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THE CONCEPT OF COMPLIANCE AS A FUNCTION OF COMPETING CONCEPTIONS OF INTERNATIONAL LAW

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Benedict

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- INTRODUCTION..... 345
- I. CONCEPTS OF LAW RELEVANT TO COMPLIANCE:
 - SOME BASIC DISTINCTIONS..... 348
 - A. *Rule-Based v. Process-Based Theories*..... 348
 - B. *Rational-Actor v. Other Approaches to Behavior*..... 349
 - C. *Directive v. Non-Directive Theories*..... 350
- II. DIRECTIVE ACCOUNTS OF LAW AS RULES FOR INSTRUMENTALLY RATIONAL ACTORS..... 350
 - A. *Realist Theories of International Relations: Law as Epiphenomenon*..... 350
 - B. *Rationalist Theories of Inter-State Cooperation: Law as a Functional Phenomenon*..... 351
 - C. *New "Liberal" Theories of International Law*..... 356
- III. CONSTRUCTIVIST ACCOUNTS OF INTERNATIONAL LAW 358
 - A. *Constitutive Norms and Discursive Communities*..... 358
 - B. *Participation*..... 359
- IV. NON-DIRECTIVE SPONTANEOUS ORDERS AND INFORMAL SOCIAL NORMS..... 360
- V. REGULATORY PROCESS ACCOUNTS OF INTERNATIONAL LAW 364
- CONCLUSION 368

INTRODUCTION

"Compliance" is one of the central concepts in current and proposed research projects using social science methods to study the effects and significance of international law. Discussion of compliance often proceeds as if the concept of "compliance" is largely shared; that is, as if there was a shared understanding that compliance is adequately defined as conformity of behavior with legal rules, and the real

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problems are about such matters as measuring, monitoring and improving compliance, and the simultaneous optimization of levels of compliance and rigor of the relevant standards. This article makes the contrary argument that the concept of "compliance" with law does not have, and cannot have, any meaning except as a function of prior theories of the nature and operation of the law to which it pertains. "Compliance" is thus not a free-standing concept, but derives meaning and utility from theories, so that different theories lead to significantly different notions of what is meant by "compliance." Thus as a research concept, "compliance" cannot stand on its own, but must depend on a stipulated or shared theory of law.

In the case of international law, the elements of the concept of law which must be specified to give meaning to the concept of "compliance" are deeply contested. There is also likely to be considerable variance in concepts of national law that are relevant to "compliance" with international law. Concepts of "compliance" depend upon understandings of the relations of law, behavior, objectives, and justice. These relations are of central importance to the real-world problems with which international lawyers are habitually concerned, and must be theorized before there can be any true theory of "compliance."

The purpose of this article is to challenge the tendency in the existing literature to view "compliance" simply as "correspondence of behavior with legal rules." This tendency is intelligibly based in a theoretical view that law can properly be defined and understood as a body of rules and expresses a practical concern to get on with the important task of producing empirical studies of compliance. The logical corollary is that a reasonable degree of conformity between these rules and actual behavior is necessary to an efficacious legal system, so that recurrent and widespread non-conformity with rules would usually call into question the existence of law.

Given these theoretical premises, the first empirical task is to determine whether, as is often asserted by international lawyers, most States and other subjects of international law conform to most legal rules most of the time.¹ We have impressions which may rise to the level of "anecdotal," but in many areas we simply do not have systematic studies to show whether or not most States conform to most international law rules most of the time,² and the studies we do have show that

1. See LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed. 1979).

2. Stephen Schwebel rightly pointed out in 1981 that international lawyers have had too little to say about fundamentals of compliance beyond anecdotes and broad impressions. See Stephen M. Schwebel, *The Compliance Process and the Future of International Law*, 75 *PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW* 178-85 (1981). In 1994 Schwebel observed that, "[c]ompliance is a problem which lawyers tend to avoid rather than

impressions based on "anecdata" are not necessarily reliable. While raw data is increasingly available on responses by States to some types of international decisions, especially where a monitoring or supervisory body exists or where the decisions confer particular benefits on other actors who perform monitoring functions,³ the dearth of good empirical studies of correspondence between state behavior and international legal rules and decisions is a serious obstacle to adequate understanding and evaluation of the international legal system. Likewise, systematic work on results of different modalities of pursuing correspondence of behavior to international rules is patchy, although domestic compliance studies have demonstrated the practical importance for policy goals, and the unanticipated consequences, of different modalities. The much-needed empirical work on compliance is beginning to appear in increasing quantity, involving case studies, large-*n* series, and other methodologies. Yet, as those engaged in this work readily acknowledge, the methodological obstacles to this inquiry are severe.⁴

Characterization in marginal cases is rendered difficult by the problems international lawyers address daily, including differences of opinion as to interpretation, uncertainty as to the authority of different sources of law, issues of opposability, and excuses precluding responsibility. Recent studies of environmental and human rights norms show checkered patterns of conformity and non-conformity with rules, and highlight the differences between conduct prescribed by rules and the

confront." S.M. Schwebel, *Comment*, in COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS 39, 39 (M.K. Bulterman and M. Kuijer eds., 1996).

3. Several scholars have addressed the establishment by the United Nations Human Rights Committee of a follow-up procedure to monitor implementation of Final Views issued under the First Optional Protocol to the International Covenant on Civil and Political Rights. See Markus Schmidt, *Portée et suivi des constatations du Comité des Droits de l'Homme des Nations Unies*, in LA PROTECTION DES DROITS DE L'HOMME PAR LE COMITÉ DES DROITS DE L'HOMME DES NATIONS UNIES: LES COMMUNICATIONS INDIVIDUELLES 157 (Actes du Colloque de Montpellier, 1995); see also U.N. Doc. A/51/40, vol. 1 (1996) (discussing follow-up procedures in the 1996 Report of the Human Rights Committee). See generally DONNA GOMIEN, JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS 1959-95 (1996) (collecting data on action taken by States in response to adverse decisions); JÖRG POLAKIEWICZ, DIE VERPFLICHTUNGEN DER STAATEN AUS DEN URTEILEN DES EUROPÄISCHEN GERICHTSHOFS FÜR MENSCHENRECHTE (1993) (explaining legal aspects of the supervisory system of the European Convention on Human Rights). An illustrative case of bilateral monitoring, accompanied by a variety of enforcement mechanisms, is the Iran-U.S. Claims Tribunal. Supervision of European Court of Justice decisions implicates a complex range of issues. See generally J.A. Usher, *Court of Justice of the European Communities*, in COMPLIANCE WITH JUDGMENTS OF INTERNATIONAL COURTS, *supra* note 2, at 87 (overviewing complex range of issues concerning supervision of European Court of Justice decisions).

4. See, e.g., Susan Subak, *Verifying Compliance with an Unmonitorable Climate Convention*, 9 INT'L ENVTL. AFF. 148 (1997).

actual conduct and long-term policies necessary to meet the underlying objectives of the particular international regime and other important policy goals. These and other studies show that the assumption that conformity and non-conformity are binary is not an adequate reflection of international practice, in which degrees of conformity or non-conformity and the circumstances of particular behavior often seem more important to the participants.⁵

But even if we knew how far state behavior conformed with international norms, we would not necessarily have an account of the causal relations of law and behavior, nor would we be much further forward in evaluating legal rules against propositions about justice. Although empirical work is vital, it must depend for its meaning and implications on further development of the theory of international law compliance. Defense of a particular theoretical approach would be too ambitious in this short article. The modest aim here is to sketch a sufficient variety of competing concepts of law, with their divergent implications for notions of "compliance," to establish that much is lost by treating the basic concept of "compliance" as unproblematic, and to show that choosing and deploying a theory (or interlocking theories) of law is essential to articulating and defending a concept of "compliance."

I. CONCEPTS OF LAW RELEVANT TO COMPLIANCE: SOME BASIC DISTINCTIONS

Any attempt to typologize theories of law in a manner useful for the purposes of this article is liable to be reductionist and to involve caricature. Four broad sets of approaches to international law will be surveyed, not on the basis of any systematic categorization, but with reference to three simplified distinctions that bear directly on research relating to compliance. These three distinctions are not categorical: they provide a rough first cut, sufficient for the limited purposes of this article but not for rigorous taxonomy.

A. *Rule-Based v. Process-Based Theories*

First, the centrality and significance of legal rules varies across the range of theories considered here. Traditional positivist theories of law are rule-based: the enterprise is to separate law from non-law, whether through source-based accounts of legal rules as commands, or social fact theories of legal rules as elements of a legal system consisting of

5. See ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 17-23 (1995).

primary and secondary rules.⁶ These positivist accounts of law and legal institutions have been influential among positivist social scientists seeking to evaluate the significance of international law. Whereas positivist legal theories have often emphasized sources, however, social scientists interested in explaining the relation of rules to behavior often identify rules by the presence or absence of objectively discernible patterns of regular behavior, including sanctioning behavior. In contrast to rule-based views of law stand process-based views, including the New Haven view of law as a process of authoritative and controlling decision,⁷ and current projects to develop a theory of compliance based on transnational legal process.⁸ Regulatory theories focusing on the close interactions of regulators and those they regulate also incorporate rules as one element in a wider process, and generate different practical understandings of compliance.

B. Rational-Actor v. Other Approaches to Behavior

Second, theories of law vary as to reliance on models built on assumptions of instrumentally rational actor behavior. Purely economic theories of law make standard economic assumptions that actors have well-defined, complete, and transitive subjective preferences over the relevant alternatives, that actors have the analytic capacity and disposition to choose the best feasible alternative given the available information, and that actors will follow game-theoretic behavior patterns in strategic situations (i.e., where the preferences and conduct of others are relevant to the decision).⁹ But many critics deny both that the relevant behavior of each actor can be modeled simply in terms of instrumentally rational maximization of preferences, and that the standard economic accounts of the influence of law on behavior adequately capture the operation of law as a normative system among moral agents. As Ayres and Braithwaite rightly note:

6. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (H.L.A. Hart ed., 1954); H.L.A. HART, *THE CONCEPT OF LAW* (2d ed. 1994).

7. See generally HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992) (presenting an account of law as a social and political process).

8. See generally Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599 (1997) (reviewing ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVERIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (1995); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995)) (discussing the perennial debates between realists and liberal internationalists); Harold Hongju Koh, *Transnational Legal Process*, 75 *NEB. L. REV.* 181 (1996).

9. See generally Lewis A. Kornhauser, *The New Economic Analysis of Law: Legal Rules as Incentives*, in *LAW AND ECONOMICS* 27 (Nicholas Mercuro ed., 1989) (elaborating an economic theory of how individuals behave in response to legal rules).

Much of contemporary social science is a stalemate between theories assuming economic rationality on the part of actors and theories counterposing action as variously motivated by a desire to comply with norms, to maintain a sense of identity, to do good or simply to act out a habituated behavioral sequence.¹⁰

Social scientists are divided on similar issues.

C. Directive v. Non-Directive Theories

Third, most theories of law are directive, in the sense that the legal system as a whole is oriented toward particular goals or objectives. Lawmakers (or society) have deliberate intentions as to the goals of the relevant society (in this case, international society), even if they differ as to what these goals are and as to how best to implement them through law. Individual actors also have particularistic motives, but the overall goal is kept in view. Natural law theories, and Ronald Dworkin's theory of law as integrity, are directive theories.¹¹ Non-directive theories, in contrast, presume that no goals of the legal system as a whole may usefully be identified, even though individual actors may act purposively. Public choice theories are a prominent example of non-directive accounts: the assumption of most law and economics theories that individual law-taking actors are self-interested is extended to the lawmakers, and indeed the role-differentiation between these two classes is expected to erode where special interests are well organized.¹²

II. DIRECTIVE ACCOUNTS OF LAW AS RULES FOR INSTRUMENTALLY RATIONAL ACTORS

A. Realist Theories of International Relations: *Law as Epiphenomenon*

The standard realist model of international relations posits that States as unitary actors rationally pursuing their own interests as best they can, given their capacities and the constraints imposed by the power and interests of others. Law may be a useful means to maintain the stability of the system (e.g., diplomatic immunity) and to solve some coordination problems (e.g., international civil aviation arrangements) where an agreed-upon rule becomes a focal point for behavior and is

10. IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE 51 (1992).

11. RONALD DWORKIN, LAW'S EMPIRE 225 (1986).

12. See Kornhauser, *supra* note 9, at 29-30.

virtually self-enforcing. Law may also be used by hegemonies to establish and enforce standards to which weaker States are obliged to conform. But compliance for realists is little more than a calculation of interests in light of the existing distribution of power. Transaction costs and the value of stability are both sufficiently high that States may behave habitually without continuous recalculation of interests, but if a legal commitment is inconsistent with a significant interest of a State and it has the power to act in a manner which better serves its interest, it will usually do so. There is no categorical difference in function between "binding" and "non-binding" international rules, although there may be differences where domestic legal systems are involved, and the discourse of justification and violation may be inconsequentially different.

Realist positions undergird apologetic explanations of conformity of behavior with international legal rules based on the alleged correspondence between the rules and the interests of States. This correspondence itself is explained by the proposition that States make the law and thus are likely only to make rules they can live with, and to have a greater interest in honoring and upholding inconvenient commitments because of the general benefit to States of the continued effectiveness of the international legal system. But with rare exceptions, international lawyers also adopt the implicit position that the legal rule itself provides a very strong reason for rule-consistent behavior.¹³ This position derives from a commitment to the normativity of law, but advocacy of this position has long been seen as "utopian," leading to justifications in which positions characterized as realist and utopian coexist without resolution.¹⁴

*B. Rationalist Theories of Inter-State Cooperation:
Law as a Functional Phenomenon*

Extending and eventually challenging realism, rationalist theories have traditionally used game theory to model cooperation among States as unitary actors.¹⁵ States are instrumentally rational egoistic interest-maximizers, but they are observed to cooperate in circumstances not

13. Cf. GUY DE LACHARRIÈRE, *LA POLITIQUE JURIDIQUE EXTÉRIEURE* (1983) (arguing that international relations are based not so much on laws as on military, economic, and cultural factors).

14. See generally MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* (1989).

15. Increasing attention is being given to more complex connections between different games. One common approach is to connect international and domestic politics through "two-level" games. See, e.g., Andrew Moravcsik, *Integrating International and Domestic Theories of International Bargaining*, in *DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS* 3, 15-17 (Peter B. Evans et al. eds., 1993).

predicted by realism (although the extent of this cooperation is a hotly contested topic). Some of this cooperation involves conforming behavior to norms, including legal rules, especially in international institutional settings. The effect of legal rules on behavior, like the effect of institutions, is analyzed in functional terms. Rules and institutions help stabilize expectations, reduce transaction costs of bargaining, raise the price of defection by lengthening the shadow of the future, increase the availability of information, provide or facilitate monitoring, settle disputes, increase audience costs of commitments, connect performance across different issues, and increase reputational costs and benefits related to conformity of behavior with rules.

Under this theory of cooperation, rational pursuit of interests is the principal explanation of behavior, but norms (including legal rules) alter the costs and incentives in the calculations of rational actors. Rules shape opportunities. In economic terms, they function like prices in a market. Compliance is thus likely to be understood as a matter of consistency of behavior with the rule as interpreted by its authoritative interpreters. Non-compliance is behavior inconsistent with the rule as so interpreted, and is synonymous (at least in the standard case of "binding" rules) with violation. Non-compliance is likely to be met by reciprocal responses and may attract third party sanctions. The evidence of the infrequency of severe sanctions, and of the apparent effectiveness of non-sanction elements of international institutions, leads to the argument that "sanctions or even threats to impose sanctions seldom constitute the most important determinant of observed levels of compliance with institutionalized rights and rules."¹⁶ Chayes and Chayes reject as unrealistic such an enforcement model of compliance, favoring a cooperative, problem-solving "managerial" model of compliance.¹⁷ This does not answer the concern that whatever success may be attributed to the managerial approach, in the absence of effective enforcement, States are unlikely to adopt or obey agreements requiring them to bear greater costs for the common good.¹⁸

In the rationalist view, decisions as to whether to comply are cost-benefit calculations that depend on the discount rate for future time periods. Apart from sanctions, the impact of legal rules on cost-benefit calculations is often condensed into issues of reputation for complying with commitments. But a reputation as law-abiding may be valued less than a reputation for unflinching protection of vital interests, just as a

16. ORAN R. YOUNG, *INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY* 195 (1994).

17. See CHAYES & CHAYES, *supra* note 5.

18. George W. Downs et al., *Is the Good News about Compliance Good News about Cooperation?*, 50 INT'L ORG. 379, 379-80 (1996).

reputation for occasional irrational rage or stubbornness may be of greater value to a market actor than a reputation for pure rationality.

Rules and institutions have the further effect over time of shaping actor preferences: that is, preferences are treated as endogenous rather than exogenous. Thus, the effect of coerced implementation in a developing country of an international law rule requiring U.S.-style intellectual property protection might be to spur growth in the number and influence of local beneficiaries of such property protection to such an extent as to shift the preferences of that State toward an intellectual property rights regime. Rules and institutions may similarly alter actors' beliefs; for example, a rule requiring reporting of pollution data may ultimately lead States to shift their beliefs about the causes of particular environmental degradation.¹⁹ Where such future shifts in interests or beliefs are predictable results of present decisions, rationalist theorists are able (albeit with difficulty) to model the relevant present decisions in rational-actor terms.

The challenge, as rationalist instrumentalist theorists see it, is posed by the unintended consequences (for future interests and beliefs) of present decisions to adopt a particular rule or, more commonly, to enter into an institution or regime with rule-making or sanctioning powers. Thus, Norway's decision to enter the Economic Commission for Europe (ECE) Long-Range Transboundary Air Pollution (LRTAP) regime may be seen as a rational pursuit of Norway's interest in reducing acid rain through a strong regime capable of mobilizing opposition to acid rain and developing tough new rules and monitoring mechanisms. However, the former USSR's decision to join the same regime may have been the result of an intense preference for a Europe-wide initiative on any innocuous subject to promote détente, and such shift of preferences as has subsequently occurred against air pollution may have been an unintended consequence of the regime and its norms.²⁰

Rationalist theorists of inter-state cooperation have been unwilling to concede a normative effect for law beyond its impact on pursuit of interests (or preferences) and, perhaps, its interest-shaping or prefer-

19. See Lewis A. Kornhauser, *Are There Cracks in the Foundations of Spontaneous Order?*, 67 N.Y.U. L. REV. 647, 670 (1992) (reviewing ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991)).

20. See EVGENY M. CHOSSUDOVSKY, "EAST-WEST" DIPLOMACY FOR ENVIRONMENT IN THE UNITED NATIONS, U.N. Sales No. E.88.XV.ST26 (1990) (canvassing history of the formation of the LRTAP regime); see also Marc A. Levy, *European Acid Rain: The Power of Tote-Board Diplomacy*, in *INSTITUTIONS FOR THE EARTH: SOURCES OF EFFECTIVE INTERNATIONAL ENVIRONMENTAL PROTECTION* 75, 81 (Peter M. Haas et al. eds., 1993); Marc A. Levy, *Remarks*, 89 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 214, 216 (1995).

ence-shaping and belief-shaping effect. The instrumental roles played by legal rules could also be played (but perhaps not as well) by other types of norms. Indeed, rationalist theorists of international relations have not paid much attention to differences in effects between legal and other norms or between types of legal norms,²¹ whereas economic theories of law have distinguished different types of norms primarily in terms of the costs imposed and benefits conferred.²²

To most lawyers, analysis of law in these highly instrumentalist terms fails to capture much of the true impact of law. One of H.L.A. Hart's most important contributions to positivist legal theory had the effect of reinforcing the need for care in treating law as a body of objectively determinable rules. He argued that while objective behavior is a starting point for demonstrating rules, it alone is insufficient; there must be an internal aspect, so that legal rules entail patterned behavior combined with an appropriate internal attitude among relevant actors involving criticism of oneself and of others for certain violations on the ground that a rule has been violated.²³ This element is essential to the understanding of norms shared by most lawyers: Chayes and Chayes, for example, define norms as "*prescriptions for action in situations of choice, carrying a sense of obligation, a sense that they ought to be followed.*"²⁴ Neil MacCormick pushes Hart's analysis further in arguing that "any account of rules and norms and standards of conduct must be in terms of this 'internal point of view,' such that, it must take account

21. See generally INTERNATIONAL REGIMES (Stephen D. Krasner ed., 1983); cf. FRIEDRICH W. KRATOCHWIL, RULES, NORMS, AND DECISIONS (1989) (criticizing this theory of norms). Chayes and Chayes likewise do not draw systematic distinctions between principles, standards, and rules; procedural and substantive norms; formal and informal authoritative norms; or tacit or background norms. See CHAYES & CHAYES, *supra* note 5, at 113.

22. See, e.g., ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992).

23. See HART, *supra* note 6, at 56-57, 88-117. The importance of an internal aspect has long been recognized in the study of the nature of legal obligation. In the second half of the seventeenth century, Samuel Pufendorf articulated a very similar notion in developing his natural law theory:

Now, altho' there are many other Things which have an Influence on the Will, in bending towards one side rather than the contrary, yet *Obligation* hath this peculiar Force beyond them all, that whereas they only press the Will with a kind of natural Weight or Load, on the Removal of which it returns of its own Accord to its former Indifference; *Obligation* affects the Will in a moral Way, and inspires it inwardly with such a particular Sense, as compels it to pass Censure itself on its own Actions, and to judge itself worthy of suffering Evil, if it proceed not according to the Rule prescrib'd.

SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS: EIGHT BOOKS, I.vi.5 (translated by Basil Kennett, 4th ed., London, Printed for J. Walthoe et al, 1729).

24. CHAYES & CHAYES, *supra* note 5, at 113.

of those who operate with these norms.²⁵ The internal aspect of norms can not be achieved merely by the pressure of social sanctions and the pressure to participate in social sanctions: at least some of the relevant actors must have a volitional commitment to a particular norm-conforming pattern of action by preference over other possible actions. This is the difference between understanding or using norms and being volitionally committed to them.²⁶

The weight of the internal aspect is manifest in Jon Elster's conclusion "that social norms provide an important kind of motivation for action that is irreducible to rationality or indeed to any other form of optimizing mechanism;"²⁷ in seeking to distinguish social norms from rationality, he emphasizes that social norms "have a grip on the mind."²⁸ Some socio-psychological studies suggest that individuals are much more likely to conform their behavior to norms to which they have an internal volitional commitment, and that such commitments are correlated with perceptions that the relevant rule is fair. Compliance is thus influenced by perceptions of fairness apart from rational calculations of costs and benefits.²⁹ Thomas Franck has sought to explain the compliance-pull of international norms as a function of their perceived procedural legitimacy.³⁰ Yet, as Robert Keohane has pointed out, it is difficult to separate compliance-pull from legitimacy so as to posit a clear causal relation between them, and it is virtually impossible in international relations to measure one without the other.³¹

If taken seriously, the "internal aspect" of rules is difficult to uncover by social science methods.³² Objective observation of the conformity between behavior and a particular rule says little about the impact of the rule on behavior. Similarly, while observation of the frequency of the imposition of sanctions for deviance from a rule is useful, it says little about the normative attitude animating the infringer or the sanctioner. Indeed,

25. NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 284 (1978).

26. *See id.* at 288.

27. JON ELSTER, *THE CEMENT OF SOCIETY* 15 (1989).

28. *Id.* at 100.

29. *See* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (1990).

30. *See generally* THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990); THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995). Chayes and Chayes take a similar approach, although they are undecided as to whether substantive justice might also be a requisite for an effective legal system. *See* CHAYES & CHAYES, *supra* note 5, at 133-34.

31. *See* Robert O. Keohane, *Comment, International Relations and International Law: Two Optics* 38 *HARV. INT'L L.J.* 487, 493 (1997).

32. *See, e.g.,* JON ELSTER, *SOLOMONIC JUDGMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY* (1989); Amartya Sen, *Behavior and the Concept of Preference*, 40 *ECONOMICA* 241 (Aug. 1973); *see also* *THE LIMITS OF RATIONALITY* (Karen Schweers Cook and Margaret Levi eds., 1990).

the infringement of the rule may not itself be an adequate explanation of the sanctioning behavior, and the sanctions may have little effect on infringing behavior.³³ Thus, an approach to compliance that focuses only on objectively observable patterns of behavior implicitly takes these patterns as proxies for internal attitudes and other relevant normative effects. Such proxies may be adequate in some policy situations, but there is frequently a risk that policy based on the circumscribed view of norms employed in rationalist instrumentalist theories will be sub-optimal or dysfunctional.

C. New "Liberal" Theories of International Law

The Hobbesian separation of the domestic and the international has long been challenged on moral and political grounds, and the phenomena of "complex interdependence" and extensive "transnational" relations have stimulated further interest in other conceptions of international relations. Marxist theories pose one familiar challenge to the predominant Western accounts, but in response to the perceived spirit of the times there has been increasing contemporary interest in the articulation of "liberal" theories of international relations. These propose accounts of international politics that begin with individuals as political actors. Preferences of individuals are aggregated and mobilized through political processes. State institutions respond to individuals and groups in different ways, but do not represent all individuals and groups, even while they enjoy general competence to regulate.³⁴

While rationalist in methodology, liberal accounts of international relations and international law point to at least three issues bearing on compliance that are not captured by standard rationalist theories of inter-state cooperation. First, liberal approaches provide a way into the very difficult problem for rationalists of fully explaining the behavior of the State where the State is treated as a single "rational" actor. Actual behavior may be more completely understood by disaggregating the State into various relevant components (e.g., the Environment Ministry,

33. Some social psychologists suggest that the likelihood of the imposition of sanctions is a more important variable than the severity of sanctions. See Oran R. Young, *The Effectiveness of International Institutions: Hard Cases and Critical Variables*, in GOVERNANCE WITHOUT GOVERNMENT 160, 176-77 (James N. Rosenau & Ernst-Otto Czempiel eds., 1992) (arguing that the risk of detection and exposure is often just as important, and sometimes more important, than material sanctions).

34. See generally Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503-38 (1995) (presenting a "liberal" theory of international law based upon these tenets). For a critical discussion see Benedict Kingsbury, *The Tuna-Dolphin Controversy, The World Trade Organization, and the Liberal Project to Reconceptualize International Law*, 5 Y.B. INT'L ENVTL. L. 1 (1994).

the Trade Ministry, the Legislature or a Legislative Committee, the Courts, the Army), and analyzing the actions and interactions of these components by reference to representative and regulative functions and to aggregations of individual and group preferences, interests and values of officials in the specific roles they play. Liberal accounts also open the way to locate the (disaggregated) State within an increasingly dense matrix of transnational interactions involving (components of) other States, inter-governmental institutions, corporations, and a whole range of cross-border groups and networks that are slowly evolving into a transnational civil society. It follows that the law relevant to behavior, and institutional and social activities relating to the making, implementation, enforcement and impact of norms, should be seen to comprise traditional inter-state law, transnational law, and aspects of national law. Compliance thus involves conformity with different sets of norms made by and directed to different sets of actors, rather than the traditional model of inter-state rules implemented by national measures. Appropriate levels of compliance, and perhaps even the meaning of "compliance," are outcomes of the political interaction of aggregated preferences or, in discursive accounts, the weighted claims and responses of the relevant actors in the discursive community.

Finally, proponents of liberal theories argue that regime-type is an important explanatory variable. Liberals might hypothesize "that the more adherence to democratic norms, the more implementation and compliance."³⁵ It is difficult to control for other variables such as bureaucratic capacity, and the causal pathways are bound to be complex and to point in different directions. Harold Jacobson and Edith Brown Weiss speculate that while democracies tend to be more transparent and more open to citizen and NGO influence, the heightened role of public opinion and open political controversy can also work against compliance. On balance, they suggest that "democratic governments are more likely to do a better job of implementing and complying with international environmental accords than nondemocratic governments; but this generalization does not always hold, and democratization does not necessarily lead automatically or quickly to improved compliance."³⁶

35. Edith Brown Weiss, *Remarks*, 89 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 211 (1995).

36. Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collective Project*, 1 GLOBAL GOVERNANCE 119, 142 (1995).

III. CONSTRUCTIVIST ACCOUNTS OF INTERNATIONAL LAW

Constructivist accounts of international relations give central significance to the social construction of identities and meanings among actors in the international system. Alexander Wendt, for example, has proposed a constructivist pre-theory which accepts that States are the principal units of analysis but argues (against realists) that key structures in the state system are intersubjective rather than material, and (against rationalists) that state identities and interests are in some way constructed by these intersubjective structures, and are thus in some significant respects endogenous rather than exogenous.³⁷ He distinguishes "corporate" from "social" (or "role") identities of States: corporate identities are composed of "intrinsic, self-organizing qualities that constitute actor individuality," while social identities are "sets of meanings that an actor attributes to itself while taking the perspective of others."³⁸ Social constructs such as norms and authority thus occupy a deeper and more significant place in the international system than rationalists allow. An approach to international law that shares much of the intellectual provenance of constructivism is an account of law not as a body of rules but as a system of legal relations, at once universalizing from individual particularities, patterns of interactive behavior, and particularizing society's universal purposes.

Philip Allott's application to international law of such a concept of law is illustrative. Law is a means of continuous self-constitution for a society, embodying the society's possibilities, and transforming behavior so that the society becomes what it imagines it could be.³⁹ For Allott, as for constructivist theorists of international relations generally, norms have an important constitutive function. The struggle of international constitutionalism is to establish a higher law, constitutive of international society and of the increasingly important global public realm (especially the spheres of the Security Council and the European Union Council, in which legitimacy and legality are seen to be lacking).

A. *Constitutive Norms and Discursive Communities*

Constructivist accounts of law as constitutive of social relations treat norms as fundamental not only to behavior but to actor identities underlying behavior. The intersubjective elaboration of norms, and their complex role as the embodiment and constitution of social relations,

37. See Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384, 384-85 (1994).

38. *Id.* at 385.

39. See PHILIP ALLOTT, *EUNOMIA: A NEW ORDER FOR A NEW WORLD* 3-8 (1990).

excludes the types of linear causal relations between norms and behavior that rationalists regard as the central topic for investigation. Most accounts of compliance presuppose the value of seeking to investigate such causal relations, while acknowledging the difficulties of such a project. The constructivist approach points, however, to the particular problems of conceptualizing "compliance" where norms are constitutive rather than simply regulative. It highlights the difficulty of extracting norms from wider structures of social relations.⁴⁰ An account of compliance oriented toward relations and identities would be almost irreconcilably different from rationalist notions of compliance that dominate the existing literature. Chayes and Chayes, for example, focus on compliance with norms, but follow the constructivists part of the way in asserting that the discursive interpretation, elaboration, application, and enforcement of international rules, accomplished through mostly verbal interchange, is at the heart of the compliance process.⁴¹ This discursive or dialogic approach seeks to make discourse material and causal,⁴² but is open to the rationalist criticism in that it says little that is truly material about when such discourse does or does not have an impact on behavior, or about the conditions and boundaries of its effectiveness.⁴³

B. Participation

Assessing the significance of variance in identity, nature, attributes and numbers of participants in relevant legal regimes is important to contemporary work on compliance. One set of issues concerns the State: Should it be seen as an "actor"? Should it be viewed as unitary or disaggregated? What is the relation between behavior of States and behavior of other participants in the legal process? Even where the focus is on States, each of the major theoretical approaches to international law suggests that variance in participation is relevant to compliance.

Rational-choice models of inter-state cooperation suggest that in the case of formal agreements the dynamics of compliance (conformity of behavior with rules) vary according to the number and interest-distributions of actors as well as the distributions of power and preference intensities; dynamics favoring compliance tend to be better in small-*n*

40. See generally Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391 (1992) (demonstrating a constructivist treatment of sovereignty).

41. See CHAYES & CHAYES, *supra* note 5, at 118-20.

42. The speech act theory of Jürgen Habermas is a different theoretical project which some international relations scholars use to bridge the same gap. See, e.g., NICHOLAS ONUF, *WORLD OF OUR MAKING* (1989).

43. See Keohane, *supra* note 31, at 494.

agreements. Downs and Rocke model the case of three States (X, Y, and Z) bordering a common but increasingly polluted lake, where X and Y have good implementation capacity and good prospects for the maintenance of that capacity but have doubts as to present capacity and especially the risk of future diminution in capacity of Z. Where costs of repeated enforcement against Z may be high, it may be rational for X and Y to set up a demanding institution in which Z is not a full participant rather than to set up either a weak or a demanding but costly institution in which X, Y, and Z are full participants.⁴⁴

Liberal theory also models a differentiated world, in which cooperation among (disaggregated) liberal states may be higher than cooperation involving non-liberal states for a variety of reasons relating to the nature of liberal democracies, including the allegedly greater participation of stakeholders and the ability of liberal states to overcome time-inconsistency problems in contracting and to establish more trust and commitment.⁴⁵

Constructivism adds a quite different dimension, however, in suggesting that the participants are themselves constituted by the norms and interactions, and that the very identities of participants are in part endogenous.⁴⁶ Empirical work is needed on the constitutive and identity-shaping effects of different accords or sets of norms, especially in conjunction with the hypothesis that compliance-relevant behavior changes over time. The weight, systemic centrality, and legitimacy of sets of norms might be relevant variables, whereas simple distinctions of legal form (e.g., between binding and non-binding norms) seem less likely to have direct causal significance.

IV. NON-DIRECTIVE SPONTANEOUS ORDERS AND INFORMAL SOCIAL NORMS

Isolation of a particular legal rule in order to study compliance with it leaves open the potentially serious problem of how to take account both of the normative order which gives the norm its context and meaning, and of the other legal and non-legal norms which color its

44. See GEORGE W. DOWNS & DAVID M. ROCKE, OPTIMAL IMPERFECTION? DOMESTIC UNCERTAINTY AND INSTITUTIONS IN INTERNATIONAL RELATIONS 105-29 (1995).

45. See Benedict Kingsbury, *Whose International Law?: Sovereignty and Non-State Groups*, 88 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 1 (1994) (criticizing descriptive and prescriptive excesses in liberal divisions of the world into "zones").

46. See generally THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS (Peter J. Katzenstein ed., 1996).

operation. This problem may be overcome in particular issue areas through careful research designs, but in other cases the distortions involved in studying compliance with a particular norm in isolation are so great as to cast doubt on the utility of the enterprise.

International lawyers commonly hold a purposive view of international law; a view that is often progressivist and aspirational. This view is buttressed by the sources image of States interacting in purposive fashion to agree on the law in particular areas, and by the belief that it is possible to identify objective technical "problems" (e.g., environmental degradation) so as to evaluate legal regimes as part of technical "solutions" to these problems. Studies of correspondence of behavior with rules are frequently pulled toward assessment of the effectiveness of rules in relation to particular explicit or presumed purposes. The purposive approach often coincides with a focus on "legal" norms, especially those adopted in international instruments.⁴⁷ But the purposive approach and the exclusive focus on legal norms both entail heuristics that are too simple for complete understanding of much of the international behavior with which work on compliance is currently concerned.

A methodically constructed order may be evaluated in rational terms on the basis of the explicit purposes of the order—although a focus on structural rationality (e.g., Max Weber's criteria for rational organization of bureaucracy) has often inhibited analysis of the purposive rationality (e.g., efficiency-maximization) of organizational forms, especially those whose purpose and structure do not fit Weberian principles.⁴⁸ Likewise, a pure spontaneous order such as a perfectly competitive market can be evaluated in standard rational terms. But the neat Hayekian dichotomy of spontaneous and constructed orders (e.g., the contrast between markets and hierarchies) proves, when applied to the vast range of hybrid institutional forms that actually exist, to present polar ideal types rather than an exhaustive classification.⁴⁹ The processes of operation and development of organizations or regimes owe much to considerations (e.g., ideologies of institutional design, methods of professional and disciplinary validation) that are not reducible to

47. Views as to what is meant by "legal" norms are spread widely. See, e.g., FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS*, *supra* note 30, at 27–40 (examining the internationalist strategy of treating international law as obligatory non-law); Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413 (1983) (discussing "soft law").

48. See James S. Coleman, *Properties of Rational Organizations*, in *INTERDISCIPLINARY PERSPECTIVES ON ORGANIZATION STUDIES* 79–90 (Siegwart Lindenberg & Hein Schreuder eds., 1993).

49. See, e.g., Oliver Williamson, *Comparative Economic Organization: The Analysis of Discrete Structural Alternatives*, in *INTERDISCIPLINARY PERSPECTIVES ON ORGANIZATION STUDIES* 3, *supra* note 48.

express purposive design or to the logic of spontaneous market exchange.⁵⁰ Since many orders are not simply either purposive constructs or spontaneous orders, defining and analyzing "compliance" by reference to the simple rationality of purposive or spontaneous orders involves distortion.

The difficulties of analyzing particular forms as pure constructed or spontaneous orders may be illustrated by reference to Robert Ellickson's investigation of the formation of social norms in a "spontaneous order" developed among cattle ranchers and other residents of Shasta County.⁵¹ The order is presumed to emerge in the same way as in a market (i.e., to be non-directive). However, Ellickson also hypothesizes that the norms that emerge as to workaday matters (meaning norms on routine matters where the stakes are not high) will maximize aggregate welfare of the group in certain circumstances. Recognizing that subjective welfare cannot be satisfactorily measured in this empirical situation, he calculates welfare in part by objective criteria, apparently allowing a directive element to creep in to the theory of spontaneous order. In standard economic analysis, preferences or interests are subjective, but Ellickson moves from individual pursuit of subjective interest to an analysis of interest-realization using criteria that are wholly or partly objective, opening scope for the view that the economic approach to norms in purely non-directive market terms cannot stand on its own.⁵²

Meshed with the complex of interactions among different governance forms and institutional systems are complex interactions between different types of norms or normative orders. Standard legal theory attests to the many ways in which relations among legal norms can be understood. Thus, Ronald Dworkin's account of relations among principles, rules, and decisions suggests that in hard cases analysis of a particular rule in isolation from background principles leads to poor decisions and misses the systemic idea of law. Relations between legal norms and other (explicitly non-legal) norms raise even more complex methodological questions for research on "compliance."⁵³ The impact on behavior of legal norms may be difficult to separate from that of other norms, and different types of norms are frequently interdependent. This

50. JOHN W. MEYER & W. RICHARD SCOTT, *ORGANIZATIONAL ENVIRONMENTS: RITUAL AND RATIONALITY* (1992).

51. ELLICKSON, *supra* note 22. Ellickson does not have international relations in view; his main hypothesis derives from observation of social practices in a cattle-ranching county in northern California. He views the social order in Shasta County as rule-based, but in his terminology it is based largely on norms, and not on law—hence the title of the book.

52. *But see* Kornhauser, *supra* note 19, at 656–63 (criticizing Ellickson's methodology).

53. *See, e.g.*, André Nollkaemper, *On the Effectiveness of International Rules*, 27 *ACTA POLITICA* 49 (1992).

problem is more severe where sanctions and formal proceedings are not seen as primary motivations of behavior, but even where sanctions are present and provide evidence of a rule, the rule in question is not necessarily a simple cause of behavior. The reality is that any social system includes a wide variety of legal and non-legal norms that may act simultaneously to affect behavior.

Demonstration of the empirical importance of studying formal and informal norms together has been one of the contributions of the "law and society" movement. Ellickson's work on the interactions of different types of norms in Shasta County is a good illustration of the value of treating formal and informal norms systematically. Building on his empirical study, he proposes an account of rules as components of systems of social control.⁵⁴ He classifies systems of social control according to the type of controller. Each generates a particular type of rule and within each category there are five sub-types of rules: substantive, remedial, procedural, constitutive, and controller-selecting. Each controller is generally associated with a particular type of sanction (one controller may enforce rules developed by another):

- (1) First-party control (actor): rules are personal ethics, sanction is self-sanction, system is called self-control;
- (2) Second-party control (person acted upon): rules are contracts, sanction is personal self-help, system is called promisee-enforced contracts;
- (3) Third-party control (social forces): rules are norms, sanction is vicarious self-help (i.e., others come to aid the person acted upon), system is called informal control;
- (4) Third-party control ([non-governmental] organization): rules are organization rules, sanction is organization-enforcement, system is called organization-control;
- (5) Third-party control (government): rules are laws, sanction is state-enforcement, system is called legal system.⁵⁵

In any particular empirical situation, rules in each category may exist, but the actual impact on behavior of any one rule is conditioned both by other rules and by the interacting operations of the relevant systems of social control. Focusing merely on the relation of behavior to formal norms is unlikely to provide either a full understanding of the operative normative environment or satisfactory causal accounts of behavior. This is a more general case of the specific concerns among international law-

54. See ELLICKSON, *supra* note 22, at 123-83.

55. See *id.* at 130-32.

yers about focusing on treaties to the exclusion of "soft-law" instruments, or focusing on written formulations to the exclusion of customary international law (including the law of state responsibility) and other relevant norms.

V. REGULATORY PROCESS ACCOUNTS OF INTERNATIONAL LAW

Process theories of international law address issues of compliance in numerous ways, many of which are discussed in the literature. There has been surprisingly little work, however, on the possibilities and problems of analyzing the regulatory strategies and compliance related operations of international legal institutions, particularly bodies established to implement regulatory treaties, by reference to theories of regulatory process.

In their work on regulatory strategies and the operation of regulatory bodies in Australia, the United Kingdom, and the United States, for example, Ayres and Braithwaite argue that "compliance is most likely where [a regulatory] agency displays an explicit enforcement pyramid,"⁵⁶ with coaxing and persuasion the preferred initial strategy (because it is less expensive and is cooperation-promoting), and a graduated scale of increasingly punitive measures deployable in response to particular breaches of rules and standards.⁵⁷ Regulatory approaches to enforcement across entire industries should likewise be a flexible pyramid, with self-regulation ordinarily the preferred method of enforcement. Escalating the pyramid gives "the state greater capacity to enforce compliance but at the cost of increasingly inflexible and adversarial regulation."⁵⁸ Ayres and Braithwaite recognize the multiplicity of motivations for behavior, acknowledging that economic rational-actor motivations matter but also asserting that altruism, virtue, trust, aggression, and resistance motivate.

Thus, they favor a minimal-sufficiency approach to social control aimed at internalizing norms rather than offering rewards and punishments for every behavior. Individuals have multiple selves and multiple motivations, and "all corporate actors are bundles of contradictory commitments to values about economic rationality, law abidingness, and business responsibility."⁵⁹ This mixed-motivation approach converges with a simple Axelrod-type Prisoners Dilemma game approach in suggesting a regulatory strategy of Tit-for-Tat,

56. AYRES & BRAITHWAITE, *supra* note 10, at 35.

57. *See id.* at 35-40 (outlining the pyramidal structure of enforcement).

58. *Id.* at 38-40.

59. *Id.* at 19.

beginning with cooperation, retaliating toughly against a defection, but meeting subsequent cooperation with forgiveness and a return to cooperation.

Application of these models to international law involves difficulties. Some international regulatory relations can be expressed in terms of Prisoners Dilemma and other standard games only with assumptions that entail gross oversimplifications.⁶⁰ The hazard that a cooperative relationship of regulators and regulated will become one of capture must be addressed. For example, this obstacle can be dealt with by involving public interest groups—however problems of power, representativity and accountability of such groups remain severe in international society. International institutions generally operate in an environment vastly different from that confronting national regulators—the relationships and leverage international regulators have with the regulated may be attenuated (although less so in concentrated global industries), and they ordinarily have difficulty mustering the power or political support to credibly threaten the level of sanction that makes a “benign big gun” strategy effective for some national agencies. Nevertheless, the basic structure of regulatory relationships may be discerned in many areas of international activity, and regulatory theories provide insight into the compliance-promoting strategies of certain international institutions.

One example is the development of complex relationships between regulator and regulated that is an emerging characteristic of the Montreal Protocol system for protection of the stratospheric ozone layer.⁶¹ The non-compliance procedure, contemplated in Article 8 of the Protocol but developed and adopted by subsequent meetings of the parties and already in operation for five years, centers on the ten-member Implementation Committee.⁶² The formal powers of this Committee culminate primarily in the possibility of recommendations to Meetings of the Parties, but thus far the Committee has included members who are also influential at Meetings of the Parties, and the Committee has in fact enjoyed significant authority and competence.

In its early years, the Committee dealt mainly with issues concerning reporting of data, debating general issues and dealing with questions concerning particular States. Initial data provided important baselines for assessing compliance with quantitative and timetable requirements.

60. Game theoretic models of particular situations are now vastly more complex than those detailed by Axelrod. See ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* (1984) The applicability of simple prisoners' dilemma models in many situations is contested, as Ayres and Braithwaite recognize. See AYRES & BRAITHWAITE, *supra* note 10, at 54–100.

61. Montreal Protocol on Substances that Deplete the Ozone Layer, 21 INT'L ENV'T REP. (BNA) 3151 (May 1993) [hereinafter Montreal Protocol].

62. *Id.* at art. 8.

The Committee has sought to build cooperative relations by refraining from challenging data submitted by particular countries where possible non-conformity with Protocol rules was outweighed by the more fundamental interest in keeping the country moving in the direction required by the Protocol.⁶³ Thus, data submitted voluntarily by South Korea before adhering to the Protocol reportedly indicated that it exceeded the per capita consumption limits of Article 5 (exempting low-use developing countries from obligations for a ten year period),⁶⁴ but revised data placing South Korea just under the limit were subsequently accepted. On data issues, as in its increasing work on issues concerning phaseout and reduction, the Committee has sought to build trust and authority among states parties. Aware of major long-term issues once obligations began to bite in 1996, the Committee prudently refrained from questioning possible less serious non-compliance by Russia in the years through 1995. The Committee has also avoided issues concerning the nature and extent of obligations to contribute to the Multilateral Fund (MLF), which might lead to a debilitating confrontation with the United States.

The first formal cases of (imminent) non-compliance referred to the Committee were submitted in 1995 by five states in respect of their own problems meeting Protocol obligations.⁶⁵ The Secretariat played a role in inducing these states to invoke the non-compliance procedure rather than simply to seek a blanket five year waiver from the Meeting of the Parties. The Implementation Committee entered into a dialogue with the three States with the most serious problems (Bulgaria and Poland may come into full compliance quite quickly), insisting on improved compliance with data-reporting requirements and moving toward agreement between regulators and regulated on plans intended to lead to eventual substantive compliance. This approach was largely endorsed by decisions of the Seventh Meeting of the Parties. The effectiveness of the Committee was potentially enhanced by the connections between progress in the Committee's dialogues and the availability of funds from the Global Environment Facility (a GEF representative was close at hand during key sessions of this dialogue).⁶⁶ With regard to state eligibility for

63. See David Victor, *The Montreal Protocol's Non-Compliance Procedure: Lessons for Making Other International Environmental Regimes More Effective*, in *THE OZONE TREATIES AND THEIR INFLUENCE ON THE BUILDING OF INTERNATIONAL ENVIRONMENTAL REGIMES* 58 (Winfried Lang ed., 1996) (reviewing the work and strategy of the Committee).

64. Montreal Protocol, *supra* note 61, art. 5.

65. Belarus, Bulgaria, Poland, Russia, and Ukraine.

66. See Victor, *supra* note 63, at 66 n.14 (discussing conditionality indirectly applied to Russia by the GEF). The effect of such conditionality is a complicated question; Russia expressed strong antipathy toward some of the Vienna decisions, and failed to meet the

assistance from the Multilateral Fund, access to the Fund has been made conditional on supply of baseline data required by the Protocol, and other links between the MLF and the work of the Implementation Committee are likely to develop.

In the Montreal Protocol case, "compliance" may be conceptualized as conformity with rules, but in practice even the narrow "legal" concepts of "compliance" and "non-compliance" are more completely described in terms of a process involving relevant international institutions, the regulated states, and other states. Theoretically, standard international law dispute settlement mechanisms (perhaps including conciliation and other mechanisms referred to in Article 11 of the 1985 Vienna Convention)⁶⁷ remain open to parties dissatisfied with breaches by other parties, but in practice such recourse is likely to be difficult where the Implementation Committee and the Meeting of the Parties are dealing with non-conforming conduct. It is arguable that the effective ratification by the Meeting of the Parties of Russia's non-conforming conduct might exclude some remedies for breach of the treaty. As to other potential actors in the regulatory process, public interest groups (NGOs) have played little role so far in matters dealt with by the Implementation Committee, but industries concerned with ozone-depleting substances and related products are significant sources of information and policy advice. These industries can play a considerable role in possible non-compliance situations in providing technical guidance and technology transfer. Given the significance for particular technologies and manufacturers of recommendations and preferences formed in Montreal Protocol institutions, particularly the MLF, lobbying by and on behalf of industrial interests is a persistent feature of these institutions.

The Montreal Protocol case illustrates the insights that regulatory models may provide for international law. The complex relations of status and operation among different components of the system

deadline set at Vienna for provision of more detailed information, thus knowingly putting in jeopardy its GEF eligibility. See DUNCAN BRACK, *INTERNATIONAL TRADE AND THE MONTREAL PROTOCOL* 103-05 (1996); Laurence Boisson de Chazournes, *Le fonds pour l'environnement mondial: recherche et conquête de son identité*, 41 *ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL* 612 (1995) (discussing the GEF generally); David Fairman, *The Global Environment Facility: Haunted by the Shadow of the Future*, in *INSTITUTIONS FOR ENVIRONMENTAL AID* 55 (Robert O. Keohane and Marc A. Levy eds., 1996). The World Bank favors in its project financing a limited conditionality requiring recipients of funds to be in (or moving toward) compliance with certain international environmental treaties. If the Bank refers in applying these criteria to findings of non-compliance by the Implementation Committee, or at least by the Meeting of the Parties, such findings potentially become a costly sanction.

67. Vienna Convention on the Law of Treaties, May 23, 1969, art. 11, 1155 U.N.T.S. 331, 335.

exemplify the intricate interactions of different types of norms and institutional structures. These interactions are not well captured in standard international legal typologies (e.g., the sharp sources-based distinction often drawn between binding and non-binding norms).⁶⁸

CONCLUSION

"Compliance" with law is an important but elusive concept. The purpose of this article is to express caution about the possibilities of elucidating "compliance" through empirical work alone. Standard empirical definitions of compliance—e.g., a reasonable correspondence between legal rules or decisions and the behavior of those to whom they are addressed—provide a useful platform for research on some problems. But while good empirical work is needed, it will not in itself explain either the effects or the causes of international legal rules, nor will it explicate the normative relations between international law and considerations of justice or morality. Theoretical work on approaches to international law and international relations is required in tandem with empirical work. At least five broad areas of further research may readily be identified.

First, as shown in this article, the differences of view about the relations of international law to behavior are such that the concept of "compliance" with international law cannot be taken as shared, but must be given meaning by reference to a theory (or a set of interlocking theories) of international law. Different theoretical accounts of international law suggest different meanings of "compliance" and call for different types of empirical research design. Some of these theoretical accounts have not yet been adequately worked out, the relations between them are poorly understood, and their implications for "compliance" have often been insufficiently specified.

Second, theoretical work is needed to clarify, and to make cognizable within standard international relations theories, the distinctive features of law and the nature and significance of norms and normative arguments. While the distinctive association of national law with courts, sanctions, and formal legal process is much less pronounced in the international legal system, international law functions in ways which are

68. On the nuanced roles of international institutions and the varieties of norms they develop and apply in practice, see Peter H. Sand, *Institution-Building to Assist Compliance with International Environmental Law: Perspectives*, 56 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 774 (1996).

not replicated to the same extent by non-legal international rules.⁶⁹ These include the connections between international legal rules and national legal systems, the linkages between issues established by international legal doctrine, the definition and allocation of roles, rights and responsibilities, modes of legitimization and delegitimization of particular positions, the validation and invalidation of distinctive forms of reasoning, a variety of distinctive institutional and dispute settlement functions, and the influence exercised by the community of international law practitioners.⁷⁰

While contemporary international relations theorists are beginning to open a path to addressing some of these issues through inquiry into whether and why persuasion works in international relations, this inquiry is at a relatively early stage.⁷¹ Within the well-developed rationalist tradition of institutionalism, crucial questions pertaining to the roles of law and norms, and to compliance, remain open to debate: Are institutions efficient? What is the balance between "exogenous" and "endogenous" factors in institutions? How and to what extent do institutions "drive a wedge between power and outcomes?"⁷² If law is to be studied as a social phenomenon, it is often necessary to take account of the dynamic processes in which rules are embedded. Many of these processes are successfully approximated in rationalist terms by neo-liberal institutionalist theory and by organization theory. But several distinctive normative features of legal rules and process are not easily reduced to an instrumentalist calculus.⁷³ Within and outside institutionalism, much more work is needed on the emergence, operation, and

69. There is a curious disjunction between the general unwillingness of positivist social science scholars in international relations to draw distinctions of function between legal and non-legal rules, and the legal positivist project of distinguishing law from non-law. While positivist social science has undervalued the distinctive functions served by legal rules, the obverse legal positivist separation of law from non-legal norms has sometimes led international lawyers to undervalue important non-legal causes of behavior, and to attribute to law a purposive design that does not take account of the other normative orders with which law is intimately bound in each society.

70. See Andrew Hurrell, *International Society and the Study of Regimes: A Reflective Approach*, in *REGIME THEORY AND INTERNATIONAL RELATIONS* 49 (Volker Rittberger ed., 1993) (addressing the differences between national and international law, and the effectiveness of international law); Young, *supra* note 16, at 184.

71. See, e.g., MARTHA FINNEMORE, *NATIONAL INTERESTS IN INTERNATIONAL SOCIETY* (1996). This is an important element of Robert Keohane's ongoing work on contested commitments in U.S. foreign policy. See Robert O. Keohane, *Commitment Incapacity, the Commitment Paradox, and American Political Institutions*, Presented at Conference on International Influences on U.S. Politics (Nov. 1996) (on file with author).

72. Duncan Snidal, *Political Economy and International Institutions*, 16 *INT'L REV. L. & ECON.* 121, 127 (1996).

73. See generally JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (2d ed. 1990) (analyzing rules as reasons or exclusionary reasons for action).

effects of legal and non-legal norms and normative orders.⁷⁴ While light can be shed on some aspects of compliance without close examination of these normative elements, investigation of many propositions concerning relations of law to behavior depends on developing methodologies that take normative elements of law fully into account.

Third, positivist social science in general has already contributed a great deal of useful theory describing and explaining the two-way causal relations between rules and behavior, but much more remains to be done in applying this work to the theory and empirical study of international problems. Much of the literature on international cooperation focuses on contracting, but there is frequently more to legal commitment than contract. Legal rules are not merely descriptive summaries of past decisions: they are projections of the past into the present, and must be analyzed as normative social constructs with this temporal dimension, rather than simply as bargains which establish focal points or path dependence. Within the realist-rationalist tradition, more theoretical work is needed also on the effects of international rules as incentives. It is at the empirical level, however, that the application of many realist-rationalist theoretical insights concerning the relations of rules and behavior remain to be tested.

Taking behavior as the dependent variable, independent variables might include the likelihood and costs of sanctions for violations of the rule, subject matter or issue areas covered by the rule, properties of the rule, and addressees of the rule, while intervening variables might include the nature and involvement of the relevant national legal systems, the roles of non-state groups, and the involvement of different parts of States. Taking rules as the dependent variable, there has been considerable analysis of power and interest as independent variables, and of regimes as intervening variables, but it is not established that these elements account for all significant variance in rules. Nor has work on specific causal relationships between behavior and rules been systematically tested against the realist "big picture" proposition that both are co-determined by power and interest.⁷⁵ This realist proposition of co-determination suggests that, provided rules are seriously intended to relate to behavior, correspondence between behavior and rules ought

74. See, e.g., *Norms in Moral and Social Theory*, 100 ETHICS 725 (1990) (symposium issue addressing norms) *Law, Economics, and Norms*, 144 U. PA. L. REV. (May 1996) (symposium issue addressing norms).

75. The variables mentioned in this paragraph are familiar in the theory of international cooperation. See, e.g., Marc A. Levy et al., *The Study of International Regimes*, 1 EUR. J. INT'L REL. 267, 290-308 (1995).

routinely to be high, but that where power configurations or interests change rapidly behavior and rules are likely to become desynchronized.⁷⁶

Fourth, changes in the agenda of international issues and the means employed for dealing with them, together with the increased visibility of non-state actors and international institutions, pose "internal" challenges for the positivist project of investigating relations of law and behavior as relations of States. One challenge appears in liberal arguments for analytic disaggregation of the State as a means to enrich standard modes of explaining and understanding behavior.⁷⁷ More complications are raised by the appreciable roles of non-governmental "civil society" actors in formation, monitoring and implementation of norms, and in the legal field by efforts to establish duties and responsibilities arising from conduct of non-state actors. The disciplines of international law and international relations are not oblivious to such phenomena, but both have much to do in refining understanding of them and incorporating them credibly and without exaggeration. More radical proposals have been made to dispense with the State as a principal unit of analysis in international affairs, in favor of studying the global and local processes of a globalized economy and a transnational civil society.⁷⁸ The autonomy of the State in the face of international military and capital structures and of connections between transnational and local interests has long been put in question, and perceptions of growing interdependence or penetration or eclipse of the State have assumed heightened political salience in some regions, but the State continues in most cases to be of at least potentially great importance: in contributing to basic order, in the effective pursuit of social goals, in the provision of some system of representation, regulation and accountability. The integrated study of a wide variety of norms and actors is long overdue; but the fashion for abandoning focus on States is, at best, grossly premature.

Fifth, the positivist social science project continues to face external challenges of theory and method. The positivist assumption that it is possible and useful to separate law and behavior, in order to examine the relations between them, is contested by those for whom the proper focus is on the continuous intersubjective constitution and reconstitution of social relations and of the very identities of actors. On these grounds

76. See, e.g., ROBERT GILPIN, *WAR AND CHANGE IN WORLD POLITICS* (1981).

77. See generally Slaughter, *supra* note 34 (developing an integrated theory of international law and international relations). Cf. Robert O. Keohane & Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 27 *WORLD POL.* 39 (1974) (addressing the growing significance of international organizations in world politics).

78. See, e.g., JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY?: THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* (1992) (questioning the usefulness of the concept of sovereignty).

and others, Kratochwil and Ruggie urged in 1986 that "the common practice of treating norms as 'variables'—be they independent, dependent, intervening, or otherwise—should be severely curtailed. So too should be the preoccupation with the 'violation' of norms as the beginning, middle, and end of the compliance story."⁷⁹ Some post-modernist positions are abnegations of the possibility of any recognizable social science research agenda. But two major elements of the external critique stand usefully alongside the social science tradition, and offer insights into the nature and process of law that will clarify and enhance the study of "compliance" with law.

First, constructivism is beginning to move from epistemological and ontological theory to the applied study of law and normative systems as social and institutional constructs, producing tangible analyses of specific problems that can be scrutinized and tested against other accounts. Second, there is a special salience for the study of law and compliance in the standard critical charge that a preoccupation with analytic description is a form of construction of reality, and has diverted the academy from the essential project of ethical evaluation, normative criticism and prescriptive social construction. Not only is law a normative system, but immanent in legal thought are notions such as justice and responsibility that provide at least one element of a structure of normative evaluation. The study of compliance with international law entails engaging with a normative system and with the ideas of law which render it a critical-constructive and ethical practice. Such engagement is not standard in contemporary international relations theory, and holds the promise that the serious study of compliance with international law may prove to be as valuable for international relations as it undoubtedly will for the development of the field of international law.

79. Friedrich Kratochwil & John Gerard Ruggie, *International Organization: A State of the Art on an Art of the State*, 40 INT'L.ORG. 753, 768 (1986).