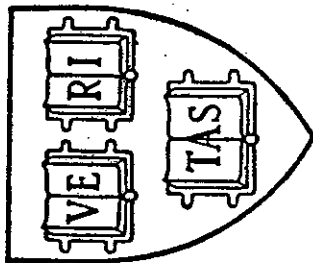


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## Book Reviews

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HOW NATIONS BEHAVE (2d ed.). By Louis Henkin.<sup>1</sup> New York: Columbia University Press, 1979. Pp. xv, 400, n.p.

### INTRODUCTION

#### *The Problem of Action*

International policy makers showed their stripes in the early days of the United States-Iran crisis. They viewed international law as an ideologically neutral framework for intercourse. Iran was exhorted to recognize the inherent neutrality of a system of immunity for diplomatic representatives of all ideological persuasions. This almost universal view of international law reflects most of the scholarly work produced in the last two centuries as international jurisprudence switched from a predominantly naturalist to a positivist tradition. As international law came to be viewed less as a frozen moral imperative and more as the willed expression of all states' search for order, the concept of sovereign equality seemed to preclude any systemic ideological favoritism. Law was obeyed, theorists proclaimed, for a series of reasons representing a reciprocal interest in playing the ideologically neutral game of international politics.

The neutrality of the international system is now, however, subject to sharp attack. Iran symbolizes the political counterpart of the critique of international economics which has developed under the rubric of a New International Economic Order. Both critiques view the reciprocal and procedurally equal participation which is the hallmark of the international economic market and of the political market of sovereign equal states as a cruel joke. While the powerful of any ideological stripe will prefer a system of free bargaining among procedural equals, this should never satisfy the weak. Expressed in simplest terms: the market favors the strong, not the deserving. A legal system which provides the rules of procedural equality is one stacked against substan-

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tive justice. Moreover, it is not ideologically neutral, for it is based on the ideology of power politics and the inconsistent sham of "sovereign equality."

Professor Louis Henkin, in the second edition of his *How Nations Behave*, sets out to assess the impact of recent developments on the model of international behavior which he developed in his first edition. Henkin provides us with many of the tools needed to understand the theoretical dilemmas of international jurisprudence, examine the process of their exposure, and go on to assess their impact upon international behavior. He does not, however, follow the developments he analyzes far enough to acknowledge their destructive impact upon his own reconstructed behavioral model.

#### *The Problem of Theory*

Two distinct problems plague all efforts to create a model of international legal theory. First, norms seem incapable of determinative application. The rule applicable to a given behavior may be too vague to permit violation to be definitively distinguished from compliance. This may present itself as a challenge to the tools of legal reasoning, or, more commonly, as an inability to distinguish behavior which a permissive rule renders privileged from behavior which falls within a gap or lacuna in the web of legal rules. I term this problem that of normative source or content. Second, should behavior appear to violate a norm, it seems impossible to distinguish deviant activity from that which is constitutive of a new behaviorally based norm. I term this the problem of normative legitimacy.

These problems affect international jurisprudential models differently, but each such model seems to suffer from both. As law seems more separate from and critical of behavior, the problem of normative source increases. The core of critical rules becomes smaller and the rest of behavior is either privileged or falls within a lacuna. In the extreme formalist view, an examination of compliance by actors with rules seems irrelevant to a discussion of a significant independent body of norms. On the other hand, as law seems more fused with behavior, the problem of legitimacy grows and norms lose their critical capacity. In the extreme, each dissenter seems able to rewrite the norm. Neither extreme formulation alone seems acceptable: the law is then either trivially irrelevant or uncritically impotent. Nor does any model which mixes these two approaches seem workable. All available contemporary models, including Henkin's, seem to attempt such a compromise. They accomplish this mediation in part by switching between two models of law: one fused with and one separate from behavior. The unus-

ceptibility of this duality to mediation by jurisprudential models is no coincidence. The duality reflects the dual nature of the international system's sovereign components, each of which has an international communal and a national particularist identity. Sovereigns lessen the apparent tension between these two identities by alternating between various models of international participation.

I have described these problems idiosyncratically because I believe that they are at the root of each of the more traditional categorical dualities. These connections will be clearest after I have developed a parallel model of the relation between theory and action. These general international social tensions—between immanent and transcendent rules (those present in social life and those revealed outside consensus) and between the international and national identity of sovereigns—manifested themselves in international law first as the familiar tension between positive and natural jurisprudence. The notion of legal neutrality in a system of states is common to both naturalist and positivist theoretical strains of international jurisprudence. Both are therefore susceptible to the theoretical problems I have outlined. I argue, in fact, that each collapses into an extreme position of either critical triviality or unhelpful fusion. Both visions sought to be critical of behavior and to find normative content in behavior patterns. The degree of separation from behavior differentiated them.

As Henkin recognizes, fighting the battle between naturalism and positivism has become uninteresting. Historically, positivism became the dominant mode of discourse. Naturalism was left behind because it could not solve the dilemma of source: if law was legitimate because separate from will, how could content be found except through consensus? Positivism, on the other hand, in the eyes of remaining naturalist critics, suffered from the problem of legitimacy: why should states be obliged to remain true to their word? Just as one must ask a naturalist where the source of his norms may be found except in consensus, so one must ask the positivist where the rule of reciprocal consent receives its legitimacy if not in revelation.

The notion of ideological neutrality is common to both naturalist and positivist theoretical strands of international jurisprudence. This notion was retained as positivism became the dominant theoretical strain. Its presence in the still extant naturalist strain, however, left that strain equally plagued by the difficulties I will discuss in the context of the dominant positivist mode. Some, who consider themselves neo-naturalists, may be, for the purposes of this critique, viewed as variants of the dominant positivist vision because they share a view of a neutral international law fused with behavior in a system of sovereign states.

More troubling is the fact that these difficulties seemed to reassert themselves within positivist views of law. The triumph of positivism was accompanied by a rigid separation of law and politics. Before that, no one spoke in these rigid categories. It was odd indeed that positivism should contribute to this separation of law and politics for it seemed to enshrine political consensus and choice as law. To the positivist, after all, law is an expression of will, not right, and whatever law's relation to politics, it is certainly distinct from morality. Neo-positivists have attempted to resolve this odd reenactment within positivism of the tension which divided positivists from naturalists with theories of shared and particulate will (of autointerpretation and community decision). But the conflict remains.

Within positivism, politics was the realm of actual policy choices. In the traditional positivist vision, law was a specific body of norms which, although often disregarded in practice, could guide the behavior of enlightened statesmen. A sharply different vision of law as a framework for international intercourse characterizes the more modern versions of the positivist vision. This view sees law as the framework within which all international behavior occurs and which can change to accommodate any behavior. It should be clear that these views characterized the relationship between law and society in different ways. In the first vision, law was separate from behavior and critical of it. In the second, law reflected international behavioral patterns quite closely. Only by alternating between them could a satisfactory model be developed. The first avoided the problem of legitimacy and the second avoided the problem of normative source. The fundamental difficulty arises because both problems must be solved *simultaneously* for international law to be a neutral guide for state behavior.

The failure of legal neutrality, then, can be seen in the recurrence of the basic tension within successive reconstructions of a unified positivist theory. These problems of source and legitimacy plague the dichotomies of naturalism and positivism, of law and politics, and of a law separate from and fused with society. The tension is played out within positivism first as the dual vision of positive law fused with, and separate from, behavior. This in turn permits the dichotomy of law and politics and the vision of international law, like international organization or diplomacy, as an ideologically neutral tool ensuring procedurally equal participation in international political and economic markets. The theoretical exclusivity and opposition of law and politics which developed was no coincidence. It reflected in positivist theory the deeper tension between naturalism and positivism which is then repeated in each doctrinal area of public and private international law.

### *Joining the Problems of Theory and Action*

If this were merely theoretical funny business, it would not warrant our attention. However, the true significance of the recent international developments which Henkin discusses, such as the call for a New International Economic Order, law of the sea, law of human rights, the advent of new international actors (both states and individuals), and challenges to the neutrality of the tools of the system of international law, organization, and diplomacy, lies in the theoretical perceptions which they spawned. They resulted from, and reinforced, the view that the system of procedural justice among sovereigns is not a neutral one and that continued belief in it imprisons policy choices and oppresses the less powerful.

By focusing on behavior, Henkin avoids discussion of the theoretical distinction between naturalism and positivism. He discovers in a behavioral approach the middle ground lost when visions of law and politics became polarized. He effectively critiques the extreme positions that the international system is one of "pure law" or "pure politics." He has provided a service by exposing the uselessness of continued dichotomy, but his own reconstruction succeeds only because he is able to alternately adopt different models of law. His objective view of legal rationality, like any other, is bankrupted once the doctrinal tensions within law are shown to be persistent and parallel. The events which he analyzes should force this realization upon us if we follow his implicit analysis. Our altered theory should then influence action through a changed perception of the game itself.

Henkin does not take us this far. By missing the deep structure of the inconsistencies he identifies and the importance of theoretical developments for behavioral explanation, he misinterprets the significance of the developments he outlines. Professor Henkin seems not to have noticed that these events have been as much theoretical as actual and that the realms of theory and action interact in a complex and reciprocal fashion. The result is a reconstructed view of legal neutrality, responding meaningfully to increasingly diverse political wills. He updates the common sense model of daily diplomacy developed in his first edition and demonstrates its strength. That model was indeed an enormous advance. Recent events, however, should push us to a new understanding of the influence of legal visions, not to a revitalized neo-positivism.

Although many of Henkin's propositions about the law observing behavior of states seem helpful, they depend for their validity upon foreign policy operatives acting out of the same conflicting theoretical structure which he identifies and which undergirds his reconstruction.

The real world developments which Henkin analyzes, however, are significant primarily because they have forced awareness of these theoretical tensions upon pragmatic policy makers. This development renders hollow predictive behavioral models which depend on the obscurity of contradiction or on faith in the possibility of neutral moderation.

## THEORY

### *Theories of Law*

Henkin's analysis of contemporary international behavior suggests theories of both law and change. In legal theory a pattern of contradiction emerges between naturalism and positivism and then, within positivism, between power politicians (realists) and idealists. As in his first edition, Professor Henkin fires powerful missives at both the idealistic legal academician and the hard boiled power politician. To those who debunk international law with the claim that the social behavior of states is "all political," Henkin demonstrates that the cup of positive law is at least half full. Moreover, he sees law in the structure of all international activities and often counters suggestions that the law has been violated with the observation that the *real* rule for that situation must have been permissive rather than prohibitory. To those who interpret all international behavior in legal terms, or would spread law to all types of behavior, Henkin presents a catalog of lacunae in the law and realistically observes that law is often disobeyed or ignored in the rough and tumble of international politics. The intersection of these observations turns out to be a highly developed model of state behavior which usefully catalogs the forces leading to law observance or violation by policy makers. He climbs inside the minds of national elites to reconstruct the law as they would perceive it and the calculus of advantage which might lead to law observance or violation in a given case. As a result, he depends on the policy maker's vision of law itself.

His hard boiled model of national behavior provides an updated vision of the relationship between law and politics which is both useful and powerful. Any unreconstructed realists or idealists who have survived in the cracks of international legal discourse are definitively dismissed. To those who are cynical about law's efficacy, law is a body of norms separated from and critical of social behavior. Actors obey or violate these external norms after an instrumental balance of the pains and pleasures of both courses of action. In this instrumental view of law, sanctions and reinforcements determine the effect of an external norm. Whether that norm is an exercise of will or of revelation is irrelevant. Endless inconclusive dialogues between naturalists and

positivists are avoided by a behavioral focus. To those who see law in every social interaction, law is an internalized and shared sense of communal purpose. It is fused with society and structures all behavior. In this intrinsic view of law, custom may be either following or reforming norms; it is never criticized by law. Again, the consensus may be willed or revealed.

The insufficiency of extreme formulations comes through clearly in Henkin's work. If all action is political, we cannot fully explain the coincidence of law observance or our sense of law present in the very patterns of political interaction. An instrumental account of individual law related behavior fails to account for our sense that law observance at least occasionally transcends even a long term understanding of risk aversion or profit maximization. Law separated from individuals seems incompatible with our sense of law as a shared internalized system of value. We cannot imagine the source of content for a law separate from social consensus. If legitimate law is an exercise of individual or communal will (positivism), we are unsure how the rule that law is will can be justified. All of these visions seem connected and their weaknesses seem parallel. All view law as separate from social and individual life. It is no coincidence that power politicians, in their attack on legal idealists, set up a positive model of law. Nor is it coincidental that Henkin opposes them by exposing the insufficiency of such a vision.

On the other hand, however, visions merging law with communal or individual life seem equally insufficient. If all action is legal, we cannot understand instances of conflict or our nagging sense of the separation of ought and is. An intrinsic account of law fails to account for our sense that conflict about norms may create deviation from ideals. If law is legitimized as shared consensus or custom, the concept of an ideal or rule is trivialized, for all deviations are expressions of changing consensus. Law fused with individual action seems inadequate to explain the persistent view of individual policy makers that external norms must be considered. If law is legitimized by its fusion with social life, we cannot understand normative criticism. If law is an expression of our ideal made manifest in life (naturalism), it seems devoid of content except through willed consensus. These visions also seem connected because they fuse law with individual or social life. Their parallel inadequacies reflect the persistence of particularity in communal union. It is no coincidence that legal idealists rely on a broad naturalist model of law in attacking the power politician. Nor should we be surprised that Henkin opposes them by criticizing this approach to law itself.<sup>2</sup>

2. Examples of Henkin's alternate adoption of views of law fused with and separate from society to further his criticism of extremist views of law and politics abound in the

In sidestepping the battle of will and revelation, Henkin advances discussion. The first reconstruction knitting positivism and naturalism dissolved into a dichotomy of law and politics. Henkin criticizes both poles because, to him, the distinctions between both law and politics and naturalism and positivism seem irrelevant to an understanding of behavior. The appropriate approach must be to ignore these theoretical disputes and concentrate upon the motives for international activity. This permits a second behavioral reconstruction moderating law and politics. Henkin does not go so far as to recognize that recent developments reveal the same tensions which undermined the first reconciliation present in this second attempt.

Henkin's approach advances a moderation-in-all-things approach to theory which would construct some defensible middle-ground between a law fused with and separate from society. If Henkin is correct in his critique of each pole, however, any such midpoint will prove untenable. If the defects of separation emerge at the moment law separates from custom, and the dilemma of fusion arises from any solidarity between law and social life, then it is hard to imagine law as *slightly* independent. Partial fusion may be no more tenable than partial pregnancy. If the choice is actually between international unity and national particularity, the alternatives are in unmediable opposition and are not points on a continuum running from positivism to naturalism. Legitimacy cannot be achieved by finding a midpoint between undifferentiated adherence to practice and differentiated critical reliance on objective value.

Consequently, a policy maker acting out of both visions is in self-contradiction, not moderated harmony.<sup>3</sup> Much turns, then, on the theoretical understanding of national policy makers. A behavioral

text. For example, he argues against the realism of power politicians by stating that "[I]nternational law is an assumption, a foundation, a framework of all relations between nations." L. HENKIN, *HOW NATIONS BEHAVE* (2d ed.) 319 (1979). Or, "[I]nternational law in particular is not a self-contained abstraction, or even a distant star for nations to steer by. It affords a framework, a pattern, a fabric for international society." *Id.* at 5. In attacking the idealist, on the other hand, he asserts that, "I do not include here [as law] that which nations do merely from habit, custom, convention. I refer to *law*, to behavior as to which there is — on the part of the actor, the victim and others — a sense of obligation." *Id.* at 14. Or, later: "[W]e know, there are serious lacunae in the domain of international law: the state of international law is still primitive, the relations and actions to which international law speaks are limited and many deplorable acts are not violations because there is no relevant law." *Id.* at 46.

3. As long as the actor's theory shields him from this contradiction, this is significant only to theorists. But academics may still argue that to the extent policy makers view laws instrumentally, they deny their normative internalization; while to the extent they view law in custom they deny the political realities of their social world. A law which is uprooted from custom will seem trivial and irrelevant because it is unrealistic. One which is fused with custom will also seem trivial in its generality and impotence to criticize. Yet one which is both seems illegitimate and internally inconsistent.

analysis will only take us so far, for we can sustain a middle position only if that position reinforces itself by shielding its adherents from awareness of its inconsistency. Theory, then, both explains and structures behavior. A full understanding of the behavior of nations must await an exegesis of the connection between theory and action.

### *Theories of Legal Thinking and Change*

Although Henkin eschews obsession with the distinctions between law and politics and between naturalism and positivism, he adamantly divides the realms of concept and action. As part of my effort to show that legal theory and action are joined in a fashion parallel to the tensions within law, between law and politics, and between naturalism and positivism, I will attempt to develop theories of the nature of legal thinking and thus of the relation between theory and change.

The tensions of legal theory reflect the moral choices presented to the policy maker between national particularist and communal behaviors. The reappearance of this dilemma in each doctrinal area of international law mirrors the dual nature of each state as a member of a community and as an individual entity. This tension is visible in the contrast between the treatment of sovereign-sovereign relations and sovereign-citizen relations in many doctrinal areas. To shield the policy maker from the pains of this dilemma, law must provide a neutral, autonomous method for choosing behaviors. Legal thinking must be independent of the tensions of moral theory so as to preserve the independence of action from values.

Henkin recognizes that to understand the resulting relationship between law and change we must understand the process by which legal theory itself changes and develops. To Henkin, recent social changes have influenced the content of international legal theory without changing its basic structure. We should refine our understanding of law's content and of its relevancy, but we should be encouraged about its viability because legal theory assimilates new situations by changing its content while remaining structurally independent of action. It is difficult to see how law could both "reflect, rather than impose existing order,"<sup>4</sup> and serve as an autonomous standard for action. It is difficult to imagine an independent law which could both lead and follow change unless some higher level theory existed to determine when to follow and when to overrule the rule. In other words, if external critical norms are forged in the crucible of international custom (thereby differentiating themselves from habit and acquiring *opinio*

4. L. HENKIN, *supra* note 2, at 93.

*juris*) some standard must exist for differentiating contranormative from protonormative behavior.

Henkin recognizes this frustrating conundrum but succumbs to it by opting now for one and now for the other pole. For example, the Cuban quarantine should be viewed as "recognition of a new small limitation, in special circumstances, on the right of transfer or deployment of weapons,"<sup>6</sup> whereas the law "against intervention in internal wars . . . has fared rather badly where internal wars reflected the major ideological struggles of our day."<sup>6</sup> In both cases, Henkin's argument is strong, but it is difficult to see that an equally persuasive argument could not be made that Cuba represented a violation while the law of intervention had been amended to permit ideologically motivated assistance.<sup>7</sup>

So long as actors retain faith in the mediation of theory, be it legal or political, action would not be affected. But as theory expands to cover more situations, it changes until its internal contradictory structure is revealed. The real significance of the recent social developments which Henkin analyzes is that their doctrinal resolution has forced awareness of the contradictions upon policy makers, who are consequently losing faith in either models of law or of politics. This theoretical development has an impact upon action through the minds of policy makers, for whom theory is both a way of understanding and a way of structuring behavior.

Legal doctrines, then, replay the social tensions which created them. As the tensions in a given legal doctrine become apparent, the faith in mediation can be maintained by restructuring the doctrine parallel to the tension. In other words, legal doctrine would develop by applying a single mediating strategy to ever more instances of the social tension. This might occur in two ways, both of which are demonstrated by the recent political developments which Henkin surveys.

First, law may expand hierarchically, subjecting deeper levels of doctrine to the same structure. This is experienced as the trivialization of law. For example, international law is split from politics to protect the positivist connection. The tension is then reenacted between naturalist and positivist strains, then between treaty and customary law, then between stiff (*pacta sunt servanda*) and flexible (*rebus sic stantibus*)

5. *Id.* at 299.

6. *Id.* at 161.

7. In saving international law doctrines from the argument that violation renders them irrelevant, Henkin resorts only occasionally to an interpretation of apparent violations as new law. This tendency reflects his choice of examples more than it does the limited nature of the tension identified in the text. The realm of high politics is less plagued by the maddening recourse to doctrinal reformation than are the larger processual legal fields.

views of treaty law, and so on. Public law is splintered from private law; public claims are splintered into acts *jure imperii* and *jure gestionis*.

Second, legal concepts may develop horizontally as novel situations are brought within the model. Old patterns of behavior may change, or new ones may develop which strain the mediating powers of the existing legal system. The legal doctrine seems weak when confronted with new situations.<sup>8</sup> In adapting to them, the doctrine mutates and becomes more nebulous. The mediation goes on at a higher level of generality, just as hierarchical expansion replays it on an ever broader plane. Development along these two lines preserves the sense of mediation. Nevertheless, as parallel mediating strategies are developed to knit together conflicts arising in divergent doctrinal areas (in response to such developments as the proliferation of primary actors of different sizes, the interpenetration of primary and secondary actors and the application of the model to new subject areas of economic and social cohabitation and welfare rather than solely to peace and security), tensions between doctrines which had been confined to divergent sectors or were so specifically expressed as to discourage comparison with other doctrines suddenly become obvious.

Expansion of the theory finally reaches a limit. As hierarchical development progresses, faith in the meaningfulness of higher level distinctions is eroded by each reappearance of the tension. As the level at which meaningful distinctions seem possible becomes lower and lower, boredom with the law increases. The core area of successful mediation becomes smaller and smaller as the doctrine factors out of law difficult questions through a process of trivialization. Law seems relevant only to a narrow field of diplomatic intercourse. At the same time, however, the horizontal expansion of legal theory brings larger areas of social activity within the legal order. In the process, the model mutates in all its previous applications to become more general. As it does, it becomes less outcome determinative. Eventually, the model expands to account for contradictory results within the same framework. At this level, theory also seems irrelevant to social behavior. For an extended period, this process of assimilating new situations to the theory will be perceived as the development of an ever stronger theory, *i.e.*, the strengthening of international law. Once the development reaches a certain point, however, its internal contradictions become apparent and faith deteri-

8. For example, the exclusivity of sovereignty alone will not support a doctrine of sovereign immunity when one sovereign finds itself in the territory of another. The fiction of an implied permission to enter with an implied grant of immunity from jurisdiction develops to explain the action. As factual applications proliferate this seems inadequate and the doctrine expands by changing its basis from inherent notions of sovereignty to implied grants of vested rights to policies which facilitate interaction.

orates. Henkin sees this process, but not its result. Recent developments have brought us to doctrinal explosion.<sup>9</sup>

#### ACTION: NEW ROLES FOR IDEOLOGY AND INDIVIDUALS

To Professor Henkin, recent events should be seen to demonstrate the vitality of legal theory. The true significance of these changes, however, is that they expose the contradictions in legal and political theory. The new developments of international society have rendered the old mediating strategies less available to policy makers who now can easily expose the contradictions within them. Henkin's analysis contributes to this development. If it seemed that resort to obfuscatory theory freed us from the pain of contradiction, then Henkin's analysis will force us to face it squarely. If that theory prevented us from thinking creatively about alternative behaviors and developing new approaches to social problems, then Henkin, by exposing the weaknesses of theory, has provided a liberating service.

9. Henkin's discussion of the Vietnam War deftly illustrates the process of doctrinal explosion. In explicating various attitudes towards the legality of the American military presence, Henkin sees that the available doctrines do not seem to yield a definitive judgment. The verdict depends upon characterization of the situation as United States and North Vietnamese "intervention" in a South Vietnamese "civil" war, United States "intervention" in a Vietnamese "civil" war, or North Vietnamese "aggression" against a South Vietnam "assisted" by the United States. Once law is viewed as a normative concept separate from social activity, the purpose of doctrinal discussions is to help determine verdicts autonomously. The labels of "aggression," "civil," "intervention," etc., can each be used to promote a communal vision of the war or an individualist vision of responsible states. Moreover, in applying them to the confused Vietnamese situation, where traditional concepts of Westphalian states were inapplicable, any content these terms may have had in their original applications was eroded. Doubts about peripheral meanings contaminate the core.

Typical of the insistence on law as an independent critical standard is Henkin's observation that "no international or other disinterested tribunal was ever seized of these issues." L. HENKIN, *supra* note 2, at 309. He is unable to come to an independent verdict because "political and moral passions . . . cloud . . . legal determinations." *Id.* He fails to see that a tribunal could no more easily reach an autonomous judgment because the fault lies in the doctrine, not in the hazy passionate minds of judges or nonjudges. Henkin adheres to a view of law separate from behavior and to a determinative understanding of legal thinking. The true significance of the Vietnamese legal conundrum, however, is that this view is incorrect. Doctrines reached the limit of coherent applicability and the naked political choice between alternative visions of international life appeared. We might simply conclude that doctrines give out and this is a matter for politics. Henkin has rightly laid to rest that possibility, however, by elsewhere demonstrating that the absence of a constraining rule is a permissive one and that law can be seen fused with social behavior as well as separate from it. Neither a fused nor a separate view will tolerate such lacunae. Even if we cease applying law to Vietnam-like situations we would not be content, for fluid doctrinal conflicts revealed in the Vietnam context suddenly appear in the traditional law of force as well. Vietnam should lead us to conclude that all doctrines of national self defense have expanded to collide with communal restrictions on national military activity.

Professor Henkin's analysis of the role of ideology has two strands. First, he correctly identifies the intensification of ideological struggle as a substantial threat to the most significant of traditional international legal doctrines, such as the distinction between war and peace, territorial integrity and nonintervention. But, second, in an analysis unchanged from his first edition, Henkin suggests that the accommodation of passionate ideological differences within a theoretical order of "equal, sovereign, mutually-tolerating secular states,"<sup>10</sup> may demonstrate the strength of international law.

The term ideological struggle as used by Henkin refers to the intense competition between Soviet communism and Western capitalism since 1917, as well as to conflicts produced by Fascism and contemporary neo-nationalism. These conflicts seem to Henkin to reduce the overall level of compliance with international norms separate from behavior. Henkin implicitly recognizes that the model of a liberal national law abiding polity can only be expanded to the international arena if there is at least a tacit conspiracy to avoid taking absolutist positions seriously. All actors must rank their long run interest in maintaining a peaceful cooperative game above their interest in winning any particular hand. When ideological beliefs give some states the self image of outsiders, their rule compliance diminishes. This analysis depends upon an understanding of law as an external set of norms allied with stability, which makes law violation seem more likely by ideological revisionists. Moreover, states within the international legal framework feel less compelled to adhere to the limits of legal self restraint in their relations with actors who have elected to leave the fold.

Whether intense ideological conflict indeed reduces overall compliance, falls within a lacuna, or merely alters the rules, seems an impossible and inappropriate question. To resolve it we would need to be able to separate legal rules from the norms of political prudence and be able to deduce judgments of compliance from general norms. If what I have been suggesting about the porosity of legal reasoning is correct, no such data could be compiled. Just as this first strand of Henkin's analysis of the impact of ideology suffers from the problem of normative source in its reliance on a vision of law separate from behavior, so his second strand suffers from its adherence to an opposed vision of the relationship between law and society.

Henkin finds a basis for confidence in law's flexible strength in the increasing accommodation of ideological struggle in the legal system. Had he tried to reach this conclusion while adhering to a vision of law

10. *Id.* at 108.



separate from behavior, Henkin would have been halted by the problem of normative content. Norms are simply too vague and the domain of legality too imprecise to permit accommodation of opposed ideologies in a distant critical legal structure. As a result, Henkin adopts the mediating strategy I have outlined above. He switches from a view of law separate from behavior to one fused with it, and finds compliance with behaviorally determined norms rather than lacunae or violations. Once law is seen to embody shared ideals, it can as easily find content in one ideology as another. States which view themselves as systemic outsiders can be induced to participate in a legal structure if by their own deviant behavior they can force legal doctrine to enshrine principles of flexibility as steadfastly as of stability.

Both strands of Henkin's analysis of the role of ideology are insufficient. By restricting his analysis to the realm of action, he underestimates the threat. He is correct in identifying ideology as a major threat to international legal order. He is correct, however, not because the norms are good and ideology reduces motivation for compliance, as he suggests, but because ideological struggle weakens belief in the availability of determinative rules.

As ideologically divergent states sharing a structural interest in order come within the legal order, they carry out their ideological struggle partly by utilizing the tools of legal argument and legal reasoning. This process pushes the inherent contradictions of legal doctrines into the open. By developing opposed legal justifications, ideological competitors expose the incapacity of legal reasoning processes to be persuasively critical of behavior.<sup>11</sup> Consequently, the body of rules which remains inviolate becomes ever smaller. Until recently, the rules of diplomatic immunity seemed to be one of these core areas. Iran may yet respond to the invitation of the United States to appear before the International Court of Justice and there attempt by skillful argument to devalue even this body of rules. Not only does ideological struggle speed this trivialization, this process reveals the supposedly neutral rule structure to be itself an ideology of procedural market justice.

11. This puzzle is experienced as the decreasing persuasiveness of doctrines employed in ideological rhetoric. Intervention is humanitarian if the Soviet Union does it in Hungary, but aggression if the United States does it in the Dominican Republic or elsewhere. Exclusive domestic sovereignty is espoused for internal activities of foreigners, but sovereign immunity is cited for the foreign acts of natives. Such duplicitous doctrine swapping plagues all areas of international legal discourse. Traditional lawyers who retain faith in the ultimate meaningfulness of the doctrines deny their "misuse." But "interpreting for survival" is endemic in a nuclear age. If high seas nuclear tests in peacetime can be "self defense," it is difficult to see any area in which communal rights could overcome assertions of autonomy. These developments are significant because they expose the irreconcilable opposition of autonomous and communal strains which have coexisted in international jurisprudence for decades.

Far more important for theory than the disrobing consequences of ideological manipulations is the resulting discredit of theory itself. Ideology weakens theory. It seems plausible that this process has had at least two sorts of results. First, policy makers for the great powers who share a structural interest in systemic continuity may find theories of power politics increasingly attractive, and may increasingly dismiss proponents of law as "legalistic" or useful only as apologists. Because they have been led to this dismissal by a loss of faith in the determinativeness of legal reasoning, and hence in the separation of law and ethics, they may be led to dismiss the moralist as equally irrelevant. This reveals a strange paradox: the more legal scholars press statesmen to wrap their action in the cloak of legality, the more statesmen lose faith in ethical as well as legal constraints on their behavior.

Second, the lesser powers which, regardless of ideological persuasion, share a structural interest in systemic revision, may also be led to lose faith in the theoretical and ethical limits on their behavior. This is particularly true of small terrorist ideologues. Terrorism may be in part a response to theoretical hollowness. Again the strange paradox: the more both major ideological camps instruct the lesser powers in the law, the less restrained everyone feels.

Such a line of reasoning may seem to suggest that we are threatened with both immorality and anarchy. If ideological intrusion advances the process of legal trivialization it may indeed seem that anything goes. The results may be that statesmen become increasingly polarized. It seems, however, that this process will do no more than remove the constraints of false consciousness from the minds of the disenfranchised lesser powers and encourage them to utilize what power they do have in what has always been a marketplace of power politics. As to the fear of anarchy, if what I have suggested is correct, we need not fear greater anarchy, for legal doctrines themselves have never been able to control behavior, at least for the greater powers. They lack the capacity to do so. It is only because we have expected legal reasoning to provide a surrogate for morality and a determinative codification of national interests in cooperation that we fear anarchy when they are weakened. The constraints of morality and the preference for peace should still control the pace of social change, as they always have, even after the lesser powers are freed from belief in the law as a protector of their freedom. If the dilemma which law cannot mediate is between the international and national faces of each sovereign, we must expect his free behavior to reflect both identities.

More important for theory than ideological intrusion is the advent of non-state actors. Henkin considers human rights law, apartheid, and

the war crimes trial of Adolf Eichmann separately. His treatment of these issues is unified by his analysis of the growing role of individuals in international law. Like ideology, individuals have been assimilated into international jurisprudence at considerable doctrinal costs. As previously compatible doctrines have expanded to account for individual participation, they have broken down. Such participation exposes the irreconcilable communal and autonomous elements of international society.

Professor Henkin rightly observes:

The law of human rights contradicts the once deep-and-dear premises of the international system that how a state behaved toward its own citizens in its own territory was a matter of "domestic jurisdiction," *i.e.*, not any one else's business and therefore not any business for international law.<sup>12</sup>

He implies that international law either prescribes standards for individual treatment or does not, thereby embracing a narrow view of law separate from social behavior. A broader view would identify the traditional legal rule as a permissive one, *i.e.*, individuals are only entitled to whatever behavior states choose to accord them. That the issue could be so doubly posed seemed purely academic as long as the rule remained completely permissive and it remained unnecessary to specify a definition of law. But as international norms restricting individual behavior (international criminal law) or state behavior towards individuals (minimum standards of justice) emerged, this theoretical obscurity began to skew our view of law's efficacy. Thus, Henkin identifies a "weakness" of international human rights law which can be found "in its enforcement."<sup>13</sup> By this he seems to mean that restrictive norms are flouted out of systematic disinterest or overriding national concern. Because law is separate from society, it has critical force and can be violated. On a first level, we have no way of assessing whether these violations, if frequent enough to indicate "weakness," are not actually indicative of the development of a more permissive view, for we cannot stake out a tenable position between law's separation from and fusion with practice.

On a deeper level, however, Henkin's analysis of human rights law reveals the structural insufficiency of the typical theoretical approach. He ascribes the enforcement failure to the disinterest of the system's policemen; other states. This is more than a failure of standing. He

12. L. HENKIN, *supra* note 2, at 228.  
13. *Id.* at 232.

has identified the inconsistency of individual participation in a state system. Either there is an international community of interests, or there is a system of fractionalized state interests. The interests of individuals are either independent or ascribable to their states.<sup>14</sup> So long as different situations are differentially treated, this poses no problem for systemic coherency. As new situations arise, some will be analogous to past communal and others to past autonomous approaches. This expands and weakens the doctrine in its original application. It is in precisely this sense that individuals pose a challenge to the roles of states in the system.<sup>15</sup>

The rise of individuals brought this doctrinal contradiction to light in two ways. First, the interpenetration of national communities and the development of international criminal law made private individuals more often the subject of international norms. Second, the simultaneous loss of faith in the autonomy of official legal reasoning blurred the distinction between the private and public capacities of individual action.<sup>16</sup> Both of these trends are illustrated by the Nuremberg decisions and by the case of Adolf Eichmann. Moreover, Henkin's treatment of the Eichmann case reveals the connection between our theoretical vision of legal doctrine and both our assessment and manipulation of social activity.

Henkin identifies the two major legal issues in the Eichmann case as the official or private nature of the abduction in Argentina and the dependence of Israeli jurisdiction on some notion of the international criminality of Eichmann's acts. Confining himself to a view of law separated from society, Henkin puzzles over the exercise of jurisdiction. Does it represent a violation of past rules or a nascent law of "universal jurisdiction of Nazi crimes"?<sup>17</sup> The answer seems to turn on whether other states are "offended" by the exercise of jurisdiction, because, in "traditional theory, international law governs the actions of states

14. This proposition is hardly startling, for it is at the heart of domestic legal disputes about the applicability of international norms in domestic cases. Either monism or dualism is possible if there is to be a unified approach.

15. For example, the principle of exclusive domestic jurisdiction was settled for most issues of national domestic interaction. The principle of communal responsibility was embodied in exceptions to this principle, *e.g.*, for foreign sovereigns within the territory, diplomatic missions, aliens under some circumstances, and in certain choice of law matters. Apartheid presented a new situation to which both the principle of international justice and of exclusive territoriality seemed applicable. This same contradiction had existed in the doctrine before, but was obscured by the view of law separate from society which could view anomalies as lacunae.

16. State action was always merely individual action in an official capacity. If no independent official thought process can control actions, or if the law chooses to ignore the possibility of such control, all international actions are those of individuals and the old adage that all international norms are addressed to individuals seems newly appropriate.

17. L. HENKIN, *supra* note 2, at 273.

against other states."<sup>18</sup> Nevertheless, he suggests that in the Eichmann case "international law may have taken another small step in moving . . . from a system in which there is a response by the victims alone to one of communal responsibility."<sup>19</sup> This rightly contrasts the national and communal alternatives available to sovereigns which are exposed in the Eichmann case.

The same problems are posed by Henkin's analysis of the abduction. Eichmann's defense to jurisdiction was based on a view of states as the sole international actors. The same vision must differentiate states from individuals. Such an approach would require either that the private acts of individuals be unregulated (*lacunae* in a law separate from society) or permitted (law fused with social behavior). The abduction would have been unchallengeable if performed by private Israeli citizens. Only if the public/private distinction has collapsed can the abduction violate Argentine territorial jurisdiction. Yet, the concept of exclusive territorial jurisdiction is itself the expression of the vision of hermetically sealed state actors which depends upon a distinction between public and private behavior. In other words, the two conceptual trends identified in the Eichmann case, if Henkin's suggestions are fully elaborated, collide with one another.

Individuals must be either part of a communal order or assimilated to particular state actors. This understanding permits us to elaborate more fully our sense of the unfairness of the Nuremberg trials. In the international order, individuals can be neither partial nor total players. If they remain partial players (having some aspects of international personality and not others), the idea of sovereign equality is violated. If they have responsibility without input (liabilities without power), our ideal of accountability, consent, and participation is abused. If they receive obligations without benefits (duties without rights), the ideal of sovereign equality or nondiscrimination is violated.

On the other hand, full participation of individuals would violate the ideal of exclusive domestic jurisdiction. To the extent that individuals have legal rights, duties, powers, or liabilities they are subject to a communal order which transcends the jurisdiction of states. This analysis reveals the contradiction between the ideals of exclusive domestic jurisdiction and sovereign equality which had been perceived as expressing sovereignty's corollary internal and external dimensions.<sup>20</sup> It was be-

18. *Id.*

19. *Id.* at 276.

20. To Henkin, these two fundamental elements of sovereignty—absolute internal authority (exclusive domestic jurisdiction) and external sovereign equality—are among the "givens" of international relations. Since these concepts entered international legal discourse after the 1648 Peace of Westphalia, scholarship and practice have expanded

cause sovereigns were exclusive territorial powers that they were equal and vice versa. Once individuals play a role, these ideals are brought into conflict, not only in novel situations such as apartheid or Nazi war crimes, but in such previously impregnable fortresses as foreign abductions and criminal jurisdiction.

This doctrinal tension is experienced as a cynicism about the detrimency of law and hence of its legitimacy. The vague sense that doctrines are being manipulated and have little inherent meaning will not be pushed back by the exhortations of positivist scholars, because they result from a deep structural inadequacy of the theory. The currency of international law is not debased by pernicious myopies. It has them to cover an immense area. It is the mechanism of sovereignty which, since 1648, has separated the national and international spheres. The sovereign played a national and an international role. Each of these two theoretical elements responded to one of these roles. As the formal division of these two spheres became more pronounced, the discourse which responded to national particularism and absolutism became the foundation of international law. This gave international law an enduring positivist bias. On the other hand, the ideological remnants of empiric and papacy, which perhaps could have been the informing dogma of a new communal order, were cleaved from law entirely.

This bifurcation began the process of legal trivialization, for a parallel nonconsensual structure developed in the realm of politics. Responding to the national particularist limitations of positivist law, the political systems (tripolar, balance of power, etc.) which have been the traditional subject matter of diplomatic history expressed the existence of a communal order. Both were realms of theory. Both permitted policy makers to avoid confronting the unprincipled contradiction of national and communal.

The theory of sovereignty was designed to support the vision of an international state system. This theory is no longer predictive. Actions do not occur in the real world as they would in a world of states. More crucially, it can no longer guide behavior. We cannot act *as if* this were a world of states. This is true first because the content of the theory has become decoupled from our moral vision. It seems unfair to treat an entity as if it were a self-chooser when it is not. Once we accept that no state seems immune from external influence and extreme power differentials are more descriptive of international relations than is equality, we excuse the transgressions of client states and void treaties signed under duress. It seems inappropriate to punish a state for the transgressions of an individual or to compensate states for the injuries of their citizens absent the expectation that the damages will be measured by the individual's pain and the benefits passed along. To argue that sovereignty's moral content expresses a "right" or an ideal separates law from social life and reopens the debate between law and politics.

Second, this is true because the concept of sovereignty is in internal conflict. Not only must external considerations determine the reciprocal treatment due states (are they to be independent or interdependent), the concept of sovereignty itself enshrines the choice between nationalism and community. It would obviously be impossible for states to be equal but not exclusive in their domestic jurisdiction or vice versa. It is precisely because sovereigns are internally absolute that they are equal. If authorities are not subject to each other's influence, they are equal and can be bound only by consent. But neither can both be true. The application of sovereign rights doctrine to individuals has revealed the conflict between equal participation and absolute isolation. Consensual obligations remain obligations and *pacta sunt servanda* must gain its authority outside consensus. Yet, it is unclear how the normative force of internal exclusivity could be understood except as an expression of consensus. The communal dissenter would be outside of either system. Henkin's analysis of the role of individuals should convince us that a normative notion of sovereignty is unavailable. Because it enshrines both visions, it is impotent to resolve whether states should be treated in isolation or in community.

exploded of its own inconsistency. This doctrinal development, then, affects the realm of action as international actors approach new conflicts between sovereign-sovereign and sovereign-citizen relationships. These spheres collide more dramatically when the legal doctrine of sovereignty which cushioned them is weakened. It is no longer possible to avoid state responsibility by obscuring the private/public dichotomy while retaining state territorial exclusivity. A vision of law separate from politics and society separated doctrine from behavior. This approach attributed behavioral inconsistency to either violations or legal lacunae. But the existence of legal lacunae depended upon the compatibility of sovereignty's internal and external dimensions, *i.e.*, of equality and exclusive domestic jurisdiction. This in turn depended on the hermetic separation of states and individuals. In other words, behavior could only escape legal criticism if the legal structure was limited by actor consent and if the class of consenting actors was the same as the class of behaving individuals. This structure could avoid the inconsistency of actor deviation by contrasting norm creating and norm violating behaviors.

Henkin recognizes that the application of international law to individual behavior signals the end of this symmetrical doctrinal escape from the contradictory alternatives of international communalism and national particularism. Nevertheless, his middle level propositions about law observation and violation in the field of human rights amount to a deceptively simple reconstruction. This reconstruction will suffice if it is adopted by policy makers. But, as law develops, it both expands and is trivialized. Arguments about sovereignty, stability, expectations, or reciprocity are equally undeterminative in the hands of any advocate.<sup>21</sup> In covering a broad new area, and exposing its inner contradictions, law comes to seem applicable to any situation but outcome determinative of no legal dilemma. Moreover, the tensions between communal doctrines of international minimum standards and exclusive domestic jurisdiction, which are obvious in such new legal areas as apartheid law, become increasingly clear in apparently settled and

21. These arguments of policy or systemic structure merely replay the choice between a communal and a particularist order. Consequently, arguments for sovereign restraint echo falsely from the lips of ex-imperialists, but so do demands for communal norms from the mouths of newly self-determinist ex-colonies. Arguments about the economic order may pursue an individualist or a communal ideal. But the matter cannot be doctrinally settled at this level for it is unclear whether an individualist order would cushioning freedom to act or to eat. Moreover, a regime of trust may be as legitimate an approach to either as a regime of rapaciousness. If reasonable expectations are to be stabilized it remains unclear whose expectations are reasonable. If reciprocity is to be the hallmark of a neutral doctrine it remains unclear how we want others to do unto us: are we willing to be held to hard bargains or would we prefer mercy? No doctrine seems capable of resolving these tensions. As policy makers come to perceive this, the system destabilizes and belief in the myth of an available legal mediation fails.

traditionally separate areas, such as economic regulation of aliens or the domestic control of natural resources.

### CONCLUSION

Obviously this expansion and trivialization is fueled by more than the rise of individuals. Still, most other developments revolve around this pivotal change. Other developments which Henkin reviews include new approaches to force, the increasingly transnational economic and judicial structure, and the new subject matter of economic welfare in the New International Economic Order. His analysis of each of these areas perceives the doctrinal problem. His concentration on law related behavior, however, creates an inappropriate concentration on action without developing and assessing the impact of theoretical development. Policy makers, after all, act out of a conception of their relationship to theory. In this sense the issue of law and politics which Henkin's entire work is meant to address is a false one. It is merely a restatement of the tension which is replayed in both doctrine and action between criticism of behavior and solidarity with it. By focusing on action so as to mediate the law/politics dispute, Henkin has diverted our attention from the more significant connection between a crumbling theory of both law and politics and action. He accomplishes this only by switching theories of law in midstream and considering politics to enter through either an unfortunate lacuna or a permissive rule. Such a view should not be possible once the theoretical implications of the developments he analyzes are fully scrutinized. The analysis he presents should spur us on to see the failure of legal mediation and to expose the regime of procedural justice as the enshrinement of an oppressive ideology of market power politics.

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