

**Sovereign power, human rights, and hypocrisy costs**

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States often say one thing and do another thing. This facile observation is especially true in the context of international law, and human rights specifically. In this paper, I propose that when states act in this way, exercising their sovereign power in ways inconsistent with their public proclamations about the value or propriety of human rights and international law, their actions are not costless.

I explain a plausible model of state support for human rights and international law – and the values or principles underlying those rules of international law – in part I. State practice of adherence varies widely, and can be described crudely as occurring or not occurring for instrumental reasons on the one hand, and what I call *endogenous non-instrumental reasons* on the other. In other words, human rights-supporting states may do so because they fundamentally believe that human rights are desirable for either deontological or consequentialist reasons.

I then describe what is probably a structural function of the modern sovereign state, the state of exception, in which the sovereign suspends the rule of law during emergencies. The modern liberal state might usually have endogenous non-instrumental reasons for supporting human rights, but in the emergency, the rule of law withers in the face of sovereign power.

In part II, I describe why states that have endogenous, non-instrumental reasons for supporting human rights laws, norms, or values may nonetheless violate those very norms they purportedly support for instrumental reasons. In order to illustrate these reasons, I use the Central Intelligence Agency's high value terrorist detainee program as a case study.<sup>1</sup> The United States publicly evoked the principles of human rights while nonetheless undermining and rejecting

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<sup>1</sup> See Scott Shane, *CIA To Close Secret Prisons, Scenes of Harsh Interrogations*, N.Y. TIMES, Apr. 9, 2009; International Committee of the Red Cross, ICRC REPORT ON THE TREATMENT OF FOURTEEN 'HIGH VALUE DETAINEES' IN CIA CUSTODY, Feb. 2007, available at <http://www.nybooks.com/icrc-report.pdf>; Mark Danner, *The Red Cross Torture Report: What it Means*, N.Y. REV. BOOKS, Apr. 30, 2009, available at <http://www.nybooks.com/articles/22614>; Mark Danner, *US Torture: Voices from the Black Sites*, N.Y. REV. BOOKS, Apr. 9, 2009, available at <http://www.nybooks.com/articles/22530>; Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1; see also Human Rights Watch, THE UNITED STATES' 'DISAPPEARED': THE CIA'S LONG-TERM 'GHOST DETAINEES' (2004); Human Rights First, ENDING SECRET DETENTIONS (2004).

those principles in practice through its network of overseas prisons operated for the purposes of terrorist interrogation.

In part III, I describe the effects of the fundamental tension between the themes described in the earlier two parts. I defend a theory of *hypocrisy costs*, or the costs that accrue to a state when its philosophically or morally sincere public statements – specifically, its evangelism about a certain value, norm, principle, or law – are inconsistent with its practice.<sup>2</sup> Hypocrisy costs can be differentiated into two further types: internal hypocrisy costs, similar to cognitive dissonance effects, and external hypocrisy costs, which make the state’s philosophical evangelism more difficult to achieve.

While hypocrisy costs may be high for states that show only deceptive and insincere support for a given set of moral arguments or normative structure, they are likely to be even more severe for those states who have endogenous, non-instrumental reasons for that support. In other words, hypocrisy is likely to make it even harder for this latter group of states to bring about foreign policy goals that implicate moral positions.

### **I. A plausible model for state compliance**

International law and human rights scholarship has traditionally focused on two major issues: doctrine and compliance. On the doctrinal side, the structure of the legal regime provides an easy target for scholars to describe what, at least under the law as it exists, states ought to do if they are not doing it. On the compliance side, empirical work allows scholars to tease out instances where states do and do not comply with international law in order to find patterns that would explain compliance more broadly.

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<sup>2</sup> Hypocrisy costs have been discussed before, but not in any theoretical depth. *See generally* Kelly Greenhill, *Engineered Migration and the Use of Refugees as Political Weapons: A Case Study of the 1994 Cuban Balseros Crisis*, 40 INT’L MIGRATION 39 (2002).

For the purposes of this paper, I bracket the former and take a modified approach to the latter. The fundamental problem with compliance studies thus far is that they have focused on explaining one or the other half of the equation: rationalists and realists attempt to explain non-compliance, while constructivists and liberals attempt to explain compliance. But an appeal to interest as a rationale for non-compliance, or normative structure as a rationale for compliance, is theoretically uninteresting unless the theories of ‘compliance’ (conceived of in the broad sense of the term) can explain some counterintuitive results.

Despite the most forceful arguments of revisionist international law scholars, states sometimes *do* comply with international law even when the costs of compliance outweigh the benefits.<sup>3</sup> And despite the most forceful arguments of traditional international law scholars, states sometimes *do not* comply with international law even when they have been socialized into the normative structure of international society and have fundamentally ‘bought in’ to the legitimacy of the laws or norms that they are being asked to comply with.

Why does this happen? One plausible reason is that the traditional doctrine of sources, which identifies what is and is not a rule of international law, is actually an illusory superstructure, and that states actually see rules of international law along a spectrum of legality or normativity.<sup>4</sup> As a form of ‘shadow law,’ or what is ‘really going on’ underneath the doctrinal superstructure of the doctrine of sources, the underlying legitimacy of the rule, conceived of as how legally binding the state sees the rule to be, is what affects compliance.<sup>5</sup>

Although this is a plausible explanation for the counterintuitive results we sometimes see in compliance, a problem is that the factors underlying the subjective understanding of

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<sup>3</sup> For the leading revisionist argument, see Jack Goldsmith & Eric Posner, *THE LIMITS OF INTERNATIONAL LAW* (2005).

<sup>4</sup> Harlan Grant Cohen, *Finding International Law: Rethinking the Doctrine of Sources*, 65 Iowa L. Rev. 65 (2007). On the traditional doctrine of sources, see Restatement (Third) of the Foreign Relations Law of the United States § 102; Statute of the International Court of Justice, Art. 38(1). On legitimacy of the rule as a determinant of how compelled a state feels to comply, see Thomas Franck, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

<sup>5</sup> Cohen, *supra* note 4, at 71.

legitimacy and obligatory pull – such as legitimacy – should be more consistent across state practice than we often see. It should not matter much what vantage point the state is coming from when it decides whether or not to allow its citizens to pollute, or to engage in human rights violations, or to violate anti-dumping provisions in trade law – *if* the rules underlying those violations are legitimate. By vantage point, I mean the *subjective* view that the state takes toward a rule's obligatory pull.

An alternative explanation better takes into account differences in *broad* state practice of compliance and non-compliance. Some states are more likely than others to comply with international law in general. Although surely some of this can be explained as coincidence of interest with the subject matter of the rule of international law – i.e., the reason why states accede to treaties or follow custom is because the outcomes guaranteed by those rules of international law are ends that they value and see as being in their interests – some of it can also be explained as the construction of identity as a member of a normative structure or legal hierarchy in which international law *is law*; this fact in itself begs compliance.

This explanation tracks the conventional constructivist model for how states internalize rules of international law and other social norms. But there is a twist, since the conventional constructivist model tends to gloss over differences between the internal or endogenous characteristics of the other agents in the social system – *even* agents who share the Self identity, and not just the Other identity. Fellow peer agents in a society can share some of the Self's identities on some axes while holding Other identities on other axes; this occurs in humans and states alike. But the types of endogenous characteristics ascribed to agents in a social system are not necessarily limited to identities, but also include their capabilities and limitations.

The constructivist theoretical move from human society to state society entails treating states like people, a logical move that has substantial support in international law theory.<sup>6</sup> But this move also allows constructivist theory to shed light on the rationales for legal and normative obligations: moral psychology explains that people vary widely in the reasons they obey the law and other social norms.<sup>7</sup> While the findings of moral psychology are consistent with the constructivist proposition that states are likely to obey rules and other normative claims when they have been socialized into a structure that values those claims and treats them – and compliance with them – as integral parts of self-identity, moral psychology also suggests that we should be skeptical about the consistency of compliance for principled reasons.

Since human agents in human society comply with rules and norms for a variety of reasons – including punishment-avoidance, cost-benefit instrumental, reputational, contractarian, and principled reasons – states are likely to vary in their reasons for compliance on these grounds, as well.<sup>8</sup> A new scholarly agenda that recognizes the diversity of reasons for compliance rather than theoretically privileging one over the other – such as the instrumentalist assumption of rational choice, or the principalist assumption of constructivism – would better fit the diversity of compliance behavior and compliance motives that actually occurs in the world.

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<sup>6</sup> Bill McSweeney, SECURITY, IDENTITY, AND INTERESTS: A SOCIOLOGY OF INTERNATIONAL RELATIONS 149 (1999) (“There are laws, rules, norms, applicable to states and their conduct which set them apart from other collectivities and individuals. But there is no logic governing their behaviour or generalizations which can explain it apart from the logic and practices which pertain to individuals in the different modes of individuality or positions which they occupy in society.”); Hans Kelsen, PURE THEORY OF LAW 215 (Knight trans. 1967) (arguing that the very existence of international law depends on the acts and behaviors of “‘states,’ that is, of those individuals who act as governments according to national legal orders.”); Myres McDougal and Florentino Feliciano, LAW AND MINIMUM WORLD PUBLIC ORDER 12-13 (1961); cf. Anthony Giddens, THE CONSTITUTION OF SOCIETY, 220-221 (1986) (describing collective actors).

<sup>7</sup> Roger Alford and James Tierney, *The moral judgment theory of international law* (draft manuscript, on file with author); see also Chandra Sekhar Sripada & Stephen Stich, *A Framework for the Psychology of Norms*, in 2 THE INNATE MIND 280 (Peter Carruthers, Stephen Laurence, & Stephen Stich, eds., 2007) (outlining various psychological bases of norm-compliance behavior); Robin Bradley Kar, *The Deep Structure of Law and Morality*, 84 Tex. L. Rev. 877 (2006) (arguing in favor of a cross-disciplinary approach to understanding people’s motivations for complying with the law and moral/values).

<sup>8</sup> Alford and Tierney, *supra* note 7, at 4. The model that Alford and Tierney describe was formulated by Lawrence Kohlberg in the context of developmental psychology and is known in the psychological literature as the Kohlbergian approach, or as Kohlberg’s stages of moral development. See generally Lawrence Kohlberg, 2 ESSAYS ON MORAL DEVELOPMENT (1984); James R. Rest, et al., POSTCONVENTIONAL MORAL THINKING: A NEO-KOHLBERGIAN APPROACH (1999) (presenting a refined version of Kohlbergian moral development theory based on recent scholarship and theoretical advances since Kohlberg’s death).

Liberal states' compliance generally does not result from instrumental reasons, but rather because liberal states are ideologically committed to the principles enshrined in those agreements. The focus on instrumental over non-instrumental reasons begs the question "what one 'instrumentally' pursues—good of self, good of others, good of world legal order, etc.—in complying with or acting to vindicate" international law.<sup>9</sup> The principles that underlie non-instrumental reasons are consistent with state's ideational structures, which serve as endogenous normative frameworks that construct the state's identity.<sup>10</sup> In Jeremy Waldron's formulation, this normative framework is a type of legal "archetype" that guides the United States' jurisprudence and practice with regards to torture, for example,<sup>11</sup> separate from exogenous factors like threats of retribution or reputational costs. Crucially, many liberal states do not have to restructure their domestic human rights practices after ratification of these treaties because *they already act consistently with the principles enshrined in them* for endogenous reasons.

Even if these states sometimes obey international law for what looks like instrumental reasons, that does not exclude an antecedent non-instrumental normative logic behind those reasons. The existence of instrumental reasons "no more excludes normativ[ity] ... than the existence of a neighborhood police force renders laws against theft from or dumping upon the lawn of my neighbor ethically nonbinding, ethical attitude-inoffensive, or ineffective."<sup>12</sup> For example, the United States does not regularly torture prisoners because its constitutional law—the manifestation of its normative framework—rejects torture as a legitimate exercise of government power. If the U.S. tortured its prisoners, reputational costs would accrue, and other

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<sup>9</sup> Robert Hockett, *The Limits of Their World*, 90 MINN. L. REV. 1720, 1758 (2006).

<sup>10</sup> See generally Alexander Wendt, SOCIAL THEORY OF INTERNATIONAL POLITICS 92-139 (1999); see also, e.g., Emanuel Adler, *Seizing the Middle Ground: Constructivism in World Politics*, 3 EUR. J. INT'L L. 319 (1997); Audie Klotz, *Norms Reconstituting Interests: Global Racial Equality and U.S. Sanctions Against South Africa*, 49 INT'L ORG. 451 (1995); Kathryn Sikkink, *Human Rights, Principled Issue-Networks, and Sovereignty in Latin America*, 47 INT'L ORG. 411, 437-441 (1993)

<sup>11</sup> Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1723 (2005) (explaining that archetypes "work in the foreground as rules or precedents, but in doing so, they sum up the spirit of a whole body of law that goes beyond what they might be thought to require on their own terms.")

<sup>12</sup> Hockett, *supra* note 9, at 1759.

states might retaliate. But empirically, the constitutional framework antedates the emergence of the human rights regime and the enforcement mechanisms posited by instrumental theorists of international law. That normative framework must be the reason for the U.S.' compliance with the anti-torture regime—rather than because torture is not in its interests or because it fears retaliation or reputational costs.

If states in fact sometimes comply with international law even when they might benefit from noncompliance, they do so by virtue of a moral choice. The content of such a moral choice is the decision whether to prioritize 'self-interest' or the structural-normative dictates of the social group of which the self is a member. In many cases states' interests are defined by their identities, and their identities are in turn constructed by their relations within, and the characteristics of, the social groups of which the states are members.<sup>13</sup>

But agents may also be members of several social groups that impose overlapping identities that are not mutually coterminous. In such a way, agents' interests in one dimension – in one sense of an agent-state's identity – may differ markedly from the interests of other members of a social group of which that agent is a member. The decision to comply or not comply with the normative structure characteristic of that social group is a *moral* decision, a decision as to how to determine the hierarchy of whose interests are more important. Do the structural, social-norm dictates of the group win out over the non-overlapping and dissonant interests of the agent?

This threshold moral choice is the real locus of the compliance decision. Agents make this choice by employing different reasons, as discussed above: some will do so for instrumental, and others for principled reasons. Lawrence Kohlberg's research in developmental moral psychology attempted to account for how people determine the hierarchy between individual

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<sup>13</sup> See Martha Finnemore, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY (1996)

interest and structural/normative claims on their behavior. He asked how people justify such hierarchies in concrete moral dilemmas, and suggested that human agents differ in their use of, and capacity to use, certain kinds of reasons to make and justify moral decisions.<sup>14</sup> But just because agents may differ in their capacities to make such decisions, that says nothing about the content of the decision; instead, it only illuminates the underlying rationales for the ultimate decision.<sup>15</sup>

This ultimately means that some agents are able to make the moral choice between individual interest and structural/normative claims for purely instrumental or punishment-avoidance reasons. Others do so for reputational reasons. But the most interesting theoretical case is when agents construct this hierarchy for fundamentally principled reasons. Kohlberg found that such agents are empirically and theoretically more likely to act consistently with their principled theoretical commitments.<sup>16</sup> But what happens when agents who have developed their own *endogenous* reasons, on *principled* grounds, for structuring these hierarchies between self and society, nonetheless act inconsistently with these endogenous, principled (or non-instrumental) reasons? In other words, if a state acts against the dictates of its endogenous normative framework, does anyone care? I return to this question in part III of the paper.

States-as-agents can have endogenous, non-instrumental reasons for adhering to a hierarchy of legality. That hierarchy might be based on fundamental constitutive principles of those states-as-agents, such as principles of the rule of law embodied in state constitutions or political cultures. Legality, in the sense of holding that rules and norms are able to command a force of obligation through processes of consent and legitimation, can serve as an endogenous

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<sup>14</sup> See *supra* notes 7-8 and accompanying text.

<sup>15</sup> Alan M. Cohen, *Stages and Stability: The Moral Development Approach to Political Order*, in *MORAL DEVELOPMENT AND POLITICS* 69, 71 (Richard Wilson & Gordon Schochet, eds., 1980).

<sup>16</sup> Kohlberg, *supra* note 7, at 540.

reason when it is inherent to domestic political and institutional norms as functions of the history and identity of that *polis*. (Such history and identity includes the incorporation of international law, and the principles of respect for human rights, into national law.

### **a. The liberal state's normative framework**

The juridico-constitutional structures of open societies like the United States are, at least nominally and theoretically, constituted around principles of legality and the rule of law. The concept of the rule of law – that laws be public, generally applicable, and not arbitrary<sup>17</sup> – protects against concerns about governments acting in favor of a short-time-horizon self-interest rather than the broader interests or structural/normative claims of the broader society and the *polis*. Governments may bind themselves in this way on both domestic and international dimensions: across history, polities have constructed themselves (or their rulers have sometimes pledged) on rule-of-law principles by invoking both international and domestic law *as law*.<sup>18</sup> The self-binding function of the rule-of-law covenant thus implicates both sources of law as constitutive constraints on sovereign power.

This implied covenant between the government and the *polis* is, on the traditional liberal conception of political legitimacy, the justification for the exercise of states' coercive power against individuals – citizens and aliens alike.<sup>19</sup> Whether based on deontological (rights-based)

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<sup>17</sup> Lon Fuller, *THE MORALITY OF LAW* 39 (1977).

<sup>18</sup> U.S. CONST., Art. II § 2 cl. 2; *id.*, at Art. VI ¶ 2; *Paquete Habana*, 175 U.S. 677 (1900); *see generally* Martti Koskenniemi, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960* (2004). The jurisprudence of the European international law judicial bodies similarly suggests the indelible connection between international human rights law and the values of domestic politics. The European Court of Human Rights adjudicates within the scope of the “values of a democratic society.” *Soering v. United Kingdom*, 161 Eur. Ct. H.R. (ser. A) at 87 (1989), reprinted in 28 I.L.M. 1063 (1989); Helen Duffy, *THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW* 330 (2005). This does not mean voting rights, but rather the values inherent to public sphere participation – to joining the *polis* as a fully-fledged member with obligations and guaranteed human rights. These rights include the positive and negative liberties associated with liberalism as the background of an endogenous normative framework. *See generally* Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* 166 (Henry Hardy ed., 2002).

<sup>19</sup> Duffy, *supra* note 18, at 61; Jacob Katz Cogan, *Noncompliance and the International Rule of Law*, 31 *YALE J. INT’L L.* 189, 192 (2006) (citing Gilbert Guillaume, *Terrorism and International Law*, 53 *INT’L & COMP. L.Q.* 537, 548 (2004)); *cf.* Dencho

or consequentialist (utilitarian) grounds, the covenant serves broader goals. (Since the covenant can be justified on either ground, I am agnostic as to whether deontological or consequentialist arguments in favor of such a liberal state-citizen covenant are stronger. Instead, it is sufficient to note that people can hold as the principled basis for their actions a deontological or consequentialist orientation.) Hanno Kaiser may have put it best:

*'in today's world, adherence to the rule of law has become a conditio sine qua non for the legitimate exercise of power. . . . A state, whose domestic legitimacy is based on the rule of law (Rechtsstaat), cannot consistently pursue policies in violation of international law. Laws, conferring rights, have a non-consequentialist kernel. Having a right is a license to be exempt from a majoritarian cost-benefit calculus with respect to the subject matter of the right. Repeatedly violating laws, irrespective of their classification as national or international, is a performative contradiction as it exhibits a character of disregard for the law, which is, arguably even in the not-so-long run, incompatible with the legitimate exercise of power, domestically and internationally.'*<sup>20</sup>

By showing adherence to the law, including international law and human rights law, the state proves itself able to show “[regard] for the law” and reinforces its own authority to govern.

The formal orientation of the covenant – the state as having to justify itself to the *polis* – arguably turns on a fiduciary theory of sovereign authority, in which the state agrees to look out for the best interests of the citizens by limiting its own ability to act. On one account of such a fiduciary theory, predicated on a Kantian conception of the structure of the family, certain norms in international law constrain what the state can do by virtue of being constitutive of state sovereignty itself.<sup>21</sup> It would follow that states exercise sovereign power over their citizens with

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Georgiev, *Politics or Rule of Law: Deconstruction and Legitimacy in International Law*, 4 E.J.I.L. 1, 14 (1993) (discussing legitimacy and the rule of law)

<sup>20</sup> Hanno Kaiser, *'Morality is nothing other than the Advantage of the stronger Party...'* Simon Blackburn's Lewis B. Frumkes Lecture at NYU, LAW & SOCIETY BLOG, Nov. 16, 2005, available at <http://www.lawsocietyblog.com/archives/153> (emphasis in original).

<sup>21</sup> Evan Criddle and Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 Y.J. Int'l L. (forthcoming 2009), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1277393](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1277393).

legitimate authority only when such exercise of power is consistent with the constitutive norms underlying what it is to be a sovereign.

Even if the Kantian fiduciary account is incorrect, the conception of legitimacy-as-constrained-sovereignty, turning on the rule of law and adherence to a juridical structure as a background constitutional principle, is constitutive of what it means to be a state, in theory as well as in practice. In the years following the cold war, the United States and the European Community explicitly used fidelity to the rule of law, democracy, human rights, and respect for international law as a test for recognizing newly independent states *as states*, welcoming them as members of the international community.<sup>22</sup> This traditional liberal conception of political legitimacy, therefore, directly implicates adherence to these norms of human rights and the limits of the modern sovereign state as the boundary between law and extralegal leadership.

Moreover, by setting limits to the identity of the modern state as one that supports human rights, the modern Western market economies sought to *teach* a governing philosophy – the traditional liberal conception of political legitimacy – to the newly independent states. They intended this educational purpose as a way to recapitulate the liberal conception of statehood by restructuring the endogenous normative frameworks and political identities of those newly independent states.

If this is what the major Western states taught to newly independent states about the values and normative frameworks of modern sovereignty, is it really representative of the true underlying values of the modern Western states?

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<sup>22</sup> See Damrosch, et al., INTERNATIONAL LAW 258 (2001) (quoting Testimony of Ralph Johnson, Deputy Assistant Secretary of State for European and Canadian Affairs, Oct. 17, 1991, Vol. 2, No. 3 FOREIGN POL'Y BULL. 39, 42 (Nov./Dec. 1991)). European Community guidelines for recognizing former Soviet-bloc states had similar provisions requiring those new states to respect human rights and the rule of law. *Id.* at 259 (quoting Foreign Ministers of the European Community Member States, European Political Cooperation Press Release 128/91 (Dec. 16, 1991), 31 I.L.M. 1486 (1992)).

**b. The Schmittian state's normative framework**

On an alternative reading of the history of sovereign power and the power of the juridical rule (crucially, implicating the rights of the citizen against the power of the sovereign), the structure of modern sovereignty is neither fiduciary nor, ultimately and in a hard case, *liberal*. Carl Schmitt's theory of the *state of exception* to the juridical order, as expanded upon by Giorgio Agamben, challenges the traditional liberal account.

Schmitt, especially *via* Agamben, proposes that the measure of sovereign power is not the extent to which it is constrained by covenant with the citizens. Similarly, the measure is not the formal outer limits (in the sense of where sovereign power ends) of such power. Instead, the true measure of modern sovereign power is the sovereign's ability to proclaim the state of exception: to suspend the formal constraints imposed upon it by a constitutional background principle prescribing adherence to the rule of law.<sup>23</sup>

In other words, during times of extreme emergency, characterized as the exception to the normal time, the rule of law can be suspended temporarily at the whim of the sovereign, because '[t]here is no rule that is applicable to chaos.'<sup>24</sup> State-emergency-as-chaos becomes the ordering principle upon which the sovereign is able to set the law aside and suspend its operation – but also keep it as an institution, instructing it to remain dormant until the emergency passes.

The decision to set the rule of law (conceived of as inherent to the juridico-political order that Agamben seeks to characterize) to one side is not guided by law, since the sovereign stands at the boundary of inside and outside juridico-political order. The sovereign does not need law to

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<sup>23</sup> See generally Carl Schmitt, *POLITICAL THEOLOGY* (George Schwab, trans., 1922); Giorgio Agamben, *STATE OF EXCEPTION* (Kevin Attell, trans., 2005); Giorgio Agamben, *HOMO SACER: SOVEREIGN POWER AND BARE LIFE* (Daniel Heller-Roazen, trans., 1998).

<sup>24</sup> Agamben, *HOMO SACER*, *supra* note 23, at 16.

justify its decision to suspend or not suspend a single rule or the rest of the system of law; that decision is located outside the law and in the sovereign.

As Agamben notes in *Homo Sacer*, the Schmittian exception thesis serves as a form of biopolitics in which the sovereign is able to exercise its control over all aspects of life.<sup>25</sup> Literally, the exception would allow the sovereign to do whatever it wanted to the citizens under its control. The purpose of the kinds of rights, negative and positive, fundamental to the traditional liberal conception of covenant between citizen and sovereign, was illusory, and was in fact a way of connecting the rights of the citizen to her existence as a person – in the natural sense, but not in a political sense. The creation of a biopolitics as (for Schmitt and Agamben) the defining characteristic of the institutions of modern Western states separated out the ‘natural and civil rights’ from the merely ‘political rights’.<sup>26</sup>

Further within *Homo Sacer*, in a section titled *Biopolitics and the rights of man*, Agamben shows that the non-citizen, though human, fails the test of citizenship necessary to implicate political rights and is left open to the machinations of sovereign power. But even for the citizen, human rights are not guaranteed. ‘We must seriously consider Arendt’s claim,’ Agamben notes, ‘that the fates of human rights and the nation-state are bound together such that the decline and crisis of the one necessarily implies the end of the other.’<sup>27</sup> The sovereign, seeking to protect not only its own political existence but also the juridico-political structure at the limits of which it stands, may decide that the decline of the state requires limiting human rights. During an emergency, the biopolitical structures that inhabit Schmitt and Agamben’s world unfold themselves; the rule of law is put in a box and set aside.

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<sup>25</sup> *Id.*; see also Michel Foucault, *SOCIETY MUST BE DEFENDED* 242 (David Macey, trans., 1997/2003).

<sup>26</sup> Agamben, *HOMO SACER*, *supra* note 23, at 130.

<sup>27</sup> *Id.* at 134.

In the political systems which extensively deprived rights to citizens and non-citizens – to *humans* – ‘for quite some time politics had already turned into biopolitics, and ... the only real question to be decided was which form of organization would be best suited to the task of assuring the care, control, and use of bare life.’<sup>28</sup> Such political systems settled on the institution of the *camp*. In the archetypal example, the concentration camp, sovereign power sets aside the rule of law and creates a space in which the *state of exception*, and not the law, governs the bodies of humans within the reach of sovereign power.

Setting aside the archetypal example of the camp form, a smaller and less atrocious (but nonetheless appropriate) example would be Guantanamo Bay, in Agamben’s eyes. There, the Schmittian thesis of the exception was put into effect. ‘What is new about President Bush’s order [of November 13, 2001, authorizing indefinite detention] is that it radically erases any legal status of the individual, thus producing a legally unnamable and unclassifiable being.’<sup>29</sup> Agamben correctly identified United States detention policy as an application of the Schmittian exception, but he located its most genuine use in the wrong place. A better example, I argue below, is the CIA secret prison system.

## II. Against the normative framework

In this section, I first describe the lack of juridical structure in the CIA secret prison system. I then connect that system to the normative frameworks offered by the traditional liberal conception of sovereign power and the Schmitt/Agamben conception. Whether the latter conception of a state of exception is correct as either a description of a tacit element of the liberal conception, or as a prescriptive platform favored by select politicians and policymakers who put

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<sup>28</sup> *Id.* at 122.

<sup>29</sup> Agamben, STATE OF EXCEPTION, at 3.

the CIA secret prison system into place, I conclude that the effect of the discourse of the Schmittian ‘exceptional’ system was to contradict the public discourse of justification for sovereign power as a function of adherence to the rule of law.

#### **a. Facts on the ground**

Although much has been made about the exercise of state power over the detainees at Guantanamo Bay, their detention there was fully within the constitutional and legal structures of the United States.<sup>30</sup> The juridico-political form there differs markedly from that in the *high value terrorist detainee program*. Under that program, the Central Intelligence Agency abducted, detained, and interrogated suspected terrorists in secret prisons outside the territory of the United States.<sup>31</sup>

These terrorists, known as “ghost detainees,” entered the world of sovereign power by standing wholly outside it. In contrast with extraordinary rendition, where the U.S. transferred custody of abducted terrorists to countries that used torture during interrogations, U.S. sovereign power stood behind the act of the interrogation.<sup>32</sup> That power was not predicated on a traditional liberal conception of authority for coercive state force. Rather than relying on the rule of law system to provide authorization, the CIA program and extraordinary rendition were both wholly separate from the rule of law.

Secret executive orders, and not the juridico-political structure surrounding Guantanamo Bay, controlled the CIA program. Although the specific executive orders authorizing the

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<sup>30</sup> Guantanamo Bay’s placement within the sovereign order of, ultimately, the rule of law happened despite fervent efforts to deprive U.S. courts of jurisdiction to hear cases involving detainees. *See Boumediene v. Bush*, 128 S. Ct. 2229, 2008 WL 2369628 (2008).

<sup>31</sup> *See generally* International Committee of the Red Cross, *supra* note 1.

<sup>32</sup> Jane Mayer, *Outsourcing Torture*, THE NEW YORKER, Feb. 14, 2005, at 106; Stephen Grey, GHOST PLANE (2006).

program have not yet been released,<sup>33</sup> the orders are forms of decision in the Schmittian sense. If the jurisprudential weakness of the ‘torture memos’ is any indication, any legal arguments in such orders were *post hoc* justifications rather than true analysis. The goal of the orders-as-Schmittian-decisions would be to characterize the prisons as exceptional, placing them outside the law.

The de facto extrajudicial nature of a secret incommunicado detention regime inevitably raises questions whether prisons were treated in ways that respected their rights under international law. The International Committee for the Red Cross visited the CIA secret prisons and drafted a report, which was later leaked to the public. In explicit terms, the Red Cross report concluded that the CIA’s treatment of its prisoners ‘amounted to torture and/or cruel, inhuman or degrading treatment.’<sup>34</sup> On April 9, 2009, several days after the report was leaked, the CIA announced it would close the secret prisons.<sup>35</sup>

The CIA prison system, as an archipelago of camps, triggered various treaties and provisions of customary international law.<sup>36</sup> Although many of those treaties are not judicially enforceable in United States courts, either because of American reservations to them or because they are non-self-executing (i.e., require implementing legislation before they come into effect), the U.S. still retained obligations to comply with customary international law to the extent that it required adherence to the rule of law in interrogations and detention.

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<sup>33</sup> Shane, *supra* note 1 (“The C.I.A. statement [about closing the prisons] comes at a time of continuing debate inside the Obama administration over which classified documents related to the agency’s interrogation program should be made public. After several delays, the Justice Department now has until April 16 to decide whether to make public legal opinions justifying the C.I.A.’s harsh methods.”).

<sup>34</sup> International Committee of the Red Cross, *supra* note 1, at 24.

<sup>35</sup> Shane, *supra* note 1.

<sup>36</sup> See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171; Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. Doc. A/810 (Dec. 10, 1948); Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287; European Convention on Human Rights, Nov. 5, 1950, 213 U.N.T.S. 221; American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; International Convention on the Protection of All Persons from Enforced Disappearance, *opened for signature* Feb. 6, 2007, UN Doc A/61/488; United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85. See generally International Committee for the Red Cross, *supra* note 1.

To the extent that the United States has violated international law, however, it might not have actionable duties toward those who it had interrogated. Instead, ‘the responsibility of a state ... is to the state of the alien’s nationality and gives that state a claim against the offending state. The claim derives from injury to an individual, but once espoused it is the state’s claim...’<sup>37</sup> The terrorist detainee program therefore implicates not only the rights of individuals but also the rights of other states.

Several of these states have countered American human rights promotion efforts with criticism of CIA prisons, Guantánamo, and extraordinary rendition. Still other states, including Liberia, Egypt, and Russia, “have begun citing United States policy to justify their repressive policies.”<sup>38</sup> Other states criticized the CIA’s terrorist abduction policies through legal and normative arguments and action.<sup>39</sup> The European Union was especially concerned about the legal implications of the detainee program.<sup>40</sup> This criticism may have future detrimental effects on U.S. foreign policy stemming from reputation and hypocrisy costs, as I argue in part III.

## **b. Why hypocrisy?**

The CIA secret prisons appeared as a rebuttal to the claims that the United States supports human rights unequivocally, and that respect for human rights are inherent to its juridico-constitutional order. The prison system was self-evidently a function of the state of exception. If the Schmittian conception of the exception were a fundamental feature of the

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<sup>37</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 cmt. a (1987).

<sup>38</sup> Brief for Retired Generals and Admirals and Milt Bearden as Amicus Curiae Supporting Petitioners at 8-9, *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (No. 05-184), available at <http://www.hamdanvrumfeld.com/GeneralsandAdmirals.pdf>; Lawyer’s Committee for Human Rights, ASSESSING THE NEW NORMAL: LIBERTY AND SECURITY FOR THE POST-SEPTEMBER 11 UNITED STATES, at 77-79 (Fiona Doherty & Deborah Pearlstein eds., 2003).

<sup>39</sup> Ian Fisher & Elisabetta Povoledo, *Italy Seeks Indictments of C.I.A. Operatives in Egyptian’s Abduction*, N.Y. TIMES, Dec. 6, 2006, at A12.

<sup>40</sup> European Parliament, *Draft report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, Doc. A6-0213/2006 (Nov. 22, 2006) (prepared by Giovanni Claudio Fava), available at <http://jurist.law.pitt.edu/pdf/tdipdraftreportnov06.doc>.

biopolitics of the modern state, then it would not be against the *system* of the United States, even if it was against public affirmations of respect for human rights. If, on the other hand, the state of exception is only a political programme of values or of ideal governance adhered to by crucial policymakers and lawyers in the Bush Administration, then it would arguably be contrary to the normative system of the United States.

Ultimately, however, I am agnostic for the purposes of this paper as to whether the theory of the exception is more correctly characterized as a description of the history and development of sovereign power, or as a political programme favored by Schmitt's intellectual descendants. At minimum, I make two claims. First, Agamben convincingly outlines the history of the exception's development. Second, to the extent that the liberal justification for sovereign power fails to explain the emergency, Agamben provides a serious alternative discourse of sovereign power.

If the exception is an inherent fact of sovereignty, then it has been insufficiently characterized as inhering in the modern state. In other words, when other states look to Western democracies like the United States as models of market economics, individual liberties, the rule of law and democratic principles, they fail to see the underbelly of what is 'really' going on as background principles of sovereign power. The state of exception is simply not part of the discourse of the liberal state.

But this failure is a function of the exception as a tool of sovereignty; the sovereign has no duty to (and is unlikely to be able to) outline the theory of exception *a priori*, since definitionally the circumstances in which the exception arises are outside the normal situation. On such an account, these circumstances might be indefinable, and it might be consistent for a sovereign to remain silent as to its own power to decide on the exception. Of course, logical

consistency is not an aretaic judgment about the correctness of the sovereign decision to set aside the rule in favor of the exception.

On the other hand, if the exception is instead a political programme favored by Schmittians (or those who have been influenced by his ideas, even second- or third-hand) then it would not be *constitutive* of the modern Western democratic state. It would not be an ever-present element of sovereignty itself, but rather a form of exogenous instrumental reason put forward by those who hold the seat of sovereignty as to the proper scope of sovereign power. It would be a separate, countervailing discourse of the rights of the executive, of sovereign power, of eternal emergency.

Under this conception of the Schmittian exception, George W. Bush, who in an uncanny (although not obviously direct) invocation of Schmitt called himself the ‘decider,’ and his advisors were seduced by a theory of absolute executive power. Under such a theory, the President would be entitled to maximal deference to make policy decisions during emergencies; inconveniences like human rights that got in the way of a pragmatic solution to the emergency could be set aside easily.<sup>41</sup> Facing an existential threat, ‘rights’ and ‘the law’ pale in comparison to the need for decisive action by a fearless sovereign. This is a consistent trope among supporters of the Bush administration’s decisionism with regard to human rights and the war on terror.<sup>42</sup>

If the theory of the exception is an ideological programme, it is fundamentally at odds with the endogenous normative framework of the modern liberal state. If, by contrast, it is a fundamental feature of state sovereignty, then it is fundamentally at odds with the public reasons

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<sup>41</sup> Scott Horton, *The Return of Carl Schmitt*, BALKINIZATION (blog), Nov. 07, 2005, available at <http://balkin.blogspot.com/2005/11/return-of-carl-schmitt.html>.

<sup>42</sup> See Damon Linker, *Carl Schmitt and the American Right*, THE NEW REPUBLIC (blog), Mar. 3, 2009, available at <http://blogs.tnr.com/tnr/blogs/linker/archive/2009/03/03/carl-schmitt-and-the-american-right.aspx>.

given about the endogenous normative framework common to modern liberal states. Whatever the rationale behind the Schmittian turn in American detainee policy, two things are apparent. First, the United States put the theory of the exception into practice. Second, in going against its stated justifications for the normative framework inherent to the modern liberal state, the United States accrued hypocrisy costs, as I argue below.

### III. Hypocrisy costs

I begin the final section of this paper by referring back to the processes by which agents, including the sovereign state (as a corporate agent) make decisions about the rule of law. A strong explanation for the modern liberal state's 'usual' adherence to the rule of law domestically and internationally is that of acculturation; through that process, states see rules (and especially human rights norms) as becoming obligatory as they learn that such rules and norms are linked with domestic understandings of legitimacy and what it is to be a modern state.<sup>43</sup>

Liberal states that have an endogenous non-instrumental normative framework (or archetype) supporting human rights—as part of the national character, the ontological Constitutional principles upon which the state is founded, or some interest other than the sum of the individual material interests within the state—rely on that framework as the rationale for complying with international human rights law. When states act in ways that touch upon their obligations to human rights, they generally comply with those obligations not because 'they ha[ve] no reason to violate' those obligations,<sup>44</sup> but rather because their antecedent normative

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<sup>43</sup> Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 668 (2004) (citing Martha Finnemore, *Institutional Organizations as Teachers of Norms: The United Nations' Educational, Scientific, and Cultural Organization and Science Policy*, 47 INT'L ORG. 565 (1993)).

<sup>44</sup> Goldsmith & Posner, *supra* note 3, at 133.

interests direct them to do so. In these cases, liberal states and their decision-makers believe it is *right* to do so.

Compliance with human rights provisions in the domestic context—for normative reasons—is consistent with the United Nations’ resolution, affirmed on the fifth anniversary of September 11, calling on members “ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee, and humanitarian law.”<sup>45</sup> Liberal states that abide by this legal-compliance principle are guided by their normative frameworks, rather than amorphous concerns that they will suffer retaliatory or reputational costs. A state’s legal justifications against the legal-compliance principle, and by extension against the tenor of the underlying endogenous normative framework, ‘undermin[e] the legitimacy of the rules themselves, ... disempower[ing] [the state] itself from invoking those rules, at precisely the moment when it needs those rules to serve its own national purposes.’<sup>46</sup> In other words, making legal arguments that would allow the state to violate the legal-compliance principle undercuts the derogating state’s commitments to that normative framework.

When combined with insistence that other states comply with international law on reference to the normative framework, this signals to other states that the United States (for example) sees itself as exempt from international law but can still require other states to show fidelity to the rule of law. Empirically, this trend is well established in the international relations literature, in which it is known as ‘American exceptionalism.’<sup>47</sup> This is a form of hypocrisy, a way in which the United States tells its peers, *we are not bound to the same standards*. In this

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<sup>45</sup> Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, G.A. 61/171, at preamble, U.N. Doc. A/RES/61/171 (Sept. 11, 2006).

<sup>46</sup> Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1487 (2003).

<sup>47</sup> See generally Michael Ignatieff, ed., AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS (2006).

sense, it is a way for the United States to say to peer states, *you ought to do X* while *I need not do X*.

International relations and international law scholars have recently turned their attention to such forms of political hypocrisy, largely within a constructivist framework. Some have focused on ethical analyses – that is, querying whether a foreign policy that is hypocritical in the sense of ‘professing beliefs ... or virtues that one does not hold or possess’ can ever be morally acceptable.<sup>48</sup> Others, like Marc Lynch, have balanced the shame spiral that activists might create for states who make hypocritical moral arguments in order to bring about progressive change in those states’ policies, against the destabilizing effects for hypocrites’ credibility and the normative structure of the international system as a whole.<sup>49</sup>

What is missing, however, is a theory of hypocrisy costs. Readers will have noted a fundamental tension between the themes in parts I and II of this paper: even if states have endogenous, non-instrumental reasons for following some rule they may nonetheless eventually break that rule. In the case I presented, the United States had endogenous, non-instrumental reasons for supporting human rights: doing so was part of its constitutional normative framework. However, the United States nonetheless acted against its own professed adherence to the rule. Although the reasons are unclear – it did so either because it was not forthcoming about the state of exception as *inherent* in the modern liberal state system, or because Bush Administration politicians, advisors, and lawyers supported a theory of governance centering on the exception and the sovereign decision – the result was a hypocritical tension between professed rule and violation.

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<sup>48</sup> See, e.g., Amy Gurowitz, *Policy hypocrisy or political compromise? Assessing the morality of US policy toward undocumented migrants*, in *MORAL LIMIT AND POSSIBILITY IN WORLD POLITICS* 138, 139 (Richard Price, ed., 2008) (quoting *AMERICAN HERITAGE DICTIONARY*).

<sup>49</sup> Marc Lynch, *Lie to me: sanctions on Iraq, moral argument and the international politics of hypocrisy*, in *MORAL LIMIT AND POSSIBILITY IN WORLD POLITICS* 165, 168 (Richard Price, ed., 2008).

This kind of hypocrisy is not limited to the United States, or to human rights. But the CIA secret prisons case presents a compelling way to demonstrate that *hypocrisy costs* are real. These are the costs that accrue to a state when its sincere public statements about its endogenous non-instrumental reasons for doing some thing, supported in the background by its constitutional normative framework, are inconsistent with its practice. Kelly Greenhill has discussed hypocrisy costs before, although not in great theoretical depth. Accordingly, I expand on her definition: hypocrisy costs are ‘those symbolic political costs that arise when there exists a real (or perceived) disparity between a professed commitment to liberal values and/or international norms, and demonstrated actions that contravene such a commitment.’<sup>50</sup>

Hypocrisy costs can be differentiated into two further types: internal hypocrisy costs, similar to cognitive dissonance effects, and external hypocrisy costs, which make the state’s philosophical evangelism – its attempts to convince other states that its own preferred normative framework is superior to other choices of normative frameworks – more difficult to achieve.

Hypocrisy costs can also be differentiated from other, similar kinds of costs (which may also arise out of hypocrisy). Specifically, retribution and reputation costs are, respectively, the likelihood that, other states will respond to violations of a rule with sanctions or their own non-compliance, and the likelihood that other states will consider the non-complying state less trustworthy in the future. These are not the primary reason that liberal states like the U.S. comply with human rights law. If liberal states have normative, non-instrumental reasons for complying with international law, then behavior inconsistent with this normative framework undermines the actor’s role in supporting, building, or affirming that normative framework in other states.

In this way, a state incurs *external hypocrisy costs* that make it more difficult for the state to convince other states that the principles and values that they espouse are morally worthy, if the

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<sup>50</sup> Greenhill, *supra* note 2, at 65 n.4.

state subsequently pursues policies that are outwardly contrary to those principles or values. These costs reduce the effectiveness of a state's attempts to acculturate other states into its preferred normative framework. They differ from reputation costs, which concern whether others see the state as a reliable partner.

The Bush Administration's foreign policy was largely predicated on promoting human rights and democracy worldwide, although this is not universally the case. If the National Security Strategy of 2002 is an indication, the most pressing targets of efforts to promote democracy are those rogue states that 'display no regard for international law... and callously violate treaties to which they are party.'<sup>51</sup> These might include the United Nations Charter's prohibition on aggression,<sup>52</sup> the Nuclear Non-Proliferation Treaty,<sup>53</sup> or the International Covenant on Civil and Political Rights.<sup>54</sup>

The U.S. faces the question whether it values strategic partners who support the 'war on terror,' or values its stated goals of promoting democracy and human rights. Although these are not necessarily mutually exclusive, some of the U.S.' allies in the 'war on terror' have unreliable human rights records of their own. There is evidence that the U.S. cares more about human rights promotion than support for the 'war on terror.' Uzbekistan forced the U.S. military to stop basing troops in that country when the U.S. criticized Tashkent for its human rights record.<sup>55</sup> On the

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<sup>51</sup> George W. Bush, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 14 (2002), available at <http://www.whitehouse.gov/nsc/nss/2002/nss.pdf>.

<sup>52</sup> U.N. Charter, art. 2(4); National Security Directive 45, *U.S. Policy in Response to the Iraqi Invasion of Kuwait* (Aug. 20, 1990), available at [http://www.fas.org/irp/offdocs/nsd/nsd\\_45.htm](http://www.fas.org/irp/offdocs/nsd/nsd_45.htm).

<sup>53</sup> Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 729 U.N.T.S. 161; Dafna Linzer, *Senate Backs White House Plan for India Nuclear Deal*, WASH. POST, Nov. 17, 2006, at A14; but see Ian Traynor, *Tehran Threatens to abandon nuclear treaty: Non-proliferation pact in question as tests resume*, GUARDIAN (London), Feb. 14, 2006, at 18.

<sup>54</sup> ICCPR, *supra* note 3; see, e.g., Department of State, Bureau of Democracy, Human Rights, and Labor, 2006 *Country Reports on Human Rights Practices – Iran* (Mar. 6, 2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78852.htm>.

<sup>55</sup> Robin Wright & Ann Scott Tyson, *U.S. Evicted From Air Base in Uzbekistan*, Wash. Post, July 30, 2005, at A01.

other hand, the close relationship between the U.S. and regimes like Pakistan and Saudi Arabia means that it cannot easily criticize them for their human rights practices.<sup>56</sup>

Moreover, these states undermine U.S. human rights promotion strategies by referring to the U.S.' own human rights record. In China, leaders 'do not see why resource-hungry China should not support dictatorships in Burma and Zimbabwe if the US does the same in Pakistan, central Asia and west Africa.'<sup>57</sup> The United States adopted China's designation of Muslim Uighurs—an ethnic separatist minority in China's far western provinces—as a terrorist group, in exchange for China's support for the Iraq war at the United Nations Security Council.<sup>58</sup> Similarly, in Russia, a refugee advocate explained that U.S. criticism of Russian treatment of suspected Chechen terrorists is misplaced: 'The West cannot complain, and if they do, our leadership can say, "Look at you, you do the same thing."'<sup>59</sup>

Many of these illiberal states would commit the human rights violations even without the United States as a foil to justify their abuses. Yet other liberal states questioned the U.S.' detainee-treatment choices. As for Europe, the broad support for the U.S. after September 11 (exemplified by *Le Monde's* headline the next day: "Nous sommes tous Americains") 'should not be interpreted as a blank cheque for every single action which the US government deems appropriate in its response to terrorism.'<sup>60</sup> Foreign pressure may have led to acculturation and re-internalization of human rights norms by the U.S. government with regard to detainee issues, although such change might also have come through a change of administration.<sup>61</sup>

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<sup>56</sup> Aziz Rana, *Haunted by a Paradox: Human Rights Promotion and American Foreign Policy*, 9 INT. J. HUM. R. 271, 274 (2005); see also Jeffrey Cassin, *United States' moral authority undermined: The foreign affairs costs of abusive detentions*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 421 (2006).

<sup>57</sup> Victor Mallet, *The geopolitical genius of China's satellite kill*, FIN. TIMES, Jan. 25, 2007, available on NEXIS.

<sup>58</sup> Josh White, *Lawyers Demand Release of Chinese Muslims*, WASH. POST, Dec. 5, 2006, available on NEXIS.

<sup>59</sup> Peter Finn, *Tajik Defendant Details Abduction by Russian Police*, WASH. POST, Aug. 11, 2005, at A18.

<sup>60</sup> Andreas Paulus, *The influence of the United States on the concept of the 'International Community'*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 89 (Michael Byers & Georg Nolte eds., 2003).

<sup>61</sup> Goodman & Jinks, *supra* note 43.

Indeed, when Leon Panetta, the Obama administration's director of the Central Intelligence Agency, announced to Congress that the CIA would be closing its secret prisons, it indicated a 'sharp break' with the Bush administration over torture and the CIA prisons. They had been unsuccessful in part, one report noted, because '*torture betrayed American values, alienated allies*, and became a recruiting tool for Al Qaeda.'<sup>62</sup> Even the Bush Administration was aware, at some level, of the hypocrisy costs that accrued to it on account of its policy choices. The State Department's annual human rights report acknowledged the irony of 'issuing this report at a time when our own record, and actions we have taken to respond to terrorist attacks against us, have been questioned.'<sup>63</sup>

External hypocrisy costs derive in part from the unique position that the United States plays as the global ultrapower. If the United States represents a global Leviathan capable of exempting itself from the law,<sup>64</sup> this constitutes a serious challenge to the practice and ideal of the rule of law, both in international affairs as well as within the world's domestic juridical orders through a trickle-down effect.

There are several strands to the argument that a state's influence in advocating for its normative framework – in this case, promoting democratic values, human rights, and the rule of law – is weakened when it fails to uphold its own standards. First, diplomatic pressure is weakened because states question the rationale for the hypocrite's inconsistent position and policies.<sup>65</sup> On a diplomatic visit to Argentina, Attorney General Alberto Gonzales was asked about the Justice Department's 'torture memos,' to which Gonzales responded that the memos were not meant for public diffusion. Despite that intent, the Argentinean interior minister

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<sup>62</sup> Shane, *supra* note 1 (emphasis added).

<sup>63</sup> Helene Cooper, *U.S. Releases Rights Report, With An Acknowledgement*, N.Y. TIMES, Mar. 7, 2007, available on NEXIS.

<sup>64</sup> For the "Leviathan" argument, see Nico Krisch, *More equal than the rest? Hierarchy, equality and US predominance in international law*, in Byers & Nolte eds., *supra* note 60, at 170.

<sup>65</sup> Neil Hicks, *The Impact of Counter Terror on the Promotion and Protection of Human Rights: A Global Perspective*, in HUMAN RIGHTS AND THE WAR ON TERROR 209, 215 (Richard Wilson ed., 2006).

responded, the memos nonetheless ‘reflect your thinking, which we do not agree with.’<sup>66</sup> Second, in contrast with its history of human rights promotion, ‘the United States is pulling in the opposite direction, undermining the multilateral system ... that has been painstakingly constructed for more than fifty years.’<sup>67</sup>

Critics of this type of argument counter that American treaty practice is not causally linked to its influence in human rights. Rather, this influence derives from its modeled domestic behavior, sanctions regimes against human rights abusers, and unipolar dominance after the Cold War.<sup>68</sup> This critique is puzzling, and is faulty for several reasons. First, sanctions do not work against human rights abusers because their markets tend to be small and unresponsive to pressure.<sup>69</sup> Second, it is precisely the modeled domestic behavior—violations of international human rights law with regard to detainee treatment—that is working to undermine the U.S.’ influence in human rights promotion. Third, it is unclear why unipolar dominance is itself a causal mechanism through which other states internalize human rights norms. The U.S.’ post-Cold War military and political dominance has not in itself caused states to internalize human rights norms; instead, those states see those ideas leading to positive outcomes in Western liberal states, which they then seek to emulate through norm-internalization (also rather than simply norm-compliance). Or at least this would be the model, but for the failure of the moral authority of the Western liberal model of human rights.

Besides external hypocrisy costs, states may also incur *internal hypocrisy costs* when their actions are inconsistent with their professed normative frameworks. It is unclear exactly

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<sup>66</sup> Horacio Verbitsky, *Pares y Nones*, PAGINA/12 (Buenos Aires), Feb. 11, 2007, available at <http://www.pagina12.com.ar/diario/elpais/1-80250-2007-02-11.html>.

<sup>67</sup> Hicks, *supra* note 65, at 218.

<sup>68</sup> E.g., Jack Goldsmith, *Should International Human Rights Law Trump US Domestic Law?* 1 CHI. J. INT’L L. 327, 337 (2000).

<sup>69</sup> Beth Simmons, *International Human Rights: Law, Politics, and Compliance* (Chap. 5) at 11 (draft presentation at the PIPES workshop, University of Chicago) (Jan. 4, 2007) (on file with author).

what form these are likely to take in different situations, but in the case study presented in this paper, the internal hypocrisy costs largely took the form of cognitive dissonance effects.

These internal hypocrisy costs can be seen in the insistence on the part of President George W. Bush, his advisors and supporters, as well as others, that the United States does not torture.<sup>70</sup> Yet after the release of the International Committee for the Red Cross' report on CIA secret prisons, it could no longer be denied that the United States did, in fact, torture. There are several plausible explanations for Bush's cognitive dissonance on torture.

First, he could simply believe that, as a matter of law, the coercive interrogation techniques used on CIA prisoners did not rise to the level of torture. Second, he could have been saying something he knew to be false, in order to avoid admitting to acts that would trigger various international and domestic criminal laws. Third, he could have believed, on a Schmittian conception of sovereign power over bare life, that in an exceptional situation law does not define what the sovereign does, and so what the CIA did could not reasonably be called 'torture.' (Such a nuanced argument is not likely to have been his rationale.) Finally, it is possible that such arguments were the product of actual cognitive dissonance – the conflict between two inconsistent statements that are both held out to be true.

The second and fourth explanations are more likely than the first and third. Other cases of 'internal' hypocrisy costs suggest that acts inconsistent with the normative framework of the *polis* are treated as if they are wholly within that framework, rather than outside it. As one example, the *Washington Post* has called waterboarding torture when used by the Khmer Rouge in Cambodia, but has refused to call it torture when used by the United States.<sup>71</sup> This form of hypocrisy is reflexive, in the sense that it forces the agent to look to herself to determine whether

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<sup>70</sup> Bush says U.S. 'does not torture people,' MSNBC.com, Oct. 5, 2007, available at <http://www.msnbc.msn.com/id/21148801/>.

<sup>71</sup> Mark Kleiman, *When is torture not torture?* REALITY BASED COMMUNITY, Mar. 31, 2009, available at [http://www.samefacts.com/archives/torture\\_/2009/03/when\\_is\\_torture\\_not\\_torture.php](http://www.samefacts.com/archives/torture_/2009/03/when_is_torture_not_torture.php).

an action is consistent with her endogenous normative framework. But the hypocrisy is created when, through psychological defense mechanisms or indifference as to the contradictions, the agent fails to recognize the inconsistency and fails to rectify it.

The problem with a failure to recognize and to rectify a hypocritical inconsistency is that leaders, institutions, and others in the hypocritical state are likely to fall into the trap again in the future. Without the reflexive stimulus alerting one to the hypocritical position of espousing certain normative values on one hand, and acting wholly inconsistently with them on the other, then the costs of hypocrisy will never be noticed or accounted for. Indeed, hypocrisy costs *ought* to be counted and internalized in policymakers' cost-benefit analysis, since they are real costs that otherwise accrue elsewhere.

Finally, if policymakers and other domestic institutions are able to avoid the reflexive blindness of internal hypocrisy costs, then the discovery and reflection upon the hypocritical position taken ought to reconstruct the conception of the normative framework in the mind of the agent espousing it. Do I really care about the values that I espouse, one might ask? Do I need to be more vigilant about acting in accordance with them in the future? Do I need to stop advocating values that I myself fail to live up to? If internal hypocrisy costs cause actors to consider these questions, they might have good collateral effects.

#### **IV. Conclusion**

External and internal hypocrisy costs present serious problems for states that make broad claims about what other states ought to do, on the basis of their own normative frameworks. When these states represent one position for endogenous, non-instrumental reasons, and then subsequently act inconsistently with that position, the states are less likely to be able to fulfill

their norm-evangelizing goals. Moreover, the inconsistency may lead domestic polities – specifically, political leaders and other institutions of the establishment – to fail to be reflexive about the kinds of policies being advocated and pursued, and the relationships between them.

This paper represents a first step toward a serious theory of hypocrisy costs in international relations. Through my analysis of the CIA prison system case study, I have demonstrated that hypocrisy costs are real and potentially costly for states that are honestly seeking to change other states' minds about normative issues. But as clear as hypocrisy costs are in the human rights issue area, they are not limited to human rights. Indeed, in other areas, such as environmental protection, hypocritical positions might impose other substantial and as-yet-unidentified costs upon participants in the discourse over those normative issues.

As for the United States, the Obama administration has taken the first steps toward putting the country back in a position of moral high ground in international human rights. With the decision to permanently close CIA prisons, the administration can show that it is serious about the values that underlie our endogenous normative framework about human rights and the rule of law. If the United States actually cares about these issues, then by showing to other states that the government is serious about adhering to its own values it may make it easier to convince other states – such as Russia and China – that human rights and the rule of law are *per se* valuable. Besides the positive deontological effects of shutting down the secret prisons, which are substantial, the consequentialist ground is no less substantial: anything that makes human rights promotion efforts more likely to succeed, especially when it itself supports human rights, is just as valuable.