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Theories About International Law: Prologue to a Configurative Jurisprudence

"[International Law] . . . is the vanishing point of jurisprudence."
—Thomas Erskine Holland ¹

MYRES S. MCDOUGAL*
HAROLD D. LASSWELL**
W. MICHAEL REISMAN***

Theories about international law, like the forms of action in Maitland's conception, have unhappily the power of ruling us from their graves. "There is a subtle interaction," wrote the late Professor Brierly in his own somewhat quixotic search for "the basis of obligation in international law,"

"between theory and practice in politics, not always easy to trace because the actors themselves may easily be unconscious of their theoretical prepossessions which, nevertheless, powerfully influence their whole attitude towards practical affairs; and at no time has it been so important, as it is today, that we should see the facts of international life as they really are, and not as they come to us reflected in false or outworn theories."²

It is the purpose of this essay, through selective canvass of our inherited theories about international law, to consider the potential contributions of such theories to a comprehensive jurisprudence of international law which will not impede, but creatively facilitate, the thinking of all whose choices and activities must affect the quality of emerging international law and public order. In the course of this canvass of past theories we will explore the need for a more viable jurisprudence of international law, the appropriate criteria for evaluating such a jurisprudence, the trends in approximation to such criteria exhibited by past theories, the factors which have affected

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This article is an initial version of the first chapter of a book which the authors have in preparation upon the world constitutive process of authoritative decision. A précis of certain later chapters of the proposed book has previously been published in 19 *J. OF LEGAL ED.* 253, 403 (1967) and will shortly appear in a book upon *The Future of the International Legal Order*, edited by Professors Cyril E. Black and Richard A. Falk. Some of the opening themes of this previous publication are more fully developed in this article.

The authors would express their appreciation to the Sarah Mellon Scaife Foundation for generous assistance in support of their work.

1. T. HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 392 (1924).

2. Brierly, *The Basis of Obligation in International Law* in *THE BASIS OF OBLIGATION IN INTERNATIONAL LAW AND OTHER PAPERS BY THE LATE JAMES LESLIE BRIERLY* 1, 2 (H. Lauterpacht & C. Waldock eds. 1958).

past achievement, possible future developments, and some conceivable alternatives for a more configurative, hence viable, jurisprudence.

THE NEED FOR A VIABLE JURISPRUDENCE OF INTERNATIONAL LAW

The interaction and interdependence of all individuals of the world have become such common and subtle features of our existence that their magnitude and full import are only rarely appreciated.³ People cross national boundaries in numbers and with a regularity which have never before been achieved.⁴ The ebb and flow of persons has not been restricted to the highly publicized inter-governmental contacts. People from all sectors of national communities travel and intermingle in striving to maximize their wealth, their skill, their understanding and, even, their prestige.⁵

The exchange of ideas across cultural "boundaries," at one time restricted to human carriers, is even more rapid⁶ and, in the longer

3. Interaction and interdependence are not, it should be emphasized, recent phenomena. The rapidly increasing intensity of interaction has emphasized interdependence; it has not newly created it. The historian who can rise above parochial limitations and can cease to move, in Professor Bozeman's phrase, "in strictly local circuits," notes the record of cultural interstimulation, interchange and interdependence from the dawn of recorded history: "history, too, is shared international experience." A. BOZEMAN, *POLITICS AND CULTURE IN INTERNATIONAL HISTORY* 17 (1960).

4. See H. ALKER & B. RUSSETT, *WORLD HANDBOOK OF POLITICAL AND SOCIAL INDICATORS* 167 (1964). For a dramatic presentation of the upsurge of foreign travel from the United States, see 1966 CAB ANN. REP. 15-17. While available statistics sustain the prediction that trends in transnational travel will continue to increase, the restrictive effect imposed by national elites must be noted. In attempting to realize internal goals, elites have not hesitated to impose barriers to the flow of peoples and/or ideas across national boundaries. See generally UNESCO, *TRADE BARRIERS TO KNOWLEDGE* (1955, rev'd); C. RANDALL, *INTERNATIONAL TRAVEL* (1958).

5. The prestige or status function of foreign travel in our culture is commonly observed and, in its more vulgar forms, has frequently been subjected to sharp satire. It is, however, a significant indicator of a trend toward widely shared values, not as yet subjected to sufficient investigation. While the intensity of the respect value of travel is obviously factored by media communications of the growing travel industry, it seems to have an independent impetus of its own.

It is worth adding that travel need not necessarily engender cosmopolitan perspectives. The Victorian "grand tour," for example, frequently served only to confirm national prejudices. The point to be emphasized is that the effect of direct exposure to alien cultures is a function of numerous factors, the most important of which may be previously inculcated perspectives about non-group members, which affect all of the traveller's perceptions.

6. The volume, intricate network pattern, and multi-faceted political effects of transnational communication are examined and discussed in W. DAVIDSON, *INTERNATIONAL POLITICAL COMMUNICATION* 13-55 (1965); see also L. MARTIN, *INTERNATIONAL PROPAGANDA: ITS LEGAL AND DIPLOMATIC CONTROL* (1958). For a penetrating policy-oriented investigation, see B. MURTY, *PROPAGANDA AND WORLD PUBLIC ORDER* (1968).

run, may prove even more influential. In the most enduring sense, the significance of physical distance has been the limits it places upon the potential of human experience. The media explosion, the creation of a social demand for news, in its broadest sense, and the growth of an infrastructure for marketing it are gradually reducing physical distance to an irrelevancy. The ease of ideological transmission has resulted in a massive, continuing cultural interchange. Non-European elites have long recognized that the power and wealth they seek can only be acquired by adopting many "western" methods. European culture, formerly a self-appointed exporter of these methods, is more and more influenced by the life patterns and styles of its former customers, and is constantly weighing the relevancy of other cultures to its own existence. The international flow of goods and services in the contemporary world has been so amply documented that its mention alone will suffice to confirm interaction and interdependence.⁷

The upward curve of global interaction is easily verified and quickly appreciated. Its more subtle by-product, interdependence, is not. The point is that sustained global interaction has rendered the life and stable existence of every individual dependent upon numerous factors operating beyond his local community and national boundaries; the contemporary individual's effective pursuit of "life, liberty and happiness" is dependent, in ever greater degree, upon his ability to identify these factors and to devise feasible methods for affecting them.

Need anyone repeat that the spectre of nuclear holocaust has underlined the interdependent character of minimum security? The precarious state of current "non-war" depends, not only on policies made and applied in Washington, Moscow and Peking, but also in Paris, Jakarta, Delhi, Rawalpindi, Havana, Tel Aviv, Cairo and so on. No national politician ever speaks solely to his constituents; the elites of other states are constantly monitoring such communications, evaluating them and regulating their own behavior accordingly. A citizen's "letter to the editor" in Kirghiz or New York will be read abroad, filed and perhaps programmed. Public opinion polls commissioned by the government of one country are avidly consumed by the governments of many others.⁸ In power terms, the contemporary arena is global. The security of any part is the security of the whole and an outbreak of violence in any region is quickly perceived as a threat to all.

The pursuit of wealth manifests a similarly high degree of interdependence. No contemporary nation can achieve or sustain a desired level of economic activity on an autarchic basis. It requires and

7. For a general survey, see 9 DIRECTION OF INTERNATIONAL TRADE (U.N., I.M.F., I.B.R.D. 195 & ST/STAT/SER.T/98) (1958). See also H. ALKER & B. RUSSETT, *supra* note 4, at 162.

8. For indications of the scope of intelligence gathering, see S. DE GRAMONT, *THE SECRET WAR* (1962); A. IND, *HISTORY OF MODERN ESPIONAGE* (1965); D. WISE & T. ROSS, *THE INVISIBLE GOVERNMENT* (1964).

seeks resources, skill, labor, goods and markets beyond its borders. The quality of a harvest in the Ukraine affects the commodities exchange in Chicago; a rail strike in Sweden disrupts or debilitates rail traffic in France; a copper strike in Chile closes factories in the U.S. Business planning here must concern itself, not only with labor relations in an American city, but in the mines of Africa and Latin America from which some of its vital raw materials come, the maritime and transport unions of a number of states which participate in distribution, and national marketing unions at many different points of final consumption. The goods must meet the standards and tastes of a variety of official and functional regulators. A breakdown of any sector of this global economy is felt everywhere else. The fearful memory of the world slump of the 1930's, which spawned economic misery for millions and, in its wake, fiendishly destructive political deviations, quickly stimulates wealth elites about the globe to aid the ailing sector.

The interdependence of peoples in relation to such other important values as well-being and respect is a more subtle, but no less decisive factor in our lives. Despite scattered islands of national and ethnic parochialism, the vast majority of the peoples of the world demand for themselves and acknowledge the fundamental right of others to the minimum conditions for a dignified human existence.⁹ The cumulative impact of personal and cultural interchange has been a broadening of identifications. Hence the deprivation of human rights visited upon one individual is increasingly felt to be a personal deprivation and a potential threat to all freedom.¹⁰ It is confusing only to the perspective provided by the school of a limited power politics that on occasion nations are willing to jeopardize themselves for the fundamental rights of others in matters in which no tangible "national interest" is evident.

The increasing interaction and interdependence which have been noted in a few spheres of human activity could easily be demonstrated in regard to the pursuit of every value which human beings covet. It is not, however, the mere fact of increasing global interaction and interdependence which we here seek to document. The fact which requires emphasis is the highly personal impact of all this interaction and interdependence upon the lives of individual human beings: the numerous roles played by the individual in the differing groups

9. See U.N. CHARTER art. 1, para. 2, art. 1, para. 3, art. 13, para. 1(b), arts. 55 and 56; Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV); Declaration on the Elimination of all Forms of Racial Discrimination, G.A. Res. 1954 (XVIII); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI). See also McDougal & Leighton, *The Rights of Man in the World Community*, 59 YALE L.J. 60, 80-81 (1949); H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 178 (1950).

10. For elaboration, see McDougal & Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968).

and communities which he inhabits increasingly partake of international involvement. Occupational activities—in business, politics, the law, the sciences, the media, the church and so on—are daily more international in focus and in audience. The broad category of professional intellectuals in each society can no longer comment accurately, usefully or creatively on any aspect of a domestic scene without a thorough appreciation of the comprehensive global arena which affects and is affected by each of its component parts. The lay citizen, a role common to all, is increasingly alive to the fact that world events affect his life and that the mundane events of his immediate existence affect the world. Where he is accorded a meaningful participatory role in some effective decision process, the global dimension of his choice is perceived with increasing appreciation and gravity.

The very enormity of decision-range and the rapidity with which major policies must be prescribed and implemented in the modern world may seem, at times, to dwarf, if not obliterate the effectiveness of any one citizen in affecting the clarification of policies having great impact on his life. Yet a realistic analysis of the components of the relevant decision process will indicate that in many vital decision functions, participation is widely shared and could be even more widely and effectively dispersed among the members of any polity were its character more accurately grasped. Analytically, a decision process, which is authoritative and controlling, may be said to be comprised of seven functions: *intelligence, promotion or recommendation, prescription, invocation, application, termination, appraisal*. In brief:

1. Intelligence is the obtaining, processing, and dissemination of information (including planning).

2. Promotion (or recommendation) is the advocacy of general policy.

3. Prescription is the crystallization of general policy in continuing authoritative community expectations.

4. Invocation is the provisional characterization of concrete circumstances in reference to prescriptions.

5. Application is the final characterization of concrete circumstances according to prescriptions.

6. Termination is the ending of a prescription and the disposition of legitimate expectations created when the prescription was in effect.

7. Appraisal is the evaluation of the manner and measure in which public policies have been put into effect and of responsibility therefor.¹¹

While the public functions of prescription and application are necessarily restricted, in terms of direct participation, to a very small,

11. H. LASSWELL, *THE DECISION PROCESS: SEVEN CATEGORIES OF FUNCTIONAL ANALYSIS* (1956); see also McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 415ff. (1967).

though hopefully, representative group, participation in all other functions presents almost unlimited democratic potential. Most of us are performing some of these decision roles without being fully aware of the scope and consequences of our acts. Because of this, our participation is often considerably less effective than it might be. Every individual cannot, of course, realistically expect or demand to be a decisive factor in every major decision. Yet the converse feeling of pawnlike political impotence, of being locked out of effective decision, is an equally unwarranted orientation. The limits of the individual's role in international as in local processes is as much a function of his passive acquiescence and ignorance of the potentialities of his participation as of the structures of the complex human organizations of the contemporary world.

Interdependence has made world power processes and world law as relevant to each individual as the decisions made in the municipality in which he lives. Responsible citizenship, then, extends from the municipality to the limits of the enormous arena in which man interacts.¹² Effective participation by the individual human being, in all his different roles and capacities, in the decision making of the contemporary world—a participation which will more adequately secure his deeply demanded values, including perhaps even survival itself—must of course depend in great measure, on an understanding of the relevant global processes, the identification of the factors which condition them, an ability to isolate feasible problems and the capacity to harness the knowledge and specialized imaginativeness of a host of disciplines.

A more systematic expansion of these impressionistic remarks about the individual human being's increasing role in, and responsibility for, world affairs would require the careful description of a comprehensive world social process, in terms of a set of interlocking, transnational functional and geographic interactions; of the global or earth-space process of effective power which is an integral part of the larger transnational community matrix; and of the processes of authoritative decision, including a world constitutive process, maintained by the holders of effective power for identifying and securing their common interests. For our immediate purposes it will suffice merely to summarize that there is today among the peoples of the world a rising, common demand for the greater production and wider sharing of all the basic values associated with a free society or public order of human dignity; that there is an increasing perception by peoples of their inescapable interdependence in the shaping and sharing of all such demanded values; and that peoples everywhere, both effective leaders and the less well positioned are exhibiting increasing identifications with larger and larger groups,

12. Wilfred Jenks in *Law in the World Community* (1967) offers persuasive statement of the involvement of all individuals in the larger community processes and outlines a challenge "not for lawyers alone" but for "succeeding generations of citizens, scholars, and statesmen." (*id.* at xi).

extending to the whole of mankind. Concomitant with this enhanced perception and understanding of overriding community membership, one may observe also in all parts of the world an increasing awareness and concern that mankind has not yet created the legal institutions, or processes of authoritative decision, adequate to clarify and secure common interests under conditions of contemporary interdependence. From peoples living in the shadow of possible ultimate catastrophe, yet tantalized by the promise of a potential abundance hitherto unknown in the production and sharing of all values, the demand for a more adequate international, transnational or world law becomes ever more insistent.

It is not news that our inherited theories about international law, our legal philosophies or jurisprudences, afford scant promise of providing the intellectual tools necessary to creating a more adequate law.¹³ For centuries our traditional jurisprudences, too often fashioned from the parochial perspectives of the nation-state or even the city-state, have had great difficulty even in accounting for the existence of international law. Some theories, unable to observe the patterns of authoritative expectation and control which in fact transcend nation-state boundaries, have concluded that international law is not really law at all, but only "positive morality," and that most decisions of transnational impact or reference are taken by mere naked power, expediency, or calculations of special interest.¹⁴ Other theories can find a "validity" or "bindingness" for international law only by derivation from transempirical postulates or from a circular, or infinitely regressive, conception of the "consent" of states.¹⁵ Even

13. For a classic statement see Pound, *Philosophical Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 73 (1923).

This is a principal theme in P. JESSUP, *A MODERN LAW OF NATIONS* (1948). Cf. P. JESSUP, *THE USE OF INTERNATIONAL LAW* (1955); Jessup, *Parliamentary Diplomacy*, 89 *Rec. des Cours (Neth.)* 185 (1957) and H. LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933). See also DICKINSON, *WHAT IS WRONG WITH INTERNATIONAL LAW* (1946); M. KAPLAN & N. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* (1961).

A systematic survey of inadequacies is offered in Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 *VA. L. REV.* 231 (1964). One can share Professor Falk's perceptions of inadequacy without subscribing to all his proposals for remedy.

14. The logical consequence of these views would be a total denial of international law and a consideration of transnational interaction only in terms of behavior based solely upon naked power. Paradoxically, this consequence is avoided and lawyers holding this view continue to treat "international law," a fact which should arouse some suspicions about the validity and utility of the theory. These theories are considered in some detail under the rubric of the frame of non-law *infra* at 208.

15. Some of the difficulties in these traditional views, and a demonstration of the infinite regress in a search for "bindingness" or "validity" in consent, are offered in Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 *MOD. L. REV.* 1 (1956).

the theories which purport to regard international law as genuine law too often narrowly restrict their focus of inquiry or severely limit the intellectual tasks with which they are concerned. Emphasis is commonly restricted to rules or mere perspectives, to the neglect of actual operations; a clear focus upon empirical decision is not attained. Authority and control are not always distinguished, with confused and ambiguous references being made simultaneously to both these indispensable elements of law. Established decision-makers are seldom identified, and there is little clear focus upon a comprehensive process of authoritative decision, extending to the making as well as application of law. Events which give rise to controversies in international law are not systematically categorized in terms of social process values, and only anecdotal attention is paid to the causes and consequences of decision. The interpenetration of the different community processes of the world, from local to global, is described, in almost complete unreality, in terms of the interrelation of "national" or "municipal" and "international" rules. The intellectual task most honored in demonstration is that of logical derivation, and the great range of tasks indispensable to policy-oriented inquiry and decision is largely neglected.

A theory about international law which would afford adequate tools to contemporary scholars and decision-makers must clearly have a more comprehensive and deeper orientation. The indispensable function of jurisprudence is to delimit a frame of reference appropriate to the study of the interrelations of law and community pro-

Such difficulties would appear to stem from failures to distinguish authority and control and from exclusive reliance upon derivational logic.

If by "binding character" and "validity" reference is made to effective control, there need be no infinite regress. Effective control is a function of the interrelation of many different variables in the world arena and may be investigated empirically. The empirical question is what factors affect decision; and the basic predispositions of the participants in an arena, including not merely their "consent," but even their demands, are among the most important factors. The consent of the effective participants in any system is obviously necessary to the continued maintenance of the system, but this does not mean that particular participants may not on occasion be required by the comprehensive network of reciprocities and retaliations in the system to conform to particular policies to which they have not explicitly consented.

If by "binding character" and "validity" reference is made to authority, infinite regress is equally unnecessary. Consent to the maintenance of a general system is at one level of abstraction and consent to the prescription or application of specific rules is at another. There is no need to confuse or contrapose the two levels. The shared expectations of the members of a community about how decisions should be taken, like other variables affecting decision, admit of empirical investigation and the rational way to relate specific decisions to such expectations is, not by logical derivations ascending in infinite regress to higher and higher abstractions, but rather by detailed specification, going down the ladder of abstraction, to the most minute phases of social processes.

For further discussion see Dillard, *Some Aspects of Law and Diplomacy*, 92 Rec. des Cours (Neth.) (Vol. I, 1957) 449, 465.

cess and to specify in detail the intellectual tasks by which such study can be made and applied to the solution of the exigent problems it reveals. A jurisprudence of international law which would be relevant to the needs both of specialists in decision and of all who would understand and affect the processes in which they live must, accordingly, comprise a configurative approach, having at least three major characteristics:

1. It must be contextual, i.e., it must perceive all features of the social process of immediate concern in relation to the manifold of events comprising the relevant whole.
2. It must be problem-oriented.
3. It must be multi-method.

A jurisprudence aspiring to relevance must be contextual because the comprehensiveness and realism with which an observer conceives his major focus of attention—how he locates law in the community which it affects and is affected by—will determine how he conceives every detailed part of his study, his framing of problems, and his choice of tools for inquiry. It is only by a configurative examination of the larger context that an observer can be assured of extending his inquiry to all relevant variables and of being able to appraise the aggregate consequences of alternatives in decision. A relevant jurisprudence must be problem-oriented if it is to facilitate performance of the various intellectual tasks which confront all who are interested in the study of the interrelations of law and society, to avoid sterile inquiry into meaningless questions, and to contribute as creatively as possible to our institutions of public order in ways that promise to extricate us from the continuing destructive anarchy of our times. A relevant jurisprudence must be multi-method in order to promote mastery over all the necessary intellectual skills, to encourage the employment of strategies in the management of both authority and control, and to insure rationality of choice among alternatives in recommendation and decision.

It may require emphasis that a contextual, problem-oriented, multi-method jurisprudence of international law must provide for the systematic and disciplined performance of a series of distinguishable, but interrelated intellectual tasks. The appropriate specification of a comprehensive set of intellectual tasks, or skills, is important because it is the range of tasks performed, as well as the quality of performance which determines the relevance of inquiry for policy. The most deliberate attempts to clarify general community policy which do not at the same time systematically pursue other tasks, such as the description of past trends in decision and the analysis of factors affecting decision, may achieve only Utopian exercises. The description of past trends in decision, which is not guided by policy priorities and explicitly related to social processes, affords a most meager basis for drawing upon the wisdom of the past. The scientific study of factors affecting decision, which is not oriented by reference to problems in basic community policy, may be of no more

than incidental relevance, despite enormous cost. The effort to predict future trends in decision by the mere extrapolation of past trends, without considering whether the factors that affect decision will remain the same, may produce destructive illusion rather than genuine forecast. In confusion about the character of, and appropriate procedures for, the different relevant intellectual tasks, the creativity in the invention and evaluation of policy alternatives, which is indispensable to rational decision, may be lost. The more specific intellectual tasks, for which a policy-relevant jurisprudence must make provision in theory and procedures, must thus include at least:

1. Clarification of the goals of decision;
2. Description of the trends toward or away from the realization of these goals;
3. Analysis of the constellation of conditioning factors that appear to have affected past decision;
4. Projection of probable future developments, assuming no influence by the observer;
5. Formulation of particular alternatives and strategies that contribute, at minimum net cost and risk, to the realization of preferred goals.

Adequate and sufficiently detailed performance of these various tasks in reference to the past, present and future of the various relevant social and decision processes of the world community must obviously require a comprehensive analytic framework which can bring into view the principal features of decision.¹⁶ A "conventional" analysis in terms of government organs and of the technical doctrines employed by officials, an effective technique for certain problems, is on the whole, inappropriate for the study of international decision. Conventional usage must yield to "functional" analysis if comprehensive and realistic orientation is to be achieved. No dependable relationship exists between a structure that is called "governmental" in a particular body politic and the facts of authority and control on the global scale. Analysts of comparative government are well aware of the discrepancy between convention and functional fact for the understanding of the legal and political process at the national or sub-national level, since it is not unusual to discover, for example, that the authority formally provided in a written constitutional charter may be ignored, or totally redefined by unwritten practice. Similarly, when the international arena is examined, the presumed congruence of formal and actual authority of intergovernmental organizations may or may not be sustained by the concurrence of expectations necessary to justify a claim of actual constitutive authority. On a wide range of matters, the principal nation-states may—and do—continue to perceive one another as unilaterally making the critical decisions, for which they accept, and reciprocally enforce, a substantial measure of responsibility.

16. In this presentation we build upon our earlier article, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 403 (1967).

The comprehensive analytic framework required must, accordingly, include a conceptual technique for delineating the relevant aspects for power and policy of any interpersonal interaction. This technique may be sought by first locating the decision—that is, choosing the phase at which a sequence of interactions appears to culminate in choices enforced by sanctions and deprivation or indulgence. The culminating phase may be organized or unorganized; for example, it may be a formal agreement or a fight, a vote or a combination of unilateral assertion and passive acquiescence. The questions that must be raised in an appropriate phase analysis cover the outcome, pre-outcome and post-outcome dimensions of the whole sequence:

1. Who acted or participated in roles of varying significance in the process which culminated in the decision? (*Participants*)
2. What were the significant perspectives of the participants? With whom were they identified? What value demands were they pursuing, with what expectations? (*Perspectives*)
3. Where and under what conditions were the participants interacting? (*Situations*)
4. What effective means for the achievement of their objectives were at the disposal of the different participants? (*Base Values*)
5. In what manner were these means or base values manipulated? (*Strategies*)
6. What was the immediate result—value allocation—of the process of interaction? (*Outcomes*)
7. What are the effects, of differing duration, of the outcome and process? (*Effects*)

It would, thus, appear that the goal criteria appropriate for the creation of a relevant jurisprudence of international law are entirely comparable to those which experience has demonstrated to be appropriate for national law.¹⁷ For the better appraisal of the potential contributions to a viable jurisprudence of our vast legacy of inherited theories about international law, it may be helpful to make more fully explicit certain goal criteria fashioned after those recommended today as appropriate for a jurisprudence of national law.

CRITERIA FOR APPRAISAL OF THEORIES ABOUT INTERNATIONAL LAW

The more important goal criteria for the identification or invention of a relevant and comprehensive jurisprudence of international law may be economically related, as with respect to a jurisprudence of national law, to four main features:

17. Some of the developments in theories about national law are recounted in Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); McDougal, *Legal Education for a Free Society: Our Collective Responsibility*, ASS'N OF AM. LAW SCHOOLS, Proceedings, Part Two (1966).

1. The establishment and maintenance of clarity in observational standpoint.
 2. The comprehensiveness and realism of the major focus of inquiry established.
 3. The range and quality of performance of intellectual tasks.
 4. Explicitness in the postulation of basic public order goals.
- It will be convenient to expand *seriatim* upon each of these features.

I. THE ESTABLISHMENT OF OBSERVATIONAL STANDPOINT

Observational standpoint is important because it affects all other relevant features: the focus of inquiry, the performance of intellectual tasks, and the postulation of goals. The principal distinction which requires to be established is that between the scholarly observer, who is primarily interested in enlightenment with respect to the aggregate interrelationships of authoritative decision and other aspects of community process, and the more active decision-maker who is primarily interested in power, in making effective choices in conformity with demanded public order. The scholar and the effective decision-maker, and even the interested community member, may of course all require the same enlightenment and all may find it necessary to engage in comparable intellectual tasks for rational inquiry and decision. Similarly, the scholar is inescapably a participant in the social processes which he observes; he may on occasion even deliberately assume the active decision-making roles of intelligence gathering and promotion. It is, nonetheless, of the utmost importance that the scholarly observer create and maintain a *functional* theory which enables him realistically to perform the indispensable intellectual tasks in reference to the flow of authoritative decisions and their accompaniment of *conventional* theories of decision; if he permits the perspectives which are part of the data he is observing to be substituted for, or to dominate, his own perspectives, the consequences can only be confusion and loss of the enlightenment toward which all scholarly specialization is directed.

It is imperative that the scholarly observer, recognizing that the enlightenment he achieves and communicates must have inevitable effects on social process, be completely clear about his own identifications and his own objectives. His most appropriate identification is with the whole of mankind and the enlightenment he seeks should be that relevant to clarifying and implementing the common interests of the whole of mankind. If the scholarly observer cannot distinguish his vantage point from that of the active participants in the process under scrutiny and achieve perspectives different from those of either the participants who make claims or of the authoritative decision-maker who responds to claims, he can establish no criteria for appraising in terms of common interest the rationality of either claims or decisions. The urgent task inherent in his role is—while seeking to make appropriate discount for the biases of his own cul-

ture, class and group memberships, personality formation, and previous experience—that of identifying and clarifying for the different participants in community process the common interests which they themselves may not have been able to perceive.¹⁸

The establishment and maintenance of observational standpoint may be aided by the development of a meta-language *about* law, as distinct from the technical language *of* law employed by authoritative decision-makers in achieving and justifying choice. It is, of course, one objective of inquiry that theory about law which serves the purposes of enlightenment should be found useful by authoritative decision-makers and, hence, become part of the theory of law; similarly, theory of law may on occasion be sufficiently precise and relevant to serve some of the purposes of the scholar in his more comprehensive inquiry. It is, however, only by keeping entirely clear the difference in standpoint and purpose that scholarly observers can create the theories about law which will make both themselves and others the more effective masters of the conventional theories of law.

II. DELIMITATION OF THE FOCUS OF INQUIRY

The delimitation of an appropriate focus of inquiry is important because it affects the comprehensiveness and realism (or contextuality) of inquiry, the manageability with which problems are formulated, and the effectiveness with which the different intellectual tasks can be performed. A relevant jurisprudence of international law will identify and locate authoritative decision, not merely in the isolated interstices of single national communities, but also as transcending all particular communities and pervading the whole global or earth-space community, which both affects and is affected by its lesser component communities.¹⁹ For such a jurisprudence, law will be conceived not simply as traditional rules, but in more comprehensive terms: as *decision*, composed of both perspectives and operations; as *authoritative decision*, combining elements both of authority and control; and, not as merely occasional choices, but as a *continuous process* of authoritative decision, both maintaining the constitutive features by which it is established and projecting a flow of public order decisions for the shaping and sharing of community values.²⁰ Each of these distinctive emphases may be briefly elaborated.

18. The potentialities in deliberate avoidance of bias are indicated in Dillard, *A Tribute to Philip C. Jessup and Some Comments on International Adjudication*, 62 COL. L. REV. 1138, 1146 (1962).

19. This is the thesis of P. JESSUP, *TRANSNATIONAL LAW* (1956).

For the slow growth of transnational perspectives in what is misleadingly called "private international law," see Yntema, *The Historic Bases of Private International Law*, 2 AM. J. COMP. L. 297 (1953); cf. Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COL. L. REV. 561 (1952).

20. The most relevant perspectives, and important contemporary applications, are incisively sketched in Schachter, *The Relation of Law, Politics and Action in the United Nations*, 1 Rec. des Cours (Neth.) 167 (1963).

A. *Comprehensiveness in Conception of Relevant Community*

A relevant jurisprudence will recognize that the whole of mankind does today constitute a community, in the sense of interdetermination and interdependence, and will extend its focus of inquiry to include this largest community, embracing the whole earth-space arena. It will observe that this largest earth-space community process operates through many different lesser communities—from local, through regional and national, to global—and it will seek to take into account the many different interpenetrating patterns of interaction by which these communities affect each other and the more comprehensive process. The important actors in community process, at all levels, will be seen to be individual human beings, but it will be noted that individuals identify and affiliate with, and make demands on behalf of, many different groups—including, not merely nation-states, but lesser territorial communities, international governmental organizations, political parties, pressure groups, tribes, families, and private associations of all kinds. The values which individuals demand through all their identifications, and which they accumulate and employ as bases of power to influence outcomes in particular interactions, will be observed to cover the whole range of human preference and will be conveniently categorized in such terms as power, wealth, enlightenment, respect, well-being, skill, rectitude, affection, and so on.

A relevant jurisprudence will identify as one component of the most comprehensive earth-space community process, as of all the lesser community processes, a process of *effective* power in the sense that decisions are in fact taken and enforced, by severe deprivations or high indulgences, which are inclusive in their effects. It will provide theories and techniques adequate for the full and realistic description of such an effective power process—in terms that include all important participants, perspectives, arenas, bases of power, strategies, and outcomes—and will distinguish between effective decisions which are taken by sheer naked power, or calculations of expediency, and those which are taken from perspectives of authority.

A relevant jurisprudence will identify, as an integral part of the larger community processes of effective power, a transnational process of *authoritative* decision in the sense of a continuous flow of decisions made from perspectives of authority—that is, made by the people who are expected to make them, in accordance with community expectations about how they should be made, in established structures of authority, and by authorized procedures. It will observe that this process of authoritative decision, like other transnational social processes, is maintained at many different community levels and in many different interpenetrating patterns of perspective and operation, in affecting and being affected by, the value processes in all the component communities, of the larger earth-space community. It will recognize both decisions inclusively taken by many participants and

decisions exclusively taken by particular participants, but it will not regard inclusive and exclusive decisions as dichotomous absolutes: it will rather seek to examine a continuum in degrees of shared participation in the making of decisions of widespread impact, with reference not only to the numbers of participants but to degrees of sharing in all detailed phases, including clarification of common interests, access to arenas, control over base values, management of strategies, and determination of outcomes.

B. Comprehensiveness in Conception of Law

In a relevant jurisprudence, international law will be explicitly conceived as the comprehensive process of authoritative decision, transcending the boundaries of particular territorial communities, which the peoples of the world establish and maintain for the purpose of clarifying and implementing their common interests.²¹ In the detailed application of this broad conception, certain ancillary emphases will be consistently observed:

1. A balanced emphasis upon perspectives and operations.

Law will be characterized as including both perspectives and operations, without exaggerated emphasis either upon mere rules (summarizing ambiguously ascribed perspectives) or bare physical operations (what decision-makers do). A focus will be sought squarely upon *decision*, as including both perspectives (the subjectivities which attend choice) and operations (the choices actually made and enforced by threats of severe deprivations or promises of high indulgence). By this emphasis the formal, manifest content of the perspectives expressed in rules may be pierced for detailed examination of the choices in fact made; yet perspectives may still be realistically studied as among the factors importantly affecting choice. It will be observed that in a pluralistic community, such as that exhibited by the largest earth-space arena, legal rules are commonly created in sets of complementary opposites and that the quality of the public order a community achieves is determined by the aggregate flow of specific choices by which such complementary rules are related to specific instances.

2. Clarity in conception of both authority and control.

Law will be regarded not merely as decision, but as *authoritative* decision in which elements of both authority and control are combined. Authority will be sought, not in some mysterious or transemirical source of "obligation" or "validity," but rather, empirically,

21. Compare the conception of law ascribed to the late Secretary-General Hammarskjöld in Schachter, *Dag Hammarskjöld and the Relation of Law to Politics*, 56 AM. J. INT'L L. 1 (1962).

The role of international law in the clarification of common interest is the principal theme in R. HIGGINS, *CONFLICT OF INTERESTS: INTERNATIONAL LAW IN A DIVIDED WORLD* (1965).

in the perspectives, the genuine expectations, of the people who constitute a given community about the requirements for lawful decision in that community. Control will be conceived as participation in effective decision-making, in making the choices which are in fact put into effect in a consequential number of instances, and it will be observed to be affected by many different variables in community process. By these emphases, both authority and control can be subjected to systematic and disciplined inquiry by employment of all the techniques of modern science.

3. Recognition of both constitutive process and other public order decisions.

The process of authoritative decision in the largest earth-space community, as in its lesser component communities, will be observed to contain two interdependent, but distinguishable, types of decisions. The first type of decisions, those which establish and maintain the whole process, may be identified as the constitutive decisions. These are the decisions, most conveniently described in terms of the phase model presented earlier, which identify and characterize the different authoritative decision-makers, specify and clarify basic community policies, establish appropriate structures of authority, allocate bases of power for sanctioning purposes, authorize procedures for the different kinds of decisions, and determine the various modalities by which the law is made and applied.²² The second type of decisions, those which shape and maintain the protected features of all the community's various value processes and which emerge in continuous flow from the constitutive process, may be categorized as "public order" decisions.²³ These are the decisions which determine how resources are allocated and developed, and wealth produced and

22. A brief summary of emerging trends in constitutive process is offered in Hammarskjöld, *The Development of a Constitutional Framework for International Cooperation*, 6 U.N. REV. 26-30 (June 1960). Cf. R. HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963) for an insightful, detailed exposition of certain pertinent features.

23. Two cautions may be required here.

The first is that the relation between constitutive decisions and public order decisions is one of interaction, not mutual exclusion. Just as the quality of constitutive process affects the quality of the public order decisions it makes, the continuous flow of public order decisions may create community expectations about constitutive process—about who is authorized to make and apply what policies with respect to whom.

The second caution is that the concept of "public order" is used both comprehensively and restrictively. Since authority builds upon authority, what we describe as constitutive process can be appropriately described as the protected features of a community's power processes. From this perspective we sometimes use "public order" to refer to all the features of community process which are protected by law, including constitutive process. The more restricted use of "public order" is to refer to the protected features of all value processes other than power. It is believed that the context will make clear in each instance which reference is intended.

distributed; how human rights are promoted and protected or deprived; how enlightenment is encouraged, or retarded; how health is fostered, or neglected; how rectitude and civic responsibility are nurtured, or blighted; and so on through the whole gamut of demanded values. By distinguishing these two different types of decisions, and seeking systematic coverage of both, inquiry may avoid destructive fixation upon the mere application of allegedly given rules and vacuous controversies about the differences between "political" and "legal" decisions and may appropriately extend its concern to all relevant features of the processes by which law is made and applied and their consequences for preferred public order.

Careful delimitation of the flow of decision in the world social process enables the scientific observer and the decision-taking participant to distinguish between the two interacting realms of social order, the *public order* and the *civic order*. The public order, as the analyst can make explicit, includes the relatively stable features of the power process (the constitutive patterns) and the protected and encouraged features of all value-institution processes other than power. Since public order is characterized by severely sanctioned commitments (in expectation and realization), civic order is the realm of milder sanction. And sanctions, it must be made evident, are value indulgences or deprivations available to influence conformance or non-conformance to prescription. Irrespective of the terminology employed, equivalent distinctions must be made articulate in a theory that is adequately fashioned to meet the issues pertinent to a comprehensive system of jurisprudence.

III. PERFORMANCE OF INTELLECTUAL TASKS

The intellectual tasks for whose performance provision must be made in a relevant jurisprudence of international law have already been indicated to extend, beyond the lawyer's traditional exercises in derivational logic and even the activities designated by more restrictive conceptions of "science," to a whole complex of interrelated activities, indispensable to effective policy invention and evaluation. It remains only to indicate briefly what is involved in each of the specified tasks.²⁴

1. The clarification of community policies.

The most relevant clarification will explicitly and deliberately seek the detailed specification of postulated goals, whatever the level of abstraction of their initial formulation, in terms which make clear empirical reference to preferred events in social process. To the

24. The criteria here briefly summarized are elaborated in more detail in Lasswell and McDougal, *supra* n.17; Lasswell and McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 FLA. L. REV. 486 (1967); McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOL. 337 (1960); and McDougal, *Jurisprudence for a Free Society*, 1 GEORGIA L. REV. 1 (1966).

degree that economy permits, every choice in alternatives recommended will be related to its larger community context and to all important community interests which may be affected. The most secure clarification will build upon the simultaneous and systematic performance of all the other relevant intellectual tasks and employ the knowledge so acquired about past trends in decision, past conditioning factors, future probabilities, and possible alternative solutions.

2. The description of past trends in decision.

Past trends in decision are most effectively described, not anecdotally in terms of the complementary theories of law, but systematically in terms of their approximations to clarified policies for constitutive process and public order. For the better comparison of decisions and their consequences both through time and across community boundaries, the events which precipitate claims to processes of authoritative decision, the factors which condition decision, and the consequences of decision for common interests will all be categorized "factually" in terms of value processes, including all the different detailed phases of such processes.

3. The analysis of factors affecting decision.

Comprehensive theories about the factors affecting decision will be formulated and tested by the appropriate procedures of contemporary science. Formulations will be inspired by the "maximization postulate" that all responses are, within the limits of capabilities, a function of net value expectation, and emphasis will be placed upon both predispositional and environmental variables. Inquiry will be made for the interplay of multiple factors, and overwhelming importance will not be ascribed to any one factor or category of factors, such as those relating to wealth or to rectitude perspectives. The significance of factors deriving from culture, class, interest, personality and previous exposure to crisis will be explicitly examined. Rigor will be sought in theoretical models, but not by an over-emphasis upon the importance of mathematical measurement or experiment.

4. The projection of future trends in decision.

Expectations about the future will be made as conscious, explicit, and realistic as possible. Developmental constructs, embodying varying alternative anticipations of the future, will be deliberately formulated and tested in the light of all available information. The simple linear or chronological extrapolations made in conventional legal theory will be subjected to the discipline of knowledge about conditioning factors and past changes in the composition of trends.

5. The invention and evaluation of policy alternatives.

Creativity will be encouraged by demand for the deliberate invention and assessment of new alternatives in policy, institutional structures and procedures. Every phase of decision process and every

facet of conditioning context will be examined for opportunities in innovation to influence decision toward greater conformity with clarified goal. Assessment of particular alternatives will be made in terms of gains or losses with respect to all values and will be disciplined by the knowledge acquired of trends, conditioning factors, and future probabilities.

IV. EXPLICIT POSTULATION OF BASIC PUBLIC ORDER GOALS

The explicit postulation of basic public order goals is important because, as already emphasized, the scholarly observer is inextricably a part of community process and the enlightenment (or obscurantism) he achieves must have inescapable effects upon such process. Just as there can be no neutral or autonomous theories of law, in the sense of rules devoid of policy content, so also there can be no indifferent theories about law, in the sense of knowledge or ignorance without policy consequences. In such a context, it is the opportunity and obligation of specialized intellectuals, maintained by community resources, not merely to relate law to some kind of policy, but rather, and further, to clarify and promote the policies best designed to serve the particular kind of public order they cherish. A relevant jurisprudence will recognize that there are today rival systems of public order aspiring toward completion on a global scale and will explicitly compare these rival systems in terms of their consequences for preferred values.²⁵ For every scholarly observer, the insistent question must be: What basic policy goals is he, as a responsible citizen of the larger community of mankind and of various component communities, willing to recommend to other similarly responsible citizens as the primary postulates of world public order?

The comprehensive set of goal values which, because of many heritages, the present writers recommend for clarification and implementation are, as already suggested, those which are today commonly characterized as the basic values of human dignity, or of a free society. These are the values bequeathed to us by all the great democratic movements of mankind and being ever more insistently expressed in the rising common demands and expectations of peoples everywhere. As demanded in the United Nations Charter, the Universal Declaration of Human Rights, the proposed covenants on human rights, regional agreements and programs, national constitutions, political party platforms, and other official and unofficial pronouncements, these values are of course formulated at many different levels of abstraction and in many different cultural and institutional modalities. The basic thrust of all formulations is, however, toward the greatest production and widest possible distribution of all important values, and the appropriate task for both scholarly observers and

25. McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 52 AM. J. INT'L L. 1 (1959) reprinted in MCDUGAL, STUDIES IN WORLD PUBLIC ORDER 3 (1960).

authoritative decision-makers, who accept and seek to implement these rising common demands, is that of effectively performing all the various intellectual tasks outlined above for the better relation of broad general preferences for shared power, shared respect, shared enlightenment, and so on to all the specific choices which must be made in different specific contexts in the prescription and application of an international law of human dignity.

The basic goal values postulated for world public order cannot of course be representative only of the exclusive, parochial values of some particular segment of the larger community, but they can admit a very great diversity in the institutional practices by which they are sought and secured. In different particular communities and cultures very different institutional practices may contribute equally to overriding goals for the increased production and sharing of values. When overriding goals are accepted, experiment and creativity may be encouraged by the honoring of a wide range of functional equivalents in the institutional practices by which values are sought.

The postulation and clarification of public order goals is emphasized in contradistinction to their derivation. Infinitely regressive logical derivations from premises of transempirical or highly ambiguous inference contribute little to the detailed specification of values, in the sense of demanded relations between human beings, which is required for rational decision. Peoples subscribing to very different styles in derivation have long demonstrated that they can cooperate for promotion of the values of human dignity, irrespective of the faiths or creeds which they employ for justification. Expressions of preference among different derivations can only divide potential co-workers, without contributing to creativity.

TRENDS IN THEORIES ABOUT INTERNATIONAL LAW

In brief survey of the vast legacy of past theories about international law for assessing their potential contributions to a relevant configurative jurisprudence, we cannot of course present every writer who has produced accessible doctrine about international law or even examine in detail all features of the recommendations of the principal groupings of writers. The most to which we can aspire is to appraise, against the backdrop of the criteria suggested above, some of the more important recurring emphases in theory which continue to have impacts, negative as well as positive, upon emerging scholarship and decision. It will be convenient to identify six complexes of jurisprudential notions which have appeared, at different times and under different conditions, in most cultures of the world and are evident in current writings. They are: the non-law frame, the transempirical and metaphysical naturalistic frame, the historical frame, the analytical frame, the sociologicistic frame, and the limited-factor frame.

Few writers can be said to fit neatly into any one exclusive frame of reference. Metaphysical naturalists such as the Stoics, for exam-

ple, share a great many assumptions and methods with the leading historicalist, Savigny, who was a severe critic of naturalism. Sir Henry Maine, on the other hand, viewed himself as an historicalist; yet in the actual execution of his studies, he was a sociologist and at times a rather sophisticated contextualist. Professor Stone's sociological jurisprudence, in turn, exhibits many of the assumptions and features of 19th century historicalism. Professor Quincy Wright's legal work has been executed largely in the analytical mode; his outstanding contributions to the study of international relations have, in contrast, drawn from diverse fields of specialized knowledge.²⁶ Despite such pervasive eclecticism in methods and presuppositions, the contributions of particular writers may still be most economically presented in terms of the dominant features of their jurisprudence.

The broad groupings of theorists with which we work can scarcely be made mutually exclusive. Most of the frames, for example, are limited-factoralistic, i.e. either doctrinally or practically they isolate certain factors as key variables and attempt to perform the requisite problem solving tasks on the basis of such variables alone. We do not, of course, deplore the intellectual operation of identifying key variables. We are concerned, however, with the significance of the rejected factors and the anterior contextual criteria, whether explicit or implicit, by which the selections were made. From our examination of such intellectual operations, a pattern of selection relatively unique to each of the general groupings will, we believe, emerge.

While trend studies of jurisprudential theory reveal certain lines of development, the impact of jurisprudential theory has not been successively evolutionary, but cumulative. It is a characteristic syndrome of perspectives of authority that statements uttered in a certain form acquire a self-sustaining mystique and a certain immunity to discreditation. Accordingly, the survey which follows is not an exercise in historiography, but rather an examination of sets of ideas or frames which, though often of ancient vintage, are currently held, at differing levels of consciousness and with varying diffusion, and which exercise decisive influence on views and actions relevant to international law.²⁷

I. THE "NON-LAW" FRAME

A recurring characterization of international law is that it is no

26. Contrast, for example, Q. WRIGHT, *THE STUDY OF INTERNATIONAL RELATIONS* (1955) with Q. WRIGHT, *CONTEMPORARY INTERNATIONAL LAW: A BALANCE SHEET* (1955) and Wright, *The Strengthening of International Law*, 98 *Rec. des Cours* (Neth.) 5 (1959).

27. For some of the observations and citations which follow, the authors are indebted to preliminary studies by Mr. Martin Rogoff, Research Assistant in the Yale Law School during 1966-67. The authors have also had access to more general jurisprudential studies by Professor William L. Morison and Mr. Luis Shchuschinski. Helpful papers were written by Joseph G. Cook, Nicholas Freud and Nina Zagat.

system of law, at all. Where this proposition has been given in form and detail susceptible to examination, it often becomes apparent that its proponents operate on limited *a priori* notions. One conception assumes an exclusive structure in which law "inheres": there must be a "sovereign" from whom law emanates and compulsory courts which apply said sovereign's "will."²⁸ In the absence of these structures and without regard to shared expectations and demands and the presence and operation of a variety of other modalities of decision-making, from tacit accommodation through highly organized religio-ritualistic processes, even the most stable patterns of interaction, claim and decision do not qualify as law.²⁹

Another conception frees itself from reliance upon structures, insisting, instead, that law can come into being only where interacting individuals share certain definite perspectives: family membership, extended kinship, or a common territorial base.³⁰ Since shared perspectives are absent in the global arena, this position holds, there is and can be no international law.³¹ Even assuming that the aforementioned perspectives are completely absent in transnational interaction, the sociological assumptions presented are obviously drawn from extremely limited historical experience and causal links are over-simplified. Inter-identification and sustained interaction may

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28. The most influential presentation of this view is, of course, Austin's: see J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 156 (Hart Ed. 1954) and see *infra* at 247. Definitions with comparable jurisprudential consequences are found in Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897); J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 117 (2d ed. 1921); SALMOND ON JURISPRUDENCE 41 (11th ed. Williams ed. 1957). T. HOLLAND, *THE ELEMENTS OF JURISPRUDENCE* 43, 133 (13th ed. 1924).
29. It is significant that Austin's formulation was not only unable to account for the phenomenon of international law; it could not account in any satisfactory manner for *municipal* customary law or "case law" and was early criticized on this ground. For a contemporary critique, exhibiting only a limited departure from Austin's assumptions, see H. HART, *THE CONCEPT OF LAW* 1-70 (1961).
30. F. SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* 16-17. A recent variation of this view is found in the heated debates over the possibility of a shared international law between different ideological or public order systems: communist and non-communist, western Christian and non-western Christian, imperialist and peace-loving and so on. See generally E. MCWHINNEY, *PEACEFUL COEXISTENCE AND SOVIET-WESTERN INTERNATIONAL LAW* (1964); Lipson, *Peaceful Coexistence*, 29 LAW & CONTEMP. PROB. 871 (1964); J. SYATAUW, *SOME NEWLY ESTABLISHED ASIAN STATES AND THE DEVELOPMENT OF INTERNATIONAL LAW* (1961); Chacko, *India's Contribution to the Field of International Law Concepts*, Anand, *Attitude of the Asian-African States Toward Certain Problems of International Law*, 15 INT'L & COMP. L.Q. 55 (1966). See also B. ROLING, *INTERNATIONAL LAW IN AN EXPANDED WORLD* (1960).
31. Ehrlich's application of these assumptions resulted in an interesting construction. Ehrlich posited that law was an outcome of fairly stable association; since the international community which he found was extremely limited, international law was confined to the claim of "life, liberty and property." E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 79-82 (Moll. trans. 1936).

have reciprocal impact upon each other, with the latter affecting the former; actual trend projections of global interaction clearly indicate the potential for increased shared identifications. Historically, terms such as kinship or nationality have often been accorded *post hoc* as a means of legitimizing interaction with "outsiders" yet maintaining the integrity of a previous authority system.

The non-law view is not restricted to the cynical or hyperrealistic politician-diplomat. It appears quite surprisingly in the works of a number of eminent international jurists though it is usually presented in the deceptive form of the "law of non-law." Following Carr,³² such writers as deVisscher,³³ Aron,³⁴ Schwarzenberger,³⁵ and Friedmann³⁶ have presented "split-level" theories of international law, the most minimum level of which is a system of non-law. Other writers have suggested that a system of non-law comes into operation in crisis: *inter arma silent leges*.³⁷ A related view seems to concede the operation of international law, but restricts its role to "feminizing" where possible international power relations.³⁸

In jurisprudential systems, which tend, in the aggregate, to accept some form of international law, non-law characterizations appear to assert themselves with a vigor proportionate to the decrease of inclinations for interidentification, whether because of endogamous ethnic notions, ideological divisions, perceived threats to group security or integrity and so on. Thus, Chinese,³⁹ Hindu,⁴⁰ Islamic,⁴¹

32. E. CARR, *THE TWENTY YEARS' CRISIS 1919-1939* (2d ed. 1946).

33. C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* (Corbett trans. 1957).

34. R. ARON, *PEACE AND WAR: A THEORY OF INTERNATIONAL RELATIONS* (1966).

35. G. SCHWARZENBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* (1962).

36. W. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW* (1964).

37. Cicero, *pro Milone*.

38. G. KENNAN, *AMERICAN DIPLOMACY 1900-1950* at 50 (1952, Mentor ed.).

39. See generally MARTIN, *TRACES OF INTERNATIONAL LAW IN ANCIENT CHINA* 71-78 (1911); Shao-chuan Leng, *Chinese Law*, in A. LARSON & C. JENKS, *SOVEREIGNTY WITHIN THE LAW* 242-46 (1965). For an early example, see WEI YANG, *THE BOOK OF LORD SHANG* (Duyvendak translation, 1928). For some consideration of the argument that the current xenophobia of China is as much a product of its cultural traditions as of its fundamental Marxism-Leninism, see Mancall, *The Persistence of Tradition in Chinese Foreign Policy* in *ANNALS OF THE AMERICAN ACADEMY* 15-26 (1963). For a synoptic survey of contemporary communist Chinese views on international law, see Chiu, *Communist China's Attitude Toward International Law*, 60 *AM. J. INT'L L.* 245 (1966).

40. KAUTILYA'S *ARTHASASTRA* 333 (Shamasastri tr. 1915) and see generally D. BROWN, *THE WHITE UMBRELLA, INDIAN POLITICAL THOUGHT FROM MANU TO GHANDI* 15ff. (1958). Cf. Nawaz, *The Law of Nations in Ancient India* 6 *INDIAN Y.B. INT'L AFF.* 172 (1957).

41. See generally M. KHADDURI, *THE LAW OF WAR AND PEACE IN ISLAM* (1940). The Koranic view of perpetual *jihad* against the *dar al-cher*—the non-Moslem world—was mitigated by a number of factors. Jews and Christians were accorded a preferred status because they shared, with Moslems, a veneration for the Bible. Also Islam's rigid doctrine of *pacta sunt servanda* was applied to agreements with non-Moslems. However, the initial validity of such a treaty depended upon its determinate duration.

Hebrew,⁴² western Christian⁴³ and communist cultures,⁴⁴ have, at times, questioned the existence or possibility of a system of law common to outsiders or adversaries.⁴⁵ An inclination to a non-law view seems to spring as well from assumptions of the inherent evil of man, deriving from cultural or theological sources or from idiosyncratic personality factors or conclusions from personal experience. It is significant that the embittered Machiavelli counseled the ideal prince to disregard pledges when convenient because men "are naturally bad and will not observe their faith toward you."⁴⁶ Confucius said that "There is deceit and cunning and from these wars arise." For various reasons, Kautilya, the fourth century legists of China, Hobbes, Bodin, Hume and such contemporary authors as Niebuhr and Morgenthau share a conception of man as essentially evil and, hence, a skepticism about the possibility of effective law.⁴⁷

The concise answer to the non-law school is social reality itself. We need only refer to the global interaction and interdependence, briefly described above, to observe that stable relationships, shared demands and expectations about appropriate behavior in given circumstances, and a wide range of patterns of decision taken in accordance with expectations of authority are present in abundance and vitality in the world arena.⁴⁸ The distorted picture acquired and projected by

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42. See 1 S. BARON, *SOCIAL AND RELIGIOUS HISTORY OF THE JEWS* 120-21, 193, 2 *id.* 110-11, 120 (1952). A useful survey of changing perspectives toward non-group members in regard to exogamous marriage—a significant indicator of perspectives—is found in L. EPSTEIN, *MARRIAGE LAWS IN THE BIBLE AND THE TALMUD* 145ff. (1942).
43. It is sobering to the recurrent western proprietary feeling toward civilization that at a time when Islam could conceive of a pattern of international law, the majority of Christian scholastics were still doubting it. Vitoria, for example, who could conceive of a *jus inter gentes*, which was still heavily loaded in favor of western Christendom, was a minority voice in his own time.
44. For a concise summary of Russian doctrinal treatment, see H. KELSEN, *THE COMMUNIST THEORY OF LAW* (1955); R. SCHLESINGER, *SOVIET LEGAL THEORY* 273-89 (1945).
45. The complex psychological mechanisms through which members of other groups are relegated to a status of flora and fauna, by use, for example, of a term such as "native," is felicitously described in A. TOYNBEE, *A STUDY OF HISTORY* 152-53 (1934). "When we Westerners call people 'Natives' we implicitly take the cultural colour out of our perceptions of them. We see them as trees walking, or as wild animals infesting the country in which we happen to come across them. In fact, we see them as part of the local flora and fauna, and not as men of like passions with ourselves; and, seeing them thus as something infrahuman, we feel entitled to treat them as though they did not possess ordinary human rights." It is significant that Toynbee could cite historical examples of comparable attitudes held by non-western peoples towards westerners.
46. N. MACHIAVELLI, *THE PRINCE* 75 (Craig ed. 1944).
47. See generally A. WALTZ, *MAN, THE STATE AND WAR* 16ff. (1959) for presentation and analysis of such presuppositions and their effects upon images of international relations.
48. It is significant that Bentham, writing almost 200 years ago should taunt the blinders imposed by an unrealistic theory of international law. Criti-

the non-law school springs, then, from a number of deficiencies in inquiry. Observational standpoints have not been clarified with care. Almost always, the perspective taken has been parochial and the absence of comprehensiveness in observation has prevented perception of the range of stable social interactions criss-crossing the global arena. Untested assumptions about the immutable nature of man have engendered distortions of focus. Where the standpoint taken has allowed for more comprehensive inquiry, an inadequate map of social process has frustrated observation. Without a model or frame for describing social process and the variety of interlocking community processes of which the world community is composed, a highly distorted picture has been presented. One of the surest indicators of the inadequacy of a jurisprudential frame is its formalization as official but inactive myth, while actual resort for problem-solving tasks is made to an unenunciated set of postulates and procedures. It is thus significant that even in the pre-Christian period, the non-law view expressed in Kautilya's *Artha Shastra*, which served as the official jurisprudence for Indian elites, was superseded in practice by a set of more positive principles of content and procedure to regulate the flourishing and mutually fruitful interactions between India and the Greek empire.⁴⁹

In this frame, conceptions of processes of authoritative decision have been marked, in high degree, by a parochial narrowness which has been unable to rise above the writer's group or national experience. The notion that a sovereign, and a number of highly articulated decision-institutions between which competences are clearly divided, are indispensable prerequisites or indicators of "law" is refuted decisively by an enormous mass of anthropological and sociological material demonstrating that authoritative decision can take place in the most unorganized of decision processes.⁵⁰ Even in its native context,

cizing Blackstone, he wrote: "States, there are such things as states in the world: we see it. Nay, says he [Blackstone], but have a little patience and I will prove it to you: ay and commonwealths and nations in the bargain. His argument is that it is *impossible* the world should be all in one state. Improbable enough indeed I should suppose it, but I pretend not to understand like him what is impossible, nor should I much want to know that one thing (if it be so) is impossible, for the sake of knowing that another thing is, which I see with my own eyes." J. BENTHAM, A COMMENT ON THE COMMENTARIES 57 (1928). See also L. OPPENHEIM, THE FUTURE OF INTERNATIONAL LAW 9-10 (1921); Brierly, *supra* note 2; Henkin, *International Law and the Behavior of Nations*, 114 *Rec. des Cours (Neth.)* 171 (1965); M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW (1961).

49. A. BOZEMAN, *supra* note 3, at 125.

50. For brief but pertinent consideration, see Barkun, *Bringing the Insights of Behavioral Science to International Rules*, 18 *W. RES. L. REV.* 1639, 1645 (1967). See B. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 23, 31ff. (1926); Lenhoff, *Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law, & International Law*, 15 *U. PITT. L. REV.* 44 (1953).

A particularly clear statement is found in H. KAHN & A. WIENER, THE

the western organic frame constitutes formula rather than comprehensive description. It is as incapable of describing the plenum of authoritative decision within any western community as it is of identifying and describing processes of authoritative decision crossing state boundaries.

In this frame of reference a balanced emphasis upon perspectives and operations is not achieved. At one extreme, the so-called "power school" focuses solely upon operations without regard to perspectives of authority. At another extreme, a linguistic philosopher such as H.L.A. Hart confines his inquiry largely to perspectives. Without indicating what indices he employs to ascertain the existence of shared "rules of recognition," he inclines to the view that in the international arena there are none; hence, he has the greatest difficulty in accounting for international law.⁵¹ It should be clear that no accurate picture of transnational interaction can be gained without balancing attention upon both perspectives and operations. The utility of behavior as an indication of "law" is drained if it is not linked to the subjectivities accompanying and engendered by that behavior. The search for perspectives without appreciating their integrality with operations, and the indices provided by the latter, is a similarly futile exercise.

Because the orientation of the non-law school has been directed to a limited number of historically unique organs with highly specific characteristics, little attention has been given to the relation between

YEAR 2000 at 363 (1967): "The view that the international system is one of anarchy stems from the fact that those centralized legislative or judicial organs that exist in the international system have very limited power, and that most nations remain, in some sense, judge, prosecutor, and jury of their causes. The picture of international politics, while having important truth, leaves out much that is equally important. It ignores entirely the self-regulative mechanisms and rules of behavior that can arise in and be maintained in informal organizations. The constraints that maintain regulative behavior in such informal systems may stem from the immediate interests of the participants, when confronted with the countervailing interests and actions of the other actors in the system, and from the indirect interest in maintaining the system insofar as it is a system consonant with the needs and interests of the participants. Most of the nineteenth century was characterized by limited wars and reasonable—as well as reasonably observed—rules of international law. Violations of the law are always more prominent in the eyes of the beholder than the observances. This is particularly true in international political systems and largely accounts for the belief that the system is anarchic. But the evidence shows that the system worked more often than it failed and even that many of the so-called violations of international law were in fact more like unilateral legislative enactments that were acquiesced in by other states because they satisfied the needs of the members of the system under changed conditions. The loose bipolar system also evolved recognized standards of behavior including some that were general and that came to be explicitly stated and including others that were relatively particular and remained tacit, for example, the United States' decision not to bomb Manchuria during the Korean War and perhaps the reciprocal decision of the Chinese not to bomb our staging areas at Pusan and in Japan."

51. H. HART, *THE CONCEPT OF LAW* 95, 208 (1961).

authority and control, or to the presence and intensity of shared expectations about both these components of decision among relevant participants. Conceptions of authority have, thus, been severed from social process. Generally, authority, according to the non-law view, is an emanation of a sovereign (which, is frequently a fictionalized concept) and it is a component of rules, expressive of that sovereign's will. Since there is no necessary correlation between such rules and the actual perspectives of authority shared by participants in social process, divergences between perspectives and operations have been over-emphasized. Hence by a set of defective references, which preclude it from finding either authority or control, the non-law school proves its hypothesis of non-law.

In regard to the performance of the intellectual tasks incumbent upon a configurative jurisprudence, we may note the characteristic non-law approach to the tasks of clarifying goals and inventing strategies. An assumption of non-law, it should be emphasized, is no necessary bar to constructive recommendations about the amelioration of international law. Yet the contributions of the non-law school have, as a whole, been meager. A primary cause has been the failure to postulate a comprehensive set of goals. Because of an orientation toward the organic structures developed in a single culture, objectives have most frequently been framed in terms of the creation of like structures on the international plane. The most recurrent theme of non-law is that an international sovereign must be created.⁵² Non-lawyers, like various others, seem unable to grasp that authoritative decisions may be made in many types of organized or unorganized decision process, and that criteria of authoritativeness must, and ultimately do, come from the aggregate of individuals and not mechanically from "law" itself.

Inadequacy in the clarification of goals has led to an extremely narrow range in strategic inventiveness. An enormous quantity of effort is dedicated to verbal constitution building, with little consideration of the acceptability of such proposals to effective elites. Quite often, further, the non-law perspective offers little explicit strategy for change. Thus, writers of the split-level wing of this school commonly submit no specific recommendations for the amelioration of the most exigent crises of our times. In a number of works, Hegelian mysticism is substituted for inventiveness: by an unaccountable dynamic of its own, quantitative increases on the level of cooperation or coordination will reach a "nodal point" and magically transform the level of coexistence or reciprocity.⁵³ In the most immediate sense,

52. W. FRIEDMANN, *supra* note 36, at 119, 153. A. LEVONTIN, *THE MYTH OF INTERNATIONAL SECURITY* 281-283 (1957). The outstanding example of world constitution building is found in G. CLARK & L. SOHN, *WORLD PEACE THROUGH WORLD LAW: TWO ALTERNATIVE PLANS* (3rd ed. 1966).

53. The criticism is presented in detail in regard to Professor Wolfgang Friedmann's work in McDougal and Reisman, *The Changing Structure of International Law; Unchanging Theory for Inquiry*, 65 COLUM. L. REV. 810, 833 (1965).

the complete failure of the non-law frame to come to grips with the pressing problems of minimum order is one primary reason for rejecting its claim to make articulate a tenable jurisprudence. Whatever its deference to the "facts," its epiphenomenal assumptions concerning authoritative expectations have sterilized its contributions and, inadvertently perhaps, thrown such weight as it has been able to exercise behind the view that the deliberate strengthening of authority and control is an utterly fruitless enterprise.

Despite, however, the lopsided deference often paid to the control component of decision, and the resulting bias in favor of emphasizing the nakedness of power in the arena of the world politics, there have been some non-law theorists, notably in the modern and recent era, who have maintained an open and even inventive mind toward the "factual" parameters of decision. Hence they have often worked with, or supported, the efforts of historians and social scientists to ascertain the "facts of life" in relation to effective control in the diplomatic and military history of nation states. The encouragement of awareness of the relevance of these investigations to the past and future problems of jurisprudence has, of course, been largely vitiated—for improving the performance of the various indispensable intellectual tasks—by the elimination of authoritative expectations from among the significant variables worthy of research.

The writers who share a non-law frame of reference and who are willing to use, support and cooperate in the execution of studies—historical, explanatory, projective—have been of relevance to international jurisprudence to the degree that they have helped to undermine the isolation of the scholar or the practitioner from other disciplines professionally concerned with the factual context. They have, with the usual exceptions, shown their willingness to take seriously the multiple-methods that have been devised, particularly in recent years, by the burgeoning psychological and cultural sciences. However thin their investigations of authority may have been, the result has been to pave the way toward fact-oriented inquiries into the features of the world social and political process which the non-law perspective shuts out of its field of vision.

II. THE NATURAL LAW FRAME

The frame of reference commonly characterized as "natural law" has been the most continuous influence on international law. Though it suffered a short period of disrepute in the past century, its impact was felt even at the apex of legal positivism. Its history spans at least three millenia and its adherents have held positions as diverse, on the one hand, as insistence upon the divine origin of all law and, on the other, the call for the mere postulation of social goals outside of positive law.⁵⁴ Natural law is sometimes employed to char-

54. The latter position was presented preeminently by the late Professor Brierly, but it is, in no sense, a radically new doctrine for positivism. See,

acterize all Western legal thinking until the 17th century. Although there is a stylistic similarity and a definite intercommunicating trend, the generic characterization attempts to homogenize a remarkably diverse production: ". . . in its long history, Natural Law has, at different times, assumed and relinquished practically every and any philosophical standpoint."⁵⁵

The naturalist frame is not, it should be emphasized, a unique product of western culture. In the long and illustrious history of Indian theoretical jurisprudence, for example, *artha* was always counterpoised by *dharma* and even in periods in which the highly scientific but quite amoral principles of human manipulation so lucidly expressed by Kautilya in his *Arthashastra* comprised the vademecum of Indian political elites, the myth of the "Chakravartin," the just world monarch who rules by virtue of his moral excellence was a cultural force.⁵⁶ This symbol was carried over into Buddhism and had a short-lived but intense impact upon Indian international politics.⁵⁷ In pre-Christian China, policy advisers, whether Confucian, Taoist or Mohist, developed compelling naturalist doctrines which are outstanding in their rejection of war and their emphasis upon persuasion and good faith in inter-state relations.⁵⁸

The common feature of all naturalist work has not been a consensus about the identity of the source of supra-legal goals, but rather the insistence that positive law, by itself, provided an insufficient guide for decision. Beyond this common assumption, naturalist work has displayed a wide variety in the performance of the jurisprudential tasks. Perhaps the most striking variation is found in the response to the problem of the relation of natural law to actual deci-

generally, Koters, *Les Fondements du Droit des Gens* 182ff. in 4 BIBLIOTHECA VISSERIANA (1925) and W. SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* 165ff. (1954).

Few contemporary positivists *soi disant* would deny the general relevance of social goals and some are quite candid in conceding the influence such goals play in the legal process: see D. LLOYD, *THE IDEA OF LAW* 11-12 (1964). The challenge which positivism has failed to take up is the development of a conceptual frame which integrates the clarification, postulation and application of such goals into legal theory.

55. Chroust, *On the Nature of Natural Law*, in *INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES* 70, 82 (Sayre ed. 1947). Cf. D'ENTREVES, *NATURAL LAW* 14 (1951): "I think that legal and political philosophy are nothing else than natural law writ large."
56. H. ZIMMER, *PHILOSOPHIES OF INDIA* 127 (1951); Bozeman, *supra* note 3, at 124-25; Nawaz, *supra* note 40, at 9-10.
57. 1 *CAMBRIDGE HISTORY OF INDIA* 499. Nawaz, *supra* note 40, at 6-9; see also Nawaz, *Legal Aspects of Anglo-Moghul Relations*, 5 *INDIAN YB. INT'L AFF.* 70 (1956) who suggests that the Emperor Asoka did, in fact, represent a Chakravaotin. See also Anantanarayanan, *Natural Law Within the Framework of Hindu Jurisprudence*, 6 *INDIAN YB. INT'L L.* 212 (1957); Sastry, *Hinduism and International Law*, 117 *Rec. des Cours (Neth.)* 507 (1966).
58. A WALEY, *THREE WAYS OF THOUGHT IN ANCIENT CHINA* 95, 152, 174 (1940); Martin, *supra* note 39, at 71ff.

sion. At one extreme, naturalists have urged that the law of nature is peremptory and that the individual must follow its dictates even if they diverge from the allegedly authoritative pronouncements of a temporal authority.⁵⁹ Interestingly enough, this position seems to have been taken by secularists as often as by the established religious authorities. Indeed, Thoreau's metaphysical naturalism, which conditioned his theory of civil disobedience,⁶⁰ is currently a politically more significant doctrine than is any religious dogma. At the other extreme, naturalists have been content to compromise with effective temporal power and have conceded that in a case of divergency between "natural" and "positive" law, the latter is to be followed.⁶¹

The diversity of response to the problem of the relation between natural law and secular authoritative decision is obviously explained in part by the degree of identification of decision specialists or secular shamans of naturalism with an established order.⁶² The more significant point to be derived from the variety of response, however, is the innovative and democratizing potential which is latent in residual naturalism. Invocation of naturalist principles has served to justify authoritative emendation and innovation of inherited prescriptions, and it has often been exploited by a non-power elite as the basis for the development of a counter-ideology. Insofar as naturalism is metaphysical rather than divine or, if religious in tone, based upon a non-hierarchical conception of religion, the doctrine can be used by any highly articulate advocate in the justification of his preferences.

Observational Standpoint

The inclusivity of standpoint of a naturalist has been facilitated, to a degree, by the acceptance of a comprehensive natural order, derived

59. This position has generally been attributed to Pufendorf, although, as will be seen below, he used the term natural law in an idiosyncratic manner. See *infra* at 223. See also HAUTEFEUILLE, *DES DROITS ET DEVOIRS DES NATIONS NEUTRES EN TEMPS DE GUERRE MARITIME* (2nd ed. 1856) and Koters, *supra* note 54, at 182-83. See also CICERO, *ON THE COMMONWEALTH*, Book III, xxii.

60. H. THOREAU, *CIVIL DISOBEDIENCE* (1950).

61. A convenient means for avoiding this problem was devised in the distinction between natural and "neutral" principles. For Suarez, for example, the law was only peripherally concerned with the ordering of human relationships (*De legibus*, I, xii) 2 SELECTIONS FROM THREE WORKS OF SUAREZ 126-28 (*Classics of International Law Series No. 20*, Scott ed. 1944) hereinafter cited as SUAREZ (Carnegie ed.); hence a conflict between natural and positive law would not arise in most areas governed by law, conventionally understood. See, in this regard, F. POLLOCK, *ESSAYS IN THE LAW* 76 (1922).

62. Compare, for example, the static conception of natural authority developed by Hobbes and Bodin in order to justify a permanent monarchical system and the dynamic conception of authority as permanently inchoate in the people developed by Buchanan, Milton and ultimately Jefferson to justify a permanent right of review and revolution by the people against a monarch or other formally authoritative leader.

from the structural regularities of the physical world, the uniformities of the human psyche, or the fiat of an omnipotent deity. The cosmopolitanism of the stoic, or of the Buddhist, for example, is a function of his general world view, and is not perceived as an act of deliberate choice. The limitation of a naturalism that submerges the thinker in the assumptions of an unevaluated world view conventionally shared by others is apparent when the naturalist's model is restrictive of the community of mankind: the inclusiveness of his standpoint is automatically attenuated. Hence Christian and Moslem naturalists could reciprocally relegate their counterparts to a lower order, in this way disqualifying themselves from searching for, and overcoming the manifold difficulties in the path of, discovered common interests. The Renaissance European had the temerity to conceive of a natural order in which non-Europeans had no place; long before, the Chinese legists had taken it for granted that the natural order was identical with the empire. The scholars immersed in parochial images of nature were unable to detach themselves sufficiently to achieve explicit awareness of the opportunity latent in the distinction between parochial conventionalities and functionally inclusive standpoints. They allowed themselves to be insulated from the discovery of the pertinent standpoints.

Focus of Inquiry

Given the dependence of natural law theorists on maps of varying degree of reference to the world community as a whole, it is not surprising to find that the naturalists have, in the course of their long history, taken almost every conceivable focus on the field of international law. The traditional emphasis of greatest relevance to a configurative jurisprudence made articulate some of the challenges that confront the scholar or the decision maker who sees the relevance of the global context as a whole.

Although archeological and historical evidence indicate that conceptions of a community of mankind were held in a number of ancient civilizations,⁶³ the principal influence on modern international law comes from classical Attic culture. The conception of a global community, not of central concern in Platonic and Aristotilean teaching, was developed by the Sophists and later taken over by the Stoics.⁶⁴ The Stoics held a mechanistic view of the universe, perceiving it as a totality operating according to unchanging laws which could be ascertained through a process of reasoning. The unity of nature necessarily led to the unity of man; how-

63. For example, see Speiser, *Cuneiform Law and the History of Civilization*, 107 PROC. AM. PHILOSOPHICAL SOC. 536 (1963).

64. H. ROMMEN, *THE NATURAL LAW* (1947) ff. 29-30. It is, however, worth noting, as an indication of the spontaneity of the natural law frame, that naturalist thinking is equally evident in the Pre-socratics. See Chroust, *supra* note 55, at 80-81.

ever, the civic responsibilities owed by the individual to lesser communities were generally acknowledged. Thus, Aurelius could write that "My nature is rational and social; and my city and my country as far as I am Antoninus is Rome, but so far as I am a man, it is the world."⁶⁵ Through the Roman period, the *jus naturale* as well as the *jus gentium*, a body of policies closer to positivistic concepts of international law, continued to be considered as applicable to individuals.

Community conceptions were sharply changed with the advent of Christianity. A significant trend of early Christian thought was its anti-culturalism, one of whose implications was the denial of the significance of membership in any community other than the most inclusive.⁶⁶ A counter-trend, which can be traced to the sixth century doctrinalist Isidore of Seville, characterized natural law as operative directly on politically organized communities but not on individuals.⁶⁷ Isidore's work, incorporated in the Decretals of Gratian, had a decisive influence on mediaeval canon law and, after Vattel, it became the dominant view in nineteenth century positivism. In retrospect, its oversimplified notion of the relations between the individual and the different communities of which he is a member can only be seen as a set-back to the development of a viable international law.

A highly sophisticated conception of community processes appears in the work of Aquinas, though that scholar apparently did not apply his notions in his more detailed studies. Aquinas paraphrased Augustine's metaphor of four "circles" of "human society": the house, the city, the state and the world.⁶⁸ Aquinas' conception of the inclusive world community and the lesser communities was expressed in a metaphor more congenial to his own age: ". . . the community of a province includes the community of a city, and the community of a kingdom includes the community of the province, and the community of the whole world includes the community of a kingdom."⁶⁹ An Aristotilean notion of perfection as social self-sufficiency, which obviously could not be attained, rendered the various communities irrevocably interdependent.⁷⁰

The development of the nation-state in Europe impelled later naturalists to give greater emphasis to the national community and proportionately less attention to both transnational social processes and lesser community processes. Vitoria and Suarez retained in diluted form the doctrine of a natural law operative on all individuals,

65. Meditations, Book VII at 9.

66. J. KLAUSNER, *JESUS OF NAZARETH* (1925); but see R. NIEBUHR, *CHRIST AND CULTURE* (1956).

67. Kusters, *supra* note 54, at 11-12. On the fantastic influence which Isidore exerted, see E. GILSON, *HISTORY OF CHRISTIAN PHILOSOPHY IN THE MIDDLE AGES* 107-08 (1955).

68. *City of God*, Book XIX, Chapter 7.

69. *COMMENTARY OF THE SENTENCES* IV, d. xxiv, q. III, a. 2, gla. 3.

70. R. HUTCHINS, *ST. THOMAS AND THE WORLD STATE* 8 (1949).

but shifted predominant emphasis to a natural law governing the relations of states.⁷¹ While Suarez continued to emphasize interdependence,⁷² both fathers of the Spanish school repudiated the Thomist doctrine of integral global perfection, by characterizing the state alone as the "perfect" community.⁷³ Vitoria, anticipating nineteenth century conceptions, went so far as to hold that:

A perfect State or community is one which is complete in itself, that is, which is not part of another community, but has its own laws and its own council and its own magistrates.⁷⁴

Naturalism, originally springing from the Stoic's conception of an integral world process, had begun to deny its basic premise.

Grotius, who brought natural law back to its pre-Christian character of a law imputed to reason rather than to God, attempted unsuccessfully to resolve the dichotomy introduced by the Spanish scholastics. In order to maintain a universal law applying to individuals as well as to states, he introduced a developmental model, according to which a world community of undifferentiated, rational human beings divided itself into smaller and smaller social groups for the purpose of expediting social interaction. The component smaller communities or states are, according to Grotius, necessarily interdependent for "there is no state so powerful that it may not at some time need the help of others outside itself, either for purposes of trade, or even to ward off the forces of many foreign nations united against it."⁷⁵ Despite the resourcefulness and elegance of this theory, the process ended, for Grotius, once states had been formed. His detailed studies are concerned largely with inter-state relations.

The counter trend, emphasizing the application of natural law to territorial communities rather than to individuals, which began with Isidore of Seville and was only imperfectly avoided by Grotius, emerges, in the writings of Pufendorf, as the predominant characteristic of neo-naturalism. According to Pufendorf and a vast array of scholars in the next three centuries, the law of nations derived solely from the law of nature, and consisted of no more than the natural law governing the interactions of independent states subordinate to no temporal authority and existing in a state of nature.⁷⁶ The verbalisms by which Pufendorf sought to exorcise the anarchism of this view are as tedious as irrelevant to a viable

71. See, generally, J. FIGGIS, *STUDIES OF POLITICAL THOUGHT FROM GERSON TO GROTIUS: 1414-1625*, 216 (1923).

72. *De Legibus*, I, vi, 18, SUAREZ (Carnegie ed.) 85; II, xix, 9, *id.* at 349.

73. III, iv, 2. *id.* at 384; F. DE VITORIA, *DE INDIS ET DE IURE BELLII REFLECTIONES* 169 (Scott ed. 1913) hereinafter, VITORIA (Carnegie ed.).

74. *DE JURE BELLII* 7.

75. GROTIUS, *DE JURE BELLII AC PACIS*, Prolegomena, 22 (1925).

76. PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO*, Bk. I, ch. 6; Bk. II, ch. 3 in PUFENDORF, 88, 186, 206 (1934); hereinafter PUFENDORF (Carnegie ed.). For general discussion, see Schiffer, *supra* note 54, at 54-55.

contemporary conception. The logical implications of this position in regard to the substantive principles of natural law were subsequently made clear in the work of Vattel.⁷⁷ In lieu of an exclusively normative system, natural law now presumes to be a description of how man actually behaves.

Some trends of naturalist thought have emphasized social process and a variety of community processes. Though a number of naturalist writers did sense the interrelations between a variety of community processes, the conception remained for the most part on the metaphorical plane. A clear conception of interpenetrating processes and a descriptive terminology of adequate detail were not developed. In later naturalist work, particularly after Grotius, conceptions of social and community process become matters of formula rather than integral elements of investigative frameworks. Social and community process, though regularly invoked by naturalists, rarely acquire a detailed content or an operational significance.

One factor contributing to these fragmentary notions of social and community process was the extremely static conception of decision with which naturalists operated. In general, the classical writers were either unfamiliar or uncomfortable with notions of process. With the major exceptions of Herakleitos and Democritus, the implicit view of man in his social and physical environments was static rather than dynamic. In line with these notions, natural law for the early Stoics frequently referred less to a normative system of social regulation than to stable structural features of the physical environment and psychogenic factors present in all human beings. The role of innovative law-making was a secondary or derivative function, primary attention being given to ascertaining these stable features. Hence, little attention was given to processes of decision and no viable conceptions were elaborated. "True law," as Cicero put it, ". . . is unchangeable and eternal."

By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it is wholly impossible.⁷⁸

Suarez's view, which was highly representative, was that what legislators decide is law only insofar as it accords with the natural law and judges have absolutely no power to make law.⁷⁹ In a conception such as this, mundane processes of decision faded into irrelevance, compared with the primary task of deriving the content of the *vera lex*.

77. See VATTEL, *THE LAW OF NATIONS OR THE PRINCIPLES OF NATURAL LAW*, *Introduction* 3, 7, (1916): hereinafter, VATTEL (Carnegie ed.).

78. *ON THE COMMONWEALTH*, Book III, XXII.

79. *DE LEGIBUS*, I, ix, 4, SUAREZ (Carnegie ed.) 107, 113.

It would, thus, be difficult to find a naturalist writer capable of sustaining a balance emphasis upon perspectives and operations. For the early naturalists, consideration of human perspectives was restricted to examination of the nature of "rationality" assumed to be common to all people, but the nature of rationality was not tested by equal consideration of behavior. Beyond this, the study of perspectives comprised the exegesis of verbalisms alleged to express the content of natural law. Thus, for Suarez, law was a measure of moral acts and rectitude⁸⁰ and for Vitoria, it was the confirmation of perspectives which did not contravene derived transempirical perspectives.⁸¹ Grotius defined law as a "rule of moral actions imposing obligations to what is right."⁸² Pufendorf, moving away from transempirical standards, defined temporal law as decrees by a political superior,⁸³ without considering as relevant the extent to which actual behavior conformed to the decrees. Vattel shifted over to a predominant emphasis upon operations, defining law as what states do.⁸⁴

The predominant historical emphasis of naturalism has been upon authority, whether it was derived from a divine source or from the nature of things. Whatever its source, authority is defined, for the naturalist as a transempirical factor, divine or metaphysical, legitimizing temporal activities insofar as they are in conformity with it. Until Grotius, there is generally no appreciation of authority as a product of social interaction and as a manipulative technique in effective decision. When, however, naturalism served as myth for socio-political structures associated with a divinity, the ruler who exercised power by the grace of God frequently became the channel through which natural law was made known.⁸⁵ In such situations, the myth was politically integrative rather than anarchic.

A number of distinct trends in regard to conceptions of authority are found. On the one hand, Suarez, by an intricate intellectual stance, strikingly similar to Austin's theory of structural criteria,⁸⁰ posits inchoate authority in the aggregate of mankind, yet gives it distinct form only in each state. But since the entire world does not constitute one kingdom or state, a global law does not exist: ". . . a human legislative power of universal character and worldwide extent does not exist and has never existed, nor is it morally

80. *Ibid.*

81. DE INDIS, II, 2. VITORIA (Carnegie ed.) 134-35.

82. GROTIUS, DE JURE BELLI AC PACIS, I, i, 9 (1925). *Id.* at 38; *see also id.*, Prolegomena at 39, 40; *id.* at 23-24.

83. PUFENDORF (Carnegie ed.) II, iii; *id.* at I, vi, 4; *id.* at II, iii, 23.

84. VATTEL (Carnegie ed.) 4, 7, 9.

85. Consider, in this regard, the facility with which apologist naturalists such as Hobbes and Bodin could fuse natural law and the monarchical apex of their preferred state system, either by secular analogy or divine invocation. One might cite as a highly instructive example of this phenomenon, the political-religious myth of Czarist Russia.

86. *See infra* at 247 *et seq.*

possible, it should have done so." ⁸⁷ Vitoria concludes that "society at large" is authorized to counter acts which are dangerous to it, but his argument is open to criticism on a number of logical grounds.⁸⁸ Common to both Vitoria and Suarez and, indeed, to most of their predecessors, is a notion of authority as a discrete entity which is given by some external agent.

A considerably more sophisticated and secularized notion of authority is developed in Grotius' work. In language strikingly similar to Duguit and anticipating many of the postulates of group psychology, Grotius reasons that man has "an impelling desire for society, that is, for the social life . . . peaceful and organized according to the measure of his intelligence, with those who are of his own kind."⁸⁹ Social order thus arises and the need to maintain it "is the source of law properly so called."⁹⁰ Unfortunately, Grotius did not proceed to identify the components of authority and control implicit in his conception and did not use them subsequently in the performance of relevant juristic tasks.

In conception of authority and control as in so many other areas, Grotius signals a turning point. Previously, a recurring deformation in naturalist thought had been the predominant emphasis upon authority. After Grotius, writers who considered themselves naturalists tended in the opposite direction. Pufendorf and Vattel emphasized the critical element of effective power, yet were ultimately unable to link it with authority in a way to derive a workable concept of lawful decision.⁹¹

In terms of current application, the naturalist view provides little relevant conception of a link between authoritative decision and social and community processes. The Stoic notion of law, insofar as one can consider it as such, was indeed grounded in social process. But later illuminations of natural law raised it to a trans-empirical level, and distinguished it from a *jus gentium* which actually regulated human relations. With Pufendorf and Vattel, this trend culminates in a final severance of natural law from social process. Indeed, a large segment of naturalism before Grotius was quite unconcerned with relating law to social process. For Suarez, to take one example, law was concerned not so much with ordering the relationships of this world as with securing the salvation of

87. DE LEGIBUS, III, ii, e; II, ii, 5; III, iv, 7.

88. GROTIUS, *supra*, note 75, at 19.

89. *Id.* § 6 at 11.

90. *See id.* at 12. *See also* Prolegomena, § 19, *id.* at 16.

91. Thus, Pufendorf: ". . . in the final analysis, obligations get their stability from force, and from the consideration that the one who desires to procure their observance has so much power, either inherent in him or given him by others, that he can bring some grave evil upon the disobedient." PUFENDORF (Carnegie ed.) I, vi, 12. To Pufendorf's credit, his notion of sanctions is not restricted to the capacity to impose deprivations; he explicitly includes the capacity to accord indulgences as an effective incident of legal power. *Ibid.*

men's souls "to the supernatural end of the future life."⁹² A similar severance from social reality in the post-Grotian period was achieved by the internal mechanization of law. Thus, Pufendorf, in a lesser known work, treated international law in the form of a geometric proof.⁹³ On occasion even Grotius himself had gone further, stating that "just as mathematicians treat their figures as abstracted from bodies, so in treating law I have withdrawn my mind from every particular fact."

. . . if anyone thinks that I have had in view any controversies of our own times, either those that have arisen or those which can be foreseen as likely to arise, he will do me an injustice.⁹⁴

Naturalist writers concerned about the gap between law and social process resorted to a number of different constructions in order to provide some link between law and life. Cicero introduced the potentially anarchic notion of individual responsibility for compliance with natural law. Self-realization, according to him, depended upon positive compliance and a temporal legislative authority could not absolve an individual from the obligation to comply with given natural principles.⁹⁵ Aquinas sought to link natural law with social and community process by drawing upon another natural law metaphor, strongly reminiscent of Plotinus: sets of subordinate systems of law applied by temporal rulers which sought to conform to the over-arching natural law.⁹⁶

Performance of Intellectual Tasks

For a system of law not ultimately linked to social and community processes, an orientation toward performance of the intellectual tasks required by problem-solving is not likely to be thought important. It is thus not surprising that the vast majority of naturalist writers have been oblivious to the components of problem solving and devoted themselves instead to the clarification of natural law through derivational exercises.

There is irony in the fact that natural law, as understood by some of its practitioners, was not a body of material norms, but rather a set of presumably rational procedures for reaching lawful decisions. Indeed, a trend from the Sophists which continues into the present period and is evident in the writings of Northrop,⁹⁷ for example, did operate on the assumption that there is a body of sub-

92. DE LEGIBUS I, xii, 10.

93. ELEMENTORUM JURISPRUDENTIAE UNIVERSALIS LIBRI DUO.

94. GROTIUS, *supra*, note 75, Prolegomena 58, at 29-30.

95. ON THE COMMONWEALTH, Bk. III, xxii.

96. For further treatment, see G. BENKERT, THE THOMISTIC CONCEPTION OF AN INTERNATIONAL SOCIETY (1942).

97. Northrop, *Naturalistic and Cultural Foundations for a More Effective International Law*, 59 YALE L.J. 1430 (1950); NORTHROP, THE MEETING OF EAST AND WEST (1946).

stantive and unchanging norms which is "natural" in the sense that its realization promises the greatest harmony both between men and between men and nature. But the procedural or "formalist" natural law, which has been sustained by the Thomist school, eschewed the notion of a body of unchanging rules and substituted a number of policy precepts, which were to be realized in different manners according to the prevailing context and by application of a set of procedural principles. In the *Summa Theologica*, Aquinas stated as "the first precept of law" that

. . . the good is to be done and followed and the evil is to be avoided. All other precepts of Natural Law are based upon this.⁹⁸

In *De Prudentia*, Aquinas broke the act of rational or "prudential" decision into eight components and proposed a set of intellectual tasks which, if applied, would clearly have maximized the rationality of decision-making.⁹⁹ The transempirical impetus of the naturalists has, however, been so strong that the precepts of Aquinas have not been built upon for the development of a comprehensive set of procedural principles.

Postulation of Goals

The common characteristic of natural law frames has been allegiance to an alleged set of standards, distinct from actual practice, by which community and individual behavior is to be evaluated.¹⁰⁰ The naturalists have, however, seldom achieved a comprehensiveness and clarity in goal postulation which would effectively assist problem solving in international law. Thus, formulations have, unhappily, too often had only an oblique relation to the allocation of social values. For the Stoics, standards for behavior were derived from static environmental and psychogenic factors. For the scholastics, goals related to an afterlife. In the work of Grotius, goals perform an important implicit role, but, with the exception of some discussions of resources, relate entirely to concerns of minimum order.¹⁰¹ By the time of Vattel, goal postulation ceases to be a characteristic feature.

98. I. II. Question 92, art. 2.

99. SUMMA THEOLOGICA II-II, 47, 13; see also question 49. For elaborate presentation and a comparison with the methodology recommended here, see Granfield, *Goal-Oriented Consensus*, 19 J. LEGAL ED. 379, 389-96 (1967).

100. The almost instinctive impulse toward such standards explains, in part, the remarkable survivability of forms of naturalism in relatively secularized cultures. For an interesting example, see L. FULLER, *MORALITY AND LAW* (1964); L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); Fuller, *A Rejoinder to Professor Nagel*, 3 NATURAL LAW FORUM 83 (1958).

101. Grotius, it may be noted, regularly applied a rough scale of common and special interests. (On interests, see McDougal, Lasswell and Reisman, *supra* note 11, at 275-76). In his discussion of specific problems, a recurring pattern of presentation was to state the apparent special interest of

With the possible exception of Brierly, no naturalist has presented his source of natural law as a set of personal preferences recommended to others as expressive of a shared common interest. Instead, the source has commonly been in transempirical derivation. By transempirical, we refer to a statement presented as a scientific verity, which, because of its formulation or its content, is not susceptible to scientific investigation. A "theocratic" transempiricalism seeks to derive its authenticity from a divine source; a "metaphysical" transempiricalism is secular in its connotation, and presumes to derive its authenticity from structural or physical features of the environment or of the human psychosomatic complex. Since neither a theocratic nor a metaphysical transempirical statement is susceptible to empirical verification, the difference between them and the choice, by a naturalist, of one or the other, will turn on personal idiosyncrasy, cultural background or milieu or the perspectives of the audience which the naturalist seeks to influence.

From the standpoint of an observer, a transempirical statement, theocratic or metaphysical, is simply an expression of intense preference, projected upon an external source by an individual who is psychologically incapable or unwilling to identify it as an ego commitment for which he takes full responsibility. Despite its seeming similarity to a statement introduced as an expressly postulated goal, it must for a number of reasons be considered a less rational performance of this task. Since it is presented in the guise of revelation, it precludes the conscious, rational and articulate assessment of alternate available goals. Although much of the act of choice may transpire on a subconscious level, the process of transempirical choice is subject in much greater degree to the influence of idiosyncratic personal factors, which are not open to identification. Where an act of transempirical derivation occurs in a group that is structured about a charismatic personality or in an institution that asserts exclusive jurisdiction in matters of faith, the degree of participation in the clarification of goal tends to be highly restricted rather than shared. Finally, for the rectitude-oriented personality, transempirical derivation introduces extreme rigidity into the postulation of goals, and contributes to the psychological disability of those who may be thrown together with others in attempts to formulate common goals, especially with those who do not share the same theocratic or metaphysical vision; similarly incapacitating are the consequences for patient collaboration in the long drawn out process of goal realization which is typically built into a heterogenous or a democratic arena.

parties, but to proceed to demonstrate that, in broader perspective, short term realization of the special interest would constitute a net loss for the successful parties. Yet, it is significant that Grotius' "common interest" was almost always the maintenance of a minimum system; he did not appear to conceive of common interest in terms of maximum goal value allocation.

Appraisal

However, inadequate its performance may have been in the actual postulation of goals, the abiding contribution of naturalism has been, not merely in an initially broad conception of community, but also in a profound inclination toward a purposive conception of law. Though few naturalists were capable of relating law to social process, no naturalist, whatever the specifics of his theory, has been content with a static or merely existential notion of law. He has insisted upon viewing law as an instrument for achieving some value: physical or physis harmony with nature, righteousness as a preparation for eternity, or minimum order in human interaction. Though the naturalist has rarely demanded of himself inventiveness in devising better means for realizing the purpose of law's social regulation, he has enriched legal thinking immeasurably by introducing this conative element into jurisprudence.

Perhaps the most significant indicator of the vigor of the assumptions of naturalism is the extent to which they have infiltrated jurisprudential frames of reference, which have otherwise been considered distinctively "modern" and anti-naturalist. Savigny's conceptions of the interrelation between an interacting group, its environment, and its law was a traditional naturalist doctrine, but in less communicable form. Ehrlich's conception of the "living law" was an obvious derivation of Stoic and Sophist metaphysical assumptions.

The naturalist's essentially integrated vision of man and the world has permitted a conception of a world community and of common interests on a global scale, matched in no other jurisprudential frame. It is clear, for example, that the so-called modern international law of the West could not have been created by scholars operating on the assumptions of Savigny and Maine or of John Austin. Unfortunately, the trend of naturalist legal thinking did not press this advantage to its fullest. Yet, the capacity of men nurtured in European culture to identify themselves, at least intermittently, with a global community is in no small measure a legacy of naturalistic speculation, and of the institutional myths and operational techniques affected by inclusive conceptions of the unity of mankind.

III. THE HISTORICAL FRAME

The parameters set by the assumptions of historical jurisprudence, which flowered in the late 18th and early 19th centuries, precluded any detailed focus on transnational processes. Historicalist treatises on international law are exceptionally rare; discussions of international law are derived, for the most part from national experience and frequently seem to have been included for reasons of esthetic elegance rather than genuine concern. Yet, indirectly, historicism has exercised a strong influence on international legal theory.

Historicism is one of the most paradoxical frames of theory about law. It insisted on the fundamental role of the idiosyncratic social consciousness of a group in its lawmaking, yet it refused to examine this group consciousness in any empirically satisfactory way. Instead, it created an entirely mythical *volksgeist*, derived largely from Roman law, and sought to apply it to current conditions without regard to what those conditions might in fact be. It preached a mystical progressivism, yet it looked back and not forward for its goals. It argued eloquently for national individualism yet it was unwilling to accord this prerogative in any meaningful way to the non-western world and was, in fact, quite incapable of specifying what such individualism meant for the national cultures it did identify.

The leading recognized historicists were the German jurist, Savigny, whose influence was felt throughout the European continent, and Sir Henry Maine¹⁰² in England. Though Maine was obviously influenced by Savigny's thought there are enormous differences in the work of the two jurists; their initial standpoints were similar, but the scope of their interests, their actual concerns, and their methods diverged markedly. In practice, Savigny was almost naturalistic. The mythic *volksgeist* which he created, and his followers elaborated, served a function akin to the *jus naturale* of the natural lawyers and his frequent exhortation that the validity of law depended upon its conformity to the people's spirit is parallel to, if not identical with, early natural law formulations. Maine, on the other hand, can easily be considered a founder of sociological jurisprudence. Though he shared Savigny's notions of the social origin of law, his models of development were more generalized, based on more comparative research, and always closer to empirical data.¹⁰³ While both shared the romanticism of their gen-

102. The following titles, in abbreviated form, are cited in this section: ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS (1861, 1930 F. Pollock ed.) hereinafter ANCIENT LAW; VILLAGE COMMUNITIES IN THE EAST AND WEST (1871, 7th ed. 1907) hereinafter VILLAGE COMMUNITIES; LECTURES ON THE EARLY HISTORY OF INSTITUTIONS: A SEQUEL TO ANCIENT LAW (1874, 1888 F. Holt ed.) hereinafter, INSTITUTIONS; POPULAR GOVERNMENT: FOUR ESSAYS (1886); DISSERTATIONS ON EARLY LAW AND CUSTOM CHIEFLY SELECTED FROM LECTURES DELIVERED AT OXFORD (F. Holt ed. 1886) hereinafter EARLY LAW; INTERNATIONAL LAW: THE WHEWELL LECTURES (1888) hereinafter INTERNATIONAL LAW.

103. A comparison of the methodologies employed by Savigny and Maine is instructive. Savigny relied heavily on traditional derivational systems; one of his students characterized the school as one of "pure science" which was "in no way concerned with the question of application or applicability." Maine, in contrast, exercised a consistent penchant for social scientific research. Thus, Pollock, commenting upon Maine's work, said that "At one master stroke, he forged a new and lasting bond between law, history, and anthropology." F. POLLOCK, OXFORD LECTURES AND OTHER DISCOURSES 159 (1890).

eration, Savigny inclined to the mystical and metaphysical,¹⁰⁴ but Maine pursued the rational and empirical.¹⁰⁵

The most fascinating historicalist product of this period is undoubtedly the juridical conceptions of Marx and Engels.¹⁰⁶ Like Savigny and Maine, the Marxist view contended that there is an inherent progressive dynamic in social process and that the essential relation between social process and the individual is primarily one of subjection to certain natural forces.¹⁰⁷ Like Savigny, Engels could conceive of law only within a group process. But where Savigny viewed law as an expression of the shared perspectives of group members, Engels could conceive of it only as the product of the divergent perspectives of two classes comprising that group.¹⁰⁸ For Savigny, the perfection of the group in its ongoing process of integration would be accompanied by the perfection of its law; for Engels, the perfection of the group—the emergence of a single dominant proletariat class—meant the disappearance of law.¹⁰⁹ Insofar, however, as Engels conceived of some stable collaborations in the millennial classless society, his conception of perfect law may have been quite close to that of Savigny.¹¹⁰

104. See Troeltsch, *An Address Delivered on the Second Anniversary of the German Hochschule für Politik*, in O. GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY 1500-1800*, at 211-12 (E. Barker transl. 1960); Kantorowicz, *Savigny and the Historical School of Law*, 53 *LAW QUARTERLY REV.* 326, 335 ff. (1937).

105. Robson, *Sir Henry Maine Today*, in *MODERN THEORIES OF LAW* 160 (1933); W. HOLDSWORTH, *THE HISTORIANS OF ANGLO-AMERICAN LAW* 80 (1928); Pollock, *The History of Comparative Jurisprudence*, 5 *J. OF COMP. LEG.* 74, 79 (1903).

106. Marx and Engels do not expressly develop a theory of international law. The only explicit discussion of law in their work is found in F. ENGELS, *THE ORIGIN OF THE FAMILY* (1884). Because of the special use to which Engels puts the term "law," this study presents difficulties both to the western student of jurisprudence and to communist glossators. On the difficulties which Soviet commentators have encountered in Engel's apparently negative view of municipal and international law (insofar as the distinction is at all relevant to him), see generally H. KELSEN, *THE COMMUNIST THEORY OF LAW* (1955); R. SCHLESINGER, *SOVIET LEGAL THEORY* 273 ff. (1945).

107. The philosophical assumptions of the Marxist jurist and the resultant apathy in regard to policy relevant inquiry is demonstrated in a jurisprudential statement by Professor Tunkin: "The wills of States (in a capitalist State this is, in fact, a will of a ruling class; in a socialist State, a will of the people) are determined by historical circumstances. It is useless, therefore, to seek to explain a specific feature of deficiency of present-day international law by referring to the ill-will of States or statesmen or to certain theories. We should rather try to find some link between the specific characteristics of international law and those fundamental laws of historical development which find expression in the facts of human society in general and in those relating to various international situations in particular." Tunkin, *International Law and Peace in INTERNATIONAL LAW IN A CHANGING WORLD* 72, 73 (1963).

108. Engels, *supra* note 106, at 206-08.

109. *Id.* at 211-12.

110. In Engels' anthropological discussions as well as in the work of Lewis

The *unterbau-oberbau* metaphor employed by Marx can be used to describe those basic features which the Marxist shared with the more conservative historicalists. All historicalists posited the basis of law in fixed natural factors. But where the continental historicalist posited the aggregate of physical and psychological factors in a diffuse *volksgeist* and Maine sought to specify them in a number of value processes, the Marxists narrowed the genuinely innovative components of society to the wealth process. The terminologies of the various historicalist writers can be interchanged with ease. The structure of the theoretical model remains much the same, subject to one profound modification rooted in the preferences of the scholar concerned. It needs no corroboration to assert that Savigny and Maine were strongly status quo oriented, while the Marxists preferred and confidently predicted revolutionary and radical change.

Historicism is often depicted as a reaction to naturalism and, indeed, the school acquired early cohesiveness by concentrating a polemical barrage against naturalistic targets. But the concatenation of social events out of which historicism arose was more complex; and when we remind ourselves that similar events are occurring in the contemporary world, and are beginning to engender parallel responses, it is timely to return with renewed curiosity to consider the socio-political etiology of this school.

Historicism was one of many parallel expressions of European nationalism.¹¹¹ Affected by the linguistic revivals of the period, the simile which continental historicists most often used to describe the development of law was the development of language. According to their view, law was generated by the interactions of cohesive groups; law manifested the working of a distinctive group spirit under the impact of prevailing environmental conditions.¹¹² This process was depicted as evolutionary: when permitted to develop freely, the group spirit or *volksgeist* would continually achieve even more refined and precise expression in law.

Morgan, upon whom he relies heavily, many of the pre-state collaborative practices cited would certainly be considered as law or patterns of authoritative decision by functionally-oriented jurists. Engels' unfortunately restricted employment of the term law as well as the "fundamentalist" impulse in communist theorizing and legal homiletics raised enormous problems for Soviet jurists after 1919; the continuation of a state apparatus required some system of authoritative regulation to be justified. Since Pashukanis, however, there seems to have been no genuine Soviet effort to treat the problem of law and society within the orthodox Marxian framework.

111. Consider in this regard, one summary of Herder's theory of language: "A *Volk's* language . . . was not something detachable, for he saw in it the embodiment of a *Volk's* inner being, its inner Kraft, without which it ceased to exist." F. BARNARD, *HERDER'S SOCIAL AND POLITICAL THOUGHT, FROM ENLIGHTENMENT TO NATIONALISM* 142 (1965).

112. 1 F. SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* 16-17.

Today nothing is more obvious than that the surge of nationalism has moved from Europe to Africa and Asia. Despite significant differences between 19th and 20th century nationalist movements, a fundamental unity of demand characterizes all such phenomena: the demand to maximize the conditions required to enable the national group to move toward the full realization of a distinctive "national personality" in every sector of the system of public order. It is no surprise to see that linguistic struggles are coupled with assertions of cultural independence or that these dimensions of collective movement are usually linked with the development of legal nationalism. The formulae of expression used by contemporary legal nationalists are almost indistinguishable from those of the 19th century continental writers.¹¹³ These national perspectives are invariably applied to transnational processes.

There is no question about the matrix in which the historicalists were provoked into articulate being: they were indissolubly linked with the vast upheaval called the French revolution. For millions of Europeans this was a traumatizing experience. Recoiling from the horrors and excesses of the reign of terror, the social strategy of gradualism had new charms. The historicalist position provided a social and political philosophy in tune with the post-revolutionary lull. By emphasizing organic, natural development, by assuring, either through Hegelian or social Darwinian concepts, the operation of an inherent progress-mechanism in history, and by concluding that bold legislative programs not in keeping with the pace of the mystical national personality or spirit were necessarily doomed to failure,¹¹⁴ both reformers and conservatives could find some common ground. In periods of divisive social crisis, it is not uncommon to find that enfranchised elite groups frequently espouse historicalist notions, without fully appreciating either the source or implications of the theory.

113. For an extremely useful historical and cross-cultural examination, see R. EMERSON, *FROM EMPIRE TO NATION* 132-169 (1960).

114. F. SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE* 20-22 (2d ed. Hayward transl. 1831). "The present existence of every individual and that of the State develops with immanent necessity from elements furnished by the past. There is no question of choice between good and bad. . . . Rejection of what is given is, strictly speaking, an impossibility; we are inevitably dominated by it, and we can only err in our judgment, but not change the fact itself." Savigny, *Zeitschrift für Rechtsgeschichte*, in 1 P. VINOGRADOFF, *OUTLINES OF HISTORICAL JURISPRUDENCE* 129 (1920).

Maine, a severe critic of most of his predecessors and contemporaries, was relatively lenient on Montesquieu and the similarities in purpose and methodology between the two authors has frequently been noted; see Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 *HARV. L. REV.* 582 (1916); Pollock, *The History of Comparative Jurisprudence*, *supra* note 105, at 84. Maine was harsh on Montesquieu, however, precisely in regard to the latter's optimism and its relevance to the potentialities of social change. "The error which vitiates his system as a system," according to Maine, was that Montesquieu "looked on the nature of man as entirely plastic." H. MAINE, *ANCIENT LAW* 133-34.

Observational Standpoint

Historicalist writings give no evidence of a concern with clarifying an observational standpoint or identifying cultural or personal predilections which might influence perception.¹¹⁵ In this regard they continue to exemplify the all-encompassing immersion in the context that distinguished the naturalists. A number of dimly appreciated characteristics were, however, common to the leading historicalists. Both in England and on the Continent, historicalists were intensely nationalistic and frequently convinced of the innate superiority of their own cultures.¹¹⁶ Hence their demand for the untrameled development of their own legal cultures was not accompanied by a matching concession to other cultures. Maine, for example, considered the social conditions prevailing in India more as impediments to be taken into consideration in implementing legislative programs devised by English colonials than as indicators of the appropriate course for the evolutionary realization of Indian law.¹¹⁷ Scholarly effort built a substantial corpus of comparative knowledge of the authoritative regulation of different societies; nevertheless, historicalists were unable to achieve a standpoint enabling them to perceive their own societies in larger perspective or to clarify a common interest with the universe of organized groups in the world community.

Conceptions of community among historicalists were based upon a limited number of shared subjectivities and never extended to a dynamic appreciation of the clarification of interests by means of intense interaction among disparate groups. They were, therefore, parochially astigmatic: they were unable to sustain a focus on global processes. Savigny's postulates, for instance, permitted him to infer some of the characteristics of a larger community that encompassed

115. Continental historicalism might have been somewhat embarrassed by the demands of clarifying an objective standpoint of observation. Savigny, for example, stated that "the historical school . . . starts from the conviction that there is no perfectly detached and isolated stage of human existence." F. Savigny, *Zeitschrift*, *supra* note 114. As a comparatist, Maine clearly achieved a high degree of objectivity; in examining his own community, he was scarcely less parochial than Savigny.

116. For all his acuity in studying other cultures, Maine revealed a consistent and wholly unselfconscious paternalism toward non-European society. Thus, he extolled "[t]hat wonderful succession of events which has brought the youngest civilisation of the world to instruct and correct the oldest . . ." quoted in M. GRANT DUFF, *SIR HENRY MAINE: A BRIEF MEMOIR OF HIS LIFE* 16 (1892). *See also* Maine's article in the two volume commemorative collection, *THE REIGN OF QUEEN VICTORIA: A SURVEY OF FIFTY YEARS OF PROGRESS* 508-09. And in his very late work on international law, he asserted that the rules of international law could be meaningfully applied only to the "civilized" part of the world. H. MAINE, *INTERNATIONAL LAW* 16. A different view is examined in his earlier work, H. MAINE, *ANCIENT LAW* 109-13.

117. H. MAINE, *VILLAGE COMMUNITIES* 3-5, 60-61.

Christian Europe, but he could not go beyond it.¹¹⁸ Maine indicates some rudimentary notion of policies generated by the interaction of discrete groups; however, these notions were left undeveloped.¹¹⁹ Engels conceived of law only as a system of oppression by means of which a non-productive class maintained its hegemony over the genuine producers of wealth. He went far enough to concede the minimum order function of law in a society driven by class tension; ¹²⁰ nonetheless his basic ethical preferences precluded him from conceiving of a dynamic process through which inter-class interests might become common interests.

The historicalists' design accepted—or, perhaps more accurately, accepted and filled in—an image of social evolution, stimulated by self-contained social forces, whose trajectory was progressive, not regressive. In Savigny's work, the influence of Hegelian conceptions of dialectic development is strongly in evidence. In Maine, one finds decisive indications of social Darwinism. It is not far-fetched to suggest that the task of the jurist was conditioned by the conjunction of positivistic determinism with a superior national power position. The operation was primarily contemplative, attempting to understand the inherent social forces that give rise to law, though evidently the contemplators had no insight into their pervasive identification with the idiosyncratic claims of a particular national power or coalition of powers.¹²¹ In Maine's case some manipulative concern arose, it would appear, at least as much from personal predilection for the exercise of power as from the juridically assigned tasks defined by his theories.¹²²

118. 1 F. SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* 26-27.

119. H. MAINE, *INTERNATIONAL LAW* 45-46. Such law was facilitated by a shared "morality"; unfortunately Maine neglected to specify from whence this morality came.

120. F. ENGELS, *THE ORIGIN OF THE FAMILY* 206 (1884). The state "is simply a product of society at a certain stage of evolution. It is the confession that this society has become hopelessly divided against itself, has entangled itself in irreconcilable contradictions which it is powerless to banish. In order that these contradictions, these classes with conflicting economic interests, may not annihilate themselves and society in a useless struggle, a power becomes necessary that stands apparently above society and has the function of keeping down the conflicts and maintaining "order." And this power, the outgrowth of society, but assuming supremacy over it and becoming more and more divorced from it, is the state."

121. The scientific historian, according to Maine, treats "existence and development, not . . . expediency." H. MAINE, *VILLAGE COMMUNITIES* 230. Maine rejected the positing of norms against which legislation might be tested and was particularly scathing in his criticism of Bentham on this ground. *Id.* at 231-33. Paradoxically, he could however maintain that "The function of Comparative Jurisprudence is to facilitate legislation and the practical improvement of law . . ." *Id.* at 3-5.

122. An astute politician's perspective of Maine is revealing. Lord Acton commented: "Maine's nature is to exercise power . . . Augustus or Napoleon would have made him Prime Minister." *LETTERS OF LORD ACTON TO MARY GLADSTONE* 26 (H. Paul ed. 1905).

Focus of Inquiry

The initial focus of the historicalists was the empirical observation that a community consists of individuals interacting in a given geographical area at a minimum level of intensity and sharing a number of critical perspectives. Unhappily, however, when these scholars tried to apply this conception of community, they did not use it as a guide to empirical observation. So far as they were concerned, once the definition was made, they were free to elaborate its metaphysics. In this style of thought Savigny, for example, conceived a community to be the external manifestation of the particular spirit of the people comprising it. A community could exist only where a vital group spirit or *volksgeist* operated and this *volksgeist*, in turn, demanded an actual communion of thought and action among individuals.¹²³ The conditions for fulfilling this prescription could arise only in the nation-state;¹²⁴ the disparity of perspectives and the relatively low rate of interaction between different communities precluded the existence of a world community.¹²⁵ Yet regional communities, though diluted in group spirit, might arise:

. . . among different peoples a community of legal consciousness may arise like that which generates positive law in a people. The basis of this intellectual communion consists partly of a community of race, partly and principally in common religious convictions. Thereon grounds itself the international law which exists especially among the Christian states of Europe. . .¹²⁶

In transnational processes, the state, as a collective manifestation of the *volksgeist*, was treated as the exclusive actor; these actors, who alone shared the generative faculty of a *volksgeist*, might find common grounds in their interaction with one another.¹²⁷

Many of Savigny's fundamental assumptions could have been given an empirical reference and a creative turn, yet, set in his static preconceptions they quickly lost relevance. The obvious truth is that his empiricism was a superficial, preliminary element in his jurisprudential system. Since the key definition was not related to world reality, by procedures that would reveal gradations, Savigny's jurisprudence has a curiously unreal quality. Specifically, his model was rigid, not developmental; true, once a community emerges, it is represented as capable of refining itself. The theory says, however, that it cannot merge or even meaningfully interact with other communities.¹²⁸ It is hard to take such a conception seriously in the

123. 1 F. SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 16-17.

124. *Id.* at 17.

125. *Id.*; see also *id.* at 26-27.

126. *Id.* at 26-27.

127. *Id.* at 18-21.

128. This rejection, it may be noted, was a product of Savigny's standpoint more than a necessary feature of his general philosophy. The doctrine that

light of comparative historical or sociological data. Evidently his standpoint led Savigny to confuse some of the products of sustained interaction with the conditions necessary for an initial interaction. Clearly the pertinent point is that while shared predispositions may facilitate communication and collaboration, initially divergent predispositions may eventually converge as shared predispositions as they are modified in the process of interaction. A community, whatever its scope, is a process and not a crystal; it is an outcome of past interaction, and a partial determiner of future outcomes.

While Savigny's conceptions permitted a focus on the community process occurring within a nation-state, they precluded, by the device of highly restrictive definitions, successful concentration either upon lesser or more inclusive communities; they were wholly incapable of accounting for transnational inter-cultural processes.¹²⁹

Maine's image of global social and community processes was more nuanced and dynamic than Savigny's. In harmony with his continental counterpart, Maine insisted that a system of law, which he perceived as non-legislative in source, rests upon sets of shared perspectives. In conventional Victorian style, he wrote of such perspectives as "religion and morality";¹³⁰ and undoubtedly these terms covered a comparatively wide range of subjective phenomena. But unlike Savigny, Maine did not assume that such perspectives could be shared only within a nation-state where they expressed a distinctive *volksgeist*. He had a dynamic notion of how the domain of community might be extended, an analysis that was flawed by over-emphasis on proselytization.¹³¹ His satisfaction with imperialism, coupled with the fact that imperial Europe virtually controlled the globe, meant that he did see an emerging global process, though he was characterologically incapable of viewing it in terms of a process of self-realization for an aggregate of divergent cultures. However, shortly before his death, in his Whewell Lectures on international law, Maine seems to indicate an appreciation of intergroup authoritative interaction without the necessity for a common religious or moral base binding the participants.¹³²

the present and future are immanent in the past will not preclude international integration, if one posits the immanence of such a development in the past. There is no dearth of statements to this effect in Hegel's writings; it is highly probable that 19th century monistic doctrines operated to a large extent on an assumption of the "immanence" of unity.

129. Thus, international law between peoples could only arise where there was "community of race" or "common religious convictions." 1 F. SAVIGNY, *supra* note 123, at 26-27. Savigny's racism was evidently not a malicious conception, yet the inclination to translate "race" into "ethnic group" and, thereby, to give his views a sounder base must be avoided. The essentially static nature of his conception of community can only be connoted by his own terms; an ethnic frame would necessarily import the possibility of interaction and development of new communities without regard to identity with a given racial group, insofar as it is identifiable.

130. H. MAINE, *INTERNATIONAL LAW* 45-46.

131. *See*, in particular, H. MAINE, *INSTITUTIONS* 386-87.

132. H. MAINE, *INTERNATIONAL LAW* 45-46.

Historicism, then, did not focus on a viable conception of community. The detailed attention given to the nation-state can be endorsed as a healthy antidote to the diffuseness of naturalism. Yet it is disappointing to see how rapidly the frame of reference rigidified as investigation was played down and transformed into a limited and largely metaphysical exercise. In the hands of the historicist, fundamental categories were used to preclude any meaningful examination of community processes less inclusive than the nation-state. Similarly, theories about transnational social and community processes were metaphysical derivations and highly inaccurate as descriptions of the world arena or world society.

When we look more intensively at the treatment of decision by the historicists it quickly becomes evident that a familiar transition took place. Beginning with terms closely linked with empirical connotations, the categories were rarified into metaphysical derivations and lost more and more of the concreteness they once possessed.

It is noteworthy that a relatively sound balance of emphasis upon perspectives and operations were characteristic of Savigny's theory for testing the existence of a community. There must be a communion of thought and action among the individuals composing the community,¹³³ i.e. collaborative action as well as certain subjectivities must be present. But the demand for the co-presence of operations and perspectives exhausts itself the moment the existence of a community has been established. Thereafter, Savigny is concerned only with "jural relations" or perspectives. The task of legal scholarship, according to him, is the incorporation of all jural relationships into a system originally discovered by historical research. These harmoniously resolved rules will, thereafter, provide a solution for any legal problem which social interaction may pose.¹³⁴ Critics, of course, have noted that this construction severs law from its historical and current social origins and is, in fact, a denial of genuine historicism.

Maine's work, though not distinguished by great theoretical precision or logical consistency, steers away from the more extreme errors of Savigny. Definitionally speaking, Maine never understood law as other than a body of rules.¹³⁵ Yet his detailed studies of municipal systems indicate a fine appreciation of the relevance of operations. As Sir Frederick Pollock perhaps overoptimistically commented, after Maine no one could conceive of law solely as a body of rules without reference to the society which it sought to regulate.¹³⁶ References to operations, even implicit, are lacking, however, in Maine's treatise on international law. Finding it difficult to fit inter-

133. 1 F. SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 16.

134. *Id.* at xix, 14.

135. H. MAINE, INTERNATIONAL LAW 14, 16. *See, however, H. MAINE, ANCIENT LAW* 107ff. for an oblique indication of a broader conception.

136. F. POLLOCK, OXFORD LECTURES AND OTHER DISCOURSES 159 (1890).

national practice into his theory he kept returning to a definition of rules inherited from Grotius and subsequent publicists.¹³⁷

Continental historicalism was never able to achieve an appropriate balance of emphasis upon authority and control. On first glance, Savigny's concept of *volksgeist* seems to be a poetic reference to authority in social process and his frequent statements to the effect that behavior cannot be considered law if it is not in conformity with the *volksgeist* seems to indicate a sophisticated grasp of authority in terms of the perspectives of community members. Yet examination of Savigny's work reveals that this conception of authority was purely formulative. In actual application, Savigny's conception of authority is derived primarily from juridical codifications of Roman law. His *volksgeist* is mythic rather than historical, and in no case does the historicalist test the rules derived by a process of formal reasoning from general historical principles against the actual practices or controlling situation to which they are to be applied.

The control factor suffers a similar fate at the hands of the continental writers. Though control appears briefly in the determination of the existence of a community, thereafter it is relatively unimportant. The validity of law is said to depend upon its conformity to the *volksgeist*, a concept unrelated to social process. For the continental historicalist, the judge inhabits a relatively unimportant position in the juridical hierarchy and the sheriff scarcely merits mention. "Law," as one of Savigny's favorite pupils put it, "is an object of pure science and pure science is in no way concerned with the question of application or applicability."¹³⁸

The English branch of historicism, with its stronger empirical character, achieved a more satisfactory balance of emphasis on authority and control. Though a workable formula for investigation does not emerge from Maine's writings, it is clear that his notion of law required decision to be both authoritative and controlling. While Maine was content to accept Austinian formulations demanding sovereign authority and effective sanctions for developed European societies, he was extremely resourceful in delineating patterns of authority and control in Eastern societies.¹³⁹ In parts of his writings, his notion of social control is much more sophisticated than his conception of authority. Thus, he clearly grasped that in religio-ritualistic societies, penance was a socially inculcated, expected, and demanded form of auto-punitive sanctioning which supplied an important control base for authoritative decision.¹⁴⁰ It is of melancholy interest to note that he did not seek to apply this insight to his own or to transnational society.

137. H. MAINE, *INTERNATIONAL LAW* 16, 51.

138. Bethman-Hollweg, a favorite pupil of Savigny, quoted in Geldart, *Introduction to R. VON JHERING, LAW AS A MEANS TO AN END* xlii (I. Husik transl. 1913).

139. H. MAINE, *INSTITUTIONS* 390ff.; *Id.*, *VILLAGE COMMUNITIES* 68ff.

140. H. MAINE, *EARLY LAW* 36-37.

Although Savigny's theory found room for some measure of community development, it did not view law as a process. Rather, law was the determination of jural relationships.

This living production of the jural relation in each given case is the intellectual element of juristic practice and distinguishes its noble calling from the bare mechanism which so many ignorant persons see in that practice.¹⁴¹

Ehrlich characterized this as a "mathematics of concepts"¹⁴² and it clearly allows small play for a conception of processes of authoritative decision. Though Maine's express definitions were in rule-complex terms, his writings, particularly his discussions of the making of customary law indicate an acute appreciation of its processual character.¹⁴³ Unfortunately, the absence of a clear and comprehensive notion of process detracts from the utility of many luminous insights.

Despite its inception in social experience, continental historicalism moved continually further from social process as it developed its jurisprudential conceptions. Law, for Savigny, is not an instrument for the regulation of social process but a passive product of it. The only relation between law and community process which Savigny developed was negative. Law, which was not in accordance with the inherent structures determined by the spirit of a given people, was not law.¹⁴⁴ As we have said, Maine's conceptions of the relation of authoritative decision and social and community process were considerably more complex. He conceded, if not enthusiastically, the innovative potential of prescription and application.¹⁴⁵ He tended to see the total social context as a control factor in prescription, most particularly by limiting what could be achieved legislatively at any given moment. Nevertheless, in his discussion of legislative exercises in his contemporary England, he presents a considerably more modern view.¹⁴⁶

Neither Maine nor Savigny developed serious conceptions of a constitutive process in either national or global terms. For Savigny, fundamental constitutive decisions, insofar as he appreciated them, transpired in the proto-period of development of the community and are interwoven with the subsequent process of historical refinement. In part of his work, Maine came considerably closer to a notion of constitutive process. A macro-social constitutive process eluded him

141. 1 F. SAVIGNY, *SYSTEM OF THE MODERN ROMAN LAW* 6-7.

142. E. EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 327 (W. Moll transl. 1936).

143. H. MAINE, *EARLY LAW* 392.

144. See, F. SAVIGNY, *OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE*, *supra* note 114, at 20-22.

145. With, of course, severe qualifications. His critique of Montesquieu on the grounds of the latter's extreme view of the plasticity of the individual has been noted earlier. See note 114 *supra*.

146. H. MAINE, *POPULAR GOVERNMENT: FOUR ESSAYS* 45 (1886).

because he accepted Austinian concepts of his own nation state and did not seriously consider the over-all structuring of authority and power in the East. However, his discussions of primitive societies, particularly in regard to prescriptive processes and the institutionalization, and ultimate secularization of the sacerdotal lawyer as a decision expert, comprise careful constitutive investigations.¹⁴⁷

Performance of Intellectual Tasks

Historicism, like naturalism, was not clearly oriented toward problem-solving. For the continental historicalist and, to a lesser degree, for Maine, society was a self-evolving and self-improving process; the juristic function was simply declaratory, seeking to identify the jural relations already existing in the social warp and woof of a given community. The Marxian approach is somewhat ambivalently orientated in regard to problem-solving. The Marxist claims to share the 19th century historicalist's abiding faith in the internal mechanism of ameliorative social growth; nevertheless, he is not content to remain an enlightened spectator like the contemporary sociological jurist. He tries to play an active role in accelerating the inevitable.

Toward one intellectual task, at least, the historicalist is explicitly negative. He disavows goal clarification. If, it was argued, law arose and developed spontaneously from an integrated social group, the human will or even sub-group preferences were irrelevant and possibly temporarily disruptive to orderly, ineluctable development. The juristic function in regard to goals was simply to articulate the inherent and idiosyncratic cultural postulates of a particular people. Insofar as the *volksgeist* which Savigny developed was mythic rather than historic, the various preferences expressed by Savigny and his followers are left unexplained. One need only compare Savigny's and Maine's preference for a stable status quo with the Marxist's preference for a thoroughly restructured society to appreciate the susceptibility of the *geist* concept to the diverse predilections of assorted historicalists.¹⁴⁸

147. H. MAINE, *EARLY LAW* 38-40.

148. Thus, goal postulation by the historicalist falls prey to the same dangers which plagued the naturalist school. See p. 225 *supra*. From the naturalist standpoint, of course, the failure to engage in goal related tasks was the most objectionable feature of historicism. "The 'absolute historicism' of the 'Historical School' reveals itself . . . to be a most destructive opponent to any creative philosophy operating with value concepts and postulates. In its attempt to level all values; to absorb entirely the 'just law' by the 'developed law'; to substitute for the notion and function of value the idea of organic 'natural' growth, the 'Historical School' occasions a dangerous mental inactivity with regard to every legal or philosophical problem. Such indiscriminate reverence for all that exists by virtue of its historical growth or evolution implies, in the final analysis, a relativism devoid of all intellectual or moral standards and criteria." Chroust, *supra* note 55, at 84.

Curiously enough, systematic trend investigation is almost non-existent among continental scholars. Once the construction of the historic *volksgeist* is complete, the jurist's task exhausts itself in deriving "jural relations" in accord with the construct, thus introducing a conceptualistic calculus subsequently exempt from acknowledged social reality. In theory, Maine was probably close to this position. In practice, fortunately, a predilection for empirical examination or "case studies" immeasurably enriched his work. Past trends, whether dealt with in the restricted mythic mode of Savigny or in the broader practice of Maine, were not, however, devoid of significance. For Savigny, they were helpful clues to the the mysterious visage of the group spirit, and were guides for juridical derivation.¹⁴⁹ For Maine, particularly in respect to his studies of non-European societies, they were indications of how far external legislative programs might feasibly be realized.

Factor analysis is a key element in the theoretical formula of historicalism. Viewing law as a necessary product of social interaction, the historical approach might have provided the take-off point for greatly expanded programs of scientific inquiry. Paradoxically enough, factor analysis was reduced to a ritualistic formula instead of becoming a genuine guide to continuing investigation of the manifold of social events conditioning behavior. For Savigny and his followers, the all-inclusive factor is the mystical notion of the group spirit. Though one might argue that this term includes or can include every phase of the social process, the fact is that, for the continental historicalist, it did not. In terms of the analysis of conditioning factors, the *volksgeist* was little more than a refinement of the primitive invocation of "dark forces" to explain events over which man seemingly had no control. Maine's work, with its stronger empirical character, achieved a much greater success in the identification and analysis of conditioning factors. He was highly critical of analytical jurists, precisely because they neglected to relate legal development to social factors.¹⁵⁰ Many of his detailed studies indicate sharp sensitivity to the identification of explanatory factors.

Trend projection for the historicalist is simply the inclusive assumption that the mechanisms of development characteristic of the group spirit will continue to be refined, and that prescriptive efforts that diverge from the group spirit will be rejected in the course of time.

Given this orientation, historicalism was not concerned with strategies of invention. In the historicalist frame of reference, the human actor is subservient to his group and physical environment; hence any activity aimed at realizing preferences not in conformity with the group spirit is an exercise in futility.

149. 1 F. SAVIGNY, SYSTEM OF THE MODERN ROMAN LAW 27-28, 31.

150. H. MAINE, INSTITUTIONS 343, 359, 360-61; *Id.*, VILLAGE COMMUNITIES 67-70.

Goal Postulation

The historicalist obviously cannot engage in the candid postulation of sweeping goals; such an exercise contradicts the basic notions underpinning his theory. The result is to drive the operation underground, or to provide the rudimentary degree of illumination involved in declaring that it is a waste of time and effort to commit one's self to preferences that diverge from the predestined path of the *volksgeist*. The fundamental image that was entertained of the working of the group spirit allowed the historicalist interpretative latitude in formulating and applying the manifestations of the *volksgeist*. It is not to be wondered at that the idea that the ends to which law must necessarily work are irrevocably and irremediably determined at some point in the dim past by the interaction of social and physical factors has resulted in a prodigious variety of assertions about the content of these directed ends. The predominantly mythic rather than historic character of the group spirit meant, as has been suggested, that personal idiosyncracies as well as cultural and class valuations were significant, if unexplored, factors in the different formulations of *volksgeist*. The detailed public order and constitutive features recommended by historicalists varied—with, however, some surprising similarities. Both Savigny and Maine saw the nation-state as the highest form of social organization, since it was, for some reason or other, the most perfect form of expression of the group spirit. Since the individual was incomplete and insignificant in comparison with his nation-state, participation in the global process was limited to states;¹⁵¹ both Savigny and Maine appeared to be largely in accord with this position even though Maine clearly felt that imperial Europe should be the dominant factor. The long-run constitutive preferences of Marx and Engels, on the other hand, though highly diffuse, were almost Jeffersonian in contrast; they envisaged an integrated global social process without the institution of states and apparently without an institutional order featuring large organizations of any kind.

In terms of public order preferences, Marx and Engels and Maine expressed themselves with the greatest explicitness. Maine was primarily concerned with rational progress and the increased production of most values. Since he felt that democracy was a drag on such a process, he associated himself in principle with a meritocratic ruling group, which was scarcely distinguishable from Hamilton's prescription a century before.¹⁵² Marx and Engels favored a maximum shaping and sharing of values subject to reservations about power. Since their view of world transformation was apocalyptic rather than developmental, they did not concern themselves

151. See, in particular, 1 F. SAVIGNY, *supra* note 149, at 68-72.

152. Maine's political preferences and his general disdain for democracy are clearly stated in his *POPULAR GOVERNMENT: FOUR ESSAYS* (1886).

with the dual problem of proposing and explicating transitional value priorities which would achieve both present fairness and a step in the evolutionary realization of long-range goals.

Appraisal

Common to the historicalists, no matter what their political inclination, is deep distrust of individuality and democracy. The historicalist also appears to be more comfortable with the collective group than with the individual despite the fact that lack of tolerance for the sharing of power implies confidence in the historic mission of a few rather than an aggregate of individuals. For Savigny, the individual is insignificant without his *volk*, and his personal preferences insofar as they diverge from the *volksgeist* are not and should not be reflected in the law. In transnational processes, Savigny could conceive only of state-to-state relations. Although classical Marxism reflects much of the rhetoric of 19th century liberalism, at its core it is group-oriented rather than individual-oriented; the class replaces the ethnic state, the *klassengeist* the *volksgeist*. Maine, in his theoretical work, is more ambivalent; he believed that social process, as reflected in law, moves from status to contract, a view which suggests that the individual becomes the central concern of law. Yet in his polemical writings, his disdain for political democracy is expressed without reservation.

Whether the historicalist attempts to engage in systematic trend and factor analysis, as Maine did and Savigny did not, or engages in projection coupled with short-range strategic invention, as the Marxist does, a common world view affects and characterizes historicalist investigation. The individual is perceived as an object of his physical and social environment who is carried along with it, even though he remains too ineffectual to leave a lasting mark upon it. In this perspective human preferences and efforts play negligible roles in history. True, a concerted effort may accelerate a predetermined vector of development or retard it somewhat; but that is as far as anyone can go. The historicalist image of law may be either pessimistic as it has been in a number of oriental cultures, or optimistic as it was in the post-Hegelian and Darwinian periods of European culture. Above all it is fatalistic, hence not without a certain man-diminishing gloom.

Historicism has, at times, given visibility and circulation to a number of critical insights. The understanding of the relation of law to social process, not entirely absent from naturalistic work, was put on firmer ground; unhappily the reciprocal relation, the impact of law upon social process, was overlooked. The emphasis upon the prescriptive capacities of individuals interacting in a group was perceptive, but the particular notion of the group was a highly oversimplified distillation of reality. The racial group, translated into the nation-state, was an abstraction which failed to take account

of the ethnic mix in European states and the eroding patterns of endogamy. The inclusion of social and environmental factors as affecting decision was insightful, but carried to monstrous disproportion. Indeed, the primary limitation of the historicalist view and the one which makes it thoroughly inapplicable to present conditions was the derivation of environmental limits from a past crystallization that froze basic predispositions, hence predetermined the range of interaction in subsequent social environments. In an age in which human intelligence is becoming more and more capable of shaping man's environment and of precipitating critical changes even in man's psychosomatic system, historicalism, however beneficent or malignant its historical role, is a crippling form of sentimentality.

IV. THE ANALYTICAL FRAME

The analytical or positivistic frame is comprised of a set of doctrines which probably enjoy more express adherence from contemporary international lawyers than any other articulate jurisprudence. At its core, analyticalism focuses principally upon the strict application of a variety of rules emanating from fixed authoritative sources and holds that the appropriate function of jurisprudence, even at its loftiest levels, is the syntactic clarification of the interrelations of such rules. The jurist is regarded as neither authorized nor qualified seriously to consider either the social context in which rules are generated or the socio-political consequences which rules, in turn, engender in specific instances of application. The jurist's task is to apply the law as it is, after determining if it is and what it is.¹⁵³

In the history of doctrine about international law, the analytical frame is commonly described as "positivism" or "the positivist approach," and our contemporary tradition has its roots deep in the Roman conception of *ius gentium*. Through a long and tortuous development, the original notion of *ius gentium*, that of rules applicable between Romans and foreigners, became transformed into a conception of principles common to many peoples and, eventually,

153. In its most extreme form, analyticalism adheres to a doctrine of *non liquet*, i.e., if there is a gap in a positive rule complex, the jurist, in whatever role he is playing, must refrain from giving any decision, since there is no "legal" answer until appropriate guidance is extended from an authorized source. Yet most analytical jurists would concede that in the case of a *lacuna*, the jurist, operating under an implied or expressed grant, must perform a quasi-legislative function. Furthermore, enumerated authoritative sources from which "law" emanates may be stated in so vague and diffuse a manner, that the analyticalist is pressed to perform operations quite outside the official parameters of his formal jurisprudence. Consider, for example, Article 38(1)(c) of the Statute of the International Court of Justice. In such an endeavor, the analyticalist may employ the techniques of the naturalist, the historicalist, the sociologist or the limited-factoralist. But, in any of these eventualities, he is at a decided disadvantage, since he can neither admit to, nor openly appraise, the methods to which he actually resorts.

into a conception of principles regulating the interrelations of different "peoples" or states.¹⁵⁴ For the great bulk of jurists of the analytical frame who have been willing to accept international law as "law," the relevant larger community has, thus, been a community, not of the whole of mankind as individuals, but rather of separate, independent states. In reaction against derivations from a transempirical *ius naturale* they have characteristically sought the rules which govern the interrelations of states in human institutions, especially emphasizing custom and agreements. Because of the rejection of the notion of a transnational law applicable to individuals, sharp distinctions have had to be made between "international" and "national" law, with various enigmatic doctrines invented to relate the two different laws to each other. In a jurisprudence shaped by the rise of the modern state and inspired by exaggerated notions of the "sovereignty" of such states, the greatest difficulty has been experienced in finding some "basis of obligation" for subjecting sovereign states to a common, supreme law; ordinarily this basis has been found in some version of "consent."

Analyticalism, though based on simplistic assumptions, is by no means a simple doctrine. A review of its manifestations at different times and in such diverse cultures as ancient Chinese law, ancient Hebrew law, and panedectal Roman law, as well as in the systematic expositions of western writers such as Austin, Gray, and Lassa Oppenheim, suggests that in large part it is a response to a variety of partially identifiable policy considerations. Unlike historicalism and metaphysical naturalism, the analytical frame does not conceive of man as a negligible factor in a mechanistic system, whose preferences can have no significant effect if they diverge from the intrinsic emanations of natural law. On the contrary, to the analyticalist, the human being is the primary effective decision-maker in social process. Paradoxically, however, the analyticalist is neither man-oriented nor an advocate of individualism. His most intense concern is with social order and with decision-conformity to constitutive patterns in a given community, whatever their content. He frequently seems to view the enormous choice potential in each individual as an anarchic hazard. Accordingly, he endeavors to dehumanize and to mechanize the process of decision as a check rein on the ambit of personal choice.

Although the analyticalist does not examine the relation of social process and authoritative decision in his juridical work, this ex-

154. An excellent brief history of this development is offered in Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239 (1932). More detailed statements appear in E. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* chs. I-IV (1920); J. BRIERLY, *THE LAW OF NATIONS* ch. 1 (1928); A. NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 17, 77, 135, 164, 232 (Rev. ed. 1954); W. SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* 63, 82, 95 (1954).

Very recent developments are recounted, with references, by Bishop in *General Course of Public International Law*, 2 Rec. des Cours (Neth.) 151, chs. I, XIII (1965).

clusion is a conscious choice rather than an omission from inadvertence. It is expressive of an extraordinary degree of concern with social and legal stability: ¹⁵⁵ fixed rules, applied in a fixed manner, are believed to provide a frame of stable decision hence stable expectation for all those to whom they are directed. The built-in assumptions are that verbal rules, as well as other communications, are capable of an independent non-contextual import; that there is a necessary convergence in fact of formalized authority and effective control; that social process is or can be made as stable as legal *nomostatics*; and that the relation between authoritative decision and social process is that the latter is subservient to the former.

These assumptions are of course a caricature of reality. Communications inquiry and contemporary linguistics have solidly established the integral relation of communication and context ¹⁵⁶ and the necessarily creative operation involved in the interpretation of any past communication.¹⁵⁷ The relation of authority and control, it is now appreciated, is always complex and changing, intelligible only in the light of continuous empirical investigation. While there are indications that the stable exercise of effective power will generate some commensurate perspectives of authority,¹⁵⁸ i.e., that in a stable situation, there is a tendency toward convergence, the actual relation of authority and control at any given moment may range across a broad spectrum, one of whose extremes is complete polarity. The degree of social stability at any given moment is also an empirical question; though the period in which European legal positivism first

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155. In the West, at least, the rise of legal positivism can be traced to other social and political factors. Dean Pound suggests that the rise of the analytical school in international law was a rather normal response to the period of rapid and highly creative growth which preceded it; analyticalism provided a frame for appraisal and consolidation. The tragedy of the school, according to Pound, is found not in the fact that it existed but that it persisted, suppressing the impulse for subsequent critical development. Pound, *Philosophical Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 73 (1923). The political implications of the enlightenment, with its strong drive for popular democracy, coupled with the association of the courts and court staff with the usurped authoritarian regimes provided more fertile ground for the growth of positivism. If the legislature was considered the instrument of the true voice and will of the people, a doctrine which restricted the role of the courts to a strict application of that will was obviously desirable.
156. F. KEESING & M. KEESING, *ELITE COMMUNICATION IN SAMOA: A STUDY IN LEADERSHIP* (1956); *LANGUAGE IN CULTURE* (H. Hoijer ed. 1954); *LANGUAGE IN CULTURE AND SOCIETY* (D. Hymes ed. 1964); C. MORRIS, *SIGNS, LANGUAGE AND BEHAVIOR* (1946); *STUDIES IN ETHNOMETHODOLOGY* (Garfunkel ed. 1968); H. SULLIVAN, *THE INTERPERSONAL THEORY OF PSYCHIATRY* (1953); Mead, *Public Opinion Mechanisms Among Some Primitive Peoples*, 1 PUBLIC OPINION Q. 5 (1937); Nadar (ed.), *The Ethnography of Law*, 67 AMERICAN ANTHROPOLOGIST 1 (Dec. 1965, pt. 2).
157. See generally, M. MCDUGAL, H. LASSWELL & J. MILLER, *INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967).
158. See H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* 140-41 (1950).

developed was characterized by a relatively high degree of social stability, it was short-lived. Finally, the assumption that authoritative decision must necessarily control social process is now recognized as at least premature; it is certainly belied by the volatile anarchy of current international relations.¹⁵⁹

The analytical frame of reference is often put forward as a truly scientific approach to the law, a claim that has achieved enough wide acceptance to indicate the prestigious aura of science and the disposition of intellectual skill groups to appropriate as much as possible of this prestige for their several purposes. Our examination of analytical jurisprudence as ostensibly applied to the field of international law will subject this claim, among others, to careful scrutiny.

Observational Standpoint

It is particularly difficult to identify the standpoint and perceived role of the analytical jurist. In one sense, he seeks to stand outside the law, attempting to describe it; yet the conception of law on which he relies is remarkably constricted, and results in an observational focus that subtly rules out in advance much that is highly relevant. To conceive of law as a specific type of rule emanating only from highly organized institutional structures¹⁶⁰ is not likely to facilitate the observation of complex patterns of authority and control in unorganized situations. Hence the analyticalist has never been able to attain to a clear view of international authoritative decision and often contributes to the chorus of those who resort to the non-law characterization.¹⁶¹

It cannot be successfully maintained, however, that the specific limitation mentioned here has been consistently adhered to. Thus, various parts of Austin's work have been described as the depiction of the psychological response of one who is subjected to the co-

159. Different factors seem to give rise to predilections for the analytical mode. On the psychological level, an inclination to submit to external authority, whether derived from cultural or personal experiences, may impel a decision specialist to the analyticalist frame. Though Hoffer's scale for investigation of the authoritarian personality does not formulate a test in terms of views about law, the rigidity of conception of myth and formula characteristic of the authoritarian personality, may be comparable to analyticalist preferences. The structuring of the modern bureaucratic system and the consequent syndrome of seeking to avoid assumption of responsibility can depict analyticalism in a compelling light. Finally, the analyticalist perspective has, at times, seemed an effective technique for restricting the discretion of appliers at all levels; the technique has, however, been frustrated, for the analyticalist has invariably resorted to derivational modalities based on an assumption that a communication, discrete from the context in which it was uttered and in which it is sustained, can acquire a univocal and unchanging meaning.

160. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 10-15, 19, 175 (H. Hart ed. 1954) [hereinafter cited as AUSTIN].

161. See p. 208 *supra*.

ercive power of the law¹⁶² and Buckland has argued that Austin was concerned only with the analysis of certain key legal concepts.¹⁶³ Neither of these intellectual operations requires a comprehensive standpoint outside the legal process, capable of providing a perspective that puts the law in context. Austin, in effect, threw up his hands when thinking about the international arena and could see it only as a rugged competition between states, exhibiting few common interests among the competitors.¹⁶⁴ Oppenheim, studying international law in the analytical mode, was forced to draw heavily on metaphysical naturalist notions in order to establish common interests and to complete his intellectual portrait.¹⁶⁵ Wilfred Jenks, whose creativity cannot be restrained by the analytical frame which he officially adopts, presses such open-ended formal sources as "general principles" and "equity" into heavy service.¹⁶⁶

The role which the analytical jurist sees himself fulfilling remains ambiguous. Austin claimed that his task was solely descriptive, and he drew a sharp distinction between Bentham's "censorial" jurisprudence and his own "expository" jurisprudence.¹⁶⁷ The leading continental analyticalist, Hans Kelsen, assumes a similar role,¹⁶⁸ though he implies that a number of legal tasks may be performed by use of his system through a process of "imputation." Oppenheim, on the other hand, was quite concerned with the development of international law and sought to include in his model certain factors which would assure rational evolution.¹⁶⁹ The contemporary analytical school, presented in the writings of H.L.A. Hart, indicates a greater sensitivity to the problem of observational standpoint, but in general follows the broad outlines of Austin's approach. Hart's concern is the "clarification of the general framework of legal thought,"¹⁷⁰ as Austin's was "the exposition of the principles,

162. Manning, *Austin Today: or the Province of Jurisprudence Redetermined*, in *MODERN THEORIES OF LAW* 181 (H. Milford ed. 1933).

163. W. BUCKLAND, *SOME REFLECTIONS ON JURISPRUDENCE* 2 (1945).

164. AUSTIN 294.

165. L. OPPENHEIM, *THE FUTURE OF INTERNATIONAL LAW* 67-68 (1921). Oppenheim himself, it may be noted, was influenced to a significant degree by continental historical doctrines: recurring in the above cited work is a profound belief in an immanent progress mechanism in history.

166. See generally, C. JENKS, *THE COMMON LAW OF MANKIND* (1958); C. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* (1964); C. JENKS, *LAW, FREEDOM AND WELFARE* (1963).

167. The distinction was originally drawn by Bentham in *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 323-24 (rev'd ed. 1823). See also, J. BENTHAM, *A FRAGMENT ON GOVERNMENT* 7-8 (F. Montague ed. 1891).

168. H. KELSEN, *GENERAL THEORY OF LAW AND STATE* xvi (1961).

169. W. SCHIFFER, *supra* note 154, at 175, summarizing the progressive positivism movement, writes that "[t]he growth of the new law of nations is supposed to be determined by conditions which reflect mankind's advance toward increasing reasonableness and perfection."

170. H. HART, *THE CONCEPT OF LAW* vii (1961).

notions, and distinctions which are common to systems of law." 171 While Professor Hart undertakes to be both an internal and external observer,¹⁷² the potentiality for a genuine theory about law is undercut by his methodology: simplified linguistic analysis. As one critic has observed, "It is not a method that can demonstrate the scientific accuracy or inaccuracy or truth or falsity of statements."¹⁷³ Hart's highly simplified notion of language, it may be added, seems anachronistic in the light of contemporary linguistics and ethnography.¹⁷⁴

The roots of European analyticalism can be traced back to Bodin, but the frame was given a decisive profile by Austin. In manifest purpose, Austin sought to illuminate an aspect of Bentham's utilitarianism; Austin himself felt that neither his work nor that of Bentham was complete without the other. Yet the differences between the two are striking and it is difficult to accept the intellectual unity which Austin himself claimed. Whereas Bentham represents an intense concern with policy choices and techniques of implementation at all community levels, Austin presents a denial of immediate value relevance to expository jurisprudence. Austin deemed his work "scientific," and, hence, insusceptible to goal or policy choices. He reflected, here, Mill's ontological theories, though he failed to grasp that Mill was demanding not that "unscientific" operations be totally eschewed, but rather that they be appropriately labeled. In fact Austin's search for austere science is undercut by his dogmatic and unsupported choice of basic definitions, which predetermine the scope of his entire work. It is, for example, not clear why he chose to define positive law as he did, why he rejected positive morality despite its conceded effectiveness, and so on. Yet, it is in these definitions that the distinctive core of Austinianism was determined.

Focus of Inquiry

The ambiguous observational standpoint and perceived role of the analytical frame have combined to make difficult a comprehensive and accurate focus on global social and community processes. Bentham, who exercised a strong influence on Austin, did conceive of a world process and a system of international law.¹⁷⁵ He made this view conform to his general jurisprudential conceptions by translating the notion of sovereignty into functional components.¹⁷⁶ Although he retained the term sovereign, and thereby introduced great uncertainty into his theory, he succeeded in demonstrating that this sovereign could be subjected to effective authoritative standards both in-

171. AUSTIN 367.

172. H. HART, *supra* note 170, at 86-88.

173. Hughes, *Professor Hart's Concept of Law*, 25 MODERN L. REV. 319, 326 (1962).

174. See note 156 *supra*.

175. J. BENTHAM, COMMENTS ON THE COMMENTARIES 57 (Clarendon ed. 1928).

176. J. BENTHAM, PRINCIPLES OF MORALS AND LEGISLATION, *supra* note 167, at 326-27.

ternally and externally.¹⁷⁷ Thus Bentham showed that an inclusive social process could be an appropriate subject of juristic analysis. Austin made no effort to introduce this flexibility into his jurisprudence. His definition of law insists upon rigid notions of "sovereign" and "inferior."¹⁷⁸ Law, properly determined, therefore, cannot exist beyond the nation-state.¹⁷⁹ Austin concedes that standards not emanating from a determinate sovereign may be significant factors in behavior, but is unwilling to define these standards as law and to include them in his juristic model.¹⁸⁰ Definitions such as these exclude the greater quantity of authoritative social regulation both within and without the state and are, obviously, of limited value for a problem-solving jurisprudence.

The analytical jurists who achieve international perspectives commence, in contrast with Austin, by assuming the existence of a transnational social process and the possibility of a system of international law. Austin's impasse of sovereignty is commonly skirted, not by adopting Bentham's functional components, but by the creation of a consent doctrine. According to this doctrine, positive international law derives from either the express or tacit consent of states.¹⁸¹ Strikingly enough, even this doctrine has not been maintained in refined form, for the analytical positivist does, at times, assert the existence of a *jus cogens* or peremptory norm,¹⁸² a notion not easily reconciled with his version of the consent formula. The Viennese school, which is probably the purest example of international analyticalism, bases its system, not so much upon explicit "consent," as upon a fundamental postulate or *grundnorm* which assumes and builds upon the patterns of effective power prevailing in a community at any moment.¹⁸³

According to the dominant analytical frame of reference, the relation between the different states that comprise the international system is one of hermetical isolation. Austin felt that international relations were and should be characterized by rugged individualism;

177. *Id.*

178. AUSTIN 132.

179. *Id.* at 298.

180. *Id.* at 140-41.

181. For survey and citation of the traditional theories of consent, see 1 L. OPPENHEIM, INTERNATIONAL LAW 16-20 (7th ed. H. Lauterpacht 1948). On the historical genesis of the concept, see W. SCHIFFER, THE LEGAL COMMUNITY OF MANKIND 49 (1954). Undoubtedly the dreariest pages of international legal theory are those recording the recurring intramural polemics of analyticalists on the theory of consent.

182. Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946 (1967); Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT'L L. 55 (1966); Schwarzenberger, *International Jus Cogens?*, 43 TEXAS L. REV. 455 (1965).

183. H. KELSEN, GENERAL THEORY OF LAW AND STATE 120-32 (A. Wedberg transl. 1945); H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 446, 564 (2d ed. R. Tucker 1966).

his descriptive (and preferred) model represented each state as seeking to promote its interests without considering the effect of its acts upon others.¹⁸⁴ Bentham's more flexible theory, in contrast, emphasized the common interests of all states forming a world community.¹⁸⁵ Oppenheim presents a classical analytical statement of the relations between sovereign states, emphasizing their discreteness and failing to provide a frame for the multifarious interactions between them.¹⁸⁶ The monistic impulse of Viennese analyticalism could not tolerate Austin's complacency in the presence of the anarchic individualism of states. Its alternative vision of a world community, however, is mystically formal rather than empirically referential.¹⁸⁷

The difficulties that beset the analyticalist focus of inquiry are once more exemplified in the linguistic approach of Professor Hart. He conceives of the world community as composed solely of states,¹⁸⁸ the "units of international law."¹⁸⁹ International law is composed of "rules for states" and states themselves must be personified in order to fit them into his analytical framework of social norms.¹⁹⁰ The intellectual tribulations generated by any attempt to fit the multiplex dimensions of transnational activity into this Procrustean bed become readily apparent and Hart, himself, is forced to concede that this theory may not provide the "most powerful tool of analysis" after all.¹⁹¹

The analytical attitude toward the relation between authoritative decision and social process can only be described as calculated obliviousness. The analyticalist will, of course, concede that law seeks to regulate social process, but questions such as the policy content of the regulation, the degree of its effectiveness and so on, are, according to him, beyond the perimeters of juristic operations. In part, this position springs from a special interpretation of science: the Viennese school, for example, has been militant in its peculiar value relativism.¹⁹² In part, it has sprung from satisfaction with the status quo: Austin was clearly satisfied with his image of England. In part, it emanates from the analyticalist's reluctance to assume the responsibility of choice. More importantly, however, this

184. AUSTIN 294.

185. See generally, J. BENTHAM, PRINCIPLES OF INTERNATIONAL LAW (1789), an attempt to apply utilitarianism to international legal problems.

186. L. OPPENHEIM, THE FUTURE OF INTERNATIONAL LAW 2, 16, 20 (1921).

187. Kelsen's pyramidal hierarchy of norms from the *grundnorm* of international law to the most particular norm of municipal law offers but a very pale reflection of the many different interpenetrating communities to which it purports to make reference.

188. H. HART, THE CONCEPT OF LAW 191 (1961).

189. *Id.* at 208.

190. *Id.*

191. *Id.* at 95, 229.

192. See generally, A. BRECHT, POLITICAL THEORY, THE FOUNDATIONS OF TWENTIETH CENTURY POLITICAL THOUGHT 236-39 (1959). But cf. generally H. Kelsen, WHAT IS JUSTICE (1957).

characteristic obliviousness to social process would seem to spring from a concealed metaphysical notion about law. Despite his avowed positivism—his formulaic conviction that law is a communication from a political superior to a political inferior—the analyticalist would appear to conceive theories of law, not as mere signs by which interacting individuals mediate their subjectivities, but rather as manifestations of something unique and autonomous with an unchanging nature or essence.¹⁹³ It is this elusive essence, and not the shared expectations of community members, which is the referent of "law" for the analyticalist.

A recurring characteristic of the analytical frame is extreme emphasis upon rules, to the exclusion of operations. It is worth stressing that this discrepancy is not necessarily latent in the analytical formulation. Austin's definition of a "rule" or "law," for example, includes the components of a normative directive accompanied by a communication of effective power: "A law . . . may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."¹⁹⁴ Moreover, Austin insists that one of the tests of law as opposed to morality is that the conduct of the subject of the directive does conform to the stipulation of the norm.¹⁹⁵ A similar formulation is found in Gray¹⁹⁶ and

193. This basic defect in the analytical approach is perceptively stated by Dean Hardy Dillard in *The Policy-Oriented Approach to Law*, 40 VA. Q. REV. 626 (1964) at 629: "To ask, however tentatively, 'what are rules?' is unwittingly to endow them with a kind of reality or existence even a metaphysical existence, which is illusory. Rules of law do not 'exist' in the sense in which a tree or a stone or the planet Mars might be said to exist. True, they may be articulated and put on paper and in that form they exist, but, whatever their form, they are expressed in words which are merely signs mediating human subjectivities. They represent and arouse expectations which are capable of being explored scientifically. The 'law' is thus not a 'something' impelling obedience; it is a constantly evolving process of decision making and the way it evolves will depend on the knowledge and insights of the decision makers. So viewed, norms of law should be considered less as compulsive commands than as tools of thought or instruments of analysis. Their impelling quality will vary greatly depending on the context of application, and, since the need for stability is recognized, the norms may frequently provide for a high order of predictability. But this is referable back to the expectations entertained and is not attributable to some existential quality attaching to the norms themselves. In other words, our concept of 'law' needs to be liberated from the cramping assumption that it 'exists' as a kind of 'entity' imposing restraints on the decision maker."

The potential clarifying, creative role of international law is the principal theme of Dean Dillard's distinguished lectures upon *Some Aspects of Law and Diplomacy*, 99 Rec. des Cours (Neth.) 449 (1957). See also Dillard, *Conflict and Change: The Role of Law*, 1963 PROCEEDINGS, AM. SOC. INT'L L. 50; Dillard, *Law and Conflict: Some Current Dilemmas*, 24 WASH. & LEE L. REV. 177 (1967).

194. AUSTIN 10.

195. *Id.* at 16.

196. J. GRAY, *THE NATURE AND SOURCES OF THE LAW* (2d ed. 1921).

Oppenheim.¹⁹⁷ For Kelsen, in contrast, a positive law turns upon hierarchic source and formulation.¹⁹⁸ Similarly, Professor Hart's criteria of law relate primarily to perspectives, with relatively little attention given to operations.¹⁹⁹

The more detailed applications of the analytical mode confirm that its definitions are purely formulatory. The analytical jurist does not, characteristically, test his putative rules of law in terms of their actual effective power or according to the degree of behavioral conformity which they evoke. Instead, he reverts exclusively to their source as the sole criterion of the existence of a rule of law. If they derive from a sovereign or equivalent, the actual extent of whose effective power is also not subjected to examination, they are, for analytical purposes, rules of law. Even were the analyticalist true to his own definitions, he would, nevertheless, exclude from his focus of inquiry large segments of authoritative decision which cannot be fitted into the rigid parameters of his frame of reference.

In analytical jurisprudence, authority and control are not consistently employed as distinctly differentiated components of decision. In a manner similar to the treatment of perspectives and operations, the initial image of a legal society includes some consideration of authority and control; subsequent inquiries, however, are restricted to abstract syntactic operations. For Austin, for example, sovereignty is initially determined by reference to effective power.²⁰⁰ But a close reading of his text will indicate that power is an abstracted notion; there is no attempt to determine the degree of effective power actually available to different participants. In order to qualify as a rule of law, it is necessary only that there be the smallest chance of a sanction being applied,²⁰¹ and there is no consideration of the highly relevant question of whether that sanction, once invoked, will actually be effective. Force for Austin is, as Maine noted, a logical postulate and not an empirically referential term.²⁰² In short, having determined a legal society, force becomes a purely formulaic component, which is presumed if a communication can be traced back to a sovereign source. This is not to suggest that authority is, in analytical usage, employed as a socially relevant category; it, too, is an abstraction, whose social content must be ascertained in inquiries, other than analytical, that reveal the degree of congruence of authority and control actually operative in a given context.

197. L. OPPENHEIM, *supra* note 186, at 4.

198. Kelsen, it may be noted, does consider efficacy, but it too is a norm. See H. KELSEN, *GENERAL THEORY OF LAW AND STATE*, *supra* note 183, at 121, 190.

199. H. HART, *supra* note 188. But consider Hart's numerous references to some operational aspects of rules: *id.* at 56, 84.

200. AUSTIN 24.

201. *Id.* at 16.

202. H. MAINE, *INSTITUTIONS*, ch. 12, 13.

Some of the shortcomings of Austinian conceptions of authority and control have been noted, and ameliorated, by Professor Hart. According to him, "There are two minimum conditions necessary and sufficient for the existence of a legal system."

On the one hand those rules of behavior which are valid according to the system's ultimate criteria of validity must be generally obeyed and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behavior by its officials.²⁰³

There are a number of unfortunate divergencies in the elaboration and execution of this statement. In the first place, once he has ascertained to his satisfaction that a legal system is generally efficacious,²⁰⁴ Professor Hart tends to emphasize authority more than control as a determinant of law. His understanding of the word "system" and his criteria for determining effectiveness are, unfortunately, not made clear. Thus, he offers no means of protection against the error of mistaking pretended authority for power that is both authoritative and controlling. In the second place, Hart's notion of authority conceals the complexity of the concept and the multiplicity of its empirical manifestations under the disarmingly simple rubric of "rules of recognition." It should be clear that his rules of recognition, if given empirical reference, must extend to the entire constitutive process of authoritative decision in any community, and, hence, that one barely begins to grasp the notion by reference only to rules.

The Austinian frame, for all its syntactic elegance, is clearly an inadequate guide to ascertaining the actual patterns of authority and control within any community. Jurists and political scientists of the current generation are too familiar with the phenomenon of the nominal sovereign to substitute definitional references to an alleged "sovereign" for empirically disciplined, research grounded, references to the extent to which a given process of decision is based upon authority and control. In communities in which patterns of authority and control are relatively unorganized and shifting constantly, or in which the structure is coarchical rather than hierarchical, the Austinian definitions afford a peculiarly inept focus. As a result of these constrictions, it is not astonishing to find that the international wing of the analytical school has felt it necessary to substitute or supplement traditional distinctions in order to describe transnational processes of prescription and application.

To substitute for the Austinian sovereign, the international analyticalists have resorted to certain principles of the equality of states and of tacit consent to certain rights asserted to inhere in them as

203. H. HART, *supra* note 188, at 113.

204. *Id.* at 100, 107.

states. Yet, these asserted principles could not be maintained in the face of the actual realities of control and could not be applied to a developmental model. Hence, the highly ambiguous doctrine of "political decision": changes made in past arrangements which did not conform to the equality doctrine, were not at first considered by the analyticalist as juridical or lawful, but would thereafter be quietly shifted from *de facto* to *de jure* status and legitimated. Thus, Oppenheim, after emphasizing the fundamental character of the equality doctrine, could state that "[t]he Great Powers are recognized *de facto*, by the smaller States, as political leaders, but this recognition does not involve recognition of legal superiority."²⁰⁵ "Legal equality" is a largely meaningless term in this formulation and, indeed, Oppenheim adds that "every progress of the law of nations during the past" was the result of Great Power "political hegemony."²⁰⁶ The effective power coloring of this formulation makes clear why the international analyticalist so frequently reverts to the non-law frame of his municipal counterpart.

The static conception of law adopted by the analyticalist renders any notion of the process character of decision irrelevant; the analytical jurist is not concerned with the process of decision-making but rather with the exposition, in a syntactic pattern, of the products of a limited number of decision sources. And the notion of decision itself has a reference as restricted as the sources from which it emanates. A decision is simply the verbalisms of a legislator or judge, and does not include the distribution of values in fact put into controlling effect.

The international analyticalist has come closer to a process notion of law, but at the expense of the integrity of his theory. Oppenheim, for example, acknowledges, though somewhat grudgingly, the changes introduced in the corpus of international law by means other than the consent of the members of the family of nations.²⁰⁷ Kelsen's contributions to international law incorporate a number of comparative, developmental models.²⁰⁸ Yet no analyticalist has delineated, in any practicable detail, a comprehensive process of transnational decision.

The absence of process conceptions of decision-making seriously detracts from the analytical treatment of the constitutive process. Analyticalists of both the municipal and international law wings cannot but be concerned with the fundamental prescriptions upon which a legal society rests. These prescriptions are, however, presented in terms of static rules rather than as features of an on-going process. In relation to an arena characterized by continuous struc-

205. 1 L. OPPENHEIM, INTERNATIONAL LAW 171, n.1 (1905).

206. *Id.* at 169.

207. *Id.* at 170.

208. H. KELSEN, PRINCIPLES OF INTERNATIONAL LAW 13ff. (1952); *id.*, LAW AND PEACE *passim* (1942).

tural changes, including changes in constitutive process, such a focus is helplessly adrift.

Performance of Intellectual Tasks

The analytical frame repudiates express goal clarification as a legitimate juridical task. The Viennese school of Kelsen represents the contemporary extremity of this view and is parallel, in this regard, to the analytical trend in ancient Chinese jurisprudence: both adhered to a concept of value relativism from which they deduced that the clarification of goals could not be enumerated among scientific juridical operations.

Goal considerations do, however, recur in the writings of analytical authors. It is indicative of the entire analytical frame that they are never presented as preferences, either of the writer or of any group with which he identifies; the assumptions of the analyticalist do not permit such explicitness. Goals are, rather, presented in the form of either transempirical naturalism, as in the manner of Austin,²⁰⁹ or in the mechanical progression metaphor of the historicalist, as in the manner of such moderate positivists as Laurent²¹⁰ and Oppenheim.²¹¹ In none of these instances does the writer himself explicitly assume the burden of choice.

Austin sought to resolve the conflict between Bentham's utilitarianism and his own positivism by the invocation of divine law.²¹² In his theory of general utility, he characterizes divine law as positive, since it was directed to an intelligent being from an intelligent being with power. Divine law is known or unknown; the latter is discovered, according to Austin, by a method of analysis indistinguishable from Bentham's pleasure-pain principle.²¹³ It is according to such criteria that a law or action is characterized as good or bad. Austin goes so far as to consider under what circumstances positive law should be subjected to popular repudiation.²¹⁴ This aspect of the Austinian corpus, which can be categorized as an example of transempirical naturalism, is in marked contrast to the bulk of his writings. Austin himself apologized for it, explaining that since utility was consulted in the making of laws, it could be used in expository jurisprudence "to explain distinctly and precisely the scope and purport of a law."²¹⁵

209. AUSTIN 59, 61, 67, 85, 104.

210. F. LAURENT, *ETUDES SUR L'HISTOIRE DE L'HUMANITE* (1861).

211. L. OPPENHEIM, *THE FUTURE OF INTERNATIONAL LAW* (1921).

212. AUSTIN 34; cf. J. BENTHAM, *COMMENTS ON THE COMMENTARIES* 46 (1928).

213. AUSTIN 37.

214. *Id.* at 54.

215. "The principle of utility, well or ill understood, has usually been the principle consulted in making laws; and I therefore should often be unable to explain distinctly and precisely the scope and purport of a law, without having brought the principle of utility directly before you." *Id.* at 59.

Bentham²¹⁶ and Oppenheim²¹⁷ sought to move beyond the static confines of analytical positivism, not by relying on transempirical naturalism, but rather by incorporating a thinly disguised version of mechanical historicalism. For both of these scholars and for many who comprised the so-called school of progressivism, the faculty of right reason, shared by all men, would ultimately reveal their true natural interests, which could be realized only in a collaborative and democratic structure of all states.²¹⁸ Clarification of the concepts of right reason and natural interest served the progressive analyticalists as a device for infiltrating a conative element and goals into their system of allegedly autonomous rules.

A modern analyticalist, such as Professor Hart, is uneasy about the value neutralism of his predecessors and seeks a "rational connexion between natural facts and the content of legal and moral rules."²¹⁹ Although he recommends some salient characteristics of these natural facts,²²⁰ he does not indicate how they are to be applied in concrete cases nor does he integrate them into a systematic set of criteria for appraising law.

Among the analytical jurists, Hans Kelsen stands out as the most rigorous adherent of exclusive positivism. Kelsen totally rejects the relevance of a non-scientific operation such as the clarification of goals and attempts only to create a syntactical construct of norms without regard to their value content.²²¹

The fact that independent criteria and ill-defined goals did operate in a frequently subliminal manner in analytical jurisprudence in no sense represents an adequate discharge of the intellectual task involved. The indirect manner in which goals were introduced and the guise, whether divine or historically determinate, in which they were presented rendered these goals as rigid as the entire structure of analyticalism. The observational standpoint of the analyticalist did not permit him to perceive that these "extensions" of positive law were no more than someone's intensely held, but unexamined, preferences at a given time and place. It is thus not surprising, therefore, to discover that his operative goals sometime reflect the special interests of Christian Europe rather than the common interests of all peoples of the world community.

Perception of the relevance of trend studies has varied widely among analytical writers. At one extreme, Austin was relatively disparaging about the utility of studies of past decision. The pre-

216. For an interesting commentary and critique of this aspect of Bentham, see 1 L. STEPHENS, *THE ENGLISH UTILITARIANS* 303 (1900).

217. L. OPPENHEIM, *supra* note 211, at 68.

218. For a useful comparative examination of views as to the optimum structuring of an ideal world community, see W. SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* 155-86 (1954).

219. See H. HART, *supra* note 188, at 189-95.

220. *Id.* at 190-93.

221. See note 192 *supra*.

ferred mode of determining what the law is was logical derivation and only when syntactics did not avail was there to be resort to historical investigation.²²² Subsequent to Austin, however, positivism put primary emphasis upon trend studies, and the performance of this task in a rigorous and highly stylized manner is a hallmark of the international analyticalist. One of the major contributions of analytical positivism has, indeed, been the enormous archival collection and compilation of a restricted number of types of decision.

These trend studies exhibit three serious limitations: a restricted notion of decision, a tendency to over-emphasize perspectives and, most pervasive, an assumption that determinate decisions of the past constitute the "law" of the present. The analyticalist, as has been noted, seeks to confine decision to the communications of a legislator and the pronouncements of courts. Even in the most organized of polities, these categories do not exhaust the aggregate of authoritative and controlling value allocations; in many organized groups they probably cover a very small proportion of the total number of decisions. The international analyticalist expands his focus to include custom. The doctrinal formula for ascertaining the existence of a custom makes provision for both perspectives and operations; the application of these criteria is, however, frustrated by insistence upon a high degree of general agreement.²²³

Analytical trend studies deal with perspectives more than with operations. A given pronouncement of a legislature is a law, for example, without reference to the operations or the actual expectations it generates. A court decision, a treaty and so on are characterized as law without reference to their effects. Insofar as an arena exhibits a high and stable congruence of authority and control, such observations may prove to be empirically accurate. In the international arena, however, where the interrelations of authority and control are often complex, the result of such assumption may be a noumenal creation with scant correlation to reality.

The most pervasive assumption of the analyticalist is that the selected decisions of the past which he chooses to characterize as law, "properly so-called," do in fact correspond to expectations of authority and control regarding current behavior and can be treated as a single, reliable index of how future decisions will be taken. There is little consideration of conditions prevailing in the past or of probable future conditions, in alternative constructs of various possibilities. The straight line projection of discrete selected variables is a singularly dubious projective technique. Translated into simple terms, the assumption that what happened in the past will invariably happen in the future is at once naive and anachronistic.

222. AUSTIN 64-65. See also Mill, *Austin on Jurisprudence*, 118 EDINBURGH REVIEW 439, 445 (1863).

223. For a comprehensive review of doctrinal theories on customary law, see K. WOLFKE, *CUSTOM IN PRESENT INTERNATIONAL LAW* (1964).

The analysis of conditioning factors is almost totally absent in the analyticalism of Austin,²²⁴ and disappears, at the phase of juridical application, in the writings of Kelsen.²²⁵ The key jurisprudential task is presumed to be the clarification and ordering of the interrelation of rules, not decisions. In the constricted world of the theoretical analyticalist, the term "knowledge" refers more to a precise ordering of terms than to the full range of contemplative or manipulative enlightenment.

We do not overlook the point that factor studies appear briefly, in analytical work, at the initial stages of definition. Even here, the only factor considered is power, and the operation is formulaic rather than investigative. For Oppenheim and the international progressive positivists, factor analysis based itself on the assumption of an inherent and mechanical progress mechanism in history.²²⁶ The obvious inference is that factor analysis is quite irrelevant to the analytical frame of reference since its conception of law is a mechanical one, in which decision is a matter of the application of ostensibly objective rules rather than choices. Hence the empirical results of factor analyses of the past do not feed back to the choosing or deciding processes of scholars or decision-makers who adhere strictly to the explicit definitions of the analytical approach.

Practical analyticalists, especially those dealing with international law, found it necessary if discomfiting to move beyond the confines of the formal theory. Oppenheim, for example, did concern himself with explaining why certain structural patterns had developed; he was, in fact, unable to establish a focus that included more than power.²²⁷ Scintillae of reference to such factors as shared rectitude systems and complementary economic relationships were never stated with sufficient clarity to make them useful elements of theory. Later analytical positivists, such as Jenks,²²⁸ have considered such a wide range of factors and found ways of making them so pertinent to juristic problems that it is misleading to catalogue them among the adherents of analyticalism.

The tasks of deliberately projecting future probabilities and of inventing or evaluating alternative strategies are not permissible components of the analytical frame of reference when the manifest content of its own formulations is applied with fidelity.

224. In setting out the fundamentals of his theory, Austin briefly examines some factors which create or sustain sovereignty, *see* AUSTIN 193-94, but does not consider them either in depth or through time; having established a community, he does not return to its elements. In his consideration of factors of decision, Austin deals only with the "sources" of judicial pronouncements: legislation, custom, the writings of jurisconsults and the judge's own notion of utility. AUSTIN 539ff.

225. H. KELSEN, *GENERAL THEORY OF LAW AND STATE*, *supra* note 183, at 4, 15-28; *cf. id.* at 110ff.

226. W. SCHIFFER, *supra* note 218, at 177ff.

227. L. OPPENHEIM, *FUTURE OF INTERNATIONAL LAW* 16 (1921).

228. For citations, *see* note 15 *supra*.

Postulation of Goals

Since goal preferences are not an integral part of the analytical frame, the details of demanded public order have played a subliminal, if no less decisive, role in analytical work and have varied according to the jurist concerned. In regard to constitutive power, for example, Austin²²⁹ and Oppenheim²³⁰ preferred a coarchical system of nation-states, with Oppenheim putting considerably more emphasis upon the desirability of organization. Kelsen and other monists, in contrast, are committed to a conception of global hierarchy and, ultimately, the creation of a world state. The analytical frame of reference has tended to preclude a consideration of preferred allocative patterns for values other than power. In the case of the Vienna school, the preclusion springs from a wish to maintain law as a pure discipline, distinct from others; hence, consideration of the public order allocation of wealth, well-being and respect, to name only a few sectors, is avoided in order to prevent law's merger with economics, sociology and theology. Austin, on the other hand, seems to incorporate Bentham's pleasure-pain principle in regard to public order value allocation.²³¹ But the principle is never brought to a level of specifics and, thus, it is not possible to determine precisely which patterns enjoyed Austin's approval.

Appraisal

From the perspective of a jurisprudence relevant to the problem-solving tasks of scholars or decision-makers, the most disappointing feature of analyticalism is the enormous amount of intellectual effort which its devotees have expended with so little relevance to effective and ameliorative transnational decision. Though discussion here has concentrated upon 19th century European analyticalism, this jurisprudential frame, in every culture in which it has appeared, has consciously turned its back on social reality and on the multi-value social effects which are the post-outcome effects of decision. Though the motives and justifications for seizing upon analyticalism have varied widely, its salient impact has been remarkably homogenous. Observational standpoints have not been distinguished and chosen with care, decision conceptions have been derivative and artificial rather than empirically grounded, and problem-solving tasks have been eluded rather than sought. Goals have not been clarified; trend studies have been either anecdotal or missing; factor analyses, when undertaken, have been restricted to the consideration of certain dimensions of power; neither projections nor strategic inventions have been systematically undertaken. Where jurists self-identified as analytical or positivist have sought to perform these tasks, they have

229. AUSTIN 294.

230. L. OPPENHEIM, *supra* note 227, at 13. But not without qualifications. *See id.* at 11, 12.

231. AUSTIN 104.

done so without guidance and at the expense of the integrity of the theory. In comprehensive appraisal it might be concluded that this jurisprudential frame, far from serving as an aid to relevant intellectual operations, has been at best irrelevant and at worst a guide to the magnification of the semi-relevant dimensions of law in the world community.

V. THE SOCIOLOGISTIC FRAME

The four frames of reference previously considered represent recurring phenomena in the history of jurisprudence. The two frames to which we now turn are distinctly modern creations. Although the sociological frame of reference and the frame of limited factor analysis have historical antecedents,²³² they may properly be considered to be products of the 19th and 20th centuries. They have been strongly influenced by innovations in the physical and social sciences²³³ and have generally sought to adapt and apply the techniques so successfully employed elsewhere to theories about law. A segment of this trend is, of course, no more than superficial mimesis, the adoption of metaphor rather than technique and an attempt to borrow the prestige of another discipline rather than its rigorous methods or criteria.

In a strict sense, there is as yet no sociological school of international law, but rather a sociologistic fashion or style of communication. While numerous writers have described themselves as sociological jurists, there are few exceptions to a pattern of "chair-bourne" sociology. The general conceptions and operational techniques of the contemporary sociologist have not as yet been applied with any degree of rigor by any "sociological" jurist. The paucity of citation to the findings of sociological investigators suggests that the trend of communicative rather than operational sociology will continue. Sociological jurisprudence has been institutionalized in the patheon of international jurisprudence to the point where dialogue with Weber, Durkheim and Pound is generally sufficient to identify one as a "sociologist."

The common feature of sociologistic jurists is concern with the identification of conditioning factors and a consensus, on the verbal if not consistently on the operational level, that these factors are to be found in the human being, discrete or in interaction. While a

232. Early contributors to a sociological approach to the law include Aristotle, Spinoza, Hobbes and Montesquieu. See Ehrlich, *Montesquieu and Sociological Jurisprudence*, 29 HARV. L. REV. 582 (1916) and G. GURVITCH, *SOCIOLOGY OF LAW* 65, 85ff. (1948). Sir Henry Maine could be considered among the founders, as was noted earlier, *supra* at 228.

233. The influence of Auguste Comte on Durkheim and his followers has been noted frequently. But the inclination to apply a rigorous scientific methodology to philosophical problems is obviously much more ancient than the 19th century. The innovative feature of the 19th century context was the tremendous prestige which physical scientific methods had acquired and the enormous promise it held out.

number of writers of this genre, such as Dean Pound²³⁴ and Professor Corbett,²³⁵ have viewed this intellectual function as a preliminary to purposive "social engineering," and Ehrlich was intensely concerned with distributive justice,²³⁶ such an engineering function—the invention, evaluation, and selection of alternatives—has never been carried through by sociological jurisprudence. The majority of sociological jurists have been concerned with understanding why and how "law" comes about; they have not dealt with the ends and consequences of that process. In this respect, their perspective has been close to the analyticalists.

The school of Legal Realism was in many respects a flamboyant expression of sociological jurisprudence, but was more polemical and iconoclastic than the parent movement. In the United States, legal realism performed a useful function by challenging many of the critical assumptions of analytical positivism, but in the end it was unable to construct a positive systematic theory of its own.²³⁷ Nor were the realists particularly concerned about the imbalance of their contribution. Even Hercules, as one Realist put it, was asked only to cleanse the Augean stables. Presumably this helped to excuse their neglect of international law, a field to which they gave relatively little attention. A current international realist such as Carlston is distinguished from the major sociological trend by the strong behavioralist emphasis in his work.²³⁸ Scandinavian realism, represented by the works of Lundstedt,²³⁹ Olivecrona²⁴⁰ and Ross²⁴¹ are firmly in the behavioralist wing of sociological jurisprudence, with strong emphasis upon operations and control and a continuing gnawing doubt about the existence of international law.

Few of the founders of modern sociology refrained from some investigation of law as an expression and means of social organization; yet they rarely engaged in critical examination of international law. The early sociological jurists manifested a similar tendency, which sprang, in part, from their often unexamined prior conceptions of

234. Pound, *The Part of Philosophy in International Law*, PROC. OF THE SIXTH INT'L CONG. OF PHILOSOPHY 372, 380-81 (1926); Pound, *Philosophical Theory and International Law*, BIBLIOTHECA VISSERIANA 73, 89 (1913).

235. Corbett, *Social Basis of a Law of Nations*, 85 Rec. des Cours (Neth.) 467, 481 (1954); CORBETT, LAW AND SOCIETY IN THE RELATIONS OF STATES (1951).

236. E. EHRLICH, *supra* note 31, at 214.

237. American realists such as Holmes, Cardozo, Frank and Llewellyn were essentially sociological in their observational techniques, though they tended to emphasize different conglomerations of social activity. None of these writers, unfortunately, gave serious attention to international law.

238. CARLSTON, LAW AND STRUCTURE OF SOCIAL ACTION 128-29, 148 (1956); CARLSTON, LAW AND ORGANIZATION IN WORLD SOCIETY 206 (1962); Carlston, *World Order and International Law*, 20 J. LEGAL ED. 127 (1967).

239. A. LUNDSTEDT, *LEGAL THINKING REVISED* (1955).

240. K. OLIVECRONA, *LAW AS FACT* (1938).

241. A. ROSS, *THE UNITED NATIONS: PEACE AND PROGRESS* (1966); A. ROSS, *ON LAW AND JUSTICE* (1958); A. ROSS, *CONSTITUTION OF THE UNITED NATIONS: ANALYSIS OF STRUCTURE AND FUNCTION* (1950); A. ROSS, *A TEXTBOOK OF INTERNATIONAL LAW* (1947).

law. Consider, for example, the tendency to identify rules by structural criteria. Weber's notion of law was a structural one, the indicia of which were absent in the international arena: accordingly, he rejected the notion of international law.²⁴² Ehrlich also developed an associational definition of law, according to which international law was not considered law.²⁴³ Because of the influence which these writers, and others of similar orientation, have exercised on international jurisprudence, their ideas are noted here.

Observational Standpoint

Although sociological jurisprudence is identified as a "school" with which not an inconsiderable number of jurists ally themselves, there is striking disparity in the standpoints taken and in the perceived roles of inquiry. A number of writers have emphasized a distinction between theories of and about law. Such a distinction was important for von Jhering²⁴⁴ and Stammler²⁴⁵ as an initial starting point and it is felt, though in a less consistent fashion, in the work of Dean Pound.²⁴⁶ Such distinctions are, however, absent in the work of a number of influential sociological writings. The sociological jurists, as a whole, do not appear to have grasped the fundamental importance of considering the different observational standpoints and distinctive juridical roles which the law specialist can take.

Lack of clarity in observational standpoint has stemmed, in part, from the methodologies of the early sociological jurists. In the absence, and at times in ignorance, of the techniques employed by social scientists, they frequently gravitated toward the traditional method of philosophical speculation, as did Stammler,²⁴⁷ or toward a crude form of participant-observation, without careful consideration of the implications of such techniques. Thus, Jhering²⁴⁸ and, to a greater extent, Petrazhitski,²⁴⁹ often relied upon introspection and generalization—which are the necessary first steps in any intellectual enter-

242. See M. WEBER, *LAW IN ECONOMY AND SOCIETY* 6 (M. Rheinstein ed. 1954).

243. E. EHRLICH, *supra* note 31, at 24, 39, 84. Durkheim may, himself, have been close to this position. In distinguishing law and morals, the distinctive difference which he found was that "one is applied by each and everyone, the other by defined and constituted bodies; one is diffuse, the other is organized." E. DURKHEIM, *DE LA DIVISION DU TRAVAIL SOCIAL* 27.

244. R. VON JHERING, *LAW AS A MEANS TO AN END* (I. Husik transl. 1913).

245. R. STAMMLER, *THE THEORY OF JUSTICE* 3 (I. Husik, transl., 1925).

246. 1 R. POUND, *JURISPRUDENCE* 286, 349-58; 4 *id.* at 44.

247. R. STAMMLER, *supra*, note 245.

248. Jhering was quite candid about the reasons for not relying upon philosophical methods. He had not been trained in them and he found, after examination, that philosophical studies were either not in point for him or on so abstract a level of analysis that he could not use them. R. VON JHERING, *supra* note 244, at liv-lvi.

249. L. PETRAZYCKI, *LAW AND MORALITY* 12ff. (H. Babb transl. 1955). On Petrazhitski's innovative psychology, see Meyendorff, *Lev Petrazycki in MODERN THEORIES OF LAW* 21, 35-36 (1933); P. SOROKIN, *CONTEMPORARY SOCIOLOGICAL THEORIES* 702-03 (1928).

prise — and not infrequently proved incapable of recapturing the standpoint of the objective scholar once their introspective data had been collated. The point is not that the technical operations were unsound, but rather that failure to clarify the observational standpoint tended to undermine their accuracy and range of application.

The perspective of the sociologist, including his focus upon processes of spontaneous group formation, would appear particularly given to appreciation of social interaction and interdependence. Empirical studies would presumably offer continuous evidence of the capacity of individuals to clarify shared interests and to devise methods for their collaborative realization. Coupled with the formula-tory impulse of the jurist, it could be expected that this approach to jurisprudence would contribute detailed clarifications of common inclusive and exclusive interests and would have little difficulty in distinguishing claims to special interests from those to common interests. Paradoxically, this fruitful development has not taken place. In the works of a number of writers, a conative disposition towards discovering and realizing common interest is presented, but never suffused with social reality. Stammler's "natural law with a variable content"²⁵⁰ and Huber's discussions of the common bases of a world community were never carried to the point of specification.²⁵¹ Ehrlich's concern with distributive justice was left in similar abeyance.²⁵² In all of these instances, it should be noted, presumed inclusive interests were to be derived from the current expectations of community members; they were not postulated goals which a disengaged observer might recommend to a given community.²⁵³ Contemporary critics were quick to note the basic similarity between this position and that of the continental historicalists.

Petrazhitski's entire conception was based on an irenic process of "positivisation" of the subjective expectations and demands shared by members of a group. He was concerned to provide techniques and objectives for legislative processes.²⁵⁴ At no time did he try to give these doctrines exemplification in transnational decisions. We are not asserting that the sociological frame inhibits a conception of common as contrasted with special interests; it does not. Sociological jurists have simply not sought to clarify these distinctions.

250. R. STAMMLER, *supra* note 245, at 153. See also Wu, *Stammler and His Critics*, in *id.* at 553, 570, who contends that Stammler actually abandoned the idea of "natural law with a variable content," but that the idea was continued by Raymond Saleilles. In fact, the term was deleted in Stammler's second edition of "Economy and Law"; in its place, the title, "the possibility of an objectively correct legal content" was substituted.

251. M. HUBER, *DIE SOZIOLOGISCHEN GRUNDLAGEN DES VOLKERRECHTS* 40ff. (1928).

252. E. EHRLICH, *supra* note 31, at note 5.

253. See Landheer, *Contemporary Sociological Theories and International Law*, 91 *Rec. des Cours (Neth.)* 1, 43 (1957) and, for the *locus classicus*, see E. DURKHEIM, *DE LA DIVISION DU TRAVAIL SOCIAL* iii.

254. L. PETRAZHITSKI, *supra* note 249, at n.18 at 49, 100. For a commentary, see Meyendorff, *supra* note 249, at 18.

Focus of Inquiry

Sociological writers have tended to find social interactions within a nation-state or a smaller group more congenial fields for investigation and analysis than transnational contexts. This predilection is clearly present in the work of the founder of modern sociological jurisprudence, Emile Durkheim. His criteria of law—stable interaction and a minimum set of shared perspectives—could have been profitably applied to transnational processes. In his general approach to law, Durkheim concluded that: "Social life, wherever it exists in a durable manner, inevitably tends to take a definite form and to organize itself, and law is nothing but the stablest and most precise aspects of this very organization."²⁵⁵ However, an etatistic predilection and a "body of rules" formulation pressed Durkheim into a subsequent definition of law as rules sanctioned by defined, authoritative organized bodies.²⁵⁶ Hence, he tended to overlook transnational processes of interaction as crucibles for the formation of law. Max Weber, though approaching his subject from a different vantage point, also arrived at an identification of law with certain structural modalities; hence he also explicitly rejected the jural quality of international law.²⁵⁷

Although Eugen Ehrlich inclined to accept certain structural features as the indicia of law, he conceded that to a "modest extent the whole human race has already become a vast legal association in regard to respect for life, liberty and property."²⁵⁸ There is no question that the criteria developed by these writers are, for some contexts, realistic. The common fallacy is the development of criteria for one set of events and the unconscious inclusion, thereafter, of certain idiosyncratic features of these situations as definitive criteria for other contexts. Beginning with the contemporary organization within states, they projected convenient, if restrictive criteria to the consideration of contexts transcending states.

Duguit postulates a global process, although this aspect of his work is more an *a priori* assumption of the inherent "social solidarity" binding all human beings than the result of inductive investigation.²⁵⁹ If Duguit's criteria had been rigorously applied they would have required studies to be made of the extent to which identifications were, in fact, intensely shared; instead, it was assumed that, in the nature of things, they were. DeVisscher, who clearly entertains an image of global social process, adopts a formulation and at times a metaphor quite close to Duguit: "The International community is a potential order in the minds of men. . ." ²⁶⁰

255. E. DURKHEIM, *DE LA DIVISION DU TRAVAIL* at 67.

256. *Id.* at 89, 213.

257. M. WEBER, *supra* note 242, at 6.

258. E. EHRLICH, *supra* note 31, at 79, 81-82.

259. L. DUGUIT, *TRAITE DE DROIT CONSTITUTIONNEL* 54-55, 99.

260. C. DE VISSCHER, *supra* note 33, at 98-99.

Max Huber²⁶¹ and Dean Pound²⁶² express another conception which, in more diffuse form, is common to deVisscher,²⁶³ Truyol y Serra,²⁶⁴ Corbett²⁶⁵ and others. Social process and society (or, in parallel manner, community process and community) are distinguished. While there is appreciation of a global social process, a variety of criteria subtly lead these writers to revert to the much more constrictive notion of a community of states. Careful analysis of the works of these authors reveals an over-demanding notion of community, the level of integration required being set so high that few nation-states even could fully qualify as communities. Though a number of writers volunteer criteria for testing various levels of integration, it is striking to discover that no one of them presents empirical trend studies of transnational interaction. So far as can be judged, their impressions of actual patterns and trends of integration are under rather than overstated.

Although a number of sophisticated analyses of community processes were developed within the sociologicistic frame of reference, they were typically weakened or vitiated so far as international law is concerned by the unconscious incorporation of some of the idiosyncratic features of contemporary state organizations.²⁶⁶ As a whole, the sociological jurisprudence of the 19th and early 20th centuries was marked by strong etatistic tendencies. Nonetheless Ehrlich's work, for instance, evidences a particularly clear notion of how a community is formed and of the multiplicity of roles which individuals play.²⁶⁷ Duguit's *a priori* concept of "social solidarity" tended to assist in identifying communities in whatever aggregate might be thought about or examined.

Recently sociological writers have been less concerned with criteria of community process and more interested with classifying different types of community. This trend was officially opened by one writer's announcement, in grand Gallic style, that an inclusive world community began in 1945;²⁶⁸ the parallel with Bishop Ussher's detailed chronology of the creation of the world is striking. More use-

261. M. HUBER, *supra* note 251, at 39.

262. Pound, *The Part of Philosophy in International Law*, *supra* note 234, at 374-75.

263. C. DE VISSCHER, *supra* note 33, at 98.

264. Truyol y Serra, *Genese et Structure de la societe internationale*, 96 Rec. des Cours (Neth.) 557 (1959).

265. Corbett, *Social Basis of a Law of Nations*, 85 Rec. des Cours (Neth.) 471 (1954).

266. Durkheim, for example, stated as a "general law," "that the partial aggregates which form a part of a vaster aggregate see their individuality become less and less distinct . . . Thus territorial divisions are less and less grounded in the nature of things and consequently lose their significance." E. DURKHEIM, *DE LA DIVISION DU TRAVAIL* 203-04. It is significant that Durkheim did not attempt to apply this "general law" to communities more inclusive than the territorial nation-state.

267. E. EHRLICH, *supra* note 31, at 63.

268. R. ARON, *PEACE AND WAR* 95 (R. Howard, transl., 1966).

ful have been the typological studies undertaken by Professor Schwarzenberger²⁶⁹ which have proven particularly influential; parallel or derivative formulations appear in the works of many writers.

Studies of the interrelations of the communities that comprise the world arena have tended to be verbal or formulatory. Surprisingly the sociological frame has not generated attempts to elaborate and explore interpenetration among different community processes. Where a beginning is made and interpenetration is described, the emphasis is quickly superseded by an increasingly monolithic conception of the state. Thus Truyol y Serra, in a representative passage, states:

In effect, if the subjects of international relations, and thus the members of the international society are, in the last analysis, individuals, more or less incorporated in a multitude of groups which intersect and mutually intertwine in all senses, on the international plain they are not (as on the national) in a *direct* relation with the society as such; they are, on the contrary, mediated by the states, as qualified groups, entities of autonomous decision, possessing the monopoly of what has been called unconditional coercion.²⁷⁰

Taken as a heuristic formula, this statement is indistinguishable from that of a positivist.

One of the more interesting variations introduced by the sociological frame has been the focusing upon the processes of civic rather than public order. In part as reaction against the wholly governmental focus of the analyticalists many sociological jurists have tended to place the center of catalytic vitality almost entirely in processes of civic order. Statements in the writings of Ehrlich,²⁷¹ Timasheff²⁷² and Petrazhitski²⁷³ are quite similar, in this respect, to the basic outlook of continental historicalists. While the change in focus was largely salubrious, it was an overreaction; a dominant focus on civic order processes was little better than the one-sidedness which it sought to remedy.

Perhaps the most striking and recurring feature of sociological ap-

269. G. SCHWARZENBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* 10-16 (1962).

270. TRUYOL Y SERRA, *supra* note 264, at 567-68. Some instruction is gained by examining the differing routes by which sociological jurists return to this extremely conventional position. Professor Stone suggests a simplified communications model, one which would, presumably, include all individuals in the world. But the state is raised to the level of a barrier making transnational communication an activity which it controls: Stone, *Problems Confronting Sociological Enquiries Concerning International Law*, 89 *Rec. des Cours (Neth.)* 96, 111-13 (1956). Cf. Schindler, *Contribution a l'etude des facteurs sociologiques et psychologiques du droit international*, 46 *Rec. des Cours (Neth.)* 233 (1933).

271. E. EHLICH, *supra* note 31, at 153-54.

272. N. TIMASHEFF, *AN INTRODUCTION TO THE SOCIOLOGY OF LAW* (1939).

273. L. PETRAZYCKI, *supra* note 249, at 221ff.

proaches is the non-sociological quality of what has been done in its name. Tension between the empirical orientation of the sociologist and the metaphysical-derivational orientation of the traditional jurist has been partially resolved by a sterilizing adjustment: the word "sociology" appears with great frequency, even though recourse to sociological material is almost totally absent. Source citations by sociological jurists—a rough index of tools, methods and conceptions employed—are almost identical with those of analyticalists and historicalists.

Notwithstanding the origin of the sociological frame of reference as a reaction against the narrow conception of law disseminated by analytical positivists, a sustained balance between perspectives and operations was not achieved. Where the analyticalist had limited law to the fiat of a determinate political superior without reference to operations, the sociologist admitted to the category of law persistent patterns of behavior, the so-called "normativity of the factual." The adherents of neither frame of reference could make effective use of the conception of law as both perspectives and operations. In Durkheim,²⁷⁴ Weber²⁷⁵ and Ehrlich,²⁷⁶ the overwhelming emphasis is upon perspectives; law was perceived as a sanctioned set of social rules.

Huber's studies of the sociological bases of international law reveal with striking clarity the transition which some sociological jurists characteristically made from a social to a predominantly normative view: "The legal proposition, which grows out of social facts, crystallizes legal concepts in juristic technique, from which, by pure conceptual operations, new legal rules are deduced as consequences, whether it be . . . by the judge . . . or by the legislator."²⁷⁷ The legal norm is conceived as standing apart from social behavior; each represents a separate field of inquiry. Huber's view was carried further by Schindler²⁷⁸ and deVisscher, the latter distinctly downgrading behavioralist conceptions of law.²⁷⁹ The final stage of this development is found in Landheer, who emphasizes the normative to an extent that makes irrelevant the sociological examination of international law.²⁸⁰

In a manner not free from ambiguity, Corbett and Stone move closer to a balanced emphasis upon perspectives and operations. Thus Corbett speaks of the utility of a continuum conception of law: from no-law, through patterns of behavior exercising a normative influence, to the legal model of the nation-state.²⁸¹ While Professor Stone clings to the notion that operations may give rise to legal rules but are not elements, in the strict sense, of law,²⁸² his references to

274. E. DURKHEIM, *supra* note 253, at 27, 66.

275. M. WEBER, *supra* note 242, at 6.

276. E. EHRLICH, *supra* note 31, at 39.

277. M. HUBER, *supra* note 251, at 8.

278. Schindler, *supra* note 270, at 241.

279. C. DE VISSCHER, *supra* note 33, at 97-98.

280. Landheer, *supra* note 253, at 1, 83-84.

281. Corbett, *supra* note 265, at 467.

282. Stone, *supra* note 270, at 138ff.

the "factual aspects" of international law indicate a possibility of conceiving of law in a more meaningful sense.

Sociological jurists have been somewhat more effective in sustaining a focus that includes both authority and control. Nevertheless, efforts in this area have been hindered by a compulsion to maintain a sharp distinction between sociology and law. Ehrlich, for example, thought of efficacy in terms of behavioral compulsion as well as of conformity with shared perspectives; unhappily, his particularized structural requirements rendered these criteria inapplicable to international law. Huber, when dealing with international law, insisted, in sum, that a rule must relate to state interaction; it must approximate current power relations, and also agree with the perspectives of relevant national elites.²⁸³ Huber's illuminations of these promising criteria tended, however, to overemphasize the control component: nation-states are the relevant actors; only the perspectives of ruling elites are held to be of any legal importance.²⁸⁴ DeVisscher, in the tradition of Duguit and Scelle, has developed a double criterion that incorporates authority and control; in actuality he tends to confuse the validity of a practice as law with its degree of behavioral efficacy. Thus, he states that

Every rule of positive international law presents two essential aspects for critical examination on different planes: the degree in which its content corresponds to social needs, and the accuracy of its formal expression compared with the practice of States.

The rule of international law retains its full force in application only insofar as it satisfies this double requirement.²⁸⁵

A relatively strong trend in sociological jurisprudence, exemplified by Professor Schwarzenberger, shifts the dominant emphasis to control²⁸⁶ and frequently slips into non-law conclusions.

Relatively few sociological jurists can be said to perceive law as a process of authoritative decision. The notion is found in a highly diffuse fashion in Petrazhitski²⁸⁷ and is given considerable detail in the work of his student, Timasheff.²⁸⁸ Although Weber and Ehrlich resort

283. M. HUBER, *supra* note 251, at ch. 2 *passim*.

284. *Id.* at 1, 39.

285. C. DE VISSCHER, *supra* note 33, at 133; *see also id.* at 140, 247.

286. G. SCHWARZENBERGER, *POWER POLITICS* 102-25 (2d ed. 1951).

287. L. PETRAZHITSKI, *supra* note 249, at 89ff.

288. N. TIMASHEFF, *supra* note 272, at 171ff.

Timasheff, despite his otherwise extraordinarily realistic description of the interrelations of authority and control, has difficulties with international law. He can find no "power structure dominating over all states" and does not think that the "unorganized communion of civilized nations" can engender the necessary conceptions of authority. The "only possible construction of international law" he finds is the formation of "similar legal rules by different States." N. TIMASHEFF, *THE SOCIOLOGY OF LAW* 260-61 (1939).

Conceptions of authority and control in functional terms (rather than in terms of the operations of specific organizations), as espoused by Malin-

to rule-complex definitions of law, a grasp of processes of authoritative decision is clearly evident in their writings. In general, the sociological frame of reference is utilized in ways that exaggerate a certain schizophrenia in conceptions of authoritative decision. Insofar as the sociological jurist is willing to accept as authoritative prescription and application in unorganized situations which are patterned by non-verbal instruments of communication, it is unmistakable that his notion of decision is one of process. Through recurring stress on cleavages between the normative and the social, however, he subtly shifts to positivism, and reverts to a conception of decision as somehow synonymous with the application of "objective rules." The sociologist quickly succumbs to the jurist.

Conceptions of a constitutive process are singularly rare among sociological jurists. It is modestly apparent in the work of Huber, deVisscher and Schwarzenberger, though it is frequently confused with a global process of naked power. Among writers of more restricted focus, such as Stone, the global perspective necessary for its examination is consciously avoided.²⁸⁹ It is unfortunate that many jurists' almost intuitive perception of the utility of a sociological perspective was not matched by a comparable appreciation of the relevance of an anthropological view that comprehended the whole of man's cultural experience.²⁹⁰

Performance of Intellectual Tasks

As a perspective heavily focused on the variegated empirical detail of the social process, the clarification of goal is a crucial task for the sociological frame of reference. Without independent and express articulations of goals, the sociological jurist runs the danger of venerating and accepting what is, simply because it is. Insofar as he is an efficient and specialized scientist, he exercises a discipline over his

owski but explicitly rejected by Timasheff (*id.* at 266-67), might have facilitated the perception that there are in fact today patterns in effective control and authority generated in unorganized processes of interaction which transcend the boundaries of nation-states.

289. Stone, *supra* note 270, at 150, 164.

290. The preeminent contribution of George Scelle was in his conception of *le dédoublement fonctionnel*, which was his answer to the critics who insisted that there could be no international law without specific constitutive organs. In this conception the officials of nation-states act both as claimants for their states before international constitutive process and, in turn when appraising the claims of the officials of other states, as authoritative decision-makers within the international constitutive process. As accurately as this conception would appear to reflect the contemporary expectations of the peoples of the world, it still escapes the understanding of many observers. See G. Scelle, *Le phénomène juridique du dédoublement fonctionnel*, in SCHATZEL AND SCHLOCHAU, *RECHTSFRAGEN DER INTERNATIONALER ORGANISATION—FESTSCHRIFT FÜR HANS WEHBERG* (1956); 2 G. SCELLE, *PRECIS DE DROIT DES GENS* 20 (1934); for a variant but related construction, see Van Panhuys, *Relations and Interactions between International and National Scenes of Law*, 112 *Rec. des Cours* (Neth.) 1 (1964).

imagination and moral sense which is far more strict than is common to the historicalist or the analyticalist. The historicalist's preferences were unwittingly incorporated in the mythic rather than historical *volksgeist* which he created; the analytical positivist was pressed to an unacknowledged choice by the normative ambiguity of his rules and by the dimly perceived complexities of interpersonal communication. The sociological jurist, in contrast, who actually works with empirically verifiable hypotheses, tacitly magnifies the extant, whatever its consequences, unless his jurisprudential conception includes the specific task of goal clarification.

The record of the sociological writers in regard to goal clarification is particularly scant, and undifferentiated. Dean Pound was outstanding in his insistence on the relevance and necessity of express goal clarification and unrelenting in his criticism of jurisprudential systems which rejected it.²⁹¹ Professor deVisscher has been insistent on the integral function of clarifying goals; the shaping of the data provided by the observation of international life is said to involve "choice and hierarchic ordering of values . . ." ²⁹² Yet the vast majority of the sociological jurists have made little contribution to this indispensable task. All sociological writers have, of course, recognized the relevance of the demands of elites and others as components of effectiveness, if not of law itself; they have perceived the utility of a developed sociological jurisprudence in facilitating the effective implementation of legislative policy, whatever it may be. Yet few have been able to accommodate this positivistic inclination with the creative task of projecting recommended goals for which scholars take explicit responsibility, or, at the very least, make acknowledgement of the relevance of their own preferences as skilled intellectuals located within the context of the larger community.

The anti-goal trend received its primary impetus from Max Weber, who eschewed goal clarification as an essentially unscientific operation.²⁹³ In fact, Weber's writings are replete with preferential statements and a number of his explicators have insisted that his real aim was to impel his students to a critical examination of their own preferences rather than to encourage automatic denial of their relevance ²⁹⁴ to the total task of the intellectual. Whatever Weber's aim may have been, an additional self-consciousness was added to the non-naturalistic jurist's reticence to engage in express goal clarification. This was in no sense dispelled by Ehrlich's rather diffuse notions of distributive justice or by Stammler's "natural law with a variable content." Despite the Kantian influence on Stammler, his goal clari-

291. Pound, *The Part of Philosophy in International Law*, *supra* note 234, at 380-81; Pound, *The Idea of Law in International Relations*, *op cit.* at 17-19.

292. C. DE VISSCHER, *supra* note 33, at 363.

293. "Objectivity" in *Social Science and Social Policy* in E. SHILS & H. FINCH, *MAX WEBER ON THE METHODOLOGY OF THE SOCIAL SCIENCES* 49 (1949).

294. A. BRECHT, *supra* note 192, at 225-31.

fication could easily be restricted to short-range minimum articulation of what participants themselves viewed as preferred policy, or, even less desirable, to references to a metaphysical teleology which ostensibly arises, phoenix-like, and uncontrollable from social process itself.²⁹⁵ It was this latter course which Durkheim chose, assuring his readers that sociological investigation would enable them "to determine the ideal toward which we are confusedly tending."²⁹⁶

In recent years the trend among sociological jurists seems to be away from goal clarification. Professor Stone declines to discuss this aspect of sociological jurisprudence, although he notes tolerantly that he is not "unsympathetic" to such efforts.²⁹⁷ As indicated earlier, the extreme in crypto-scientism is presented in the recent work of Professor Landheer who distinguishes absolutely between the sociology of law and the philosophy of law.²⁹⁸

The sociological jurist resorts to trend studies to pursue a number of different objectives. He is concerned with current expectations and quite correctly assumes that past decisions are among their significant indicators. The relevance of these investigations is restricted by the degree to which the scholar allows himself to slip into the easy but unreliable assumption that knowledge of past trends and correlations alone is sufficient. Most sociological jurists are impelled by the scientist's challenge to explain the phenomena on which he is focusing attention; past decisions are repositories of latent data with which to confirm or disconfirm theoretical models of the interdetermination among relevant interacting factors.

Trend studies from the sociological frame have been in many ways disappointing. Conceptions of decision, as was noted earlier, have not been adequate. The American branch of the school, for example, has tended to see past decision in terms of court judgments. This restrictive focus arose in part from the formal history of Anglo-American legal development, in part from the militant assaults of the American legal realist tradition. Dean Pound, for example, could speak of statements of international law as "attempts to formulate a system of social control,"²⁹⁹ but his detailed focus revolved almost exclusively

295. The variability of Stammler's natural law content was belied by the rigidity of the postulates which Stammler actually derived from his speculation. He himself changed the name of the section of his work, in a later edition, to one stressing the absolute quality of certain basic principles. In his *Theory of Justice*, moreover, the content of justice at a given moment in time appears to be the expectations of members of a community, with no indication that these are, in any sense, checked by the perspectives of a disengaged observer. *Id.* at 153.

296. DE LA DIVISION DU TRAVAIL at iii.

297. Stone, *supra* note 270, at 72-73. In recent publication Professor Stone engages in a difficult quest for "justice." See, e.g., J. STONE, HUMAN LAW AND HUMAN JUSTICE (1965); cf. Blackshield, *A Pelican in the Wilderness*, 19 J. LEGAL ED. 127 (1966).

298. Landheer, *Contemporary Sociological Enquiries Concerning International Law*, 89 Rec. des Cours (Neth.) 61, 72-73 (1956).

299. Pound, *The Part of Philosophy in International Law*, *supra* note 234, at 374; see also *id.* at 375.

around courts. Professor Llewellyn, with an anthropological focus, succeeded in evolving a broader conception of decision-making.³⁰⁰ In Europe, the often unconscious association of law with a state structure, which is found in Durkheim, Weber, Ehrlich and others, acted as a barrier to the examination of unofficial decision patterns whose authority or control crossed state lines. The exception is found among the Scandinavian realists, particularly Professor Alf Ross, who operates with a more functional definition of decision-making.³⁰¹

Although Ehrlich had a multi-value conception of decision and hence could see law or law-relevant material in many unorganized value processes, his basic outlook tended to de-emphasize public order decision and to give prominence to the civic order.³⁰² A comparable tendency in Petrazhitski resulted in a theory that was well adapted to the description of coarchical structures but had no tools for dealing with hierarchical structures of authoritative decision.³⁰³

The sociological frame of reference has been too selectively applied to sustain a viable conception of decision in terms of choice. Hence its focus on past decision has been narrow and, in terms of the requirements of effective problem-solving, anecdotal. The monographic studies executed by a number of eminent sociological jurists are scarcely distinguishable from their analytical or historical counterparts.

As noted above, the distinctive feature of the sociological frame has been its desire to isolate the recurring factors that condition group existence and its quest for scientific laws of social process comparable to the findings of the physical sciences. Antecedents of this emphasis can clearly be traced to Aristotle and Kautilya, and are prominent in the work of Montesquieu and Sir Henry Maine. Additional impetus for this quest was supplied by 19th century Marxism, which appeared to many Western scholars as an impressive challenge to their preferred value systems in the language of science. One answer was to pursue a sounder science of social interaction.

It cannot be maintained that sociologistic studies have been outstandingly scientific. The core progression in scientific work is, of course, hypothesis-formulation, empirical testing, reformulation and re-testing and, ultimately, verification of probability. Sociological jurists have been as prolific in the formulation of hypotheses as they have been barren in putting them to the test. The failure to develop systematic and comprehensive models of relevant processes, and especially the recurring confusion of value and institutional categories, has repeatedly resulted in one-factor exaggerations that rely on

300. See generally, K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962).

301. A. ROSS, *ON LAW AND JUSTICE*, *supra* note 241, at 59; see also *supra* note 241.

302. E. EHRLICH, *supra* note 31, at 153-54.

303. For a critique in this respect, see P. SOROKIN, *CONTEMPORARY SOCIOLOGICAL THEORIES* 703 (1928). *But cf.* Meyendorff, *supra* note 249, at 35.

grotesquely distended omnibus terms. There is scant utility in declarations that proclaim power or naked force as the omni-significant factor. Presented with this analysis, Petrazhitski is reputed to have replied "what is force?" His point presumably was that broad terms such as power or wealth are essentially relational and can have only ambiguous meaning and even less utility if they are not amplified into a theoretical system that performs two tasks: locates the most inclusive concept-labels in reference to a set of inclusive terms for the whole social process; specifies operational indices for the sub-labels within each principal category. It is significant that "power" in the writings of Schwarzenberger³⁰⁴ and Morgenthau,³⁰⁵ for instance, includes almost all other values, though with inadequate delimitation.

A number of other writers such as Corbett and Stone and, to a lesser degree, deVisscher reveal dissatisfaction with a one-factor power model. Stone's work indicates a demand for broader analysis of salient factors. Corbett and Alvarez,³⁰⁶ in the tradition of Duguit and of Stammler's Kantian school, tend to emphasize psychological features common to all men, and sensitivity for factors of this kind characterizes Petrazhitski. The American legal realist trend varied from utilizing a factor theory of psychological caprice, sometimes referred to as borbyrigmal jurisprudence, to a fairly comprehensive study of the numerous identification components of judicial personnel; the focus, however, remained primarily upon the perspectives of the judge and not upon total group interaction, considered in terms of all significant values. Indeed, Professor Llewellyn in applying the insights of anthropology succeeded in generalizing the judge into the "decision-maker," but his impact in this regard upon the realist tradition was relatively insubstantial. A number of writers emphasize wealth, while others make rather sweeping invocation of rectitude demands. No writer appears to have developed an express and comprehensive notion of value factors, and there has been no rigorous investigation by any sociological jurist of the institutions specialized to value shaping and sharing.

The sociological frame of reference has not been oriented toward all the problem-solving tasks. As a result, neither the projection of the future nor the invention of strategy have been considered to be integral intellectual tasks. Almost exclusively concerned with the isolation of conditions and the formulations of natural laws of social interaction, the sociological jurist has made only casual projections. Strategies have been relatively improvised and disjointed, rather than disciplined by evaluation of a wide range of alternatives. From the time of Durkheim, a pattern, repeated currently in the work of Schwarzenberger and the numerous writers influenced by him, has been to postulate models of two or three different types of community

304. G. SCHWARZENBERGER, *supra* note 269, at 22.

305. H. MORGENTHAU, *POLITICS AMONG NATIONS* (1967).

306. A. ALVAREZ, *LE NOUVEAU INTERNATIONAL DROIT* (1960).

and to imply mechanical progressions from one to the other.³⁰⁷ As a group, the sociological jurists tend either to the post-prandial type of legal utopianism or, depending on prevailing current expectations, to dire Cassandriac predictions. The highly creative proposals that many avowed sociological jurists have originated bear little if any relation to their jurisprudence.

Postulation of Goals

Goal postulation and clarification, as we noted, have not received unanimous recognition as an integral juridical responsibility among writers of the sociological frame.³⁰⁸ In no case, have the preferred features of public order been presented in sufficient detail to make them relevant to operational problem-solving. Nevertheless, it is revealing to note the primary concern with minimum order manifested by the goal-sensitive sociological jurist. With the exception of writers such as Stammler, who tended toward a Kantian notion of imperatives, preferences have been clearly in favor of maintaining social stability. Stammler's "natural law with a variable content" was expected to fluctuate according to personal and group demands at any given moment. By seeking to balance different interests Dean Pound's "ideal international law" was structured primarily to avoid the violent disintegration of the international system; Pound felt that the preferable form was based upon nation-states as the primary units. Professor deVisscher, pursuing the same goal, tends toward global centralism, although not without misgivings.³⁰⁹ Few sociological writers have been able to present in any meaningful detail the integral relation between satisfactory public order value allocations and minimum (or maximum) order.

Appraisal

In the spectrum of modern sociological inquiry the sociological frame of jurisprudence is an anachronism. It has tended to resort to the writings of its nineteenth century progenitors for authoritative quotations rather than to them as sources of hypothesis and technique for the investigation of current reality. Its operational methods are far closer to those of the natural philosopher of the 18th or 19th century than to those of the social scientist of the 20th century. It is significant that of the recent sociological jurists, relatively few have produced models or theories which the broad trend of sociology has considered useful or relevant.

Logomachal squabbles among sociological jurists as to the proper name for their "school" and its actual meaning help to underline the fact that, by current sociological standards, there has not yet de-

307. E. DURKHEIM, *DE LA DIVISION DU TRAVAIL* 72ff; G. SCHWARZENBERGER, *supra* note 269, at 11-16.

308. The outstanding exception, as was noted earlier, has been Dean Pound.

309. C. DE VISSCHER, *supra* note 33, at 363.

veloped a genuine scientific sociological frame of jurisprudence. Such a frame may yet develop and may finally stock its investigative arsenal with modern tools of social scientific inquiry in place of the obsolesced artifacts which it now employs. Should this development transpire, sociological jurists will be forced to undertake a critical reexamination of the fundamental aims of a recommended theory of law. A sociological perspective, oriented toward problem-solving and bold in its postulation of community goals, might contribute much to the amelioration of the global arena.

At the present time, however, it is appropriate to consider whether such an effort is worthwhile, and whether the sociological frame of reference is the most promising approach to the insistent problems of world public order now and in the probable future. Whether the avowed purpose of the sociological frame becomes one of policy-oriented creation or remains primarily one of contemplation, the sociological perspective and, indeed, the name itself, point up the limitations inherent in its adoption. The division and sovereigntization of the many foci within the social sciences have encouraged specialization; however, a cumulative cost of specialization is an aggregate of disjointed perspectives upon social process. We shall suggest that the optimum approach, and the probable trend of future development, is an inclusive social scientific approach, that incorporates the several foci of specialization upon the environmental habitat, and variable psycho-cultural characteristics of man. The challenge to sociological jurisprudence then, is to become genuinely "sociological" by providing a comprehensive map and a repertory of techniques for the continuing study of authoritative decision.

VI. LIMITED FACTOR ANALYSIS

Partly as a reaction against the tendencies of self-identified sociological jurists to transform their approach into the dialectical style of the analytical school, there has arisen a relatively recent demand to examine the world community, including its legal institutions, in ways that take full advantage of the arsenal of empirical tools that have been invented and applied with such profusion to the investigation of psychocultural processes in general. Some of these approaches are "itemistic" in the sense that they enumerate lists of variables whose past, present or prospective impact upon the world social process is of some significance. But the most influential initiatives comprehended in this approach have undertaken to delimit the relevant tasks by selecting a set of presumably critical factors of such relative importance that they can be confidently studied as key variables in the global process. Among these variables are found, with differing degrees of definitional clarity and operational precision, terms that refer to the perspectives and operations of authority as well as of control.

It may seem premature, as matters stand at the moment, to attribute to this approach a position that implies a high degree of

independence from previous emphases, and of potential impact on the development of jurisprudence in the international field. From one viewpoint these recent theory building and data gathering operations can be looked upon as a belated revival of the sociological approach, suitably amplified to take into explicit consideration the psychological factors that received peculiar prominence among the American Realists. It would be taken for granted that those identified with any such emphasis are equipped to comprehend and to cooperate in the specialized advances that have been so characteristic of the near-explosive development of the social and behavioral sciences.

The question may also be raised as to why this approach is separated from, rather than expressly subsumed under, the configurative approach with which we identify ourselves, and which we recommend to fellow scholars and to decision-makers as a synthesis of assumptions and techniques anticipated, fragmentarily at least, in the long history of explicit jurisprudential reflection on international law. Certainly the developments with which we are dealing include many of the operations required if a configurative map is to be made fully effective. There is the additional point, in this connection, that many of the scholars involved attribute various degrees of influence to the configurative viewpoint and to specific though partial exemplifications in work with which we have been directly associated.³¹⁰

We would make unequivocal our sense of the relevance of these impressive efforts to generate limited-factor models of the world decision process and to cultivate a new division of labor among scholars that cuts through traditional interdisciplinary barriers and seeks to bring international lawyers into professional collaboration with every significant body possessing specialized competence. There is no *necessary* conflict between a configurative and a limited factor approach, particularly if one underlines the point that no individual scholar can do everything that needs to be done himself, or that he can do everything at once. If the requirements of a configurative jurisprudence are to be met, there must be a division of emphasis and of activity—a division of labor—among the hundreds and thousands of researchers, teachers, and consultants who are engaged in strengthening the intellectual assets of the world community.

It will presently be apparent why we think it useful to emphasize some of the differences that distinguish the limited-factor approach from the configurative conception that we commend to all who are in search of a comprehensive, yet particularizable, jurisprudence of international law. Some of the general statements that have been put forward by contributors to the limited-factor approach do not measure up to the actual implications of what they do, or are equipped

310. See, e.g., M. KAPLAN & N. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* (1961) and the work of Professor Falk, cited *infra* at 281.

to do. In some cases the general statements are to be dismissed as regressions— to perspectives that prevented past jurisprudential movements from coping with the challenges inseparable from the field as a whole. If the fractionalization that so often accompanies the growth of differentiated intellectual activities is to be avoided, or at least minimized, it must be made explicit what the total requirements of a viable jurisprudential theory are.

The frame of reference employed in limited factor analysis³¹¹ has been concerned with the isolation of a restricted number of variables, which, as we indicated, are presumed to be key factors in an interactive situation; thereafter the factorialist undertakes to perform a number of intellectual tasks by exclusive reference to these selected variables. Restriction of focus to a number of presumably key variables is a natural inclination and is often justified by expedience and by its presumed economy. The physical features of people, for example, based upon sets of acquired stereotypes, are commonly employed as a shorthand method of characterizing and categorizing the population. While few would contend that such folk techniques are of a generally reliable accuracy, the relative degree of science or magic involved in "rules of thumb" of this type depends upon the extent to which their frequency interpretations prove reliable.³¹²

Limited factor analysis, as part of a theory of problem-solving, has a long history of both advocates and critics.³¹³ We are not concerned with the obviously mystical modalities of this technique as, for example, in the reading of animal entrails or the consultation of omens—although it is, perhaps, worth noting that current political elites in certain cultures continue to resort to these and similar practices. We are, rather, concerned with the purportedly scientific effort, as a preliminary operation, to restrict observation of the

311. The term "limited factor analysis" was chosen here to emphasize the primary distinguishing feature between this frame and a more contextual approach. Professor MacKenzie, in his useful survey of the adaptation by students of politics of social scientific techniques, refers to limited factorial theories as "partial theories," confessing that his initial inclination was to label them "gimmicks." W. MACKENZIE, *POLITICS AND SOCIAL SCIENCE* 111 (1967). We prefer the terms limited factor analysis because (a) many of the theories considered here, for example communications analysis and systems analysis, do purport to be comprehensive, though an observer may evaluate them as, at best, partial and (b) the primary critique of a contemporary observer of these theories would not relate to their instrumental potentialities within a comprehensive conception, but rather to their pernicious effect upon performance of the relevant intellectual tasks insofar as they forward unsubstantiated claims of comprehensiveness, based upon the investigation of only selected variables. A useful critique of many limited factor theories is found in Wormuth, *Matched Dependent Behaviorism: The Cargo Cult in Political Science*, 20 *WESTERN POL. Q.* 809 (1967).

312. H. REICHENBACH, *THE RISE OF SCIENTIFIC PHILOSOPHY* 236 (1951).

313. For a highly illustrative example, see Maine's criticism of Austin's limited factorialism: H. MAINE, *EARLY HISTORY* 359-361.

multiplicity of factors in social interaction to a few supposedly key variables and, thereafter, to perform the intellectual tasks of problem solving by reference only to such variables without regard for their larger context.

Limited factor analysis is not, it should be emphasized, necessarily unscientific. The process of choosing a short list of variables is a scientific operation, in the sense of being susceptible to verifications by empirical testing, when, in fact, the selection of variables is made upon the basis of a prior, comprehensive contextual investigation of all known factors; it remains scientific insofar as the "key" quality of the chosen variables is regularly checked by resort to contextual examination. It is significant that when key variable indices have been successfully employed in the social sciences, they have been based upon prior more comprehensive examination. The so-called "random samples" of contemporary statistics, for example, are chosen from selected categories which have been assembled after a contextual examination. The point to be emphasized is that the operational advantages of limited factorialism will be maximized rather than minimized if explicit attention is given to the major factors which are left out.

In the past, limited factorialism has tended to derive more from practical and often inconsistent applications of older, more comprehensive, theories than from explicit restrictions systematically introduced by new theories. We have noted the analyticalist rejection of the relevance of investigating past trends³¹⁴ and the rejection on the part of a number of extremist natural lawyers of the operational details of social reality as an element of law.³¹⁵ Until recently, however, these have comprised a definite minority trend. Either expressly or implicitly, most theories, at their initial phases of conceptualization, have pressed toward a comprehensive, if not always realistic, conception of law.

Contemporary limited factor analysis, in contrast, is consciously posited upon a belief in the utility and, often, inevitability of a focus restricted to a limited number of variables. It is for this reason that it may be considered, when applied to legal inquiry, as a unique frame of jurisprudence. Three basic characteristics recur in the work of limited factorialists: an attempt to achieve a transposition from adjacent disciplines, most frequently from the physical sciences; a tendency to confuse the problem of constructing a measuring unit with the problem of exploring and (for certain writers) influencing the process; and, finally, an analogical rather than methodological definition of science. Each of these characteristics requires brief comment.

At most levels of contemporary civilization, the word "science" has been rather effectively appropriated by the physical or natural

314. Frame III *supra*.

315. Frame I *supra*.

sciences. Under assault from within and without, scholars of society have attempted to increase the credibility of their image as scientists by relying on two broad strategies. On the one hand, many of the operational methods of the natural sciences have been successfully adapted; recent cybernetic advances have also triggered a renewed burst of optimism in the use of statisticalized models. On the other hand, there have been attempts, on the part of a sizable number of theorists, to transpose, without careful consideration, some of the models and frames developed in areas of natural scientific investigation, to the study of society. The transposition of metaphor and model is a common intellectual phenomenon,³¹⁶ a further exemplification of how to overcome a low value status by partially incorporating the practices of the better-off. In scientific work the hazard is substantial because relational patterns are assumed *a priori*.

A more persistent confusion has concerned the relation between measuring units and empirical investigation. A basic postulate of socially oriented problem solving is that the problem should determine the tools to be employed and not the reverse. Not infrequently, the challenge to the investigator calls for the invention of conceptual and procedural tools. The history of scientific effort in Europe since the sixteenth century is only partially understood. But it seems to call attention to the disadvantages for inquiry of clinging to specific patterns when the problem-context has been changed, or needs a new and sweeping redefinition. Some exponents of limited-factor approaches to the world social and political process allow the tool to dictate the problem instead of striking an integrated solution of the policy problems of research by stressing the problem and demanding steady perfection of the tools. A leading systems builder writes that

Modern theoretical physical science has reared its present lofty edifice by setting itself problems that it has the tools or techniques to solve. When necessary, it has limited ruthlessly the scope of its inquiry. . . . The physicist does not make predictions with respect to matter in general but only with respect to the aspects of matter that physics deals with; and these, by definition, are the physical aspects of matter.³¹⁷

Whatever the utility of this definition of science—and it is extremely dubious—it is clear that such an approach to jurisprudential problem-solving has only accidental relevance. Indeed, the same systems builder added that “the small number of variables”

316. K. DEUTSCH, *THE NERVES OF GOVERNMENT* 2ff. (1963). *see also* Pound, *Philosophical Theory and International Law*, 1 *BIBLIOTHECA VISSERIANA* 73 (1923).

317. Kaplan, *Problems of Theory Building and Theory Confirmation in International Politics*, in *THE INTERNATIONAL SYSTEM* 6, 7 (K. KNORR & S. VERBA eds. 1961) [hereinafter cited as Kaplan, *Problems*].

with which he dealt "necessarily abstract from a far richer context" and ". . . are not sufficient for any analysis aspiring to high predictive power."³¹⁸ In fact, this conception of system works only within itself. It is dramatically similar to the Grotian geometric proof of law and is open to the same criticisms.³¹⁹

Some of those who advocate and use limited factor analysis employ the word "science" in a unique way. As in the above citation, the tendency is analogical rather than methodological. Science is understood to be composed of a number of operational techniques employed by physical scientists, usually by theoretical physicists, rather than a highly generalized method which can be adapted, according to the needs of the problem with which the investigator is presented, to any aspect of reality. To confuse science with what some scientists do at some times in some fields on some problems is a transposition of metaphor quite similar to that of the medievalist, and diverges from the generally accepted notion of science. According to the latter, science is a method of establishing hypotheses, with as high a degree of probability as possible, by empirical investigation. Even the most persuasive theoretical speculation is not considered as established, though it may be acted upon, until it has been disciplined by empirical data. There can be little doubt that an informed exponent of scientific method would deal with "key variables" only insofar as it was demonstrated that the problem at hand could benefit in intelligible ways from the restriction.

Observational Standpoint

On the affirmative side it is evident that limited factorialists have been more sensitive to the need of clarifying the several standpoints of observation than have theorists of most of the other frames. Writers such as Kaplan,³²⁰ and Snyder, Bruck and Sapin,³²¹ and others³²² are often concerned with making their standpoint explicit; in general they make it apparent that they intend to hold to the position of an observer who is outside the field of interaction that is under study. Kaplan's work, in particular, is outstanding in its clear appreciation of an observer's conception of the common interests shared by all participants in a social process and in the consideration given to the psychopathology of persisting demands on behalf of special interests.³²³

318. *Id.* at 8.

319. P. 220 *supra*.

320. A. KAPLAN, *SYSTEM AND PROCESS IN INTERNATIONAL POLITICS* (1957).

321. R. SNYDER, H. BRUCK & B. SAPIN, *FOREIGN POLICY DECISION-MAKING* (1962); see also Robinson & Snyder, *Decision-Making in International Politics*, in *INTERNATIONAL BEHAVIOR: A SOCIAL PSYCHOLOGICAL ANALYSIS* 435 (Kelman ed. 1965).

322. See, e.g., C. LINDBLOM & D. BRAYBROOKE, *A STRATEGY OF DECISION* (1963); D. EASTON, *THE POLITICAL SYSTEM* (1953).

323. A. KAPLAN, *supra* note 320, at 253ff.

Professor Falk, prominent among the professional international lawyers who espouse a factoralist approach, has on occasion demanded a perfectionistic, perhaps even metaphysical, position. His call is for a theory "sufficiently advanced to provide government officials with a scientific alternative to human judgment" and he consistently searches for legal rules which have some "autonomous" or "objective" or "neutral" content, independent of the empirical policies which they seek to establish among peoples.³²⁴ The policy vacuum which he demands is not met in life. Falk's statement is a manifestation of the recurring demand for absolute scientific accuracy which has characterized the approach of many contemporary factoralists. It is, however, significant and pertinent that Falk also calls for disengaged national scholars to clarify common interests³²⁵ and, in his detailed legal work, constantly strives for impartiality.³²⁶

Focus of Inquiry

In their eagerness to move rapidly from the realm of "theory" and "disputation" to the task of getting on with the empirical task, some of the exponents of limited-factor approaches have allowed themselves to over-promise, and to arouse expectations of relevance to the jurisprudence of international law that cannot be fulfilled in the immediate future. These scholars are operating in a world that is over-eager for prompt results, for immediate pay-offs. In order to obtain the degree of attention, toleration, and support essential to demonstrate the pertinence of a given line of inquiry—particularly if it is somewhat out of conventional routine—it often seems tactically expedient to exaggerate, or to acquiesce in the exaggerations of others. The implementation of a configurative approach, we have said, does indeed call for simplified theory and circumscribed topics of investigation. But it is important that the nature of the simplification should be made sufficiently explicit and given enough prominence to discourage efforts at premature and inapposite application. The initial enthusiasm for a given limited factor approach can generate exaggeration about its potential and

324. Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231, 232 (1964).

325. *Id.* at 236-38.

The non-homogeneous distinction between "national" and "international" interests which he emphasizes greatly increases the difficulties in clarification of common interest. What this false dichotomy obscures is that the most important "national" interests a state may have are the common, inclusive interests it shares with other states. It affords no way of distinguishing between common interests, shared by all states, and special interests, asserted against the community, or for assisting in the accommodation of common interests, in instances of potential conflict.

326. See, e.g., Falk, *International Law and the United States' Role in the Vietnam War*, 75 YALE L.J. 1122 (1966); Falk, *International Law and the United States' Role in Vietnam: A Response to Professor Moore*, 76 YALE L.J. 1095 (1967).

stife acknowledgment of the relatively modest contribution that the partial theory or technique can actually make. In spite of actual results, claims of performance achieve a half-life of their own. Despite the cautions of early innovators, computer research and game theory have already travelled this cycle.

An examination of the focus of limited-factor scholars reveals a strong determination to formulate inquiry in terms that can be directly related to mathematical models and statistical data. This emphasis is often called a systems approach, which is in principle a means of implementing a contextual focus. However, some of the limited-factor studies to date cannot be welcomed as genuinely pertinent, not because they are partial, but because they fail to concentrate on the relevant.³²⁷

Given the paucity of needed information on a global scale it is not possible to take some generalized power-and-society models as other than visualized or formalized restatements of a prose model; none of them can now be put into satisfactory empirical conjunction with quantitative indicators. The working models typically neglect to find explicit categories for the inter-faces between the shaping and sharing of power and the shaping and sharing of other

327. Restriction of attention to a number of purportedly key variables cannot help but affect the realism in focus and the conceptions of decision of the limited factoralist. At the level of initial conceptualization, no factoralist suffers from the highly simplified notions which have been common to many of the preceding frames. Yet, as he moves closer to the operational phase of theory building, the factoralist does undertake heroic simplifications. Social process is generally limited to the production and allocation of one value, community process is defined by structural features rather than by intensity of interaction, and so on. In systems analysis terms, for example, a comprehensive structure is broken into subsystems, the output and input of which are abstracted beyond the point of reality. While the impacts upon any given subsystem may be considered in study of that subsystem without consideration of their source, the output of that subsystem, when the larger system which contains it is under study, cannot be realistically presented in the same manner. Kaplan's highly sophisticated conceptions of "subsystem", for example, while responsive to power realities, do not adequately incorporate "parameter values" arising from concerted international effort which significantly affect the behavior of a given subsystem. A. KAPLAN, *supra* note 320, at 5, 8ff.

The claims of systems exponents of a high degree of representation of reality in their models or schema is presented in BLACK, *THE APPLICATION OF SYSTEMS ANALYSIS TO GOVERNMENT OPERATIONS* 9 (1966). The point, however, is not the degree of detail achieved within the focus taken by a systems engineer, but the comprehensiveness of the initial focus. There is ironic significance that Kaplan himself criticised Skybolt, among other cost analysis projects essentially on these grounds. See review by Kaplan of C. BORKLUND, *MEN OF THE PENTAGON* (1966) in 23 *BULL. ATOM. SCIENTISTS*, Dec., 1967, at 32-33.

On terminological confusions regarding the word "system," see Goodman, *The Concept of "System" in International Relations Theory*, 8 *BACKGROUND* 257 (1965). On the considerably more cautious approach now taken by Easton, see D. EASTON, *A FRAMEWORK FOR POLITICAL ANALYSIS* 30ff. (1965).

values (such as wealth, respect, enlightenment, and so on). Hence input-output sequences are not specified in ways that concentrate scientific effort on improving the available indicators and stocks of relevant data.³²⁸

These limitations are less serious, perhaps, than the omission of operationalized variables that would make it feasible to study the interplay within the power process of authority and control itself. The intellectual challenge in the study of international law is formidable, though answerable.³²⁹ The weak point of current limited-factor efforts is precisely at the point where the expectations and operations called "control" overlap expectations and operations called "authority." They seldom make clear what frequencies are specified to distinguish naked power or pretended authority from the pattern that is both authoritative and controlling. Similarly, their theoretical constructs reveal few useful indicators for describing the various components of demands by participants in the decision process; they fail, for example, to distinguish claims that relate to the facts of a controversy or to particular remedies demanded from justifications. Nor do they relate the responses of decision makers to the claims about the factual components of the situation or the demands for remedies which are indulged or deprived.³³⁰

328. In dealing with community process, the preliminary restriction of variables has a comparable effect. As the focus is expanded, the quantity of variables is contracted, by either elimination or attempted generalization. Thus, while the study of an urban process—the work of Walter Isard may be cited as an outstanding example—may be based upon eighty to one hundred variables, the study of the world constitutive process is often based upon less than a score of factors. One of the most discordant aspects of international systems analysis resulting from this attenuation is the strained coexistence between sophisticated mathematical and econometric models and almost childish simplified political scientific conceptions.

329. Systems analysis has been strikingly lucid in its conceptual delineation of the interrelation of different hierarchical and coarchical processes. Easton's work has been particularly successful in this regard. Kaplan conceptualizes a global system, incorporating a wide variety of subsystems, the output of any one component system comprising a potential "parameter value" for other systems; since the various systems interact, the output of any one subsystem will ultimately be fed back to it, in an intensity and regularity commensurate with the level of interaction. In conception, a model such as this presents, at a high level of generality, a clear picture of the interrelations of the varied community processes comprising the global arena. At lower levels of specification, however, the restriction of the variables under study distorts rather than details actual patterns of interrelation. See D. EASTON, *supra* note 322. Easton's "constructivist" approach now suggests that systems-analysis be used as a preliminary means of relating disparate data. Cf. *id.* at 97; A. KAPLAN, *supra* note 320, chs. 1-2. See also K. DEUTSCH, *THE NERVES OF GOVERNMENT* (1963).

330. The most common and most serious effect of such simplifications is reflected in the sacrifice of balanced conceptions of perspectives and operations and authority and control in favor of single factor conceptions. Broad ranging analyses of the manifest content of elite communications, for ex-

The undeveloped state of mathematics is a severe constraint upon the evolution of limited-factor models that combine formal elegance with empirical relevance. Hence the disappointment that has been experienced by scholars who expected so much of "game theory."³³¹ This sense of letdown comes from a familiar phenomenon to which reference was made above, namely, the partial incorporation of approaches of a scientific character from other fields without the critical reflection necessary to evaluate their applicability to the social, political and legal process. In the case of game theory the obvious restriction is that there are, as yet no mathematical solutions for non-zero sum games.³³² It is noteworthy that the most significant and useful game theoretical applications to international relations have, in fact, gone beyond the frontiers of mathematical game theory, employing, in an impressionistic manner, the insights of gaming.³³³ It is probable that the significance of

ample, have concerned themselves exclusively with written messages; although the scientific methodology of the treatment of such language messages is striking, it is matched by no comparable examination of language equivalent and behavior. In contrast, the advocate of game theory or bargaining theory, while working with an implied matrix of shared expectations, is primarily concerned with operations. It is significant that a renowned bargainer should criticize government officials for being too "legalistic," because their deference to perspectives attenuated their operational options: T. SCHELLING, *ARMS AND INFLUENCE* (1966). Psychological and sociological approaches to international law and international relations have tended, for the most part, to avoid these pitfalls, but have, on the other hand, resorted to highly simplified notions of unit participants. See, e.g., Perry, *Notes on the Role of the National: A Social-Psychological Concept for the Study of International Relations*, in *INTERNATIONAL POLITICS AND FOREIGN POLICY* 87 (Rosenau ed. 1961).

331. J. VON NEUMANN & O. MORGENSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (rev'd ed. 1947); see also R. LUCE & H. RAIFFA, *GAMES AND DECISIONS* (1957).
332. Unfortunately, in game theory winning is a conception limited in time and in scope. The game theorist has had difficulty in translating into mathematical terms, if not in appreciating, that a win, at any given moment in time, must be put into a broader temporal perspective: the short-term win may well be the long-term loss: K. DEUTSCH, *supra* note 329, at 69-70. Moreover, win is put in limited value terms; in fact, the objectives of a participant must be expressed in terms of the entire value spectrum. The game theorist's assumptions of rationality and clarified participant preferences are considerably less flexible than those of Snyder, Bruck and Sapin, for example: R. SNYDER, H. BRUCK & B. SAPIN, *supra* note 321, at 137ff. Luce & Raiffa discuss the problem, but dismiss it as tautologous. R. LUCE & H. RAIFFA, *supra* note 331, at 49. Although this may be true within their frame of assumptions it begs the fundamental empirical question of degree of rationality, however defined, of specific participants. Moreover, gaming seems to encounter difficulty in treating objectives as elements of context, affected and changed from moment to moment by numerous other factors in process.
333. See generally, B. BRODIE, *STRATEGY IN THE MISSILE AGE* (1959); *id.*, *ESCALATION AND THE NUCLEAR OPTION* (1966); F. IKLE, *HOW NATIONS NEGOTIATE* (1964); T. SCHELLING, *THE STRATEGY OF CONFLICT* (1960); T. SCHELLING, *ARMS AND INFLUENCE* (1966).

game theory and related techniques for the jurisprudence of international law will be found in the introduction of fundamental procedures rather than in explicit mathematicalized theory. The techniques of simulation, to which we refer briefly in the next section, exemplify what is meant.

One of the most discordant elements indicative of a persisting difficulty, of the otherwise sophisticated conception of decision found in limited factor theories, is encountered in notions of law and authority. Although law is, at times, referred to as process, the notion of law as a body of rules frequently recurs. Systems analysts such as Kaplan,³³⁴ game theorists such as Luce and Raiffa,³³⁵ and content analysts such as North and Triska,³³⁶ often drift into rule conceptions.³³⁷ Such a simplification may facilitate their own theorizing; it does, nevertheless, undercut the significance of their work for effective jurisprudential application. Despite limited factorialist disregard of the traditional disciplinary boundaries, there has been a persisting inability to relate fact specialists with norm specialists.

A number of limited factorialists have been particularly successful in identifying a constitutive process within the different systems under study. Thus, Modelski, using a type of systems analysis, demonstrates a clear grasp of a world constitutive process.³³⁸ Outstanding, in this regard, is the work of Morton Kaplan. Among the variables which he considers are "essential rules," "transformation rules" and "actor classificatory rules." He defines essential rules as "those rules which describe general relationships between the actors of a system or which assign definite systematic rule functions to actors independently of the labeling of the actors."³³⁹ A rule rather than process conception of constitutive decision tends to rigidify Kaplan's presentation, and this is particularly evident in his rather static notions of change or transformation. Yet Kaplan's early work in this regard deserves recognition as an important development.

334. A. KAPLAN, *supra* note 320, at 9-10, 13-15.

335. R. LUCE & H. RAIFFA, *supra* note 331.

336. R. NORTH, K. HOLSTI *et al.*, *CONTENT ANALYSIS: A HANDBOOK WITH APPLICATIONS FOR THE STUDY OF INTERNATIONAL CRISIS* (1963).

337. Limited factorialism has had a similarly disruptive effect upon the maintenance of a balanced emphasis on authority and control. Content analysis studies of treaties, for example, differ only in technique from the basic approach of the positivist. While systems analysis commences with highly sophisticated notions of authority and control, the necessity for simplification results in a set of operational conceptions which are much closer to the rigidities of an earlier day than to those of a contemporary political scientist. In game and bargaining theory, the emphasis is upon control. There may be room in the formulae of these theories for improvement in this regard, but improvement and refinement have not yet taken place.

338. G. MODELSKI, *A THEORY OF FOREIGN POLICY* (1962); *id.*, *THE COMMUNIST INTERNATIONAL SYSTEM* (1960).

339. A. KAPLAN, *supra* note 320, at 9-10.

Performance of Intellectual Tasks

Limited factorial response to the demands of goal clarification extend over a broad spectrum. At one extreme, there is some reflection of the suggestion that the clarification of goal should be eschewed because of the difficulty of the task. Decision remains purposive, it is asserted, by projecting extremely short-range and limited, non-comprehensive goals.³⁴⁰ No informed observer can doubt that human beings always operate upon the basis of preferences that are in varying degrees implicit. The "incremental" thesis is evidently not a call for irrationality, but rather for the "hunch theory" of decision, a view that was much discussed during the vigor of American legal realism.³⁴¹ The justification offered for an "incremental" theory is that it produces better consequences. However, lacking a comprehensive map of relevance and desired consequences, a strict incrementalist runs into trouble both in estimating what is worth knowing and in appraising the net benefits of alternative policies.

The task of goal clarification is integral to game theory applications. Hence consideration has been given to the nature of interests and to the theory of comparative utility.³⁴² While the goals of systems or process analysis have tended to restrict themselves to systemic maintenance and stable transformation, a leading systems analyst, such as Kaplan, has been concerned with the clarification of common interests on both the minimum and maximum public order levels.³⁴³ Yet, if one can speak generally of the many disparate theories of contemporary limited factorialism, goal clarification in terms of the delineation of shared common interests has not emerged as an integral element of inquiry. In part, this deficiency stems from an inadequately maintained observational standpoint; in the most fundamental sense, it derives from the incomplete or partial character of limited factorialism as an approach. In the absence of a demand for contextuality and an orientation toward problem solving, the integrality of goal clarification to modern jurisprudence must remain undiscerned.

While no limited factorialist rejects the relevance of trend studies, actual examination of past decision varies considerably. Kaplan, for example, suggests that "Law is the consequence of past political decisions."³⁴⁴ Rosecrance puts emphasis upon the general historical study of given political epochs.³⁴⁵ For some systems theorists, history is ostensibly invoked in order to indicate the spectrum of polit-

340. See generally, Lindblom, *Policy Analysis*, 48 AM. ECON. REV. 300 (1958); C. LINDBLOM & D. BRAYBROOKE, *A STRATEGY OF DECISION* (1963).

341. See, e.g., Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929); J. FRANK, *COURTS ON TRIAL* 170-71 (1949).

342. See R. LUCE & H. RAIFFA, *supra* note 331, ch. 2.

343. A. KAPLAN, *supra* note 320, at 277ff.

344. *Id.* at 14.

345. R. ROSECRANCE, *ACTION AND REACTION IN WORLD POLITICS* (1963).

ical systems. But, in fact, the systems analyst is quite independent of history and does not hesitate to hypothesize a system, if it is of utility or interest to him. The game theorist is even less concerned with systematic trend studies, although the leading theorists acknowledge their dependence upon the future researches of other disciplines for the advancement of their own.³⁴⁶ Other limited factorialist approaches, such as the manifest content analysis of given flows of diplomatic correspondence, have obviously placed key emphasis upon trend study. Some trend studies have, however, been excessively narrow, and indeed almost anti-contextual. Trend studies of voting patterns within parliamentary-diplomatic international arenas, for all the sophistication of their statistical technique, have not been integrated with comparable studies of other functional decision-making mechanisms to which elites have resort or with sufficient explicit indication of limited relevance; a vote out of context is as meaningless as a case out of context.³⁴⁷

The core task of limited factorialism is, of course, the identification and analysis of conditioning factors. For most limited factorialists, however, the isolation of factors is a result of *a priori* assumption rather than posterior conclusion from preliminary empirical inquiry. Factorialists characteristically assume that select variables are the relevant keys to behavior and that the isolation and examination of such variables alone will permit him to acquit himself of the remaining intellectual tasks. Some writers have been candid in regard to the partial character of their theories and their dependence upon other disciplines, which they do not seek to incorporate, but which they acknowledge to be necessary for the application of many of their own insights. Other authors have employed variables which were quite open-ended or so highly generalized that they lost all utility as they were brought ever closer to reality.³⁴⁸ Whether the genuine limited factorialist is correct in his assumption that given variables are key remains moot so long as he fails to set out the contextual principles upon which factor selections are made.

While a number of factorialists do engage in projective tasks, the range of the operation has been rather limited. Thus, systems and process analysts have been predominantly concerned with the conditions that determine transformation or disintegration. Game and bargaining theorists are concerned with future choices and moves toward a "win"; however, they do not engage in more comprehensive projections. The gaming frame is especially pernicious in that by positing a limited number of options, it discourages the search for alternatives, encouraging, instead, investigators to work ingeniously within a limited framework. Transmuted to actual prac-

346. R. LUCE & H. RAIFFA, *supra* note 331, at 10-11.

347. See, e.g., H. ALKER & B. RUSSETT, *WORLD POLITICS IN THE GENERAL ASSEMBLY* (1966); T. HOVET, *BLOC POLITICS IN THE UNITED NATIONS* (1960).

348. Kaplan, *Problems* 9; Rummel, *Understanding Factor Analysis*, 11 *J. CONFLICT RESOL.* 444 (1967).

tice, this pattern can only increase the probability of a resort to violence. Some content analysts have written as though they were deriving immutable laws of behavior which will serve predictive purposes. Purposive projection, however, depends ultimately upon an orientation toward problem-solving which limited factoralism does not consistently sustain. In the absence of a deliberate concern with problem-solving, the invention and evaluation of programs and strategies have suffered severe restriction. As with projection, alternate strategies have been considered in the short range; and further they have tended to be framed in terms of special rather than common interest.

The persisting weakness of most factoralist work has been the tendency to concentrate upon one intellectual task, and thereafter to generalize, often diffusely, about the other tasks from factor analysis. While factor analysis, alone, can make important contributions, for example, explaining variance, investigators must not lose sight of the range of comprehensive configurative analysis as well as the limits of techniques developed for the performance of any one intellectual task.

Postulation of Goals

One of the fundamental weaknesses of limited factoralism is its failure to articulate a comprehensive conception of preferred public order. Where factoralists do express preferences, they usually refer only to the minimum order level. Thus, the systems analyst seeks to avoid the breakup of a system; the game and bargaining theorist assumes a limitation of options, which increases the probability of resort to violence; and so on. Limitation of variables prevents the factoralist from focusing on the variety of value demands and expectations of participants, without whose consideration inquiry must remain in corresponding measure purblind. The ultimate rationalization of minimum order choices depends in no small part on the relative degree of their conformity to longer-range public order preferences. Unless these are expressly clarified, rationality is frustrated. One difficulty in the way of Professor Falk's efforts to formulate an international law that embraces both the noncommunist and communist worlds resides, thus, in his unwillingness to postulate a comprehensive set of inclusive policies, for which he as a scholar is willing to take responsibility in recommendation, relevant to appraising the detailed practices of both sets of participants.³⁴⁹

349. This difficulty appears both in his recommendations about the problem of expropriation and in his interpretations of aggression and self-defense. See R. FALK, *THE ROLE OF DOMESTIC COURTS IN THE INTERNATIONAL LEGAL ORDER* (1964); Falk, *International Law and the United States' Role in the Vietnam War*, 75 *YALE L.J.* 1122 (1966).

Appraisal

The limited-factor approach has brought to bear on the study of international relations an arsenal of promising theoretical constructions and of data gathering and processing techniques that have, in competent hands, helped to move the study of authority and control from the many formulae of traditional "legalism" to a degree of demonstrated touch with reality. Limited-factor procedures, at their best, do not constitute a new or adequate approach to international law; rather they are potential means of implementing a genuinely configurative conception. When scholars fail to make full and explicit use of a contextual, problem-oriented and multi-methods approach, they lose the possibility of evaluating either the potential contributions or the limitations of a partial model, and run the risk of performing a disservice to international law and jurisprudence by launching a semi-pertinent image of authority and control on an independent career of cumulative distortion, undisciplined by continuous reference to, and appraisal by, a configurative map of the relevant whole.

FACTORS CONDITIONING PAST INADEQUACIES IN THEORY

The factors which have conditioned our inherited jurisprudences of international law are quite inseparable from the general factors which have, through time, affected the world's succession of legal systems and public orders.³⁵⁰ Theories about international law, like other perspectives of human beings, are a function of a constellation of both predispositional and environmental factors. The predispositional factors include the perspectives which the peoples of any given time bring to the arenas of their interaction. The environmental factors embrace both the patterns of communication and collaboration to which they are exposed and features of the resource environment. The significance of all factors, whether predispositional or environmental, must of course be assessed in the cold light of the maximization postulate: that people will invent and apply the theories through which they expect to be best off with respect to all values.

One most persistent factor in international jurisprudential theory has been the intellectual difficulty which theorists have encountered with respect to the entire phenomenon of intergroup law. Any reasonably comprehensive world history will quickly indicate that the Western assumption that international law is a creation of Hugo Grotius and his contemporaries is outstanding only

350. See Wight, *Why is There no International Theory?*, in H. BUTTERFIELD & M. WIGHT, *DIPLOMATIC INVESTIGATIONS* 17 (1966). For the relevance of environmental factors, see H. SPROUT & M. SPROUT, *THE ECOLOGICAL PERSPECTIVE ON HUMAN AFFAIRS, WITH SPECIAL REFERENCE TO INTERNATIONAL POLITICS* (1965).

for its inaccuracy, narrowness and arrogance.³⁵¹ A genuine international law—in the sense of stable patterns of authority and control which limit the options of participants in a relatively unorganized arena—is a feature even of intertribal relations at the dawn of recorded history;³⁵² similarly, it recurs, at this most elementary level, whenever groups of discrete identification interact with relative stability through time. This elemental international law manifests a number of striking similarities with emerging contemporary conceptions, yet is differentiated by one key factor. It is similar to the distorted contemporary conception in that the intense level of identification of each tribal member with the symbol system of the corporate entity permits the observer to speak of a law between tribal units in a manner in which the complex interactions within a modern nation-state can never be accurately represented. It is differentiated in that the primitive economy of tribal life never permitted the emergence of a self-conscious specialist group with the facilities for and interest in conceptualizing the fact that an “international law” did obtain. One witnesses an international law without an international jurisprudence or theory about law.

International jurisprudence emerges with the development of urban civilization in the river basins of the Indus, the Ganges, the Nile and the Tigris and Euphrates.³⁵³ The comparative stability of urban as opposed to tribal existence and the capacity to accumulate and store essential values supported an economy which maximized itself by a division and specialization of labor. As various class and occupation groups defined themselves with increasing clarity, the tribal *shaman* or his equivalent was gradually transformed into a group of decision specialists, which supplied policy services to the ruling elite and, simultaneously developed its own group identity and *esprit*. It is at this point in human history that international jurisprudence begins to develop. Its origins were and to an extent continue to be an intellectual exercise, a technique of differentiation and skill group identification and a means of organizing knowledge and facilitating the performance of decision functions.

Early legal theory was predominantly theistic, because theism was the common symbology of civilization, because it was deemed a significant base of elite power, and because the theorists themselves were often recruited from or identified with the priesthood.³⁵⁴ While

351. See Jessup, *Diversity and Uniformity in the Law of Nations*, 58 AM. J. INT'L L. 341, 351 (1964): “Any identification of a specific limited geographic or civilizational origin in Europe of those basic legal concepts which came to be accepted by the whole international community, is a myth.”

352. See, e.g., A. BOZEMAN, *POLITICS AND CULTURE IN INTERNATIONAL HISTORY* (1960); Verosta, *International Law in Europe and Western Asia between 100 and 650 A.D.*, 113 Rec. des Cours (Neth.) 597 (1964).

353. For general studies, see V. CHILDE, *MAN MAKES HIMSELF* 114ff. (1951); R. REDFIELD, *THE PRIMITIVE WORLD AND ITS TRANSFORMATIONS* 111ff. (1953).

354. For a useful historical examination, see H. MAINE, *EARLY LAW AND CUSTOM* 38-40 (1886).

the internal effect of the theistic character of law was to integrate it with the total culture, the geographical division of the pantheon of divinities tended to fragment world conceptions and to render jurisprudence an exercise in the rationalization of special interest rather than the clarification of the common interest. The so-called secularization of law after Grotius was but a logical continuation of this process, with minor changes in form: the symbol sets of the nation-state supplanted those of the national divinity, while sustained levels of interaction extended residual identifications beyond territorial boundaries to cultural boundaries. The so-called modern international law commenced as a colossal rationalization of the claims, first of Rome, and later of Western Christendom. In this context of conditions, what is surprising is not the extent to which special interest claims are reflected but rather the extent to which genuine common interests have asserted themselves.

The fragmented character of the world of the past, with the different civilizations exhibiting very limited boundaries, strengthened a predilection toward a non-law view in addition to weakening impulses toward identification of common interest. While shared perspectives of authority were clearly a contribution to interaction and value production within an inclusive public order system, they were a decided debit when that order encountered strong effective power elites from without. The behavior options of the latter were unencumbered by perspectives of authority, while those of the former were limited in direct relation to the intensity with which the perspectives were held. The transmitted experience of China with the Mongols and of Rome with the barbarians was interpreted as proof of the impossibility of a genuine international law and as compelling evidence of a global decision process based entirely upon naked power. It is significant that theorists were unable to relate the comparable challenge of the "inner proletariat" presenting a counter-myth and formula to an established civilization to that of the challenge of the barbaric outsider. It was readily perceived that a mature system responded to the demands of an inner proletariat by accommodation and integration and not by the suicidal denial of the possibility of an internal system of authoritative decision.³³⁵

The ebb and flow of inclusive authority conceptions correspond to the onslaughts of stronger effective elites from without. After each crisis, an intellectual paralysis was followed by disenchantment with inherited theories and a groping for new theories of authority and control. In one sense, it led to the clarification of preferences and frequently to a striking program of action. With the extension of stability, the dispersion of a shared symbol set and the generalization of special interests, new inclusive patterns of authority were established. Symbols performed an integrative function, helping people to express and communicate modalities of achieving greatest net ad-

vantages. The process of constantly integrating special into common interests paralleled the lateral extension of the self system of identification.

In this context of conditions, we may summarize the most relevant environmental factors affecting jurisprudential inquiry as follows. The world of the past was characterized by less frequent and less intense interactions. The factual community of mankind was more diffuse and not so manifestly interdependent as it is today. The resultant parochialism was reflected in jurisprudential theory in part in limited observational standpoint. Legal theories tended to depict national and international interaction as discrete and to concentrate largely upon the former. It is significant that even in periods of extensive imperial hegemony, the unity of mankind was viewed in terms of the acceptance of one dominant culture rather than in the interstimulation and integration of many diverse cultures.

Other factors included the enormous diversity of communities, which for the most part rested on identification systems highly resistant to assimilation or integration. The distance between communities and the poor quality of communication, in almost all important modes, tended to emphasize the fragmentation as opposed to unity of mankind.

The most serious conceptual and methodological blocks to the emergence of an effective theory about law included both confusions about law and confusions about the functions of theory. The most important factor, however, was the absence of a realistic theory of language or symbols and the necessary resort to extremely primitive and intuitive theories of communication and culture. The relevance of such theories to theory about international law cannot be understated. Operating without the aid of such tools in a municipal system, the sensitive and intuitive lawyer can generalize upon his own experience with minimal distortion, due to the comparatively homogenous character of his civilization. But the aggregate world arena has been characterized by diversity. Hence impressionistic generalization from municipal experience has been marked by naivete, egocentricity and anachronism.

The most recurring and pervasive response to the constellation of factors, thus briefly noted, has been that of parochialism. Focus has almost always been too narrow. Theorists identified with a locally ascendant elite, or a national or regional religious dogma, or cultural complex, and so on. Patterns of personal loyalty may have contributed to a concentration upon certain organic institutional arrangements.

Another factor, currently suffering rapid attenuation, is the cultural trend of traditionalism. A high cultural premium was put upon inherited value systems; the greatest value indulgences were accorded to the legitimizers rather than to the criticizers of tradition. Although relatively brief periods of radical innovation did occur,

they could not sustain themselves and quickly succumbed to cultural traditionalism. The impact of traditionalism upon jurisprudential theorizing was manifest both in method and in content. But the myth of traditionalism is being rapidly superseded by the myth of innovation. It is probable that the most rewarded jurisprudential theories of the future will be those of process, innovation and change.

The world of the past was characterized by a less differentiated division of labor than currently obtains. Proportionately fewer individuals were involved in enlightenment activities and the channels for the transfer of the products of enlightenment to both elite and rank-and-file members were considerably less developed. At any given moment, the storehouse of current, relevant and retrievable knowledge was much less than it is currently. In addition to these deficiencies in personnel and organization, the tools for the collection, investigation and evaluation of data were considerably less developed.

We cannot overlook the fact that jurisprudential inquiry in the past was undertaken for the most part by self-conscious members of a skill group, which frequently confused the perpetuation of its identity and the furtherance of its interest with the selfless pursuit of knowledge. Lawyers, as the members of any interest group, were loath to accept theorizing or investigation which might undermine the base values of their position in community process.³⁵⁶ Given the growing complexity of the law and the necessity of detailed and specialized knowledge for disquisition upon most aspects of it, recruitment of legal theorists was often virtually limited to those who had been initiated in the cult of the law. Like theologians and medicine men, lawyers have on occasion shown more concern for the exclusive interest of a special skill group than for inclusive community purposes.

POSSIBLE FUTURE DEVELOPMENTS

The factors that will condition theories about international law in the future could be quite different from those which bequeathed to us the confusions of the past. Through the developments of modern science and technology, and the new access to the reaches of outer space and the depths of the oceans, man's resource environment is undergoing irreversible transformation. The rapidly accelerating growth in the world's population, along with the technological improvements in communication and transportation, increasingly make the accessible physical universe a single environment. It is conceivable, further, that contemporary intellectuals are fashioning more viable perspectives for transmission to their successors. It could come to be perceived that in the universe of the future all men will

356. For a pertinent discussion of the problems involved in the policing of a professional skill group, see Cranberg, *The P-M Bomb*, 23 BULL. ATOMIC SCIENTISTS, Dec., 1967, at 37.

have more to gain from comprehensive identifications and inclusive demands than from parochialism and exclusive, egoistic assertion.³⁵⁷

The future course of theories about international law will no doubt continue to display the same sensitivity to complex constellations of conditioning factors that such theories have shown in past centuries. Any disciplined attempt to project the probable lines of development must therefore estimate the direction, strength and timing of the universal social process, and anticipate the role that jurisprudence will play in the justification of controversial claims and decisions, and in the intellectual community concerned with research, teaching and consultation. It serves no clarifying purpose to assume that the world will suffer either annihilation or coerced subordination to the totalitarian system of public order imposed by one huge imperial power. Let us assume—and the assumption does no damage to either common sense or scientific inference—that after an intermittent sequence of crises of varying intensity the world community eventually succeeds in consolidating, largely by persuasive means, a public order that goes beyond minimum security, fundamental as that is, to the cultivation of policies that approximate an optimum order.

First of all, it is safe to foresee that all the approaches to law that have been taken in the past are likely to continue, with fluctuating emphases, in years to come. Every jurisprudential viewpoint has left its trace in the literary inheritance of man and hence has achieved a secular immortality exemplified in occasional revivals, not only of scholarly attention, but of advocacy. In a universalizing civilization of science and technology, the residues of the past are stored and subject to retrieval. If, as we anticipate, the relative position of the intellectual continues to prosper, all stored knowledge is peculiarly subject to reevaluation for its suggestiveness in providing a standpoint, or in fashioning a conceptual tool, that may be perceived as useful beyond the realm of scholarly enlightenment and academic competition. So long as some classics of natural law, historicalism, or of any other variety of jurisprudence are available, it is probable that theoreticians will somewhere, sometime, try to blow the breath of present relevance into the fossil.

It is not, however, essential for the resurrection of various emphases in the approach to law that the members of future generations be directly aware of the classical texts. Traces of every viewpoint are embedded in the doctrines, formulas and popular miranda of civilized societies. As has been documented in detail in many researches, the jurisprudence of Rome permeates the vocabulary and point of view of thousands of lawyers who never had occasion to open a single volume in Latin or Greek (or a translation). Beyond these opportunities for incidental learning, the several approaches

357. For a perceptive account of recent developments attributable to an increasing recognition of interdependence, see Van Asbeck, *Growth and Movement of International Law*, 11 INT'L & COMP. L.Q. 1054 (1962).

to international law that we have enumerated can confidently be expected to reappear in the future since they are partial expressions—with accompanying exaggeration—of component features of the problem solving orientation of man. Although it is necessary, in order to achieve full insight and understanding, to elevate an intellectual task to the fully deliberate status of a method, it is not necessary to achieve such an elaborate level of awareness in order to employ the tasks themselves, whatever the degree of proficiency involved. One does not have to adhere to some “historical school,” for instance, to mobilize information about remote or recent events salient to a problem; so far as the individual is concerned he may re-invent the distinctive character of historicalizing jurisprudence by magnifying the supposed authority of the past. The sociological approach, to select another instance, is latent in every problem solving task that seeks to discover the impact of one set of psycho-cultural factors on another. So long as wars, revolutions and related crises continue, it is to be anticipated that men will revive or re-invent a non-law conception. The search for goal clarification as implicit in the recognition of value outcomes and effects of decision, whether the pattern of goal is perceived as woven into the texture of the natural order or not. In the same way the projection of future events—always implied in attacking any problem—may proceed by affirming or rejecting competing images of nature, which include the attributing of divine purpose or undirected evolution. Since a large part of the globe is likely to continue to operate within an articulate framework of communist ideology, it is to be foreseen that appeals to the earlier theological formulations will be of diminished importance as symbolic means of justifying conceptions of common interest.

We are particularly cognizant of the recurring circumstances that give such vitality to approaches that approximate the full formal subtlety of the analytic style of thought. For analytic perspectives are built-in to the dialectical structure of authoritative decisions which, in the simplest terms, is a process of selecting among rival proposals for the adoption of general prescriptions, or for the applying of prescriptions to concrete instances. The competitive arena may concern itself either with exploring the factual dimensions of the concrete circumstances, or with examining chains of argument ostensibly pertinent to the characterization of “facts.” The former task is open to non-professional counsel; the latter set of operations typically requires a degree of professional learning. Given the advantages of professional differentiation to counsel—and to many decision-makers—it is evident that factors are always present that exert a steady pressure toward argumentative elaboration. The analytic jurisprudence is, in effect, dialectic without data; or, rather, dialectic assuming data. We cannot doubt that the professionals in future years will continue to display a disposition to inflate the task of argument at the expense of inquiry.

Nevertheless, it is to be expected that coming decades will contribute concurrently to the factual component of decision processes, and to the factual requirements of a jurisprudential approach. A world that escapes disaster will continue to change in the direction of universalizing the culture of science and technology, a development that changes both the operational characteristics and the perspectives of society. The operational reconstruction permeates the values and institutions of every sector of every component of the world community. The perspectives underline empirical inquiry; hence they encourage a viewpoint that links theory with data, and mobilizes assets for the purpose of organizing the functions of intelligence and appraisal on a scale that serves the objectives of science and scholarship, and of civic and public policy. A jurisprudence of international law that fails to guide the activities that relate to the gathering, storing, retrieval, and utilization of data about the world context will be a declining jurisprudence, a candidate for fossilization.

From the standpoint of scholars who demand a more viable jurisprudence—a standpoint that makes it possible to incorporate every valid element of the formulated conceptions of past jurisprudence—it is reassuring to realize that the factors indicated above are among those that may work toward the diffusion of a configurative approach to international law. More intense interaction in the world community inevitably entails increasing interdependence, and new opportunities for the perception of interdependence: conceivably such new conditions and opportunities may bring more appropriate clarifications of goal, and policy, in the light of past knowledge and critical estimates of the ever-receding future.

ALTERNATIVES FOR A CONFIGURATIVE JURISPRUDENCE

A viable jurisprudence of international law must, we conclude, be articulately configurative in its conception of the field, and hospitably disposed toward the invention or adaptation of the technical procedures by which general or partial models generated by disciplined imagination are subjected to the further test of social reality.³⁵⁸

We have described such a jurisprudence as contextual, and it is overwhelmingly evident from the review of past jurisprudence that unless the context embraces all persons and groups who are in continuing interaction with one another, such a jurisprudence, by con-

358. The more detailed alternatives we recommend will of course be elaborated in the book of which this article is the opening chapter. Some anticipation of our recommendations may be found in McDougal, Lasswell, and Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 403 (1967) and in various previously published books: M. MCDUGAL, H. LASSWELL, & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); M. MCDUGAL, H. LASSWELL, & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967); B. MURTY, *PROPAGANDA AND WORLD PUBLIC ORDER* (1967).

firming the parochialism of one territorial civilization, or of one segment of human society, will contribute to the rigidities of outlook and operational routine that endanger the realization of global public orders aspiring toward either minimum or optimum levels.

The observational standpoints essential to the execution of such a program call for the insight that permits any participant in world community process to distinguish between (1) the vantage point that enables the scholar and scientist to pursue the fundamental goal of providing an enlightened and ever-contemporary image of the whole, and (2) the position that must be taken by decision-makers located within the many different territorial and functional structures of the world arena.

An adequate configurative jurisprudence will make accessible to scholars and decision-makers alike an inclusive and differentiated map of world community process that will facilitate realistic perception of the interdependencies affecting every value-institution sector in such a process.³⁵⁹ Within the context of this larger community process, a configurative approach will provide an intellectual armory for bringing into focus the global process of effective power, distinguishing among effective decisions those in which perspectives of authority are conjoined with control and those which diverge in the direction of naked power or pretended authority.

An adequate configurative jurisprudence will differentiate, within the whole transnational flow of authoritative and controlling decision, the choices that are constitutive, in the sense of allocating degrees of permissible participation in the world arena, from those whose primary concern is the protection of all the other institutional practices in the shaping and sharing of values by which a comprehensive public order is established. In such a jurisprudence, distinction will be made also between the public order of the world community, whose features are protected when necessary by the use of severe sanctions, and the world civic order, whose choices are expected to be, and in fact are, supported by resort to relatively mild sanctions.

An adequate configurative jurisprudence will, further, seek to provide for both scholars and decision-makers intellectual tools with analytic and procedural means for mastering the tasks inseparable from every problem. The acceptance of a contextual problem-solving approach carries implications whose significance is rapidly dawning on modern man as he plunges into an extended extra-terrestrial environment, and strives to adapt himself to the innovative volcanism of techno-scientific civilization. Man looks ahead; he is future-oriented to a degree that, however latent in the past, was unthinkable until the tempo of change approached its present

359. For theories which seek to make the necessary distinctions, see M. McDougal, H. Lasswell, & I. Vlasic, *LAW AND PUBLIC ORDER IN SPACE* chs. 1-2 (1963); Lasswell, *Toward Continuing Appraisal of the Impact of Law on Society*, 21 *RUTGERS L. REV.* 645 (1967).

pace and spread. To look ahead is to become aware of the essentiality of clarifying one's goals in a frame of reference that includes all mankind and all potential forms of sentience with which he may have eventual confrontation. A jurisprudence that guides the scholar or the decision-maker will contain the categories that aid an orientation toward the manifold of events that includes the future as well as the past; will utilize all the available stocks of knowledge to illuminate trends, explanatory conditions, and projective potentials; and will, hence, stir the creative origination of objectives and strategies that afford realistic anticipation of the benefits, costs and risks of alternative options available to a human community whose members are growing accustomed to accept the challenge of taking the course of evolution into their own hands.

A jurisprudence that aids in this vast enterprise must go well beyond the traditional tasks of proposing conceptual systems whose principal role is to provide an argumentative syntax for the justification of claims and decisions. It has always been obvious on reflection that, even in the employment of a theory of law that treats law as an exercise in disputation about rules, it is necessary to emphasize procedures in order to provide for a sequence of exposures to accumulated learning and to the institutional practices of controversy that transform the layman into a professional. Today it is apparent that the procedural implementation of a conception of jurisprudence goes beyond early educational exposures and must include a continuing life-time program of self-study and social observation.

As the configurative task of jurisprudence is clarified, the significance of commitment to a fundamental, overriding objective grows more and more apparent. We therefore recommend to scholars and decision-makers alike a two-fold conception of the goal appropriate to the jurisprudence of international law: first, diligent use of all problem-solving operations as means of achieving a disciplined, rather than an arbitrary or conventionally routine, commitment to a postulated goal for the public and civic order of mankind; second, the adoption of human dignity as the postulated aim of jurisprudence, understanding this to embrace within the world commonwealth all men everywhere, and to imply a universe of wide rather than narrow participation in the shaping and sharing of values, including power, until such time as power itself becomes redundant and yields to the civic order of man.³⁶⁰

360. Cf. Van Asbeck, *Growth and Movement of International Law*, 11 INT'L & COMP. L.Q. 1054, 1072 (1962). "What then is the purpose of our study of international law and of the law of nations, and their related fields? What significance can it have? The answer seems clear. To explore how the present law has come to be what it is, how it is involved in a process of reform and extension and intensification, in order that we may be able to assist in the building, stone upon stone, in storm and rain, of a transnational legal order for States and peoples and men. All our thinking and all our efforts should be directed towards this end, towards an order which transcends power and calls for service."

It is by clarity in observational standpoint, realism in focus upon authoritative and controlling decision in the whole community of mankind, systematic and disciplined employment of all relevant intellectual skills, and explicit postulation of basic goal values that contemporary scholars may be able to create a jurisprudence of international law which is appropriately contextual, problem-oriented, and multi-method and, hence, capable of drawing freely and effectively on the partial contributions of every emphasis that has found articulate expression in past reflection on the task of scholars and decision-makers in the world community of yesterday or the future.