension of decision processes studied in the social sciences:[129]

> The development of moral insight through participation in institutional procedures is nowhere more clearly revealed than in the negotiation of complex agreements, such as those involved in treaties or collective bargaining contracts. The good negotiator in such a case must not only make a genuine effort to understand the declared aims of the opposing party, but must be capable of some sympathetic participation in those aims.[130]

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127. Nicola Lacey, *Out of the 'Witches' Cauldron?: Reinterpreting the Context and Re-assessing the Significance of the Hart-Fuller Debate* 33 (LSE Law, Society and Economy Working Papers 18/2008), *available at* http://www.lse.ac.uk/collections/law/wps/WPS2008-18_Lacey.pdf.
128. *Id.* at 5.
129. *Id.* at 26. Note also that Buchanan later won the Sveriges Riksbank Prize in Economic Sciences.
130. *Id.* at 33 (quoting Lon L. Fuller, *Irrigation and Tyranny*, 17 Stan. L. Rev. 1021, 1033–34 (1965)).

The contrast with power-based conflict models of negotiation and enforcement between sovereign powers is stark. Lacey thinks this aspect of Fuller's work is yet to have its influence properly felt: "[T]he philosophical paradigm which Hart made so influential dominates the jurisprudential field; while the broader interests which Fuller enjoyed have yet to find an equally central place on the agenda of legal theory."[131]

O'Connell's adoption of international legal process jurisprudence arguably sidesteps Hart (posthumously still under attack by natural law philosopher and former student Dworkin) and points in the direction of Fuller's jurisprudence revisited and the transnational legal process method of Koh. She supports Hart's community acceptance of law but, as I read her, with special expertise from practicing international lawyers, broadened to include extra-legal sources including *jus cogens* and Kelsen's dynamic theory of judicial law-making that might adjust the artificial boundaries of sovereignty.

Political realists and critics still believe that international law scholarship cannot stand apart from the "science" of international relations between sovereign powers. Goldsmith and Posner, for example, continue to claim that unless international norms are backed by force, when they come up against national interest, they yield every time.[132] In their view, serious violations could occur such as when the strong invade the weak, proving that prohibitions against the use of force in the UN Charter have no teeth and need not be taken seriously despite procedures in place for passing resolutions.

Not so, claims O'Connell. We don't discount domestic law every time it is violated without being effectively enforced. Moreover, effective sanctions even according to Kelsen are not conceptually required to enforce every law for every defection or act of noncompliance. If sanctions are not applied in a particular transnational procedural setting for a particular instance of noncompliance (imposing a nontariff trade barrier for example), Kelsen's norm prescribing that sanctions "ought" to be applied continues to exist nonetheless. The validity, binding nature, and persuasive qualities of the norm do not terminate. We are always in a dynamic process in relation to the *status quo*. The availability of sanctions is sufficient so long as professionals in transnational institutions believe psychologically or sociologically that free-riders from convention are normatively expected to comply and eventually most will. Nor does a legal process model claim, as neo-formalists do, that pragmatic balancing of two kinds of interests denudes law of any normative quality.

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131. *Id.* at 36.

132. Jack Goldsmith & Eric Posner, Op-Ed., *Does Europe Believe in International Law?*, WALL ST. J., 25 Nov. 2008, at A15 (". . . Europe's commitment to international law is largely rhetorical. Like the Bush administration, Europeans obey international law when it advances their interests and discard it when it does not.).

Social theorist Russell Hardin views Fuller's thinking about institutional practices as favorably as he does Hume's. The "coordination function of laws in certain branches . . . serve 'to order and facilitate interaction.'"[133] Further, "having certain laws helps us to coordinate, hence to produce further laws, hence to coordinate better."[134] This continuous process integrates best practices. Hume argued that law and institutions are artificial incentive systems working by feedback to improve performance—once they get established by convention most who participate are kept in line by acquiescence and anyone defecting can be brought back into line by many pressures including coercion. Globally, this iteration requires institutionalized processes of transnational coordination.[135] Recent work in social science methods in the philosophy of law also is producing new legal realism in international law scholarship—"a greater focus . . . on empirically-grounded work that involves *method* in a social science sense. In doing so . . . a 'new legal realist' approach . . . has four attributes: normative commitment, commitment to empirical work, critical self-reflection and translation of empirical findings for both policy and practical tools."[136]

C. On Compliance

Recall that O'Connell agrees with Hart's conceptual work that obeying international law is obligatory not by reason of threats, consent, or moral obligation, but because the community of nations accepts customary practices, including *pacta sunt servanda*, as law from an internal point of view. But why do state officials believe they ought to comply simply because this law is binding even if not in their interest? Why not defect anyway if in their vital national interest? Two empiricist observations by the eighteenth-century skeptic Hume, a congenial philosophical naturalist of the Scottish enlightenment, lead us to consider ways to understand a normative legal process theory without the unifying neo-Kantian transcendence of Kelsen's pure theory or the immanent substantive content of *jus cogens* norms from natural law.

1. Defection and Free-Riding

First, Hume suggested rationally that while it is in the interest of nations to have laws of nations and an obligation for all nations to obey them, it is

133. Russell Hardin, David Hume: Moral & Political Theorist 142 (2007).
134. *Id.*
135. Goldsmith and Posner also think international law scholarship is important for states when they coordinate or cooperate, since "they need to establish a point of coordination." Goldsmith & Posner, The Limits of International Law, *supra* note 68, at 202.
136. Shaffer, *supra* note 55, at 4.

not necessarily in the interest of a single nation-state to obey them. "What is in the interests of every nation is that other nations obey . . . [the law of nations], while it does not."[137] The dilemma in this adage becomes clear when we ask, for example, whether a nation will cooperate with or defect from an international law to ban or control nuclear weapons under an inspection and sanction regime.

The paradox, a public order variant of the Prisoner's Dilemma in game theory is grist for the mill of rational choice theorists and political realists.[138] Their solution to the problem of opting-out of cooperation always seems to require some form of threat of coercive sanction by a powerful enforcer like Hobbes's sovereign to induce cooperation to maintain public order. These dilemmas presuppose models involving threats (such as mutual destruction) for noncompliant human nature that are measured by predicting probable behavioral responses.

Like Austin's jurisprudence, law for them is a prediction of results of sanctions threatened or imposed by those in political power. Don't powerful states always impose the order they prefer on weaker states coercively, while exempting themselves from the same rules?[139] Defection (noncompliance) usually signals self-interest through extortion or bargaining leverage, as when modern pirates seize commercial vessels on the high seas, terrorists launch indiscriminate violence to invite reprisals for advantage in recruiting or exposing weakness in asymmetrical power relationships, or weak nations seek nuclear weapons to stabilize relations with more powerful neighbors or to sell them.[140]

When considered from the viewpoint of political realists from Thomas Hobbes to George Kennan,[141] of legal positivists in the tradition of Morgenthau,[142] or of contemporary rational choice and game theorists such as law professors Goldsmith and Posner,[143] the decision to comply with international

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137. Jonathan Harrison, Hume's Theory of Justice 233 (1981).
138. For development of game theory in arms control and the diplomacy of violence during the Cold War, see Thomas C. Schelling, The Strategy of Conflict (1960); Thomas C. Schelling, Arms and Influence (1966).
139. Made famous by Thucydides, History of the Peloponnesian War 402 (Rex Warner trans., Penguin Books rev. ed. 1972) (422–415 BC) (as said by the Athenians in the Melian dialogue: "when these matters are discussed by practical people, the standard of justice depends on the equality of power to compel and that in fact the strong do what they have the power to do and the weak accept what they have to accept.")
140. *See* Kennedy, Of War and Law, *supra* note 20, at 141–43.
141. "I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems." George F. Kennan, American Diplomacy, 1900–1950, at 93 (1950). George F. Kennan, Memoirs 1950–1963, at 71–72 (1967). His memoirs explain how he came to assemble from extensive notes a polemic against morality in foreign policy, which remained unfinished until he presumably completed it in the article: George F. Kennan, *Morality and Foreign Policy*, 64 Foreign Aff. 205 (1985). *See* Gordon A. Christenson, *Kennan and Human Rights*, 8 Hum. Rts. Q. 345 (1986).
142. Morgenthau, Politics Among Nations, *supra* note 48.
143. Goldsmith & Posner, The Limits of International Law, *supra* note 68.

law is a false choice. In their view the question should be what the interests of a sovereign state rationally require in using its powers to achieve national goals in cooperation or in competition with other states or non-state actors. Rules of international law may be useful instruments of policy, according to these realists, but compliance and defection are purely epiphenomenal effects of national interests, not evidence of obeying or disobeying binding law.[144] In their view, social science methods of investigation, now including rational choice models and game theory, are far superior procedures for scholarly inquiry into the behavior of nations than normative methods derived from moralistic-legalistic thinking in the natural law-natural rights tradition.

We have already discussed O'Connell's criticism of the book, *The Limits of International Law* by Goldsmith and Posner, which is a good example of recent attempts to neuter the perverse influence of the "legalisms" of international lawyers as they tie the hands of officials charged with protecting vital national security interests. O'Connell is no enemy of rational choice theory, but is highly skeptical of the authors' "comprehensive analysis of international law,"[145] one that looks at the nuts and bolts of international law cases and doctrines using rational choice models as if to show that the entire history and tradition of international law scholarship and practice is misguided.

For O'Connell rational choice theory is but an offshoot of economics and game theory and much too narrow a discipline to displace her renewal of classic international law. She rejects a host of their specific examples when she thinks they are factually incorrect or do not support the authors' thesis that nations will not comply with international law without coercion when not in their national interest. In their view, the expectation that nations will comply without tough sanctions actually encourages defection or free-riding and thus will have negative influence on the behavior of states. But if Hart is accepted as the beginning point for international obligation from community acceptance of customary rules as law in practice, then his explanation of sanctions appears much more persuasive. As O'Connell and Hart each point out, sanctions reinforce compliance already practiced for many other reasons and may persuade as well as coerce free-riders into compliance. That shift undercuts the revival of a generally exclusive theory that law is obeyed only because it is backed by coercion from some monopoly of force. Some political realists even dismiss international law as an independent discipline, considering it merely as part of an external international relations theory.[146] After reviewing what states do in actual practice with sanctions and compliance, all things considered, O'Connell

144. Fichtelberg, *supra* note 17, at 9, 10–11, 13 n.20, 14.
145. Goldsmith & Posner, The Limits of International Law, *supra* note 68, at 17.
146. Raymond Aron, Peace and War: A Theory of International Relations (1966); Paulson, *supra* note 66.

sides with the well-worn observation by Henkin that: "*almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.*"[147]

Hume's second idea, a view of empiricism, is consistent both with this observation and with O'Connell's study of enforcement practice. Incongruously, in my analysis, this view leads social science in a direction with naturalist assumptions that seem at odds with the models of pure rationalism undertaken by Goldsmith and Posner.

2. Convention

Hart's view of internal motivation for a community's acceptance of customary practice as law finds common empiricist grounds in the observation first made by Hume of "convention." Insights from Hume's explanation have not been appreciated as much as they should until the last half-century. Convention introduces an explanation inherited today by naturalists, legal positivists, legal process, and rational choice theorists. It is associated with describing social and psychological behavior, as collective choice philosopher Russell Hardin explains in his scholarship on Hume's moral and political thought.[148]

Hume observed that the power of internal motivation in following convention, such as rules of the road or patterns of settled practices, explains compliance with social norms better than coercion, social contract, or morality.[149] Coercive sanctions, to repeat O'Connell's view, merely aid the inner workings of convention described as a normative tendency, by deterring free-riding and by signaling seriousness of compliance. Through convention, Hume reasoned in his treatise, self-interest becomes common interest over the long haul:

> [C]onvention is not of the nature of a *promise*: . . . It is only a general sense of common interest; which sense all the members of the society express to one another, and which induces them to regulate their conduct by certain rules. . . . Two men, who pull the oars of a boat, do it by an agreement or convention, tho' they have never given promises to each other. . . . [I]t arises gradually, and acquires force by a slow progression, and by our repeated experience of the inconveniences of transgressing it. On the contrary this experience assures us still more, that the sense of interest has become common . . . and gives us a confidence of the future regularity of their conduct.[150]

147. Louis Henkin, How Nations Behave: Law and Foreign Policy 47 (2d ed. 1979).
148. Hardin, *supra* note 133.
149. David Hume, A Treatise of Human Nature 489–91, 516, 522, 543 (reprinted, L. A. Selby-Bigge ed., 1888).
150. *Id.* at 490.

According to Hardin, philosopher David Lewis looked seriously at the account in Hume's treatise and developed it in his 1969 book, *Convention*.[151] Hardin calls Hume "a late twentieth-century political philosopher" because only in the last half-century have Thomas Schelling and Lewis presented accounts of coordinated iterations developed from Hume's convention free of shared religious or other values or draconian measures as grounds of social order. Hart in effect used convention as acceptance in practice of primary norms of obligation through secondary rules of recognition in *The Concept of Law*. In a recent book, *Social Conventions*, Andrei Marmor casts new light on the difference between "deep" constitutive conventions for recognizing what counts as law and "surface" coordinating rules of practice and so affirms Hart's basic concept of the social foundations of law.[152] This important refinement of convention is a long way from Hobbes, who used a kind of game theory with coercion to resolve primitive prisoner dilemma problems, but that was only to induce cooperation with and deter defection from established convention affirmed by the sovereign.[153]

What turns convention into binding law that ought to be obeyed? There are communal practices that in fact are antisocial and harmful, as in gangs, conspiracies, and criminal or terrorist networks, and perhaps such conventional practices as cheating in global financial markets by those in the know. They may also reflect protest movements of conscience cutting against established convention, such as those lead by Martin Luther King, Jr. or Nelson Mandela. But why does a statement of social fact of compliance with conventional practice become an obligatory norm without the element of coercion, moral duty, or consent? What distinguishes orders under threats from a robber or gang for you to pay money from similar orders by a tax collector, investment bank regulator, or official to pay money or fines? That problem for international law is the same problem faced by all law, and Kelsen, Austin, and Hart all deal with it.

Hart answers that from the internal point of view acceptance of rules of a community by those in the know recognizes as constitutive the "standing disposition of individuals to take such patterns of conduct both as guides to their own future conduct and as standards of criticism which may legitimate demands and various forms of pressure for conformity."[154] This "standing disposition," can be instilled or adopted for any reason whatsoever. "[S]ome rules may be accepted simply out of deference to tradition or the wish to identify with others or in the belief that society knows best what is to

151. David Lewis, Convention: A Philosophical Study (Blackwell Publishers 2002) (1969).
152. *See* Andrei Marmor, Social Conventions: From Language to Law (2009) (reconsidering Lewis' dominant thesis on convention, Lewis, *supra* note 151).
153. Hardin, *supra* note 133, at 216, 222, 227.
154. Hart, The Concept of Law, *supra* note 16, at 255.

the advantage of individuals. These attitudes might coexist with a more or less vivid realization that the rules are morally objectionable."[155] The robber or gang does not accept the community's rules for other reasons. They may view the accepted rules from the inside in order to calculate how to displace them with their own conventions. Short of revolution, antisocial conventions of honor among thieves or terrorists are illegitimate coercive orders, unacceptable to normal practitioners of the dominant social convention. Transnational social justice movements, though not law, may eventually "legitimate demands and various forms of pressure" and by interaction change a constitutive convention of how law is made.

In his study of Hume, Hardin reexamines "iterated coordination" as convention in an advanced society for obeying particular rules of law without coercion or moral obligation. Hume explains "moral ideas, rather than demonstrating the truth of them, because he essentially holds that moral views have no truth value."[156] Hume never resolved the question he famously made clear whether you can derive an "ought" of preferred behavior from an "is" of social convention—value from fact.[157] That is left to political and personal preference. Kelsen handled the question by presupposing a conceptual basic norm as "ought" but from Kant not sociology. O'Connell supports a normative theory of international law through natural law and legal process jurisprudence, though I believe these may be compatible with scientific naturalist methods of interdisciplinary scholarship. She also observes convention from Hart's internal point of view of practice as evidence of binding obligations to obey international law with sanctions available at many different levels for preventing defections from convention within a process of change.

Kelsen distinguishes a law's validity from a fact's truth value. For him "sociological jurisprudence presupposes the normative concept of law" and distinguishes the different commands for money in the above example by virtue of whether the order was authorized by a legal order assumed valid.[158] Hume would remain skeptical, for his observation of social fact as a truth value does not presuppose a normative concept. Hume's empiricism merely explains convention, nothing else. Through a process of continuous iteration, however, conventional modern practices of what counts as law, including the use of force within a legal order or resisting unconscionable violence, are recognized, coordinated, modified, and further explained by observing and *engaging reflectively* in social behavior. For Hume, the fact of observing convention does not imply anything more than that if we wish to

155. *Id.* at 257.
156. Hardin, *supra* note 133, at 225.
157. Some modern philosophers disagree. *See* John R. Searle, *How To Derive "Ought" from "Is,"* 73 Phil. Rev. 43 (1964).
158. Kelsen, General Theory of Law & State, *supra* note 4, at 175–78.

enjoy certain benefits, then we should behave in a certain way, a utilitarian judgment. The possibility of a normative concept of law in the acceptance of convention is not, for Kelsen, Hart, Henkin, or O'Connell, incompatible with Hume's naturalism. The normative and the conventional tolerate each other, but they remain simply different intellectual operations.

In accepting and complying with a dominant convention, including the convention of what counts as law, a community of participants in the know creates an expectation that even those not consenting ought to continue to obey unless there is good reason not to. There is a pull toward compliance by practicing legal professionals even in the international community, as Henkin and O'Connell argue and Goldsmith and Posner question. Convention may be described as social fact, but it becomes normative when those engaging and participating actively in international law practice make a separate judgment to accept that convention, perhaps with changes, as a normative expectation for others when considered beneficial for the common good of the entire community. The torture memos illustrate convention and defection among legal professionals. By the choice of legal language used to authorize alternative interrogation techniques there was defection from conventional legal practice banning torture. The attempt to change what counts as law in conventional practice failed, but the process of enforcement in non-state crime remains on-going and dynamic and may yet refine expectations. "A social theorist must reckon Hume's analysis of convention and his use of it to explain social order the greatest contribution of all of Hume's work in social and political theory," according to Hardin. "It is a theory that is compelling still today."[159]

Convention also helps explain transnational coordination of international law among sub-national officials and judges working inside sovereign nations or in domestic and international courts.[160] O'Connell contributes to this scholarship, for she, too, describes conventional patterns of enforcement practice among international and domestic courts and administrative regimes. Transnational legal processes already penetrate national structures with need for coordinated regulation in trade and exchange. They serve functional purposes of coordination similar to those inside the administrative state, as described in Max Weber's legal sociology. Too much focus on sovereign power leads to false concerns about legal authority and hierarchy in international governance at the expense of global pluralism.[161]

Recent scholarship also takes "lessons from coordination" in foreign affairs and international law for US federalism with rich results.[162] In foreign

159. Hardin, *supra* note 133, at 225–26.
160. Robert B. Ahdieh, *Foreign Affairs, International Law, and the New Federalism: Lessons from Coordination*, 73 Mo. L. Rev. 1185 (2008).
161. *See* Paul Schiff Berman, *Global Legal Pluralism*, 80 S. Cal. L. Rev. 1155, 1177 (2007).
162. *See* Ahdieh, *supra* note 160.

affairs, coordination in the United States is not always centralized to a single locus of national power for coordinating compliance with international obligations. Decentralized coordination may take place with many participants from subnational groups and states.[163] State and local governments and courts often interpret international and foreign law to accommodate local circumstances without bumping up against the barriers of classical sovereignty.[164] And iterated coordination flows both ways, including monitoring by political authority.[165] A recent empirical study of transjudicial citations among international courts shows judges staying within the bounds of treaty authority under which they operate, especially if monitored by their states, depending on the judge's ideology and whether judges attend international judges' conferences.[166] The two international European courts, for example, tend to cite European norms and values and not decisions of other courts.

There are yet other conventions involving normal international judicial assistance, recognizing and enforcing foreign judgments and arbitral awards under treaties and comity in private litigation. National courts also enforce decisions of regional tribunals such as the European Court of Human Rights, the European Court of Justice, or the Inter-American Court of Human Rights. National courts seldom enforce decisions of the International Court of Justice or state-to state arbitral awards, for states generally comply because the convention of compliance is viewed as a political matter and accepted generally.

Here there are exceptions, as O'Connell points out. In *Medellin v. Texas*,[167] Chief Justice Roberts writing for the US Supreme Court refused to enforce a directive to Texas by President George W. Bush to comply with an ICJ judgment and final order. The ICJ ordered a review and reconsideration of convictions and sentences of Mexican nationals after Texas prosecutors

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163. Christenson, *Federal Courts and World Civil Society*, *supra* note 108, at 405, 456–81 (relating global civil society to structures of judicial devolution of power and sovereignty internally and externally through transnational legal process in federal courts).
164. State responsibility for non-state actors and "para-statals" may be shifting to a supervisory role for the state and the concept of "intermediate responsibility." *See* Gordon A. Christenson, *Attributing Acts of Omission to the State*, 12 Mich. J. Int'l L. 312, 366–70 (1991).
165. *See* T. Alexander Aleinikoff, *Transnational Spaces: Norms and Legitimacy*, 33 Yale J. Int'l L. 479, 483 (2008). The ideological potency of this question was seen in the fierce opposition to Yale Law School Dean Harold Koh's nomination to be legal adviser of the US Department of State. *See* Eric Lichtblau, *After Attacks, Supporters Rally Around Choice for Top Administration Legal Job*, N.Y. Times, 2 Apr. 2009, at A19. Koh's "transnational legal process" that studies the flow of decisions across sovereign boundaries is scarcely a new field.
166. Erik Voeten, Borrowing and Non-Borrowing Among International Courts (11 May 2009), *available at* http://ssrn.com/abstract=1402927 (judges anticipate what their external citations communicate to third parties, expecting more or less scrutiny for using sources of law other than the primary treaties that they are delegated to interpret).
167. Medellin v. Texas, 128 S. Ct. 1346 (2008).

failed to notify Mexican consular officers of the prosecutions, placing the United States in noncompliance with the Vienna Convention on Consular Relations of 1963.[168] The Supreme Court did not even reach the question of whether state practice of general compliance with ICJ decisions among nations is binding customary law. Justice Breyer dissented: "Enforcement of a court's judgment that has 'binding force' involves quintessential judicial activity."[169] Nor did it consider the Vienna Convention and UN Charter binding in US courts. Unless authorized by Congress, the Court held that President George W. Bush's executive direction to Texas to comply with the ICJ order lacked constitutional authority. Absent Congressional action, at present the Supreme Court decision leaves to the states the decision whether to comply with a final order of the ICJ on matters within the criminal jurisdiction of the states.

National and regional courts may enforce sanctions directed against individuals by the UN Security Council carried out under national or regional constitutional orders, raising the important question of potential conflicts in legal orders—regional, national, and international—including whether general international law limits the authority of the Security Council in abridging non-derogable fundamental individual rights and freedoms.[170] In commenting on *Yassim Abdullah Kadi v. Council*,[171] a historical case from the European Union's Court of First Instance, O'Connell believes that even the Security Council operates within the limits of general international law, especially *jus cogens*.[172] Domestic and regional courts are cautious in testing the boundaries of Security Council enforcement measures. When the case O'Connell mentions reaches the Grand Chamber of the European Court of Justice, that court avoids ruling on the illegality of the Security Council's sanctions by citing only constitutional resistance from within the EU's regional legal order.[173] This approach indeed mirrors that of the United States Supreme Court in the above cases surrounding the Vienna Convention on Consular Relations.

These cases have been cited also as evidence that in practice the national constitutional legal orders of states prevail when in conflict with international law.[174] This dogma aimed at protecting the shell of "sovereignty," however, ignores the complexity of developing practice. General international law,

168. Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. 12 (31 Mar.).
169. *Medellin*, 128 S. Ct. at 1383 (Breyer J., dissenting).
170. Daniel Halberstam & Eric Stein, *The United Nations, the European Union, and the King of Sweden: Economic Sanctions and Individual Rights in a Plural World Order*, 46 Common Mkt. L. Rev. 13 (2009).
171. Case T-315/01, Kadi v. Council, 2005 E.C.R. II-3649.
172. O'Connell, *supra* note 1, at 278.
173. Case C-402/05 P, Kadi v. Council, 2008 ECJ EUR-Lex LEXIS 1954 (3 Sept. 2008).
174. Goldsmith & Posner, *Does Europe Believe in International Law?*, *supra* note 132.

perhaps *jus cogens* in addition to regional or national legal orders, through a deep constitutive convention developing in tandem may be seen as a limitation on overreaching sanctions power of the Security Council or other treaty organizations intruding on individual rights and freedoms. The Supreme Court precedent that the United States rightly will not give effect to a treaty that violates the US Bill of Rights[175] closely resembles the Grand Chamber's approach of constitutional resistance. Both courts preserve domestic constitutional rights and procedures but then they "permissively read the UN Charter and other international instruments as allowing for this kind of flexibility in implementation."[176]

Hume's original observation that the basis of social order is convention is being constantly revised by studies of iterated coordination and deep constitutive convention at all levels of global society in practice.[177] The dynamic aspect of these studies is reinforced in enforcement practice O'Connell summarizes. Some sanctions signal changes in practice that may fragment international law. Since every treaty regime with a court has its own subject matter and sanctions for noncompliance, one of the unifying insights from O'Connell's survey is in the process for deciding and executing particular sanctions for specific treaty violations. The measures and countermeasures available for noncompliance with substantive law appear to have a conceptual language and regularity in international law even if applied in different treaty regimes—proportionality of countermeasures, for example, as Franck's recent study explains.[178] The UN International Law Commission's articles on state responsibility codify this practice with Kelsen-like language.[179]

V. CONCLUSION: A NEW *NOMOS* OF OUR PLANET?

In an article on transnational spaces, legal scholar Alexander Aleinikoff notes an ideological stance of dominant political realists who resist opening spaces for influence from the outside: "[L]ate modern notions of sovereignty and law . . . rooted in understandings of the nation-state now several centuries old, see law as an emanation of a sovereign who rules over a territory and a people."[180] With O'Connell, one might suppose that this idea of sovereignty

175. Reid v. Covert, 354 U.S. 1, 15–16 (1957).
176. Halberstam & Stein, *supra* note 170, at 67.
177. *See* Jacob Katz Cogan, *Representation and Power in International Organization: The Operational Constitution and Its Critics*, 103 Am. J. Int'l L. 209 (2009) (study of deep constitutive convention in international organization).
178. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 Am. J. Int'l L. 715 (2008).
179. *See* James Crawford, The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries (2002).
180. Aleinikoff, *Transnational Spaces*, *supra* note 165, at 483.

reflects Carl Schmitt's theory of law following Hobbes. Schmitt's books on political theory and sovereignty have attracted intellectual following from both the Left and the Right, each extreme wanting to use sovereign power to sanction noncompliance with international law to fit its own ideological outcome: unilateral humanitarian intervention from the Left, preemptive intervention from the Right.

Schmitt's early theory sees international law as emanating from the political power of "a concrete territorial spatial order," a *nomos* of the earth from territorially sovereign states or empires separated by the lawless seas that nations use for war, fishing, and trade.[181] In ancient times for Schmitt, "*nomos*" originally meant a first appropriation of territory and constitution of order.[182] But for the later Schmitt, "*nomos* is a matter of the fundamental process of apportioning space that is essential to every historical epoch—a matter of the structure-determining convergence of order and orientation in the cohabitation of peoples on this now scientifically surveyed planet."[183]

Through projecting power from sovereign space, inner constitutional order of course may become a hegemonic, federal, or imperial global legal order. Sovereign power is effective when projected from its rootedness in concrete spatial order by opposing external enemies, not by internalizing universal abstractions into domestic positive law thus weakening *nomos*. This late-modern view of sovereignty from Schmitt would likely appraise O'Connell's legal process jurisprudence of incorporating international human rights through domestic courts from the outside at least as dangerous and boundless as the rights of man from the Enlightenment were for Edmund Burke or Schmitt.

Contemporary French philosopher Chantal Delsol sees similar danger for international law in transforming matters of conscience from the ancient unwritten law into universal positive international law to punish those with noncompliant consciences:

> If there must be an ultimate norm or authority, it can only be the individual conscience, and this requirement entails that international law cannot be the final authority, the single repository of universal laws. In fact, international law wars with individual conscience, to the point that each wants to get rid of the other. This is the heart of the matter, its central point.
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> . . .
>
> Who will judge international law? To what or whom, will one appeal against it if it is deemed to represent the ultimate earthly norm, especially at a time when Heaven is believed to be closed? . . . Infallibility and conscience are mutually

181. G.L. Ulmen, *Introduction* to Schmitt, The *Nomos* of the Earth, *supra* note 79, at 9, 23.
182. *Id.* at 69–79.
183. *Id.* at 78.

> exclusive. Neither the Inquisition nor the totalitarian states would have countenanced Antigone. Nor does international law.
>
> We cannot *institutionalize* the revolts of conscience.[184]

Schmitt's last book on public international law completed in 1954 makes one further attempt to reconsider the old *nomos* from land and people in tension with themselves and with the lawless sea, the one that failed during the twentieth century. "Every new age and every new epoch in the coexistence of peoples, empires, and countries, of rulers and power formations of every sort, is founded on new spatial divisions, new enclosures, and new spatial orders of the earth."[185]

Mary Ellen O'Connell begins her book, as Schmitt does, with a Eurocentric view of territorial sovereignty and international law, but then she moves beyond Europe and the Americas. She shows us in *The Power and Purpose of International Law* the possibility of a revived *nomos* in international law grounded in tradition and human experience with sanctions and external conflict with presumed enemies. She, too, seems skeptical of ungrounded social scientific models and abstractions, preferring to examine what states do and accept as law in practice. Individual consciousness for her emerges concretely, from our past classic traditions that seek to limit violence through dynamic legal processes within an exploding universe of new knowledge and instant communications. From the immediacy of these communications and accompanying images of violence, disruption, and disaster, we have come to believe somehow that coercion should be used only for lawful human purposes. For O'Connell, sanctions signal the seriousness of this kind of *nomos*: peace, protecting fundamental human rights, preserving our earthly environment, and spreading prosperity among all who dwell on this wondrous planet for its time in vast space.

We are fallible humans, organized as we are in nations and groups for common purpose and protection. Sometimes we do not believe in nor wish to believe in complying with international law for reasons of conscience or self-interest. O'Connell's brilliant focus on sanctions and compliance in positive and natural law theory and practice enlightens us with its clear language and guidance for states in their use of force. This focus is especially vital for professionals who practice international law and foreign relations from the inside and help decide on behalf of us all whether that force will be used as sanction or delict.

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184. Chantal Delsol, Unjust Justice: Against the Tyranny of International Law 93, 95 (Paul Seaton trans., 2008).
185. Schmitt, The *Nomos* of the Earth, *supra* note 79, at 79.