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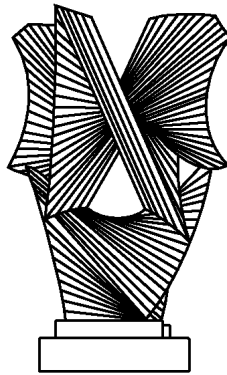
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MORAL AND LEGAL RHETORIC IN INTERNATIONAL RELATIONS:
A RATIONAL CHOICE PERSPECTIVE

Jack L. Goldsmith & Eric A. Posner*

Abstract. Critics of realist and rational choice approaches to international law argue that if nations were motivated entirely by power or self-interest, their leaders would not make moral and legal arguments because no one would believe them. Thus, the prevalence of moral and legal rhetoric on the international stage refutes the behavioral assumptions of realism and rational choice. This paper argues that even if nations are not motivated by a desire to comply with morality or law, the use of moral and legal arguments could occur in equilibrium. Signaling and cheap talk models show that nations may engage in talk in order (1) to deflect suspicion that they have unstable political systems or adversarial interests, and (2) to coordinate when gains from coordination are available. International talk is often moral and legal because the obligational vocabulary of moral and legal dispute between individuals is also useful for purely amoral strategic interactions when cooperation and coordination are involved. The existence of moral and legal rhetoric in international relations is the result of strategic incentives, not of the desire to comply with morality or law.

During the sixteenth year of the Peloponnesian War between Athens and Sparta, an Athenian force landed on the island of Melos, a Spartan colony and a neutral in the war. Thucydides' *History of the Peloponnesian War* recounts a dialogue between Athenian envoys and Melian leaders.¹ In a famous passage, the Athenians demand that the Melians submit to their rule:

For ourselves, we shall not trouble you with specious pretenses – either of how we might have a right to our empire because we overthrew the Mede, or are now attacking you because of wrong that you have done us – and make a long speech which would not be believed; and in return we hope that you, instead of thinking to influence us by saying that you did not join the Spartans, although their colonists, or that you have done us no wrong, will aim at what is feasible, holding view the real sentiments of us both; since you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they will and the weak suffer what they must.²

This passage is striking because the Athenians make no attempt to mask their imperialistic aims behind “specious pretenses.” They simply assert that they have an interest in ruling the Melians

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¹ See Thucydides, *The Peloponnesian War* (5.84).

² *Id.* at 5.89.

and will achieve this end because they are more powerful.³ As one historian has noted, if these and related passages in *The Peloponnesian War* are accurate, “the Athenians of the fifth century were . . . a very remarkable, if not unique, people in admitting openly that their policy was guided by purely selfish considerations and that they had no regard for political morality.”⁴

In contrast to the Athenians, Nazi Germany was extravagant in its regard for the forms of political morality. When Hitler announced establishment of universal military service in March 1935, he claimed that this violation of the Versailles treaty was justified by the allies’ prior violations of the treaty. Similarly, he justified occupation of the Rhineland in March 1936 -- a violation of the Locarno treaties (in which Germany agreed that the Rhineland would remain demilitarized) -- on the ground that the treaties “ceased in practice to exist” because of a 1935 France-USSR mutual assistance pact. In November 1936, Germany and Japan signed the Anti-Comintern Pact, a mutual assistance treaty against the USSR. Germany renounced this treaty when it signed the Nazi-Soviet pact in July 1939, claiming that Japan had breached the treaty first. Hitler also provided legal justifications for his invasions of Austria, Czechoslovakia, Poland, Denmark, Norway, Belgium, Holland, France, Yugoslavia, and Russia, and his declaration of war against the United States. He justified these and other international acts in moral terms as well, harping on the injustice of the Versailles treaty, and asserting the need for humanitarian intervention in other countries to halt mistreatment of German-speaking populations. Nazi documents captured by the allies make it clear that Hitler at all times sought simply to maximize his power and the power of Germany, and self-consciously used moral and legal rhetoric in order to mislead his enemies, avoid alienating neutrals, and pacify domestic opposition.⁵

Hitler’s Germany, not Thucydides’ Athens, typifies the use of moral and legal rhetoric in international affairs. Consider other examples:

- * Before the Civil War, the United States, a traditional neutral power with a relatively weak navy, argued in diplomatic circles that international law gave neutral ships broad protection from belligerent attack. During the Civil War, when the United States was a belligerent with a relatively powerful navy for the first time, it reversed course. It asserted unprecedentedly broad belligerent rights, and it insisted in diplomatic correspondence that these actions were consistent with international law.⁶
- * The Soviet Union invaded eastern Poland on September 13, 1939, twelve days after Germany invaded western Poland. The invasion violated several international laws.⁷

³ When the Melians failed to surrender, the Athenians conquered Melos, “put to death all the grown men whom they took, and sold the women and children for slaves.” Id. at 5.116.

⁴ See A.H.M. Jones, *Athenian Democracy* 66 (1957).

⁵ See, e.g., Gerhard L. Weinberg, *The Foreign Policy of Hitler's Germany : Starting World War II 1937-1939* (1994); Norman Rich, *Hitler’s War Aims: Ideology, the Nazi State, and the Course of Expansion* (1973). In extremis Hitler would direct agents to construct enemy attacks on German interests in order to justify retaliation. A famous example is when Germany faked a Polish attack on the German radio station near the Polish border at Gleiwitz in August 1939, just before Germany invaded Poland.

⁶ See Goldsmith and Posner, 1999, at 1139-51.

⁷ These laws included the 1921 Treaty of Peace between the Soviet Union and Poland (which established the Poland-U.S.S.R. borders); the 1928 Kellogg-Briand Pact (which renounced war as an instrument of national policy); the 1932 Poland-U.S.S.R. non-aggression Pact (which purported to extend to 1945); and the 1933 Convention Defining Aggression.

Nonetheless, beginning four days after the invasion, and continuing throughout September-October 1939, the Soviet government -- through diplomatic notes, radio broadcasts, and reports to the Supreme Soviet and Pravda -- made a "comprehensive case in international law" in support of the invasion.⁸

- * In the treaty of 1907 in which Russia and England partitioned Persia, the two nations promised to "respect the integrity and independence of Persia" and claimed to be "sincerely desiring the preservation of order throughout the country." Similarly, Secretary of State Hughes rationalized the United States' imperialistic policy in Latin America as follows: "We are aiming not to exploit but to aid; not to subvert, but to help in laying the foundations for a sound, stable, and independent government. Our interest does not lie in controlling foreign peoples, [but rather] in having prosperous, peaceful, and law-abiding neighbors."⁹
- * The United States has signed and ratified many human rights treaties with conditions (such as opting out of prohibitions on the juvenile death penalty) that narrow the treaties' obligations to rights already guaranteed by domestic law. Many believe that these conditions are "specious, meretricious, [and] hypocritical" because the United States "pretend[s] to assume international obligations but in fact [undertakes] nothing."¹⁰ China signed the International Covenant on Civil and Political Rights two years ago. Although it continues to violate the civil and political rights of its citizens, it claims that it acts consistently with international law and norms. Many other countries – weak and powerful alike – sign or ratify human rights treaties and claim adherence to them even though they abuse their citizens.
- * "Bismarck records the remark made to him by Walewski, the French Foreign Minister, in 1857, that it was the business of the diplomat to cloak the interests of his country in the language of universal justice."¹¹

In sum, nations provide legal or moral justifications for their actions, no matter how transparently self-interested their actions are. Their legal or moral justifications cleave to their interests, and so when interests change rapidly, so do the rationalizations. At the same time, nations frequently accuse other nations of violating international law and norms, as though to discredit them. One must ask, what do leaders who talk this way accomplish? Since the talk is obviously self-serving, why would anyone ever believe it? And if no one believes it, why would anyone bother engaging it?

Yet not all international talk is deceitful. Consider these examples:

⁸ George Ginsburgs, *A Case Study in the Soviet Use of International Law: Eastern Poland in 1939*, 52 *Am. J. Int'l L.* 69, 69 (1958). Its arguments were (a) the Polish state and government had ceased to exist; (b) the Polish government had abandoned Polish territory; (c) self-defense; (d) humanitarian considerations; (e) national self-determination; and (f) the spuriousness of the original Polish title. *Id.*

⁹ The quoted passages are from Reinhold Niebuhr, *Moral Man and Immoral Society* 105-06 (1932). Niebuhr also observes that "no nation has made a frank avowal of its imperial motives. It always claims to be primarily concerned with the peace and prosperity of the people whom it subjugates."

¹⁰ Louis Henkin, *The Ghost of Bricker*, .

¹¹ Edward Hallett Carr, *The Twenty Years Crisis, 1919-1939*, at 72 (1939).

- * Under international law nations traditionally “declared” war, and this declaration successfully notified belligerents and neutrals alike that the declaring state intended to follow certain rules of war.
- * In 1945, President Truman declared the right of the United States to exploit the resources in the continental shelf, and within just a few years this declaration was recognized by most nations to represent customary international law.
- * When a nation “recognizes” other nations or governments, the mere utterance of words alters numerous international relationships involving diplomatic rights and privileges, the capacity to make treaties, and much more.
- * Nations constantly talk about establishing military alliances, adjusting trade relations, modifying patterns of immigration, extraditing criminals, and so forth, and in a wide range of circumstances this talk seems to influence policy and behavior.

In these examples, talk straightforwardly produces collective gains. The point of the talk is thus clearer here than in the earlier examples. But the mechanism by which the talk influences behavior remains uncertain. Once again, the question arises: why is the talk believed, and how does it influence action?

This paper shows how tools of rational choice can shed light on puzzles about the use of moral and legal rhetoric in international relations. We argue that the use of international legal and moral rhetoric is an equilibrium phenomenon that emerges from nations pursuing their self-interest. The argument’s main purpose, aside from shedding light on the rhetorical aspects of international relations, is to address the criticism that the pervasive use of moral and legal rhetoric in international affairs is inconsistent with the rational choice accounts of international behavior. We show to the contrary that the existence of such talk is consistent with the standard premises of rational choice. Our aim is to sketch the many functions that talk can serve on the international stage, to speculate about why the talk has the content that it does, and to offer loose predictions about how talk is used in international affairs.

The analysis proceeds as follows. Section I briefly reviews prior attempts in international relations theory and international law scholarship to account for legal and moral rhetoric. Section II uses rational choice models of signaling and cheap talk to explain why nations talk to each other. Section III attempts to explain why this talk often has moral and legal content. The difference between sections II and III is that the former examines the question why nations talk to each other at all; the latter examines the question why they talk in moral and legal terms. Section IV explains how talk can build into international law. A brief conclusion offers predictions generated by our account of moral and legal rhetoric.

I. THEORETICAL APPROACHES TO INTERNATIONAL LAW TALK

No convincing explanation has been given for the strategic use of moral and legal rhetoric. In this section we briefly review the leading accounts.

A. Realism

Realists believe that nations act instrumentally to further their own interests, and they view international behavior largely as a function of the distribution of national power. It might be thought that realists would pay little attention to legal and ethical rhetoric. To the contrary, the

major realist writings of the twentieth century – Niebuhr’s *Moral Man and Immoral Society*, Carr’s *The Twenty Years Crisis*, and Morgenthau’s *Politics Among Nations* and *The National Interest* -- extensively analyze such rhetoric.¹² These now-classic texts were in significant part normative manifestos designed to warn of the dangers of taking moral and legal rhetoric seriously in international relations. They were thus not particularly concerned with providing a positive theoretical account for the rhetoric.¹³ But they did provide one in passing, and their account has been influential.

The realists argue that nations’ legal and moral rhetoric are “disguises” or “pretexts” for actions motivated by a desire for power.¹⁴ They believe that the purpose of the pretext is “to perpetuate [powerful nations’] supremacy . . . in the idiom peculiar to them.”¹⁵ They are less clear about why pretexts are believed. They claim that one important audience is domestic constituents, whom leaders persuade to support the nation’s foreign policy by moral and legal rhetoric.¹⁶ They also believe the rhetoric is designed “to fool the outside world” – presumably foreign leaders and foreign domestic audiences.¹⁷ They additionally think that legal and moral rhetoric “heal[s] a moral breach in the inner life of the statesman, who find themselves torn between the necessities of statecraft and the sometimes sensitive promptings of an individual conscience.”¹⁸ This last passage indicates the realist belief that moral and legal rhetoric satisfies a deep human psychological requirement to view behavior as just.¹⁹ For the classical realists, this psychological craving explains why moral and legal rhetoric might be believed and thus uttered. But the realists think that nations are motivated by power, not moral and legal precepts, and they thus do not believe that moral and legal rhetoric have significant behavioral consequences on the international stage. It might rouse domestic support for international action that itself was motivated by a desire for power on the part of leaders, but it does not affect the way nations interact with each other.

The realist theory of talk is not persuasive. A statement can mislead people only if it is sometimes true. If political leaders never acted consistently with law or morality, their claims to the contrary would not be believed.²⁰ If the audience of international rhetoric consists of foreign leaders, then the realist argument depends on the dubious assumption that leaders are routinely deceived by other leaders’ rationalizations even as they engage in the same rationalizations

¹² See Carr, *supra* note __; Niebuhr, *supra* note __; Hans Morgenthau, *Politics Among Nations: The Struggle for Power and Peace* (1948); Hans Morgenthau, *In Defense of the National Interest* (1951).

¹³ We thank Stephen Krasner for this point.

¹⁴ Morgenthau, *Politics Among Nations* at 61-62; Morgenthau, *National Interest*, at 35;

¹⁵ Carr, *supra* note __ at 79-80; for similar points, see Morgenthau, *National Interest*, at 22; Niebuhr, *supra* note __, at __.

¹⁶ Morgenthau, *Politics Among Nations* at 62; Niebuhr, *supra* note __, at 95-96, 105.

¹⁷ See Niebuhr; Morgenthau; cf. Carr.

¹⁸ Niebuhr, *supra* note __, at 105; see also Carr and Morgenthau.

¹⁹ See Morgenthau, *Politics Among Nations*, at 61; Niebuhr at __; Carr at __.

²⁰ See Jon Elster, *Social Norms and Economic Theory*, 3 *J. Econ. Persp.* 99 (1989); cf. Carr, *supra* note __, at 92 (“The necessity recognized by all politicians, both in domestic and international affairs, for cloaking interests in the guise of moral principles is in itself a symptom of the inadequacy of realism.”).

themselves.²¹ The prevalence of moral rhetoric in an amoral world is a rebuke and a challenge to realism.

B. Constructivism and International Law Scholarship

Constructivists argue that international behavior is largely a function of social relationships among nations. For constructivists, international norms shape the identities and preferences of national leaders in ways that do not reduce to an instrumental calculus. Moral and legal rhetoric is central to the constructivist project. Constructivists embrace the critique of realism mentioned above, contending that the widespread use of such rhetoric is decisive evidence that international relations cannot be explained – as realism and various rational choice theories aim to do – in purely instrumental terms.²² Talk about norms implies belief in them, which in turn means that nations are influenced by them. Moreover, talk about norms can influence the content of norms and thereby influence national behavior.²³ International law scholars have embraced these arguments. They maintain that the “justificatory discourse” of international law is a “principal method of inducing compliance with international law.”²⁴

The problem with the constructivist argument is that it does not explain how moral and legal talk influence national behavior. The constructivist literature is full of claims about nations “entangl[ing] themselves in a moral discourse which they cannot escape,” and about the “logic of argumentative rationality slowly but surely taking over” national behaviors.²⁵ But because constructivists do not account for the strategic uses of moral and legal rhetoric, or for the many instances in which there appears to be no relationship between this rhetoric and national behaviors, their empirical claims are hard to test and to generalize as theories of international behavior.

C. Institutionalism and Strategic Choice

The institutionalist and strategic choice strands of international relations theory maintain that nations rationally maximizing their interests can overcome collective action problems by creating

²¹ Stephen Krasner is a modern realist who has a somewhat different account for moral and legal rhetoric. Stephen Krasner, *Sovereignty: Organized Hypocrisy* (1999). Krasner argues that in the international environment characterized by multiple, contradictory norms (such as human rights and state sovereignty) and no authoritative decisionmaker, leaders are driven by purely instrumental concerns but nonetheless pay lip service to international norms in order to appease their many different domestic and international constituents. Krasner believes that nations receive small instrumental benefits from rhetorical bows to international law and morality. But he fails to specify how or why such talk brings benefits, or why this talk would ever be believed. See Goldsmith (2000). Nonetheless, we agree with Krasner that the gap between talk and action on the international plane demands explanation, and we seek to build on his work.

²² See, e.g., Martha Finnemore, *National Interests in International Society* 139-40 (1996).

²³ See, e.g., Thomas Risse and Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practice*, in Risse, Sopp, Sikkink, *The Power of Human Rights: International Norms and Domestic Change* 13-17 (1999); Thomas Risse, “Let’s Argue”: Communicative Action in World Politics, 54 *Int’l Org.* 1 (2000); Friedrich Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989).

²⁴ Chayes and Chayes, *The New Sovereignty: Compliance With International Regulatory Agreements* 26 (1995).

²⁵ Risse and Sikkink, *supra* note ___, at 16.

institutions, including international law and international “regimes,” which are clusters of norms and conventions.²⁶ These rational choice theorists agree with the realists that nations are at bottom motivated by self-interest. But they are more optimistic about the prospect of international cooperation, whether informal or embodied in institutions.

This tradition has used various rational choice models to explain the role that communication plays in international affairs.²⁷ It has also focused on the ways in which institutions can generate information that facilitates cooperation.²⁸ But it has not, to our knowledge, focused on international moral and legal rhetoric *per se*. It therefore has not responded to the argument, implicit in the constructivist literature and prevalent in the international law literature, that the widespread use of such rhetoric implies that moral and legal norms are an exogenous influence on national behavior. Our aim in this paper is to answer this argument by showing that under plausible conditions self-interested nations would use moral and legal rhetoric, even though they are not motivated by a desire to comply with moral or legal obligations.

II. TWO THEORIES OF INTERNATIONAL RHETORIC

Nations, like individuals, talk to each other. Leaders, diplomats, and other authorized representatives issue proclamations, register protests, make deals, sign treaties, engage in chit-chat, speechify, hobnob. One purpose of talk is to convey information. There are two broad conditions under which information cannot be conveyed. The first is that of pure conflict, the zero-sum game. A nation would not make a statement that would give another nation an advantage over it, so the other nation would always assume that a statement made by the speaker is intended to injure it. Because the recipient of the message would therefore not believe it, there would be no reason for the speaker to make that statement, at least for purposes of conveying information to this particular rival. Second, if international relations were a positive sum game, but nations had full information about each other’s characteristics and strategies, talk would also not make sense. All talk would either be rejected as inconsistent with known information, or ignored as superfluous.

Thus, talk is possible only if international relations present opportunities for mutual gain, and if nations have some private information. Both of these premises are plausible, and on the basis of them we examine a few models of how nations might convey information through rhetoric: signaling models, in which nations reveal information by engaging in costly actions; and cheap talk models, in which nations coordinate by speaking.

A. Signaling

National leaders have private information about various characteristics of their nations. They have private information about the nation’s own political stability, and they have private information about their citizens’ preferences and values. Although foreign nations can learn some

²⁶ Robert O. Keohane, *After Hegemony* (1984); *Cooperation Under Anarchy* (Kenneth Oye ed. 1986); David A. Lake and Robert Powell, *Strategic Choice and International Relations* (1999). There is much disagreement in this literature about the robustness of these institutions.

²⁷ See, e.g., James D. Morrow, *Modeling the Forms of International Cooperation: Distribution Versus Information*, 48 *Intern’l Org.* 387 (1994); cf. Geoffrey Garrett & Barry R. Weingast, *Ideas, Interests, and Institutions: Constructing the European Community’s Internal Market*, in *Ideas and Foreign Policy: Beliefs, Institutions, and Political Change* (Judith Goldstein & Robert O. Keohane eds. 1993).

²⁸ Keohane, *supra* note __.

of this information through regular contacts, observation, scholarship, and espionage, history shows that cultural barriers are difficult to overcome, and mutual ignorance is common.

Political stability can be formalized as discount rate. Citizens and politicians in a “civilized” state with stable political institutions expect to accumulate property over time, by contrast to citizens and politicians in “rogue” nations who fear that their property will be expropriated. We assume that a nation’s discount rate is private information, but that all nations know the probability distribution of discount rates. A nation with a low discount rate wants other nations to know this; nations with high discount rates want to conceal this information. The reason is that, as the repeated prisoner’s dilemma model shows, players with low discount rates are more attractive cooperative partners in long-term relationships. It is thus in the interest of a civilized nation to send “signals” -- that is, engage in high-cost actions that reveal its discount rate -- that a rogue nation cannot mimic.

Any action will serve as a signal as long as its cost exceeds the rogue nation’s discounted benefit from cheating the other player in the first round of a cooperative relationship, and is less than the civilized nation’s discounted benefit from the successful long-term cooperative relationship. Costly actions might include paying a debt, refraining from seizing alien property, and respecting national borders. These acts are costly in the sense that holding the response of other nations constant, a nation does better by defaulting on debts, seizing property, and invading neighbors, than by refraining from these behaviors. It is possible to construct an equilibrium in which civilized nations send signals to show that they are civilized, and obtain cooperative returns, while rogue nations do not send these signals, because they discount the long-term returns to cooperative behavior. Signaling can distinguish low from high discount rate nations and thereby facilitate cooperation among low discount rate nations

Another kind of private information is the preferences or values of citizens. Nation X might believe that Nation Y is a threat because citizens of Y have a longstanding aversion to the ethnic group that dominates X, perhaps because of past prosecutions, myths, antagonisms, and so forth. As the attitudes of the citizens of Y change with time, it becomes important for Y to send a signal to X. A loose example comes from the difficulties that the United States had during the Cold War of persuading black African nations that it would be a reliable ally. African nations, informed in part by the various humiliations endured by their diplomats on American soil, probably believed that the United States would never be as loyal to them as to European nations, just because many American citizens were obviously racist. The State Department spent a lot of time trying to persuade the African states that American intentions were good, but the states regarded this as so much cheap talk. By contrast, the Civil Rights Act would have been regarded as quite a substantial signal, at least if foreign observers understood how American institutions worked. A deeply racist nation does not give equal rights to minorities. It is striking that one of the main proponents of the Civil Rights Act in the executive branch was the State Department.²⁹

In the analysis so far, talk is not necessary for the purpose of issuing a signal. Talk is unnecessary because the act of paying debts, protecting property, respecting borders, or enacting civil rights statutes is sufficient to provoke the desirable response. If talk is costless, a nation that merely says it is “civilized” or that it shares the interests and values of other nations, will not be believed, for any nation can say the same thing; and if the talk is accompanied by appropriate actions, there is no need to persuade the audience that the speaking nation belongs to the right type.

²⁹ See Azza Alama Layton, *International Politics and Civil Rights Policies in the United States, 1941-1960* (2000).

Costless talk cannot by itself send a signal and thus signaling cannot be a direct explanation of discursive practices.

Nonetheless, talk might play a weak role in signaling type. To see why, think of talk as not costless but as a signal whose cost is arbitrarily close to zero. There are games in which all players pool around a cheap signal. As an example, consider Spence's original discussion of job-market signaling.³⁰ He argued that an education can serve as a signal, because education is more costly for bad workers than for good workers. But education can serve as a signal only if it is too costly for the bad workers. If education is cheap enough, there can be an equilibrium in which both good and bad workers obtain the education. The reason that the workers might pool in this way is that, given that the employer believes that people who fail to obtain the education are bad types, the workers can obtain the job only if they obtain the education. The employer reasons that given that the education is cheap, someone who fails to obtain the education cannot possibly belong to the good type, and the employer would rather hire someone who is a high type with probability equal to the representation of high types in the population, than someone who is definitely not a high type. Both kinds of worker send the signal but the signal does not reveal their types.

Suppose, now, that an employer is trying to decide between hiring two otherwise identical people, one of whom says "I am a hard worker" and the other of whom says "I am a no good, lazy worker." The employer is obviously more likely to hire the self-proclaimed hard worker even though the statement is cheap talk. The reason is that the statement "I am a hard worker," like the cheap education, is an arbitrarily cheap signal; so a worker who did not send this signal, would clearly belong to the bad type. The employer will reason that someone who says that he is lazy cannot possibly be hard-working, and so would rather hire someone who claims to be hard-working than someone who admits to being lazy. Observe that in equilibrium no rational job applicant will admit to being lazy, and so the employer will not be able to discriminate on the basis of the applicants' types.³¹

This analysis applies to international talk. Because the talk is cheap, no one will be influenced by a nation's claim that it is civilized, that is, no nation would adjust its prior belief about the probability that the speaker is civilized. *But a nation that failed to send this weak signal would reveal that it belongs to the rogue type.* In equilibrium all nations send the signal by engaging in the appropriate international chatter. Failure to engage in the correct form of chatter would reveal that one is a rogue state. In this pooling equilibrium everyone sends the signal because no one gains from failing to send the signal. Talk does not have any effect on prior beliefs about the likelihood that the speaker is civilized, but it is not meaningless, because failure to engage in the right form of talk would convey information that the speaker is not civilized.

With the possible exception of 5th century B.C. Athens, no state publicly admits that its

³⁰ See A. Michael Spence, *Job Market Signalling*, 87 Q. J. Econ. 355 (1973).

³¹ See Eric A. Posner, *The Strategic Basis of Principled Behavior*, 146 U. Penn. L. Rev. 1185 (1998), which uses this argument to explain why firms say "we put the customer first" rather than "we maximize profits," even though all firms maximize profits; and why governments say "we do not put valuations on life" rather than "we value lives at \$X million" even though all governments place valuations on life when they use cost-benefit analysis and similar decision procedures. See also Eric A. Posner, *Law and Social Norms* ch. 11 (2000). A somewhat similar model, though relying on cheap talk, can be found in David Austen-Smith, *Strategic Models of Talk in Political Decision Making*, 13 Intern'l Pol. Sci. Rev. 45, 49 (1992).

foreign policy is driven solely by power and interest.³² States proclaim that their acts are consistent with international law or morality. Candor is off the equilibrium path, just as candor on the part of lazy job candidates is off the equilibrium path. This argument, indeed, casts doubt on Thucydides' account of the Melian dialogue, about which there is in fact much historical controversy.³³ The clear historical record of Hitler's duplicity is more reliable evidence of what nations do. Hitler did not acknowledge that Germany violated international law and morality because he could not gain by doing so.

To be sure, we have not yet explained why international talk has the content it has, that is, why states make moralistic and legalistic claims rather than simply saying that they are civilized or something similar. The explanation is a bit more complex than the analogous explanation in the job market context: applicants say they are hard-working because employers want hard-working employees. The reason for the complexity is that the audience of international talk is more diverse than the audience of a job applicant. We discuss this issue in section III.

B. Cheap talk

In our signaling model, talk has little meaning in the sense that equilibrium talk does not cause nations to update their beliefs about the probability that the speaker belongs to the rogue type. Posterior beliefs are identical to prior beliefs. But in other models, known as cheap talk models, talk does affect beliefs in equilibrium. Talk enables players to coordinate on strategies that are jointly value-maximizing, and it does so by allowing players to reveal information about their strategies or about hidden characteristics. We briefly examine several models below.

1. *Coordination games with full information.* The information-conveying role played by cheap talk is easiest to see in pure coordination games. In a coordination game, all players benefit from engaging in the same action, but there are at least two sets of mutually beneficial actions and the players do not know which action the other players will take. Nations often face such coordination problems. Time zones that facilitate international communication, technological standards that advance transportation and trade, and "rules of the road" that prevent collisions on the seas and in the air are all plausibly viewed as solutions to coordination problems.

³² In this regard, it is noteworthy that the Melian dialogue, unlike most others in *The Peloponnesian War*, occurred not "before the people" (i.e. in public), but rather in private with Melian leaders ("the magistrates and the few"). See Thucydides, *The Peloponnesian War* (5.84).

³³ See, e.g., Jones, *supra* note __, at 66-67 (concluding that "Thucydides, in order to point his moral, put into the mouths of the Athenian spokesmen what he considered to be their real sentiments, stripped of rhetorical claptrap"); G.B. Grundy, *Thucydides and the History of His Age 436-37* (1948) (concluding that "[i]t is almost impossible to resist the conjecture that [the dialogue] is a precis of the arguments of the two speeches, one by the Melians, and another by the Athenians, which [Thucydides] never had the opportunity of bringing into literary form."). The historical accuracy of the speeches in *The Peloponnesian War* is a famous problem. Of the speeches Thucydides himself stated: "Some I heard myself, others I got from various quarters; it was in all cases difficult to carry them word for word in one's memory, so my habit has been to make the speakers say what was in my opinion demanded of them by the various occasions, of course adhering as closely as possible to the general sense of what they said." (1.22). In this connection, Jones supports his conclusion that the speeches at Melos were imagined by pointing out that "it is virtually impossible that [Thucydides] can have had any information on the Melian debate, which was held behind closed doors between the Athenian commissioners and the Melian government, who were all subsequently executed." Jones, *supra* note __, at 66.

When nations face coordination problems, coordination can occur spontaneously, through repeated interaction, conflict, and adjustment. But it can be achieved more quickly through talk. For in a pure coordination situation, one player has an incentive to announce his move (and take the move announced), and the other player has an incentive to believe him and make the same move. The second player does not improve its payoff by disbelieving the first player and acting on the resulting belief. This is a simple but important point. When nations are in coordination games (as opposed to say, a one-shot prisoner's dilemma), they have an incentive to talk, and to believe the talk of the other nation.³⁴ Cheap talk solves a coordination problem by picking out one of the multiple equilibria.

There are, of course, numerous complications. Pure coordination games -- in which all parties prefer the same equilibrium, or are indifferent among multiple equilibria -- are rare. More common are battle of the sexes games, in which there is some conflict over the equilibrium. One technological standard might benefit nation X while the other technological standard benefits nation Y: they both obtain payoffs of 0 if they fail to coordinate on the same standard, but X prefers its standard and Y prefers *its* standard. Additional complications arise when a dynamic perspective is taken. Even if both nations settle on X's standard at round *i*, Y might see some benefit in deviating at round *i*+1, if by doing so it can get X to switch to Y's standard, and the distributive gains are high enough for Y. In pursuit of such a long-term strategy, Y might engage in deceptive talk, and X might disbelieve Y's talk. Still, it is clear that when there is not too much conflict of interest, players will believe each other's talk, and even when there is some conflict of interest, players will simply discount the value of talk somewhat rather than disbelieving it completely.³⁵

2. *Cooperation in a repeated bilateral prisoner's dilemma.* Imagine that two nations face a prisoner's dilemma in which they can obtain mutual gains by refraining from predatory behavior such as an invasion across a border or prosecution of a foreign diplomat. If they have low enough discount rates, enjoy a continuing relationship, and satisfy a few other conditions, they can cooperate to achieve the outcome of mutual restraint. But this cooperation might be hindered by an unforeseen contingency which creates ambiguity about what counts as a cooperative action. For example, one nation might believe that pursuing criminals across the border is not an "invasion," while the other assumes that it is. And one nation might believe that prosecuting a diplomat for espionage does not violate rules of diplomatic immunity, while the other does not. Such disagreements in the interpretation of the cooperative move might lead to retaliation and thus to a breakdown in cooperation.

Such situations are nothing more than a coordination problem over what counts as a cooperative move. Talk clarifies which actions count as cooperative moves, and which count as defections that will provoke retaliation.³⁶ By disambiguating actions cheap talk facilitates cooperation, although the reservations made in the prior section -- concerning distributive consequences and dynamic considerations -- apply here as well.

³⁴ See, e.g., Vincent P. Crawford & Joel Sobel, *Strategic Information Transmission*, 50 *Econometrica* 1431 (1982).

³⁵ See Morrow, *supra* note __, for a model that explores these complications.

³⁶ See Goldsmith & Posner, *supra* note __; Garrett & Weingast, *supra* note __.

Consider an example.³⁷ In the nineteenth century there was a rule of customary international law that prohibited a belligerent from seizing an enemy's coastal fishing vessels. In some cases the behavioral regularity might have reflected a bilateral repeated prisoners dilemma in which nations A and B refrained from seizing each other's fishing vessels because each recognizes that it is better off than it would be if each state preyed on the other's fishing vessels.

Cooperation is possible here, but it depends on each state having the same understanding of what counts as a seizure of a *coastal fishing vessel*. If A thinks a fishing vessel could be a giant fishing trawler, and B thinks that a fishing vessel is a small boat manned by a few sailors, then when A seizes a giant fishing trawler under B's flag, B will interpret A's innocent act as a violation of the implicit deal not to seize fishing vessels. B might retaliate by seizing one of A's small vessels. A will interpret this act not as justified retaliation but as an unprovoked instance of cheating. Cooperation can break down. But there is another possibility. A and B realize that they might not have the same understanding of the game that they have been playing. Rather than retaliating against B immediately, A lodges an objection, and threatens retaliation unless B provides an explanation. By talking -- by exchanging information about what counts as a coastal fishing vessel, both before and after incidents -- the nations can avoid breakdowns of cooperation. The talk is credible because each nation receives higher payoffs from cooperation than from defection.

3. *Cooperation in more complex environments.* The insight that talk can serve to clarify what counts as a cooperative move also applies in more complex environments such as multi-player prisoner's dilemmas. Consider a situation involving a powerful state's interaction with a group of small states. The relationship takes the form of a bilateral prisoner's dilemma in which the large state agrees by treaty to forego intervention in the small states' affairs if small states protect religious minorities.³⁸ The large state is assumed to be powerful enough to take over the small states individually but not if they ally with each other. At the same time, the small states want to preserve their sovereignty, but they are not willing to ally with another small state simply to aid the latter in injuring its religious minorities without risking retaliation from the large state.³⁹ Thus, the small states face a multilateral prisoner's dilemma among themselves concerning retaliation.

In this situation, when a large state intervenes in a small state it will often be ambiguous whether a violation of the agreement actually occurred. The large state will of course claim that the small state abused a minority religious group. The small states face a coordination problem over how to interpret the agreement so that they know whether to retaliate or not. To reduce the ambiguity of the situation, the small states might agree among themselves that certain actions count as violations and certain actions do not count as violations, and retaliate against the large state only when its intervention does not respond to a violation. Since they face coordination problems over what counts as cooperation, talk can reduce ambiguity and enhance cooperation.⁴⁰ Examples of

³⁷ See Jack L. Goldsmith & Eric A. Posner, *Understanding the Resemblance Between Modern and Traditional Customary International Law*, 40 *Va. J. Int'l L.* 639, 641 (2000).

³⁸ The example is drawn from Barry R. Weingast, *A Rational Choice Perspective on the Role of Ideas: Shared Belief Systems and State Sovereignty in International Relations*, 23 *Pol. & Soc'y* 449 (1995).

³⁹ Weingast elides the question how the small states can cooperate; but certainly such an equilibrium can be constructed.

⁴⁰ Weingast focuses on how shared belief systems facilitate this response, but in other work he observes that shared belief systems can be negotiated, or constructed, out of talk. See Garrett & Weingast, *supra* note __.

this phenomenon include the attempt by the Soviet Union to enlist the support of third world countries by establishing a set of shared understandings about justified expropriation of investments by Western companies, and subsequent efforts by third world countries to demand compensation for historical injustices; and, as Garrett and Weingast argue, the procedures developed by the European Community to resolve trade disputes.⁴¹

4. *Cheap talk with information asymmetries.* Another useful model is that of cheap talk with two audiences.⁴² Suppose a revolution brings a new government to power in the Third World. The government can align itself with the Soviet Union or with the United States: each alignment brings different sorts of aid, but let us suppose of equal cash value. The country rendering aid expects to be able to use the territory of the nation in question for military bases and to exclude its enemy from that same territory. Aid is conditional on fulfillment of these expectations. Members of the new government have private information about their own ideological or pragmatic leanings, or those of the groups that support them. The payoff matrix might look like this:

	Private information	
	Pro-West	Pro-East
Announce “capitalism”	2	0
Announce “socialism”	0	2

The payoffs are to the new government, and assume that the new government obtains a payoff of 2 when it receives aid (regardless of the source) but incurs a cost of -2 when it gives bases to, and submits to the political interests of, a nation whose ideology is inconsistent with the new government’s ideological or political leanings.

Holding constant the level of aid, the pro-West government prefers dealing with the United States, and the pro-East government prefers dealing with the Soviet Union. Cheap talk consisting of an announcement of alignment reveals information about the government’s orientation. To see why meaningful cheap talk can exist in equilibrium, observe that if the nation announces “capitalism,” the United States by hypothesis gains more by rendering aid and receiving strategic advantages than by declining to do so, given the Soviet Union’s strategy to stay out in this eventuality. If the nation announces “socialism,” the United States gains more by declining aid, as it will not have access to the territory. Analogous reasoning applies to the Soviet Union. As to the new government, given these strategies by the United States and the Soviet Union, it can do no better than truthfully announce its inclination toward capitalism or socialism.

A related model can be used to show why powerful states sometimes make pronouncements around which other states coordinate. Consider Truman’s proclamation that the United States reserved the exclusive right to extract minerals from the continental shelf off the American coast. The private information is the extent of ocean floor that the U.S. reserves for its

⁴¹ Garrett & Weingast, *supra* note __.

⁴² See Joseph Farrell & Robert Gibbons, *Cheap Talk with Two Audiences*, 79 *Amer. Econ. Rev.* 1214 (1989). Our model is loosely based on the model of the credibility of lobbyists in David Austen-Smith, *Strategic Models of Talk in Political Decision Making*, 13 *Intern’l Pol. Sci. Rev.* 45 (1992).

own use, which itself depends on complex domestic factors such as the level of exploration technology and the business plans of domestic companies. Other nations want to avoid wasting resources on exploration of that area if American forces would prevent them from extracting resources there. The U.S. plausibly prefers a situation in which other nations refrain from exploiting this area, to one in which they do, and force is needed to expel them. On these assumptions the U.S. will reveal the area over which it plans to exert control. Other nations avoid this area in order to minimize conflict, and this benefits the U.S. as well because the U.S. seeks to avoid conflict. Thus, the American announcement is credible and influences the behavior of foreign nations.

5. *International talk and domestic audiences.* When a leader talks publicly to other leaders, he often intends the talk for the consumption of the domestic audience. Two cheap talk models can explain why such talk occurs.

First, some domestic audiences might be poorly misinformed (or if you want, “rationally ignorant”). President Kennedy talked tough to the Soviet Union while withdrawing missiles from Turkey; President Clinton talked tough to Cuba while opening diplomatic channels. The relevant domestic audience might believe the talk and be unaware of the withdrawal of the missiles, or unable to evaluate the significance of the withdrawal. Because they fear the Soviet Union or hate Cuba, they are pleased to hear the talk. Meanwhile, the leader achieves foreign policy goals that are inconsistent with the interests of the audience he fears to offend. Foreign leaders, by contrast, invest heavily in understanding the motives of other nations and are unlikely to be deceived. There is a similar view in the public choice literature, which holds that politicians must disguise interest group transfers because the public pays some attention to policy and will not vote for politicians who make the wrong transfers. Thus transfers to farmers must take the form of price supports or ethanol initiatives rather than piles of cash. Similarly, concessions to the Soviet Union or Cuba are concealed by rhetorical posturing. Both theories raise the question why the public does not eventually catch on, and seem implicitly to assume that politicians adopt mixed strategies, and occasionally act consistently with their words.

Second, leaders have constituents who demand evidence of loyalty. Even cheap talk can commit a leader to a particular audience by alienating competing audiences.⁴³ A Republican politician might alienate some middle of the road supporters by complaining about the civil rights record of China (even without taking any action) but also obtain offsetting political returns from the far right. Multiple audiences can discipline speakers, forcing them to tell the truth when they would rather dissemble.⁴⁴

Both theories suggest that leaders sometimes act consistently with the interests of their citizens. This suggests an objection to our argument. If citizens want their nations to comply with international law, then leaders will sometimes comply with international law. Although their motive is not strictly to comply with international law, it is close enough. It is to be reelected by people who want them to comply with international law. And this suggests that international moral and legal rhetoric simply reflect a desire, albeit a derivative or second-order desire, to comply with

⁴³ Fearon analyzes the disciplining effect of domestic audiences in a signaling model, in which escalation of diplomatic crisis is a signal of the leader’s preferences because the leader will be punished by domestic audiences if he backs down. James D. Fearon, *Domestic Political Audiences and the Escalation of International Disputes*, 88 *Amer. Pol. Sci. Rev.* 577 (1994).

⁴⁴ Farrell & Gibbons, *supra* note ____.

international law as much as possible.

There are two responses to this argument. First, citizens may want their leaders to comply with international law, but as is always the case, their preferences for this good will be more or less strong compared to their preferences for other goods. Nations will comply with international law only when citizens are willing to pay in terms of the other things that they care about, such as national security, vengeance against terrorists, the rescue of co-ethnics, trade, or the dissemination of their values overseas. If this theory is correct, compliance with international law will vary predictably with the “price” of other goods, the wealth of the nation, and other relevant parameters. This would happen without any change in norms or preferences of the sort asserted by the constructivists. Greater compliance with international law over the last few decades (if such is the case) would be explained not by a greater desire to comply with international law, as constructivists argue; it would be explained by the lower “price” of complying with international law, the result of peace, prosperity, American hegemony, and other factors.

Second, the introduction of a preference for complying with international law creates methodological difficulties. An attractive theory of international relations would show why nations comply with international law rather than assuming that they have a preference for doing so; or, in other words, the theory would derive the preference for complying with international law, if there is one, from deeper preferences such as the desire for wealth and security. Many nations do not, or did not, comply with international law; and all nations comply with some laws but not others. A theory of these patterns of compliance, and of the development of international law in the first place, cannot assume what it seeks to prove.

In any event, we do not believe that citizens have a strong preference for their leaders complying with international law. Citizens might be altruistic; they might want their leaders to aid starving children in Eritrea or persecuted Moslems in Kosovo. But that is different from wanting their leaders to comply with international law, indeed, might be inconsistent with international law, as events in Kosovo illustrate. Further, we note that the international rhetoric used by nations is quite consistent across types. All nations say that they comply with international law, and appeal to similar principles, norms, and ideals. Yet the populations are quite different, and presumably one would in the natural course of things expect different populations to have different attitudes about the importance of complying with international law. This suggests that international law rhetoric is either unrelated to the interests of domestic audiences or related in only an indirect way, for example, to deflect suspicions about leaders’ motives, as we suggested in the earlier analysis.⁴⁵

6. *International talk and audiences of foreign citizens.* When a leader talks publicly, he sometimes intends the talk for the consumption of citizens in foreign countries. Shortly before World War II, different segments of the British public disagreed about Hitler’s motives. One segment believed that he sought to take over Europe; another segment believed that he sought merely to annex territory occupied by German-speaking populations. We now know that the first group was correct, but Hitler’s main foreign policy achievements prior to 1939 -- the military occupation of the Rhineland, the Anschluss with Austria, and the occupation of the Sudetenland -- were consistent with both theories.⁴⁶ Britain could confront Germany aggressively, through heavy investment in armaments and mobilization, only with the support of both groups, so Hitler’s goal before the invasion of Poland was to prevent the second group from realizing the truth. Hitler

⁴⁵ As explained in section III, below.

⁴⁶ See sources cited supra note ____.

did so by making moral and legal claims; he argued that the Versailles treaty was invalid because it was unjust; by implication he left open the possibility that Germany would comply with valid treaties, including the Munich agreement. He used moral and legal rhetoric to obscure his intentions, thus exploiting divisions among his enemies. If he had openly admitted his intentions in response to the many diplomatic challenges, his foreign adventures would have met with more opposition.⁴⁷

Formally, this model is the same as the asymmetric information model involving the non-aligned nation's announcement of capitalism or socialism. Suppose that British citizens have identical preferences. They believe that Britain should mobilize for war if Germany wants to take over Europe with probability greater than 0.8. Initially, suppose that prior to Munich, among the British, the appeasers believe that the probability is currently only 0.3, whereas the militarists believe that the probability is 0.9. After the Germans march into the Sudetenland, neither group has any reason to update its beliefs: they have no new information about whether the Germans seek to control territory that is not already occupied by German-speaking populations. Hitler's strategy is to avoid invading non-German countries as long as possible, and in the meantime conceal his intentions behind a haze of ambiguous rhetoric. If, instead, he admitted that he intended to take over Europe, the appeasers would update their beliefs, and Britain would mobilize, to the disadvantage of Hitler.

Our claim that Hitler's rhetoric *concealed* his intentions appears similar to the realists' claim that moral and legal rhetoric is a ruse. The problem with the realists' view is that it lacked a mechanism to explain how the ruse would work. We have shown how nations' verbal adherence to moral and legal norms can have a point even if national behaviors are not guided by these norms in a meaningful way. Hitler's moral and legal rhetoric was rational for two reasons. First, he did not want to send the wrong signal; if he had admitted that Germany had every intention of violating international law, people would have realized that Germany was an unreliable state, not to be trusted in cooperative dealings, and that Germany's interests (in more territory) were in direct conflict with their own, so appeasement would be self-defeating. Second, he wanted to divide his enemies (both domestic and foreign), and he could do so as long as his talk and behavior were consistent with the more benign interpretation of German intentions, held by many in Europe until the outbreak of the war.

* * *

"International talk" can have various audiences: sometimes foreign leaders, sometimes domestic constituents, sometimes foreign constituents. The models described above can explain why talk occurs, and why it is sometimes credible. In analyzing actual events, however, it is important to realize that the speakers' talk and behavior will depend on which audience they are primarily trying to influence. Moreover, moral and legal rhetoric potentially affects all three audiences -- foreign leaders, foreign constituents, and domestic constituents -- simultaneously. As mentioned above, multiple audiences can have a disciplining effect that makes talk meaningful. But the fact of multiple audiences also makes it hard to analyze the effect of moral and legal talk in a rigorous way.

III. ON THE CONTENT OF TALK: LEGALISM AND MORALISM

⁴⁷ It appears that the Melian leaders insisted on private talks with the Athenian envoys because they feared that the envoys would be able to mislead the population in a similar way. See Thucydides, *supra* note __, at s. 85.

The signaling and cheap talk models imply that nations find it in their interest to talk, and sometimes will update their beliefs after hearing talk. But the models say little about the content of the talk. The signaling model implies that the talk is anything but an admission that the action was influenced by a high discount rate or interests adverse to other nations. The cheap talk models imply that talk will reflect efforts to coordinate but not that nations use moralistic and legalistic rhetoric. Why, then, do nations engage in moral and legal talk?

This question raises the problem of multiple equilibria. Many different messages are consistent with the models that we have discussed. In narrowing down this universe of possible messages to the handful that we observe, we rely on simple psychological and historical intuitions – which has been the convention among scholars since Schelling suggested that focal points enable players to choose among multiple equilibria.⁴⁸ This concession to the limits of rationality, however, is not a concession to the constructivist view that the messages have intrinsic moral force.

The signaling model shows that nations want to deny that they have a high discount rate or that they have interests that strongly conflict with the interests of nations with which they seek to cooperate. One way to make these denials is to be explicit, and to say, for example, “our actions are motivated by our long-term national interest, not short-term political gain for existing officeholders.” Perhaps nations do this, perhaps not; but two other strategies are more interesting.

First, nations invoke ideals. These ideals could in principle be anything. A state might justify a violation of a border by saying that the border reflects historical injustices, or that the other nation, by persecuting minorities, forfeited its sovereign rights under international ethical norms. It could say that the border was the result of a treaty that is invalid because it violates an international legal formality. It could say that it was commanded by God to strike down the infidels. It could say that non-Christian nations forfeit certain international entitlements. But among all these possibilities, what determines what a nation will say?

We conjecture that the *appeal to the basis of obligation will occur at the lowest level of abstraction consistent with the characteristics of the intended audience*. If a given nation cares only about cooperating with Christian nations, because only Christian nations have military and economic power, or non-Christian nations are uncompromisingly hostile, then an appeal to Christianity is a way of saying that predatory behavior directed at a non-Christian nation does not imply predatory behavior toward a Christian nation. In other words, the predation is not the result of a high discount rate or an aspiration to rule the world; it is the result of a policy of engaging in predation only against non-Christian nations. The reference to the Christianity of nations is an economical method for designating the set of “in-group” nations, the nations with whom the speaker seeks to have cooperative relations because of similar interests.

Why shouldn't talk be more general? Why would a Christian nation appeal to common Christian beliefs rather than to common humanity or to common moral or legal ideals, as would happen later? The answer lies in the two audience game. Suppose the Ottoman Turks generally do not cooperate with Christians but that the possibility of a military alliance between one Christian nation and the Turks against another Christian nation cannot be discounted altogether. The two audience game shows that by appealing to Christian values in ordinary disputes, a Christian nation can reveal that it would receive low payoffs from dealing with Turks, for otherwise it would not alienate the Turks by excluding them from the audience of potential cooperators. But if, as time

⁴⁸ Thomas Schelling, *The Strategy of Conflict* (1960).

passes, Christian and non-Christian nations begin to derive returns from coordination, moralistic appeals will be watered down so that non-Christian nations do not infer that they are being repudiated.⁴⁹

Our conjecture implies that the history of international discursive practices reflects shifts in payoffs from coordinating with different nations. When returns from coordination are maximized by dealing with a small number of countries with similar traditions and values, talk will appeal to relatively specific values -- religious (Christian), regional (Europe), racial, and so forth. When returns are maximized by dealing with a larger number of diverse countries, talk will be watered down, and reference will be to thin moral values (friendship, loyalty, trust) and, at the extreme, purely formal values such as law. A sketch of this historical development looks like this:⁵⁰

1. Christian nations (7th century -- 18th century)
2. European nations (18th century -- 19th century)
3. Civilized nations (19th century -- second half of 20th century) (this was taken to exclude African and other third world countries)
4. Nations that respect human rights (second half of 20th century -- 2000)

The appeal of the word “law” on the international stage is the same as that in the domestic realm: it avoids committing the speaker to values that are controversial across groups and thus by implication to friendly relation with only some nations and not others.

The second strategy that nations employ for denying that they have high discount rates or dangerous goals is that of rationalizing their behavior with reference to a particular relationship. To understand this strategy, consider two different strategic situations.

In the first, two nations in a repeated prisoner’s dilemma coordinate on what move counts as cooperation -- say, not searching neutral ships -- then one nation deviates “by mistake.” That nation’s navy employs captains who must exercise judgment in difficult circumstances; some might opportunistically search vessels in violation of orders; at this point, the nation will want to reassure the other nation that this was an aberration and will not be repeated. Payment of some sort will lend credibility to this reassurance. But in any event the nation admits the mistake.

In the second case, the nations are not in a prisoner’s dilemma but, let us say, the belligerent simply has no interest in searching neutral ships, as it has better uses for its navy. Then one day one of the belligerent’s captains does search such a ship. Here, the belligerent has no interest in reassuring the neutral that this will not happen again, though it may want to discipline its navy. But it may want other nations to know that it made no promises not to harass neutral ships, so the action in question was not a violation of a promise, and the reason it wants other nations to know this is again that nations might otherwise infer that the speaker has a high discount rate or other undesirable characteristics or interests.

⁴⁹ During the Indian Wars the U.S. violated treaties with Indians but reassured European countries by claiming that it only violates treaties with “savages.”

⁵⁰ See Jörg Fisch, *The Role of International Law in the Territorial Expansion of Europe, 16th-20th Centuries*, 3 *ICCLP Rev.* 5 (2000); Gerrit W. Gong, *The Standard of ‘Civilization’ in International Society* (1984); Linda S. Frey & Marsha L. Frey, *The History of Diplomatic Immunity* (1999).

The belligerent has an interest in distinguishing the two cases.⁵¹ There is a conventional way of doing so. One argues that the treatment of neutral ships is a matter of custom or customary law in the first case, and mere comity in the second case.⁵² This argument could be made using amoral language, in which reference is made to expectations and the potential surplus that can be obtained through cooperation. But this would be artificial. The language of cooperation is the language of obligation: in both cases one engages in (short-term) sacrifice for the sake of a greater (joint) good. In distinguishing actions that contribute to a surplus (custom) and actions that do not (comity), it is a natural use of language to claim that the first is a matter of moral obligation and the second is not.

If this explanation is correct, it shows why some observers of international relations mistake strategic behavior for moral behavior, and thus attribute moral goals to amoral polities. When nations cooperate in their self-interest, they naturally use the moralistic language of obligation rather than the strategic language of interest, but saying that the former is evidence of moral motivation is like saying that when nations talk of friendship or brotherhood they use these terms, which are meant as aspirations for closer relations, in a literal sense. Or it is like taking seriously the rituals of diplomatic protocols like sovereign equality as representations of reality when in fact all know that they are nothing of the sort. The language of conscience has been exported to the international stage; but conscience itself has not. To think otherwise is to confuse a metaphor for reality.

IV. HOW TALK BECOMES LAW

International law is constructed from talk, or more precisely, behavior *and* talk. It is an equilibrium phenomenon rather than an exogenous constraint. To see why, focus on the game in which two nations engaged in a repeated bilateral prisoner's dilemma must coordinate on conventions that determine which actions will count as acts of cooperation and which actions will count as acts of defection. The example above concerned border crossings.

Initially, observe that in principle the definitions of cooperation and defection might emerge without any talk at all. If information is complete, the nations will know which actions generate a surplus and which actions do not. The former will be considered cooperative moves, and will not provoke retaliation. The opposite will be true for the latter. If the strategic situation is very simple -- few people cross the border, when they do it is only for a short time for a very clear and easily observed purpose like trade, etc. -- then information will be sufficiently close to complete that talk will not be necessary. When a nation deviates from existing patterns, the other nation might verbally object or simply retaliate by doing the same. If discussions ensue, each nation will appeal to existing patterns of behavior as establishing a custom that is in their joint interest. Over time, it appears that it was useful to distinguish "mere" custom and customary international law, which is just a linguistic device to distinguish between cases in which past practices (in the speaking nation's view) are merely self-interested behavior, not directed toward joint surpluses; and cases in which those practices were in fact cooperative moves in a repeated prisoner's dilemma or similar game. This is a natural progression, because the word "custom" is ambiguous. It refers both to behavior that is repeated over time but has no obligational content, and to behavior that is

⁵¹ As noted above, scholars have already recognized that discussion and shared beliefs facilitate cooperation in a repeated prisoner's dilemma because of the importance of coordinating on one of multiple equilibria; see Garrett & Weingast, *supra* note __; Weingast, *supra* note __. But they do not discuss moralistic language.

⁵² E.g., Britain in the nineteenth century. See Goldsmith & Posner, *supra* note __.

obligatory. The ambiguity was dissolved by referring to “customary *law*” or “customary international *law*.” The word *law* makes explicit the obligatory content of the practice. Appeal to the law is a way of saying that past actions provide evidence of future intentions, that we have done well by acting consistently with them, so you should not deviate. The notion that law necessary implies that the parties have submitted to an outside authority, real or metaphysical or moral, is a modern confusion.

When interactions are complex, nations find it in their interest to work out their differences through diplomacy. The main purpose of such diplomacy is to specify what moves will count as cooperative and uncooperative, or more generally to coordinate on the actions that are in the nations’ joint interest. Diplomacy is difficult because there are often distributive questions, but diplomatic talk, though cheap, is perfectly rational and meaningful just because coordination is almost always an important goal. Sometimes, meanings can be clarified through discussions, but often it will make sense to memorialize the parties’ conclusions in joint statements of various sorts, or treaties.

Treaties are thus best understood as attempts to clarify actions in order to facilitate coordination. Because ratification is often politically expensive, and requires widespread domestic support, they are more credible than mere joint statements and similar memoranda. Thus, they can serve as signals. This is true even in the United States where the president can unilaterally abrogate a treaty (or for that matter, violate it, often). The treaty ratification process gives domestic interest groups an opportunity to oppose or support a particular foreign policy; if all go along, then foreign countries can be confident that there is popular support for the policy, support that will continue to influence U.S. foreign policy even as administrations and congressional majorities change.

It is often observed that some treaties are vacuous, or merely aspirational, and some realists seem to take this as evidence that treaties do not really matter. But when nations send representatives to conventions in order to create treaties, they might not know in advance how much other nations share their interests. The degree of conflict may be revealed in the course of negotiations, during which initial proposals are watered down. This is why the final product might be so vague that observers might wonder why it was worth all the effort. But it may have been worth the effort in an *ex ante* sense: nations might have anticipated greater room for coordination, then been disappointed as their interests became clearer to each other.

CONCLUSION

If the Athenians and Melians were in a situation of pure conflict, then the Melian dialogues would not have occurred. Suppose that Athens planned to take everything of value from Melos, occupy their territory, and kill their men and sell their women and children as slaves, and that Melos knew this. Then, there is nothing to talk about. Any promises that Athens might make in order to extract concessions would have no credibility, nor would any representations about their intentions or the state of the world. If Melos would not believe anything that Athens might say, Athens would have no incentive to speak.

In the more usual case, the powerful state seeks the surrender of the weak state. Athens in fact sought surrender from Melos, and wanted to make Melos a tributary ally. The more powerful state seeks to avoid the risks and costs of battle, and to avoid these costs it is willing to give something to the weak state in return -- for example, the lives of some or all of the conquered people. If the strong state has managed to establish a reputation for not breaking promises made to surrendering states, then the weak state might believe it, and the best outcome is obtained. The talk

then proceeds purely in terms of interest -- giving each state a share of the surplus in proportion to its bargaining power. Talk is used (1) to pick out one of a set of strategies that are potential equilibria, or (2) to reveal hidden characteristics of the speaker when these characteristics are attractive to the respondent. There is no need to make legal or moralistic claims, as Thucydides' Athenians say.

Moralistic and legalistic rhetoric become important under two conditions. First, nations acting aggressively need some convenient rhetoric with which to influence speculation about their preferences. They do so by describing their motives in universalistic or semi-universalistic terms. Moral or religious rhetoric will sometimes suffice, but the idea of law, because it is purely formal, is particularly convenient. The appeal to law is simply the denial of self-interest. Even as ruthlessly power-hungry a state as Nazi Germany always cloaked its behavior in the garb of international law and political morality. But the other examples in the introduction -- the behavior of the United States during the Civil War, and more recently in connection with the ABM treaty, the partition of Persia by Britain and Russia, the Soviet justification of its invasion of Poland, American policy toward Latin America, and the United States' fulsome, empty commitments to human rights treaties -- are also very much of this flavor.

Second, nations seeking to coordinate in complex interactions appeal to past statements and practices in order to clarify their own actions or to protest the actions of other nations. This negotiation over what actions count as proper, usually but not always in bilateral cooperative relationships or multilateral coordination, is familiar, and illustrated by the examples provided in the introduction. When nations argue about whether certain export practices count as dumping, whether the targeting of neutral vessels is implied by a declaration of war, whether underseas mining may extend over the continental shelf, and whether certain diplomatic privileges follow from recognition of a sovereign state, they are attempting to establish the meaning of the words they use in international discourse, and thus to control the consequences of their announcements. The pattern is familiar from the common law: determination of acceptable behavior in a given interaction on the basis of generalization from instances of consent to similar kinds of behavior in past interactions. The description of this process in legal and moral terms is natural, as the method is analogous to legal and moral reasoning in domestic contexts.

We offer the following predictions along with illustrations.

- (1) As states' interests become closer, between-state talk will become more honest, and will change beliefs in equilibrium. Communication between the United States and Russia is more honest than communication between the United States and the Soviet Union.
- (2) The rhetoric of governments of open or democratic societies will be more honest, and more likely to change beliefs of other governments, than the rhetoric of governments of closed societies. Turkey's commitment to civil rights is more credible than China's.
- (3) States never admit that actions are taken for the purpose of enhancing their power. Hitler's rhetoric is exemplary; the Athenians' is the main exception but of dubious authenticity.
- (4) Justifications for action in international rhetoric appeal to widespread values. As values among nations diverge, and as the number of diverse nations with which the speaker seeks cooperative relationships increases, justification becomes increasingly abstract. An intervention in a foreign state might be justified by (1) divine right to the territory; (2) heresy of the foreign rulers; (3) the imperative to civilize savages; (4) the right to protect ethnic or religious minorities; and (5) the obligation to vindicate human rights.

It is not clear to us whether these hypotheses could be tested rigorously, but they seem to us promising conjectures for organizing historical research and thinking about current problems in international relations.