LEGAL RULES AND INTERNATIONAL SOCIETY

Anthony Clark Arend

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For my mother,
CORA CLARK AREND,
with much love

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INTRODUCTION

As the world enters the twenty-first century, one of the greatest uncertainties facing both scholars and practitioners of international relations is the future of the international system. As the cold war was coming to an end, many commentators began to speak of the emergence of a "New World Order." While it was unclear precisely what that phrase meant—indeed, it undoubtedly meant many different things to different people—the concept of the New World Order expressed a hope that the international system was becoming more peaceful and just.[1] In such a new system, many assumed international legal rules would be strengthened and multilateral organizations would play a significant role in managing international conflict. But as the tragedies of Somalia, Rwanda, and the Balkans played themselves out, the expectations for a better international system seemed premature. International legal rules seemed impotent and international organizations seemed incapable. Many believed that the world would settle back into a competitive balance-of-power system.

Nonetheless, in the midst of these tumultuous world events an increasing amount of scholarship is being devoted to the study of norms and institutions. As this study proceeds, one element that deserves a

fresh look is international law. The purpose of this book is to attempt to provide such an examination of international law. I believe the time is especially propitious for this examination for several reasons. First, there is a need to rehabilitate the status of international law within the political science community. Second, there is a need to provide a methodology of international law that returns the discipline to an examination of empirical data. Third, the changing nature of the international system requires that certain fundamental principles of international law be reexamined. Let me say a few words about each of these points.

INTERNATIONAL LAW AND POLITICAL SCIENCE

In a 1990 essay on recent works on international legal rules, law professor Phillip Trimble observed that "[t]o academics and practitioners alike, international law is a peripheral enterprise."[2] He then went on to cite a report prepared by John King Gamble and Natalie S. Shields in which they argue that "many academics still regard international law as . . . a 'fringe' specialty, well meaning, even noble, but naive and largely irrelevant to the real world."[3] Within the discipline of political science, this skepticism toward international law has been especially high. During most of the post-World War II era, realism (both classical realism and its successor, structural realism) has been the dominate paradigm for understanding international relations. For the vast majority of structural realists, international rules—whether actually called "international law," seen as an element of an "international regime," or termed "international norms"—are largely epiphenomenal. The rules may exist, but they do not exert an independent influence on state behavior. Accordingly, the study of international rules is not an extremely useful pursuit for political scientists. They would make better use of their time by studying the political and economic factors that really affect behavior.

Notwithstanding these rather pessimistic views, however, scholarly interest in international rules has been increasing over the past several years. Confronted with the difficulty of explaining cooperation among international actors under the logic of the realist paradigm, another approach to international relations has emerged in recent years—institutionalism. In contrast to the realists, institutionalists assert that international rules and institutions can indeed play a significant role in international relations and that a proper understanding of the international system requires an understanding of these rules and institutions.

Interestingly enough, however, much of the institutionalist literature does not explicitly discuss *international law*. Instead, the institutionalist writings examine more general concepts such as "principles," "norms," and "rules," ignoring the distinctiveness of international legal rules and the international legal system.[4] Why has this been the case? One reason may be the legacy of the realists. After years of blasting international law and international legal scholars as irrelevant to international relations, the realists may have seemingly turned the words "international law" into a red herring. As a consequence, while the institutionalists may have wished to reintroduce normative concerns to international relations, they may have been fearful of doing so with a discussion of "international law." The safer, social science-sounding words like "norms" and "institutions" may have seemed more appropriate. Another reason may have been the lack of familiarity with the substance of international law. It is quite difficult to discuss the role legal rules play in international relations without a reasonable understanding of what those rules are and how they are constituted. And yet perhaps another reason may be that even the institutionalists may view international law as formal rules that do indeed bear little resemblance to the realities of international relations. They may think of international law not as a dynamic set of rules that are created and changed through state practice, but rather as stultified, dust-covered treaties that have no connection to the real world—the Kellogg-Briand Pact, for example.

A basic proposition of this book is that understanding international law—international *legal* rules—is essential to the study of international relations. As Professor Andrew Hurrell asserts, "it is international law that provides the essential bridge between the procedural rules of the game and the structural principles that specify how the game of power and interests is defined and how the identity of the players is estab-

lished."[5] International law, he continues, "provides a framework for understanding the processes by which rules and norms are constituted and a sense of obligation engendered in the minds of policy-makers."[6] In short, understanding the nature of international *legal* rules is crucial to an understanding of international relations generally. They are different in nature from other types of rules and play a distinctive role in international politics.

Fortunately, some political scientists are beginning to recognize the distinctiveness of legal rules.[7] Under the leadership of scholars such as Lea Brilmayer, Harold Koh, Anne-Marie Slaughter, Kenneth Abbott, John King Gamble, Oran Young, Christopher C. Joyner, Friedrich Kratochwil, Charlotte Ku, as well as Professor Hurrell, there has been a growing dialogue between international legal scholars and political scientists.[8] Indeed, in recent years a number of workshops and conferences have been organized specifically to further this dialogue. These include events sponsored by the Academic Council on the United Nations System, the Schell Center for Human Rights at Yale Law School, and the American Society of International Law. This book seeks to encourage this dialogue and help reverse the practice of neglect that international law suffered at the hands of many political scientists in the past. Needless to say, some of the discussion of international relations theory will be quite familiar to international relations scholars, and some of the examination of international law will not seem new to international legal scholars. But to be truly interdisciplinary, I believe it is necessary to provide sufficient background so that scholars from both fields can appreciate the other arguments that this book seeks to advance.[9]

INTERNATIONAL LAW AND EMPIRICAL DATA

But even while the political scientists were all but ignoring international legal rules, much scholarship was flourishing within the discipline of international law. Throughout the cold war, legal scholars were authoring a plethora of treatises, casebooks, and articles. Indeed, with changes in the international system and developments in technology, scholars had more substantive legal issues with which to grapple—outer space, the deep sea-bed, self-determination, human rights, and others. But unfortunately, a great deal of this scholarship has been doctrinal in nature.[10] By that I mean that scholarly debates about what a particular rule of law is tend to center around different conceptions raised by different scholars. For example, when examining the question of whether there is a rule of international law permitting the use of force for humanitarian intervention, the discussion may focus on the value of, let us say, Professor Michael Reisman's approach versus Professor Fernando Tesón's approach. As a consequence, the debate frequently centers on the scholars' paradigms and not the behavior of the international actors that they are supposed to be evaluating.

In theory, legal scholars do not create rules of international law; rather they muster empirical evidence that supports the existence of a particular rule. But to do this, they need to examine real-world behavior. Increasingly, legal scholarship seems to have been removed from this basic, but often very time consuming and complicated, exploration of the behavior of international actors.[11] This may be attributable to several factors.

First, in the old days of international law, there was only one international actor—the state. And there were not that many states in the international system. Hence, to do a thorough examination of customary state practice in 1920, did not require an examination of all that many states. At present, however, there are 191[12] states in the international system, and there are a variety of other international actors whose behavior may affect the development of international law.

Second, it is difficult to evaluate empirical data once it has been collected. Perhaps a scholar can obtain evidence of state behavior, but how is he or she to determine whether there is sufficient state practice for a putative rule to constitute international law? It is one thing to note, as does Article 38 of the Statute of the International Court of Justice, that a rule of customary international law requires there to be "a general practice accepted as law."[13] But how much practice is required for there to be a "general practice?" Do all 191 states have to participate in this practice? Indeed, what is a practice? And how does an investigator determine if the practice is "accepted as law?" Is mere rhetorical endorsement sufficient? Or is more required? In short, it is

difficult to develop a common methodology for analyzing and evaluating practice.

A second basic proposition of this book is that the determination of rules of international law must be rooted in empirical analysis. Accordingly, it will seek to provide a useful methodology that will enable scholars and practitioners to examine the practice of international actors and evaluate that practice.

THE CHANGING NATURE OF THE INTERNATIONAL SYSTEM

It is almost axiomatic to say that the international system is in a state of flux. With the end of the cold war and the seeming rise of multilateral institutions, two fundamental aspects of the international system may be undergoing change: the structure and the actors.[14]

First, it is quite clear that the bipolar system that dominated the globe for over forty years no longer reflects reality. Instead, the structure is in transition. Some suggest that the structure is moving toward a multipolar system, while others contend that it is a unipolar system.

Second, there has also been an increase in the role played by a host of nonstate actors. At the broadest level, international governmental organizations from the United Nations to the European Union to NATO to the Organization of American States have been much more involved in international relations since the end of the cold war. Similarly, nongovernmental organizations like the International Committee on the Red Cross, Amnesty International, and Greenpeace have also been more active than in past years. In addition, other nonstate entities such as the Bosnian Serbs, the Palestinians, and the Kurds have been engaged in international negotiations and concluding international agreements in an unprecedented fashion.

A third proposition of this book is that the changing structure of the international system and the new role of nonstate actors *may* affect the nature of international law. In particular, these developments may have an important impact on the way in which international law is made.

As noted earlier, under traditional international legal theory, international law was created by states. If nonstate actors are entering into the international negotiating process in different ways, scholars may need to reassess their assumptions about how international law is constituted. Moreover, if the structure of the international system is changing, the role that legal rules play in international relations may also be changing.

In light of these three propositions, this book seeks to accomplish four main goals. First, it will attempt to demonstrate the importance of recognizing the distinctiveness of international *legal* rules. To do this, it will differentiate legal rules from other types of rules that exist in the international arena—moral rules, rules of the game, rules of etiquette, and so on—and will show that legal rules are qualitatively different from other rules. Second, this work will propose a methodology for determining the existence of a rule of international law. This methodology, it is hoped, will serve both scholars and practitioners as they evaluate state practice. Third, it will seek to demonstrate the relevance of international legal rules to the interactions of international actors in the contemporary world. To this end, this book will examine several competing theories of international relations and explore the implications of these theories for the role of legal rules in international society. Drawing upon constructivist theory, this book will reach several conclusions about the critical role legal rules do play in international politics in the contemporary international system. Fourth, this work will examine certain changes that may be occurring in this system and explore the implications of these possible changes for international legal rules.

In order to accomplish these tasks, this book is divided into six chapters. Chapter 1 will examine the variety of rules that exist at the international level. Chapter 2 will discuss the creation of international legal rules. Chapter 3 will set forth my methodology for determining the existence of a rule of international law. Chapter 4 will look at the relevance of international legal rules to international relations. Chapter 5 will examine possible scenarios for the evolution of international law. Finally, chapter 6 will provide the conclusion for this work.

NOTES

1. See Anthony Clark Arend, The United Nations and the New World Order, 81 *Georgetown L. J.* (1993) for an examination of a variety of meanings of the phrase "New World Order."

2. Phillip R. Trimble, International Law, World Order, and Critical Legal Studies, 42 *Stan. L. Rev.* 811 (1990).

3. John King Gamble, Jr. & Natalie S. Shields, International Legal Scholarship: A Perspective on Teaching and Publishing, 39 *J. Legal Educ.* 39, 40 (1989).

4. Hurrell explains that "the quest for rigour (and perhaps an excessive desire to avoid the sins of idealism) has led to far too wholesale a dismissal of the need to understand both the specific character and the technical features of the international legal system." Andrew Hurrell, International Society and the Study of Regimes: A Reflective Approach, in Volker Rittberger, ed., *Regime Theory and International Relations* 49, 72 (1993).

5. Id. at 72.

6. Id.

7. As Professor Slaughter has written:

> International law and international politics cohabit the same conceptual space. Together they comprise the rules and the reality of "the international system," an intellectual construct that lawyers, political scientists, and policymakers use to describe the world they study and seek to manipulate. As a distinguished group of international lawyers and a growing number of political scientists have recognized, it makes little sense to study one without the other.

Anne-Marie Slaughter, International Law in a World of Liberal States, 6 *European J. Int'l L.* 503 (1995). One example of a recent work that seeks to explore differing research methods used in international law and international relations is Charlotte Ku & Thomas G. Weiss, eds., *Toward Understanding Global Governance: The International Law and International Relations Toolbox* (1998).

8. A most recent—and outstanding—discussion of the nature of interdisciplinary scholarship in this area is Anne-Marie Slaughter, Andrew S. Tulumello & Stepan Wood, International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship, 92 *Am. J. Int'l L.* 367 (1998). These three scholars examine both how international legal scholars are making use of international relations theory and how international relations scholars are using international law. They also "explore how IR and IL scholars might collaborate most profitably in the future," id. at 383, by suggesting a "Collaborative Research Agenda." Id. at 385. In addition, an excellent bibliography of interdisciplinary works is included.

9. Indeed, this is an observation made by one of the anynomous reviewers of an earlier draft of this manuscript.

10. See Anthony Carty, *The Decay of International Law* 13 (1986) ("At present doctrine is understood to afford evidence of the existence of rules of international law.").

11. This is a point that has been made by Professor William V. O'Brien.

12. This figure includes three "freely associated states": The Federated States of Micronesia, the Republic of the Marshall Islands, and Palau. It also includes Serbia-Montenegro as one state. I owe this information to Professor Charles E. Pirtle.

13. Statute of the International Court of Justice, art. 38, para. 1 (1945).

14. I am indebted to Professor Charles E. Pirtle for emphasizing these two factors.

ONE

THE VARIETY OF INTERNATIONAL RULES

As noted earlier, the political science community recently has witnessed a new flourishing of normative discussions. Scholars from both the institutionalist and realist camps have engaged in lively debates about the role of norms and institutions. The pages of such journals as *International Organization, Political Science Quarterly,* and even *International Security* are filled with extensive examinations of both sides of the debate. Initially, regime theory helped reinvigorate normative discourse into the mainstream of international relations theory.[1] As scholars asked if "regimes matter," they were, in effect, asking the crucial question: Do normative concerns matter in contemporary international relations? Most recently, constructivists have been raising important questions about the role of norms in international politics.[2]

As these discussions proceed, it is critical that distinctions be drawn among the different kinds of rules that exist at the international level. In order to appreciate the distinctiveness of international legal rules in particular, it is necessary to differentiate legal rules from other types of rules. Even though some commentators may equate the term "rules" automatically with "law," all rules that operate in international interactions are not legal in nature. Rather there are a variety of rules that

have different characteristics. The legal requirement for coastal states to grant innocent passage through the territorial sea, for example, is fundamentally different in nature from the rule of protocol regarding the welcoming of a visiting head of state.

Although it is impossible to provide an exhaustive examination of each and every type of rule, this chapter seeks to provide a basic description of several types that may play roles in international politics and then to define international law. First, it will set the stage for a discussion of rules by very briefly exploring different "normative categories" that figure in the literature. Second, it will attempt to differentiate moral rules, legal rules, and several other types of rules. Finally, drawing upon this understanding of legal rules generally, it will examine the nature of international law—that is, of *international* legal rules.

NORMATIVE CATEGORIES

In normative discussions, scholars often use different words to describe what might be called different "normative categories." Professor Stephen Krasner's definition of a "regime" provides an example of this lexical undertaking. In his oft-cited 1982 article, he describes regimes as "sets of implicit or explicit principles, norms, rules. and decision-making procedures around which actors' expectations converge in a given area of international relations."[3] Without at this point getting into a discussion of the regime concept per se, it is useful to note that Krasner is differentiating four normative categories: principles, norms, rules, and decision-making procedures. He goes on to define these four concepts. "Principles," according to him, "are beliefs of fact, causation, and rectitude."[4] In other words, principles form a normative category that is at the highest level of abstraction. They constitute the fundamental assumptions that underlie a particular regime and define its very nature. "Norms," says Krasner, "are standards of behavior defined in terms of rights and obligations."[5] Norms thus would be more specific than principles. In essence, they would be elaborations upon rights and obligations that would flow

from the broader principles. Still more specific are "rules." According to Krasner, they form "specific prescriptions or proscriptions for action."[6] Rules would thus seem to provide detailed guidance for behavior at what might be called the "operational" level. Finally, "decision-making procedures are prevailing practices for making and implementing collective choice."[7] These procedures are thus not necessarily more specific than rules, but simply operate in a different context.

While Krasner's distinctions may be useful, his typology is problematic since it could be interpreted as claiming that these are discrete categories upon which there can be agreement. But, in fact, whether something is a "principle" or a "norm" or a "rule" could be quite debatable. Is, for example, the inviolability of a diplomat a "principle," a "norm" or a "rule?" It could be argued that since it sets forth a basic belief of rectitude—that is, it is legally wrong to arrest a diplomat—it would constitute a principle. Yet, it could be contended that it is a norm since, it defines the right of a sending state not to have its diplomats interfered with and the concomitant obligation of a receiving state not to interfere with the diplomats of the sending state. Finally, it could be argued that diplomatic inviolability is a rule, since it establishes a specific proscription.[8]

Without ultimately passing judgment on this or other categorizations, I will use the word "rule" in this book as an inclusive term to describe all types of normative categories.[9] I recognize that there are differences in levels of generalization among rules. For example, it is clear that the right of "freedom of navigation" is nowhere near as specific a normative rule as the right "to draw straight base lines" under certain circumstances. Similarly, the rules concerning the procedure for voting in the United Nations Security Council are different in nature from rules relating to human rights. Nonetheless, the generic term "rules" is sufficiently general to encompass all these examples.

But if the word rule will be used to describe the whole range of normative categories, what kinds of rules exist? What are the distinctions among the rules that may exist at the international level?

TYPES OF RULES

Moral Rules

Perhaps the most ancient kind of rule associated with human interaction is moral rules. Virtually, all the world's great religions have codified sets of rules that define right and wrong behavior. The Ten Commandments, the Code of Hammarabi, and other ancient texts set out fundamental moral rules. Even nonreligious philosophical frameworks make certain assertions about moral behavior. But how can a *moral* rule be defined?

Simply put, a moral rule is one that obliges the actor to behave in a particular way. As H. L. A. Hart notes, "moral rules impose obligations and withdraw certain areas of conduct from the free option of the individuals to do as" he or she chooses.[10] A moral rule says that a person *must* do something or, conversely, *must not* do something. But the same could be said for legal rules. In the United States, for example, an obligation is imposed upon an individual to drive on the right side of the road. He or she is not "free" to drive on the left. What then makes moral rules distinctive?

One of the great philosophical debates surrounds the nature of morality. In particular, there is much disagreement about the origins of moral rules. Many thinkers—from Plato to Augustine to Ghandi—would claim that moral rules have their source in the metaphysical. Morality, they would assert, comes from God or from a vision of the Good or some other transempirical source. Other commentators would argue that moral rules can be discovered through careful observation of empirical reality. By examining our environment, they might argue, certain rules necessary for human survival can be determined.[11] Still others would contend that moral rules are merely conventional. They are rules of behavior that have been agreed upon, either explicitly or implicitly, by the members of a particular society. It clearly lies beyond the scope of this work to enter into an extensive philosophical discussion of the origins of morality. For our purposes, it is sufficient to note several characteristics of moral rules that serve to distinguish them from other rules, especially legal rules.

First, irrespective of whether the source of a moral rule is found in the metaphysical, the physical, or the conventional, there seems to be broad agreement that moral rules are not the product of a political process. In other words, it is not the state or some other political authority that creates moral rules. Political authorities may follow moral rules; they may even enact preexisting moral rules as laws. But the rules of morality do not have their ultimate origin in these authorities. The source may be God; it may be "society"; it may be "human nature." But it is not the state.

Second, just as moral rules are not created through the political process, they are also not enforceable—as moral rules—by political authorities. Clearly, if a moral rule has been enacted into a legal rule, then that *legal* rule is enforceable by political authorities. But a moral rule *qua* moral rule is not so enforceable. So, for example, there would seem to be universal agreement that it is a moral rule that persons are not to commit murder.[12] That moral rule has also been made a legal rule by political authorities in all states in the international system. Consequently, if an individual commits murder, the political authorities in a state may take action against the individual for violating the *legal* rule. There are, however, numerous moral rules that have not been made legal rules and are thus not enforceable by political authorities. Many societies consider it to be morally wrong to lie. Yet, in these same societies, only certain types of lying have been legally proscribed—perjury, libel, slander, etc. If I tell a lie in court while under oath, I can be punished by the state for perjury. If, however, I promise to take a friend to the airport and do not show up, the state cannot impose a sanction upon me.

It is, of course, possible that there may be some form of sanction for violating moral rules outside the realm of the political. Many religions allow religious leaders or institutions to impose certain punishments on a coreligionist if that person fails to observe rules of morality. Certain Christian churches, for example, may excommunicate a person who commits blasphemy or engages in certain types of behavior. Moreover, many religions assert that individuals who violate moral rules will be punished by other than earthly powers. This punishment may take the form of divine punishment in this life or in the life be-

yond. But with the exception of theocracies where the moral rules have also been made legal rules, it is not the political authorities who enforce morality.

Finally, moral rules are different from other types of rules because of the nature of the obligation engendered by moral rules. As noted earlier, moral rules are not created by the political process and are not enforceable through the political process. Thus, for rules of morality there is a sense in which the obligation to follow the rules is owed to something beyond the political. I perceive myself constrained to follow a moral rule not because of my relationship to the body politic, but because of my relationship to some "higher" normative order. I may owe the obligation to God, to "society," or to my "inner self," but I do not owe it to something political.

Are there universal moral rules at the international level? Many a discussion has centered around this question. Given the diverse philosophical and religious frameworks out of which the peoples of the world operate, some observers would argue that there can be no truly *universal* moral rules. Perhaps there could be moral rules that exist within certain different cultural groupings—"the West," "the Islamic World," and so on.[13] But, as the argument goes, there can be no moral rules that encompass the entire international community. The world is simply too diverse. Other scholars would contend that there are at least *some* moral rules that are universal. Professor Fernando Tesón, for example, argues that there are certain fundamental principles of justice that transcend political boundaries.[14]

It lies beyond the scope of this work to plumb the depths of this important philosophical question. It is, however, not necessary that there be a complete set of common moral rules in order for there to be universal *legal* rules. Given the divergent nature of the two kinds of rules, the existence of one is not contingent upon the existence of the other.

Legal Rules

In light of this brief discussion of moral rules, the next type of rule to distinguish is legal rules. How can a legal rule be defined? Just as different definitions of morality abound, so too do different definitions of law or legal rules. In fact, each of the great jurisprudential schools has formulated various versions of the meaning of the word "law."

One of the earliest approaches to jurisprudence is the natural law school. Beginning with Stoic thought and continuing through Christian medieval thinking, natural law dominated the philosophy of law for centuries. Even today, there is a great deal of natural law thinking reflected in scholarship. Discussions relating to human rights and "just" uses of force, for example, often draw heavily upon the natural law tradition.[15] Even some elements of feminist scholarship share certain natural law propositions.[16] For natural law writers, there exist certain fundamental principles of right and wrong behavior that can be known by all rational creatures. In *De Res Publica*, Cicero explained that there was "a true law—namely, right reason—which is in accordance with nature, applies to all" persons "and is unchangeable and eternal."[17] For the Christian natural law thinker Thomas Aquinas, all law could be understood in terms of four categories: eternal law, divine law, natural law, and human law.[18] Eternal law, for Aquinas, represented the ultimate law of the universe. This type of law was fully known only by God. Divine law was then the portion of the eternal law that God made known to human beings through revelation. Natural law was the "participation of the eternal law in the rational creature."[19] In other words, natural law was the portion of the eternal law that human beings could know through reason. Finally, human law was what we would term "positive" law. It was law created by various political authorities. Significantly, however, Aquinas believed that human law was not really "law" unless it conformed with the natural law. A king or parliament might duly enact a rule, but if it violated the tenets of the natural law, it could not be properly considered "law." Following upon this logic, for natural law theorists, legal rules would be those rules derived from and consistent with these fundamental moral principles.

While this approach has had a profound effect on thinking about both morality and law, I believe it raises some difficulties in the contemporary world. While moral rules may serve to provide the basis for formulating legal rules and while many legal rules reflect the substance of moral rules, legal rules are not automatically deducible from moral rules. As Hart argues, "theories that make this close assimila-

tion of law to morality seem, in the end, often to confuse one kind of obligatory conduct with another, and leave insufficient room for differences in kind between legal and moral rules and for divergences in their requirements."[20] As noted above, moral rules—which may indeed play a critical role in behavior—give rise to a different kind of obligation. They create an obligation that is owed to something beyond the body politic. With legal rules, there is a perception that the obligation to abide by the rules is precisely an obligation owed to the body politic.

Moreover, if law and morality are conflated it becomes nearly impossible to evaluate the moral sufficiency of a particular law. In particular, such conflation could lead to one of two fatal errors. On the one hand, an observer could assume that if a particular behavior had been made legal, that such behavior was therefore moral. Thus, a German citizen living during the time of National Socialism could conclude that Nazi laws regarding the treatment of Jews and other minorities were moral merely because they were law—that which is legal must be moral. Or, on the other hand, one could take a Thomistic approach and conclude that a law that did not comply with certain moral rules was simply "not really the law." That approach, however, would also inhibit efforts to change immoral laws. During the civil rights movement in the United States, for example, it would have been useless to say that segregation laws were not "really law" and to go about business as usual. Instead, these laws were acknowledged as existing laws, but were criticized as *immoral* laws and thus in need of change. In short, by viewing law and morality as different kinds of obligations, it is possible to provide a moral evaluation of a particular law, and, conversely, to provide a legal evaluation of a moral rule.

Legal positivists take another approach to the nature of law. While there are many different versions of positivism, positivists typically assert that law is a set of rules that are created by political authorities. The laws are thus "posited" by some human authority. Accordingly, law becomes the product of the political process and enforceable through the political process. Legal obligation is owed to the body politic. This understanding does, I believe, capture the essence of law and thus the distinctiveness of legal rules.

Some positivists, however, claim that sanction is necessary for a rule to constitute a legal rule. John Austin, for example, considers law to be the command of a superior to an inferior, where the superior has the capability of imposing a sanction upon the inferior for noncompliance.[21] This Austinian view of law has had a profound effect on much subsequent legal thought. There are, however, a number of practical problems with this approach. Setting aside for a moment the problem sanction poses for international law, even much domestic law does not stand up to the sanction requirement. The oft-cited example is the famous *Steel Seizure* case.[22] When President Truman ordered the seizure of the steel mills during the Korean War, the U.S. Supreme Court ruled his action unconstitutional. The Court, however, had no means of enforcing the decision. The president, after all, is the individual charged by the Constitution with executing the law. Nonetheless, the Court's decision was deemed to be legally binding on the president despite the inability of the Court to force Truman to comply. Moreover, at a deeper level, no domestic law can fundamentally be dependent upon a sanction. Even though there are generally sanctions to punish those that violate the law, the efficacy of domestic law cannot ultimately depend upon those sanctions. Instead, the law is contingent upon perceptions of legitimacy.[23] If even a very small percentage of the population of the United States—2 percent for example—believed that a particular law was illegitimate and refused to obey it, no amount of coercive power present in the state could enforce compliance. It is thus the perception of legitimacy that makes the rule law and not the guarantee of sanction. It is enough that actors regard the rules as binding and, accordingly, believe that a sanction would be appropriate for a violation of such rules.

This example thus introduces another element of law that needs to be clarified. It is indeed possible for other kinds of rules to be produced through the political processes—rules of the game, for instance. One of the distinctive characteristics of law, however, is that the parties that create it and those to whom it is addressed, regard it as "law." This may sound tautological: a rule is a legal rule because it is regarded as a legal rule. But it is an extremely important characteristic. Actors perceive law to be of a different normative character than moral rules or rules of the game. They regard it as *legally* binding.[24]