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## Outcasting: Enforcement in Domestic and International Law

**ABSTRACT.** This Article offers a new way to understand the enforcement of domestic and international law that we call “outcasting.” Unlike the distinctive method that modern states use to enforce their law, outcasting is nonviolent: it does not rely on bureaucratic organizations, such as police or militia, that employ physical force to maintain order. Instead, outcasting involves denying the disobedient the benefits of social cooperation and membership. Law enforcement through outcasting in domestic law can be found throughout history—from medieval Iceland and classic canon law to modern-day public law. And it is ubiquitous in modern international law, from the World Trade Organization to the Universal Postal Union to the Montreal Protocol. Across radically different subject areas, international legal institutions use others (usually states) to enforce their rules and typically deploy outcasting rather than physical force. Seeing outcasting as a form of law enforcement not only helps us recognize that the traditional critique of international law—that it is not enforced and is therefore both ineffective and not real law—is based on a limited and inaccurate understanding of law enforcement. It also allows us to understand more fully when and how international law matters.

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## ARTICLE CONTENTS

<b>I. SKEPTICISM ABOUT INTERNATIONAL LAW</b>	261
A. Austin's Objection	261
B. The Internality Objection	264
C. The Brute Force Objection	267
D. The Modern State Conception	268
<b>II. LAW ENFORCEMENT IN THE MODERN STATE CONCEPTION</b>	270
A. Primary and Secondary Enforcement	270
B. Does International Law Satisfy the Modern State Conception?	273
C. Is the Modern State Conception Valid?	276
<b>III. LAW WITHOUT POLICE</b>	282
A. Medieval Iceland	284
B. Classical Canon Law	290
C. Feature or Bug?	299
<b>IV. OUTCASTING AND EXTERNAL ENFORCEMENT IN INTERNATIONAL LAW</b>	302
A. External Physical Enforcement	303
B. Internal Outcasting	305
C. External Outcasting	306
<b>V. EXTERNAL OUTCASTING IN INTERNATIONAL LAW</b>	308
A. Describing Variation in External Outcasting	310
1. Permissive or Mandatory?	311
2. Adjudicated or Nonadjudicated?	313
3. In-Kind or Non-in-Kind?	314
4. Proportional or Nonproportional?	317
5. First Parties Only or Third Parties Included?	318
B. Explaining Variation in External Outcasting	319
1. Outcasting Is Costly? Make It Mandatory	320
2. The Regime Creates Public, Not Private, Benefits? Use Cross-Countermeasures	320
3. Outcasting Is Too Attractive? Require Adjudication or Proportional Sanctions	322

4. First-Party Outcasting Is Ineffective? Bring in Third Parties	323
C. Eight Externalized Outcasting Regimes	324
1. Simple Outcasting	326
2. One Step Removed: Adjudicated	327
3. Two Steps Removed: Adjudicated and Non-in-Kind	327
4. Three Steps Removed: Adjudicated, Nonproportional, and Third Parties Included	330
5. Three Steps Removed: Mandatory, Non-in-Kind, and Third Parties Included	331
6. Four Steps Removed: Mandatory, Adjudicated, Non-in-Kind, and Third Parties Included	333
7. Four Steps Removed: Adjudicated, Non-in-Kind, Nonproportional, and Third Parties Included	334
8. Five Steps Removed: Mandatory, Adjudicated, Non-in-Kind, Nonproportional, and Third Parties Included	336
D. The Limits of Externalized Outcasting	339
1. External Outcasting Relies on Cooperative Benefits	340
2. Outcasting Favors the Powerful over the Weak	341
3. Outcasting Is Nonviolent	342
<b>VI. INTERNATIONAL LAW ENFORCEMENT REIMAGINED</b>	344
A. Examining International Law as Law	345
B. Reimagining Possibilities in International Law	347
C. The Sovereignist Fallacy	348

Is international law *law*? In 2009, the American Society of International Law organized a panel at its annual meeting to discuss the question. Most of the panelists, however, began by expressing indignation that such a panel had even been convened. Andrew Guzman thought the question was a “futile” one;<sup>1</sup> Thomas Franck was “surprised that we have gathered here again at the beginning of a new political era to ask this tired old question”;<sup>2</sup> and José Alvarez was “appalled that we are still discussing this 1960’s chestnut of a question.”<sup>3</sup> Instead, they agreed, the more interesting question—indeed, the proper organizing question of the field—is, “how well does international law do in its effort to influence state behavior.”<sup>4</sup>

We understand this reaction, but we do not share it. The question of whether international law is law matters a great deal. Most fundamentally, it matters from the moral point of view. Law’s moral import follows from a basic truth accepted by all but hardcore anarchists: namely, that legal systems are morally valuable institutions.<sup>5</sup> Thus, whether we ought to respect, support, or obey international law depends in part on whether it possesses those properties that make legal regimes worthy of our esteem and allegiance—that is, on whether it is “really” law (an implication, by the way, not lost on critics who deny its legality). But there is an additional—and, we shall see, deeply illuminating—reason why this jurisprudential question ought to be engaged. As we will show in this Article, responding to the critics who argue that international law is not law allows us to make substantial new progress in answering the very question international law scholars *do* care about: *whether* and *how* international law affects state behavior.

The reason is simple. The principal objection made by critics of international law is that international law cannot be real law because *it cannot matter in the way that real law must matter*. In particular, they argue that

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1. Andrew T. Guzman, *Rethinking International Law as Law*, 103 AM. SOC’Y INT’L L. PROC. 155, 155 (2009).
  2. Thomas Franck, *Remarks*, 103 AM. SOC’Y INT’L L. PROC. 161, 161 (2009).
  3. José E. Alvarez, *But Is It Law?*, 103 AM. SOC’Y INT’L L. PROC. 163, 163 (2009).
  4. Guzman, *supra* note 1, at 156.
  5. To say that the law is a morally valuable institution is to make a claim about its potential. The moral value of the law stems from its distinctive ability to solve problems that no other comparable social institutions are capable of solving. See SCOTT J. SHAPIRO, *LEGALITY* chs. 6, 14 (2011). When a particular system does not solve these problems, exacerbates them, or creates new problems, it fails to realize its potential and correspondingly lacks moral value. In this respect, law is like marriage and education. While these social institutions are capable of realizing important moral goods, their failure to do so deprives their instantiations of value and may render them morally pernicious.

international law cannot matter in the way it must to be law because it lacks mechanisms of coercive enforcement. Anthony D'Amato describes this objection as follows:

Many serious students of the law react with a sort of indulgence when they encounter the term "international law," as if to say, "well, we know it isn't *really* law, but we know that international lawyers and scholars have a vested professional interest in calling it 'law.'" Or they may agree to talk about international law *as if* it were law, a sort of quasi-law or near-law. But it cannot be true law, they maintain, because it cannot be enforced: how do you enforce a rule of law against an entire nation, especially a superpower such as the United States or the Soviet Union?<sup>6</sup>

On this objection, international law cannot be real law because real law must be capable of affecting behavior through the threat and exercise of physical coercion. Since international law lacks mechanisms of physically coercive enforcement, it cannot affect behavior in the right way and hence cannot be a real legal system. It follows that answering the skeptic who doubts that international law is law also answers the skeptic who doubts that international law matters. For in order to respond to the first skeptic, one must show that international law is capable of affecting behavior in the right way to be law. But once one shows that international law matters in the right way, one *ipso facto* shows that it matters!

No doubt, one could try to answer the question of whether international law matters directly without engaging the central objection to international law as law. But there is a crucial advantage to addressing the former question via the latter. For examining whether international law is law first requires one to figure out *all the ways* in which legal systems must be capable of affecting behavior to be law. This inquiry opens up a fascinating range of new possibilities about how law might matter to its subjects. With the help of the fuller account that results, we will not only see that international law is capable of affecting state behavior in the right way to be law; more significantly, it is capable of affecting state behavior in ways that have previously eluded international law scholars. Though international law does not matter to states in the same way that much modern domestic law does, we will show that it matters to them nonetheless. International law has mechanisms of law enforcement and these mechanisms give states reason not to violate the law.

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6. Anthony D'Amato, *Is International Law Really "Law"?*, 79 NW. U. L. REV 1293, 1293 (1985).

Jurisprudence, then, can be an invaluable tool for empirical investigations of legal phenomena, for the former aims to uncover logical space often neglected by the latter. Indeed, the temptation to overlook important areas of jurisprudential space when analyzing international law is especially strong. After all, the legal systems with which we are most familiar are domestic. In our culture, modern state regimes are the paradigm instances of law. The inclination to focus exclusively on the state and to understand all legal phenomena through this lens is thus completely understandable. But it is also, we argue, a grave mistake.

In this Article, we show that critics of international law have succumbed to this temptation and have taken modern legal systems as their exclusive model for law. They have adopted what we call the “Modern State Conception” of law. The Modern State Conception maintains that regimes are legal systems only when they possess the distinctive capacities of the modern state; namely, they possess a monopoly over the use of force within a territory and use this monopoly to enforce their rules. In the domestic context, the monopoly is shared by a host of interlocking bureaucratic organizations that employ intimidation and violence as a method of enforcement, such as police, militia, prosecutorial agencies, and correctional institutions. In the Modern State Conception, then, law matters through the threat and exercise of violence by such organizations. Skepticism about international law naturally follows from this conception given that international law does not possess these bureaucratic institutions. Famously, it does not have its own army or police force. While international prosecutorial agencies and prisons have sprung up in recent years, nothing resembling the modern state’s enforcement apparatus exists or is likely to exist for the foreseeable future. If law must matter through the threat and exercise of physical coercion by an interlocking system of bureaucratic institutions, then international law cannot matter in the right way to be law.

We argue that the concept of law that lies behind this critique of international law is seriously flawed because of its limited understanding of how rules must be capable of affecting behavior in order to count as law. Its failure stems not simply from the fact that the Modern State Conception insists that legal rules only affect behavior when they are enforced; more importantly, it falters by adopting an excessively narrow conception of law enforcement itself. The Modern State Conception errs by insisting that law may only be enforced in the same way that it is enforced in modern states. First, it demands that the law can matter only if it is enforced *internally*, i.e., by the regime itself. Second, it requires that law matter only if it is enforced *violently*, i.e., through the threat and exercise of physical force.

This narrow understanding of law enforcement ignores regimes that outsource enforcement to external parties. We argue that, contrary to the Modern State Conception, as long as some party is tasked with using coercion in order to ensure compliance with the rules, the regime itself need not perform the role. We call this *externalized enforcement*. Moreover, we argue that the coercion used to enforce the law need not involve the threat and exercise of violence. Rather, it may involve the threat of exclusion, or as we call it, *outcasting*. Unlike the distinctive method that modern states use to enforce their law, outcasting is nonviolent: it does not rely on bureaucratic organizations, such as police or militia, that employ physical force to maintain order. Instead, outcasting involves denying the disobedient the benefits of social cooperation and membership. And it is frequently carried out by those outside the regime. We call this *externalized outcasting* and argue that it is a form of law enforcement that is ubiquitous in modern international law.

Seeing externalized outcasting as a form of law enforcement helps us see that the traditional critique of international law—that it is not enforced and is therefore both ineffective and not real law—is based on a limited and inaccurate understanding of law enforcement. Disobedience need not be met with the law’s iron fist—enforcement may simply involve denying the disobedient the benefits of social cooperation and membership. Once we broaden our understanding of law enforcement to include externalization and outcasting, rather than limiting it to internalization and violence, we will see that international law matters in the way that legal systems must matter.

While we hope to rebut the principal source of skepticism about the legality of international law, we do not intend to completely answer the question of whether international law is law in this paper. To do so would require us to set out a complete theory of law, demonstrate that this theory deems international law to be a genuine legal system, and respond to the numerous objections lodged against the legality of international law over the last several centuries. Clearly, such a project is beyond the scope of a single article. Our aim is more limited, though we believe it to be quite substantial. For as we will show, responding to the principal objection to international law not only makes headway towards resolving the age-old question of whether international law is law, it also helps uncover certain truths about how international law affects state behavior that have hitherto been ignored by scholars who directly study such questions.

We make our case in six parts. The first Part examines various objections levied against international law as law. We begin with John Austin’s classic argument that international law does not meet the basic conditions of law—most notably, there is no sovereign capable of issuing commands. H.L.A. Hart famously demonstrated the flaws in Austin’s argument. We suggest that it is

possible to reframe Austin's critique to accommodate Hart's objections. In this reframed critique, international law is not law because it is (1) not backed by physically coercive sanctions and (2) not administered by members of the system in question. We develop these two objections – which we call the “Brute Force Objection” and the “Internality Objection.” Finally, we note that while the two objections are analytically distinct, they often come together as a package. That package is the Modern State Conception.

In Part II, we develop the Modern State Conception and its application to international law. In order to set out a precise characterization of the Modern State Conception, we introduce the idea of an “enforcement chain.” An enforcement chain is a connected sequence of legal norms whose first link is a conduct rule (Don't park in front of a fire hydrant!), and subsequent links are rules that are designed to enforce previous links (Pay a parking ticket!, or Impound the car of the person who has failed to pay his parking tickets!). The Modern State Conception holds that (1) conduct rules must be enforced through a law enforcement chain, and (2) at least one link in the chain must permit officials to use physical force. In this view, international law cannot be law because it is not enforced by international officials using physical force (though some regimes—including the United Nations as originally conceived—come close). We explain that we accept *arguendo* the first claim—that law must be enforced to be law—but dispute the second—that law must be enforced by internal physical force.

In Part III, we go on to show that the Modern State Conception is demonstrably false to the extent that it claims to be a complete description of what counts as law and law enforcement. A dominant mode of enforcement in domestic legal systems for the past two millennia—and one still actively in use in our own federal system today—has involved various forms of externalization and outcasting. The law has routinely used private parties to exile, excommunicate, outlaw, pillory, and shun those who break the rules. The recourse to externalization and outcasting is not simply a response to the technological and economic challenges of assembling a centralized body of individuals who are entrusted with a monopoly on the legitimate use of force. In many legal systems, it is a feature, not a bug: using externalized enforcement and exclusion from the benefits of social cooperation and membership to enforce the law is in keeping with the values of the legal system, while the deployment of brute force is not.

Having established both the possibility and ubiquity of externalization and outcasting in domestic law, we turn in Part IV to examining their role in *international* law. Rather than wielding physical coercion using its own police or armies, international law typically externalizes enforcement to outside parties (usually states) and engages in acts of nonviolent outcasting. To



demonstrate this, we offer detailed descriptions of externalization and outcasting in international law, drawing on examples from our earlier examination of domestic law, as well as from international law. This much more complete picture of law not only gives the lie to the Modern State Conception, but it also provides a new way of understanding international law and its enforcement.

In Part V, we show that externalization and outcasting not only exist in international law, but that they are ubiquitous. Across radically different subject areas—from human rights to trade to the international postal service—international legal institutions use others (usually states) to enforce their rules and typically deploy exclusion rather than physical force. These substantively diverse legal regimes have a set of common features. Once we describe these features—namely, their use of external enforcement and outcasting—we can see that regimes that appear on the surface to be very different are really applications of the same law enforcement model. At the same time, we can begin to identify a set of variations in the way external outcasting operates. We proceed, then, to examine five different categories of externalized outcasting—what might be called variations on the externalized outcasting theme. We show that not only can we *describe* the different forms of outcasting, but we also can *explain* why they take the forms they do. Finally, we show how the variations in the characteristics of outcasting regimes work together to respond to specific challenges. We examine eight different forms of externalized outcasting and show how they are tailored to meet the enforcement needs of the areas of international law that they enforce.

Finally, in Part VI, we show that the more complete picture of international law offered in this Article sets the stage for a reinvigorated inquiry into some of the central organizing questions in the field of international law today. We show that the phenomenon of externalized outcasting is germane to the *efficacy* of international law. For if externalized outcasting is a form of law enforcement, then its existence is highly relevant to the task of tallying the successes and failures of international law. Put slightly differently, if the only form of law enforcement one is willing to recognize is intimidation and violence by police, then international law will look pretty ineffective. We contend, however, that there are sources of motivation generated by international law which have hitherto been invisible to scholars and whose existence should be countenanced when deciding whether, when, and how international law matters. Moreover, the deeper and more accurate picture of international law that we provide—one that views externalized outcasting as an important and effective tool of law enforcement—goes beyond providing a more complete picture of international law. It offers a deeper understanding of how international law functions and thus allows scholars and practitioners to

more effectively anticipate and address international law's shortcomings while enhancing its strengths.

### I. SKEPTICISM ABOUT INTERNATIONAL LAW

The question of whether international law is properly considered law is rarely debated these days. This reluctance, however, represents a significant departure from more than a century of preoccupation with this issue. Indeed, until recently, many considered it *the* organizing question of the field of international law.<sup>7</sup>

In this Part, we will review the main objections made by the original skeptics of international law. While these arguments have proven faulty, we will see that it is possible to reformulate them so as to avoid their surface vulnerabilities. Our aim, then, is to continue the long-running conversation that was abruptly, and we think mistakenly, dropped several decades ago. In the process, we will show that adjudicating an issue that no one seems to care about any more will have profound implications for the questions that many now care about intensely.

#### A. Austin's Objection

The *locus classicus* for the view that international law is not law is John Austin's *The Province of Jurisprudence Determined*. To understand Austin's skepticism, we must briefly recall the basic elements of Austin's theory of law. According to Austin, all rules are general commands.<sup>8</sup> A command is the expression of a wish by a person or determinate body, backed by a threat to inflict an evil in case the wish is not fulfilled, issued by someone who is willing and able to act on the threat.<sup>9</sup> Austin calls the evil resulting from the violation of a command a "sanction."<sup>10</sup>

Having characterized the genus of rules as general commands, Austin proceeds to delimit the species of law. For Austin, only the rules of positive law are "law simply and strictly so called."<sup>11</sup> Positive law consists of those rules

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7. See, e.g., Ruth Okediji, *Public Welfare and the Role of the WTO: Reconsidering the TRIPS Agreement*, 17 EMORY INT'L L. REV. 819, 837 n.43 (2003) ("The organizing inquiry of international law is 'is international law law?'").

8. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 5-6 (Univ. of London 1832).

9. *Id.* at 6-8.

10. *Id.* at 8.

11. *Id.* at 378.

issued by the sovereign. The sovereign is someone who is habitually obeyed by the bulk of the community and habitually obeys no one else.<sup>12</sup> Austin took the King-in-Parliament to be the British sovereign because the bulk of British society habitually obeyed the King-in-Parliament, while the King-in-Parliament habitually obeyed no one else.<sup>13</sup>

According to Austin, then, what makes a law *the law* is that it constitutes a general command issued by the sovereign. Given this jurisprudential conception, it is understandable that Austin would reject the legal status of international law.

[T]he law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author . . . . [T]he law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.<sup>14</sup>

International law appears to suffer from two defects on the Austinian model. First, the elements of international law are not commands, for commands are expressions of wishes of some person or well-defined collective body. The community of nations, however, is an “indeterminate” body and is thus incapable of expressing wishes.<sup>15</sup> International law can only be set by general opinion, not command. Second, laws properly so-called are commands issued by the sovereign. International law, however, lacks a sovereign—there is no nation or supranational body that is habitually obeyed and obeys no one else.

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12. *Id.* at 210.

13. Technically, Austin regarded the corporate body of the King, the peers, and the electors of the House of Commons as the sovereign. *See id.* at 235-41.

14. *Id.* at 208.

15. *Id.* at 147.

Austin's attack on international law was highly influential.<sup>16</sup> Sir Thomas Holland, who occupied the Chichele Chair of International Law and Diplomacy at Oxford for thirty-six years and wrote the famous treatise *The Elements of Jurisprudence*, argued that international law was "law only by courtesy."<sup>17</sup> Because international law lacks a "political arbiter by which it can be enforced,"<sup>18</sup> its rules are best considered as "the moral code of nations."<sup>19</sup> William Edward Hearn, a passionate devotee of Austinian jurisprudence, declared that "[l]aw cannot be predicated of mere customs which are not even true commands, much less the commands of any competent State."<sup>20</sup>

Even those who objected strongly to Austin's theory of law nevertheless agreed with him on the defects of international law as law. Edward Jenks rejected the idea that all laws must be commands and that all laws must be issued by an omnipotent sovereign; yet, he thought that international law was not fully law. "Although, in fact, many important nations have agreed to submit certain classes of disputes between one another to judicial or arbitral treatment by international tribunals, . . . yet such tribunals have no executive

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16. Not everyone accepted Austin's skeptical view; indeed, many Austinian sympathizers accepted the legal status of international law. Though E.C. Clark regarded law as "a rule of human conduct sanctioned by human displeasure," E.C. CLARK, PRACTICAL JURISPRUDENCE: A COMMENT ON AUSTIN 188 (Cambridge Univ. Press 1883) (emphasis omitted), he was nevertheless adamant that international law fit such a definition. According to Clark, international law is law because it is backed by the general hostility engendered by the violation of its rules. *Id.* at 186 ("I maintain that the rules of International Conduct, as now actually administered by the general consent and action of civilised nations, constitute a practical law, to which it is absurd to deny the name . . ."). J.L. Brierly not only denied that legal systems must make provisions for sanctions, but regarded self-help in international law as a form of sanctioning. See J.L. BRIERLY, THE LAW OF NATIONS 101 (1963) ("This absence of an executive power means that each state remains free . . . to take such action as it thinks fit to enforce its own rights. This does not mean that international law has no sanctions, if that word is used in its proper sense of means for securing the observance of the law . . .").
17. THOMAS ERSKINE HOLLAND, THE ELEMENTS OF JURISPRUDENCE 133 (13th ed. 1924).
18. *Id.* at 134 ("[L]aw without an arbiter is a contradiction in terms.").
19. *Id.* at 135.
20. WILLIAM EDWARD HEARN, THE THEORY OF LEGAL DUTIES AND RIGHTS 40 (London, Trübner & Co. 1883); see also 2 JAMES PATERSON, COMMENTARIES ON THE LIBERTY OF THE SUBJECT AND THE LAWS OF ENGLAND RELATING TO THE SECURITY OF THE PERSON 97 (London, Macmillan & Co. 1877) ("[T]o call [public international law] a law at all is rather a figure of speech than a correct use of technical language. It is a law only in the sense in which the code of honour or the code of morals, or religion, or any other rule of conduct is a law, being a collection of self-imposed rules and maxims drawn up in imitation of municipal laws . . .").

authority, and cannot enforce submission to their decisions . . . .”<sup>21</sup> George Paton departed so far from Austin that he claimed that “[i]t is possible to conceive of law without a sovereign authority or a court without compulsory jurisdiction or even perhaps if there are no organs of enforcement.”<sup>22</sup> For Paton, the essential feature was instead the regulation of self-help: “[T]he moment when law emerges is when self-help is regulated by the community.”<sup>23</sup> Unfortunately, according to Paton, the regulation of self-help in the international sphere was only beginning to emerge. “So long as all declarations of war are lawful, it is difficult to say that a system of law is in operation.”<sup>24</sup>

*B. The Internality Objection*

In *The Concept of Law*, H.L.A. Hart showed that Austin’s theory of law is seriously flawed. As he pointed out, Austin was mistaken to claim that all laws arise from commands. Custom, for example, is a recognized source of law in domestic legal systems.<sup>25</sup> But as Hart noted, domestic customary norms are set by the mere opinion and moral sanctions of indeterminate bodies, not by imperatives. Modern legislation cannot be construed as commands either. One cannot command oneself but, as Hart argued, legislators can and typically do enact legislation that applies to themselves.<sup>26</sup> Austin, therefore, cannot impugn international law for not arising from commands, for most domestic law does not arise from commands either.

Hart also showed that the absence of an Austinian sovereign does not detract from the legality of international law insofar as most domestic systems lack a sovereign as well.<sup>27</sup> An Austinian sovereign is legally omnicompetent but the sovereign’s powers in modern domestic regimes are usually limited. The United States Constitution, for example, limits the sovereign powers of the American people, both by making certain constitutional provisions

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21. EDWARD JENKS, *THE NEW JURISPRUDENCE* 11 (1933); see GEORGE W. KEETON, *THE ELEMENTARY PRINCIPLES OF JURISPRUDENCE* (1930); see also FREDERICK POLLOCK, *A FIRST BOOK OF JURISPRUDENCE FOR STUDENTS OF THE COMMON LAW* 14 (5th ed. 1923) (suggesting international law is analogous to “those customs and observances in an imperfectly organised society which have not fully acquired the character of law, but are on the way to become law”).

22. GEORGE WHITECROSS PATON, *A TEXT-BOOK OF JURISPRUDENCE* 71 n.1 (1st ed. 1946).

23. *Id.* at 71.

24. *Id.*

25. See H.L.A. HART, *THE CONCEPT OF LAW*, 44-49 (2d ed. 1994).

26. See *id.* at 42-44.

27. See *id.* at 66-78, 221.

unalterable<sup>28</sup> and prescribing an extremely onerous procedure that must be followed before an amendment is ratified.<sup>29</sup> The United States has a legal system even though it does not have an Austinian sovereign.

While Hart's critique is certainly correct, the Austinian critique can be reframed in a way that captures the essence of the challenge but dodges the Hartian responses. To see how this might be done, let us begin with the core idea behind Austin's theory of law. We might say that, according to Austin, the distinctiveness of the law as a social institution is constituted by the unique way in which it seeks to affect human behavior.

First and foremost, the law distinguishes itself because it seeks to affect behavior through the *enforcement* of its rules. Subjects are encouraged to obey because consequences they care about follow from their decision to comply. Second, the law is distinctive because its enforcement comes in the form of *sanctions* that attach to noncompliance. In Austin's formulation, "evils" follow disobedience. Third, sanctions are imposed by *powerful members* of the population, otherwise known as "officials."

According to Austin, then, the distinctiveness of the law is constituted by *how* it seeks to affect behavior and *by whom*. To be law, a regime must matter through (1) enforcement, which takes the form of (2) sanctions for disobedience (3) imposed by the officials of an extremely powerful group.

Once we notice that Austin's theory is predicated on a view about the distinctive ways in which law seeks to affect behavior, we see that he did not have to insist that all laws are *commands* issued by a *sovereign*. Instead, Austin could have relaxed his jurisprudential model by merely requiring that laws be enforced by sanctions (even if they were not created by commands) and administered by officials of the normative system in question (even if the regime does not have an Austinian sovereign). A regime that does not enforce its rules through the imposition of sanctions, or has sanctions but delegates enforcement to non-regime members, cannot be a legal system.

Notice that this weaker set of conditions still impugns the legality of international law. With few exceptions, which we will explore in Part II, international law does not seek to affect behavior by sanctioning the violation of its rules "internally," that is, through designated international bureaucracies. It relies primarily on nation-states to ensure that violations of the rules are sanctioned. We call this the "Internality Objection."

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28. See U.S. CONST. art. I, § 9, cl. 1 (prohibiting abolition of the slave trade before 1808); U.S. CONST. art. V (providing that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate").

29. See U.S. CONST. art. V.

As an illustration of the Internality Objection, consider the World Trade Organization. The World Trade Organization (WTO), with 153 member states<sup>30</sup> representing more than ninety-seven percent of world trade,<sup>31</sup> is widely considered one of the strongest and most effective international legal organizations of the modern era. And yet, the WTO itself does not have the authority under international law to enforce the rules that it creates. The Internality Objection therefore holds that those rules are not, in fact, law.

The enforcement of international trade law principles of the WTO occurs through “a compulsory third party adjudication system.”<sup>32</sup> Under the WTO agreement,<sup>33</sup> member states agree to resolve disputes *exclusively* through the adjudicative procedure,<sup>34</sup> and states are required to abide by decisions issued by the expert panels and the appellate body to avoid retaliation.<sup>35</sup> If the offending party refuses to comply, decisions of the panel are enforced through authorized economic retaliation imposed by the aggrieved state party.

In the context of international trade, therefore, trade law principles are *not* enforced internally, namely, by the officials of the WTO itself. Rather, sanctions are imposed and administered by the officials of the aggrieved state party. The WTO merely authorizes state parties with legitimate complaints to retaliate against noncompliant states through a limited denial of Most Favored Nation status. This authorization permits a state with a legitimate complaint to impose offsetting tariffs and other protectionist measures on a state that is found to have violated its treaty obligations. The WTO, in other words,

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30. See *Members and Observers*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited Oct. 1, 2011).

31. *The World Trade Organization*, WORLD TRADE ORG., 7 (2009), [http://www.wto.org/english/res\\_e/download\\_e/inbr\\_e.pdf](http://www.wto.org/english/res_e/download_e/inbr_e.pdf).

32. Petros C. Mavroidis, *Licence To Adjudicate: A Critical Evaluation of the Work of the WTO Appellate Body So Far*, in *TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO: AN INTERDISCIPLINARY ASSESSMENT* 73, 73 (James C. Hartigan ed., 2009); see also BERNARD M. HOEKMAN & PETROS C. MAVROIDIS, *THE WORLD TRADE ORGANIZATION: LAW, ECONOMICS, AND POLITICS* 77 (2007) (noting that trade law and the law of the sea provide “the only two operational examples in international relations of compulsory third party adjudication”).

33. The dispute resolution process is governed, in particular, by Annex 2 of the WTO Agreement. See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 33 I.L.M. 1226 (1994) [hereinafter DSU].

34. See HOEKMAN & MAVROIDIS, *supra* note 32, at 78.

35. See Pao-Li Chang, *The Evolution and Utilization of the GATT/WTO Dispute Settlement Mechanism*, in *TRADE DISPUTES AND THE DISPUTE SETTLEMENT UNDERSTANDING OF THE WTO*, *supra* note 32, at 91, 92.

delegates the enforcement of its rules to the bureaucratic machinery of its members, typically its legislative or executive branches. Enforcement of trade rules is a form of externalized sanctioning: the retaliation is performed by the member states, not the WTO. The WTO is simply the gatekeeper.

According to the Internality Objection, international law cannot be a genuine legal system because it does not enforce its own rules and hence does not seek to affect behavior in the right way. As the WTO example illustrates, the enforcement of international law is not administered by designated international organizations. Rather, sanctions are delegated to external parties, namely, the governmental bureaucracies of member states, to impose and administer.

### *C. The Brute Force Objection*

Having sketched the Internality Objection, we now note a related challenge to international law. Recall the passage quoted above in which Austin states that international law is backed solely by “moral sanctions,”<sup>36</sup> i.e., a diffuse hostility that nations express when the rules of international law are broken. This passage suggests that the objection to international law is that it does not sanction the violation of its rules through the use of brute physical force; it merely contents itself with weak “moral” sanctions. Call this the “Brute Force Objection.”<sup>37</sup>

Once again, let us illustrate the Brute Force Objection by considering the WTO. As one commentator put it, when states are found to have violated the trade rules, “there is no prospect of incarceration, injunctive relief, damages for harm inflicted or police enforcement. The WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.”<sup>38</sup> The WTO, in other words, does not enforce its rules through the threat or exercise of physical force. Member states may not resort to violence either. As mentioned above,

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36. See *supra* note 14 and accompanying text.

37. We do not mean to suggest that Austin himself accepted the Brute Force Objection. Though Austin claims that international law was deficient for only imposing moral sanctions, he does not explicitly require that sanctions be physical in nature and, in certain places, implies that they are not. See, e.g., AUSTIN, *supra* note 8, at 8-9 (rejecting Paley’s view that sanctions must be “violent”). It is plausible to suppose, however, that Austin’s critique of international law was influential in getting others to accept the Brute Force Objection, even if he did not accept it himself.

38. Judith Hippler Bello, Editorial Comment, *The WTO Dispute Settlement Understanding: Less Is More*, 90 AM. J. INT’L L. 416, 417 (1996).



trade law is enforced through retaliatory trade measures taken by the aggrieved parties.

The Brute Force Objection is rooted in a widespread intuition that law and physical coercion are intimately connected. Robert Cover famously expressed this intuition at the beginning of his essay, *Violence and the Word*, when he wrote: “Legal interpretation takes place in a field of pain and death.”<sup>39</sup> Indeed, Cover thought the link between violence and law to be “obvious”<sup>40</sup> and to sever the connection would be “something less (or more) than law.”<sup>41</sup> Similarly, Hans Kelsen characterized the law as the “organization of force.”<sup>42</sup> Law differs from morality and religion on his account insofar as legal demands are backed by socially organized physical coercion.

The Brute Force Objection is distinct from the Internality Objection insofar as it does not focus on *who* enforces the law but rather *how* it is enforced. It claims that legal systems must matter to us in the same way that modern domestic legal systems do, namely, through threat or exercise of brute physical force.

#### *D. The Modern State Conception*

The Internality and Brute Force objections are analytically distinct, but they nonetheless frequently come together as a package. Critics often assume that a regime is law only when it (1) contains bureaucratic enforcement mechanisms, i.e., it enjoys internality, *and* (2) those mechanisms employ intimidation and violence to ensure compliance, i.e., it uses physical force. Thus, international law fails on this view to be a legal regime for two reasons: (1) it lacks its own enforcement mechanisms, and (2) it lacks internal mechanisms that employ brute force.

It is not surprising that these two objections are commonly paired. For these objections are simply expressions of different aspects of the same jurisprudential account, namely, what we called the “Modern State Conception” of law. According to the Modern State Conception, a regime counts as a legal one only if it seeks to affect behavior in the manner that modern states do: it must enjoy a monopoly over the use of physical force and

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39. Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (footnote omitted).

40. *Id.*

41. *Id.* at 1607.

42. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 21 (Anders Wedberg trans., 1945).

employ this monopoly to enforce its rules.<sup>43</sup> The Modern State Conception, in other words, requires legal systems to (1) possess *internal* enforcement mechanisms (2) that use the threat and exercise of *physical force*. It follows on this view that international law is not a proper legal system because it does not contain these sorts of institutions and hence cannot affect behavior in the right way. For this reason, we call the combination of the Internality and Brute Force objections the “Modern State Objection.”

The Modern State Objection takes modern domestic legal systems as the paradigm cases of law and judges all other regimes against this ideal. Because international law does not resemble the modern state in the way in which it seeks to control behavior, this objection denies international law jurisprudential status. Consider, in this regard, John Bolton’s critique of international treaty law. “It is a flat misunderstanding of reality,” Bolton argues, “to believe that there are enforcement mechanisms ‘out there’ internationally that conform to the kind of legal system that exists in the United States.”<sup>44</sup> When a contract is breached in domestic law, he notes, “there is a defined way to get remedies. There is a process to decide which promises are legitimate and a procedure to enforce a court order that a party has breached a promise.”<sup>45</sup> By contrast, no similar procedure exists for redressing the violation of treaty obligations.<sup>46</sup>

A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war.

This is not domestic law at work. Accordingly, there is no reason to consider treaties as “legally” binding internationally, and certainly not as “law” themselves.<sup>47</sup>

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43. In a recent article, Gillian Hadfield and Barry Weingast have independently identified (what we call) the “Modern State Conception” as an assumption shared by many theorists of law and have developed an alternative model in which nonofficials collectively enforce the rules of the group through boycotting. See Gillian K. Hadfield & Barry R. Weingast, *What Is Law? A Coordination Account of the Characteristics of Legal Order*, J. LEGAL ANALYSIS (forthcoming), available at <http://ssrn.com/abstract=1707083>.

44. John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 4 (2000).

45. *Id.*

46. *Id.*

47. *Id.*

Bolton's argument seems to be that treaties cannot generate real legal obligations because there are no force-based mechanisms "out there" to ensure their compliance. Treaties cannot be a source of law, in other words, because there are no treaty police. While contractual breaches can be redressed through the threat or exercise of physical coercion by the state, violations of treaty obligations can only be enforced by the moral sanctions of the international community or the self-help remedy of war.<sup>48</sup>

## II. LAW ENFORCEMENT IN THE MODERN STATE CONCEPTION

In the Parts that follow, we will attempt to evaluate the cogency of the Modern State Objection by examining and critiquing its underlying conception of law. It behooves us, therefore, to say a bit more about the Modern State Conception of law and its constitutive elements. To do so, we must first clarify its notion of law enforcement.

### *A. Primary and Secondary Enforcement*

It is commonplace to say that the law enforces its demands by imposing costs on those who violate its rules. But what exactly does this mean? How does the law impose costs on rule violators? Take a trivial example of law enforcement. Suppose you forget to put money in a parking meter when you park your car. The standard response from the police is a parking ticket. A parking ticket is a demand to pay a fixed sum of money because of a parking violation. In other words, the police do not wait until you return to the car and forcibly take your money. Rather, they impose a duty on you to pay the parking violation bureau. Of course, if you fail to pay, the law will likely become more aggressive. The police may end up booting your tire or seizing your car, or the sheriff may come to your house and confiscate goods equal to the value of the fine or, worse, lead you off to jail.

Let us distinguish, accordingly, among three kinds of legal rules. *Conduct rules* tell people which actions they are obligated, prohibited, or permitted to perform. They require us to put money in meters if we want to park, to pay taxes on our income, and not to engage in arson. A subset of conduct rules are *enforcement rules*. The function of enforcement rules is to ensure that the

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48. For a popular expression of the Modern State Conception as applied to international law, see Editorial, *Scorning the World Court*, N.Y. TIMES, Jan. 20, 1985, <http://www.nytimes.com/1985/01/20/opinion/scorning-the-world-court.html>, which states that "[s]trictly speaking, there being no world government, there's no such thing as world law."

conduct rules are followed. *Primary enforcement rules* are addressed to the conduct rule violators. These rules either impose duties on violators to perform some costly act or deny them a beneficial right. Primary enforcement rules may obligate the conduct rule violator to pay a fine, report to jail, leave the country, wear a red letter, etc., or deny them the right to drive, serve liquor, exclude others from taking their property, etc.

If primary enforcement rules are the law's Plan B, then *secondary enforcement rules* are its Plan C. Secondary enforcement rules come into play when the conduct rule violator fails to follow the primary enforcement rules.<sup>49</sup> These rules either impose duties on people other than the conduct rule violator to perform some harmful act on (or refrain from performing some beneficial act for) the conduct rule violator, or the rules permit people other than the conduct rule violator to perform some harmful act on (or refrain from performing some beneficial act for) the conduct rule violator. Thus, secondary enforcement rules may require the police to apprehend the conduct rule violators, shame them, seize their property, etc., or permit creditors to seize property from debtors, allow crime victims to retaliate against offenders, authorize property owners to physically exclude trespassers, etc.

Primary enforcement rules are frequently backed by multiple secondary enforcement rules. For example, unpaid parking tickets may be enforced through the garnishment of wages. The rule requiring garnishment is a secondary one insofar as it is directed to someone other than the parking scofflaw, namely, the scofflaw's employer. Suppose that the employer fails to withhold wages. The law will likely require officials to take further steps to ensure that the employer complies (e.g., demanding that the employer pay a fine, revoking his license, etc.). Ultimately, the law may require officials to use physical force against the employer (or others). They may shutter the doors, imprison the CEO for contempt, or enter the business premises and take the money themselves. In such cases, law enforcement bottoms out in physical force employed by legal officials.

We can think of legal rules, therefore, as forming *enforcement chains*. The first link in the chain is the conduct rule being enforced by the subsequent rules. Typically, the second link is a primary enforcement rule that imposes duties on those who violate the initial conduct rule. Later links are normally secondary rules that enforce the prior primary rules (and transitively the initial conduct rule).

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49. Secondary enforcement rules can exist even when there are no primary enforcement rules. They are "secondary" rules because they are directed at individuals other than the conduct rule violators.

Enforcement chains may also be split into *subchains*. A jurisdiction may respond to unpaid parking tickets by requiring employers to garnish wages *and* by requiring police to seize the offenders' cars. These subchains likely will be of differing lengths: the law may have contingency plans for the failure of employers to garnish wages but have no response for the failure of the police to seize the cars.

We can now see how the law enforces its rules: it imposes costs on rule violators either by (1) *imposing duties on them or others or both* or (2) *denying them rights or providing rights to others or both*. Primary enforcement rules require conduct rule violators to act in ways deemed costly or deny them the right to act in ways deemed beneficial. Secondary enforcement rules require or permit others to act in ways deemed costly to the conduct rule violator or not to act in ways deemed beneficial. These primary and secondary rules form chains, with each rule designed to enforce earlier links and, ultimately, to ensure that the initial conduct rule is followed.

Having clarified the notion of enforcement, we can now state more clearly the basic presuppositions of the Modern State Conception of law. Its first tenet holds that most conduct rules must be enforced in order to be law.

**Enforcement Thesis:** Most legal conduct rules are part of law enforcement chains.

The second tenet defines a "law enforcement chain" as one that authorizes or mandates internalized violence.

**Internalized Violence Thesis:** A law enforcement chain is an enforcement chain that has at least one secondary link that either requires or permits officials to use physical force on the person who violated the initial link or on his or her property.

The Modern State Conception can be seen, therefore, as a theory composed of a necessary condition and a definition. The Enforcement Thesis demands that most legal conduct rules be part of law enforcement chains, while the Internalized Violence Thesis defines a "law enforcement chain" as one that threatens violence by officials at some point in the sequence.

It should be pointed out that the Modern State Conception does not require the regime in question to include the full panoply of coercive bureaucratic institutions characteristic of contemporary states. It need not have police, militia, large prosecutorial agencies, *and* correctional institutions. But it must at least have some such bodies. It might have police but not public prosecutors; it might have jails, guards, and wardens but not police; it might have police and prosecutors but no prisons. As long as some institution exists

whose role is to use the threat or exercise of physical force in order to enforce conduct rules, the Modern State Conception will recognize the regime as law.

Two final clarifications are in order. First, the Modern State Conception does not demand that the law seek to affect behavior *only* through the threat and exercise of violence. Officials may appeal, for example, to the citizenry's sense of moral obligation to obey the law or to their patriotism. The Modern State Conception insists, however, that these motivations are neither necessary nor sufficient for the existence of law. Regardless of how else a regime seeks to affect behavior, at the very least it must do so through internal threats and the exercise of physical force. Second, the Modern State Conception does not demand that obedience to the law be coercively obtained. The motivation for obeying the conduct rules, in other words, need not be "transmitted" up the enforcement chain from the secondary rules threatening force. Why citizens obey the law is left open by the account. The Modern State Conception insists that the law give citizens a certain kind of reason in order to be law, not that they act for that reason.

*B. Does International Law Satisfy the Modern State Conception?*

The Modern State Objection claims that international law is not law because most of its rules are not part of law enforcement chains. Without its own police, prosecutors, or jailors, international law cannot be enforced by the right people in the right way.

We can imagine two ways in which to respond to the Modern State Objection. One accepts its underlying theory of law, i.e., the Modern State Conception, but argues that international law does indeed satisfy it. The other accepts that international law does not satisfy the Modern State Conception, but argues that the Modern State Conception is itself flawed. Let us discuss each in turn.

The first response to the Modern State Objection maintains that international law fits the Modern State Conception. The best example for such a claim would likely be mutual defense treaties, which are core instruments of international law. The North Atlantic Treaty, and the organization it creates (the North Atlantic Treaty Organization), is one of the most robust mutual defense treaties. The provisions for collective self-defense represent the core of the NATO alliance<sup>50</sup> and emerged as a device to deter the threat of Soviet

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50. See PAUL E. GALLIS, CONG. RESEARCH SERV., 97-717 F, NATO: ARTICLE V AND COLLECTIVE DEFENSE (1997).

aggression—and to respond to it, if needed.<sup>51</sup> Under Article V of the North Atlantic Treaty, member states commit to come to the aid of one another:

The Parties agree that an armed attack against one or more of them . . . shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked . . . .<sup>52</sup>

Decisions to use force to repel aggression are made and enforced by internal NATO structures. The principal decisionmaking body of NATO is the North Atlantic Council, which is made up of representatives from each of the twenty-six member states.<sup>53</sup> The Council can direct a response by the NATO Response Force, which operates as a standing army ready to respond to acts of aggression against a member state. The Force provides NATO with the ability to react quickly to situations of threat and engage in high-intensity combat on a modern battlefield for thirty days on its own, or for a longer period as part of a NATO Combined Joint Task Force.<sup>54</sup>

Even NATO, however, suffers from a flaw in the eyes of the Modern State Conception of law enforcement. Yes, it can deploy physical force. And, yes, it has its own forces capable of engaging in that physical force. But the laws it enforces are not its own. It exists, instead, to enforce the U.N. Charter's Article 2(4) prohibition on the use of force and Article 51 right of self-defense. NATO's enforcement mechanism is thus *external* rather than *internal* to the legal system it exists to enforce.

The United Nations Charter offers yet another instance in which international law nearly meets the Modern State Conception, but falls just short. A central principle of international law—codified in Article 2(4) of the United Nations Charter—is the prohibition on the use of aggressive force by a sovereign state against the sovereign territory or political independence of

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51. See FUTURE NATO SECURITY: ADDRESSING THE CHALLENGES OF EVOLVING SECURITY AND INFORMATION SHARING SYSTEMS AND ARCHITECTURES, at vii (Martin Edmonds & Oldrich Cerny eds., 2004).

52. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243, 246.

53. NORTH ATLANTIC TREATY ORGANISATION: 60TH ANNIVERSARY 2 (Hanna Weijers ed., 2009).

54. JEFFREY P. BIALOS & STUART L. KOEHL, THE NATO RESPONSE FORCE: FACILITATING COALITION WARFARE THROUGH TECHNOLOGY TRANSFER AND INFORMATION SHARING 1 (Sept. 2005), available at <http://www.ndu.edu/CTNSP/docUploaded/DTP%2018%20NATO%20Response%20Force.pdf>.

another state.<sup>55</sup> Under Chapter VII of the U.N. Charter, the Security Council is empowered to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to take action to “restore international peace and security.”<sup>56</sup>

The founders of the United Nations expected that a significant portion of the enforcement actions under Chapter VII would be carried out by forces assembled from member states who would “make available to the Security Council” armed forces and assistance pursuant to special agreements.<sup>57</sup> A Military Staff Committee (MSC) would be responsible for “the strategic direction of any armed forces placed at the disposal of the Security Council.”<sup>58</sup>

Had this vision been realized, it would have satisfied the Modern State Conception of law enforcement by giving the United Nations Security Council the power to deploy internal physical force to enforce its decisions. But this vision was never realized. It fell victim to the Cold War before it could take shape.<sup>59</sup> Instead, it is the member states that carry out the enforcement actions specified in Security Council resolutions through *external physical enforcement*.<sup>60</sup>

Even if there are cases in which international law meets the stringent criteria of the Modern State Conception of law (we, as yet, have not identified any), it is inarguable that most of international law does not. Hence when defenders of international law respond to critiques of international law by pointing to such structures, they effectively fall into a trap. Critics are likely to respond to such examples by noting first that the defenders of international law are picking out, at best, a few good examples for their case. Second, they will likely point out that any international law that actually fits this conception

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55. U.N. Charter art. 2, para. 4 (“All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”).

56. *Id.* art. 39. Chapter VII, by its very title, outlines the United Nations’ response to “Threats to the Peace, Breaches of the Peace, and Acts of Aggression.” *Id.* ch. 7.

57. *Id.* art. 43, paras. 1-3.

58. *Id.* art. 47, para. 3. The Military Staff Committee is established by Article 47(1). The responsibility of the Military Staff Committee for the “strategic direction of any armed forces” is set forth in Article 47(3). For more on the procedures set forth in Articles 42, 43, and 47, see Eugene V. Rostow, *Agora: The Gulf Crisis in International and Foreign Relations Law, Continued*, 85 AM. J. INT’L L. 506, 507-08 (1991), which argues that the enforcement provisions in the U.N. Charter have not yet been fully realized.

59. It was described by one historian as “a sterile monument to the faded hopes of the founders of the UN.” Eric Grove, *U.N. Armed Forces and the Military Staff Committee: A Look Back*, INT’L SECURITY, Spring 1993, at 172, 172.

60. External physical enforcement under Chapter VII of the U.N. Charter is discussed in more depth in Section IV.A.



of law is arguably antisovereignist and antidemocratic, for if international law is enforced against member states in the way that domestic law is enforced against individuals in a modern state (through internal threats of force), then international law lays claim to the right to subjugate nation-states to the will of the international organization in the same way that nation-states lay claim to subjugating individuals to the will of the national government.<sup>61</sup> That position may be particularly difficult for advocates of international law to defend when the sovereign state in question is a democracy. Advocates of international law, unprepared to adequately respond to either critique, tend to let the conversation drop at this point—or they deny the legitimacy of the inquiry at all (witness the quotations with which this Article opened).

*C. Is the Modern State Conception Valid?*

Instead of arguing that international law satisfies the Modern State Conception, the more promising and, in fact, popular strategy in defense of international law has been to argue against the Modern State Conception itself. Thus, most defenders concede that international law is not enforced through the barrel of a U.N. gun, but they deny that enforcement is necessary for legality. In other words, they seek to undercut the Modern State Conception by attacking the Enforcement Thesis. On their view, most conduct rules need not be part of enforcement chains in order to be legal rules. Indeed, they are willing to accept as a conceptual possibility that a regime can still be a legal system

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61. Consider, for example, the following critiques of international law, drawn from public debates. On the floor of the U.S. House of Representatives, Congressman Ron Paul argued: “[I]t is time to stop trying to manipulate the United Nations and start asserting our national sovereignty. If we do not, rest assured that the United Nations will continue to interfere, not only in our foreign policy, but in our domestic policies, as well.” 149 CONG. REC. 9949 (2003) (statement of Rep. Ron Paul). Pat Buchanan similarly argued that the Law of the Sea Treaty “represents a permanent loss of national sovereignty. Hence it is inherently un-American.” Patrick J. Buchanan, *Should the U.N. Be Lord of the Oceans?*, AM. CAUSE (Feb. 28, 2005), <http://www.theamericancause.org/a-pjb-050228-lordoftheoceans.htm>. Conservative commentator Frank Gaffney wrote: “Just as Hurricane Katrina ruptured the levees protecting New Orleans, the concerted U.N. assault on the barriers to further erosion of American sovereignty threatens to swamp our freedom of action and our Founding principle of ‘no taxation without representation.’” Frank Gaffney, *Sovereignty Levees Breached?*, WASH. TIMES, Sept. 12, 2005, <http://www.washingtontimes.com/news/2005/sep/12/20050912-090351-9594r>. Representative Christopher Smith, speaking about the Convention To Eliminate All Forms of Discrimination Against Women, asked: “Do our constituents . . . really want a group of international bureaucrats telling them that the day set aside to honor our mothers must be abolished?” *Women’s Rights Treaty a Threat to Mother’s Day*, *Lawmaker Says*, CHI. TRIB., May 4, 2000, [http://articles.chicagotribune.com/2000-05-04/news/0005040213\\_1\\_treaty-women-have-equal-rights-mother-s-day](http://articles.chicagotribune.com/2000-05-04/news/0005040213_1_treaty-women-have-equal-rights-mother-s-day) (quoting Rep. Christopher Smith).

even though it does not enforce any of its rules. The fact that international law does not have the right enforcement mechanism, therefore, is not fatal to its legality, for a regime does not need *any* enforcement mechanism to be law, let alone the right kind.

Those who reject the Enforcement Thesis have presented three sorts of arguments in their support. The first kind employs a philosophical thought experiment. Consider a community of extremely conscientious and well-intentioned individuals who are governed by a democratically elected assembly and a cadre of wise judges. Because the members of this community completely and wholeheartedly accept the legitimacy of the governing regime and consequently always obey the rules, the community has no police, jails, or other mechanisms of enforcement. Joseph Raz, for example, imagines a society of angels governed by legislatures and courts that is so obedient that subjects do not need to be threatened with sanctions for breaking the rules.<sup>62</sup>

Many have the intuition that such sanctionless communities have law. If we take this intuition seriously, then we should reject the Enforcement Thesis. For while enforcement is normally required in the actual world, given human weakness and foibles, the thought experiment shows that beings who can be trusted to do what they think is right and, as a result, do not need coercive enforcement can nevertheless have law. Contrary to the Modern State Conception, most legal conduct rules need not be part of enforcement chains, let alone law enforcement chains; in fact, none of them do.

Though we are personally persuaded by this argument, we are aware that many are not. Some reject it because they do not trust intuitions about bizarre hypotheticals. Since we never encounter anything like angelic legal systems, they complain, we cannot be confident in our reactions to such outlandish scenarios. Others reject the argument because their intuitions pull in precisely the opposite direction: they are convinced that “law” without enforcement would not really be law.<sup>63</sup>

Because the status and outcome of such thought experiments are controversial and have failed to persuade many people, we will eschew them in this Article. We will, therefore, restrict our evidence to actual legal systems. A regime will constitute a counterexample to the Modern State Conception only if it exists or has existed and our intuitions are reasonably firm about its jurisprudential status.

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62. JOSEPH RAZ, PRACTICAL REASON AND NORMS 159–60 (1975); see SCOTT J. SHAPIRO, LEGALITY 169–75 (2011).

63. See, e.g., Ekow N. Yankah, *The Force of Law: The Role of Coercion in Legal Norms*, 42 U. RICH. L. REV. 1195, 1235–38 (2008).

A second strategy for rejecting the Enforcement Thesis relies on empirical observation, not philosophical intuition. It proceeds by noting that people normally obey the law out of a sense of moral obligation. Consider Anthony D'Amato's argument against the idea that "enforcement is the hallmark of law":

Most of "law" concerns itself with the interpretation and enforcement of private contracts, the redress of intentional and negligent harms, rules regarding sales of goods and sales of securities, rules relating to the family and the rights of members thereof, and other such rules, norms, and cases. The rules are obeyed not out of fear of the state's power, but because the rules by and large are perceived to be right, just, or appropriate.<sup>64</sup>

According to D'Amato, coercive enforcement does not play a major role in ordinary compliance with law. Since legal rules are obeyed rather out of a sense of moral obligation, enforcement cannot be constitutive of legality. D'Amato concludes that skeptics who believe that international law cannot be law because it lacks enforcement mechanisms must, therefore, be mistaken.

Unfortunately, D'Amato's argument misses the mark. The Enforcement Thesis does not claim that a regime is a legal system only if its subjects comply out of fear of enforcement. As we noted earlier, this thesis is agnostic on why citizens obey the law. The Enforcement Thesis merely requires that law enforcement mechanisms exist, not that citizens act because of them. Critics of international law, therefore, can recognize that people normally obey law out of moral considerations but also maintain that a regime would not be law if it did not provide them alternative reasons to comply.

D'Amato's argument fails for an additional reason. One cannot infer from the fact that citizens normally obey out of moral considerations that "enforcement is not a hallmark of law." For it is plausible to suppose that regimes are perceived as legitimate only because enforcement mechanisms exist for those who do not accept the legitimacy of the regime. In other words, people are willing to obey the law out of the sense of moral obligation only because they have assurance that they won't be "suckers" and that those who break the rules will be punished for doing so.

The final attempt to undermine the Enforcement Thesis distinguishes sharply between ordinary domestic law and public law. According to this response, the Enforcement Thesis is a plausible requirement to impose on rules that bind ordinary citizens. The rules of criminal law, torts, contract law, and

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64. D'Amato, *supra* note 6, at 1295.

so on are indeed backed by the physically coercive power of the State. By contrast, public law—the rules that bind state actors—are not enforced in this way. Indeed, the argument proceeds, they are not enforceable at all. And because public law is unenforceable, the Enforcement Thesis is not a plausible requirement to impose on this group of legal rules and hence cannot be a principle valid for all legal rules.

Because this is a provocative argument, we should examine it closely. Consider the institution of judicial review. Jack Goldsmith and Daryl Levinson argue that its power to enforce constitutional law is an illusion. They write:

Courts are cast as powerful enforcement agents, prevailing upon the political branches of government to comply with their commands. But of course courts cannot play any such role. Courts are merely subdivisions of government, lacking the powers of purse and sword that might be used to coerce the compliance of other government officials and their constituents.<sup>65</sup>

Contrary to the received wisdom, courts cannot enforce constitutional law because they are the “least dangerous branch.”<sup>66</sup> Judges merely declare a law or action “unconstitutional” but have no power to back up such declarations with coercion.

Courts are not the only powerless ones. According to Goldsmith and Levinson, *no one* can enforce domestic public law. With “no sovereign above the sovereign,” there is no body powerful enough to employ coercion against wayward state actors. “[P]ublic law cannot rely on the enforcement capacity of states for compliance. Lacking the kind of ‘external’ enforcement mechanism that states provide for ordinary domestic law, public law regimes must be internally self-enforcing through some combination of rationally self-interested and normative, internalized, or role-based motivations.”<sup>67</sup>

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65. Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1831 (2009) (paragraph break omitted). It should be made clear that Goldsmith and Levinson do not themselves argue that international law is law or that the Enforcement Thesis is false. They simply argue that international law shares with constitutional law “the absence of an enforcement authority capable of coercing powerful political actors to comply with unpopular decisions.” *Id.* at 1794. We are using their argument about the unenforceability of public law to construct a possible argument against the Enforcement Thesis.

66. See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* (1962).

67. Goldsmith & Levinson, *supra* note 65, at 1840.

Goldsmith and Levinson extend their argument to public international law. Just as domestic public law is unenforceable against domestic state actors, public international law cannot be enforced against them either. Since there is “no sovereign above the sovereign,” there is no way to coerce wayward state actors to comply with the public law of the international realm.

If we accept Goldsmith and Levinson’s argument about the unenforceability of public law, then the Enforcement Thesis loses its appeal. Since domestic public law is law despite being unenforceable, rules can be legal norms even though they are not enforced. And if the Enforcement Thesis is invalid, then the Modern State Conception is invalid as well. International law cannot, therefore, be denied the status of legality simply because it lacks mechanisms of coercive enforcement.

The success of this refutation of the Modern State Conception hinges on the claim that domestic public law is unenforceable. But is that true? Consider *United States v. Nixon*.<sup>68</sup> In that case, Richard Nixon refused to hand over the tapes to the special prosecutor investigating Watergate, claiming executive privilege. The Supreme Court unanimously disagreed and ordered the President to turn over the tapes. Nixon complied with this order. Far from being a feckless institution, then, judicial review was a highly effective mechanism of law enforcement. Public law, it would seem, is enforceable after all.

Goldsmith and Levinson might argue that, contrary to appearances, the Court was not the enforcement body in this case. Nixon did not comply because he respected the authority of the Court; rather, he complied because he would certainly have been impeached and convicted otherwise. Even assuming that this claim about Nixon’s motivations is true, it is hard to see how it vindicates Goldsmith and Levinson’s ultimate thesis about the unenforceability of public law. For it would simply follow that public law was enforced in this instance by the impeachment mechanism. Even if judicial review did not enforce public law in this case, the threat of congressional impeachment did!

Goldsmith and Levinson would, no doubt, reject this inference. Nixon, they would point out, did not have to listen to Congress. As President, he was the Chief Law Enforcement Officer and Commander-in-Chief of the armed forces. If he refused to vacate the Oval Office following impeachment by the House and conviction by the Senate, no one would have physically forced him to do so. His leaving would have had to be his own decision: public law can only be self-enforced by the President, not enforced against him by the Court, Congress or anyone else.

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68. 418 U.S. 683 (1974).

It is hard to know, of course, whether Nixon would have been physically forced to leave the Oval Office if he were impeached, convicted and refused to budge. But the outcome of the hypothetical is irrelevant to the issue of whether impeachment was an effective method of public law enforcement in *United States v. Nixon*. For refusing to leave the Oval Office following impeachment and conviction would have had terrible consequences for Nixon, far worse than relinquishing the reins of power. The dishonor and public scorn that would have been heaped on him for precipitating a constitutional crisis would have been more than he was willing to bear. The threat of impeachment, therefore, was genuinely coercive: it compelled Nixon to comply with the Court because the costs of playing hardball were simply too great.

Goldsmith and Levinson are wrong, therefore, to claim that public law cannot be enforced. As we have seen, impeachment and judicial review can be effective tools for disciplining state actors. Indeed, they are not the only options available. Public law can be enforced at the ballot box: state actors who violate the law can be voted out of office. Others can be fired, fined, or denounced by their superiors. Funding denials are also powerful enforcement tools. Agencies or governmental subdivisions that refuse to follow the law may see their budgets shrink dramatically.

We can now see that there is a missing premise in Goldsmith and Levinson's argument. Recall the passage cited earlier: "Lacking the kind of 'external' enforcement mechanism that states provide for ordinary domestic law, public law regimes must be internally self-enforcing."<sup>69</sup> Even if public law cannot be enforced in the same way as ordinary domestic law, it does not follow that public law cannot be enforced at all. It would follow *only* if law enforcement had to take the form that it does in ordinary domestic law, namely, internalized physical coercion. In other words, Goldsmith and Levinson can establish the unenforceability of public law only by severely limiting the kinds of coercive actions that count as law enforcement. The reason they do not countenance judicial review, impeachment, elections, firings, and defunding as mechanisms of law enforcement, despite being coercive, is that they are not *physically* coercive.

There is an irony here. The third attempt to rescue international law relies on Goldsmith and Levinson's argument that domestic public law is unenforceable. Since enforcement is not necessary for domestic public law, it must not be necessary for all other forms of public law, including international law. But this argument follows only if we tacitly accept the Modern State Conception's narrow understanding of law enforcement. This effort to

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69. See *supra* text accompanying note 67.

undermine the Enforcement Thesis thus unwittingly relies on the Internalized Violence Thesis.

The third attack on the Enforcement Thesis, therefore, ultimately depends on the validity of the Internalized Violence Thesis. Unfortunately, we do not know whether the latter is true. And if we cannot establish its truth, we cannot use it to falsify the Enforcement Thesis and, with it, the Modern State Objection. Indeed, there are strong reasons to reject the Internalized Violence Thesis. As we will see in the next Part, this understanding of law enforcement is far too narrow. Not only does the Internalized Violence Thesis fail to capture the way in which public law is enforced, it does not even comport with the way in which ordinary domestic law has been enforced in other legal systems. And if the Internalized Violence Thesis is not even true of ordinary domestic law, we have no reason to accept it at all.

Fortunately, we will also see that once the Internalized Violence Thesis is rejected, a new defense of international law becomes available. For when we broaden our understanding of how law can be enforced, we will find that international law fits this expanded definition. International law might not be enforced through internalized violence, but it manages to enforce its rules nonetheless.

### III. LAW WITHOUT POLICE

The appeal of the Modern State Conception is obvious. Every modern domestic legal system has police, prosecutors, and prisons. They are the most visible symbols of the law and its tremendous power. Indeed, it would be difficult to imagine a modern state maintaining control over its territory without bureaucratic organizations that employ the threat and exercise of physical force. Nevertheless, we argue that legal systems are possible even in the absence of these organizations. As we will see, many legal regimes have existed without police forces, prosecutors, or prisons. The Modern State Conception cannot be valid for the simple reason that it cannot account for the existence of these legal regimes.

The fact that certain legal systems have governed without the use of physical force, however, does not mean that they are the real-world analogues of the philosopher's society of angels. Quite the contrary, these regimes enforced their rules and did so quite ruthlessly. As we will see, these systems typically externalized the enforcement of the rules to non-regime members. They relied on these outside parties either to use physical force against the disobedient or to deny the deviants the benefits of communal belonging and social cooperation.

In this Part, we will briefly discuss two premodern legal systems: medieval Icelandic law and canon law. These systems existed for centuries without police or other force-backed bureaucratic organizations. Despite lacking the trappings of the modern state, these systems managed to develop effective enforcement mechanisms through the liberal use of externalization and outcasting.

Of course, we do not intend to provide detailed descriptions of these legal regimes in this Article. We hope to provide just enough information about these systems to achieve two limited objectives. First, we will attempt to persuade the reader that medieval Iceland and the Catholic Church had actual legal systems. In the case of medieval Iceland, we will sketch its history and constitutional structure to demonstrate that the country had a legislature and a court system for several hundred years. In the case of the Catholic Church, we assume that many know that it had (and still has) legislative institutions (the papacy, episcopal councils, the College of Cardinals) and will not bother to describe them. We will rather dwell on the lesser-known fact that the Church had a complex system of courts, much of which persists to the present day.

Our second aim in this Part will be to describe these systems' enforcement mechanisms. In the case of Iceland, we will discuss the institution of outlawry, and, in canon law, the sanction of excommunication. We will see the innovative ways in which these premodern legal systems were able to enforce their law. Once we appreciate that internalized violence is not the only way to enforce ordinary domestic law, we will have reason to reject the Modern State Conception of law and with it its challenge to international law.<sup>70</sup> This will leave us in a position to explore how a fuller vision of law enforcement that includes externalization and outcasting—as exemplified by our account of law enforcement in medieval Iceland and the canon law—opens up a range of possibilities for both domestic and international law enforcement that were previously not apparent.

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70. The similarity between international law and medieval Icelandic law has been noted by Stanley Anderson, *Human Rights and the Structure of International Law*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 1, 3-5 (1991). See also Gillian K. Hadfield & Barry R. Weingast, *Collective Punishment: A Coordination Account of Legal Order* (Univ. of S. Cal., USC Law Legal Studies Paper No. 11-9, 2001), available at <http://ssrn.com/abstract=1786918> (exploring the similarity between a number of normative orders including medieval Icelandic law and the World Trade Organization).



A. *Medieval Iceland*<sup>71</sup>

Iceland has been described as history's "first new society."<sup>72</sup> Unlike nearly every other premodern polity whose genesis has been long forgotten and is otherwise unrecoverable, the founding of Iceland is well documented and written records describing the surrounding events survive. According to archaeological evidence and extant sources, Iceland was settled between 870 and 930 primarily by Norwegians, with a minority of Irish and Celts.<sup>73</sup> The first of these immigrants encountered a virtually, if not entirely, empty landmass and within sixty years managed to divvy up the entire island into private farms and pasturelands. By the beginning of the next century, Iceland's governmental structure had evolved into the form it would maintain until Iceland surrendered and was subordinated to Norway in 1262-64.<sup>74</sup>

The reasons for the mass migration to Iceland are not entirely clear. The scarcity of land in other Scandinavian countries and colonies, advances in shipbuilding technology, improved defenses against Viking invasions in other parts of the Atlantic world, and a sense of adventure are among the reasons frequently cited by historians.<sup>75</sup> The famous sagas written by the Icelanders pin the blame, however, on the oppressive rule of King Harald Finehair of Norway.<sup>76</sup> According to this native account, Harald imposed taxes on the petty landowners of Norway and sought to limit their rights.<sup>77</sup> Many of these landowners left Norway to escape Harald's rule and search for freedom.

The society these immigrants established was remarkably egalitarian: Iceland did not have a king, feudal lords, or an aristocracy. Regional leaders, called chieftains or *godí*, had little executive power and did not rule within their

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71. For the Icelandic terms in this Section, we follow the anglicizations adopted in WILLIAM IAN MILLER, *BLOODTAKING AND PEACEMAKING: FEUD, LAW, AND SOCIETY IN SAGA ICELAND* (1990). For Miller's explanation of his spellings, see *id.* at xi.

72. See RICHARD F. TOMASSON, *ICELAND: THE FIRST NEW SOCIETY* (1980).

73. GUNNAR KARLSSON, *THE HISTORY OF ICELAND 12-15* (2000). Karlsson's chronology comes from *The Book of Settlements*, authored in the twelfth century by the priest Ari Porgilsson, which is considered one of the principal sources for the settlement. *Id.* at 11.

74. See MILLER, *supra* note 71, at 16-17.

75. *Id.* at 14.

76. *Id.* at 13-14; see also KARLSSON, *supra* note 73, at 15 ("In the *Book of Settlements* the most common cause of the emigration of individual settlers is the aggression of the king of Norway, Haraldr Fairhair.").

77. JESSE L. BYOCK, *MEDIEVAL ICELAND: SOCIETY, SAGAS, AND POWER* 53-54 (1988).

territory.<sup>78</sup> Farmers were free to choose the chieftains they wished to support and were permitted to switch alliances each year.<sup>79</sup> And while social divisions existed between chieftains and farmers, the landed and the landless, and freemen and slaves, the class hierarchy was considerably flatter than the complex stratification of Norwegian society and other European nations.

In keeping with their egalitarian culture, the settlers governed themselves via assemblies, or Things, that they set up almost immediately upon arriving in the country. These Things were governed by established procedures and met at regular intervals at predetermined locations.<sup>80</sup> The most important of these assemblies met each spring to hear lawsuits and resolve administrative issues.<sup>81</sup> This spring assembly, known as the *varthing*, was formally divided into two parts: courts of prosecution and panels for handling debts.<sup>82</sup> Each Thing was presided over by three chieftains who selected the judges—which functioned more like our juries<sup>83</sup>—that would hear each case.<sup>84</sup>

In addition to these local assemblies, a national assembly, called the Allthing, was instituted in 930.<sup>85</sup> The Allthing met once a year in June, when the travel was least burdensome,<sup>86</sup> and functioned as a national court system and legislature.

The courts convened at the Allthing were called Quarter Courts, each of which represented a quarter of the country.<sup>87</sup> Quarter Courts had original

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78. Chieftains were local leaders who likely had both religious and secular tasks. KARLSSON, *supra* note 73, at 24-26. Chieftains also constituted an important part of local organization. Every household had to declare itself to be “in Thing” with—which essentially meant in alliance with—a chieftain, and once so allied, members of the household were known as that chieftain’s “thingmen.” The head of the household chose the allegiance for all of his household members. See MILLER, *supra* note 71, at 17. Thingmen were required to attend the Things presided over by their chieftains. See JESSE BYOCK, *VIKING AGE ICELAND* 171 (2001).

79. BYOCK, *supra* note 77, at 120.

80. *Id.* at 59.

81. *Id.* at 60.

82. See BYOCK, *supra* note 78, at 171.

83. *Id.*

84. *Id.*

85. According to the traditional account, Ulfljotur was sent back to Eastern Norway around 927 to study the law of the gulathing. On the basis of this study, he compiled and brought back a new law code. This code was adopted in 930 as the law of the land by the community of settlers. TOMASSON, *supra* note 72, at 15.

86. BYOCK, *supra* note 77, at 61.

87. KARLSSON, *supra* note 73, at 22. The Quarter system was instituted in the 960s. See *id.* at 24. The Quarters were comprised of three local Things, except for the North, which encompassed four Things. MILLER, *supra* note 71, at 18.

jurisdiction over cases that arose between litigants from different Things and appellate jurisdiction over cases that had not been resolved at the local Things.<sup>88</sup> They also provided litigants with a choice of forum in serious cases: when anything more than a three-mark fine was at stake,<sup>89</sup> the plaintiff could choose to litigate either in his local Thing or in the Quarter Court.<sup>90</sup> Cases that did not reach resolution at the Quarter Courts could be finally resolved at the Fifth Court, which also met at the Allthing. In addition to resolving these divided cases, the Fifth Court had original jurisdiction over certain serious crimes.<sup>91</sup>

The Allthing was not only the site of the Quarter and Fifth Courts, but also of the Logretta, the nationwide legislative council that reviewed old laws, created new ones, granted certain exceptions from the law, and made treaties.<sup>92</sup> The Logretta was comprised of chieftains from the local Things.<sup>93</sup> Together, the laws crafted at the Logretta formed the Gragas, the Icelandic code, which was applied by the courts at the Allthing and by the local district Things.

Presiding over the Logretta was Iceland's only significant national officer: the Lawspeaker.<sup>94</sup> His role, however, carried little or no official power.<sup>95</sup> The Lawspeaker's job was to recite one-third of the nation's laws by memory annually at a national monument known as the Law Rock around which the Allthing convened,<sup>96</sup> and also to announce any new legislation enacted at the Logretta.<sup>97</sup>

Scholars of this period of Icelandic law emphasize the Allthing's significance as constitutive of a unified legal system for Iceland—not merely because of the national legal bodies that convened there, but because of its symbolic power. As Jesse Byock writes, “The Althing system made Iceland into one legal community: it was a maximal group which had the obligation to end

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88. BYOCK, *supra* note 77, at 65.

89. Other more serious forms of punishment will be discussed at length in this Section.

90. See MILLER, *supra* note 71, at 17.

91. *Id.* at 18.

92. See BYOCK, *supra* note 78, at 174-75.

93. BYOCK, *supra* note 77, at 61.

94. BYOCK, *supra* note 78, at 175.

95. On this point, Byock elaborates, “[a]lthough the position of the law-speaker was prestigious, it brought little or no official power to its holder, who was allowed to take sides and to participate in litigation and in feuds as a private citizen.” *Id.*

96. See MILLER, *supra* note 71, at 227. It is not clear to what extent the Lawspeaker decided which laws to recite, nor is it clear whether there was any special significance to the selection. BYOCK, *supra* note 78, at 175-76.

97. BYOCK, *supra* note 78, at 175.

fighting by peaceful settlement and the machinery to arrange such resolutions.”<sup>98</sup>

While Iceland had a well-developed legislative and judicial system, it had no executive institutions. It had no army, fire department, tax collectors, or social workers. In particular, it had no law enforcement personnel. No officials were charged with preventing criminal acts, prosecuting those that did occur, enforcing court rulings, or executing sentences.<sup>99</sup>

Because Iceland had no public prosecutors, victims who were wronged and wished redress from the courts had to take the legal initiative themselves: they had to commence a prosecution by suing the accused wrongdoer in the appropriate judicial forum.<sup>100</sup> If the victim/prosecutor was successful, the court would declare the defendant guilty and subject to one of three penalties. Petty offenses were punished by a three-mark fine.<sup>101</sup> More serious offenders were subject to “outlawry.”<sup>102</sup> Someone declared an “outlaw” was cast outside the law: they lost the rights normally accorded members of the Icelandic community, such as the rights to reside in Iceland, to hospitality, and to own property.<sup>103</sup>

Icelandic law provided for two forms of outlawry. In “lesser” outlawry, the outlaw was banished from the country for three years.<sup>104</sup> His property was

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98. BYOCK, *supra* note 78, at 181; *see also* MILLER, *supra* note 71, at 21 (“Political and jural unity was achieved by the symbolic load borne by the Allthing and the law that was recited there.”).

99. *See, e.g.*, KARLSSON, *supra* note 73, at 21, 24.

100. *See, e.g.*, MILLER, *supra* note 71, at 227-28.

101. *Id.* at 223. In addition to prosecution, victims could either engage in self-help by initiating/continuing feuds or seek settlements via private arbitration. *Id.* at 7-8. We assume in our discussion that neither feuding nor settling is a form of law enforcement. While the law’s permitting feuds and settlements might indicate that the law used these private actions as means to enforce its rules, this inference should be resisted. As we will discuss later on, successful prosecutors were accorded greater rights than feuders. *See infra* text accompanying note 110. This strongly suggests that the law preferred the former to the latter and privileged prosecution as a method for imposing penalties on wrongdoers. In the case of settlement, the formal law actually forbade arbitration in cases of killing or serious injury absent permission by the Logretta. Though the sagas suggest that these limitations were not heeded, “legal experts[] were willing to claim a priority for formal legal resolution over purely private settlement.” *Id.* at 262.

102. MILLER, *supra* note 71, at 224.

103. LAWS OF EARLY ICELAND (*Gragas I*) 7-8 (Andrew Dennis, Peter Foote & Richard Perkins trans., 1980).

104. *See* BYOCK, *supra* note 77, at 231.

confiscated and a portion of it was awarded to the plaintiff.<sup>105</sup> In the “full” version, the outlaw was exiled for life. Furthermore, he was denied legal personality and was treated as though he were dead. Not only could his property be confiscated, but he also could be killed with impunity.<sup>106</sup>

Using the terminology introduced in the previous Part, we can describe the norms levying fines and declaring outlawry as Iceland’s primary enforcement rules. They imposed duties on the losing defendant to engage in certain costly activities, i.e., to pay a fine or to leave the country. It stands to question, then, how the primary enforcement rules were themselves enforced, given that Icelandic law did not possess executive institutions. Put bluntly, why did losing defendants pay their fines and leave the country if there were no sheriffs forcing them to do so?

In part, defendants complied with the primary enforcement rules because the rules were deemed legitimate.<sup>107</sup> To disobey a court judgment would have brought dishonor upon oneself and eroded one’s standing and support within the community. But there was another motivation for complying with the sanctions imposed by the law: failure to do so—to engage in so-called “judgment breaking”—led to an escalation in penalties. In the case of fines, Icelandic law provided that those who did not pay the three marks were subject to lesser outlawry. Lesser outlaws who did not leave the country were in turn subject to full outlawry.<sup>108</sup>

Icelandic legal rules, therefore, formed enforcement chains. The primary enforcement rules imposing fines were backed by other primary enforcement rules imposing lesser outlawry. And the primary enforcement rules imposing

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105. See MILLER, *supra* note 71, at 235. Property was confiscated from an outlaw in a ceremony held at the defendant’s home known as a *féránsdómur*. *Id.* First, the outlaw’s wife’s property was set aside, and then all creditors’ claims were paid. One half of the remaining assets was awarded to the defendant, and the other half to the men of either the Quarter or the district for the maintenance of the outlaw’s dependent or, if the outlaw had no dependents, then to needy members of the community. *Id.*

106. See BYOCK, *supra* note 77, at 231-32.

107. On the legitimacy of the law in Iceland, see MILLER, *supra* note 71, at 229 (“[I]t seems that people felt that law promoted order, not just the systemic order derived from the assignment of things to a place in a legal and social structure, but actual peace. The sentiment is captured in the Norse proverb invoked by Njal: ‘With laws shall our land be built, but with disorder laid waste.’” (quoting NJÁLA 70:172 (William Ian Miller trans.) (c. 13th century))).

108. BYOCK, *supra* note 77, at 231; see also LAWS OF EARLY ICELAND, *supra* note 103 at 38, 92 (noting that lesser outlaws would become full outlaws if they did not pay the prescribed penalty to the confiscation court); LAWS OF EARLY ICELAND (*Gragas II*) 107-08, 383 (Andrew Dennis, Peter Foote & Richard Perkins trans., 2000) (describing increasing penalties for judgment breaking).

lesser outlawry were backed by additional primary enforcement rules imposing full outlawry.

Icelandic law not only bolstered its enforcement rules with an escalating schedule of penalties; it outsourced that enforcement by relying on members of the community to enforce the law through violence and outcasting.<sup>109</sup> The loss of rights for a full outlaw, for example, amounted to a death sentence. The full outlaw could be killed with impunity, and indeed, the prosecutor of the case was obliged to kill him.<sup>110</sup> Other outlaws were even incentivized to do this killing themselves, since an outlaw could earn full reprieve from his sentence by killing three outlaws.<sup>111</sup> Moreover, any assistance granted to an outlaw was itself punishable; no one was allowed to harbor an outlaw or help him to leave the country lest he be subject to outlawry himself.<sup>112</sup> Icelandic law, in other words, contained secondary enforcement rules. It imposed a duty on those other than the conduct rule violator either to kill the conduct rule violators or not to assist them.

Iceland's system of law enforcement was not perfect. It was not used one hundred percent of the time, and parties sometimes opted to engage in private feuds rather than bringing their cases to the courts.<sup>113</sup> However, Iceland's legal system provided numerous incentives for formally prosecuting cases rather than feuding. A victor in the courts gained the offender's assets, and killing an outlaw was far less dangerous than blood revenge since the law's legitimacy made it easier to garner support and isolate the convicted outlaw.<sup>114</sup> Plus, killing an outlaw would not subject the prosecutor to any legal action

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109. Miller articulates externalized law enforcement in Iceland in terms of the lack of state monopoly on violence:

In Iceland, the violence of the law was not something removed from the general populace. There were no state apparatus to pretend to monopolize the legitimate use of force. Violence did not take place behind prison walls, there was no sheriff to issue a summons to a hostile party, to keep the peace in the court, or to execute judgment. It was up to free adult males to do the work of law.

MILLER, *supra* note 71, at 232.

110. See BYOCK, *supra* note 77, at 231-32; MILLER, *supra* note 71, at 234.

111. See MILLER, *supra* note 71, at 239.

112. See *id.* at 234, 238.

113. See, e.g., Peter Dinunzio et al., *Karl N. Llewellyn: How Icelandic Saga Literature Influenced the Scholarship and Life of an American Legal Realist*, 39 CONN. L. REV. 1923, 1936 (2007) ("Parties were free to abandon the proceedings at anytime and engage in bloody attacks against the opposing party. As a result, the specter of violence loomed at every stage of a lawsuit . . .").

114. See MILLER, *supra* note 71, at 239.

himself.<sup>115</sup> As a result, as William Miller describes, “any feud[] was likely at some time to find itself in a phase which employed legal process. . . . [E]ventually the dispute got to law.”<sup>116</sup>

As we can see, the fact that Iceland did not have police, public prosecutors, or prisons did not mean that Icelandic law was not enforced. Those who broke the law were subject to sanctions for their offenses. Depending on the violation, primary enforcement rules required the violator to pay a fine or go into exile. Icelandic law also contained an escalating schedule of sanctions for those who failed to abide by the initial penalties. Finally, Icelandic law contained secondary rules for dealing with those who refused to obey the primary enforcement rules. Thus, Icelanders were forbidden to assist or harbor an outlaw and were permitted to confiscate their property and, in the case of full outlawry, to take their life.

Unlike modern states that have professional bureaucracies, Icelandic law *externalized* enforcement on to private parties. Moreover, it did so primarily, though not exclusively, through the technique of *outcasting*. Outlawry treated the lawbreaker as a social outcast: it denied him the benefits of social cooperation and membership. Thus, it imposed a duty on the outlaw to leave the country and prohibited others from according him hospitality or assistance in any way. It also released others from respecting the outlaw’s property rights.

It should not be surprising that, in the context of Iceland, social exclusion would be a powerful tool of law enforcement. Given the harsh environment and scarce resources, Icelanders had difficulty surviving on their own. Exclusion from social life made life intolerable for most inhabitants: losing one’s property and the assistance of one’s neighbors was a compelling enough reason to take the law seriously.<sup>117</sup>

### *B. Classical Canon Law*

Iceland is not the only regime to have had a legal system despite not possessing police or other law-enforcement personnel. In fact, the canon law of the Roman Catholic Church—perhaps the longest surviving legal system in

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115. *Id.* at 238-39.

116. *Id.* at 238.

117. Though violence could be used against offenders, it was nevertheless a precarious enforcement mechanism. Attempting to kill another person, after all, is a dangerous activity and most people were not eager to try. *See id.* at 211.

history<sup>118</sup>—is similar to medieval Iceland in this regard: it managed to have a legal regime, and enforce its law, despite the absence of internal coercive institutions.

In this Section, we will briefly describe the medieval canon law regime. Fortunately, the burden of exposition here is considerably lighter because of the greater familiarity of the subject matter. In contrast to the medieval Icelandic commonwealth, most readers know a good deal about the history and structure of the Catholic Church. They know that the Catholic Church has legislative officials and institutions such as the pope, the College of Cardinals, bishops, Vatican councils, and so on. They know that these individuals and bodies create many rules, such as those relating to holy days, sacraments, sexual conduct, family structure, ordination of clergy, heresy and so on, and prescribe sanctions for their violation.

What they might not know, however, is that the Catholic Church has, and has had, a very complex court system. We will begin, then, by describing this court system as it existed at the height of canon law, during the so-called “classical period.”<sup>119</sup> We will see that classical canon law constituted a genuine

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118. While there is uncertainty about when exactly the canon law first constituted what could be considered a cohesive “legal system,” most scholars assert that by the second or third century, the church had developed a structure of episcopal courts with sufficient hierarchical authority to discipline recalcitrant members. *See, e.g.*, JAMES A. BRUNDAGE, *MEDIEVAL CANON LAW* 7-9 (1995) (noting how Constantine I’s acceptance of the Christian church coincided with more regular meetings of church councils and synodal assemblies, which aided in the development of an ecclesiastical organizational structure and a more clearly enunciated authority for bishops over their congregants); ELISABETH VODOLA, *EXCOMMUNICATION IN THE MIDDLE AGES* 7 (1986) (noting that although “[l]ittle is known of early ecclesiastical institutions,” hierarchical institutions existed by the second century and episcopal courts had disciplinary authority by the third century). This system of rules, first created and enforced over 1700 years ago, continues to be used today. *See, e.g.*, R. H. HELMHOLZ, *THE SPIRIT OF CLASSICAL CANON LAW* 1 (1996) (noting that large sections of canon law were still in force in nineteenth-century England, that many canon law rules have taken root in modern English and American law, and that courts of the Catholic Church still use this legal regime).

119. Most scholars mark the beginning of the “classical period” at some point in the twelfth century, with the development of a progressively more complex and centralized legal regime that the Church applied with greater uniformity. For a full discussion of the beginnings of the classical period, see, for example, CHARLES HOMER HASKINS, *THE RENAISSANCE OF THE TWELFTH CENTURY* (1927), which describes the intellectual reinvigoration that marked this period; HELMHOLZ, *supra* note 118; and JAMES A. BRUNDAGE, *THE PROFESSION AND PRACTICE OF MEDIEVAL CANON LAW* 26-63 (1988). Marking the “end” of the classical period of canon law is more difficult. Most scholars mark 1234 as the end of the period of prominence for Gratian’s *Decretum*, a date which coincides with the decision of Pope Gregory IX to send his own decretals to the preeminent universities in Bologna and Paris and marks a time of transition when the classical canon law developed into a broader legal



legal system, for it not only possessed legislative institutions but a sophisticated structure of adjudicative ones as well.

Canon lawyers normally mark the beginning of the classical period at 1140 with the publication of Gratian's *Decretum*.<sup>120</sup> In this book, Gratian sought to synthesize and harmonize the conflicting mass of canon rules derived from disparate sources, such as scripture, papal decisions, church councils, and the sayings of church fathers. The *Decretum* quickly became the principal canon law textbook in the newly founded law schools throughout Europe and stimulated a surge in legal scholarship devoted to explaining the various doctrines of Gratian.<sup>121</sup>

In general, law begets law, and canon law is no exception. One of the great accomplishments of Gratian's textbook was to demonstrate how abstract principles of canon law could be used to resolve apparent conflicts between rules and how these rules could then be used to answer concrete questions.<sup>122</sup>

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tradition referred to as the *ius commune*. See generally ANDERS WINROTH, *THE MAKING OF GRATIAN'S DECRETUM* (2007) (examining the original version of the *Decretum* and the legal and intellectual developments surrounding its creation); Kenneth Pennington, *The Decretalists 1190 to 1234*, in *THE HISTORY OF MEDIEVAL CANON LAW IN THE CLASSICAL PERIOD, 1140-1234: FROM GRATIAN TO THE DECRETALS OF POPE GREGORY IX*, at 211, 245 (Wilfried Hartmann & Kenneth Pennington eds., 2008) [hereinafter *THE HISTORY OF MEDIEVAL CANON LAW*]. Yet the end of Gratian's prominence is not generally considered to be when the classical period also ended. Indeed, the Code of Canon Law that existed in the time of Gratian was only significantly reformed with the promulgation of a new code in 1917. Prior to 1917, the most significant reform of canon law—impelled by the Protestant Reformation—occurred with the Council of Trent, which met from 1562-63 and significantly amended, clarified, and added new doctrine to the corpus of canon law that had existed in 1140. See generally JAMES A. CORIDEN, *AN INTRODUCTION TO CANON LAW* 10, 15-20 (rev. ed. 2004) (discussing what Coriden identifies as the seven different periods in the development of canon law and marking the difference between the classical period and a period of decline and reform as beginning around the time of the Protestant Reformation).

120. See BRUNDAGE, *supra* note 118, at 48. While the date of composition and first appearance of the *Decretum* is uncertain, it is customary to consider its first publication in 1140. HELMHOLZ, *supra* note 118, at 7. For a detailed description of the writing of the *Decretum* and a full discussion of both the revisions of the document and the important additions made to Gratian's work, see, for example, Michael H. Hoeflich & Jasonne M. Grabher, *The Establishment of Normative Legal Texts: The Beginnings of the Ius Commune*, in *THE HISTORY OF MEDIEVAL CANON LAW*, *supra* note 119, at 1, 1-21.

121. For a full discussion of the *Decretum's* influence on classical canon law, see, for example, James A. Brundage, *The Teaching and Study of Canon Law in the Law Schools*, in *THE HISTORY OF MEDIEVAL CANON LAW*, *supra* note 119, at 98, 98-120, which describes the growth in complexity of the canon law as a result of Gratian and the coinciding growth in law schools with scholars dedicated specifically to the study of canon law; and HELMHOLZ, *supra* note 118, at 7-10.

122. BRUNDAGE, *supra* note 118, at 48.

This increase in legal knowledge led to an increase in litigation, which in turn generated a considerable amount of new law.<sup>123</sup>

The growth in legislation and litigation created tremendous pressure for the institutional reform of ecclesiastical courts. Before the classical period, adjudication was mainly an ad hoc affair. At the local level, bishops and archdeacons decided cases in the normal course of their official duties and did so without a cadre of trained personnel. Bishops who faced particularly difficult legal questions could call a “synod,” a general assembly of clergy from the region. During these meetings, legal problems would be discussed and the members would advise the bishop on how to rule.<sup>124</sup>

By the close of the twelfth century, however, bishops and synods could no longer keep up with the rising caseloads and responded by delegating judicial responsibilities to legally trained judges. These judges were often called the “bishop’s officials,” and chief judges the “officials-principal.”<sup>125</sup> By the latter half of the thirteenth century, many of these officials-principal presided over complex judicial bureaucracies. In addition to a staff of clerks who produced and copied documents, registrars who maintained the docket, and bailiffs who notified parties about their appearances, subordinate judges would often examine witnesses and try cases delegated by the official-principal. Because this court was a standing judicial forum, it became known as the bishop’s “consistory court.” Consistory courts were distinguished from those at which the bishop himself presided. These latter courts were known as “courts of audience.”<sup>126</sup>

Above the bishop consistory courts and courts of audience were the provincial courts. Archbishops established provincial courts to hear appeals coming from below as well as exercising original jurisdiction over particularly weighty matters.<sup>127</sup> At the top of the judicial hierarchy, of course, was the pope

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123. *See id.* at 44-54.

124. *Id.* at 120.

125. *Id.* at 121-22.

126. For further discussion of the development of the episcopal court system in the twelfth and thirteenth centuries, see *id.* Lesser prelates, such as archdeacons, also developed courts of their own. These courts concerned themselves with minor disputes not sufficiently important to warrant episcopal attention and with the enforcement of disciplinary rules of the Church. Thus, these lesser courts punished sexual misbehavior, drunkenness, violations of the Sabbath, and so on. Archdeacons, too, responded to the rising tide of litigation by delegating their judicial responsibilities to trained legal professionals to adjudicate cases that would ordinarily come before them. For a full discussion of the powers and responsibilities of different classes of clerics, see *id.* at 122-23.

127. *Id.* at 123.

and his curia in Rome. The pope claimed both original and appellate jurisdiction over all matters that arose within the entirety of western Christendom.<sup>128</sup>

By the late twelfth century, popes began to appoint trained legal professionals to the College of Cardinals who would advise them when hearing cases. The resulting judicial body became known as the “Roman consistory.”<sup>129</sup> The pope and cardinals met daily in consistory to hear arguments and appeals and then to deliberate about the proper outcome in each case. This system ultimately proved unworkable, given the crushing demands of other papal responsibilities.<sup>130</sup> As a result, the pope delegated all but the most important cases to general hearing officers known as “auditors-general.” Because the auditors-general heard cases in a round courtroom, taking turns presiding, the court was nicknamed “the Wheel.”<sup>131</sup> To this very day, the pope uses the Wheel as the main tribunal of justice.<sup>132</sup>

The increased complexity of the system of adjudicating canon law was in many respects due to the increasing sophistication of the lawyers trained to handle such cases. Scholars such as James Brundage celebrate this accomplishment as the greatest triumph of classical canon law, a system that was as much about ferreting out and condemning heretics as it was about establishing uniform inheritance and land title rights between sophisticated actors. Moreover, because of the increased sophistication of the canon law bar, the Church was able to engage in a form of legal regime arbitrage: litigants went to ecclesiastical courts – instead of local ones – because the courts, stocked with well-prepared graduates of elite canon law universities, offered more efficient and effective services than those offered locally.<sup>133</sup>

Tomes, of course, could be written about the ecclesiastical courts during the classical period. Our aim here is only to sketch the basic structure of the ecclesiastical courts so as to give the reader a reason to believe that canon law

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128. *Id.*

129. *Id.* at 124.

130. *Id.* at 123-25.

131. *Id.* at 125.

132. For a full discussion of papal oversight of issues arising in canon law, see *id.* at 124-26.

133. See BRUNDAGE, *supra* note 119, at 30-35 (describing what the author identifies as four separate stages in the professionalization of canon lawyers and explaining how with this increasing professionalization, a canon lawyer’s caseload became larger and often more complex); see also VODOLA, *supra* note 118, at 35 (“In another way, too, canon law had become more concerned with law and legal practice . . . university training in jurisprudence, and especially study of the *Corpus iuris civilis*, had intensified the canonists’ focus on purely juristic themes . . .”).

was an actual legal system. Church canons were not simply the rules of an organized religion—they were laws of a living, breathing legal regime. They were created by legislative processes and applied by a hierarchical and complex system of duly constituted courts.

Having attempted to show that classical canon law was a genuine legal system, we will now explore the ways in which the Catholic Church enforced its rules. To do so, we begin with the debate among canon lawyers about whether the Church was permitted to use “temporal” sanctions, such as monetary fines, corporal punishment, and the death penalty. Initially, many argued that the Church ought to remain in the higher realm and eschew physical coercion. Punishments should be limited to spiritual sanctions: prayer, fasting, public displays of contrition, and so on. Gratian quotes the Bible to support this point: “resist not evil: but whosoever shall smite thee on thy right cheek, turn to him the other also.”<sup>134</sup> Gratian does, however, collect authorities justifying the use of force. Augustine, for example, argued that such counsels of patience were meant to soften the hearts of good people. If one applied such maxims to bad people, one would be giving them license to commit evil. Augustine also argued that inflicting force—even deadly force—to turn someone away from evil is actually more charitable than letting them persist in sin. Even execution is far better than eternal damnation.<sup>135</sup>

The canonists tried to harmonize these opposing viewpoints in the following way. First and foremost, they held that the Church was forbidden from *directly* inflicting most types of physical punishment. In particular, the death penalty could never be directly imposed by the church. Nevertheless, the Church could seek the death penalty through the proper secular authorities, though only in the interest of justice and only when there was no longer any reasonable hope the criminals would amend their ways.<sup>136</sup>

Canon law did permit bishops to keep armed personnel in their retinue and to threaten physical force in order to enforce their judgments. However, it emphatically prohibited them from following through on their threats if the person subject to the punishment resisted. Bishops had only two main choices

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<sup>134.</sup> *Matthew* 5:39 (King James); see also HELMHOLZ, *supra* note 118, at 339-40, 344 (documenting the general discussion amongst ecclesiastical officials over the use of temporal sanctions and citing Gratian’s *Decretum*); VODOLA, *supra* note 118, at 2-12 (noting other sources of ecclesiastical and biblical authority authorizing excommunication).

<sup>135.</sup> HELMHOLZ, *supra* note 118, at 345-47.

<sup>136.</sup> *Id.* at 348.

for dealing with contumacy: excommunication or recourse to secular authorities to impose temporal sanctions.<sup>137</sup> Let us discuss each option in turn.

Excommunication came in two basic forms, minor and major. Minor excommunication entailed separation of the person from the sacraments of the Church. Thus, the excommunicated could not receive the Eucharist, go to confession, be married, and so on. Nor could they hold ecclesiastical office or participate in the liturgy in a ministerial capacity (though they were permitted to attend mass). Major excommunication entailed a complete separation from the Christian community. Those subject to major excommunication were shunned from their neighbors; no one was permitted to talk, eat, or do business with them.<sup>138</sup>

Because excommunication was the most serious sanction the Church could impose on those who disobeyed its rules—the *glossa ordinaria* to the Decretals called it “the eternal separation of death”<sup>139</sup>—the Church imposed strict requirements on its use. Both major and minor excommunication could be imposed only by an authorized episcopal court and only after due process had been served.<sup>140</sup> Thus, the person would have to have had fair warning, the opportunity to defend himself, and the right of appeal to a higher court. Sentences of excommunication had to be in writing, where the cause of excommunication was clearly set out, and the person excommunicated was entitled to a copy.<sup>141</sup>

The extreme gravity of excommunication also led canonists to insist that it be used only “medicinally.” Excommunication was designed to restore spiritual health, not to punish. Thus, if a poor man could not pay his debt, he was not to be excommunicated for his failure. Moreover, canon law required that a sentence of excommunication be lifted if it was clear that the person excommunicated had no intention of complying with the court’s original order.<sup>142</sup>

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137. For a full discussion of how and when Church figures could use temporal power, see *id.* at 344-48.

138. For a general discussion of major and minor excommunication, see *id.* at 370-84.

139. *Id.* at 375.

140. Persons could only be excommunicated by judicial superiors. *Id.* at 376. Thus, bishops could not be excommunicated by bishops but only by archbishops or higher.

141. *Id.* at 376.

142. For a discussion of the overriding “medicinal” purpose of excommunication, see *id.* at 376-78. See also *id.* at 377 (quoting Joannes Andreae, a fourteenth-century legal scholar, as stating that “the prelate, as a doctor, who sees that the medicine of excommunication, even if justly imposed, is not helpful but rather detrimental may discreetly remove it even during contumacy, if he sees that this will be useful to the health of the person excommunicated”).

In special cases, canon law dispensed with the necessity of adjudication. In situations of heresy or violent assault on a cleric, the offender was subject to automatic excommunication, known as “excommunication *latae sententiae*.”<sup>143</sup> In order to circumvent the requirement of due process, canon law promulgated the fiction that offenders had been warned in advance that excommunication would automatically follow a certain offense and thus they had fair notice of this sanction. Once a person was excommunicated *latae sententiae* and not in danger of dying, only the papal court could grant absolution and lift the sanction.<sup>144</sup>

If excommunication did not motivate the offender to reform his ways, canon law permitted ecclesiastical courts to refer the matter to the secular authorities. In the terminology of canon law, the recalcitrant person would be “relaxed” to the secular arm for punishment. A lively debate arose among canon lawyers as to whether the Church was merely permitted to request that secular authorities impose temporal punishment or whether it could demand assistance as a matter of right. Canon law eventually settled on the latter option. The legitimacy of secular authorities, they claimed, ultimately derived from the Church, and thus the government is obligated to heed ecclesiastical referrals. Failure on the part of the king to comply with ecclesiastical demands could itself be met with a sentence of excommunication.<sup>145</sup>

That the Church claimed authority over the secular arm did not mean that the secular arm always acquiesced. In France, for example, King Louis IX

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143. *Id.* at 383-85.

144. *Id.* at 385. Out of concern that those to be excommunicated receive due process, Gratian was particularly wary of excommunication *latae sententiae*, precisely because this form of excommunication did not give the excommunicate a judicial avenue to contest the sanction. See VODOLA, *supra* note 118, at 29-30.

145. For a full discussion of these two perspectives, see HELMHOLZ, *supra* note 118, at 350-57. For a discussion of the concept of “relaxing” a sinner “to the secular arm,” especially as the process applied to early instances of heresy, see Joseph Prud’homme, *Dissent and the Death Penalty: Developing a Comparative Perspective*, in AUGUSTINE AND HISTORY 91, 115 (Christopher T. Daly, John Doody & Kim Paffenroth eds., 2008). Helmholtz divides these two camps into those adopting the Gelasian view and those adhering to a hierocratic perspective. Those espousing the former position held that temporal authority and spiritual authority were “two jurisdictions [that] were independent but mutually supportive.” HELMHOLZ, *supra* note 118, at 351. In contrast, as Church leaders found it useful to infer a duty on the part of the state to aid in effectuating ecclesiastical dictates, they began to promote the hierocratic view. As the name implies, this position held that a temporal authority had to enforce the mandates of the Church on pain of excommunication. *Id.* at 352-53. Interestingly, Vodola notes a tension in exerting pressure, through excommunication, on leaders who refused to follow Church directives, and the need to avoid fanning the flames of anticlerical movements, particularly those in France. See VODOLA, *supra* note 118, at 140, 161-64.

refused to respect ecclesiastical referrals on the grounds that doing so would lead to grave injustices. The Church was more successful in the German-speaking lands, where secular authorities were receptive to its entreaties. Cooperation between spiritual and secular authorities was strongest in England. From the early thirteenth century, the common law granted the Church the right to petition the royal courts to impose sanctions that were unavailable in ecclesiastical courts. After forty days of excommunication, a bishop could submit a petition, called a “significavit,” to the Chancery requesting that the recalcitrant offender be imprisoned. Upon receipt of the significavit, the Chancery would issue a writ, called a “letter of caption,” ordering the sheriff to imprison the offender until he received absolution from the Church. Importantly, English courts made no inquiry into the legitimacy of the Church’s requests. As long as the significavit was issued by a duly constituted episcopal authority, secular authorities would issue letters of caption as a matter of course.<sup>146</sup>

As this brief sketch indicates, medieval canon law was able to enforce its rules despite the fact that it was not authorized to use physical coercion. For while it did not have control over the body, the Church claimed power over something even more precious: the soul. Canon law, for example, authorized ecclesiastical courts to control the expiation of sin. Judges could impose spiritual sanctions on the offender requiring certain acts of public penance before absolution would be granted.

If these primary enforcement norms proved ineffective, canon law’s secondary enforcement rules permitted courts to excommunicate recalcitrant individuals. Through minor excommunication, offenders were denied the sacraments of the Church and, as a result, risked eternal damnation.<sup>147</sup> In the terminology of this Article, minor excommunication is a form of “internalized outcasting.” It is internalized in that *Church officials* were prohibited from ministering to the excommunicated individual. It is outcasting because the

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146. For a full discussion of the varying ways temporal authorities enforced excommunication regimes, see HELMHOLZ, *supra* note 118, at 357-59.

147. An excommunicate, while excluded from Church rituals or the community itself, was not damned merely by nature of the excommunication: such a final determination on the fate of one’s soul could only be made by God. *See, e.g.*, R. H. HELMHOLZ, *CANON LAW AND THE LAW OF ENGLAND* 108 (1987) (stating that “earthly excommunication did not represent a final determination” given that the sanction was always subject to “reversal by God” and “[u]njust sentences were inevitable”).

excommunicated were *nonviolently denied the benefits of receiving Church sacraments*. Indeed, “excommunication” means “separated from the community.”<sup>148</sup>

By claiming power over the spiritual lives of offenders, the Church was able to leverage control over their social lives as well. Through major excommunication, the Church could deprive offenders of social interaction and thereby cut them off from their communities. Major excommunication, thus, is a form of externalized outcasting, because it prohibited the *laity* from associating and cooperating with the offender.

We have also seen that the Church had yet another enforcement tool in its arsenal. Though it denied itself the amenities of a state, the Church had the next best thing: access to states that were willing to use physical force. Thus, the Church was able to externalize law enforcement by referring the matter to secular authorities. While the Church did not dirty its hands by using physical force, it was able to see to it that physical forms of coercion would ultimately be used against sinners.

### C. Feature or Bug?

As the cases of medieval Icelandic law and canon law demonstrate, the Modern State Conception is both an excessively narrow and historically incomplete account of law. Legal systems can and have existed despite lacking the capacities of a modern state. Even without police, jails, and professional prosecutors, these systems were able to do what legal systems normally do: enact legislation by officials who follow formal rules, resolve disputes according to preexisting norms by judges following rules of procedure and

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148. Numerous scholars of classical canon law have suggested that the sanction was overused and had become less effective by the time of the Reformation. Helmholz, for example, cites one late-medieval commentator on canon law as saying that the practice had come to be used for trivial purposes and had “wrought confusion in the church.” HELMHOLZ, *supra* note 118, at 390. He quotes another French “provincial estate” as saying that excommunication was used so indiscriminately that “the greater part of the population was excommunicated.” *Id.* at 391; *see also* HELMHOLZ, *supra* note 147, at 102 (noting the common perception that excommunication ceased to be effective because its “misuse” caused a “decline in respect for the Church and clergy, or with a more general breakdown in societal order”); David C. Brown, *The Keys of the Kingdom: Excommunication in Colonial Massachusetts*, 67 *NEW ENG. Q.* 531, 535 (1994) (explaining the Church’s power to separate a sinner from communion with other Christians); Rosalind Hill, *The Theory and Practice of Excommunication in Medieval England*, *HIST.*, Feb. 1957, at 11 (arguing that the sanction was overused and had become trivialized as a minor inconvenience). While the excessive use of excommunication no doubt diminished its effectiveness, this would be true for any sanction, even those administered by regimes with internalized enforcement mechanisms.



evidence, and enforce legislation and court orders using various forms of coercion.

The Modern State Conception fails, therefore, because of its parochial definition of law enforcement. Contrary to the Internalized Violence Thesis, it is possible to enforce the law in ways other than how modern states enforce ordinary domestic law. Rather than rely on internal enforcement mechanisms, legal systems can utilize non-regime members to exercise coercion against those who violate the rules. And rather than rely upon the imposition of physical force, they can depend instead on nonviolent exclusion from the benefits of community.

As we have seen, Iceland not only externalized its enforcement but used both outcasting and violence. It externalized outcasting by requiring outlaws to exile themselves and by forbidding others from assisting these outlaws in any way. And it externalized violence by requiring the holder of a full outlawry judgment to kill the outlaw and by permitting others to do the same. Medieval canon law also externalized its outcasting through the technique of major excommunication<sup>149</sup> and externalized violence through the relaxation of the contumacious to the secular arm.<sup>150</sup>

At this point, the defenders of the Modern State Conception might concede that regimes need not enforce their rules through internalized violence for these rules to be law. Rather, they might make a normative claim instead: regimes that do not use internalized violence may be legal systems, but they are *deficient* ones. After all, the examples we used to prove our case are premodern, medieval systems. Their lack of physically coercive bureaucracies, the argument might go, was a serious inadequacy, a problem that was cured only with the advent of the modern state.

Two responses are in order. First, externalization and outcasting are not the exclusive province of the medieval world. In our modern system of cooperative federalism, the federal government routinely outsources enforcement of federal law to the states. States play a critical role in federal environmental, education, social welfare, health care, and criminal law.<sup>151</sup> The Clean Air Act, for instance, seeks to “protect and enhance the quality of the Nation’s air resources so as to

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149. Minor excommunication was a form of *internalized* outcasting because it was carried out by the clergy.

150. As mentioned before, relaxation to the secular arm became an option only in certain countries and only after the beginning of the thirteenth century. It follows, therefore, that neither internalized nor *externalized* violence is necessary for legality.

151. While states play a central enforcement role in federal environmental law, enforcement does not fall on states alone. The federal government, through administrative agencies, and individual citizens, through citizen suits, contribute to the enforcement effort.

promote the public health and welfare and the productive capacity of its population”<sup>152</sup> by harnessing the bureaucratic machinery of state governments. While the federal government sets the mandate to be enforced, states develop implementation plans to bring the federal mandate to fruition. Each state has “primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained.”<sup>153</sup>

State implementation plans for national primary and secondary ambient air quality standards are to “include enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as schedules and timetables for compliance.”<sup>154</sup> In addition to delegating enforcement to states, the Clean Air Act places sanctioning authority in states.<sup>155</sup> States are called upon to “assess and collect a noncompliance penalty against every person who owns or operates” any stationary source not in compliance with federal emission controls and standards.<sup>156</sup>

Modern legal systems also enforce their rules through healthy doses of outcasting. As we saw before, domestic public law in the United States is enforced through impeachment, elections, job termination, and defunding. Rather than arresting the President of the United States for failing to abide by the law, the President can be cast out of office through impeachment and conviction or defeat in the next election. Federal agencies that fail to execute congressional mandates are not sent to the gulag—their budgets get slashed. And states that fail to enforce federal law are not normally invaded by the United States Army—they simply lose valuable federal dollars and must, as a result, cut services or increase taxes.

There is another reason to reject the idea that systems that lack physically coercive bureaucracies are deficient. At least from the perspective of the cultures involved, the absence of such power was a feature, not a bug. Icelanders considered their outlawry regime to be in keeping with the egalitarianism of the Commonwealth. Iceland was special precisely because it did not have a king. Similarly, the Church of the classical period was convinced

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152. 42 U.S.C. § 7401(b)(1) (2006).

153. *Id.* § 7407(a).

154. *Id.* § 7410(a)(2)(A).

155. The Clean Air Act vests the Environmental Protection Agency with sanctioning authority as well. *Id.* § 7410(m).

156. *Id.* § 7420(a)(2)(A).

that temporal sanctions would sully its spiritual character and mission. Rather than being a source of shame, canon law took pride in the distance it kept from Caesar. Those who regard such systems as lesser versions of law, therefore, betray a modern prejudice: they fail to appreciate that brute power is not always to be pursued and that, indeed, its acquisition can be inconsistent with the moral ends of a legal system.

#### IV. OUTCASTING AND EXTERNAL ENFORCEMENT IN INTERNATIONAL LAW

With the blinders imposed by the Modern State Conception removed – and a fuller vision of law that includes outcasting and external enforcement as really and truly law – international law appears in an entirely new light. We are able to see that allowing the Modern State Conception to set the terms of the debate over international law leads us to ask and answer the wrong questions. Yes, very little of international law meets the Modern State Conception of international law – very little (if any) of it is enforced through brute physical force deployed by an institution enforcing its own rules. But what is interesting is not so much what international law is not, but *what it is*. And that is law that operates almost entirely through outcasting and external enforcement.<sup>157</sup>

In this Part, we document how international law works in light of the broader understanding of law that we have put forth. What we see is that, time and again, international legal institutions use others (usually states) to enforce their rules, and they typically deploy outcasting – denying individuals the benefits of social cooperation – rather than physical force. The much more complete picture of law offered above thus not only gives the lie to the Modern State Conception, but also provides a new way of understanding international law and how it functions.

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157. Outcasting bears a strong resemblance to Anthony D’Amato’s concept of reciprocal entitlement violation. According to D’Amato, international law is enforced by allowing victim states to violate the rights of offending states. See D’Amato, *supra* note 6, at 1310-13. There are three main differences, however, between outcasting and reciprocal entitlement violation. First, outcasting does not necessarily involve the *violation* of an entitlement. Consider boycotts. By refusing to trade with another, the outcaster declines to exercise her own entitlement to trade, rather than violate any of the rights of the outcasted. Second, D’Amato conceives of reciprocal entitlement violations as internalized violent enforcement, *id.* at 1313, whereas outcasting is nonviolent and neutral as between internal and external enforcement. Third, D’Amato treats reciprocal entitlement violations as permissive and first-party countermeasures, *id.* at 1310-13, whereas outcasting comes in mandatory and third-party varieties as well. See *infra* text accompanying note 181 and text following note 210.

Different international legal regimes can be classified depending on the particular modes of enforcement on which they depend. We illustrate this by dividing law enforcement into internal and external enforcement, and into that which resorts to physical force and that which does not. These two different axes can overlap to create four separate categories: (1) internal and physical; (2) external and physical; (3) internal and nonphysical; and (4) external and nonphysical. To illustrate this, consider the following four-square diagram:

**Figure 1.**

	INTERNAL	EXTERNAL
PHYSICAL	Modern State Conception	External Physical Enforcement
NONPHYSICAL	Internal Outcasting	External Outcasting

As this diagram makes clear, the Modern State Conception of law enforcement is only one part of the larger picture—it encompasses law that is enforced through internal systems using physical force. But there are three other forms of law enforcement: external physical enforcement (enforced by external actors using physical force), internal outcasting (enforced by internal actors using nonphysical means), and external outcasting (enforced by external actors using nonphysical means). As we described the Modern State Conception of law in some depth above, we focus here on completing the picture with more detailed descriptions of the other three forms of law enforcement. This serves as a prelude to a closer examination in the next Part of the type of legal enforcement regime that is most prevalent in international law: external outcasting.

*A. External Physical Enforcement*

External physical enforcement operates by externalizing enforcement onto other actors that, in turn, resort to physical force. As we noted above, the

Modern State Conception demands that enforcement be enforced internally—that is, by the regime itself. All *external* legal enforcement (whether physical or nonphysical) violates this demand. It instead tasks some party outside the regime with ensuring compliance with the rules. Classical canon law, for example, provided that the ecclesiastical courts could “relax” a person to external actors—the secular authorities—for physical punishment.<sup>158</sup>

Nearly all physical enforcement of international law is external physical enforcement.<sup>159</sup> As noted above,<sup>160</sup> a central principle of international law—codified in Article 2(4) of the United Nations Charter—is the prohibition on the use of aggressive force by a sovereign state against the sovereign territory or political independence of another state. Although the original intention was for the United Nations to have troops at its disposal to carry out enforcement actions,<sup>161</sup> in practice such actions have been carried out by states acting with the approval of the United Nations Security Council.

In the Korean War, for example, the Security Council encouraged member states to “furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area.”<sup>162</sup> Similarly, the first U.S. Gulf War was initiated pursuant to Security Council Resolution 678, which authorized “Member States co-operating with the Government of Kuwait . . . to use all necessary means . . . to restore international peace and security in the area.”<sup>163</sup> The resolution “[r]equest[ed] all States to provide appropriate support for the actions undertaken” pursuant to that authorization and “[r]equest[ed] the States concerned to keep the Security Council regularly informed on the progress of actions undertaken.”<sup>164</sup> In these cases and many others like them, the use of physical force under Chapter VII was carried out by actors outside the institutional bureaucracy of the United Nations, thus making the use of physical force to enforce the law *external* to the United Nations.

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158. See *supra* text accompanying note 145.

159. For discussion of *internal* physical enforcement of international law, see *supra* Section II.A.

160. See *supra* Section II.B.

161. Article 43 of the U.N. Charter calls on member states to make “a special agreement or agreements” to provide armed forces to the Security Council in order to form a standing U.N. army. To date, no member state has signed a special agreement with the United Nations. U.N. Charter art. 43.

162. S.C. Res. 83, U.N. Doc. S/RES/83 (June 27, 1950).

163. S.C. Res. 678, ¶ 2, U.N. Doc. S/RES/678 (Nov. 29, 1990).

164. *Id.* ¶¶ 3-4.

External physical enforcement also occurs through the use of self-defense (authorized by Article 51 of the U.N. Charter) and, as we argued earlier,<sup>165</sup> through mutual defense treaties authorizing states to come to the aid of one another in the event of an attack. States are permitted to use physical force to engage in self-defense and collective self-defense to repel an armed attack.<sup>166</sup> Mutual defense treaties enforce this principle of international law by providing that if one of the parties to the treaty is attacked, the other will come to its aid, thereby enforcing the right of the first state to repel aggression against it. In both cases, the use of physical force is external to the treaty organization.

*B. Internal Outcasting*

Internal outcasting occurs when the internal bureaucratic structures of a legal system enforce the law without resorting to the threat or use of physical force. Internal outcasting meets the internality condition of the Modern State Conception—it has at least one secondary enforcement link that is addressed to officials of the regime in question. But it does not provide for the use of violence—it does not require or permit officials of the regime to use physical force to enforce the law. For example, minor excommunication in classical canon law entailed separation of a person from the sacraments of the Church.<sup>167</sup> This penalty relied on enforcement by Church officials (*internal* to the Church) by denying the benefits of membership in the Church (*outcasting*).

Internal outcasting is used in international law any time a regime sanctions lawbreaking behavior of a state by excluding the state from participation in the treaty bodies. The World Health Organization (WHO) offers an example. The WHO directs and coordinates a vast array of international public health programs aimed at everything from combating infectious diseases (such as HIV/AIDS, swine flu, and SARS) to setting health-related norms and standards to improving access to clean water.<sup>168</sup> State parties have the right to appoint delegations to the World Health Assembly, which is the WHO's

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<sup>165</sup>. See *supra* Section II.B.

<sup>166</sup>. Article 51 provides, in part: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.” U.N. Charter art. 51.

<sup>167</sup>. See *supra* notes 138, 147-148.

<sup>168</sup>. *Working for Health: An Introduction to the World Health Organization*, WORLD HEALTH ORG. (2007), [http://www.who.int/about/brochure\\_en.pdf](http://www.who.int/about/brochure_en.pdf).

decisionmaking body.<sup>169</sup> The Health Assembly elects its President and other officers, elects the Executive Board of the WHO (which serves as the executive arm of the WHO), adopts its rules of procedure, appoints the WHO Director-General, and establishes committees necessary for the work of the Organization, to name just a few of its enumerated functions.<sup>170</sup> The Health Assembly also has the authority to adopt health regulations and standards that are binding on parties that do not expressly opt out within a specified time period.<sup>171</sup>

The WHO is supported by mandatory contributions by state parties, as well as voluntary donor contributions. The mandatory state party contributions are enforced, moreover, by the prospect of internal outcasting. If a Member “fails to meet its financial obligations to the Organization . . . the Health Assembly may, on such conditions as it thinks proper, suspend the voting privileges and services to which a Member is entitled. The Health Assembly shall have the authority to restore such voting privileges and services.”<sup>172</sup> Note that the state party is not ejected from the WHO altogether. Instead, the state party loses the ability to participate as a voting member in the Health Assembly—and thus loses control over the activities of the WHO that the Health Assembly oversees and directs. In other words, the sanction for the offense of nonpayment is exclusion from the benefit of participating in the governance of the institution—an enforcement action carried out by the Health Assembly itself. Hence, the enforcement regime is internal outcasting: “internal” because the punishment is carried out by officials internal to the regime, and “outcasting” because the punishment constitutes exclusion from some of the benefits of community membership.

### C. *External Outcasting*

This brings us to the final form of law enforcement—external outcasting. To put external outcasting into context, recall that external physical enforcement violates the requirement of the Modern State Conception that the law be enforced by officials of the regime. Internal outcasting, on the other hand, meets the internality requirement but violates the brute force

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169. Constitution of the World Health Organization, art. 11, July 22, 1946, 62 Stat. 2679, 14 U.N.T.S. 185 (“Each Member shall be represented by not more than three delegates, one of whom shall be designated by the Member as chief delegate.”).

170. *Id.* arts. 16-18, 24, 28-29.

171. *Id.* arts. 21, 22.

172. *Id.* art. 7.

requirement—it does not require or permit officials to use *physical force*. External outcasting is distinguished from these two forms of law enforcement in that it violates *both* the internality and the brute force requirements—it is enforced by officials outside the legal regime without the use of physical force at any point in the enforcement chain. Outlawry under medieval Icelandic law, for example, was enforced not by the Allthing itself but by individual members of society. And the enforcement operated primarily (though not exclusively) by denying the outlaw the benefits of social cooperation and membership, rather than through physical force.

To see how external outcasting applies in international law, we return to the example of the WTO. As we noted in Part I, the WTO falls far short in the estimation of the Modern State Conception: it violates both the internality and the brute force requirements. And yet, the WTO is widely regarded as one of the strongest and most effective international legal regimes in existence. How is that possible?

We can now see that the WTO uses *external outcasting* to enforce its rules. The trade law principles established in the General Agreement on Tariffs and Trade are *not* enforced internally—that is, by the officials of the WTO itself. Yes, the WTO has a compulsory dispute resolution system. But the decisions rendered by the WTO’s Dispute Settlement Body are *enforced* through authorized retaliation by the aggrieved state party. It is the *states*, not the legal regime of the WTO itself, that impose the sanction. Enforcement is thus *external* to the legal regime. The enforcement regime of the WTO is also devoid of any threat or use of physical force. As we noted earlier, “[t]he WTO has no jailhouse, no bail bondsmen, no blue helmets, no truncheons or tear gas.”<sup>173</sup> Nor are member states permitted recourse to violence to enforce the rules. Instead, enforcement is limited to specific, approved, retaliatory trade measures taken by the aggrieved parties after a process of adjudication. Like the Icelandic outlaw, the state party found in violation of the General Agreement on Tariffs and Trade simply loses a measure of protection under the legal regime.<sup>174</sup> And just as in medieval Iceland, the threat of losing the protections of the legal regime provides a powerful inducement to compliance.<sup>175</sup>

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173. Hippler Bello, *supra* note 38, at 417.

174. Of course, the loss of protection is not as complete as it is for the full outlaw. Instead, the loss of protection, and hence permissible retaliation by the victim, is limited to an amount approved by the Dispute Settlement Body. The principle nonetheless remains the same: the law is enforced by lifting the legal protections ordinarily enjoyed by the offender and allowing external actors to retaliate without fear of sanction.

175. It is worth pausing to note that in international law, internal and external outcasting often occur hand-in-hand. A state found in violation of an international legal regime will often



The WTO is far from alone. Indeed, once we begin to look at international law through the prism of external outcasting, we see that it is everywhere. It is used to enforce international regulatory regimes such as the Convention on International Civil Aviation and the International Telecommunication Union; it is used to enforce the rules of regional organizations such as the European Convention on Human Rights; it is used by the United Nations Security Council to “give effect to its decisions”;<sup>176</sup> and it is used to enforce environmental legal agreements such as the Montreal Protocol and the Convention on International Trade in Endangered Species. External outcasting is so pervasive that it is fair to say that it is the primary mode of law enforcement utilized by international legal regimes. In the next Part, we further explore external outcasting and examine the various shapes that it takes across widely varying areas of international law.

#### V. EXTERNAL OUTCASTING IN INTERNATIONAL LAW

The concept of external outcasting serves to describe a form of law enforcement that is entirely distinct from the Modern State Conception. And in the process, it helps us see a set of common features that run through diverse international legal institutions—features that the Modern State Conception previously rendered invisible. Legal institutions that could not be substantively more different—for example, the Convention on International Civil Aviation and the Convention on International Trade in Endangered Species—use the same law enforcement model. That model takes on different forms in different contexts, but in each case external actors enforce the law through exclusion from the benefits of community membership. Seeing this common thread opens up a new way of understanding the basic structural foundations of international law.

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lose its voting rights or other rights to participate in the governance of the regime (internal outcasting), while at the same time losing the right to claim the protections or other benefits enjoyed by members of the legal regime (external outcasting). See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 68-87 (1995) (discussing “membership sanctions,” which frequently encompass both internal and external outcasting). Alternatively, a legal regime might provide for internal outcasting for some types of violations (for example, nonpayment of membership fees), and external outcasting for other types of violations (for example, violation of the substantive norms of the international legal regime). Our claim is not that these are mutually exclusive modes of enforcement but that they can—and should—be logically distinguished.

<sup>176</sup> U.N. Charter art. 41.

Before we begin, we should note that the dynamic reflected in the concept of “outcasting” is partially reflected in the literature on “shaming” and its “collateral consequences.”<sup>177</sup> Human rights scholarship, in particular, has highlighted the ways in which states are sometimes publicly singled out for their violations of human rights laws as a nonviolent means of discouraging lawbreaking behavior.<sup>178</sup> States that are singled out in this way lose the respect otherwise accorded to members of the legal regime, and this in turn might have concrete collateral consequences. When such shaming is explicitly contemplated by the law for the purpose of encouraging states to follow the law, then it is an instance of outcasting.

Consider an example: many human rights agreements require member states to make public reports to human rights treaty bodies regarding their practices covered by the treaty (usually accompanied by “shadow” reports by nongovernmental organizations), followed by a public dialogue with the bodies during which a state may be criticized for its practices. This process can subject a noncomplying state to shame. To the extent that the shaming is used as a nonviolent means of inducing compliance with the human rights treaties – and, as earlier noted, denies them respect otherwise accorded to members of the regime – it is an instance of outcasting (internal outcasting when the shaming is done by human rights bodies created by the treaties, external outcasting when shaming is done by nongovernmental organizations). As important as this is, however, we argue that the earlier literature has missed the bigger picture of which shaming is but a very small part.<sup>179</sup>

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177. One of us has elaborated on the “collateral consequences” that might result from a country’s decision to comply or not comply with a treaty regime. See Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005).

178. See, e.g., RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (forthcoming 2012); MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Emilie M. Hafner-Burton, *Sticks and Stones: Naming and Shaming the Human Rights Enforcement Problem*, 62 INT’L ORG. 689 (2008); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (reviewing ABRAM CHAYES AND ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY* (1995) and THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)). Similarly, the so-called “English School” has made related arguments about the socialization of states. See, e.g., HEDLEY BULL, *THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS* (1977); ANDREW HURRELL, *ON GLOBAL ORDER: POWER, VALUES, AND THE CONSTITUTION OF INTERNATIONAL SOCIETY* (2007). For more on norm-based theories of law enforcement, see OONA A. HATHAWAY & HAROLD HONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 111-204 (2005).

179. One of the authors’ own work is no exception. See Hathaway, *supra* note 177; Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Oona A.

Our argument proceeds in four steps. First, we describe five categories of variation in external outcasting regimes. We aim to show that even as we can see the common features of international legal institutions that utilize external outcasting, we can see—and describe—their differences as well. Second, we show not only that we can describe variation in external outcasting regimes, but also that we can explain it. The differences between outcasting regimes are not random; they are predictable responses to the underlying characteristics of the legal systems in which they operate. Third, we show that the characteristics of external outcasting regimes are not only responsive to the legal context in which they operate, but they also work together. Hence outcasting regimes are best understood not as bundles of separate characteristics operating in isolation from one another, but as a package of moving parts that work in tandem to enable the outcasting regime to address specific challenges. Finally, we end by acknowledging that outcasting, for all its strengths, is not a panacea; like other law enforcement models, it has its limits that should not be ignored.

*A. Describing Variation in External Outcasting*

We begin by identifying the variations in outcasting regimes and examining how they operate across international law. The categories through which we examine externalized outcasting here include whether the enforcement regime is (1) permissive or mandatory; (2) adjudicated or nonadjudicated; (3) in-kind or non-in-kind; (4) proportional or nonproportional; and (5) first parties only or third parties as well.<sup>180</sup>

The five categories are designed so that every international legal regime that uses external outcasting can be classified under each one. Every regime is either permissive or mandatory, every regime involves adjudication or not, and so on. By giving shape and order to the complex array of international legal regimes, we can identify the institutional design choices that underlie each regime. This sets the stage, in turn, for a renewed inquiry into the influence of international law on state behavior, allowing researchers and practitioners alike to better understand and anticipate international law's shortcomings and strengths.

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Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003); Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. 588 (2007).

180. The five categories outlined here are not exhaustive, but they do identify what we regard as the most salient characteristics of outcasting regimes.

1. *Permissive or Mandatory?*

An externalized outcasting regime may either *permit* states to refuse to provide an outcast state the benefits of cooperation or it might *mandate* that they deny the benefits of cooperation to the outcast state. Whether an outcasting regime is permissive or mandatory thus turns not on what it requires of the outcast state, but on the nature of the conduct it requires of the outcasting states.<sup>181</sup>

The WTO is an example of a *permissive* regime. As already explained, the regime relies on externalized outcasting. Once the Dispute Settlement Body has found that a state has acted in violation of the law—and the violating state has chosen not to change its behavior—it becomes an outcast. The state that originally brought the complaint (external to the WTO) is permitted (but not required) to deprive the outcast state of the usual legal protections offered by the General Agreement on Tariffs and Trade up to an amount determined by the Dispute Settlement Body.

Economic sanctions under Chapter VII of the U.N. Charter offer an example of a system of *mandatory* externalized outcasting sanctions. Chapter VII establishes the powers of the United Nation Security Council to maintain and restore peace and security.<sup>182</sup> The Security Council may use an array of techniques to achieve these aims, including “complete or partial interruption of economic relations”—in other words, outcasting from existing economic relations.<sup>183</sup> The United Nations does not actually impose the sanctions itself, however. Rather, it directs member states to do so; hence the outcasting is *externalized*. Participation, moreover, is required if the Security Council so specifies. The U.N. Charter provides that action “*shall* be taken by all the Members of the United Nations or by some of them, as the Security Council may determine.”<sup>184</sup>

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181. We presume that the decision of whether to outcast a state or not is always permissive. This category thus applies not to the decision of whether to render a state an outcast in response to its law-violating behavior but of whether to treat the outcast state differently as a result of its outcast status.

182. U.N. Charter art. 39.

183. *Id.* art. 41 (“The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.”).

184. *Id.* art. 48, para. 1 (emphasis added). In addition, under Article 49 of the Charter, “The Members of the United Nations *shall* join in affording mutual assistance in carrying out the measures decided upon by the Security Council.” *Id.* art. 49 (emphasis added).

To illustrate how the Chapter VII mandatory sanctions regime works in practice, consider Security Council sanctions against Libya in the early 1990s.<sup>185</sup> The Security Council issued a resolution that called on the Government of Libya to comply with requests relating to the investigation of the bombing of Pan Am Flight 103 over Lockerbie, Scotland and UTA Flight 772 over Chad and Niger. It called on Libya to “cease all forms of terrorist action and all assistance to terrorist groups and . . . demonstrate its renunciation of terrorism.”<sup>186</sup> And it announced in no uncertain terms that “*all States shall*” adopt aviation, diplomatic, and arms sanctions against Libya “until the Security Council decides that the Libyan Government has complied.”<sup>187</sup> After Libya surrendered the suspects for trial in the Netherlands and took significant steps to comply with U.N. resolutions, the Security Council lifted all sanctions against the country, permitting U.N. member states to resume full economic and diplomatic relations.<sup>188</sup> States that had imposed sanctions as required by the resolutions lifted their sanctions regimes,<sup>189</sup> and the country’s economy, which had stagnated during the lengthy period of the sanctions regime, expanded at a rapid rate: GDP rose thirteen percent in 2003, ten percent in 2005, six percent in 2006 and 2007, and four percent in 2008.<sup>190</sup>

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185. S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 31, 1992).

186. *Id.* ¶ 2.

187. *Id.* ¶ 3 (emphasis added). The Security Council later expanded sanctions to require states with “financial resources . . . owned or controlled” by Libya to “freeze such funds and financial resources.” S.C. Res. 883, ¶ 3, U.N. Doc. S/RES/883 (Nov. 11, 1993). And in 1998, the Security Council again reiterated its demands that Libya comply with the earlier resolutions, ordered Libya to transfer those accused in the Lockerbie bombing to the Netherlands for trial, and threatened “additional measures if the two accused have not arrived or appeared for trial promptly.” S.C. Res. 1192, ¶ 9, U.N. Doc. S/RES/1192 (Aug. 27, 1998).

188. S.C. Res. 1506, U.N. Doc. S/RES/1506 (Sept. 12, 2003).

189. See *Libyan Sanctions Regulations*, 31 C.F.R. § 550 (2011). The U.S. Department of State listed Libya as a state sponsoring terrorism from 2000 to 2005, meaning that it remained in a restrictive export-licensing category. *Country Reports on Terrorism*, U.S. DEP’T OF STATE, <http://www.state.gov/s/ct/rls/crt> (last visited Oct. 13, 2011). On June 30, 2006, “the United States rescinded Libya’s designation as a state sponsors [sic] of terrorism.” *Country Reports on Terrorism 2006*, U.S. DEP’T OF STATE, <http://www.state.gov/s/ct/rls/crt/2006/82733.htm> (last updated May 1, 2007). Nonetheless, lifting of the sanctions regime meant that nonstrategic trade, financial transactions, and investment in Libya were permitted.

190. *GDP Growth (Annual %)*, THE WORLD BANK, <http://data.worldbank.org/indicator/NY.GDP.MKTP.KD.ZG> (last visited May 20, 2011). This is not the only such example. Between 1946 and 2002, the Security Council used its Chapter VII authority to impose sanctions dozens of times, including against Rhodesia, South Africa, Iraq, Yugoslavia, Somalia, and Libya. See PATRIK JOHANSSON, U.N. SECURITY COUNCIL CHAPTER VII

2. *Adjudicated or Nonadjudicated?*

Some international legal regimes require adjudication for externalized outcasting. As we use the term here, “adjudication” may involve legal process in a courtroom, but it need not. An “adjudicated” externalized outcasting regime is an outcasting regime in which outcasting is only permitted once a body has determined that a norm has been satisfied or violated, where that determination is authoritative for the parties. By contrast, an unadjudicated outcasting regime permits actors to engage in outcasting without first presenting their claims to an authoritative decisionmaking body.

We have already seen one clear example of an adjudicated external outcasting regime: the WTO. A state party that claims to have been harmed by another state party’s violations of the underlying trade agreement may lodge a complaint with the Dispute Settlement Body (DSB). Once the DSB has considered the arguments of both sides, it rules on whether the behavior of the accused state party is, in fact, inconsistent with its treaty obligations. If it is, and if the wrongdoing state refuses to cure its behavior (and an appellate body upholds the DSB’s decision), the state that filed the complaint may then put in place the retaliatory trade sanctions that have been approved by the DSB.

There are also international legal regimes that do not require adjudication before state parties engage in externalized outcasting of states that violate their legal obligations. Yet they are becoming less common as international legal regimes grow increasingly robust. Perhaps the most notable example of externalized outcasting without adjudication is the longstanding international law doctrine of countermeasures. The International Law Commission (ILC) defines countermeasures as “measures, which would otherwise be contrary to the international obligations of an injured State vis-à-vis the responsible State” if “they were not taken by the former in response to an internationally wrongful act by the latter in order to procure cessation and reparation.”<sup>191</sup> It continues, “[c]ountermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.”<sup>192</sup> Countermeasures thus allow a state party to an international agreement to cease performing its obligations toward another state party in retaliation for a wrongful act. The countermeasures must be

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RESOLUTIONS, 1946-2002—AN INVENTORY (2003). Text of the resolutions from 1946 through 2009 is available at <http://www.un.org/documents/scres.htm>.

191. Rep. of the Int’l Law Comm’n, 53rd sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR 56th Sess., Supp. No. 10, at 324 (2001).

192. *Id.*

proportional and must terminate as soon as the responsible state has complied with its obligations.<sup>193</sup> Moreover, the ILC makes clear that such countermeasures are only permissible where there is no dispute settlement procedure available to the parties.<sup>194</sup>

An example of this use of countermeasures—and thus of unadjudicated externalized outcasting—can be found in a now-famous 1978 dispute between the United States and France.<sup>195</sup> The United States and France were parties to a bilateral air service agreement. A U.S. airline flew a flight from the United States to London, where passengers switched to a smaller plane to fly on to Paris. France claimed that this change of planes violated the air service agreement. In retaliation, French authorities shortly thereafter ordered a U.S. airline to return a flight to London after landing at an airport in Paris, without allowing the plane to unload passengers or cargo. Believing that the French action violated the agreement, the U.S. Civil Aeronautics Board issued an order requiring French airlines to file all their flight schedules to and from the United States—thus partially suspending a benefit of the treaty. Once the governments agreed to submit the case to arbitration, the order was lifted and normal flights resumed.<sup>196</sup>

### 3. *In-Kind or Non-in-Kind?*

An externalized outcasting regime may enforce the law by engaging in an in-kind response—by withdrawing in-kind benefits—or not. Denying in-kind benefits simply means denying the outcast the same kind, class, or category of benefits that the outcast denied to other members by breaking the rules of the regime. Put another way, externalized outcasting that provides for an in-kind response allows member states to respond to violations of the rules of the

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193. U.N. Int'l Law Comm'n Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, arts. 51, 53 *in* Rep. of the Int'l Law Comm'n, U.N. GAOR, 53d Sess., Supp. No. 10, A/56/20 (2001) [hereinafter ILC Draft Articles and Commentary].

194. The ILC's articles on state responsibility provide that countermeasures may not be taken or must be suspended if the "wrongful act has ceased" and "the dispute is pending before a court or tribunal which has the authority to make decisions binding on the parties." *Id.* art. 52, para. 3.

195. Air Serv. Agreement of 27 Mar. 1946 (U.S. v. Fr.), 18 R.I.A.A. 417 (Int'l Arb. Trib, 1978).

196. HJORTUR B. SVERRISSON, COUNTERMEASURES, THE INTERNATIONAL LEGAL SYSTEM, AND ENVIRONMENTAL VIOLATIONS 92 (2008); David J. Bederman, *Counterintuiting Countermeasures*, 96 AM. J. INT'L L. 817, 820 (2002). For more on the relationship between countermeasures and the *Air Service Agreement* case, see MATH NOORTMANN, ENFORCING INTERNATIONAL LAW: FROM SELF-HELP TO SELF-CONTAINED REGIMES 35 (2005).

regime by engaging in actions vis-à-vis the outcast that would otherwise violate the very same rule violated by the outcast in the first place. Alternatively, an externalized outcasting regime might enforce the law by denying an outcast party a different kind of cooperative benefit than the outcast denied to other members by breaking the rules of the regime. We call these “cross-countermeasures.”<sup>197</sup>

Nearly every regulatory regime employs a version of externalized outcasting that denies *in-kind* benefits of the immediate cooperative regime to those that violate it. The international postal service offers a classic example. The service is overseen by the Universal Postal Union (UPU), which was created by treaty in 1874 and claims to be “the second oldest international organization worldwide.”<sup>198</sup> The treaty that founded the UPU and successive additions and changes together provide for an elaborate system that allows mail to be delivered from any member state to any other member state. Moreover, the UPU ensures that mail can be delivered to any member state using a more or less uniform flat rate, that postal authorities in every member state give equal treatment to foreign and domestic mail, and that each country retains all money collected for international postage (though subsequent revisions provided for the allocation of charges among postal administrations according to the difference in the rate of mail delivery between countries).<sup>199</sup> States that fail to meet these obligations may lose their equivalent rights. A

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197. Moreover, cross-countermeasures can be divided into related and unrelated cross-countermeasures. Related cross-countermeasures are countermeasures that, while non-in-kind, are directly connected to the benefits the outcast denied to other members. For example, as we describe *infra* text accompanying notes 211-216, the Montreal Protocol on Substances That Deplete the Ozone Layer provides that states may lose their rights to trade in ozone-depleting substances if they fail to comply with their obligations under the Protocol to limit their production and consumption of such substances. The regime denies the outcast a different kind, class, or category of benefits (loss of trading rights in return for environmental pollution) and is thus non-in-kind, but the benefits are related (trading rights in ozone-depleting substances in return for excess production or consumption of ozone-depleting substances). Unrelated cross-countermeasures, by contrast, are countermeasures that are not directly connected in this way. For example, the European Convention on Human Rights provides that states may be expelled from the Council of Europe for failing to comply with the obligation under the Convention not to torture. See *infra* text accompanying notes 201-204.

198. *The UPU*, UNIVERSAL POSTAL UNION, <http://www.upu.int/en/the-upu/the-upu.html> (last visited Oct. 10, 2011); see Treaty Concerning the Formation of a General Postal Union, Oct. 9, 1874, 19 Stat. 577. The UPU was originally called the “General Postal Union.”

199. Treaty Concerning the Formation of a General Postal Union, *supra* note 198, arts. 2, 3, 9; Additional Protocol to the Constitution of the Universal Postal Union, Nov. 14, 1969, 22 U.S.T. 1056, 810 U.N.T.S. 7; GEORGE A. CODDING, *THE UNIVERSAL POSTAL UNION: COORDINATOR OF THE INTERNATIONAL MAILS* 97 (1964).



member state may thus suspend the mail delivery to and from a state that refuses to reciprocate.<sup>200</sup> Therefore, the UPU uses denial of an in-kind benefit as a means of enforcement.

Externalized outcasting regimes may alternatively deny an outcast *non-in-kind* benefits—deploying what we call cross-countermeasures. Cross-countermeasures are most likely to be found in contexts in which it is illegal, impossible, or excessively costly for states to retaliate for lawbreaking behavior by withdrawing in-kind benefits. For example, consider the European Convention on Human Rights.<sup>201</sup> The Convention is the most ambitious—and successful—international human rights regime in the world. But it cannot work through in-kind outcasting. If a member state fails to meet its obligations under the Convention by, say, torturing one of its citizens, the other member states may not retaliate by torturing one of their own citizens. To do so would be obviously illegal and ineffective. The Convention instead uses externalized outcasting from the Council of Europe as the penalty—effectively threatening to deny the outcast state the benefits it enjoys from participating in the web of economic, political, and legal ties with other member states.<sup>202</sup> Moreover, if the member does not comply with the Committee’s request, “the Committee may

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200. Universal Postal Convention art. 72, July 5, 1947, 62 Stat. 3157, 4 T.I.A.S. 482 (terminated by the Universal Postal Convention, July 11, 1952, 4 U.S.T. 1118, 169 U.N.T.S. 3) (“When a country does not observe the provisions of Article 28 concerning freedom of transit, Administrations have the right to discontinue postal service with that country. They must give advance notice of that measure by telegraph to the Administrations concerned.”). A nearly identical provision appeared, as well, in the 1952 Convention, which superseded the 1948 Convention. Universal Postal Convention art. 33, July 11, 1952, 4 U.S.T. 1118, 163 U.N.T.S. 3; see CODDING, *supra* note 199, at 112 (noting that “a similar article has been included in postal conventions since 1920”).

201. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222. The Convention may be enforced through submissions to the European Court of Human Rights. *Id.* art. 33 (“Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.”); *id.* art. 34 (“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”).

202. The Statute of the Council of Europe provides that “[a]ny member of the Council of Europe which has seriously violated Article 3 may be suspended from its rights of representation and requested by the Committee of Ministers to withdraw under Article 7.” Statute of the Council of Europe art. 8, May 5, 1949, 87 U.N.T.S. 103. Article 3 provides: “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council as specified in Chapter I.” *Id.* art. 3.

decide that it has ceased to be a member of the Council as from such date as the Committee may determine.”<sup>203</sup> The strength of the Convention thus ultimately rests on a threat of ejection from the Council of Europe, and a complete loss of the benefits that come with that membership—including a vast array of political, economic, and regulatory programs, and access to over two hundred treaties open only to Council of Europe members.<sup>204</sup>

#### 4. *Proportional or Nonproportional?*

Externalized outcasting regimes either require a proportional response to lawbreaking behavior or permit a nonproportional one. Outcasting regimes that require a proportional response generally require that the harm done *to* the outcast state through the denial of the benefits of community membership be equivalent to the harm done *by* the outcast state through its lawbreaking behavior. This requirement is more often found in outcasting regimes that provide for the withdrawal of in-kind benefits, for the obvious reason that it is simpler to craft a proportional response when the response is similar in kind to the original violation. The alternative is a regime that permits a nonproportional response—one in which the harm done to the outcast state through denial of community benefits need not be calibrated to match the harm done by the outcast state through its lawbreaking behavior.

We return to the international law doctrine on countermeasures for an example of *proportional* externalized outcasting. The International Law Commission states that “[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”<sup>205</sup> The proportionality requirement for countermeasures means that, as Thomas Franck once put it, “an otherwise lawful response to an unlawful act, if it crosses the threshold of proportionality, may become unlawful.”<sup>206</sup> As the arbitral tribunal explained in the *Air Service Agreement* arbitration discussed above, “It is generally agreed that all counter-measures must, in the first instance, have some degree of equivalence with the alleged breach . . . .”<sup>207</sup> That requirement was clearly met

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203. *Id.* art. 8.

204. *Complete List of the Council of Europe’s Treaties*, COUNCIL OF EUR., <http://conventions.coe.int/Treaty/Commun/ListeTraites.asp?CM=8&CL=ENG> (last visited Sept. 22, 2011) (listing 210 Council of Europe treaties).

205. ILC Draft Articles and Commentary, *supra* note 193, art. 51.

206. Thomas M. Franck, *On Proportionality of Countermeasures in International Law*, 102 AM. J. INT’L L. 715, 716 (2008).

207. *Air Serv. Agreement (Fr. v. U.S.)*, 18 R.I.A.A. 416, para. 83 (1978).

in the *Air Service Agreement* arbitration, the ILC later pointed out, because the countermeasures were taken in the “same field as the initial measures and concerned the same routes.”<sup>208</sup>

A regime that provides for nonproportional externalized outcasting—or at least does not expressly require a response proportional to the injury suffered—is Chapter VII’s economic sanctions. As noted above, Chapter VII allows the Security Council to respond to any “threat to the peace, breach of the peace, or act of aggression” and to act to “maintain or restore international peace and security.”<sup>209</sup> One way in which the Security Council does so is through economic sanctions—essentially denying the lawbreaking state the benefits of economic cooperation with other U.N. member states. Although this enforcement action by member states may be proportional to the harm inflicted by the lawbreaking behavior that incited the Chapter VII action, it need not be.

##### 5. *First Parties Only or Third Parties Included?*

International legal regimes that enforce through externalized outcasting may involve outcasting by first parties only or they may involve outcasting by third parties as well. First-party outcasting regimes allow only those states that are directly injured by the unlawful behavior of the outcast state to exclude the lawbreaking state from the benefits of community membership. By contrast, those regimes that include outcasting by third parties allow states other than those directly injured to suspend benefits.

The WTO’s Dispute Settlement Understanding provides for outcasting by *first parties only*. A state must have been actually harmed by the illegal behavior of a state in order to participate in its outcasting. Only an injured party may invoke the dispute settlement procedure and only parties that have invoked the dispute settlement procedure may suspend concessions or other obligations vis-à-vis the lawbreaking state. The Dispute Settlement Understanding makes this plain: “any party having invoked the dispute settlement procedures may request authorization from the DSB to suspend the application to the Member concerned of concessions or other obligations under the covered agreements.”<sup>210</sup> Hence only first-party outcasting is permitted.

By contrast, almost any international legal regime that suspends membership rights of an outcast state *includes third parties*. For an example, let us return to the Universal Postal Union. There, a state that fails to meet its

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208. ILC Draft Articles and Commentary, *supra* note 193, art. 51 commentary.

209. U.N. Charter art. 39.

210. DSU, *supra* note 33, art. 22.

obligations can find its reciprocal rights suspended. During the suspension, states that are members of the UPU are no longer obligated to deliver mail to or from the outcast state. That is true even for states never directly harmed by the outcast state's unlawful actions, whatever they may have been. Another example of third-party outcasting is offered by Chapter VII economic sanctions. As already described, U.N. member states are not only permitted to participate in Chapter VII economic sanctions against states that have done them no direct harm, but they are sometimes even required to do so.

*B. Explaining Variation in External Outcasting*

There are many different forms of external outcasting, and those differences are not random. They are instead quite systematic—differences in outcasting regimes can be traced to differences in the legal rules to be enforced. Thus we can not only describe differences between outcasting regimes; we can also explain why the use of different regimes in different circumstances is to be expected.

Let us begin with what we call “simple outcasting.” Simple outcasting is outcasting that is *permissive, nonadjudicated, in-kind, proportional, and first parties only*. Simple outcasting is possible when the agreement directly creates private benefits—for example, an agreement that grants the airlines of member states the right to fly over one another's territory, an agreement that provides legal protections to diplomats, or an agreement that provides for the extradition by each state of those suspected of committing crimes in the territory of the other.

But simple outcasting is not always possible or desirable. For example, outcasting may be so costly to the outcasting states that they will not voluntarily engage in it. In those cases, simple outcasting will almost certainly be ineffective. To work, the external outcasting regime must be modified to respond to the particular challenge posed by the legal context in which it operates or face irrelevance. Each characteristic—permissive or mandatory, adjudicated or nonadjudicated, in-kind or non-in-kind, proportional or nonproportional, and first parties only or third parties included—can be expected to respond to particular underlying features of the legal regime.

Seeing this helps us understand much of the variation we find in many of the international legal regimes that exist in the world today. It is plausible to suppose that these regimes were shaped by the dynamics we identify here, even though those making design choices likely would not have described or explained them as we do. Understanding how outcasting regime design responds to particular underlying characteristics of the law it governs also points the way toward making improvements in the enforcement of international law. It can help us consider how to address what may initially

appear to be insurmountable enforcement problems—problems that, more often than not, could be overcome by smart institutional design that is cognizant of the many available variations in outcasting regimes.

1. *Outcasting Is Costly? Make It Mandatory*

An external outcasting regime requires member states to withdraw cooperative benefits from a state that violates the law. The withdrawal of cooperative benefits is meant to create an incentive for the outcast state to change its behavior. Yet in some cases, outcasting is costly not simply to the outcast state but to those doing the outcasting as well. Outcasting, after all, deprives *both* the outcast state and outcasting state (or states) of the benefits of cooperation with one another.

A possible regime design response to this dilemma is to make outcasting mandatory, rather than permissive. In such cases, member states may be *required* to engage in outcasting, rather than being left with a choice as to whether to outcast or not. In the case described above of Chapter VII economic sanctions against Libya, for example, the Security Council *required* member states to participate. As a result, there was much more widespread participation and the sanctions regime was much more successful than would likely have been the case were the decision to put in place sanctions left to each individual country.

2. *The Regime Creates Public, Not Private, Benefits? Use Cross-Countermeasures*

Consider an agreement among states to forbear from human rights violations against their own citizens. Such an agreement does not itself create private benefits for member states but is rather designed to foster the public good of human rights. As a result, simple outcasting is infeasible—suspending a human rights treaty norm (such as the prohibition on torturing one’s own citizens) in response to the violation of that norm would be both illogical and ineffective. The same is obviously true of many environmental agreements, as well as a variety of other agreements that create public goods.

One might think that in these contexts external outcasting is impossible. But, in fact, it simply requires a different form of external outcasting. In-kind sanctions are not possible, so they must be replaced with sanctions that are non-in-kind, or what we call cross-countermeasures. It is true, for example, that a stand-alone human rights agreement does not permit enforcement through simple outcasting. But that problem can be solved by embedding the human rights regime in a larger community structure, just as the European

Convention on Human Rights is embedded within the Council of Europe. Embedding the Convention within a broader community makes it possible to employ cross-countermeasures as part of the Convention's externalized outcasting regime. The threatened penalty for extreme noncompliance is exclusion from the Council of Europe and all the benefits of membership that come with it—the violation of the human rights agreement is thus enforced by outcasting that utilizes non-in-kind sanctions: rather than threaten torture in response to torture, the regime threatens exclusion from the private benefits generated by the broader set of relationships of which the human rights agreement is a part.

Where opportunities for cross-countermeasures do not already exist, they can be created through careful institutional design. A treaty regime can create private membership benefits that may then be withdrawn from states that violate the rules of the legal regime. An example of this can be found in the Montreal Protocol on Substances that Deplete the Ozone Layer<sup>211</sup>—an agreement designed to protect the ozone layer by restricting and eventually eliminating the production of substances that cause ozone depletion, chlorofluorocarbons (CFCs) chief among them. The Protocol obligates states to report certain data on a regular basis and to limit their production and consumption of certain specified ozone-depleting chemicals.<sup>212</sup> In return, state parties receive some private benefits above and beyond the public benefit of halting the depletion of the ozone layer. Specifically, state parties gain access to trading privileges that nonparties do not have. While parties must ban the import and export of certain designated substances from and to nonparties,<sup>213</sup> they are permitted to import and export those substances from and to parties.<sup>214</sup> Hence parties are included in the trading regime for the designated substances and are able to buy and sell them, whereas nonparties are not. These provisions encourage participation in the Protocol, by denying nonparties access to (and making it difficult for them to sell) the listed ozone-depleting substances. But they also have the effect of creating a tangible benefit that can be denied to noncomplying states. The trading rights of parties can be suspended under the “indicative list of measures” from “specific rights and

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211. Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. No. 100-10, 1522 U.N.T.S. 29 [hereinafter Montreal Protocol]. The Montreal Protocol is a protocol to the Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 324.

212. Montreal Protocol, *supra* note 211, arts. 2, 3, 5, 7.

213. *Id.* art. 4.

214. *Id.*

privileges under the Protocol . . . including those concerned with . . . trade.”<sup>215</sup> A state that fails to comply with its obligations under the Protocol could find its rights and privileges suspended.<sup>216</sup>

The International Atomic Energy Agency (IAEA) takes a similar approach in a very different substantive context. The IAEA aims to prevent the proliferation of nuclear weapons while promoting peaceful nuclear programs. The Treaty on the Non-Proliferation of Nuclear Weapons requires that non-nuclear-weapon states sign a contract with the IAEA, called a Comprehensive Safeguards Agreement.<sup>217</sup> That agreement requires states not to use nuclear material to make weapons or other explosive devices. To ensure that they are living up to their commitments, states agree to grant the IAEA access to peaceful nuclear facilities and to allow it to employ various verification systems. States that sign the contract then gain access to a variety of programs through the IAEA for promoting scientific and technical cooperation on peaceful uses of nuclear technology. The IAEA offers participating states economic assistance, expert services, specialized equipment, training, and other types of support. It also supports research and development, and “helps countries assess and plan their energy needs.”<sup>218</sup> Any state that then fails to permit inspectors access or otherwise violates its Safeguards Agreement can be outcast from this regime, losing access to the financial and technical support that it provides.<sup>219</sup>

### 3. *Outcasting Is Too Attractive? Require Adjudication or Proportional Sanctions*

Sometimes the problem with an outcasting regime is that outcasting is *too* attractive. States may be looking for an excuse to legally disregard the constraints of the regime by outcasting a suspected wrongdoer. For instance,

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215. UNITED NATIONS ENV'T PROGRAMME, HANDBOOK FOR THE INTERNATIONAL TREATIES FOR THE PROTECTION OF THE OZONE LAYER 297 (6th ed. 2003).

216. See Duncan Brack, *Monitoring the Montreal Protocol*, in VERIFICATION YEARBOOK 2003, at 209, 220-21 (Trevor Findlay ed., 2003). State parties that fail to comply with any aspect of the treaty are initially engaged in an iterative nonconfrontational exchange meant to bring them back into compliance with the Protocol. *Id.* at 216-24.

217. Treaty on the Non-Proliferation of Nuclear Weapons art. 3, *opened for signature* July 1, 1968, 21 U.S.T. 483, 729 U.N.T.S. 161.

218. *Promoting Science and Technology*, INT'L ATOMIC ENERGY AGENCY, <http://www.iaea.org/OurWork/ST/index.html> (last visited June 20, 2011).

219. See, e.g., DAVID FISCHER, HISTORY OF THE INTERNATIONAL ATOMIC ENERGY AGENCY: THE FIRST 40 YEARS 290 (1997) (“On 10 June 1994, the IAEA Board of Governors decided to suspend all IAEA technical assistance to the DPRK.”).

economic or trade sanctions may in some cases be highly attractive to states. Import-competing interest groups within a state can be expected to welcome the opportunity to increase trade barriers. An increase in tariffs or restriction on trade with an outcast state will almost always find an appreciative domestic audience—though over time the costs of the restriction to the domestic economy as a whole will exceed any short-term concentrated benefits.

In such cases, an outcasting regime may use two techniques to rein in outcasting behavior. First, it may require adjudication. Adjudication by an authoritative disinterested decisionmaker serves to assure that a violation in fact occurred and is not a mere pretext for retaliatory action. It offers an opportunity, as well, for parties to resolve differing interpretations of treaty obligations. It can also serve to slow down the outcasting response, preventing what might otherwise become a rapid cycle of retaliation and counterretaliation. And adjudication serves to legitimate the outcasting response, hence reducing the chance that the outcast state will regard the outcasting action as itself lawbreaking and seek to retaliate.<sup>220</sup> Second, the regime may require that the outcasting be proportional to the harm done by the outcast's lawbreaking behavior. The proportional response serves the purpose of imposing a cost on the outcast for its lawbreaking behavior and thus discourages such behavior in the future. If the outcasting is done by the harmed party, proportional outcasting may also serve a kind of compensatory function. But requiring that the outcasting be proportional helps to ensure that the outcasting party will not reap benefits that exceed the harm suffered—and thus find outcasting too attractive. Again, this serves to keep the outcasting in check—allowing discipline to be imposed on the outcast but keeping the response within strict bounds.

#### *4. First-Party Outcasting Is Ineffective? Bring in Third Parties*

First-party outcasting—outcasting by the party harmed by the outcast's lawbreaking behavior—is not always effective on its own. In a cooperative regime to which all member states contribute, outcasting by a single party that is harmed by the uncooperative behavior of another state may not provide much of an incentive for the outcast state to change its wayward behavior.

Consider, for example, the Chapter VII economic sanctions against Libya discussed above. Libya was suspected of playing a role in the bombing of Pan

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220. Tom Tyler has extensively and persuasively argued that procedural justice contributes importantly to the legitimacy of the law and hence to people's willingness to comply with it. See, e.g., TOM R. TYLER, *WHY PEOPLE COOPERATE* 93-95 (2011); TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 104-57 (2006).



Am Flight 103 over Lockerbie, Scotland, and UTA Flight 772 over Chad and Niger. If only the United Kingdom, Chad, and Niger had put in place economic sanctions against Libya, the economic pressure on Libya would have likely been minimal and therefore ineffective. Instead, the Security Council mandated sanctions by all U.N. members—thus requiring third parties to participate in the outcasting.<sup>221</sup> The outcasting was much more effective as a result—and Libya eventually surrendered the suspects for trial.

*C. Eight Externalized Outcasting Regimes*

The characteristic-by-characteristic story we have told so far provides only a partial picture. We have shown how each characteristic responds to the environment in which the outcasting regime operates. But that story obscures how the characteristics operate *together*. Based on the five characteristics described above, there are thirty-two unique possible variations in outcasting regimes. It is only in examining these variations—and how they are actually put to use in international law—that the full richness of the outcasting enforcement model becomes clear.

Almost as interesting as what we find in comparing these thirty-two variations to existing legal institutions is what we do *not* find. Certain combinations of characteristics are rare. It is not that they are impossible, but they are likely to exist only in unusual circumstances.

First, when outcasting is in-kind, it is almost always proportional. This is understandable because outcasting regimes aim to limit uncooperative behavior. Yes, refusing cooperative benefits to an outcast state serves a broader goal of promoting cooperative behavior. But if the penalty is excessive, it could undermine the regime. Requiring in-kind outcasting behavior to be proportional serves to limit this danger.

Second, non-in-kind, proportional outcasting is unlikely to exist unless it is also adjudicated. The reason is perhaps obvious. If the outcasting penalty is non-in-kind, determining a proportional response is a challenge. For example, what should the economic penalty be for a violation of the laws of war? In most cases, the appropriate proportional non-in-kind outcasting penalty for a violation can only be legitimately resolved by bringing in an authoritative decisionmaking body.

Third, outcasting by third parties almost always requires adjudication. A reason for this was voiced during the debate at the International Law

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221. In this case, the third-party economic sanctions were mandatory, but they can also be permissive.

Commission over defining the scope and reach of customary law countermeasures. As one scholar explained:

There was a general reluctance to widening the circle of states empowered to resort to such powerful means in safeguarding fundamental interests of the international legal order. In light of the risks entailed in allowing individual third states to apply sanctions in response to a breach that does not directly affect them, [a delegate] supported institutionalized responses.<sup>222</sup>

Involving third parties in outcasting increases the risk that the system of cooperation will unravel; adjudication helps control and restrict the outcasting and thus contains the risk.

Fourth, first-party outcasting regimes are unlikely to be mandatory. First-party outcasting regimes give states that are harmed by the lawbreaking behavior of another state the opportunity to respond by withdrawing cooperative benefits from that state. If a state was truly harmed by the illegal behavior, it is not usually necessary to require the harmed state to respond. That is all the more true if the outcasting regime is in-kind – for if it was in the outcast’s interests to defect, the outcasting state will likely also find (authorized and hence lawful) defection attractive.

These are not hard and fast rules; in many cases, it is possible to point to exceptions. And yet, they serve to limit the number of variations of outcasting regimes commonly found. We have identified real-world examples for only one of the eight possible in-kind, nonproportional outcasting regimes, for only one of the four possible nonadjudicated, non-in-kind, proportional regimes, for only one of the eight possible nonadjudicated, third-parties-included regimes, and for none of the eight possible mandatory, first-parties-only regimes.<sup>223</sup> As a result, we have identified existing international legal regimes

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222. ELENA KATSELLI PROUKAKI, *THE PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE AND THE IDEA OF INTERNATIONAL COMMUNITY* 74 (2010).

223. The only in-kind, nonproportional regime for which we find real-world examples is discussed in Subsection V.C.4 below (“Three Steps Removed: Adjudicated, Nonproportional, and Third Parties Included”). The only non-in-kind, proportional, nonadjudicated regime for which we find real-world examples is discussed in Subsection V.C.5 below (“Three Steps Removed: Mandatory, Non-in-Kind, and Third Parties Included”). The only third-parties-included, nonadjudicated regime for which we find real-world examples is also discussed in Subsection V.C.5 below (“Three Steps Removed: Mandatory, Non-in-Kind, and Third Parties Included”). We find not a single real-world example of a mandatory, first-parties-only regime. Again, however, we emphasize that our survey is not exhaustive and that there may be real-world examples of these regimes that we have not yet identified.

for only one quarter of the thirty-two possible variations of outcasting regimes. We examine these eight variations and consider real-world examples of each. Our initial survey is far from exhaustive, however. There certainly are many more examples of outcasting than are identified here, some of which likely match some of the twenty-four variations excluded below. This discussion thus merely provides a starting point for considering the ways in which external outcasting is regularly and extensively used to enforce international law. And it serves to show how the five characteristics of external outcasting regimes work *together* to address specific challenges posed by particular international legal regimes.

### 1. *Simple Outcasting*

We begin, once again, with what we call simple outcasting. Simple outcasting is permissive, nonadjudicated, in-kind, and proportional, and only first parties are included.

Customary countermeasures are a clear example of this form of external outcasting. Such countermeasures are permissive—an injured state is never required to put in place countermeasures. They are nonadjudicated—a state can put them in place without first seeking a decision from an authoritative decisionmaking body. They are in-kind—they involve suspension of obligations that “correspond to, or are directly connected with, the obligation breached.”<sup>224</sup> As discussed in more depth above, countermeasures must be proportional. And, finally, only the injured state (first party) is permitted to put in place countermeasures; hence, third-party action is prohibited.

The Vienna Convention on the Law of Treaties also provides an example of simple outcasting. Article 60 of the Convention states: “A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.”<sup>225</sup> It further explains that a “material breach” of a multilateral treaty by one of the parties entitles any party specially affected by the breach “to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State.”<sup>226</sup> Like customary countermeasures, therefore, Article 60 allows for simple outcasting—permitting parties harmed by a breach to respond by suspending the in-kind,

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224. ILC Draft Articles and Commentary, *supra* note 193, art. 48 commentary (internal citation omitted).

225. Vienna Convention on the Law of Treaties art. 60, May 23, 1969, 1155 U.N.T.S. 331.

226. *Id.*

proportional obligations of the harmed party toward the party that caused the harm without first seeking adjudication.<sup>227</sup>

2. *One Step Removed: Adjudicated*

A second type of externalized outcasting regime differs from simple outcasting in just one respect—it is adjudicated. This type of externalized outcasting can therefore only take place once it has been approved by an authoritative decisionmaking body. Like simple outcasting, however, it is permissive, in-kind, and proportional, and only first parties are included.

The signal example of this type of externalized outcasting is the World Trade Organization. The countermeasures regime under the WTO is virtually identical to the customary countermeasures regime, with one key difference: before in-kind, proportional, first-parties-only countermeasures are permitted, the WTO's Dispute Settlement Body must make a finding of wrongdoing and approve the proposed countermeasures. This serves to discipline and slow the outcasting process, allowing outcast states plenty of opportunity to self-correct before sanctions are put in place. This, in turn, serves to preserve the trade system and head off the escalation of a dispute over the treaty obligations into a trade war.

3. *Two Steps Removed: Adjudicated and Non-in-Kind*

A third type of externalized outcasting regime differs from simple outcasting in two respects—it is adjudicated and non-in-kind. Like simple outcasting, it is permissive and proportional, and only first parties are included.

All of the international legal regimes that fall into this category involve a state party giving up its sovereign immunity and allowing itself to be sued—usually in a specialized forum—if the other party believes that it has violated the terms of an international agreement. If the state is found to have violated the law and to have harmed the complaining party as a result, the state is usually subject to a binding obligation to pay damages or make other reparations.

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227. Article 60 operates very much like customary countermeasures, but with one key difference: countermeasures temporarily suspend only the obligations of the wronged state, whereas Article 60 allows the wronged party to either formally suspend or permanently terminate the treaty obligations of both parties in whole or in part. Rep. of the Int'l Law Comm'n, *supra* note 191, at 324.

There are numerous examples of these regimes. Consider Chapter Eleven of the North American Free Trade Agreement. Under NAFTA, Mexico, the United States, and Canada must grant one another's investors nondiscriminatory treatment and may not expropriate their investments except in extraordinary circumstances. If a member state (or those for whom member states are responsible under international law, such as provincial, state, or municipal governments) violates these requirements, Chapter Eleven permits an investor to seek money damages against the state that allegedly violated the law.<sup>228</sup> The case proceeds to arbitration, as detailed in the agreement.<sup>229</sup> The decision of the arbitral tribunal is final and binding on the parties to the case.<sup>230</sup> This provision is not a mere dead letter; it has been actively used, leading to awards against member states. For instance, an American corporation, Metalclad, won an arbitral award of \$16.6 million against Mexico after a Mexican municipal government refused to provide a construction permit for a hazardous landfill even though the construction had already been approved by the Mexican federal government.<sup>231</sup>

Why does outcasting take the form it does in this case? To begin with, in-kind retaliation is not a viable option for a long-term sustainable regime. If a member state fails to provide adequate protection to the investments of the national of another member state, the harmed member state cannot simply be permitted to retaliate by similarly disregarding the protection of investments of the bad actor's nationals. Such a system of direct retaliation would likely lead to immediate collapse of the agreement because investment requires a high degree of stability and security that would be undermined by the reciprocal retaliation. Hence it is necessary to turn to non-in-kind retaliation, or cross-countermeasures. Here, the cross-countermeasure is the loss of sovereign immunity that would otherwise be guaranteed under customary international law and hence loss of insulation from a decision that obligates the state to pay damages or make other reparations for the harm done as a result of a legal violation. Each member state agrees to allow parties that allege they have been harmed by unlawful behavior to file an arbitral claim against the offenders

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228. See North American Free Trade Agreement ch. 11, Dec. 8, 1993, 107 Stat. 2057 [hereinafter NAFTA], available at <http://www.sice.oas.org/trade/NAFTA/chap-111.asp>.

229. *Id.* arts. 1120-37.

230. *Id.* art. 1136.

231. Metalclad Corp. v. United Mexican States, ICSID Case No. ARB(AF)/97/1, Award ¶ 131 (Aug. 30, 2000), 5 ICSID Rep. 212 (2002), available at <http://naftaclaims.com/Disputes/Mexico/Metalclad/MetalcladFinalAward.pdf>.

seeking compensation.<sup>232</sup> As with most instances of non-in-kind outcasting, an adjudicatory body is necessary to determine the appropriate remedy. The parties agree to treat that body's decision as final and binding.<sup>233</sup>

Chapter Eleven of NAFTA is far from alone. Chapter Eleven was based in significant part on the U.S. Model Bilateral Investment Treaty (BIT).<sup>234</sup> Like Chapter Eleven, the U.S. Model BIT requires a host state to submit investment disputes to binding third-party arbitration at the request of an investor.<sup>235</sup> The externalized outcasting thus operates in the same way as Chapter Eleven. But this model is not limited to investment disputes. It applies, as well, to the Iran-U.S. Claims Tribunal, the Law of the Sea Convention (which provides various binding dispute resolution options), the Marshall Islands Nuclear Claims Tribunal, the U.N. Compensation Commission, and every other international agreement that grants jurisdiction to a dispute resolution body with power to render a binding judgment against a state party.

Indeed, most notable of all is the International Court of Justice (ICJ). Like NAFTA's Chapter Eleven, the ICJ statute provides that states that accept the ICJ's jurisdiction agree to give up a limited degree of sovereign immunity—permitting a case to be brought against them to resolve a dispute concerning the interpretation of a treaty, a question of international law, and the existence of a breach of an international obligation.<sup>236</sup> If the state is found in breach of an international legal obligation, the ICJ has the authority to determine the “nature or extent of the reparation to be made for the breach of an international

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232. Indeed, Chapter Eleven has come under fire from public interest groups for precisely this reason. See MARY BOTTARI & LORI WALLACH, PUB. CITIZENS GLOBAL TRADE WATCH, NAFTA CHAPTER 11 INVESTOR-STATE CASES: LESSONS FOR THE CENTRAL AMERICA FREE TRADE AGREEMENT, at viii (2005), available at [http://www.citizen.org/documents/NAFTAReport\\_Final.pdf](http://www.citizen.org/documents/NAFTAReport_Final.pdf) (“[T]he sovereign immunity shield—the long-standing common law principle that governments cannot be sued for certain types of activities—does not apply in NAFTA’s private tribunal system. This means that foreign investors are empowered to sue the United States for cash compensation over federal, state and local policies in instances when U.S. residents and companies would have no such right.”).

233. That commitment, in turn, is given force by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 (entered into force June 7, 1959).

234. U.S. Model Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Feb. 24, 1984, reprinted in 4 INT’L TAX & BUS. LAW. 136 (1986).

235. *Id.* art. 24.

236. Statute of the International Court of Justice, June 26, 1945, art. 36, 59 Stat. 1055, 1060, T.S. No. 993.

obligation.”<sup>237</sup> Thus the ICJ permits the harmed state to engage in proportional and adjudicated cross-countermeasures against the offending state.

4. *Three Steps Removed: Adjudicated, Nonproportional, and Third Parties Included*

A fourth type of externalized outcasting regime differs from simple outcasting in three key respects—it is adjudicated and nonproportional, and third parties are included. The only similarities it bears to simple outcasting, then, are that it is permissive and involves in-kind sanctions.

A significant number of regulatory in-kind membership sanctions fall into this category. The International Coffee Organization provides a typical example. The Organization provides assistance to coffee growers around the world and encourages coffee-growing nations to engage in enhanced cooperation on trade, sustainability, quality, and consumption promotion.<sup>238</sup> The Agreement that governs the Organization states that if a member is in breach of its obligations, the governing body, the International Coffee Council, may “exclude such Member from the Organization.”<sup>239</sup> Once excluded, the member loses all rights and privileges under the agreement. This includes not only voting rights in the organization and other benefits provided directly by the organization (the exclusion from which constitutes *internal* outcasting), but also rights granted to it by other member states by virtue of its status as a member—including access to trade privileges and other forms of “cooperation on coffee matters.”<sup>240</sup>

It is notable that membership sanctions of this form leverage the power of third-party actors to bring pressure on member states to comply with the law. A threat by a single member to outcast a lawbreaking state by withdrawing in-kind membership benefits would be unlikely to have a significant impact on the outcast’s behavior. But the threat of complete exclusion from the in-kind

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237. *Id.* art. 36(2)(d).

238. *Mission*, INT’L COFFEE ORG., [http://dev.ico.org/mission.asp?section=About\\_Us](http://dev.ico.org/mission.asp?section=About_Us) (last visited Jan. 18, 2010).

239. International Coffee Agreement art. 46, Sept. 28, 2007, available at <http://www.ico.org/documents/ica2007e.pdf> (“If the Council decides that any Member is in breach of its obligations under this Agreement and decides further that such breach significantly impairs the operation of this Agreement, it may exclude such Member from the Organization. The Council shall immediately notify the Depositary of any such decision. Ninety days after the date of the Council’s decision, such Member shall cease to be a Member of the Organization and a Party to this Agreement.”).

240. *Id.* art. 1(1).

benefits of membership by all member states provides a much more emphatic incentive to comply with the law. Moreover, third-party sanctions of this form are generally accompanied by some form of adjudication. Because the sanction is severe—complete exclusion from group benefits—adjudication provides security to members that the decision will not be made lightly. That is true in the case of the International Coffee Agreement, as it is in most instances of in-kind membership sanctions: the members of the International Coffee Organization may not unilaterally choose to outcast a fellow member. That decision must instead be made by the International Coffee Council, the authoritative decisionmaking body of the Organization.

*5. Three Steps Removed: Mandatory, Non-in-Kind, and Third Parties Included*

A fifth form of external outcasting also differs from simple outcasting in three respects: it is mandatory and non-in-kind, and third parties are included. It has only two characteristics in common with simple outcasting—it is nonadjudicated and proportional.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) puts in place this kind of outcasting regime. The treaty aims to regulate trade in endangered species. It is enforced by exclusion of cross-border trade that does not comply with the treaty's requirements. Specifically, the treaty creates a trade system that works as follows: a specimen of a CITES-listed species may be imported into or exported (or re-exported) from a state party if it is properly documented and if that documentation is presented at the port of entry or exit.<sup>241</sup> That same species *may not* be imported or exported by a state party without the documentation. A non-state party may participate in the trading scheme, but only if it presents documentation equivalent to that required of state parties—in other words, only if it follows the requirements of the treaty.<sup>242</sup> Hence any endangered species listed under CITES that does not comply with CITES' certification requirement is

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241. The Management Authority of the State (which the treaty requires each state party to designate) must issue an export permit or re-export certificate. The Convention on International Trade in Endangered Species of Wild Fauna and Flora, *opened for signature* Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, arts. III-VI, IX [hereinafter CITES]. The Convention separates covered species into three categories, each with different trade restrictions. *Id.* For a sample permit form, see <http://www.cites.org/eng/res/12/E12-03R14A2.pdf>.

242. CITES, *supra* note 241, art. X.



prohibited from leaving or entering any state party.<sup>243</sup> Only if the trade complies with the requirements of CITES may it cross the border of a state party.<sup>244</sup>

There are several interesting elements of the CITES regime worth noting. First, it shows once again how cross-countermeasures can be used where in-kind sanctions are unavailable. It would be illogical for a member state to kill or capture an endangered plant or animal in retaliation for another state killing or capturing an endangered plant or animal. Instead, CITES requires each state party to use outcasting against any other state party that attempts to trade an unlicensed endangered plant or animal by putting in place a cross-countermeasure—excluding the endangered plant or animal from cross-border trade. Second, it shows how third-party outcasting can be used to enhance the effectiveness of a regime. CITES requires that only one party to the transaction be party to the treaty in order for the trade to be governed by the treaty's requirements, thus allowing the regime to be effective even if many states opt out. In this way, including third parties can lead to a highly effective enforcement regime, even if outcasting is not uniformly exercised.

Finally, this type of outcasting regime is unusual in two respects. First, it is unusual because it provides for non-in-kind sanctions without requiring prior adjudication. Non-in-kind, proportional sanctions are ordinarily accompanied by adjudication, because the incommensurability of the harm and the penalty makes setting an appropriate outcasting penalty difficult.<sup>245</sup> In the cases

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243. *How CITES Works*, CONVENTION ON INT'L TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, <http://www.cites.org/eng/disc/how.shtml> (last visited Oct. 13, 2011).

244. Although not specified in the treaty itself, the Conference of the Parties and the Standing Committee have adopted a process of recommending suspension of trade in response to significant trade in an endangered species by a state party in violation of the Convention. When a state party violates the terms of the treaty, the Conference of the Parties can recommend a temporary suspension of trade with the violating state. In an effort to improve the effectiveness of the Convention, this has become an increasingly frequent practice. (For a list of all countries currently subject to such trade suspensions, see *Countries Currently Subject to a Recommendation To Suspend Trade*, CONVENTION ON INT'L TRADE IN ENDANGERED SPECIES OF WILD FAUNA AND FLORA, <http://www.cites.org/eng/resources/ref/suspend.php> (last updated Sept. 14, 2011).) The State that has violated a provision of the treaty may respond to the recommendation to suspend trade by enacting required legislation, reducing illegal trade, submitting missing annual reports, or otherwise responding to specific recommendations of the Standing Committee. If it takes the actions necessary to bring its practices into compliance, the recommendation to suspend trade is immediately withdrawn. *Id.* ("Recommendations to suspend trade are withdrawn immediately upon a country's return to compliance."). This constitutes a permissive adjudicated outcasting regime—one that matches the variation described in Subsection V.C.7 below.

245. See *supra* text accompanying note 222.

identified here, however, the outcasting regime overcomes the incommensurability problem by requiring states to simply refuse passage to the noncomplying plant or animal. Hence, under CITES, the penalty for attempting to import or export a plant or animal in violation of the treaty is refusal of permission to import or export that plant or animal. In both cases, there is little risk of escalation or need for an authoritative decisionmaking body to set an appropriate penalty. Second, this type of outcasting is unusual in that it involves outcasting by third parties without requiring adjudication. Outcasting by third parties almost always requires prior adjudication because allowing states to unilaterally apply sanctions in response to a breach that does not directly harm them can cause a system of cooperation to quickly unravel. In CITES, however, that danger is contained by the presence of widely publicized, clear, objective technical standards. As a result, it is highly unlikely that third-party outcasting will spiral out of control on the basis of unfounded accusations or overreactions by third-party outcasting states.

*6. Four Steps Removed: Mandatory, Adjudicated, Non-in-Kind, and Third Parties Included*

A sixth category of externalized outcasting differs from simple outcasting in four respects: it is mandatory, adjudicated, non-in-kind, and third parties are included. It shares only the requirement of proportionality with simple outcasting.

All of international criminal law falls into this category. We tend to think of international criminal law as a system for sanctioning individuals—for it is individuals who are tried and, if found guilty, jailed. Yet international criminal law operates at the same time as a sanction on states. Consider, for example, the International Criminal Court (ICC). The ICC has jurisdiction with respect to four crimes: the crime of genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>246</sup> These crimes are not creations of the Rome Statute, of course. They are already regarded as violations of international law that each state is obligated to prevent. A state party that fails to prevent these crimes from occurring—and then fails to investigate and prosecute the crime—agrees to the jurisdiction of the court with respect to these crimes on its territory or by its nationals.<sup>247</sup> The Rome Statute thus operates as an outcasting

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<sup>246</sup> Rome Statute of the International Criminal Court art. 5, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

<sup>247</sup> *Id.* arts. 12, 17. The substantive and procedural mechanics of complementarity under the ICC are covered by Articles 17-19 of the Rome Statute. Substantively, Article 17 requires the Court to find a case “inadmissible” if the case “is being investigated or prosecuted by a State

regime because state parties that violate international law by failing to meet their obligation to prevent a serious crime from being committed in their territory or by their nationals and then failing to investigate or prosecute that crime forfeit their sovereign right to prosecute criminal violations by their own citizens or within their own territory.

Outcasting by the ICC is both mandatory and adjudicated. State parties are obligated to prevent and prosecute serious crimes. When they fail to act, and a case is referred to the ICC by a state party or by the Security Council acting under Chapter VII of the U.N. Charter, the Prosecutor “shall analyse the seriousness of the information received” and “shall submit to the Pre-Trial Chamber a request for authorization of an investigation, together with any supporting material collected,” if “there is a reasonable basis to proceed with an investigation.”<sup>248</sup> The case may only proceed if the Pre-Trial Chamber agrees that there is a reasonable basis to proceed.<sup>249</sup> It is non-in-kind: failure to prevent genocide may not be punished with failure to prevent genocide; it is instead punished with the loss of the sole right to engage in criminal prosecution. This form of outcasting is proportional—the state only loses sole jurisdiction over those crimes that it fails to prevent and prosecute. It retains its sovereign control over all other criminal prosecutions in its territory. Finally, the outcasting involves third parties, for all states that are party to the Convention are obligated to assist in the investigation and prosecution.

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which has jurisdiction over it,” *id.* art. 17, para. 1(a), or “has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute,” *id.* art. 17, para. 1(b). The ICC can only abrogate the right of a state to prosecute if the state is “unwilling or unable” to carry out an investigation and prosecution. *Id.* art. 17, para. 1(a). Procedurally, the Prosecutor must notify parties upon initiating investigations and must give states one month to respond as to whether investigations are already being undertaken by the state. *Id.* art. 18, para. 1-2 (stating that the Prosecutor must notify “all States Parties and those States which . . . would normally exercise jurisdiction over the crimes concerned”). If a country notifies the Prosecutor that it is conducting its own investigation, the Prosecutor cannot proceed unless a Pre-Trial Chamber authorizes the investigation. *Id.* art. 18, para. 2. Moreover, the issue of complementarity need not be raised by one of the parties; the ICC can “on its own motion” determine whether a case should be left for prosecution to national courts. *Id.* art. 19, para. 1. For more on complementarity, see Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery To Implement International Criminal Law*, 23 MICH. J. INT’L L. 869 (2002); Jann K. Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, 1 J. INT’L CRIM. JUST. 86, 86-87 (2003); and Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC’Y INT’L L. PROC. 240, 247 (2000).

<sup>248</sup> Rome Statute, *supra* note 246, arts. 13-15.

<sup>249</sup> *Id.* art. 15, para. 4.

*7. Four Steps Removed: Adjudicated, Non-in-Kind, Nonproportional, and Third Parties Included*

A seventh category of externalized outcasting also differs from simple outcasting in four respects: it is adjudicated, non-in-kind, nonproportional, and third parties are included. It shares only one characteristic with simple outcasting—it is permissive.

Permissive economic sanctions regimes fall into this category. Such sanctions regimes are again a response to the inability to resort to in-kind sanctions. Chapter VII economic sanctions, for example, are authorized in response to “the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>250</sup> Under Article 2(4) of the U.N. Charter, states may not make a “threat or use of force against the territorial integrity or political independence of any state.”<sup>251</sup> Hence a threat to the peace may not be met with unilateral military force. Instead, the Security Council may authorize a military response (which, as noted earlier, constitutes external physical force) or economic sanctions. Those economic sanctions are external outcasting that is non-in-kind, adjudicated (by the Security Council), nonproportional, and involves third parties.

Economic sanctions against South Africa offer a striking example. After decolonization, South Africa continued to operate under the colonial-era system of “apartheid,” an extensive system of legal racial segregation and discrimination. Beginning in 1960, in the wake of the Sharpeville massacre, the United Nations called on South Africa to end apartheid, to no effect.<sup>252</sup> Unable to resort to in-kind outcasting, the United Nations turned instead to non-in-kind outcasting: it put in place cross-countermeasures in the form of economic and trade sanctions. In 1962, the United Nations General Assembly condemned the policy of apartheid and “the continued and total disregard by the Government of South Africa of its obligations under the Charter of the United Nations and, furthermore, its determined aggravation of racial issues by enforcing measures of increasing ruthlessness involving violence and

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250. U.N. Charter art. 39. Article 103 of the U.N. Charter states, “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.” *Id.* art. 103. Hence if a Security Council resolution calling for economic sanctions conflicts with obligations a state may have under a trade agreement, the resolution prevails.

251. U.N. Charter art. 2, para. 4.

252. S.C. Res. 134, U.N. Doc. S/RES/134 (Apr. 1, 1960).

bloodshed.”<sup>253</sup> It called on its members to voluntarily sever political, fiscal, and transportation ties with South Africa.<sup>254</sup> On August 7, 1963, the United Nations Security Council noted that “the situation in South Africa is seriously disturbing international peace and security,” called on South Africa to abandon its policy of apartheid as called for in an earlier Security Council resolution, and called on all U.N. member states to put in place a voluntary arms embargo against South Africa.<sup>255</sup> Several countries, including the United States and the United Kingdom, halted their arms trade with South Africa in light of the resolution. That arms embargo was later made mandatory in 1977, with the passage of Security Council Resolution 418.<sup>256</sup> In the intervening fourteen years, however, the arms embargo remained permissive.

*8. Five Steps Removed: Mandatory, Adjudicated, Non-in-Kind,  
Nonproportional, and Third Parties Included*

The eighth category of externalized outcasting regime is the polar opposite of simple outcasting: it is mandatory, adjudicated, non-in-kind, nonproportional, and third parties are included.

Mandatory economic sanctions fall into this category. Such sanctions are put in place through the same process as permissive economic sanctions. Under United Nations Charter Chapter VII, the Security Council has the power to act in response to “the existence of any threat to the peace, breach of the peace, or act of aggression.”<sup>257</sup> One option available to the Security Council is mandatory economic sanctions. We earlier discussed an example of Chapter VII mandatory economic sanctions—the sanctions on Libya in the wake of the Lockerbie bombing.<sup>258</sup> In that case, the U.N. provided that “*all States shall*” adopt aviation, diplomatic, and arms sanctions against Libya “until the Security Council decides that the Libyan Government has complied.”<sup>259</sup> This

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253. G.A. Res. 1761, ¶ 2, U.N. Doc. A/RES/1761 (Nov. 6, 1962).

254. *Id.* ¶ 4.

255. S.C. Res. 181, U.N. Doc. S/RES/181 (Aug. 7, 1963).

256. S.C. Res. 418, U.N. Doc. S/RES/418 (Nov. 4, 1977). The arms embargo was strengthened and expanded by S.C. Res. 591, U.N. Doc. S/RES/591 (Nov. 28, 1986). The restrictions were lifted by Resolution 919 in 1994. U.N. Doc. S/RES/919 (May 25, 1994).

257. U.N. Charter art. 39.

258. *See supra* text accompanying notes 185-190.

259. S.C. Res. 748, ¶ 3, U.N. Doc. S/RES/748 (Mar. 31, 1992) (emphasis added). The Security Council later expanded sanctions to require states with “financial resources . . . owned or controlled” by Libya to “freeze such funds and financial resources.” S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993). And in 1998, the Security Council again reiterated its demands

was in direct contrast with the South African sanctions regime—which, as already noted, was voluntary until 1977, when only the arms embargo was made mandatory.<sup>260</sup>

Once enacted, mandatory economic sanctions regimes are, on the whole, more effective than permissive ones. Economic sanctions can be costly to outcasting states as well as the outcast state. Therefore mandating participation can lead to much more effective outcasting. Yet mandatory regimes require greater political consensus to put them into effect. In the case of sanctions against South Africa, several states—including the United Kingdom and France—objected to punitive sanctions in 1963,<sup>261</sup> but did not reject the voluntary regime, choosing instead simply to abstain.<sup>262</sup> There was no similar opposition to the sanctions against Libya, thus making mandatory sanctions possible.

The European Convention of Human Rights also establishes a mandatory, adjudicated, non-in-kind, and nonproportional outcasting regime that includes third parties. As described above, the European Convention of Human Rights provides for cross-countermeasures because in-kind outcasting is not possible. The regime is, moreover, adjudicated: if a state party violates the Convention, any person harmed may bring suit before the European Court of Human Rights.<sup>263</sup> The Court is empowered to require measures to redress the specific

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that Libya comply with the earlier resolutions, ordered Libya to transfer those accused in the Lockerbie bombing to the Netherlands for trial, and threatened “additional measures if the two accused have not arrived or appeared for trial promptly.” S.C. Res. 1192, U.N. Doc. S/RES/1192 (Aug. 27, 1998).

260. See Raymond Paretzky, Comment, *The United States Arms Embargo Against South Africa: An Analysis of the Laws, Regulations, and Loopholes*, 12 YALE J. INT’L L. 133, 134 (1987) (“On November 4, 1977, the United States joined in the unanimous vote of the United Nations Security Council adopting Security Council Resolution 418, which established a mandatory arms embargo against the Republic of South Africa. This resolution succeeded Security Council Resolution 181, a non-binding call to all nations to adhere voluntarily to an arms embargo, which had been in effect from 1963 to 1977.” (footnotes omitted)).

261. See Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT’L L.J. 1464, 1486 n.85 (1996) (citing 1963 U.N.Y.B. 18, U.N. Sales No. 64.I.1).

262. See *id.* at 1485 n.81 (citing Resolutions Adopted and Decisions Taken by the Security Council in 1963, U.N. SCOR, 18th Sess., 1041st mtg. at 6, U.N. Doc. S/5386 (1963)). Mandatory sanctions, however, later proved more politically palatable than outcasting South Africa from the United Nations altogether—a proposal made and rejected in 1974, a few years before the arms embargo was made mandatory. See David Lawther Johnson, Comment, *Sanctions and South Africa*, 19 HARV. INT’L L.J. 887, 916 (1978).

263. The Court is, at present, the most active international court in existence, with more than 30,000–50,000 new applications lodged every year. The Court has arguably been a victim of its own success. Its ability to process complaints cannot keep up with the rate at which they

individual harms alleged in the case and make recommendations for more general measures to prevent similar violations in the future.<sup>264</sup> Once a decision is rendered—and individual or general measures are ordered by the Court—state parties are required to comply.<sup>265</sup> If a state party refuses to cooperate with a decision of the Court, it could—in an extreme case—find its membership in the entire Council of Europe suspended or revoked by the Committee of Ministers.<sup>266</sup> This penalty involves all the members of the Council (hence it is third-parties-included outcasting), need not be proportional to the harm done by the outcast state, and is mandatory—once a state is cast out of the Council, Council members cannot treat it as if it were still a state party.

Yet another example of this type of outcasting is the Montreal Protocol on Substances That Deplete the Ozone Layer. As discussed earlier,<sup>267</sup> the Protocol places limits on the amount of ozone-depleting substances each member state may produce and consume. In return for agreeing to observe these limits, state parties receive access to trading privileges denied to nonparties: parties to the Protocol are only permitted to import and export certain designated substances with a country that is also party to the Protocol.<sup>268</sup> These trading privileges not only make membership in the Protocol attractive to states, but they also provide the basis for an outcasting regime. Any state party that violates the Protocol can have its trading rights suspended—thus losing access to the

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arrive. In 2009, the Court had a backlog of over 120,000 cases. *Profile: European Court of Human Rights*, BBC NEWS (Dec. 1, 2010), [http://news.bbc.co.uk/2/hi/europe/country\\_profiles/4789300.stm](http://news.bbc.co.uk/2/hi/europe/country_profiles/4789300.stm). A case begins when an individual or state files a complaint or “application” alleging a violation of the Convention. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 33-35, Nov. 4, 1950, 213 U.N.T.S. 222.

264. The first type of remedy provided by the Court—“individual measures”—aims to address the harm to the individual complainant as a result of the violation and to achieve, as far as possible, “*restitutio in integrum*.” COUNCIL OF EUR., SUPERVISION OF THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS, 3RD ANNUAL REPORT 2009, at 18 (2010), available at [http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM\\_annreport2009\\_en.pdf](http://www.coe.int/t/dghl/monitoring/execution/Source/Publications/CM_annreport2009_en.pdf). States may also be ordered to take “general measures,” which aim to put an end to similar violations in the future. *Id.*
265. Article 46 of the Convention clarifies that state parties to the Convention must comply with decisions of the Court. Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 263, art. 46 (“The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”). The Court automatically transmits the file to the Committee of Ministers of the Council of Europe after rendering a final judgment and the Committee is charged with executing the judgment. *Id.*
266. ELISABETH LAMBERT-ABDELGAWAD, THE EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS 38-39 (2002), available at <http://www.echr.coe.int/NR/rdonlyres/5BDDF858-F85B-4523-BD58-27243CB2F03C/o/DG2ENHRFILES192002.pdf>.
267. See *supra* text accompanying notes 211-216.
268. Montreal Protocol, *supra* note 211, art. 4.

benefits created by the regime.<sup>269</sup> This outcasting sanction is mandatory (no state party is permitted to trade with a state whose trading rights have been suspended), adjudicated (the decision to suspend trading rights is made in advance by the treaty organization, not by individual parties), non-in-kind (the outcasting state does not respond to the violation by consuming and producing excess ozone-depleting substances but instead by putting in place trade sanctions), and nonproportional (there is no requirement that the trade sanctions be equivalent to the harm done by the outcast), and it includes third parties (all parties to the convention are prohibited from trading with the outcast).

What is particularly notable about this final category of external outcasting is the way in which outcasting regimes are creatively designed to address what might at first appear to be insurmountable challenges to outcasting. International law scholars habitually point out that human rights law and international environmental law cannot be enforced by reciprocal sanctions. That is clearly true. But that does not mean that an outcasting mechanism—denying a lawbreaker the benefits of cooperation—cannot be deployed to enforce the law. Doing so simply requires careful and creative institutional design. It requires, first, recourse to cross-countermeasures. That, in turn, sometimes requires engineering benefits through treaty design—embedding a human rights treaty in a robust economic and political regime or creating trading benefits only available to state parties. That recourse is strengthened by involving third parties and making their participation mandatory—every state party is responsible for disciplining the wayward state by outcasting it. And, finally, because the penalty is strong and because third parties are involved, the outcasting is subject to adjudication—there is a decision rendered by a body charged with interpreting the treaty’s requirements. This focuses attention on the relevant legal standards, thickening the understanding of the legal rules that apply to state behavior while granting the outcasting decision legitimacy and preventing a rapid unraveling of the cooperative regime that the outcasting is meant to enforce, not weaken. It is outcasting, but it is far from simple.

#### *D. The Limits of Externalized Outcasting*

For all its strengths, outcasting is not a panacea. Like any law enforcement regime, it has its limits. Most notably, externalized outcasting relies on the

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269. *Indicative List of Measures That Might Be Taken by a Meeting of the Parties in Respect of Non-Compliance with the Protocol*, § C, in U.N. ENV’T PROGRAMME, HANDBOOK FOR THE INTERNATIONAL TREATIES FOR THE PROTECTION OF THE OZONE LAYER 297 (6th ed. 2003).



existence of private benefits for member states. After all, outcasting only works if outcast states are denied access to the benefits of cooperation. It is sometimes possible to use clever institutional design to overcome this limitation—for example, in areas of international law primarily concerned with public goods, such as human rights and environmental law, it is possible to deny a state access to private benefits through cross-countermeasures. But there are, nonetheless, some limits to external outcasting that cannot be so easily avoided.<sup>270</sup>

1. *External Outsourcing Relies on Cooperative Benefits*

Outcasting is made possible by the existence of cooperative benefits. For outcasting to work, therefore, there must be some degree of cooperation. Where there is none or very little, outcasting is powerless. Consider, for example, the state of Burma (renamed the Republic of the Union of Myanmar by the military junta that currently governs). The state is the subject of extensive economic sanctions by many countries and has become so isolated from the international community that there are few cooperative benefits left to withdraw. The international community therefore has relatively little capacity to enforce international legal rules against Burma using outcasting sanctions, for it is impossible to further outcast a voluntary outcast.

The dependence of outcasting on the existence of cooperative benefits also means that, generally speaking, outcasting is more powerful if there are more participants in the outcasting regime. A larger number of participants means that the collective benefits are likely to be more significant and therefore the outcasting sanction more powerful.<sup>271</sup> Put differently, the cost of exclusion

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270. In addition to the limits noted below, outcasting regimes are limited by their reliance on detection of violations. Where violations of the law are difficult to detect, an outcasting regime will likely be ineffective in generating compliance. For example, regulations of oil pollution at sea—covered by a separate section of MARPOL from the equipment certification scheme described above—have long been hampered by the difficulty of connecting pollution to the source. See Ronald Mitchell, Moira L. McConnell, Alexei Roginko & Ann Barrett, *International Vessel-Source Oil Pollution*, in *THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL REGIMES: CAUSAL CONNECTIONS AND BEHAVIORAL MECHANISMS* 43 (Oran R. Young ed., 1999). In this respect, however, outcasting is far from alone. Any enforcement regime relies on detection of violations. Where violations go undetected, enforcement will necessarily be lax and ineffective.

271. David Singh Grewal makes a related observation in *DAVID SINGH GREWAL, NETWORK POWER: THE SOCIAL DYNAMICS OF GLOBALIZATION* (2008). He observes that the more widespread a norm or practice that facilitates cooperation is, the greater the network power that norm or practice may hold—a dynamic he notes can generate resentment as well as cooperative behavior. *Id.*

grows as the group from which one is excluded expands. Hence, outcasting regimes may require a threshold number of participants to become effective—particularly outcasting regimes that rely on enforcement by third parties.

Finally, the reliance of outcasting regimes on ongoing cooperation points to a central tension. Much of outcasting is a contradiction in form: it involves the use of what would otherwise be lawbreaking in the service of rule-enforcement. By denying cooperative benefits to a state that has broken the rules of the legal regime, outcasting aims to bring about renewed cooperation. Yet the act of outcasting itself is in contradiction with the very cooperation it aims to produce. Outcasting regimes can therefore be fragile—too much outcasting can bring down the entire system. This tension—and the need to manage it—may help explain why the vast majority of modern outcasting regimes in international law utilize some form of adjudication. The requirement to go to adjudication before outcasting serves as a backstop against unraveling. Even when outcasting is permitted, adjudication serves to slow down the system of outcasting, allowing cooler heads to prevail. It also frequently serves to temper the level of the outcasting sanction—keeping it to levels that provide motivation for renewed cooperation without excessively undermining the cooperative regime in the process.

### *2. Outcasting Favors the Powerful over the Weak*

It is no secret that powerful states are often offered special treatment under international law. Viewing international law through the lens of outcasting helps explain why: the more a state contributes to the collective benefits shared by all the members of a particular legal regime, the harder it is for the other member states to discipline that member through outcasting. When a state that contributes a great deal to the regime is outcast, all the members of the regime lose the benefits of cooperation with the outcast. The aggrieved members may find it more expedient, instead, to turn a blind eye to the wrongdoing. In such cases, the outcasting penalty will prove weak.

Regimes that rely on first-party outcasting are especially favorable to larger and more powerful states. Recently, for example, Antigua won a case against the United States in the World Trade Organization for illegal trade restrictions on Internet gambling sites operated from Antigua. In compliance proceedings, the arbitrator authorized an “annual level of nullification or impairments of benefits accruing to Antigua” equal to \$21 million per year, and permitted Antigua to “suspend obligations under the TRIPS Agreement at a level not

exceeding US \$21 million annually.”<sup>272</sup> Antigua has so far chosen not to put in place the permitted external outcasting sanctions by suspending its obligations to the United States. Why? In part because the authorized sanctions were only a small fraction of what Antigua had sought. Probably equally important, however, is the reality that Antigua has far more to lose from cutting itself off from the United States than it has to gain. The United States accounted for 23.5 percent of Antigua’s exports and a whopping 58.2 percent of Antigua’s imports in 2007.<sup>273</sup> Antigua has virtually no military, depending instead on the United States to provide regional security.<sup>274</sup>

Any external outcasting regime that relies on first-party outcasting will likely face similar inequities. Larger, more powerful states will find outcasting less threatening—particularly if the state threatening to put in place an outcasting sanction is smaller, weaker, or more dependent on the outcast state. This is problematic from a fairness perspective. It could also prove problematic for the legitimacy of a legal regime, and hence its long-term effectiveness. If smaller and weaker states find that they always lose, they may be less eager to participate in the regime—and they may take opportunities to undercut the regime when they can do so without retribution. At the same time, it must be remembered that inequality is a basic fact of the international system—one that outcasting did not create. Indeed, in some cases, outcasting can serve to ameliorate inequity by binding powerful and weak states together in regimes that provide mutual benefits of social cooperation and membership to them all.

### 3. *Outcasting Is Nonviolent*

The most significant limitation of outcasting is its pacifism. Outcasting is *nonviolent* exclusion. The danger, of course, is that the outcast will not heed a toothless attempt at exclusion unless physically forced to do so.

Take the double-hull tanker requirements under the International Convention for the Prevention of Pollution From Ships—known as

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272. *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services (Current Status Summary)*, WORLD TRADE ORG. (Feb. 24, 2010), [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds285\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm).

273. U.N. Stat. Div., *Antigua and Barbuda*, WORLD STATISTICS POCKETBOOK (2011), available at <http://data.un.org/CountryProfile.aspx?crName=Antigua%20and%20Barbuda>.

274. Antigua spends 0.5% of its GDP on its military. It ranks 161st in the world in its military expenditures as a portion of GDP. CIA, *Antigua and Barbuda*, THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/ac.html> (last updated Sept. 27, 2011).

“MARPOL.”<sup>275</sup> The agreement puts in place extensive equipment requirements for tankers. Each ship whose flag state is a party to the Convention is required to carry documentation—issued by the flag state of the ship—which certifies their compliance with these equipment standards.<sup>276</sup> When a ship enters the port of a state party, the port state has the right to inspect the ship’s required documents as well as the ship itself.<sup>277</sup> If the port state “determines that a ship can be regarded as substandard”—meaning that its “hull, machinery, equipment or operational safety, is substantially below the standards required”—it “should immediately ensure that corrective action is taken to safeguard the safety of the ship and passengers and/or crew and eliminate any threat of harm to the marine environment before permitting the ship to sail.”<sup>278</sup> MARPOL thus requires substandard ships to be denied the right to sail out of port, outcasting them from all open waters.

Suppose a port state does as MARPOL requires and outcasts a substandard ship by forbidding it to sail until deficiencies are remediated. It is possible that the crew of the ship will heed the order and remain patiently. But it is also possible that the crew of the ship will ignore the order and attempt to leave the port. The obvious solution is for the port state to threaten to use physical force to detain the ship. It might seize the ship, arrest the sailors, and so on. In this way, violence may compensate for the pacifism of outcasting. Outcasts that refuse to heed exclusion orders are *forced* to do so.

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275. International Convention for the Prevention of Pollution from Ships, Nov. 2, 1973, *as modified by* Protocol of 1978, *opened for signature* Feb. 17, 1978, 1340 U.N.T.S. 62 (entered into force Oct. 2, 1983) [hereinafter MARPOL].

276. MARPOL requires each oil tanker of a certain size to carry an International Oil Pollution Prevention certificate—issued by the flag state or by a classification society selected by the flag state after inspection verifying required equipment was in place. This is only one of several documentation requirements under MARPOL, all of which operate in a similar fashion. *Id.*, Annex I; RONALD B. MITCHELL, INTERNATIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE 172-73 (1994). Ships of nonparties are not provided with an IOPP Certificate but are held to the same construction and inspection requirements. *See* INTERNATIONAL MARITIME ORGANIZATION, REPORT OF THE MARITIME SAFETY COMMITTEE ON ITS EIGHTY-NINTH SESSION 5 (2011), *available at* <http://www.uscg.mil/imo/msc/docs/msc-89-add-3.pdf> [hereinafter IMO, REPORT OF THE MARITIME SAFETY COMMITTEE].

277. IMO, REPORT OF THE MARITIME SAFETY COMMITTEE, *supra* note 276, at 9; *see* Resolution MEPC.117(52), Amendments to the Annex of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, Oct. 15, 2004 (entered into force Jan. 1, 2007), *available at* [http://www5.imo.org/SharePoint/blastDataHelper.asp/data\\_id%3D15720/117%2852%29.pdf](http://www5.imo.org/SharePoint/blastDataHelper.asp/data_id%3D15720/117%2852%29.pdf); MITCHELL, *supra* note 276, at 172.

278. IMO, REPORT OF THE MARITIME SAFETY COMMITTEE, *supra* note 276, at 7, 13.

Let us call these sorts of schemes “mixed” enforcement regimes. They are “mixed” because violence and outcasting are used in tandem. Put in the terms we introduced in Section II.A, mixed regimes contain mixed enforcement chains. Each chain consists of links of a different character: some links authorize outcasting while others authorize physical force. In the case of MARPOL, the physical force link follows the outcasting link because violence acts as a fail-safe ensuring that the exclusion of outcasting is heeded.

It is a remarkable feature of outcasting that in many cases the outcast need not be threatened with violence at all. Consider the breaking off of diplomatic relations by recalling one’s diplomats. This is a case of “pure” outcasting. No violence is threatened because the outcast is not required to participate in the exclusion. The outcaster can unilaterally withdraw the benefits. Or consider Security Council-authorized economic sanctions under the U.N. Charter. Member states outcast the scofflaw nation by refusing to engage in economic interchange with it. Again, no violence need be threatened against the outcast because the sanction takes the form of a boycott—a boycott only requires the participation of the outcasting states, not the outcasted one.

In general, outcasting regimes need not threaten violence against outcasts when the benefits of cooperation depend solely on the actions of the outcasters. For in such cases, the outcasters can deny such benefits simply by refusing to act cooperatively with the outcasts. Outcasting is weaker when the benefits of cooperation involve *permitting* outcasts to act. For in these instances (such as MARPOL), withdrawing the benefits by withholding permission will be effective only if the outcast respects the decision. If it does not, violence may be necessary to ensure that the outcast complies.

## VI. INTERNATIONAL LAW ENFORCEMENT REIMAGINED

The picture of international law offered in this Article aims to open up a new way of seeing international law and thus cast the central organizing questions of the field in a new light. We have shown that the Modern State Conception of law reflects only a small slice of what is, in fact, law. It is now apparent that the debate over whether international law is or is not law based on the Modern State Conception of law is largely beside the point. International law need not meet the Modern State Conception’s conditions of internality and physical force to be law, for law that is enforced externally rather than internally and through outcasting rather than through physical force is law, too.

Here we briefly discuss three central contributions this new understanding of international law promises to make. First, we aim to offer a new account of international law *as law*—and thereby show that the “1960s chestnut of a

question” is not irrelevant but has simply been considered on the wrong terms. Second, we show that this new understanding of international law opens up a series of new questions for scholars of international law, allowing them to look at the organizing questions of the field through a new lens and thereby reimagine the possibilities for international law. Third, and finally, we argue that the new picture of international law that we offer here casts the normative debate over international law in new light. We aim to turn the sovereigntist critique on its head—showing that states that choose not to participate in international legal institutions are simply voluntary outcasts.

*A. Examining International Law as Law*

This Article examines and responds to the central critique made by skeptics of international law—that international law cannot be law because it does not matter in the way law must matter. We show that by engaging this critique directly, we can open up logical space that would otherwise not have been apparent. In doing so, we are able to make new progress on an issue that is of pressing interest to international legal scholars—when and whether international law matters.

Yet our aim in engaging the critique of international law as law is not merely instrumental. We aim, as well, to make progress toward answering the broader question of whether international law is *law*. As we stated in the Introduction, we do not attempt a full answer to the question here. Doing so would require us to first articulate a theory of law, which is far beyond the confines of this Article. We have instead sought to make a step toward that goal by engaging the central critique of international law and demonstrating that it is ill founded. We hope in the process that we have shown that the effort to engage the question whether international law is law is not “futile” or “tired,” but is fruitful, fresh, and worthy of continued study.

The stakes of this broader debate are immense. The Modern State Conception derives its appeal not only from the fact that all paradigmatic instances of law in the modern world have well-developed enforcement institutions that employ physical intimidation and coercion. Its appeal is also explainable by the fact that the properties which make law *law* are also those properties that make law morally valuable. On the Modern State Conception, internal physical enforcement is necessary for a regime to be a legal system because what makes regimes worthy of respect—indeed morally indispensable in the modern world—is that they can accomplish certain tasks that no other comparable social institution can. Namely, they can wield and focus an enormous amount of physical force to ensure that people obey their demands. In the words of Hans Kelsen, law is “organized force.” Thus, despite the fact

that legal officials are almost always a small minority of a population, the bureaucratic organization of enforcement personnel harnesses and magnifies their power, thereby enabling them to compel obedience to the will of the law.

In our view, the moral distinctiveness of the law does not derive from its ability to use internally controlled physical coercion in order to enforce its will. Rather, it stems from the fact that legal systems are extremely sophisticated instruments for effecting social change through the creation and application of rules. The idea might be expressed as follows: when a community faces moral problems that are numerous and serious and that require complex, contentious, or arbitrary solutions, certain modes of governance such as improvisation, spontaneous ordering, private bargaining, or communal consensus will be costly to engage in, sometimes prohibitively so. Unless the community has a way of reducing the costs of governance, resolving these moral problems will be expensive at best, and impossible at worst. On our view, the moral indispensability of the law arises from its ability to meet this demand in an efficient manner. By providing a highly nimble and durable method for creating and applying rules, the law enables communities to solve the numerous and serious problems that would otherwise be too costly or risky to resolve.<sup>279</sup>

To be sure, law would not be morally indispensable if it were purely aspirational in nature. Legal systems not only create and apply rules: they also see to it that their demands are met. But as opposed to the Modern State Conception, we do not require that legal systems ensure that their will be done in any particular fashion. Their methods for motivating compliance are a contingent matter. Whether a particular regime deems it appropriate to employ physical force depends on the costs and benefits of doing so. Much will depend on the material wealth of the society, the current state of technology, the legitimacy enjoyed by the regime, the cultural meaning of violence, the climate and geography of the territory, the degree of social interdependence and cooperation, the availability of external sources of coercion, and so on. Indeed, the ability of the law to solve moral problems may in some cases *depend* on its decision to eschew violence as a means of enforcement. As we saw in the case of Iceland, the egalitarian ethos of the commonwealth demanded that the law be enforced by private individuals. And the Roman Catholic Church took itself to be spiritually barred from using temporal sanctions. If it was to do God's will, it would have to turn the other cheek. So, too, the nature of state sovereignty demands that international law only apply physical force in rare instances. Like Iceland and classical canon law, international law must—and does—rely on

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279. See SHAPIRO, *supra* note 5, at 170–76.

another means of law enforcement. And that means, more often than not, is externalized outcasting.

*B. Reimagining Possibilities in International Law*

Seeing external enforcement and outcasting as modes of law enforcement allows scholars to reimagine the possibilities for international law. Recognizing that international law often operates through external enforcement—by calling on states to enforce the law—can lead us to see the successes and failures of international law in an entirely new light.

Once we see that international law relies heavily on external enforcement, this shifts our attention to how external enforcement works—and when and why it does not. Law that relies on external actors for enforcement is vulnerable in an obvious way to the independent choices of those external actors. An international legal regime might rely on external actors to enforce, but that does not mean they will always do so. Attention, therefore, must be paid to when, why, and how external actors will act to enforce international legal obligations. Seen in this light, the problem of international legal enforcement is turned upside down—when an international legal regime that relies on external enforcement goes unenforced, it is not a failure of the international institution as such, but a failure of states to act. Viewing the problem through this lens, then, offers a new agenda for scholars seeking to understand how to make international legal regimes more effective.

At the same time, once we see outcasting as a central mode of international law enforcement, we see international law enforcement in an entirely new light. International agreements that lack enforcement through physical force do not necessarily lack enforcement. Enforcement through exclusion from the benefits of social cooperation can be as powerful at motivating states to comply with the law as any physical force—and sometimes even more powerful. And not only is outcasting powerful, but it is multifaceted. Different forms of outcasting are better suited to addressing different sets of challenges. This opens up a new world of possibilities for international law—and a host of new questions for scholars to answer. Why do some variations exist in some contexts and not in others? Are there further variations that could be used to respond to challenges not already met by existing forms of outcasting? Are there areas of international law where outcasting could be better tailored to effectively enforce the law? What barriers exist to making those changes and how might they be overcome? We have attempted to begin this conversation, but much remains to be done.



C. *The Sovereigntist Fallacy*

The Modern State Conception insists that regimes are legal systems only when they enforce their commands internally through the threat and exercise of physical force. This vision of law places defenders of international law in an indefensible position: if international law is “really” law, then it is like a modern state—with international police ready to use violence to force states to comply with its commands. To be real law under the Modern State Conception, then, international law must live up to the greatest fears of its critics—trampling state sovereignty and democratic self-determination.

We have attempted in this Article to show that this is a false trap. Law enforcement that fits the Modern State Conception is *one* form of law enforcement, but it is not the *only* form. There are other forms of law enforcement that violate the conditions of the Modern State Conception—enforcing commands through external actors, or relying on outcasting rather than physical force, or, as in the case of most of international law, both.

Once we see that international law most often operates not through the tools of the Modern State Conception but instead through externalized outcasting, we can see that the sovereigntist critique of international law stands on a false foundation. By relying on external actors to enforce the law, international law places responsibility for the success or failure of law back upon the states that created it. It is not the blue-helmeted police of the United Nations that enforce the vast majority of international law, but pressures brought to bear by other states. Those states act, moreover, not by threatening physical force. Rather, they create agreements that produce benefits for all their members—and then threaten to exclude those who violate those rules from some or all of the benefits of the regime.

Indeed, the very nature of the international legal system *requires* that it be so. International law, like Icelandic and classical canon law, *must* rely on some means of enforcement other than physical force. International law’s lack of the capacities of a modern state is a feature, not a bug, of international law. Yes, international law is not enforced by an international police force—and *that is exactly as it must be*. Just as the presence of a king with the power to physically force compliance with the law would have been inconsistent with the egalitarianism of medieval Iceland and temporal sanctions administered by the Church of the classical period would have sullied the Church’s spiritual character; so too would the existence of international police exerting physical power to force states to comply be inconsistent with the very meaning of international law, which is based on respect for the sovereignty and self-determination of states.

It is impossible to overemphasize the importance of state sovereignty in international law. The international legal system is both created by and creates sovereign states. A treaty, for example, is “an international agreement concluded *between States*.”<sup>280</sup> Similarly, customary international law results from a general and consistent practice *of states* followed by them from a sense of legal obligation. At the same time, the very idea of what it is to be a “state” is, in a very real sense, a legal construction—one based on physical facts, to be sure—but nonetheless constructed through shared understandings. Perhaps the most important of these shared understandings is that the quintessential defining characteristic of a “state” is its monopoly over the legitimate use of force within its geographical boundaries. International law thus creates, protects, and reinforces state sovereignty through various legal rules including the obligation not to use aggressive physical force against another sovereign state except in rare circumstances. International law cannot primarily rely on internal physical force against states as a means of law enforcement, because to do so would threaten to collapse the very idea of what it is to be a “state” and thus eliminate the precondition for the existence of international law in the cause of enforcing it.

The recognition that international law most often relies on outcasting rather than physical force turns the sovereigntist critique on its head. If international legal regimes are best understood as arrangements that generate community benefits for member states and impose discipline through outcasting (excluding lawbreakers from the benefits of membership), then international law does not have the power to rob states of their sovereignty. Instead, it only has the power to take away the very benefits that it has itself generated. If that is true, then states that refuse to join international agreements out of a fear that doing so will undermine their sovereignty are simply voluntary outcasts.

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280. Vienna Convention on the Law of Treaties, *supra* note 225, art. 2 (emphasis added).