Ch. 4 The Practice Approach

Introduction

I have suggested that Dworkin's New Philosophy offers at least two important insights into the doctrinal question of law. The first is about the functional role of international law within the state sytem, which may be called the

> CORRECTION THESIS: international law as we find it, including treaties and administrative and customary law, is in fact a remedy for the problematic tendencies of a politically decentralized state system (e.g. legal norms granting diplomatic immunity help address coordination problems and miscommunications which can precipitate confusion and conflict; environmental law, like the Kyoto Protocol, coordinates multi-state action in response to global climate change)

The second insight, which addresses further questions about what significance this might have for state conduct, is what may be called the

> DUTY OF MITIGATION: absent special justification, states have sufficient reason to adopt policies that help to correct for or at least contribute to the mitigation of problematic tendencies of a politically decentralized system.

To the extent that state compliance in fact corrects for such tendencies, states have sufficient reason to comply with that treaty, administrative, or customary law as it may apply to them, at least absent special justification excusing them from performance.

If my account of the authority of international law in Ch. 1 is correct, this is not yet an account of why international la is authoritative for states. While is does address the doctrinal question of why states have reason to obey, to the extent the Duty of Mitigation is seen as a natural duty — as it is for both Dworkin and Kumm — reasons for state compliance with international law are too closely linked to the morality of its content. As proposed in Ch. 1, going practice assumes that law can have a form of legal authority that, crucially, persists despite inconsistency with widely accepted moral truths. Positivist views that appeal to state consent accommodate this concern about the form of authority, but, as argued in Ch. 2, they do so in a way that is undesirably revisionistic. In this chapter, I outline a positivistic version of Dworkin's New Philosophy that better captures both the form and scope of going international legal practice than any view so far considered. Following the work of Aaron James, I call this the practice approach to international law.

According to the practice approach, states have an associative obligation to comply with international law. Whatever further natural duties states may or may not have, they have sufficient moral reason for compliance, absent special justification, by virtue of the specific social relationship that defines them as states in the first place. By participating and being recognized by others in the state system, a politically decentralized social practice, states claim the rights of sovereignty but also undertake an associative obligation to mitigate.

In addition to the Correction Thesis, the practice approach may be expressed as the following further claims:

> SOVEREIGNTY THESIS: Sovereignty, or the right to rule, is not simply the function of domestic policy or the choices of peoples, a bundle of rights to rule institutionally specified through the complex social interactions of states and other international political agents. This system not only specifies the moral rights and countries of rule, it distributes those rights through the mutual recognition of states.
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> ASSOCIATIONAL DUTY OF MITIGATION: absent special justification, states have sufficient reason to adopt policies that help to correct for or contribute to the mitigation of problematic tendencies of a politically decentralized state system, simply by virtue of presumed membership in the state system, which is to say, by vitue of credibly claiming the right to rule over a territory with the privileges the state system affords.
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> AUTHORITY THESIS: associative obligations of states have the following authority characteristics: (1) the give states directed reasons for action such that compliant actions are owed

to other states in a way distinct from advice and requests ("reason-giving"); (2) the obligation to comply with law is defeasible by sufficiently important countervailing concerns ("defeasibility"); (3) their content is set in part by going political practice, and so is not a direct function of the morality of its content ("content-independence").

In this way, I suggest, these theses suffice to account for the authority of international law as we find it in contemporary practice. Although it is positivistic in some ways, it is unlike state consent views in that it applies broadly across treaty, administrative, and customary law, and so need not be excessively revisionistic.

My discussion of this account will focus mainly on motivating and elaborating the foregoing main theses. I will address objections, but do not claim to have defended it against rival views. My main aim is to articulate the general contours of a practice approach, on at least one characterization of how it might go.

A General Account of Associative Obligations

In most general terms, associative obligations are standards for right conduct that bind agents on the basis of their membership in a group or participation in a social practice. They are very common. On the less-controversial end, associative obligations include things like the obligation to lend your neighbor a cup of sugar and to treat a sibling with respect. On the more controversial end, associative obligations might include why we ought to feed our pets and pay taxes, and why states ought to comply with international law. But what is it about these relations that suffices to ground obligations?

Consider siblings. Brothers and sisters are generally thought to have certain rights and obligations against one another, and these rights and obligations are generally thought to be based in their relationship. For instance, if my sister were to invite me to her wedding, I would have an obligation to attend, absent special circumstances that would suffice to excuse my absence. Of course, anyone who is invited is allowed to come. But I, her brother, had better be there or else I am going to be in for it - that is, I will be susceptible to special forms of accountability seeking - public scorn, shame, and resentment - by my sister for the special wrong that I have done to her. If this were to happen - if I were to skip the wedding and become subject to my sister's and family's scorn - and if I were to ask, "Why punish me so?" or even "Why punish *me* and not others who also missed the wedding?" her answer would almost certainly be: "Because you are my *brother*!" Some views might take her answer to be elliptical for a longer answer about the rights of human beings or the sanctity of tradition, but a theory of associative obligation does not. Rather, it says that reference to the relationship between individuals is precisely the place to go when justifying this class normative claims.

The idea of associative obligations also illuminates the practice of promising. Suppose that I promise to paint the house, and you accept my promise. Now suppose that, for no particular reason, I do not fulfill my promise. My failure puts you in the position to rebuke me or otherwise hold me accountable. Maybe I owe you an apology or even compensation. But why? Perhaps it is because there is a true moral principle, *pacta sunt servanda*, and the truth of that principle implies the wrongness of my action and the justifiability of your rebuke. Perhaps it is because I consented, thereby wrapping myself up in a contradiction when I went against my own will and did not paint the house. Perhaps it is because everyone, including me, benefits by having a working institution of promising, and keeping my promises is how I pay my fair share. But why not think that the answer is as simple as what we would actually say: "Because you promised!"

When does association with other agents become obligating? These examples - familial obligation and promissory obligation - might seem to have very little in common. People normally choose whether or not to make promises, whereas hardly anybody has a say in whether they will have siblings or not. Promises are normally temporary- they evaporate when they are discharged. Familial obligations are not like this, as they cannot be discharged without a significant disruption of normal practice. Worse, not all relations appear to give obligations at all. Living in the house next to yours may give me neighborly

obligations, but does the fact that I work in the skyscraper next to the one you work in give them too? This is less obvious.

What *is* obvious, or at least what I believe is apparent in this diversity, is that it might be too much to ask for a single set of necessary and sufficient criteria for when a relationship grounds associative obligations. We might, however, be able to provide a general account that is both illuminating about these two canonical cases, while also offering some guidance about others.

To do this, let us explore a fictional example. Suppose there is a group on campus, a student club. It's a pretty cool club - well known, respected, with some level of prestige and honor - so it is exclusive to some extent. Members are given special privileges. They include one another in group events during the year, so their calendar is never empty, and they are connected to a vast network of club alumni after graduation, thus gaining access to exclusive opportunities. As members graduate, new members are invited to join or, more and more, applicants ask to join and are then invited. With this continual flow of new and departing members, leadership is in a state of constant flux with dominant members or alliances coming and going.

But there are problems. Members disagree about who should be allowed in. One wants to be more inclusive, to share the bounties of membership and to grow the alumni pool. After all, he says, the point of this whole group is to meet new people and make new connections. Another disagrees, preferring to be more exclusive to improve the quality of the alumni pool and the character of the people with whom she will associate herself. After all, she says, the point of this whole group is to refine ourselves and secure our job prospects. More fraught than argument about who should be accepted into the club are arguments about who should be *kept*. There are grumblings about the slackers whose grades have fallen off or who have switched their majors from pre-med to philosophy, and so who do not promise to improve the alumni pool for future members. In fact, they might deter promising applicants from joining the club even if they were accepted. People begin to suggest denying them the privileges of membership.

The problems are not all simply disagreements. For instance, everyone can agree that it makes no sense for every member to be in touch with every alumnus to keep the alumni network alive. The obvious redundancies make it a waste of time. But nobody wants to do the work alone, or even in a small group, while the others can simply enjoy the benefits of their labor without doing their part. People start thinking of creative ways to distribute the labor, making sure that everyone dos there part, but there are a number of competing options, none of which really gets going, and so the alumni network starts to fall apart as the club simply loses touch.

But, maybe because of the vision of a particular dominant alliance at some point in the history of the club or simply as a matter of dumb luck, the alumni network does not fall apart. Instead, members divide up the alumni contact lists more or less evenly, and each member stays in contact with only those few people. The lists are redistributed every year to account for the changing membership. They begin accepting only people who are willing to do this, but who also meet standards of promise with respect to the improvement of the alumni network (they have high GPAs, are ambitious, are independently well connected). They also develop standards for membership: minimum GPAs, regular participation in group activities, a good record of staying in contact with assigned alumni.

Of course, over time these standards change, sometimes subtly and sometimes abruptly. For example, at different times, the club tends towards evaluating applications differently. Some weigh GPA more heavily. Others focus on whether applicants have ambitious majors. The same is true for membership standards. When the club is doing well because applicant interest is high and the alumni are successful and closely connected, standards for keeping members might drop whether from a sense of complacency or simply a desire to share the wealth, but more likely both and other reasons besides. When the club is doing poorly, the alumni are lethargic and unwilling to donate money, standards for acceptance might drop while standards for continued membership might rise.

Other changes are more abrupt. One example might be the year that someone finally brought everyone's attention to the fact that what was originally a co-ed club has become dominated by men, largely due to arbitrary gender biases implicit in the application process. Not only is this exclusion immoral, the member argues, it is killing the quality of our alumni network, which, after all, is one of the

main reasons we're here. In the beginning, it was just this one outspoken person charismatically declaring that demographic quotas shall be used while accepting applicants and loudly shaming anyone who failed. Over time, people just started using them, and after a few years, these standards made the gender bias begin to even out.

Now the big question: Do the members have an obligation to comply with the rules of the club? Do they owe it to the other members to abide by the demographic acceptance quotas, which might themselves raise moral questions, when evaluating applications? Are they rightly sanctioned, or even expelled, by the membership when they fail to do so? Or when they fail to keep in touch with their assigned alumni, even though they cannot choose which or how many alumni they are assigned? The answer is yes. Yes, members owe it to one another to contact their alumni, and to keep their GPAs up, and even to use the demographic quotas while evaluating applications. Why? Because they are members. But to stop there would not illuminate the answer, so let us go further.

Here is a general characterization of the club, broken down into component conditions that appear jointly to suffice to ground associative obligations. (1) The club is a social practice - a group of agents whose behaviors can be understood as individual activity coordinated by a set of norms. (2) These norms are organized around generally accepted but appropriately vague purposes - something about full calendars and job prospects. (3) Norms play two basic functions: regulative and constitutive. On the regulative side, norms set the standards for member behavior, and are presumed by members to ground accountability seeking behaviors when they are violated. On the constitutive side, norms figure prominently in any understanding of the identities of the agents. If I am a member of the club, I am someone who keeps such and such GPA, who uses such and such admission guidelines, who calls these assigned alumni, who attends these events. Many if not all of these norms play both regulative and constitutive roles. Altogether, these norms fulfill a third function, a corrective function. (4) For reasons outside of the club's control, leadership is persistently fragmented and in flux, and this leads to problems that most everyone recognizes. Not only do morally objectionable practices pop up, the club begins to fail to effectively pursue its own purposes, even when everyone is willing to do their part. (5) The norms about admission, membership, and networking coordinate the activities of the membership and correct these problems, but only because the members act as though they owe it to the others to comply. It is certainly not the case that every member has consented to every norm in this organization. Nor is it the case that they have consented to some decision procedure for determining rules. Nor is every rule constitutive of the club consistent with morality. That does not mean that the whole club is rotten. In fact, it isn't all that bad. It is helping people get jobs after graduation and cultivating a sense of belonging. But it just as certainly *is* the case that if a member fails to maintain the minimum GPA, even if that standard has changed since his joining, that he is liable for sanction or expulsion. And it is the case that if he does not use the customary standards for admissions, he is liable for sanction as well.

Why? Because when one claims the rights of membership - the prestige on campus, permission to attend exclusive events, access to the alumni network - one at the same time undertakes an obligation to uphold and improve the legitimacy of the group or social practice that grants those rights. A member's claim to the institutionally specified rights and privileges granted to members is only as strong as the practice's right to distribute or withhold them. What threatens that legitimacy? Pathologies. They open the practice to moral objections and introduce procedural inefficiencies and maldistributions of benefits and burdens which threaten to change the best interpretation of the practice from something that pursues widely acceptable goals to something with the purpose of arbitrary inequality and discrimination. How can a member satisfy this obligation? By deferring to existing corrective norms where they exist and fulfill the corrective function; or by amending existing norms in whatever legislative capacity members are granted by the practice so that they better correct for pathologies; or by legislating new corrective norms when none exist. Thus emerges a general characterization of associative obligations. When agents claim rights on the grounds of their participation in a legitimate social practice, they undertake an obligation to the other members of that group to defer to [when they exist], positively amend, and establish norms that mitigate the pathologies of that practice in order to uphold and improve its legitimacy.

This explanation helps illuminate familial obligations, one of the paradigmatic examples we began with. Why does the fact that two people are siblings (normally) give them special obligations to one another? The reason is that, as members of a family, siblings presume entitlement to certain privileges - care, attention, love, support. Along with these are privileges of privacy - members of a family can rely on the support of co-members without having to publicize their need for it. We call this "keeping it in the family". But every family is different, and each works out for itself how extensive these privileges are, and how onerous the obligations of membership will be. These standards are not (typically) worked out formally, but politically, by members acting in the ways they interpret as appropriate for their role - whether by helping with homework, doing chores, asking for money, throwing family birthday parties - and seeing which of those actions get picked up, mimicked, and ultimately entrenched as a constitutive norm of the family. This political family structure comes with its problems. Such informality invites deviance, free-riding, and simple confusion. Who will host the next holiday? Who will house the parents when they are suddenly unable to care for themselves? How will inheritance be split? For many of these, simple customs are developed to solve the problems. Holidays are hosted on a regularly rotating basis. Ailing parents will be cared for by whichever child has the best combination of free time, available money, and living space. Other problems demand more precise solutions. How inheritance will be divided is often explicitly negotiated in the form of a will, ultimately answerable only to the dying party. So long as a person claims a share of the inheritance, or a place at the thanksgiving table, they have an obligation to do their part in maintaining these rules and customs, and to working with the others to create new rules and customs as new problems arise. By claiming these rights, family members undertake familial obligations.

I can imagine how this account of associative obligations could shed light on the practice of promising as well, though I will go into less detail here. But the idea would be that people often cannot satisfy their interests without coordinating behavior with others, and promising is one of the best tools we have for arranging such coordination. However, as Hobbes's "Foole" demonstrates, there is something seemingly irrational about the performance of covenants, since performance necessarily comes at a cost. This would be doubly true of promises, in which the benefits are typically seen as "one directional". So there is an intrinsic tension in promising between the need for coordinating institutions and the rational self-interest of specific agents that encourages to non-performance. Strong prohibitions on promise-breaking, the right to publicize broken promises, the privileges that come with "trustworthiness" are all corrective norms to combat this tension. So when we claim the rights of a promisee (the right to performance) or even the rights of a promisor (the privileges of trustworthiness), we undertake the institutionally specified obligations constitutive of a practice of promising that we, even in our own promise here and now, are working out.[1]

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[1] This answer also illuminates the question, "Can a promise be made in the state of nature?" - a question long thought to be the final nail in the coffin of practice account of promising. If promising depends on the existence of institutions (perhaps for the sake of enforcement a la Hobbes), then promises cannot happen in the state of nature. But many theorists agree that promises *can* happen in the state of nature. The associative obligation view puts a new spin this affirmative answer. Yes, promises can happen in a state of nature, but only if it begets a larger practice of promising. If we make a "promise" in the state of nature, but nobody ever mimics our behavior, the promisor does not perform, and there are no costs for non performance, then we have not actually made a promise. Instead, we are in the strange situation of finding out that we never actually did what we thought we were doing. We thought we were doing a thing called promising, and had promising been taken up by others, then maybe we would have actually been doing it in that first instance. However, since nobody took up the idea of promising - it never caught on - we were not actually promising in that first instance. It is as if we were trying to start a new dance craze, "The Pilch", by gyrating frantically on the dance floor but nobody followed suit. Ever. Were we doing The Pilch? Not really. We were just gyrating frantically.

The State System as a Social Practice

But what does any of this have to do with international law and why states ought to comply with it? Dworkin's insight into the connection between international law and the state system helps answer this question. Like the school club, the family, or the institution of promising, the state system is a social practice constituted in such a way that it grounds associative obligations. Among these obligations, or perhaps at their heart, is the obligation to mitigate. States can discharge this obligation, I will argue, only by complying with international law.

To begin, is there a plausible interpretation of the state system that makes it seem like the kind of social practice that could ground associative obligations? That is, is there an interpretation of the state system that casts is as (1) a social practice that is (2) organized around widely acceptable purposes, (3) presumed to be the source of rights and privileges for members, (4) prone to pathologies, and (5) at least partially constituted by norms that fulfill a corrective function? I think that there very clearly is, and I am not alone. For instance, in *The New Sovereignty*, Chayes and Chayes argue

> "That the contemporary international system is interdependent and increasingly so is not news. Our argument goes further. It is that, for all but a few self-isolated nations, sovereignty no longer consists in the freedom of states to act independently, in their perceived self-interest, but in membership in reasonably good standing in the regimes that make up the substance of international life…. Sovereignty, in the end, is status — the vindication of the state's existence as a member of the international system. In today's setting, the only way most states can realize or express their sovereignty is through participation in the various regimes that regulate and order the international system."[2]

Alexander Wendt has famously expanded on similar ideas in his own writing, as exemplified by the following passage:

> "Sovereignty is an institution, and so it exists only in virtue of certain intersubjective understandings and expectations; there is no sovereignty without an other. These understandings and expectations not only constitute a particular kind of state — the "sovereign" state — but also constitute a particular form of community, since identities are relational. The essence of this community is a mutual recognition of one another's right to exercise exclusive political authority within territorial limits. These reciprocal "permissions" constitute a spatially rather than functionally differentiated world — a world in which fields of practice constitute and are organized around "domestic" and "international" spaces rather than around the performance of particular activities."[3]

Wendt's writing style can be unfamiliar for analytic philosophers, but his idea is the very one captured by Chayes and Chayes: States are members of a group, the society of states. They owe their rights — sovereignty, the right to rule — to that group such that without the recognition of the other members, the state would not be the bearer of those institutionally specified rights.

Practice affords us plenty of examples of states who are sovereign only because they are recognized as such by an international society of states. Israel, certainly in the earliest parts of the post-war period is a perfect example where domestic procedures for foundation and the popular creation of a sovereign state mattered far less, if at all, than international insistence that such state be created and respected. South Sudan and South Korea (and probably North Korea, though this case is less clear in light

[2] Chayes and Chayes, 27

[3] Wendt, Alexander "Anarchy is what states make of it" p 412; see also Kratochwil and Ruggie "International Organization: State of the Art or Art of the State"

of its roguish behavior) are also probably examples of countries that enjoy sovereignty not because of some domestic process whereby citizens gave up their rights, and not because of a dictum from God establishing their rights, but because the international community recognized protective associations in those regions as sovereigns.

This "exogenous" view of sovereignty also explains cases of state-like agents who are not actually or clearly states. A simple example is the Principality of Sealand, a manmade island of the eastern coast of England that claims sovereignty and political autonomy. Although citizens of this principality have reached complete unanimity about their independent status, no state in the world recognizes their sovereign rights. As an interpretive matter, it would be an error to claim that Sealand is a state. A more recent and serious example is the Autonomous Republic of Crimea, who supposedly seceded from Ukraine in February 2014 after a landslide vote to do so.[4] At the moment, most European countries and the Unites States reject this vote as illegal, thus refusing to recognize Crimea's sovereignty. Russia, on the other hand, has already treated with Crimea, thus implicitly recognizing it. Thus the exogenous view would tell us that Crimean sovereignty is unsettled, as is the case in practice.

These authors also describe the state system as a political practice — one whose terms are worked out as a matter of proposals made by peers and then instituted through a process of uptake, repetition, and mimicking. Chayes and Chayes write about how states frequently discover the boundaries of their treaty obligations by "testing" the limits of what cosigners will tolerate.[5] In a more cynical state of mind, we might take this as an example of states trying to cheat on their agreements, but nothing about the case forces this interpretation on us. In fact, given that states willingly enter into agreements from a shared sense of urgency, cheating seems not to be the best interpretation of such envelope pushing. Instead, Chayes and Chayes suggest, this testing is a way of specifying the terms of membership — in this case, membership in a treaty — by seeing which actions will be tolerated and which will not. State actions, therefore, are a kind of legislative proposal about the boundaries of permissible state action, to be approved or rejected by the others as indicated through their reactions.

An example will be instructive. Consider the international legal custom of flying high orbit spy planes over other countries.[6] Prior to the cold war, international custom had been that state boundaries rose straight from the Earth's surface to the end of the atmosphere. However, when the US and USSR began flying spy planes over one another, other members of the international community generally accepted this. Gradually, as other countries developed the technology to do so, they followed suit. This was very clearly a case of presumed legal obligations changing through a political process of performative proposal, of pushing the envelope, and the subsequent development of new customs through mimicry and further boundary testing.

These are especially clear cases because they are extreme, but the image of the state system as a social practice lived by highly autonomous states but governed by norms and organized around widely acceptable purposes is apparent even in humdrum cases of international political life. As Dworkin says, and as custom assumes, states are indeed sovereign. They are politically independent units, afforded vast rights of non-interference and autonomy. But those rights have readily apparent limits. States are not supposed to engage in aggressive warfare, and, for the most part, they do not. In the event of natural catastrophes, states are expected to send aid and support, and, for the most part, they do. States respect borders, elections, trade deals, norms about he treatment of diplomats, standards about how violent conflict will be conducted, and when they do not they are open to public shame and formal sanction by the others.

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[4] Of course, the legitimacy of this vote can be questioned both on the basis of how the options on the ballot were phased and also on the basis of large social group who opposed secession boycotting the elections.

[5] Chayes and Chayes 12

[6] Cheng, Instant Custom

And the purpose of such a system? That is an interpretive question, and different people might give different answers, but a few suggestions do not seem too controversial. We forbid aggressive war, put very high standards on when the use of interstate violence is permitted, and give special privileges to diplomats because we want peace, or at least security. Even if we ourselves do not care so much about this purpose, we can understand why someone reasonably might. Indeed, as Dworkin says, one of the major reasons for the creation of the balkanized Westphalian state system in the first place was to substitute " economic competition for the bloody religious conflicts that had marked the previous century."[7] We allow states to extract their domestic resources and to refine and sell them abroad for the sake of amassing wealth because we care about prosperity. We expect states to respect borders and territorial integrity, to respect domestic legislative procedures, and not to dominate in joint ventures because we care about the preservation and toleration of diversity. I may be wrong about what the purposes of the state system are — maybe we care about autonomy rather than diversity, for example — but surely something like these are correct. But what is important to note is that something like these purposes — values that are widely acceptable from the internal perspective of the members — are a necessary part of making sense of the state system that we have.

As Wendt rightly says, these norms of the state system play a double role. On one hand, they regulate the behavior of states in fact. That is why, for example, states act differently with respect to events within their borders as opposed to events without. The US sent aid to the Philippines after Haiyan, but sent the national guard and FEMA to Louisiana after Katrina. Our government creates rules about how our elections will go, but does not in Lithuania. Why? Because there are rules about what states are allowed to do domestically, and what they are allowed to do internationally, and these rules are different.

Aside from the regulatory function, these norms also specify what it is to *be* a state. A state is the kind of thing that has the right to hold and regulate domestic elections, and to exclude foreign governing bodies from interfering in those processes. States have the right to protect citizens from natural catastrophes, and a responsibility to do so that ranges far beyond similar responsibilities to non-citizens. The rules that govern what states may and may not do also specify the rights that define what it is to be a state in the first place. In this way, the state system is not only presumed to regulate states, it is the presumptive source of those rights that set an association of persons apart *as* a state.

As was discussed in Ch. 3, the state system practice is prone to pathologies. Its decentralized structure makes problems of common concern, the solutions to which demand coordination, more difficult to solve than in a hierarchical system where subjects could simply defer to the will of a Hobbesian sovereign. The problems of the Kyoto Protocol and the recurring challenges to the legitimacy of international courts are examples of just such problems. Norms of non-interference put minorities at risk of domestic oppression. Norms that make state autonomy and self-help the default presumption inhibit transparency and communication, undermining assurances of security and non-aggression.

So the final question, then, is: Is the state system at least partially constituted by norms that, if complied with, could correct for these pathologies? Again, the answer is yes. Those norms that are both constitutive and corrective are international law. Through this political practice, states have worked out a set of regulatory norms that are specially capable of addressing the negative externalities of that very practice. Many of these norms take the form of customs. Diplomats are presumed to have special rights and privileges, because they help states communicate their intentions and to give assurances for effectively. Documents that specify the boundaries of permissible treatment of individual humans (UDHR) or laborers (ILO standards) are treated as if they have a special reason-giving status for states, even though not all states got to take part in their enumeration. A modern version of the idea of the treaty emerged, whereby states could formally negotiate mutually acceptable terms for coordination on specific issues and make those terms explicit and publicly available.

What we have in the state system, therefore, is a social practice, guided by widely acceptable purposes, presumed by practitioners to be the source of rights and privileges, prone to pathology, and at

[7] Dworkin, New Philosophy, 16

least partially constituted by norms that fill a corrective function - or at least that could fill this function if generally complied with. In terms of the formal criteria discussed earlier, this system is isomorphic with the the school club, the family, and perhaps even the institution of promising. So, just as when members of the club claim the privileges of membership or members of the family claim familial rights, when states claim the rights of sovereignty — rights institutionally specified by the political practice that is the state system — they undertake an associative obligation to do their part in mitigating the pathologies of the system that specifies and grants those rights.

The Obligation to Mitigate and Compliance with International Law

It is tempting to stop here and say: States have an obligation to mitigate the pathologies of the state system and they can do this by conforming to international law; therefore states have an obligation to comply with international law. But this argument is open to an early and simple objection which says: even if we agree that states have an associative obligation to mitigate, and we agree that compliance with international law is *one way* that a state can discharge this obligation, these alone do not suffice to show that states have an obligation to comply with international law. This is because there may be other ways, besides acting in conformity with international law, for states to address pathologies and thereby discharge their obligation. It follows, then, that states do not have an obligation to comply with international law, so long as they realize one of the alternatives.

What might such an alternative be? How else might a state mitigate or contribute to the mitigation of the problems of the state system? One way might be to work towards the dissolution of the state system. If states' obligations are to get rid of the problems that come with the state system, one way to do this is to get rid of the state system altogether in favor of international anarchy. This form of anarchy need not be a return to the state of nature for individual humans — they can remain within their respective protective associations (formerly states) — but *would be* a return to the state of nature for protective associations. We need not assume that this would make human life solitary, poor, nasty, brutish, or short, though certainly it would mark a dramatic change.

But it is not obvious that dissolution into an international state of nature would rid us of the pathologies, or even that such dissolution is conceptually coherent. Wendt, for example, argues that what might appear to be the dissolution of the state system into anarchy is really nothing more than the assertion of stronger rights to autonomy and self-governance *within a state system*.[8] If the leaders of the world come together and say, "No longer shall we coordinate our behaviors through this political practice. Instead, there are no rules about how protective agencies shall treat one another," this would itself be an example of political legislation within the state system. As agents subsequently competed for resources or whatever agents do in the state of nature, they would be living out the rights that they give one another as members of a political community. Just trying to think what it would mean to dissolve the state system is conceptually problematic.

We can take this one step further. Let us assume that we can make conceptual sense of the dissolution of the state system into anarchy. In the first place, there are forceful moral argument why this ought not to be done. Importantly among these is an argument on the basis of the values that constitute the purposes of the state system that we would be foregoing by dissolving it. I have suggested that the state system is organized towards the achievement of security, prosperity, and toleration. What would be the purpose of returning to the state of nature? To avoid legal encumbrances? To avoid burdensome duties to aid others? More charitably, one might say that the purpose of a return to anarchy is the pursuit of freedom. But what is liberty without security, even for a state? What is freedom without prosperity? For there is no reason to assume that these go hand in hand. The valuable purposes of the state system cannot be achieved in a state of nature, and the values that might motivate dissolution do not outweigh them.

[8] Wendt, "Anarchy" 391

The final, and perhaps most obvious response to the anarchist, is that there states have no practicable avenues to bringing about the dissolution of the state system. Even if dissolution was conceptually coherent, and even if it was not open to decisive moral objection, it still would not be practically possible. Partly this is due to political will, or the lack thereof. People and states genuinely benefit by being part of the state system. However limited they may be, we, as a world, have made significant gains precisely in the areas of security, prosperity, and toleration in the post-war period that marks the relatively short span of time we have actually had the modern state system. It will be hard to get them to give these benefits up.

But here is a more plausible alternative: perhaps states could contribute to the establishment of a centralized world state to fulfill their obligation. Most, if not all, of the pathologies that Dworkin, Beitz, Kumm, and James identify arise from the decentralized character of the modern state system. Decentralization leads to coordination problems. Excessive autonomy leads to risks of domestic oppression and unequal distributions of wealth. The problem is not governance *per se* like the anarchist thought, it is decentralization. So perhaps a state could satisfy its obligation to mitigate by helping to bring about a centralized world state that would, almost analytically, avoid these pathologies.

This alternative seems not to suffer the conceptual shortcomings of the anarchist. While administrating a world state would surely be a herculean task, there is not, on the face of things, any conceptual incoherence in the idea of one big state. Wendt might disagree and claim, as we have seen, that there is no state without an other, but this appears to be a point about semantics.[9] Call it what you will, state or global protective association, it seems at least conceivable that such an organization could come to be.

Working towards a global state also at least conceptually could avoid the moral problems faced by anarchy. Surely a global state could pursue the same values that constitute the purpose of the modern state system. We might argue about whether a global state will be the most efficient way to achieve certain values — toleration of diversity comes to mind as the kind of thing that might be quashed by bureaucracy — but nothing in the practice account of associative obligations says that states have an obligation to correct pathologies in the most efficient way. The modern state system, even corrected by international law and given full compliance, is almost certainly *not* the most efficient way imaginable to achieve its purposes.

But practicability is a serious problem for a world state. Even if the political will were present internationally to create a world state (which it is not), we lack the administrative capacity. We lack a shared history of acceptable world governance or even of acceptable governance in the first instance. What we do share is a long tradition of self-governance and autonomy, and a world state marks a dramatic break from that. Perhaps we can see a world state on the distant horizon, maybe because we have been reading science-fiction, but it is, I believe, excessively optimistic to think that there is anything states can do now to hasten its arrival.

There are almost certainly other ways that a state could contribute to the mitigation of the pathologies of the state system besides compliance with international law, dissolution into anarchy, and the establishment of a world state, though I do not know what they are. So let it suffice for me to say the following. If a state does not want to comply with international law while, at the same time claiming the rights of sovereignty, any excuse for noncompliance must be of the form: In order to satisfy my obligation to mitigate, I will do X, where X is inconsistent with compliance with international law but (1) contributes to the mitigation of the pathologies of the state system, (2) pursues purposes of comparable or greater value than the purposes of that system, and (3) is both conceptually and practically possible. However, in the apparent absence of alternative means for mitigating the pathologies of the state system — the conceptual deficits of global anarchy and the practical deficits of the world state — compliance with international law is the only means available to states to satisfy their obligation.

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[9] Wendt, Anarchy. Also Wendt, *Social Theory*

This, then, is the answer to Dworkin's doctrinal question. Why should states follow international law? When states claim the institutionally specified rights of sovereignty, they undertake obligations to mitigate the pathologies of that system. In the apparent absence of practicable and morally unobjectionable alternatives, this obligation can only be fulfilled by complying with existing corrective norms, amending existing norms so that they better fill the corrective function, and legislating new norms through the political means available to members when no corrective norms exist. At the moment, those existing corrective norms are international law, and the means for amending and creating new norms are what states currently recognize as the sources of international law — custom, treaties, judicial rulings, and administrative commands. Thus states have an obligation to comply with international law.

Associative Obligations and Authority

I have critiqued the previously considered views — natural law, state consent, and Dworkin's new philosophy — on the basis of how well each could capture the sense of authority presumed by practice. Consideration of examples suggests that current international legal practice presumes that international law has three characteristics. First, that international law gives states particularly a specific kind of reason for action that is distinguishable from reasons given by advice and requests. Second, these reasons are normally decisive in practical deliberation, but can sometimes be overridden or defeated by countervailing considerations. Third, international law gives states such reasons for action even when specific legal rules are inconsistent with widely accepted moral truths. Together, these three conditions represent the form of international legal authority as presumed in practice. Reflections on state consent theory raised a fourth criteria for a successful account of international law as we find it: that it explain how a maximally large set of the legal rules currently recognized in practice could have the kind of authority those rules are presumed to have. This is the scope of international law. How well any answer to the doctrinal question about international law satisfies these criteria should count for or against that theory as considered against alternatives.

Does the practice approach capture both the form and scope of international law as we find it? In part, this is an empirical question that turns on what tends to fulfill the corrective role. But there is, at least, reason to suspect that the legal rules authorized by the practice approach do correct better than any of the considered alternatives. This is particularly clear in the case of state consent. Because it would demand such vast revisions of existing international law, its narrowness likely excludes many important corrective norms like the ILO's labor standards and possibly even human rights law. While natural law theories can avoid problems of scope (by accepting the challenge of giving a moral justification for apparently immoral laws), they insist on thinking of legal duties as a kind of moral duties. This shuts down the ambition to find an account of law that speaks to diverse agents on grounds that each can accept from its own perspective. By grounding legal duties in associative obligations, and by linking sovereign rights to compliance, the practice approach constructs a for of political and legal address that can use a state's own reasons to justify the demand for conformity. Again, which of these forms of legal authority best fulfills the corrective function, assuming both are available, is an empirical question. But these alternatives represent the state of the art in contemporary international legal theory, so even this merely relative success for the practice approach is significant. The task, though, is to show how the view can do this.

How does the practice approach explain the reason-giving characteristic of international law? There are two ways to answer this question, one that answers from an external perspective, and one that answers from an internal perspective. It is not obvious that both are necessary — the external suffices — but the internal can be instructive as well. The external explanation is just to say that states have an associative obligation to comply with law as a result of their claiming the institutionally specified rights of sovereignty. We have now discussed this at length. The internal explanation makes reference to a state's own reasons for claiming those rights. The strength of the state's claim to those rights is limited to the right of the institution to shape and give those rights, so if the state has reason to claim the rights, the state has reason to be concerned about the legitimacy of the system. From there we can make the now

familiar arguments about the connection between legitimacy and pathologies and the corrective role of international law to explain, on the basis of the state's own reasons, why it ought to comply with international law.

But we have seen that it is not enough to show that law is reason-giving, but that these reasons are somehow distinct from the kinds of reasons given by advice and requests. How does the practice approach make this differentiation? Again, there are two answers for this. First, associative obligations are the appropriate grounds for accountability seeking behaviors upon non-compliance. When one shirks their associative obligations — as in the case of the brother who skips his sister's wedding or the promisor who reneges — they are rightly sanctioned or rebuked proportionately to the gravity of the offense. Failure to grant requests and especially to heed advice (at least when it is good advice) may result in bad consequences, but these would not be rightly interpreted as sanction on rebuke. In the normal case, it is not wrong to ignore advice or to refuse requests. It is wrong, however, to fail to fulfill associative obligations, which on the practice account explains why it is wrong to violate the law.

Second, when somebody requests that I do some action, or advises me to do some action, there is no sense in which I owe them my performance. According to the practice approach, conformity with associative obligation *is* owed to others. In the case of the familial obligation, I owe my conforming performance to the members of my family. In promising, the promisor owes performance to the promisee. In international law, the state owes compliance to the other states whose respective claims to sovereignty also depend on the legitimacy of the system and the mitigation of pathologies. To use Margaret Gilbert's term, legal obligations are *directed*, whereas reasons to heed advice or grant a request are not.[10]

Next, how does the practice approach explain the defeasibility of law? By grounding legal obligations in associative rather than moral obligations, the practice approach shows how law and morality can conflict. The analogy with promises is instructive. We are, I believe, bound by our immoral promises. If I promise you that I will drive the getaway car to help you rob the bank, but then drive off just as you step through the front doors (perhaps because my conscience gets the better of me), then it seems that you are in a position to hold me accountable. After all, I just broke a very important promise to you! That does not mean that I should have kept the promise. All things considered, I did the right thing to drive off. Not only did I keep from doing something immoral myself, I made it much easier for the authorities to apprehend a known criminal. All of this is just to say that associative obligations, the kind of obligations at the heart of the practice approach to international law, can be defeated by sufficiently grave countervailing considerations. Law is no exception.

How does the practice approach explain the content-independence of legal authority? Given the current absence of practicable or otherwise better alternatives, the only or at least best way for states to discharge their obligation to mitigate the pathologies of the state system is to comply with international law, whatever it happens to be. This means that even if particular legal rules conflict with widely accepted moral truths, states still have an obligation to conform.

Consider NAFTA, our primary example of morally problematic but presumptively authoritative international law. This trade agreement is having the double effect of exacerbating wealth inequality between Mexico and the Unites States while simultaneously displacing traditional Mexican farmers who now cannot compete with commodities from the US. The obvious objection to the authority of this law is that it is immoral, but the practice approach maintains that states ought to obey it despite this immorality because international law fills a corrective function. How so?

The answer shifts attention from NAFTA itself to the customary legal principle *pacta sunt servanda*. Many of the problematic tendencies of a politically decentralized practice like the state system have to do with failures of coordination. Like promises and agreements for individual persons, treaties are one of the most powerful, effective, and widely recognized solutions to coordination problems. But they only work when both parties have reasonable assurance that their agreement will be honored. The practice approach make sense of why international law would include a strong customary prohibition on the

[10] MG, Is an agreement an exchange of promises?

violation of treaties, even when they are immoral. Treaty making only solves coordination problems only when there is assurance of performance, and the strong prohibition on reneging, even if the agreement seems to either or both parties to be inconsistent with moral truths, backed up with the force of law gives that assurance. States ought to comply with NAFTA, despite its apparent immorality, because there is a justified legal principle that commands conformity to treaties, and that legal principle is justified by its corrective role.

Perhaps this can justify immoral treaties, but can an analogous argument be offered for immoral customary or administrative law? Yes, an analogous argument can be given. Just like treaties, these source of law need to be able to give states assurance that others will comply in order to fulfill the corrective function by coordinating state action. Such assurance can only be provided by a strong prohibition on non-compliance, even when the terms of the law are deemed morally problematic by one of the parties. In fact, the above example of NAFTA actually makes this very point, since *pacta sunt servanda* is best understood as a custom that sometimes has morally problematic consequences but is nevertheless backed up by the force of law. States need, in a sense, to coordinate on a means for facilitating future coordination. That states have, in fact, settled on the customary principle *pacta sunt servanda* fulfills this coordinative need.

To balance this controversial point about content-independence, the practice approach adds that the state's obligation to mitigate also includes an obligation to amend existing law to better fulfill the corrective function and an obligation to create new law when none already exists. Thus the practice approach leaves open the possibility that consistency with widely accepted moral truths might be part of how a revised version of an existing legal rule "better" fulfills its corrective function. So this approach need not be completely divorced from morality, even though legal obligation is not ultimately a moral obligation as might be found in the Kantian or Lockean traditions.

How revisionistic must the practice approach be? Not at all, actually. The practice approach holds that states have an obligation to comply with international law as they find it. Of course, as just mentioned, states may deviate from existing law — that is, they may act contrary to currently recognized norms — if they believe that the new norm instantiated by their action could be accepted by others as an amended and improved version of existing norms. But in a political practice like the state system, proposing new norms is done performatively, by acting in the way that you think members out to act. Whether or not this performative legislative proposal is accepted or not — and so whether the action was legal or not — depends on whether other members follow suit. So deviation is risky. And when it does not manifest in sanctions for non-conformity, it is because the supposedly deviant behavior became the new norm. But because the practice account does not insist on consistence with widely accepted moral norms, we are not forced to revise immoral laws. Because it does not insist on the willed acceptance of legal rules, we do not have to exclude legal rules that states do not consent to. And because the practice approach does not favor one source of international law — treaties or customs or judicial rulings — it can accommodate all currently recognized sources. If the practice approach is revisionistic, it is only to the extent that states can identify, on publicly acceptable bases, new rules that would full currently unaddressed corrective needs and new versions of existing rules that would better correct for pathologies. But these revisions are far less sweeping than those proposed by any of the alternative views considered.

Concluding Remarks

What the practice approach offers, in the end, is a theory that uses a familiar and everyday kind normativity — associative obligations — to ground an account of why states ought to comply with international law. It does not insist that practitioners change their concept of legal authority, but leaves the current conception intact. It does not insist on vast revisions of existing law, but illuminates both the conditions under which revision would be appropriate, but how such revision might be achieved. It offers an analytically rigorous account of why states ought to comply, while also giving guidance about how to link demands for compliance with reasons that actual states otherwise have. It integrates Dworkin's highly promising new philosophy, including much of what makes it appeal to theorists who situate

themselves within the natural law tradition, with the positivist commitment to the separation between law and morals, to offer a clear answer to the doctrinal question. For these reasons, I believe that the practice approach represents a significant step towards understanding international law and, perhaps, law in general.