CONFIGURATIVE JURISPRUDENCE AND THE CLARIFICATION AND GROUNDING OF VALUES AND MORALITY IN CONTEMPORARY THEORIES OF JUSTICE

ABSTRACT

This article examines the contribution and relation of configurative jurisprudence (the jurisprudence of Yale Professors McDougal, Lasswell, and Reisman) to the development of the contemporary discourse on justice. I provide a brief overview of the introduction of the human dignity concept into professional training by configurative jurists in 1943. I trace the salience of this insight into the post-war period where theoretical concerns were expressed regarding whether Nazi law was law at all. I then provide a short overview of the newer theories of justice developed by Rawls, Sen, and Dworkin. Since the historic problem of the relationship of law to value has been the insistence of conventional theory that, in general, law is objective and morality is subjective, this article provides an exploration of this premise from the perspective of Holmes and the Legal Process School. That approach is compared with the insights of configurative jurisprudence about the distinction between the objective and the subjective. I then continue on the theme of subjectivity by commenting upon the measurement of subjectivity using the Q methodology, which suggests that the line dividing the objective and the subjective is narrow. I then review the central ideas of Sen and Dworkin, with a comparison drawn from configurative jurisprudence. The article concludes by placing these discourses into the global context of justice deficits and rule-of-law promise.

INTRODUCTION

One of the most influential factors on the collaboration of Yale Professors Myres S. McDougal and Harold D. Lasswell was the crisis of World War II. Conventional wisdom insisted that law and morality were distinct matters. Thus, the world of legal education was engaged in professional training while at the same time ignoring or avoiding the major problems of public policy and public interests in the re-creation of the professional class of lawyers who, in the broad sense were an important component of the policy process itself. They saw "little conscious, systematic effort to relate (basic policy) clearly and consistently to the major problems of a society struggling to achieve democratic values."[1]

As early as 1943, McDougal and Lasswell noted that, from a global perspective, democratic values have been under assault. In an article entitled *Legal Education and Public Policy: Professional Training in the Public Interest*, these authors asserted that:

> the dominant trends of world politics have been away from the symbols and practices of a free society towards the slogans, doctrines and structures of despotism. The outburst of racialism in Germany is but one of several profound recessions from the ideal of deference for the dignity and worth of the individual. Whenever democratic attitudes have declined, institutions connected with democracy have weakened or vanished.[2]

Using legal education as the wedge into the discourse, McDougal and Lasswell insisted that legal education take account of the principle of the public interest. Thus, tying education to professionalism and to the public interest, they brought in the importance of the normative aspect of basic community policies, which fell within the arena of professionalism and the public interest. In explaining the broad view of the professional responsibility of lawyers, and the educational responsibilities in training them, these authors believed that:

> [t]he lawyer it must be recalled is a member of a learned profession—of a skilled group [that] has the temerity to make a profession of tendering advice to others. It is his responsibility to acquaint himself not only with what

[1] Harold D. Lasswell & Myers S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, *in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 1265 (New Haven Press 1992). This essay was first published in 52 YALE L. J. 203 (1943).
[2] *Id.* at 1270.

> the learned have thought, and with the historical trends of his time, but also the long term interest of all whom he serves and the appropriate means for securing such interests.[3]

The authors also noted that "war is the time to retool our education processes in the hope of making them fit instruments for their future job."[4] In terms of the normative aspect of legal education, they stress the salience of the "cardinal value of democracy" and the "realization of human dignity in a commonwealth of mutual deference."[5] The goal variables that are explicitly identified are the variables of shared power, shared respect and shared knowledge.[6] The central point of this article was that legal education was a crucial form of a functioning jurisprudence, and that a functioning jurisprudence that precluded the public interest in democratic values and human dignity was not justifiable and not sustainable. In short, the conventional wisdom of law and legal education, which insists that law be value free and neutral, was misplaced in the light of the enormous challenges posed by the promotion and defense of democratic values and human dignity. In the context of the war, the nation itself was immersed in a life and death struggle over those very values. These values had been publicly articulated in the Four Freedoms and the Atlantic Charter. Those values became the foundation stones of modern international law and the U.N. Charter. I suspect that we owe McDougal and Lasswell a debt in bringing to the concerned discourse about legal education and jurisprudence the importance of the fundamental value commitments of a community, which we generally describe as morality.

In the aftermath of World War II, the jurisprudential crisis deepened concerning the extent to which law should be distinct from morality. Many theorists felt uneasy about the separation of law from morality and values. Some theorists felt that Nazi law could not be described as law at all. Others felt that Nazi law was law although it was bad law. This generated an important exchange in the Harvard Law Review between Professor H.L.A. Hart and Professor L.L. Fuller.[7] This discourse was in part influenced by the conventional view of law and sovereignty, which view suggested that sovereignty was essentially unlimited and immune from moral restraint. This represented the practices of Nazi Germany, which included policies and practices for the wholesale extinction of human beings. Thus, since World War II, there has in fact been a revival in all sectors of jurisprudence touching upon the role of a jurisprudential and philosophically grounded theory of justice.

The literature of traditional jurisprudence has been useful in demonstrating (within the tradition) the importance of the discourse concerning jurisprudence. Among the important contributions is the work of Cambridge Professor N. E. Simmonds.[8] Simmonds provides us with an important overview and insight into the developments in the theory of justice and their importance to jurisprudential discourse. These traditions seek to throw light on "the right of subjective freedom" or the nature of the 'good' and the critical question about what constitutes "an excellent valuable life for the human being."[9] This discourse leads us into a clarification of modern liberalism and its dependence upon subjectivism. This, in turn, raises the question of the relationship of subjectivism to the concept of morality and the extent to which morality itself depends upon objective indicators to determine its currency. Liberalism seeks to constrain itself in defining the good, preferring to develop neutral concepts between contending versions of the good. These issues themselves become critical to modern jurisprudence.

Contemporary efforts to clarify the concept of justice itself have been inspired significantly by the work of distinguished philosophers and economists. Among the most influential of these modern philosophers is

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[3] *Id.* at 1275.
[4] *Id.*
[5] *Id.* at 1282.
[6] *See id.* at 1282-93.
[7] H.L.A. Hart, *Positivism and the Separation of Law and Morals,* 71 HARV. L. REV. 593, 629 (1957); Lon L. Fuller, *Positivism and Fidelity to Law—a Reply to Professor Hart*, 71 HARV. L. REV. 630, 630-72 (1957).
[8] For a masterly work on traditions in the theory of justice, *see* N. E. SIMMONDS, CENTRAL ISSUES IN JURISPRUDENCE: JUSTICE, LAWS, AND RIGHTS (Sweet & Maxwell, 2d ed. 2002) (1986).
[9] *Id.* at 6.

John Rawls,[10] who wrote *A Theory of Justice* (1971). The inspiration for Rawls' approach is his concern that utilitarianism does not provide an adequate account of the idea of justice that considers carefully the position of individual rights. Implicit in the criticism of utilitarianism, therefore, is the notion that utilitarianism stresses the collective right to happiness without an adequate account of the distribution of that right to individuals at the tail end of it. Utilitarianism, therefore, in not adequately addressing the allocation of rights, opportunity, liberties, and other important values, does not in principle respect the distinctive identify of the individual, or adequately focus on the freedom and equality of citizens in a democracy. In short, the implication of the utilitarian approach is that it would short-change the rights, opportunities, and liberties of the individual in the process of prioritizing the greater happiness of the many.

Rawls' approach to this problem comes in the form of an imaginative thinking experiment. We must imagine a situation in which we have a blank slate about the particular facts involving us and society. We know, of course, the general facts about society and science. From this initial position, people would then have to consider what they can rationally agree would be the justice principles to govern society. The first principle that we would agree on is that justice must guarantee equal fundamental liberties for all—this could include freedom of thought and expression, freedom of association, freedom of conscience, equal political rights, freedom of choice with a right to personal property, etc. The second principle of justice would be that all our allocated 'fair equal opportunities' develop talent and capacity and allow for competition for desired social positions. This second principle implies educational and healthcare benefits for all. Rawls then develops his crucial innovation—a the third 'difference principle.' This principle of justice mandates that economic inequality be subject to allocations that provide a maximum benefit for the least advantaged members of society. The implication of the difference principle is that political economy should be driven by the impulse for redistribution of income, wealth, and economic powers and responsibilities, so that the least advantaged class would be better off than it would be in any other system of political economy. In effect, Rawls' theory is reconcilable with a property-owning democracy.

In drawing up this intellectual framework, Rawls, although relying on some conception of the good, uses a modest version of it. He calls it "a thin theory of the good."[11] In order to avoid a multitude of conflicting conceptions of the good, Rawls uses an intellectual device that requires a certain veil of ignorance so that people do not know their own conception of the good. From this starting point, a rational person (in Rawls' original position) would choose the two principles of justice. As indicated, the first principle allows each person the most extensive system of basic liberties as are compatible with a similar system to everyone else. Critically, Rawls' third principle describes social and economic inequality as just only insofar as these inequalities work to the advantage of the least advantaged people in society; in effect, they moderate the potentially unjust discrepancies of the first and second principles. In this sense, Rawls has given us an objective working theory of a 'thin good' that may be (broadly speaking) an indicator of a social democratic system of politics and law. In such a way, Rawls' theory has reinvigorated the philosophic discourse about the fundamental idea of justice.

Rawls' theory is an important complement to the configurative approach to legal theory. Given the historic difficulty of making fundamental value commitments and morality an important part of the critical discourse of legal theory, Rawls' effort to generate an objective theory of morality has compelled conventional jurisprudence to more seriously consider not only the Rawls' version of justice but also the imperative of the idea of justice *in general* to legal theory and public order. Rawls' theory, in particular his theory around the difference principle, stresses the idea of the importance of criteria for rationally allocating important values in terms that are equitable and that reasonable people may intuitively find acceptable. Although he does not develop a theory of decision making that is context-driven to give more precision to the challenge of providing maximum benefit for the least advantaged members of society, his approach has in

[10] John Bordley Rawls (1921-2002) was an American philosopher and a professor at Harvard University.
[11] JOHN RAWLS, A THEORY OF JUSTICE (Harvard Univ. Press 1971).

fact provided a critical justification for the approach of a society based on social democratic principles and which seeks to avoid the social deficits that result from extremes of wealth and poverty.

In configurative jurisprudence, attention is given to the preference for a social democratic system for the delivery of justice. At the heart of any society distinct from a social democracy is the juxtaposition of a society structurally resembling a pyramid in which one might structurally delineate the number of members of society who monopolize the upper tenth of any and all values. In short, the dominant minority monopolizes the values central to justice; the subordinate majority experiences value deprivation

PYRAMID ILLUSTRATION

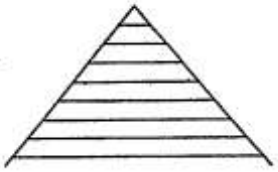

Diagram A[12]

Rawls' theory is one that confronts the 'pyramid' problem with his difference principle, and that principle requires those who monopolize the values to agree to provide maximum value benefits for the worst off. Acting on that principle, we may emerge with a social construction having some resemble to the 'turnip' illustrated in Diagram B (below). The social democratic geometrical figure resembles more the structure of an onion or a turnip in which we see a vaster aggregate of people sharing the middle, upper middle, and lower middle and only a small category occupying the top and bottom portion.

TURNIP ILLUSTRATION

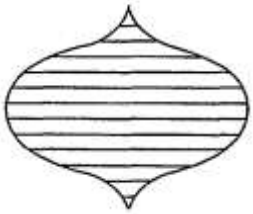

Diagram B[13]

These theories recognize that in certain circumstances, social stratification, social dominance, and resource deprivation result in disproportionate availability of values for individuals represented at the bottom of the social pyramid (or at either the bottom or the top of the social turnip). In this sense, we are given an important indicator of how to organize social strategies for the improvement of the element of social justice dominated by the socio-political dynamic of (for example) racial prejudice. Here rules that target "racial prejudice," "racial discrimination," "racial dominance," and "invidious discrimination," facilitate the alleviation of injustice, and the stigmatizing of vulnerable groups. It will be apparent that there are important

[12] *See* Harold D. Lasswell & Myers S. McDougal, *The Social Process as a Whole, in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 335, 344 (New Haven Press 1992).
[13] *See id.*

similarities, ideologically, between Rawls and the configurative approach. Rawls describes the commitment to provide maximum advantages for the worst off as a theory of a 'thin good.' This could be implied in configurative jurisprudence, although a thin good would appear to represent the value minima for a defensible commitment to human dignity. This would leave open the question that justice may also be defined and justified when it is able to produce and distribute values that go beyond value minima to a more complete satisfaction of the value demands of a more optimal sense of human dignity. Rawls' thin good idea does have rhetorical value. It gives justice a more modest and achievable objective that may comport with political realism. A sense of justice couched in excessively idealistic terms may produce expectations that are inflated and unrealistic.

In a sense, the approach of McDougal and Lasswell has also sought to ground a theory of justice, not objectively, but in an explicitly formulated postulate, the enhancement of human dignity. More recently, the Nobel Prize winning economist Amartya Sen has sought to address what are perceived to be the shortcomings of Rawls' view of justice. These shortcomings are thought to implicate his moral lack of insight into ideas of global justice. Sen has brought the economist philosophers eye to deepen discourse around the idea of global justice and its procedures and methods for clarification. There is much in Sen's approach that may be seen as compatible with the approach of McDougal and Lasswell. One major difference between the Sen approach to justice and that of McDougal and Lasswell is the postulating of an overriding master value of human dignity. Sen has sought to avoid such an abstraction; although I suspect that the complex method and theory that Sen generates moves the global theory of justice significantly in this direction. This is taken up in detail at the latter part of this presentation.

Most recently, one of the most distinguished jurisprudence scholars of our time, Professor Ronald Dworkin[14], has written a book on the theory of justice. It is a book that, to a large extent, has its focus on reshaping academic philosophy's approach to the theory. Like Rawls and Sen, Dworkin wants to establish and objective theory of justice. The title of his newest book is *Justice for Hedgehogs* (date). There are many ideas in Dworkin's approach that are compatible with the ideas of McDougal and Lasswell; and, of course, there are many ideas that are contentious. Dworkin makes a critical distinction between ethical issues and moral issues to establish his theory of justice. The ethical issues are "what people should do to live well: what they should aim to be and achieving their own lives." There is a second kind of issue that flows from this and according to Dworkin is a moral principle. This moral principle is: how people should treat others. In Dworkin's view, when we answer the ethical question: what it takes for a life to go well, we can then answer the question which is moral: how we should consider or take into account the lives of others. The first ethical principle here is a principle that focuses on the idea of self-respect. Self-respect requires recognition of taking one's own life seriously and understanding what is important to make your life a successful experience rather than a wasted opportunity. A second principle that supports self-respect is the idea of authenticity. I have a responsibility to identify what counts as success in my life. Dworkin believes that these ideas taken together namely self-respect and authenticity generate a concept of human dignity, which requires both of these ideas. If the self is entitled to a life of self-respect and authenticity, it is also because it is an entitlement shared by all other selves in the community. How adequate or useful this concept of human dignity is, or whether the approach taken to the clarification of fundamental values is superior to the approach of McDougal and Lasswell, we take up in a later in this presentation. However, whatever the difference in approaches they generate a serious discourse on the most fundamental questions of human value and responsibility. In this sense, these discourses significantly enhance the currency of jurisprudence.

[14] Ronald Dworkin (1931-) is an American philosopher of law, a scholar of constitutional law, and a professor of law and philosophy at University College London.

THE PROBLEMS OF OBJECTIVITY IN LAW AND SUBJECTIVITY IN THE COMMITMENT TO JUSTICE AND MORALITY

One of the enduring problems of modern jurisprudence is the widespread commitment to the idea that an essential ingredient of a defensible theory of law is the characteristic of its objectivity. The priority of objectivity resonates with the idea of scientific thinking. The priority of objectivity in legal theory finds the theory of an objectively ascertainable pedigree a critical criterion for the validity of a legal proposition. Similarly, the priority given to objectivity weakens or precludes a role for morality in jurisprudential discourse. Morality is not validated by the idea of an objectively ascertainable pedigree. It is not amenable to the methods by which a scientific truth is validated. In moral propositions, currency is not enhanced or understood in the language of cause and effect or formal logical discourse. Its currency only makes sense in the quality and the rigor of the world of 'ought' discourse. Today it is commonly assumed that the currency of ethics and morality is defended by the tools of justification. The extent to which the tools of justification from time to time enter the world of legal discourse creates space for morality and ethics to enter the world of positivistic legal thought. In this paper, I explore some of the dimensions of the objective and the subjective components of legal theory.

One of the most important objectives of rule and precept-focused jurisprudence is to secure for law, and the intellectual frame behind it, a theoretical basis for an 'objective' legal order. A frame that focuses on objectively verifiable rules or other precepts meets this concern, and those who seek to modify or otherwise tinker with the dominant (rules oriented) law view must meet the criterion of 'objectivity', if their contributions are to be valued or taken seriously in dominant academic circles. For example, Professor Dworkin's focus on principles as a missing ingredient in Hart's taxonomy of a rules-based legal system severely undermines the linchpin of Hart's system, in particular, the Rule of Recognition.[15] How then are we to objectify 'principles' without a Rule of Recognition, where Dworkin has been both scholastically courageous and incisive. He suggests that the conceptual basis of a legal principle lies in the notion of 'rights'. Mainly, principles presuppose rights. Yet these rights often reflect moral understandings that are well accepted not only in law but also in the general political and moral culture of the society. Therefore the serious intellectual task of jurisprudence is to take these 'rights' seriously, which at least intellectually means taking moral discourse seriously. This in turn means finding an 'objective' moral basis for 'moral rights', which is often the rational basis of Dworkin's favorite precept, the legal principle.[16]

For many traditional positivists, there has long been a belief that law is 'objective' while morality is 'subjective'.[17] Effectually, Dworkin rejects this kind of assumption by attempting to demonstrate that a sophisticated and rigorous understanding of contemporary moral philosophy can facilitate a level of objectivity about the content and nature of moral rights.[18] Oddly enough, he owes a great deal of this kind of insight to Professor Hart who remains one of the foremost moral philosophers of the twentieth century.[19] Dworkin has simply pushed this point much further than Hart would have imagined, indeed, to the point of

[15] Hart was responsible for the revival and reformation of positivism. Under Hart's theory, law obtains its character as such through promulgation by an identifiable sovereign, through some generally accepted procedural mechanism that allows one to identify it conclusively as law. Hart called this 'master' rule the "rule of recognition." H. L. A. HART, THE CONCEPT OF LAW 92 ff. (Clarendon Press 1961). Hart's theory sharply separates legal and moral norms. *See* Lon L. Fuller, *Positivism and Fidelity to Law—a Reply to Professor Hart*, 71 HARV. L. REV. 630 (1957).

[16] For a sampling of the recent scholarly discussion of legal pragmatism, *see* RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (Harvard Univ. Press 1990); ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 12 (Cornell Univ. Press 1982).

[17] For the positivist, a primary jurisprudential and intellectual task is the identification of what must be obeyed. Hence the recurring concern with finding the 'sources' of law.

[18] For his most recent contribution, *see* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (Apr. 17, 2009) (unpublished manuscript, on file with the Boston University Law Review) (forthcoming 2011). I discuss this piece in detail later in the paper.

[19] *See* H. L. A. HART, LAW, LIBERTY, AND MORALITY (Stanford Univ. Press 1963).

severely undermining Hart's rules-based paradigm![20] How does one distill an objective moral right from all the other weakly justified moral rights? The clearest test holds that a moral right is entitled to be specified as a moral right if it is justified by reasons external to the statement-maker. Justification is the key to the broadening of the precept of a 'juridical' moral right.

Perhaps the single most compelling objection to legal realism is the charge that it is *law-denying* in the objective sense as used by conventional positivism. Judge Hutchenson's term, the *hunch*, has generated no sympathetic understanding for the difficulties in the judging role. Rather, it has been a kind of albatross on the back of the realist judges, making it difficult to take realism more seriously. Professor Carrington's attack on critical legal studies, which can be seen as a modern Harvard-style mutation of legal realism, carried the notion that critical legal studies (and by implication, realism) was at its core a 'rule of law'-denying perspective of questionable value in reputable academic and intellectual circles. The efforts of critical legal studies scholars to be rigorous '*about* law' legal analysis and the attendant deconstruction of past legal institutions and ideas which undermined conventional assumptions about law's objectivity became associated with gutter intellectualism, as the labels *trashing*[21] and *crit* became interchangeable.

It is suggested that the misconceptions about the objectivity/subjectivity of law and moral order remains one of the most important jurisprudential issues, and harsh words and intellectual scapegoating should not obscure the seriousness of these issues for responsible dialogue. My strategy for presenting this issue is to focus the discourse in terms of the development of American legal thought associated primarily with Holmes, the later legal process school, and the distinctive approach that configurative jurisprudence brings to this issue. Although the literature of law is steeped in the assumption that law is objective, I shall use as the main vehicle for illustrating this position the insights of Mr. Justice Holmes.

I do so because Holmes effectively articulated the objectivity of law and provided insight into the subjectivity of law with his *bad man* theory.[22] Holmes further determined that the practical meaning of law lies in predicting what judges do.[23] He added in another context that certainty in law, like life, was an illusion and that repose was not man's destiny. He further tarnished the tie-in of objectivity to logic and legal doctrine by suggesting that a judge could give any conclusion a logical form. In short, one can find both a strong basis for the objectivity of law or the subjectivity of law in Holmes' writings and meditations on law and life. This is not to suggest that he was a muddled theorist. Rather, it suggests that once the important problems of both clarifying the relevant vantage point assumed by the statement-maker, and understanding the complexity of unpacking the recurrent problem concerning the subjective or objective character of law, Holmes' insights are most instructive.

It will doubtless be recalled that in Holmes' time a sharp distinction was indeed made between law and morality on the basis of this distinction. Law was scientific and therefore objective. Morality was subjective, therefore, like 'values' and normative 'oughts' are likewise subjective. As objective in character, law is external: it is effectually an observable scientific phenomenon. As subjective, morality was 'internal,' requiring non-science for its elucidation. From a scientific perspective, legal rules therefore are objective, an example of hard law. Moral rules are subjective, an example of non-law 'soft' rules.

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[20] Hart's rule based paradigm is explained fully in Chapter V of H. L. A. HART, THE CONCEPT OF LAW (Clarendon Press 1961).

[21] *See* Jeffrey L. Harrison & Amy R. Mashburn, *Jean-Luc Godard and Critical Legal Studies (Because We Need Eggs)*, 87 MICH. L. REV. 1924, 1937 (1989). Harrison and Mashburn explain:

> Deconstruction is also known by the less genteel, but perhaps more descriptive term, trashing. The oft-quoted definition of trashing is: "Take specific arguments very *seriously* in their own terms; discover they are actually *foolish* ([tragi]-*comic*); and then look for some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed."

Id. (internal citations omitted).

[22] *See* Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897). Holmes' *bad man* theory premised on the idea that morality and law should always be separated to limit confusion and unpredictability. The law should be viewed through the eyes of the bad man who has no morality, and desires only to avoid punishment.

[23] *Id.*

Holmes' celebrated essay, "The Theory of Legal Interpretation," is a good illustration of these distinctions.[24] Indeed, a good introduction to this issue is Holmes' objective theory of legal interpretation, which is expressed in this piece. According to Holmes, the task associated with legal interpretation was not "to discover the particular intent of the individual to get into his mind and bend what he said to what he wanted;" rather, the critical objective was to ask "what those words would mean in the mouth of a normal speaker of English."[25] It seems Holmes tried to invent an ideal "speaker of English" for the interpretation of language embodied in legal instruments.[26] In Holmes' theoretical model, "the normal speaker of English" had a spatial and temporal relation that was external to the particular writer, and a "reference to him as the criterion [of interpretation] is simply another instance of the externality of the law."[27]

The problem concerning the importance of the interpreter deliberately striving for an external standpoint, that is purged of the subjectivities of those engaged in the process of agreement making, has been a longstanding interpretive problem for many scholars. Consider the following statement of the leading contract scholar of the 20th century:

> I shall continue to do my best to clarify the process of law and interpretation, of both words and acts as symbols of expression; to demonstrate that no man can determine the meaning of written words by merely gluing his eyes within the four corners of a square paper; to convince that it is men that give meanings to words and that words in themselves have no meaning….[28]

Holmes' insights into the nature of law also inspired the legal realist version of the revolt against formalism.[29] The power of realist deconstruction led to the charge that realists were effectually law-denying legal nihilists. After the war, one may suggest that the realist version of the revolt also inspired important challenges as to the next steps in legal theory. Three discernable approaches emerged in the aftermath of the realist challenge. The most direct response to legal realism may be identified with configurative jurisprudence. Thus, it was thought, from the ashes of realist victories a pathway could be hacked for a more explicitly, decision-focused, value/goal guided, contextual and multidisciplinary 'science' of law and policy. In international law, this came to be called the New Haven School.[30]

At Harvard, eminent scholars grappled with the problems traditional theory posed in the aftermath of realist deconstruction. They implied that the central question—What is a valid law?—obscured the more important question, of salience to a functioning legal order—What is a proper 'judicial' or 'legal' question? A response to this question would do much to objectively clarify judicial roles as distinct from the 'executive', the 'administrative', or the 'legislative' role. The Legal Process School was concerned with the indicia of

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[24] Oliver Wendell Holmes, *Theory of Legal Interpretation,* 12 HARV. L. REV. 417 (1899).

[25] *Id.*

[26] *Id.*

[27] *Id.* at 418.

[28] Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. QUARTERLY 161, 164 (1965).

[29] Formalism is a theory about the nature of rules, the nature of legal justification and the nature of law. Formalism attempts to probe the character of law and to speak "profound and inescapable truth about law's inner coherence." Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law,* 97 YALE L.J. 949, 950 (1988).

[30] *See* W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC 118 (1992).

> The New Haven School of jurisprudence is an entirely secular theory of law but it takes the perspective long associated with natural law, that of the decision maker. For New Haven, the notion of decision extends across the range of social organization and throughout the hierarchy of power; it includes the making of law or legislation as well as its application through courts or other institutions, and it conceives of both these activities as operating at the constitutive or structural level and in all of the various value processes of a community, including the production of wealth, of enlightenment, of skill, of health and well-being, of affection, of respect and rectitude….
>
> From the standpoint of the New Haven School, jurisprudence is a theory about making social choices. The primary jurisprudential and intellectual tasks are the prescription and application of policy in ways that maintain community order and, simultaneously, achieve the best possible approximation of the community's social goals. The jurisprudential tools necessary for performing these tasks must address a wide range of issues, including: (1) the way one looks at oneself; (2) the way one looks at the social process one is trying to understand and influence; and (3) the way one tries to influence it.

Id. at 119-20.

objectively defining the proper judicial role in a working rule of law-governed democracy.[31] The Legal Process School provided a more flexible approach to the question of "What is law?" by focusing the key inquiry into the issue of the objective criteria that are used to define the principle of institutional competence in governance. Thus the salience of such issues as "What is a legal question?", "What is an administrative question?", "What is an executive question?", and "What is a legislative question?".

A third perspective, which found much favor with philosophers, was the language-sensitive, refined, analytical jurisprudence of Professor H. L. A. Hart.[32] Hart, of course, reinvented and gave new life to traditional questions like: What validates a law?[33] However, it was the more subtle Legal Process School that sought to combine both the objectivity of positivism with the notion of a more fluid conception of law as legal process. Nevertheless, the ideas of externality and objectivity of law attributable to Holmes were influential to the architects of the Legal Process approach and, I submit, also forms the conceptual basis of the Legal Process School.[34] From the Legal Process perspective (and its Holmesian assumptions there is an objectively verifiable, and therefore 'correct' model of the judicial role; and this role can be distilled from the past so as to prescribe the future.[35] This view assumes, in a broader vein, that there exist objective criteria that define and distinguish the 'legal' from the 'nonlegal', the 'judicial' from the 'political' question, and that these criteria are external-objective in character. A key assumption in this framework is that all results of decision are the products of persons who have purged themselves of all subjectivities, that is to say, they make objective decisions.[36]

In this view, the focus on process is on the 'judicial' in a literal and very limited sense. Process means definition and redefinition of role. Major goals or purposes in this model are centered mainly on role-maintenance, i.e., the maintenance of a proper judicial role in a working democratic political culture. The technique was defined as one of judicial self-restraint. The impacts of self-restraint were to be judged more in terms of what such outcomes did for preserving the 'judicial' character of a role, rather than with regard to impacts on the structured ordering of the substantive practices in the social process. One might say that law (the judicial role) became an end itself rather than a means to an end.

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[31] *See* William N. Eskridge, Jr. & Phillip P. Frickey, *An Historical and Critical Introduction to The Legal Process, in* THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW li, lix-cxiii (Hart et al ed., 1994). Hart has elaborated that:

> Law is a response to the problems which are intrinsic in the existence of a society. It is an effort to deal with the problems: to deal with them in a way which at least will preserve the minimum benefits of group living and at best will increase the benefits to the currently attainable maximum. Law, therefore, is dynamic and not static. It is a doing of something, an activity with a purpose. Reflecting on this purposive quality, we come to see that it infuses the whole of law and all its parts. We come to see that every legal problem is a problem of purpose, of means to an end, and needs to be approached with awareness that this is so.

Henry Melvin Hart, Jr., *[Revised] Note on Some Essentials of a Working Theory of Law*, Hart Papers, Box 17, Folder 1 (no date). On the idea of law as institutional settlement, consider the following:

> [I]t is a by no means indefensible view of law to think of it as consisting most importantly of an operating system of general propositions, established by authority of the society, answering the questions of the *who* and *how* with respect to all methods of concern to the members of society, and so making possible their peaceable settlement….Law comprises (although it may not be confined to) a series of institutionalized processes for settling by authority of the group various types of questions of concern to the group.

Henry Melvin Hart, Jr., "Notes and Other Materials for the Study of Legislation" 53-54 (1950) (mimeographed materials on file in the Harvard Law School Library's "Red Set" of faculty materials).

[32] *See* H. L. A. HART, LAW, LIBERTY, AND MORALITY (Stanford Univ. Press 1963).

[33] *Id.*

[34] The Legal Process School, which flourished during the 1950's and 1960's, was a sustained, if somewhat diffuse, effort to connect government decision making with its institutional context. It possessed many virtues, which is why it dominated legal scholarship for at least two decades, continued as an important theme for several more, and remains the approach that many legal scholars use for addressing day-to-day issues in particular fields. The idea that each government institution possesses its own particular role, and its own particular methodology for fulfilling that role, enabled legal process scholars to explain the relationship between law and politics. *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to Henry M. Hart, Jr. & Albert M. Sacks, in* THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW li (Foundation Press 1994) (1958).

[35] HAROLD D. LASSWELL, PSYCHOPATHOLOGY AND POLITICS 341 (Viking Press 1960) (1930).

[36] *See* Myres S. McDougal, et al., *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 189 (1968).

In this respect, the position of the legal process perspective shares some affinity with the formalistic school. Judge Fitzmaurice, writing in dissent, crystallized this point well when he wrote: "Inferences based on the desirability or, as the case may be, the undesirability, of certain results or consequences, do not . . . form a satisfactory foundation for legal conclusions…."[37] The teleological interpretive question—What is law for?—was conceded in classically *bad man* terms. The *bad man* wants to know the outer limits of licit behavior; he wants to know when public force will be used—the support his claim of legal right. The *bad man* needs objective law.[38] The school thus seemed implicitly accepted at least some of the implications of a Hobbes-type universe and perhaps even a *laissez-faire* approach to the power process. These assumptions seem to be more intensively identified with those who emphasize as critical the idea of judicial 'self-restraint', rather than that of judicial 'activism'.

The legal process then, in practical terms, is the one that epitomizes the goal of legally constructed fairness embedded in the idea of procedural due process. The focus is more on conflict management and conflict resolution. Law is seen as an 'umpire' between competing wills; and the outcomes of judicial decision are system-maintaining so long as every claimant has been accorded his 'due process' (efficiency plus, cost-effective, and fair process). The definition of law is the definition of legitimacy conceived in terms of conflict managing values. If this conclusion is sound, then it seems that the legal process theory, on balance, takes a kind of *laissez-faire* approach to the disposition of power in society. Important consequences for the relationship between law and justice flow from this premise. For example, any symbol can serve as an operational index of legitimacy if the propaganda managers are competent and if effectual elites are sufficiently deft in the manipulation of the symbols of moral rectitude, while in fact the substantive value processes might be unfairly managed by them or their surrogates. This framework appears to simplify radically the actual working of the power process. Nevertheless, its critical theoretical salience reposes in its assumed objectivity and assumed externality that is a tribute to the durability of Holmes' theoretical meditations.

There are two broad responses to Holmes' formulations and the Legal Process School. The first response comes from the psychoanalytic insight into the subjective-objective dichotomy, a conceptual Gordian knot that Professor Lasswell chopped over forty years ago when he substituted for this "fictitious cleavage" a continuum of reference points that reflect the subjectivities of individual and collective selves.[39] Therefore, the critical decisional question is not the establishment of an ideal type of legal form (or form of English speaker) that is external to the relevant participants, but rather the recognition of how shared perspectives (subjectivities) stabilize and change value allocations in society and whether these outcomes are good or bad according to the stated goals or major purposes of the legal and political culture.[40] McDougal, Lasswell and Miller have described the function of a decision-maker in law, essentially, as one conditioned by a much more comprehensive and realistic range of decisional indices and goals from which the interpreter cannot, in any event, escape.[41] This does not deny the existence of some form of externality, because it emphasizes that the decision maker does not have to strive for normal externality; it is a fact of life.[42] The interpreter has such externality thrust upon her by the fact that she cannot directly observe the subjectivities of the parties with conflicting interpretive claims.

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[37] Dissenting Opinion Of Judge Sir Gerald Fitzmaurice, Legal Consequences For States Of The Continued Presence Of South Africa In Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, at 224.

[38] Oliver Wendell Holmes, *Theory of Legal Interpretation,* 12 HARV. L. REV. 417 (1899).

[39] *See* Harold D. Lasswell & Myers S. McDougal, *Trends in Theories About Law: The Conception of Relevant Intellectual Tasks*, *in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 203, 212-17, 220-23, 231-35, 236-42 (New Haven Press 1992).

[40] Frederick Samson Tipson, *The Lasswell-Mcdougal Enterprise: Toward a World Public Order of Human Dignity,* 14 VA. J. INT'L L. 535, 572 (1974).

[41] *See* Harold D. Lasswell & Myers S. McDougal, *The Clarification of Values, in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 725 (New Haven Press 1992).

[42] Harold D. Lasswell & Myers S. McDougal, *Particular Value-Institution Processes*, *in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 375, 496 (New Haven Press 1992).

The critical issue is this: observing the subjectivities of component actors is an exercise in realism if decisions are to be made about 'real' demands (perspectives). Some of these components of behavior are easily observable and we tend to call these facts 'objective'. Some components of behavior are less observable and we tend to call these facts 'subjective'. Because we cannot readily or easily observe and record less observable behaviors in the myriad of behaviors that cover human associational behavior the objective model of law implicit in Holmes' formulation would tend to discard the less observable as an insufficiently 'hard' predicate upon which to sustain the concept of law. The terms *objective* and *subjective* seem to be a rigid intellectual artifact with a self-sustaining life of its own in law. It appears to have inhibited the development of a more innovative interpretive methods and techniques in practical arenas of legal decision-making. From the configurative standpoint, this distinction is not sound. A configurative theorist would place behavioral interaction on a continuum that moves from the more to the less observable.

To the extent that there are techniques to discover the less observable facts of human behavior, there would appear to be no good reason to exclude such techniques and facts from shaping legal theory to comport more realistically with the human subjectivities found in ever-evolving community expectations about control, authority, and policy content. The key insight is that the contents of consciousness are empirical. The critical question should therefore focus on the indices one uses to distill the content of consciousness in context. It is these indices that 'ought' to shape the decisional role. In other words, the issue of externality and objectivity hold drawbacks to rational inquiry such as the lack of a principle of realism; its lack of a principle of contextuality; the inability to supply empirical indices that 'ought' to frame the decision role as a challenge to the traditional and emergent demands of men and women in society. The focus of inquiry implicit in Holmes' demand for objectivity appears to require that the decision maker purge himself of the crucial facts of social interaction animating the claim upon which the legal problem is based viz., the subjectivities of the claimants themselves.[43]

THE MEASUREMENT OF SUBJECTIVITY: THE Q METHODOLOGY

New developments in the measurement of human perspectives (subjectivities) have provided a reliable predicate to both distill and measure human subjectivity and to provide both content and boundaries to the notion of shared subjectivities. The pioneer of this approach was William Stephenson. Stephenson was an English trained scholar holding doctorates both in physics and psychology. His major invention was the Q methodology for the measurement of human subjectivity.

The Q methodology examines correlations between the expressions of subjects across a sample of variables. Q factor analysis reduces many individual viewpoints of the subjects down to a few factors that represent shared ways of thinking.[44] Q Methodology is a distinctive method of measuring human subjectivity. It was initially introduced in the journal NATURE by a letter written by the originator of the methodology, William Stephenson.[45]

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[43] Harold D. Lasswell & Myers S. McDougal, *Trends in Theories About Law: The Relation of Law to Its Larger Community Context, in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 141, 148 (New Haven Press 1992).

[44] *See*, C. Burt & William Stephenson, *Alternative Views on Correlations Between Persons,* 19 PSYCHOMETRICA 327-330 (1939); Steven R. Brown, *Q Methodology and Quantum Theory: Analogies and Realities* (1992). Read at meeting of International Society for the Scientific Study of Subjectivity (Oct 23, 1992); Steven R. Brown, *Q Methodology as a Foundation for a Science of Subjectivity in Operative Subjectivity*, 18, 1-16 (1994-1995); S.R. Brown, *Q Methodology and Qualitative Research*, 6 QUALITATIVE HEALTH RESEARCH 561-267 (1996); D. Durning & W. Osuna, *Policy Analysts Roles and Value Orientations: An Empirical Investigation Using Q Methodology*, 13 JOURNAL OF POLICY ANALYSIS AND MANAGEMENT 629-657 (1994); William Stephenson, *The Study of Behavior: Q Technique and its Methodology,* (1953); Steven R. Brown, *The History and Methods of Q Methodology in Psychology and the Social Sciences* (http://facstaff.uww.edu/cottlec/QArchive/Bps.htm).

[45] William Stephenson, *The Technique of Factor Analysis*, 136 NATURE 297 (1935). Stephenson was a brilliant statistician and a physicist by training. He also held a Ph.D. as a psychologist. Stephenson's most comprehensive study was titled "The Study of Behavior: Q Technique and Its Methodology."

Q Methodology had a formidable array of detractors in the field of psychology; and these detractors (it has subsequently been shown) had misunderstood what Stephenson was doing. It is possible that, contemporaneous to the introduction of Q methodology, the scientific aspect of psychology generated unease about the measurement of subjectivity. Stephenson's opponents were concerned with looking at science in a Newtonian way: they wanted objective criteria with which to depict causality and human behavior. The resistance to Stephenson was such that he left the U.K. and settled in the United States.[46] It still took some time for his work to be fully accepted. The duration of time and the demise of his opponents eased the transition of this methodology to general acceptance.

Professor Brown explains the central features of Q methodology and its relation to subjectivity:

> First and foremost is the axiom of subjectivity and its centrality in human affairs. Subjectivity is everywhere, from the loftiest philosophizing and diplomatic negotiating to the street talk of the juvenile gang and the self-talk of the daydreamer, and it is the purpose of Q technique to enable the person to represent his or her vantage point for purposes of holding it constant for inspection and comparison. Communicability of this kind is typically shared, i.e., a matter of *consciring* (Stephenson, 1980), and is consequently about fairly ordinary things—about soccer, yesterday's debate in Parliament, the scandal surrounding President Clinton's fund-raising activities, the opening of a new play, and anything else under the sun. What is considered "ordinary" will, of course, depend on context, so that even the above study about Q methodology was about a fairly ordinary topic among those entering into that discussion: Each participant generally understood what the others were talking about.[47]

As Brown explains the Q methodology and the measurement of subjectivity, its compatibility with configurative jurisprudence is significant. If a central aspect of human problems to which law must respond is the expression of desire by the subject, then expression of desire may be contextualized in terms of desire for values. These are the intersubjective conflicts in compatible desires about values that generate the realism and relevance of the problems to which the law must respond. Among further implications of the Q methodology is the insight generated by Stephenson that the mathematics of factor analysis, which implicated the Q methodology, and Heisenberg's metrics mechanics were "virtually identical."[48] Critical, however, to the insight of quantum mechanics is the notion of what, exactly, is measured. Quantum mechanics measures states of energy. The communication of a demand or a desire may be the expression of a subjective state of energy. According to Brown,

> in quantum theory, however, there are no quantities that determine an individual subatomic collision, and similarly in Q methodology "there is no quantity hitherto put forward to explain a psychological event that determines operant factors." In short, Q technique does not measure variables as such, but states of mind; and when Q studies are made of single cases, several factors are typically shown to exist simultaneously in a state of *complementarity*, i.e., communicability exists in various states of probability. Moreover, the complementarity at issue in Q methodology, as in particle physics, is a function of measurement rather than a vague metaphor: It is the Q factors which are in a relationship of complementarity. Finally, measurement and meaning are as inextricably entwined in Q as in Heisenberg's uncertainty principle: The observer of the person's subjectivity is the person him- of herself (rather than the external scientist), and it is the person who also provides the Q-sort measurements.[49]

The critical importance of the human personality to the study of law and culture may be therefore seen as reflecting upon the critical importance of human subjectivity. In the context of configurative jurisprudence, human subjectivity is encapsulated in the energies that are described in terms of the person's essential identity; and identity is given social relevance by the degree of energy generated to sustain it in the individual. Additionally, human subjectivity contains the element that expresses human demands; and critical to personality, culture, and society is the energy the human being generates to express or articulate demands. Finally, personality also encompasses expectations. Expectations, too, have a subjective dimension; and the

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[46] *See* Steven R. Brown, *The History and Principles of Q Methodology in Psychology and the Social Sciences*, http://facstaff.uww.edu/cottlec/QArchive/Bps.htm.
[47] *Id.*
[48] *Id.*
[49] *Id.* (internal citations omitted.)

extent to which expectations are retained or changed will be a function of the energy levels expended on demands for change and the energy levels expended upon the defense of expectations.

The Q methodology has become widely embraced with the establishment of the journal *Operinsubjectivity*. Since then, the University of Missouri has established the William Stephenson Communication Research Center in its school of Journalism. Moreover, an international society for the scientific study of subjectivity was created in 1989; and other developments show that this approach has now been used and taught in political science departments, in medical schools, in schools of journalism and communications, in marketing, psychoanalysis, public policy research, literary interpretation, feminism, identity theory, and narrative analysis. More importantly, since the establishment of the Society for the Policy Sciences, regular contributions have been made indicating that the implications and value of the Q methodology for law (as well as environmental studies and other fields).

An important indicator of an approach to Q Methodology and law is evidenced in the claims made to authority for the protection of human rights as described by the Lasswell-McDougal approach. This suggests the influence of the Q methodology on the jurisprudence of McDougal and Lasswell.[50] Moreover, when appraising the distinctions between the generational types of human rights, the application of Q methodology appears to be relevant in determining the shared prioritizations, which are a function of shared subjectivities.[51]

The methods of measuring subjectivity pioneered by Stephenson, Brown and many others provides an important addendum to the jurisprudence of McDougal and Lasswell with its stress on the individual and, in particular, the actual perspectives of the individual as a social actor, with claims to identity and with capacity to stake claims for demanded values. These perspectives in the dynamics of social organization reflect the imprint on personality on value dynamics. Additionally, the role of observer in law is a role that also implicates the perspectives of the observer in terms of the observer's value orientation. The challenge in the context of decision is to determine what values are most compatible with the common interest, which is the critical guide for rational legal decision-making. Here McDougal and Lasswell establish as the master normative principle behind the idea of common interests and that is a postulated public order of human dignity. Since postulation reflects subjective expression of the scholar's postulated preference, there is the question as to how the technique of postulation may be justified, at least for the purpose of an inquiring system. It may be that, from a functional perspective, the procedures for measuring subjectivity imply that the measurement may well meet a test for objectivity. If this is true, then the difference between the approach of McDougal and Lasswell and that of conventional legal theory is not an unbridgeable divide. But it would depend on the extent to which conventional theory is receptive to the approach, the theory, and the foundations of the Q methodology.

By making law *objective*, the legal process school sought to sustain a very old tradition reflected in both the natural law tradition and legal formalism. It sought to refine the concept of law without power—a concept that held that the legal regime could sustain and regenerate a continuing myth independently of the power process. It attempted this in a refined and sophisticated manner. The approach had enough flexibility that judges with a realist outlook could be jurisprudentially repackaged as judicial activists within a legal process paradigm. Indeed, in some contexts the consequences of legal decision could often serve as the index of what is to exemplify the relatively passive virtues of self-restraint.

An essential concern with the Legal Process approach, especially in its more restrained orientations, is that it seems to assume, in large measure, that structure should condition role. This assumption is implied in the objective characterization of the nature of law. The critical question, however, is not the externality factor

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[50] MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 146 (Yale Univ. Press 1980).
[51] *Id.*

as such-this is a biological datum; rather, it is the content and character of the indices that sufficiently frame the predispositions of a decision-maker, allowing her to make a sensible decision that should, so far as possible, fulfill such subjective demands perspectives of all claimants as are consistent with the aggregate pattern of shared subjectivities of the body politic as a whole. It is the character of individuated and collective demands that, in context, should inform the decisional role and not the reverse. This reversal is the essential difference in the starting points of configurative theory as contrasted with such theories as are focused on the externality and objectivity of law.

To summarize, the critical difference between the configurative and legal process approaches lies in their diverse approaches to the challenge spawned by the realists. For the configurative school, the challenge lay in developing a comprehensive and realistic model of decision that could be meaningfully related to the social process and understood in terms of the priorities of that process. To the legal process school, there was the self-conscious cultivation of the legal image whose function was less result-oriented, less consequential, and therefore less guided by policy.

In some important respects, the discourse about the objectivity of law tends to overstate the difference in the objectives of the protagonists. Certainly, both preceptualists and the legal process scholars are in some degree searching for a rational legal order. So are the configurative/realist scholars. The focus on rules or narrowly defined roles confronts the dilemma of the chaos of fact and context. This represents unresolved tensions between the problems of law and society and the necessary interdependencies and interdeterminations that condition this difficult arena. On the other hand, there is an important normative component that seems to be obscured by the supposed insistence upon a rigid objectivity for law. This may be simply illustrated. Professor Dworkin has said a "good" jurisprudence must focus upon rights and find the intellectual means to have rights taken seriously.[52] A focus on rights, rules and principles may emphasize only one dimension of perspective viz., the perspectives of the conspicuous group or class, including the attendant intellectual elite which may often seek to justify, as fundamental rights, interests that are seen to favor this or that interest group. Those kinds of interests really claims, quickly mutate into 'rights'.

This generates incredible confusion. For example, a theorist may have great difficulty figuring out whether affirmative action is or is not racial discrimination or whether the freedom of the press outweighs the right to a fair trial. Here it seems configurative jurisprudence makes a distinctive contribution. From the perspective of a detached observer, the observer observes claims. Claims become problems when there is a difference between demand (or claim) and expectations (received rights). This has the following normative implication: it permits the legal process to focus on what people want. If we put precept-focused jurisprudence into the context of an authoritarian state, the law is seen from the perspective of those who monopolize the precept-making process viz., the state officials. There apparently is no room in the operative discourse of conventional jurisprudence for claims or demands as they emerge from the community members themselves. This means that a realistic jurisprudence that is sensitive to democratic values must focus in an important way on the perspectives of the community members themselves.

Such a focus has the normative value of seriously considering claims or demands that emerge from all sectors of the community and not simply the claims of right of the establishment. It also means that taking claims seriously permits a reasoned elaboration of the dynamic element of social process and posits a more realistic role for law, viz. that it can and should respond to claims in fact. In short, before we take rights seriously, we need to take claims seriously. Since a claim is a subjective event (a demand perspective), it is in this sense that the supposed objectivity of law becomes a hindrance to a realistic and progressive law for a progressive age. McDougal and Lasswell, however, do note that subjectivities are often perspectives expressed in frequencies over time. They avoid the inelegance of calling such frequencies *objective*, preferring the phrase the characterization as *shared subjectivities*. Here the differences of the objective and the subjective characterization may tend to be over-stated in terms of practical differences. Finally, a focus on claims and

[52] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81-130, 331-35 (Harvard Univ. Press 1977).

claimants holds the value of recognizing them as participants in legal processes. Participation in this sense is empowerment and more. One cannot therefore take rights seriously if one cannot or will not take claims seriously.

CONTEMPORARY CONTRIBUTIONS TO THE DISCOURSE OF JUSTICE AND MORALITY

SEN'S 'IDEA OF JUSTICE'

One of the most important intellectual and scholastic contributions to the discourse concerning the conceptual justification for fundamental moral commitments and by implication human rights commitments is represented in the recent scholarship of the Nobel Prize winner economist, Amartya Sen. In Sen's work, *The Idea of Justice* (2009), Sen provides both an appreciation and a critique of the contributions from modern philosophers such as John Rawls.[53] Sen provides a keen, insightful critique of the strengths and weaknesses of Rawls' perspective. Central to Rawls' concept of justice is the idea that it must meet objective grounds for its justification as a principle of justice.

The central thrust of Sen's criticism is that Rawls' concept of justice cannot shed from itself the problems of subjectivity. An additional flaw in Rawls' concept of justice, Sen points out, is that it is based on a contractarian model with an inherent narrowness that leads to pervasive parochialism. Such parochialism limits the scope of the discourse and excludes from its perspective the global salience of the concept of justice. Sen's own contribution is to suggest, from a global perspective, that there will be more contingency in the notions of justice and morality; and this very contingency requires a sustained discourse using the tools of public reasoning, applied with a central commitment to the notion of impartiality and objectivity in the structure of such discourse.

Sen's approach is influenced by this commitment to social choice theory.[54] Social choice theory has its roots in the mathematical application and insights to social policy generated in revolutionary France. Its modern expression is largely owed to Kenneth J. Arrow[55] One of the central issues in social choice theory is the problem of how to integrate incompatible preferences. In this theory, the effort is made to inform choice by calculating the effects on individual well-being that result from alternative social policies.[56] Social choice theory shares a focus with the approach of configurative jurisprudence in the sense that it identifies individual interests and values that are important to human welfare. To the extent that this identification is designed to influence collective social choice, it sets as the task a mathematical method of measuring individual interests and values.

Since the focus of social choice theory is on the individual, it is an approach that (at least effectually) should see human problems emerging from the bottom and percolating up to the policy process. This approach implicitly suggests that what are identified are perhaps the problems that individuals generate about the values that they value. However, this is not absolutely clear, since the process of rationally integrating

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[53] AMARTYA SEN, THE IDEA OF JUSTICE (Belknap Press of Harvard Univ. Press 2009).

[54] Sen's earlier work has been highly influenced by social choice theory; although it is clear that, in the evolution of this work, he has expanded the boundaries of social choice theory. Social choice theory is:

> the formal study of choices or decisions by groups of people including society. Social choice theory seeks to provide a basis for arriving at collective decisions given peoples' differences in preferences and values. Widespread agreement on social and political policies is relatively rare. In view of widespread disagreement, how can we make sense of the idea that society itself prefers or chooses one alternative over another? Are there any ways to consistently combine different individual opinions and values into a collective choice for society as a whole?

Samuel Freeman, A New Theory of Justice (Review of Sen's "The Idea of Justice"), New York Review of Books (Oct. 14, 2010) vol. lvii, no. 15, pg. 58.

[55] KENNETH JOSEPH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (Wiley 2d ed. 1963) (1951).

[56] Samuel Freeman, A New Theory of Justice (Review of Sen's "The Idea of Justice"), New York Review of Books (Oct. 14, 2010) vol. lvii, no. 15, pg. 58.

these values may not be in terms of an explicitly postulated goal value, such as the realization of human dignity. Of course, one of the most problematic issues in social choice theory is how to (rationally) choose between competing values. Nevertheless, this theory seeks to provide a method of evaluating different social states (in terms of claims for values) and seeks to resolve value conflicts by constructing meaningful measures of social welfare. It is possible that the ideas of social welfare and social well-being have a function of guiding choice, at least statistically, in the direction of an integrated value norm, namely well-being. Indeed, it may be that, from the economists' perspective, projecting desired value beyond well-being (so as to include the other principle desired values) represents excessive methodological complexity. Thus, from the perspective of configurative theories of justice, the inquiry would include not only well-being but also power, wealth, respect, skill, affection, and rectitude. Still, it is possible to give the concept of well-being a stretched meaning, so as to include all the values that sustain the human rights and human dignity principle.

For a deeper and wider empirical understanding of individual value problems and claims, Sen has suggested a method that may be described as *informational broadening of the focus on contending values*.[57] This solution appears to represent a much more explicit and in depth form of contextuality, in that Sen's informational theory requires value comparisons to be made with a wider range of real data. Sen seeks to look at values in terms of basic needs, basic freedoms, and basic capabilities. These factors enable practitioners to see the actual status of value deprivation and the possibilities of access to value advantages. I would suggest that there clearly is a point of agreement between McDougal and Lasswell and Sen on the idea that there is a need for an informational broadening focus that is global. The differences are that McDougal and Lasswell have generated a model of the global social process with critical markers that guide us to an understanding of the state of world order as it is and the value challenges that the idea of justice mandates for the future. I suspect that if Sen's informational broadening focus on contending values would embrace the social process model of McDougal and Lasswell and the way they see values in this context as interdetermining and being interdependent on each other, then each approach will in fact be enriched by the consideration of the other.

The capabilities aspect of Sen's analysis emerged as an approach to welfare economics. Sen was attempting to broaden the scope of discourse of welfare economics for the purpose of bringing in a wider range of real values important to opportunity and process freedoms. In collaboration with Nussbaum, Sen identified ten capabilities that they believe should be supported by all democracies. These include capabilities related to life, bodily health, bodily integrity, sense, imagination and thought, emotion, practical reasoning, affiliation, other species, play, control over one's environment.[58] This explicit effort to distill capability values may be usefully compared to the eight or nine values identified in the configurative jurisprudential approach. Configurative jurisprudence certainly welcomes the effort to delineate the central capability values, which are globally and cross-culturally important. In configurative jurisprudence, there is a checklist of value, as we have seen, which certainly have both capability and opportunity aspects. However, configurative jurisprudence uses values in two senses. Values are used in normative terms; values are also used to provide a clear contextual background to the value problems in describing society as it is. In this latter sense, values make scholastic sense, as well as significant social relevance when we can conveniently tie in values to the institutional social and cultural processes of a community. Configurative jurisprudence appears to do this with a relative ease. Thus, power is represented in governance institutions; wealth in corporate-type institutions; labor and skill in the organization of unions and guilds; affection in the family; health and well being in clinics and hospitals; rectitude in churches, temples, and mosques; respect in the structure of social stratification; and enlightenment in schools and universities. It is not as easy to develop a precise analog of institutions relating to the capability values developed by Sen and Nussbaum. For example, life would seem to include, institutionally, the idea of community or society. This would include too much. Bodily health may include the institutions of healthcare or fitness; it is unclear exactly to which institutions bodily integrity are specialized. Similarly, the ideas of sense, imagination, thought, emotion, and practical reasoning would

[57] *See* AMARTYA SEN, THE IDEA OF JUSTICE 169, 182, 238 (Belknap Press of Harvard Univ. Press 2009).
[58] MARTHA CRAVEN NUSSBAUM, et al., THE QUALITY OF LIFE (Clarendon Press; Oxford Univ. Press 1993).

seem to be ambiguous in terms of whether we are talking about the family, the system of community education, the system of fundamental laws protecting artistic freedom and privacy, and the system of legal and academic freedom. Similarly, it is not easy to develop the institutional mechanisms that Sen has in mind regarding other species, play, and—important as the environment is—it is such a generalized value, which in effect implicates every other value, that its autonomous status may be problematic. Finally, in this regard, as I have already suggested, the central challenge is the identification and clarification of the content of justice principles and the development of principles of procedure to give these principles concrete realization in social practice. Here, configurative jurisprudence, with its sensitivity to the general problem that confronts practical lawyers in decision-making context, deals with the problem of grounding value judgements in instances of particular application, and developing a coherent theory and method for the clarification and procedural grounding of such values.[59]

Although Sen's stresses the issue of capabilities for functioning, he also indicates a caution concerning the accounting for peoples' preferences. This accounting actually involves Sen in a shift in vantage point. Here, Sen is not looking at preference from the perspective of the person asserting a preference. Instead, he is examining those preferences from the perspective of a disengaged observer. And, from that perspective, Sen suggests that preferences may emerge from mistaken beliefs or which "are adaptations to miserable or coercive circumstances." In this sense, deference to human preferences must be tempered by the perspective of a disengaged observer. However, the disengaged observer does come with a yardstick to measure the imperfections of human preference against a standard that the observer uses to evaluate the weakness in the assertion of such preferences. What is important in Sen's approach is that the observer's tools must be sufficiently sharp to penetrate the reality, in order to reduce the inequality as it relates to peoples' capabilities and to stress politicies and practices that secure real capability for functioning in an environment of real opportunity.

Like Lasswell and McDougal, Sen has made important contributions to the conceptual basis and justification of human rights.[60] Drawing on sources largely tied to economics, Sen provides important insights into the conceptual basis of human rights—insights that have many parallels with or similarities to the approach taken by Lasswell and McDougal. Sen's socio-economic perspective generates support for the configurative approach to jurisprudence as a theory for inquiry, especially regarding the nature of human rights and the form of justice that human rights might provide.

Sen proposes that "[t]here is something very appealing in the idea that every person anywhere in the world, irrespective of citizenship, residence, race, class, cast or community, has some basic rights which others should respect."[61] This attractiveness suggests that there is some objective basis (not particular to any culture or specific social system) of justice from which can be extracted some construction of human rights. On the other hand, the basic idea of legal rights, "which people are supposed to have simply because they are human,"[62] is seen by many critics as entirely without any kind of reasoned foundation. The questions that are recurrently asked are: do these rights exist? Where do they come from?

Sen addresses the vital question: What are human rights? This is, indeed, a major component of the world of Lasswell and McDougal. To the extent that human rights have an affinity with principles expressed in the American Declaration of Independence (which stated that people have "certain inalienable rights") or the 1789 French Declaration of the Rights of Man (which asserted that "all men are born and remain free and

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[59] *See generally* Harold D. Lasswell & Myers S. McDougal, *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo*, *in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 1489 (New Haven Press 1992); Harold D. Lasswell & Myers S. McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, *in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 1527 (New Haven Press 1992).

[60] *See* MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (Yale Univ. Press 1980); *see also* AMARTYA SEN, THE IDEA OF JUSTICE 355-415 (Belknap Press of Harvard Univ. Press 2009).

[61] *Id.* at 355.

[62] *Id.*

equal in rights"), such evidence of objective human rights foundations became the target of Jeremy Bentham's assault on "anarchical fallacies."[63] According to Bentham, "Natural rights is simple nonsense: Natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts."[64] Bentham makes the connection between the legal fallibility of natural inalienable rights ("nonsense upon stilts") and human rights, and sentences human rights to the same disparaging assessment. Responding to Bentham's assessment, Sen concedes that human rights are, in the first instance, a conceptual construct: Human rights do not exist like some physical, tangible instrument like the big clock above parliament, Big Ben. However, Sen counters, the concept of human rights is not, in its nature, like legislative law in a statute. Human rights have emerged in the form of solemn proclamations as legally relevant affirmations. These affirmations suggest strong ethical responses about what should be done, and these suggestions take the form of legal covenants. "They demand acknowledgment of imperatives that something needs to be done for the realization of these recognized freedoms that are identified through these rights."[65]

A central thrust of Bentham's attack on the idea of natural human rights concerns the use of the term *rights*. Bentham insists that the term *rights* can only be used in the sense of a right objectively determinable in a positive law framework. The use of the term *rights* in other contexts would seem to be pretentious. Bentham's view is similar to the view developed by Austin about the way in which the terms *rights* and *law* are used. And, to explain away the phenomenon of law that exists outside of the state (such as international law), Austin talks of this being, instead, a form of positive morality. It is worthy of note that the term *morality* is qualified by the term *positive*. Perhaps the term *positive* carries the implication that a rule of international law may be determined and defined by objective factors. And although not strictly *law*, in the sense that Austin uses the term, it is nonetheless a prescriptive system of some community salience.

Sen suggests that Bentham is confounding the issue of fundamental moral commitments and the concept of rights. They are, Sen says, two separate issues, which concern the content of the right and its viability. Sen asserts rather importantly that the nature of an instrument like the Universal Declaration of Human Rights is "the ethical assertion … about the crticial important of certain freedoms … and, correspondingly, about the need to accept some obligations to promote or safeguard these freedoms."[66] In effect, then, Sen distinguishes between *claims* and rights. This is an important distinction; and central to his approach is to identify "the *kind* of claims that the ethic of human rights tries to present."[67] Here, Sen's approach is quite compatible with configurative jurisprudence. Configurative jurisprudence looks at human rights as a theory for inquiry. A critical leg of inquiry is identification of the problems that emerge from the community context, which problems state claims to the ethics of human rights values and standards.

In configurative jurisprudence, a problem is essentially a claim for some dimension of human rights value. To systematize such an approach, configurative jurisprudence has understood human rights problems as the clash between rising common demands and the reality of deprivations. However, McDougal and Lasswell have tried to be more specific about the content of the claims that are staked in the context of human rights values. Lasswell and McDougal believe that an instrument like the UDHR has both a descriptive and a normative appeal.

The descriptive appeal is that the rights expressed in the instrument can be reduced to claims involving eight values. These are (1) respect, (2) power, (3) enlightenment, (4) wellbeing, (5) wealth, (6) skill, (7) affection, and (8) rectitude. Empirically, one may detect a rising specter of common demands that these

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[63] Jeremy Bentham wrote his *Anarchical Falacies* during 1791-2 and took aim at the French "rights of man." *See* Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued during the French Revolution* (1792), *in* J. Bowring (ed.), THE WORKS OF JEREMY BENTHAM, vol. II (Edinburgh: William Tait 1843).

[64] AMARTYA SEN, THE IDEA OF JUSTICE 356 (Belknap Press of Harvard Univ. Press 2009) (citing THE WORKS OF JEREMY BENTHAM, vol. II 501 (Edinburgh: William Tait, 1843)).

[65] AMARTYA SEN, THE IDEA OF JUSTICE 357 (Belknap Press of Harvard Univ. Press 2009).

[66] *Id.* at 358

[67] *Id.* (emphasis in original).

values be honored. Additionally, what heightens the importance of the human rights problem is the reality of value deprivations that humanity experiences. It is therefore the clash between expectations in the realization and participation in these values and the practice of deprivation that creates the fundamentals of a human rights claim.

Like Sen, Lasswell and McDougal believe that the claims may be specified with great particularity, which means that the claim would generate a much more precise decision-making response to it. They have seen, as one of the key tasks for clarifying the content of human rights claims, is to develop a detailed map specifying the multitude of these claims, value by value. However, the question of what a preferred outcome should be (in terms of the shaping and the sharing of claim values) is determined by the explicit postulation of the goals of the public order committed to the principle of human dignity on the widest possible scale.[68]

Professor Sen responds to the choice about human rights claims by suggesting application of what he calls "open and informed scrutiny"[69] and his method of "open impartiality"[70] in the appraisal of the currency and human rights value of a particular player. What Sen is getting at is that his open informed scrutiny relies on an openness to information drawn from context; and this openness is tempered by the critical importance of impartial reasoning. In Sen's view, the scrutiny implicit in his focus of method and inquiry is one that would yield an outcome that meets a test of impartial objectivity. I suspect that the stress of configurative jurisprudence on contextuality (as well as the clarified standpoint of a disengaged observer) comes close to the approach recommended by Sen. However, McDougal and Lasswell's theory insists on an explicit postulation (as a scholarly commitment) for the purpose of guiding inquiry. Our sense is that the difference between Sen and Lasswell and McDougal is not very great in this regard.

Although Sen is not a specialist in jurisprudence, he suggests an approach to understanding the currency of declarations and instruments relating to human rights. This approach has a similarity to that in the context of configurative jurisprudence. The essence of Sen's approach is to suggest that the declarations [ethical claims] have an influence on the process of making law. Sen refers, for example, to the fact that the European human rights framework (established in the Human Rights Act of 1988) was eventually legislated into British law for direct application in the British courts.[71] We may also note that modern forms of constitution-making have included human rights standards in these instruments as well. Sen does, however, accept Professor Hart's analysis that moral rights are not really rights in any legal sense until they are incorporated into the law of the state as coercive legal rules. In this sense, human rights as moral imperatives may become legal imperatives when they are legislated into law.

The problem with Sen and Hart is the difficulty of conceptualizing the idea that there is such a thing as transstate law. Even if we analogize treaty-based international law as sovereign-determined, there are many other sources of international law that are only artificially sovereign-determined. Thus, the currency of customary international law or the reliance on general principles of law carries only a weak and indirect sovereign imprimatur. In contemporary practice, a great deal of recognition is given to human rights law that has not been subject to sovereign legislated action. In this regard, the currency of lawmaking requires a deeper appreciation of the process that leads to the prescription of law. It also, in turn, requires a sophisticated understanding of law as a process of communication; and the tools of communication are critical for an appreciation of what Reisman has called *micro law*.[72] And the implications of lawmaking in

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[68] For the taxonomy of claims in the human rights context, *see* MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 7-37 (Yale Univ. Press 1980).
[69] AMARTYA SEN, THE IDEA OF JUSTICE 358 (Belknap Press of Harvard Univ. Press 2009).
[70] *Id.*
[71] *Id.* at 363.
[72] *See generally* W. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS (Yale Univ. Press 1999).

informal settings influencing the grounding of human rights norms and values would, we believe, provide important additional insights for Professor Sen to consider.[73]

Professor Sen does consider human rights issues beyond the legislative route, recognizing that legislation is not the exclusive vehicle for making human rights influenced policy outcomes. Moreover, he insightfully supports "a versatility of ways and means" as critical for human rights practice.[74] In fact, he argues that this is "one of the reasons why it is important to give the general ethical status of human rights its due, rather than locking up the concept of human rights prematurely within a narrow box of legislation, real or ideal."[75]

Sen also unpacks the complexity of claims with respect to the idea of freedom. He makes a useful distinction between opportunity claims and process claims of freedom. With regard to opportunity claims, Sen very usefully emphasizes the idea of the capability—that is to say, the real opportunity to achieve valuable participation. However, Sen also insists that process freedoms are important to the realization of capability freedoms. Additionally, as an economist, Sen provides an impressive defense of the notion of socio-economic rights. In general, these rights are challenged as rights at all. At other times, they are put into a classification of generations. Sen has provided an extremely useful critique of the objections to the recognition of socio-economic rights. He stresses that the fundamentals of these critiques are an institutionalization critique and a feasibility critique.

At the institutionalization level, the argument is simply that if these rights were real rights they would indicate precisely formulated correlative duties. Sen responds to this argument by suggesting that the correlative obligation might well be perfect or imperfect. In the context of first generation rights, it is not unusual to see the existence of imperfect obligations; nevertheless, it is still an important intellectual task to further public discussion and bring effective pressure in support of these claims to move essentially from the imperfect to the relatively perfect.

With regard to the feasibility critique, the argument seems to be that there are so many poor, needy people that it is simply infeasible to recognize such rights; and therefore these rights should not be recognized. Again, the fact that such socio-economic rights state claims for change and for political agitation and for improved impartial objective discourse would seem to suggest that an approach that discards them from scrutiny and discourse has no value.[76]

Professor Sen's capability approach to the study of justice, which includes a focus on freedom, is an important contribution to unpacking the modern discourse of the theory of justice itself. This approach has an affinity with the approach to the idea of justice in the work of Lasswell and McDougal. What is critical, I believe, to Sen's focus of inquiry is that he has identified a critical problem—the solution of which does require innovative and perhaps novel thinking methods. If I understand Sen correctly, his capability approach essentially requires us to clarify the specifics (or the specific aspects) of abstract ideas, like liberty and equality. In short, these terms will perhaps obscure more than they actually reveal about a viable and defensible theory of justice. In this, Sen has mirrored a central issue in configurative jurisprudence.

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[73] *See* GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM 84 (Syracuse Univ. Press 1st ed. 1985); *see also* Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law Is Made*, 6 YALE STUDIES IN WORLD PUBLIC ORDER 249 (1980); *and* W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC 101 (1981); *see also* Winston P. Nagan & Craig Hammer, *Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights*, 47 VA. J. INT'L L. 725 (2007).

[74] AMARTYA SEN, THE IDEA OF JUSTICE 366 (Belknap Press of Harvard Univ. Press 2009).

[75] *Id.*

[76] *See* AMARTYA SEN, THE IDEA OF JUSTICE 379-85 (Belknap Press of Harvard Univ. Press 2009).

An early effort indicating Lasswell and McDougal's identification of this problem is found in Lasswell's *The Public interest: Proposing Principles of Content and Procedure*.[77] In this article, Lasswell addressed the problem of clarifying the content of value-based propositions, in terms of the plurality of specific issues or problems implicated in such propositions. This he developed through a recommended series of principles of content (supplemented by principles of procedure) for grounding value-specific judgments in circumstances that require specific application.[78] These authors explain the importance of this issue as follows:

> The principal objective of the present inquiry is explication of a framework within which realistic assessments can be made of the relevance of alternative policies to the public order of the global community and its component communities. The prescriber or applier or other evaluator of policy options has an obligation to make himself as conscious as possible of the full range of communities, from global to local, of which he is a member and upon which his choices will have unavoidable impact. The aspiration of a decision maker who represents a community whose basic constitutive process projects a comprehensive order of human dignity—as is increasingly sought in the contemporary emerging global "bill of human rights"—and who is personally committed to this goal, should be to make his every particular decision contribute to progress toward this outcome. Such a decision maker will recognize that, in the global interdetermination of all values, there is indeed a human rights dimension to all interaction and decision, and will make every effort to insure that such dimensions are effectively taken into account in decision.
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> This recommendation, it must be clearly understood, is not that a decision maker assume the license to impose his own unique, idiosyncratic preferences upon the community. It is, rather, a demand that the decision maker identify with the whole of the communities he represents, and that he undertake a systematic, disciplined effort to relate the specific choices he must make to a clarified common interest, specified in terms of overriding community goals, for which he personally can take responsibility.[79]

The central problem that McDougal and Lasswell address here is the technique for clarifying the content of moral norms and values, and facilitating the more concrete and discriminating expression of these norms and values. Additionally, the idea of making these norms operable in the real world of finite consumers requires the development of principles of procedure to guide the grounding of the specific conception of a value in terms of the concrete problem, which requires specific prescription and application. Principles of content require better clarification of the ubiquitous processes by which human beings engage in the prescription of norms relevant to asserted claims to values.

To give operative effect, therefore, to principles of content, the theorist and applier must consider the following:

(1) The ascertaining of expectations (with regard to the values being claimed as well as the processes that implicate them—these would include the content of the norms, the expectations of authority which accompany the norms, and the expectations of efficacy in grounding such norms); and

(2) These expectations in the view of McDougal and Lasswell should be appraised against shared community expectations as well as scholars' postulated commitment to the goal values of human dignity; and

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[77] *See* Harold S. Lasswell, *The Public Interest: Proposing Principles of Content and Procedure*, *in* THE PUBLIC INTEREST 54 (Carl J. Friedrich ed., 1962); *cf.* Harold S. Lasswell, *The Interplay of Economic, Political, and Social Criteria in Legal Policy*, 14 VAND. L. REV. 451 (1961); *see also* Harold D. Lasswell & Myers S. McDougal, *The Clarification of Values, in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 725, 725-86 (New Haven Press 1992) (dealing with the procedures for the clarification and grounding of value judgment). For the specific procedures for the clarification of values in Human Rights, *see generally* MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (Yale Univ. Press 1980).

[78] A specific advance on Lasswell's thinking, as applied to Human Rights values, is found in Myres S. McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA J. INT'L L. 387 (1974) (largely reprinted in Chapter 5 of MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (Yale Univ. Press 1980)).

[79] MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 372-73 (Yale Univ. Press 1980).

(3) Since expectations about the content and reach of values will be incomplete (and therefore generate ambiguity, gaps, and contradictions) there will be an important intellectual task for theorist and applier—that of supplementing expectations; and

(4) Supplementation is made with reference to compatibility, with the goal values of the more abstract principle of human dignity; and

(5) Effective integrating expectations with intensity of claim and compatibility with overriding goal values; and

(6) There are special principles relating to the processes of claiming values and access to moral norms. Claims give us clues to the multiple dimensions implicated in more abstract statements of value and morality. By keeping what is claimed in fact a part of the calculus of grounding value judgments, the grounding of value judgments becomes more realistic and relevant to both participation and outcomes in these processes; and

(7) It may be that the ultimate evaluator is an authorized decision maker. Here, the decision maker must be aware of the functions of decision and how claim, value clarification, and grounding may be given operative effect as community policy.

In order to guide the grounding of value judgment in concrete instances of specific appraisal and application, McDougal and Lasswell also recommend principles of procedure, which serve as a complement to the recommended principles of content. The first principle of procedure is the contextual principle, which stresses the importance of the fact that all claims for values emerge as problems, which are outcomes of the community context. A response to such problems will correspondingly have effects on the community context and its active participants. Thus, the contextual principle is an important procedural mechanism for bringing an appropriate information base to the attention of both scholar and active decision maker.

The second principle is the principle of economy. Not every claim is of vast socio-political consequence. Thus, a discriminating eye must be kept on the principle of an economic focus on the importance of the claims to values for the parties and the community. The third principle is a principle of manifest or provisional focus. Such a focus would seek to understand what the parties are demanding and, tentatively, understanding of the prospective facts and, possibly, legal theories, which (as a threshold matter) are part of the conflict.

The fourth principle of clarified focus is a more searching inquiry, which builds upon the clarifications garnered from a provisional focus. This requires the inquirer or decision maker to understand the provisional facts in terms of the larger context, independently of the perspectives of the parties, and possibly from the perspective of a disinterested, impartial observer. An appraisal of the potential facts and the independent conclusions drawn from them should provide for a much more precise clarification of the range of prescriptions and potential choices in outcome.

The fifth principle requires the observation of the relevant past trends in decision. This requires an appraisal of the extent to which past trends approximate the desired goals of a public order committed to human dignity. The sixth principle requires a realistic orientation in a scientific sense to factors such as the predispositions of the operative players and other environmental factors that could have influenced the past trends in decision. This principle requires an appraisal of these and other factors or conditions, which might determine future outcomes.

The seventh principle requires the observing of constraints on future probabilities respecting the grounding of value judgments. This may require the theorist or decision maker to consider alternative future possible choices; estimate the advantages and disadvantages in terms of desired values for the grounding of possible alternatives in decision; this exercise should provide some tangible conception of the probable net

advantages and disadvantages of possible option alternatives. Finally, there is the eighth principle of evaluating and inventing alternatives to the approach to the grounding of value judgment. Here, alternatives require a certain creative orientation on the part of both theorist and decision maker. This creative clarification of alternatives provides for the prospect of improving the delivery of a defensible system of human justice in concrete social process context.[80]

Professor Sen's elaboration of a capability approach to the clarification and grounding of value judgment is, in my view, an important contribution to the issue of clarifying the specific implications and problems of justice implicated in abstract ideas such as liberty and equality. Of particular importance is Sen's clarification of liberty, which he does in terms of the idea of 'freedom' (having an opportunity aspect as well as a process aspect), and Sen's integration of liberty into his capability approach. The central value of his capability approach lays in its elucidation, which is dependent upon an informational focus. This means, essentially, that capability, when understood in terms of a broader contextual informational focus, provides a broader framework for the analysis of justice from a global, cross-cultural perspective.

Sen postulates that this approach is more compatible with a global and non-parochial view of the critical discourse about global justice and human rights itself. According to Sen:

> Any substantive theory of ethics and political philosophy, particularly any theory of justice, has to choose an informational focus, that is, it has to decide which features of the world we should concentrate on in judging a society and in assessing justice and injustice. It is particularly important, in this context, to have a view as to how an individual's overall advantage is to be assessed; for example, utilitarianism, pioneered by Jeremy Bentham, concentrates on individual happiness or pleasure (or some other interpretation of individual 'utility') as the best way of assessing how advantaged a person is and how that compares with the advantages of others. Another approach, which can be found in many practical exercises in economics, assess a person's advantage in terms of his or her income, wealth or resources. These alternatives illustrate the contrast between utility-based and resource-based approaches in contrast with the freedom-based capability approach.
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> In contrast with the utility-based or resource-based lines of thinking, individual advantage is judged in the capability approach by a person's capability to do things he or she has reason to value. A person's advantage in terms of opportunities is judged to be lower than that of another if she has less capability—less real opportunity--to achieve those things that she has reason to value. The focus here is on the freedom that a person actually has to do this or be that—things that he or she may value doing or being. Obviously, the things we value most are particularly important for us to be able to achieve. [However,] the idea of freedom also respects our being free to determine what we want, what we value and ultimately what we decide to choose. The concept of capability is thus linked closely with the opportunity aspect of freedom, seen in terms of 'comprehensive' opportunities, and not just focusing on what happens at 'culmination'.[81]

There is an interesting parallel between Sen's capability/opportunity aspect of freedom, seen in terms of comprehensive opportunities, and the approach of McDougal and Lasswell. Central to the concept of human rights, in their view, is the concept of respect. According to these authors, respect is defined as an interrelation among human beings in which they reciprocally recognize and honor each other's freedom of choice about participation in the value processes of the world community or any of its component parts.[82] Additionally, a significant part of *Human Rights and World Public Order*[83] focuses on the multidimensional claims of individuals relating to "fundamental freedom of choice."[84] What is central to their approach, therefore, is the idea that respect (seen in terms of fundamental freedom of choice) is analogous to the capability/freedom/informational approach of Professor Sen.

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[80] *See* Harold D. Lasswell & Myers S. McDougal, *The Application of Constitutive Prescriptions: An Addendum to Justice Cardozo*, *in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 1489 (New Haven Press 1992).

[81] AMARTYA SEN, THE IDEA OF JUSTICE 231-32 (Belknap Press of Harvard Univ. Press 2009) (citations omitted from original).

[82] *See* Chapter 6 of MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 451 (Yale Univ. Press 1980).

[83] *See generally id.*

[84] Chapter 6 of MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 468 (Yale Univ. Press 1980).

Moreover, what is evident in the McDougal-Lasswell approach is the effort to contextualize opportunity freedom in terms of *all* identifiable values implicated in a normative order committed to human dignity. Thus, we could crosscut Professor Sen's capability freedom with all the values which implicated and which are to be found in the Universal Declaration. These include the capability freedoms in terms of the power process (and the many discriminating particular claims that emerge from this) as well as the claims to all other values implicating freedom of choice (such as wealth, respect, enlightenment, skill, affection, health and wellbeing, and rectitude). Additionally, when the analysis is given, the informational focus or gloss, which Sen values, then Sen's approach serves as a complement to the approach of McDougal and Lasswell, which requires a deliberate focus on the most comprehensive context from which the problems implicating fundamental values emerge. My sense is that Sen, in particular, with an emphasis on the process aspects of freedom is clearly interested in the discriminating clarification of the content of justice norms, as well as the processes in which these norms can be grounded in terms of real human beings, regardless of nationality, state, or gender.[85] According to Sen,

> Both the processes and opportunities can figure in human rights. For the opportunity aspect of freedom, the idea of 'capability'—the real opportunity to achieve valuable functionings—would typically be a good way of formalizing freedoms, but issues related to the process aspect of freedom demand that we go beyond seeing freedoms only in terms of capabilities. A denial of 'due process' in being, say, imprisoned without a proper trail can be the subject matter of human rights—no matter whether the outcome of a fair trial could be expected to be any different or not.[86]

From this perspective, Sen's approach (with its stress on the importance of both principles of content and procedure) for human rights discourse and practices would appear to be compatible with the general approach taken by McDougal and Lasswell for the clarification and grounding of value judgments in instances of particular application. I therefore suspect that Professor Sen's work, taken in the light of the complementary approach of McDougal and Lasswell, will advance our understanding of the nature and challenges that human rights pose for the idea of justice and its concrete realization in the global community.

I have only provided a very partial distillation of some of Professor Sen's insights into the theory of justice. His concept of a focal lens that is global and inclusive, that avoids parochialism, that accepts contingency as a challenge to critical scrutiny and discourse, as well as his insights into capability and process freedom, as well as Sen's contributions to the importance of impartial reasonings and partial orderings, significantly complement the ideas about global justice, the rejection of chauvinism, and the embracing of cosmopolitan values for the world community that are characteristic of configurative jurisprudence. Additionally, Sen's focus on grounding justice concepts in specific applications is an important and formidable challenge to contemporary theory.

REFLECTIONS ON DWORKIN'S 'JUSTICE FOR HEDGEHOGS'

Professor Ronald Dworkin, one of the most creative and prolific jurisprudence scholars of this age, has most recently put his considerable contributions together in an effort to provide a compelling, objective justification of the critical principle of morality, which is for Dworkin the principle of human dignity. I have already indicated that McDougal and Lasswell also insist upon the normative guidance of the principle of human dignity, which they derive from explicit postulation. It would be important to consider just how important the justification of the human dignity value is, in terms of the criteria and methods used by Professor Dworkin and those used by McDougal and Lasswell, which have been earlier outlined in this paper. Dworkin's most recent contribution to the objectification of moral precepts in philosophical and legal

[85] *See especially* AMARTYA SEN, *Opportunity and Process Aspects of Freedom*, *in* THE IDEA OF JUSTICE 370-71 (Belknap Press of Harvard Univ. Press 2009) (citations omitted from original).
[86] AMARTYA SEN, THE IDEA OF JUSTICE 371 (Belknap Press of Harvard Univ. Press 2009) (citations omitted from original).

discourse is found in his soon to be published book, *Justice for Hedgehogs* (forthcoming 2011). The title of this book is drawn from the title of the famous essay by Isaiah Berlin, "The Hedgehog and the Fox."[87]

According to Berlin, important philosophers who might be classified as hedgehogs "relate everything to a single central vision, one system less or more coherent or articulate in terms of which they understand, think and feel—a single universal organizing principle in terms of which alone or that they are and say has significance."[88] In a sense, Dworkin is choosing to ground an objective morality for law and philosophy on the approach of the hedgehog. The hedgehog knows one big thing. It seems to be Dworkin's contention that the foundation of an objective morality can be grounded and justified in one big thing or one big norm. This of course suggests that the perspective of the fox namely, that the fox knows a multitude of things (and that knowing them is a perspective that will not contribute to an objective theory of justice).

In a sense, Dworkin's development of the hedgehog view of objective morality is rooted in his belief that, while there is not a multitude of right answers in law, there is always one correct answer. This perspective is partly a critique of the skepticism generated by an about law perspective and identified largely with legal realism. Dworkin seeks to grapple not with legal skepticism but with philosophical skepticism. Dworkin suggests that external meta-ethical skepticism is generally used to debunk moral discourse. Dworkin does not believe that the external perspective can quite grapple with moral propositions and the internal discourse they generate. Dworkin insists that an external evaluation by external metaphysical perspective cannot provide either a deconstruction or a justification of moral norms. This is because moral discourse in order to be correct, true or valid or justified, is entirely a matter of internal first-order moralizing. In his view, first-order judgments are the only real judgments about morality that exists. Consequently, he insists that there cannot be an external perspective to evaluate the currency of a moral norm because there cannot be such perspective.

Thus, since there are no external second-order metaphysical questions to raise about the currency and nature of moral judgments, external skeptical metaphysics cannot undermine moral and ethical thinking. In short, to quote Dworkin, there are "no sensible independent, second-order, metaphysical questions or truths about value."[89] Since the distinction made between internal and skeptical external metaphysical discourse has a parallel with Hart's view that the '*about* law' external perspective of legal realism is irreducible to the critical foundations of legal discourse founded on rules, and that jurisprudence to be meaningful can only be done from an internal perspective. The rules contain meanings that are only properly understood from an internal perspective. This view, which therefore excludes from legal discourse external skepticism, strengthens the objectivity of the rule or precept based paradigm of law. In this sense, Dworkin wants to insulate completely moral discourse from insights that are external to the nature of moral discourse as he defines it. This is a good strategy for trying to make the moral statement that has been developed, and one that is coherent and objective. One does this by developing a kind of definitional stop as to what kind of discourse is licit or illicit. According to Dworkin, there is

> only one way we can "earn" the right to think that some moral judgment is true and this has nothing to do with physics or metaphysics. If I want to earn the right to think or to say that abortion is wrong even to save a woman's life, then I have to offer substantive reasons why we should have to accept that very strong opinion.[90]

Those reasons have to be moral reasons and not reasons of external skepticism. I am uncertain whether, in using this device, Professor Dworkin has made a compelling case that moral propositions may not be strengthened or weakened by non-moral propositions. I am inclined to think that this is somewhat counter-intuitive. Critics have suggested that Dworkin is at pains here to reconcile the discourse he is generating with

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[87] ISAIAH BERLIN, THE HEDGEHOG AND THE FOX; AN ESSAY ON TOLSTOY'S VIEW OF HISTORY (Simon & Schuster 1953).
[88] *Id.* at 1.
[89] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 6 (Apr. 17, 2009) (unpublished manuscript, on file with the Boston University Law Review) (forthcoming 2011).
[90] *Id.* at 9.

the standards of objectivity and discourse implicated in the work of the philosopher, Hume. My concerns about this distinction are similar to the concerns I have had about the use of this distinction by Professor Hart.

In *Justice for Hedgehogs*, a critical aspect of Dworkin's theory of objective moral justification reposes in his distinctive approach to epistemology. Following Hume there is the domain of scientific thinking which suggests that scientific concepts and beliefs are a condition and a consequence of the physical universe. He also draws out the idea of a distinctive epistemology of interpretation. The domain of interpretation falls within the compass of value. In Dworkin's view, we form beliefs and generate discourse based on science and values. In terms of claims of value, according to Dworkin, there are no sensible, independent, second-order metaphysical questions to be asked or answered. From Hume's influence, Dworkin draws the idea that the issue of truth in the domain of value is a matter of conviction and argument.

The method of discovering truth in terms of conviction and argument is to be found in the concept of interpretation. There is some overlap between the approach of Professor Sen and Dworkin on the question of the standards and methods of interpretation. Sen, drawing on what he calls the necessity of reason focuses on ethical objectivity and reasoned scrutiny in order to develop an objective theory of the ideal of justice. According to Sen:

> [R]easoning is a robust source of hope and confidence in a world darkened by murky deeds—past and present. It is not hard to see why this is so. Even if we find something immediately upsetting, we can question that response and ask whether it is an appropriate action and whether we should really be guided by it. Reasoning can be concerned with the right way of viewing and treating other people…and with examining different grounds for respect and tolerance.[91]

It may be that Sen's ethical objectivity and reasoned scrutiny have a parallel in Dworkin's more rigorous concept and method of interpretation. Additionally, interpretation in the McDougal/Lasswell system does involve five distinctive modes of thinking and goal or value thinking is a discrete intellectual task that needs interpretative clarification as well as the tools of interpretation needed to ground value or moral concepts in instances of particular application. Dworkin's interpretation would seem to implicate both of these ideas.

Although here I am forced to bypass a great deal of the sophistication and complexity in Dworkin's approach, I take the opportunity to address briefly Dworkin's master moral concept of human dignity. Dworkin establishes this idea by a two stage analysis in which one must pose questions that are normative but ethical rather than moral. In Dworkin's terms, the ethical questions are found in such ideas as "what people should do to live well: what should they aim to be and achieve in their own lives?"[92] His second question, which he determines to be moral, is the question about how people should treat others. Dworkin's ethics, it turns out, are based on two complementary ideas. These are the notion of self-respect and the notion of authenticity. The idea of self-respect suggests that each autonomous person has an obligation to take their own life seriously and that there should be some recognition that it is objectively important that your life should be "a successful performance rather than a wasted opportunity."[93] The complementary principle of authenticity is that the self has the responsibility to self-identify what counts as success in one's own life. These two ethical ideas clearly are ideas that require the self to be self-reflective, seriously self-reflective and these reflections indicate that the self will be predisposed to certain values. Yet these imply a certain retrospection and care in the identification of those values. Whether values matter in my life may be tested by one in terms of whether it contributes to the narrative that one consciously or subconsciously endorses for the self.

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[91] AMARTYA SEN, THE IDEA OF JUSTICE 46 (Belknap Press of Harvard Univ. Press 2009).

[92] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 8 (Apr. 17, 2009) (unpublished manuscript, on file with the Boston University Law Review) (forthcoming 2011).

[93] *Id.* at 128.

Dworkin seems to suggest that if an individual's authenticity and self-respect are a sovereign virtue, and that an individual endorses for their interest and well-being, then this is how the individual sees their essential human dignity. If the individual embraces this idea of human dignity as consistent, the individual must recognize that all non-self others have rights to the same quantum of self-respect and authenticity. There are shades of Rawls here in the sense that the individual who cannot see the future who makes some choice as to the well being, self-respect and authenticity of the self. In the context of McDougal and Lasswell, they work on an assumption that central to the principle of human dignity, is the ability of the self to make choices about what they term as desirable values. They see these values as operative in social process and the institutions specialized to them in social practice. Thus, the self in their system will express desires for all the values that, in shaping and sharing minimally, will at least secure minimal self-respect and minimal authenticity. On the other hand, the prospect of shaping and sharing could be quite consistent with self-respect and authenticity if the individual is able to shape and share more optimally in the value experience.

Thus, what an individual self desires as a reflection of authenticity and self-respect is specifically targeted to the value institutional practices of society. The person may claim for some level of participation in the shaping and sharing of power or any other fundamental value such as wealth, respect, enlightenment, affection, health and well being, skill and rectitude. These values when generalized are conveniently formulated as the values that contribute to a public order of human dignity. Dworkin, McDougal, and Lasswell require methods and procedures in the grounding of moral or value precepts. However, it is important to note that McDougal, Lasswell, and Dworkin assign special significance to individual well-being, self-respect, and authenticity for the creation of value in the narrative or biography of the self; and they make these markers a central element in their approach to law and public order. It may be worthwhile to note both parenthetically and in conclusion the importance of the individual story, narrative or autobiography. Lasswell's earlier work in psychoanalysis gave great credence to the biography of those he studied. Each life story was valuable not only therapeutically but also in deepening our understanding of the role of the individual life in the 'I' and its absorption of the 'we' in society.

This idea was well developed by Professor Wayne C. Booth of the University of Chicago in his Amnesty lectures at Oxford.[94] Booth posed the question as to how Amnesty could justify its policy and practice of condemning torture in all circumstances. What Booth ultimately required us to consider was the individual victim, who should be so valuable as to require an absolute prohibition of the torture and mutilation of that person. Booth concluded that what we were really protecting was the uniqueness and the cultural distinctiveness of the individual narrative. The following excerpt from Professor Booth's Oxford Lecture clarifies this more fully:

> Our true authenticity, in this view, is not what we find when we try to *peel away* influences in search of a monolithic, distinctive identity. Rather it is the one we find when we *celebrate* addition of self to self, in an act of self-fashioning that culminates not in an in-dividual at all but in—and here we have to choose whatever metaphor seems best to rival Mill's bumps and grinds of atomized unites—a kind of *society;* a *field* of forces; a *colony*; a *chorus* of not necessarily harmonious voices; a manifold *project*; a *polyglossia* that is as much in us as in the world outside us.[95]

Booth continues:

> Each life's trajectory is of course uniquely its own—but the word "own," like all other pronouns that refer to the social self, now becomes radically transformed: it no longer demarcates any firm boundaries between any two persons. Indeed, most of what I think of as "my own" no longer "belongs" to me….My claim is only for the

[94] *See generally* Wayne C. Booth, *Individualism and the Mystery of the Social Self; or Does Amnesty Have a Leg to Stand On?*, reprinted in FREEDOM AND INTERPRETATION: THE OXFORD AMNESTY LECTURES 1992 at 69–101 (Barbara Johnson ed., 1993) (presenting the most penetrating and insightful analysis of individual identity, social identity, universal obligation, and the issue of torture).
[95] *Id.* at 89.

> social self when properly understood—which means, of course, as *I* understand it—a far more cogent version than I ever have managed, here or elsewhere![96]

Booth expands on the theme of what makes life precious, that is to say, the implications that the 'I' is invariably a component of the 'we' with a complex narrative. Consider the following:

> My value consists largely in the values or "voices" I have absorbed, and in the continuation of the dialogue among them—among my present selves and the further selves that I/we hope to encounter. Whatever differences in value one finds among lives or moments in life are thus insignificant when compared to the universally shared value or enacting a dramatic story line. Every prisoner, ever murderer, ever torturer shares this potentiality for dramatic change and growth into the future.
>
> From this first value springs a second: though all lives are inherently, irreducibly valuable because the very possibility of enacting the human drama at all is laden with value, some story lines are in fact better than others, the fact/value split having long since collapsed, and it is thus always for all persons possible, at any given moment, to encounter experiences with "characters" who improve or corrupt the narrative. It is just this possibility of fresh and valuable free experience that is terminated with physical coercion or destruction. To freeze me where I am, to cut off my possibility of encountering and imbibing better selves, indeed to impose on my drama the self I become under torture, is the ultimate offense.[97]

Booth provides an insightful and powerful defense of the idea of authentic individual dignity. I am uncertain whether Dworkin was influenced by Booth's work; but the ideas are complementary. Torture is really an effort to destroy the "story" of a person (as Booth explains); and I see implicit in Dworkin—as well as in the jurisprudence of McDougal and Lasswell—that the individual story (for which one is "responsible" for what one makes of one's life—and therefore responsible for the narrative), which is more probably a story not just of the 'I' but also the 'we', is meaningful and collectively the story tells us about the life of the community and humanity as a whole. Dworkin's idea of the moral worth of human dignity therefore means that the narrative of the self is an entitlement of all non-self others.

One of the most important technical issues that Dworkin addresses is the notion of the truth or currency of a proposition in the context of value discourse. Here, truth does not depend on pedigree. It depends on conviction and argument. Thus, "our moral convictions can finally be sustained or challenged only by other convictions and arguments drawn on that dimension."[98] It is the combination of conviction and argument that therefore is the guarantor of a truth in the context of value discourse. But what does this mean? Dworkin's approach here is to pin the method of the truth of a value proposition on the processes of interpretation that he has explained. Dworkin's approach interpretation is that it is a distinctive truth-seeking and argumentative phenomenology of interpretation. The central features of his approach to interpretation starts with the notion that interpretation is a social, practice-based experience. Here, interpretation proceeds through the ascription of value. To be an interpreter you identify the appropriate practice and then ascribe to it a value that will reveal the practice in the best moral light. There is recognition that practices have an inherent social quality, as well as an argumentative dimension, which reflects the influence of the individual self-system. That influence will reflect the personal values and convictions of the interpreter.

This approach to interpretation, which is partly grounded in social practice, may be contrasted with some elements of real world experience in the jurisprudence of McDougal and Lasswell. For example, McDougal and Lasswell underline the importance of the contextual foundation of institutional practices. Moreover, they insist on the fact that institutions suggest a certain dynamism in advocacy and decision that reflects the interplay of actors, values and practices. However, they provide explicit markers to map and clarify the value claims of any participant—including the interpreter—in social process. A shorthand version of this is that the individual self-system—acting individually or in association with others—ubiquitously stakes claims to the

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[96] *Id.* at 89, 92.

[97] *Id.* at 92-93.

[98] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 19 (Apr. 17, 2009) (unpublished manuscript, on file with the Boston University Law Review) (forthcoming 2011).

dominant values in society. The claim targets the specialized institutions specialized that is, to the form of discourse (or interpretation) specialized to the value-institutional practice. Claiming the truth of the foundation of one's value claim may as well be sustained by the form of advocacy, or interpretation as a base of power or a base of authority in order to secure the practice of shaping and sharing of the desired value. The question that is of concern to the critic is that it is impossible to engage in the practice of interpretation as clarified without an external perspective that may implicate both legal culture and the culture of philosophy. To the extent that Dworkin's theory does concede a certain empirical reference in terms of interpretation as a social, practice-based phenomenon, it appears that the critical distinctions used to sustain the boundaries of moral discourse (at least understood in Hume's terms) require some revision on his part.

A second aspect of Dworkin's theory of interpretation is the notion that interpretation may distance itself from the empirical world by the use of concepts that, I suggest, insulate it from the problems generated by the real world. According to Dworkin, "We develop our different and distinctive moral personalities through interpretations of what it is to be honest or reasonable or cruel, or what actions of government are legitimate or when the rule of law is violated."[99] Dworkin distills a number of widely used concepts that are shared in interpretative discourse. These include legitimacy, justice, liberty, equality, democracy and law. My sense is that this is an artificial construct. It is an assumption implying that we can purge personality of complexity and then supply a selected a possibly controverted checklist of ubiquitous concepts, against a psychological background that is purged of personality dynamics. By contrast, McDougal and Lasswell start by making the individual-self system an identified beginning point of description and analysis. Since the individual is a claimant for value and seeks to participate in the decisions that may justify those values, the critical question is what exactly are the main conceptual and normative structures that shape the individual self system as a social participant?

Central to the personality/social process context of the individual in society is the fact that the individual is a bearer of perspective. Perspective is unpacked as comprising of three principle components that influence—to use Dworkin's terms—the desire (or perhaps even the passion) to interpret. First, every perspective emerges with the complexities and challenges of personal identity. The morality of personal identity is complex. It may involve the state or the authorities ascribing an identity to a person whose psychological reality rejects that identity. Thus, the interpretative approach may not be sufficiently nuanced to capture the moral and ethical issues implicit in claims to identity and the manner by which these claims are justified.

Another important aspect of the individual's perspective is the perspective of claiming or demanding access to the shaping and sharing of values. In some political cultures, claiming is tantamount to disloyalty in a state. In states that have transformed from totalitarian to democratic forms there may still be a significant demand deficit from the people who ostensibly live in a democratic state.

A third aspect of personality perspective is what we might call a perspective of expectation. Thus, one's claims relating to one's identity and one's demands may be subject to Dworkin's third criterion of interpretation that is the task of seeking a "reflective equilibrium" relating to convictions, practices, goals and organizing concepts.[100] It will be apparent that Dworkin sees in his interpretative approach the notion that human perspective is subjective but that his approach succeeds in objectively sustaining his ideas of authenticity, self-respect, conviction and argumentation. The question that concerns me is whether Dworkin's approach obscures essential features crucial to the role of values in law and society. For example, McDougal and Lasswell suggest that value clarification and application are matters in part of advocacy as a form of decision-making (the importance of the coherent articulation of fundamental values and interests in the domain of authoritative decision).

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[99] *Id.* at 101.
[100] *Id.* at 86, 99.

Additionally, there is the importance of a better understanding of the functions of decision-making in the clarification and grounding of value judgments and very critically, the role of the scholar, interpreter of the process of claim and decision implicating the fundamental value commitments in the community. In terms of the scholar as interpreter the McDougal/Lasswell approach suggests that there is greater clarity and therefore the prospect of greater coherence if the value problems that are generated as claims or demands are adequately contextualized in terms of past practice, current practice, and future problems. To the extent that problems represent a conflict or tension between what the demander wants and what he might expect, that difference between claiming and expectation is a difference about how the system might respond to claims that involve the shaping and the distribution of values. The context therefore is critical; and a critical function of context requires newer epistemologies such as the idea of contextual mapping of social process, claiming, outcomes, and responses to them.

The context from which problems emerge requires a number of value adjustments that therefore generate a number of discrete intellectual inquiries with their own internal methods for establishing coherence and currency. First, there is the important task of goal or norm clarification. The problem invariably implicates values at a high level of abstraction. The problem requires clarification that may have a great coincidence with the hedgehog view of a unitary value such as human dignity. It might also require a great deal of detailed analysis to determine how the values are consistent with the one big value and with the nature of the claim implicating values. From normative analysis, we shift to a different intellectual task. That task is essentially scientific and requires the interpreter to examine the causes and conditions that have shaped responses to such value demands in the past and whether these factors are relevant to the present and the future. The next intellectual task involves historic or trend thinking. The critical questions here are to examine how society has handled the problem in the past and to what extent the past should condition the present and the future. The next intellectual task is the task of prediction. Here the interpreter must look at the problem in terms of a projection into the future that the interpreter believes bears the greatest approximation to a desired interpretative outcome. Thus, the predictive task is guided by normative analysis and (perhaps) the hedgehog view of what is morally justifiable. Prediction may also project into a future that is vastly incompatible with the values of human dignity. These at least represent interpretative choices. Finally, the interpreter is expected to function with a certain measure of creativity. Here I would suggest that reflective equilibrium as a desired outcome requires interpretative tools that are creative and holistic. The creative task here is to develop the interpretative tools and incentives, which could include a consideration of strategies and tactics by which an interpretative outcome might self-consciously approximate the common interest in advancing human dignity. I am therefore not persuaded that the methods of interpretation suggested by Professor Dworkin are sufficiently intellectually challenging to secure the objectives that he seeks.

I want to comment briefly on the idea that the truth of the moral virtue of human dignity is rooted in the idea of both conviction and argument.[101] I presume that what Dworkin means is that his ethical principles from which he drew the idea of its application to non-self others are a matter that is self-evident and therefore self-justifying. If this is right, I also assume that the concept of 'conviction' here is an observation that is to be found in all human beings (or most of them). I assume also that this is a conviction that deeply informs the interpreter (scholar); and that the scholar's concept of the justification of human dignity is founded on self-justifying ethical principles and the moral conclusions drawn from them; and that a further

[101] Dworkin tells us that moral concepts and their truth lie in the realm of interpretation. *Id.* at 10-11. He argues that morality is a matter of conviction and that one can only test one's convictions against another's. *Id.* Thus, Dworkin asserts that the moral truth in which we believe is not merely a matter of subjectivity (*see id.* at 10) but also a matter of "conviction" (*see id.* at 10, 39) and "communicative action" (*see* C. Edwin Baker, In Hedgehog Solidarity, 90 B.U. L. REV. 759, 812 (2010)). The transformation of 'communicative action' into 'argument' occurs because the concept of liberty that Dworkin describes, "which allows the ethical environment to be set organically so far as possible through individual choices one by one rather than by collective action, provides much more incentive for *conversation aimed at persuasion*." Ronald Dworkin, *Response*, 90 B.U. L. REV. 1059, 1078 (2010) (emphasis added).

justification to sustain the objective truth of these principles may be secured through Dworkin's idea of conviction and the further idea that conviction also shapes rigorous intellectual argument in justification.

The ethical principles that Dworkin develops (or clarifies) are certainly analogous to an assumption in the McDougal-Lasswell approach that the human being claims values, and from their scholarly viewpoint these values represent in the aggregate the universal value of human dignity. The difference is that McDougal and Lasswell use value discourse in two different senses. First, their conception of any social process means that human relationships are infected with value claims and demands. This is an empirical fact. I also believe that their approach was influenced by the empiricism of cultural anthropology in which the focus was on how the social processes of traditional communities developed to accommodate human needs. McDougal and Lasswell describe these needs in value terms. This clearly is a matter that Dworkin's internal approach seeks to limit or avoid. However, the importance of this approach is that one of the important tasks of scholarship is to be able to describe the public order (how values are actually produced and distributed) is a different question from the kind of public order that one recommends for the desired distribution and production of values. This is the normative question. It seems that Dworkin implies an understanding of the justice problems created by how the system actually operates regarding its fundamental value commitments.

The approach to McDougal and Lasswell is essentially not to assume this. Additionally, on the question of conviction, I assume that Dworkin assumes that everyone has such a conviction and has the capacity for argumentative interpretation. The idea of conviction, at least in terms of the scholarly commitment, comes close to the idea that the normative priority given to the principle of human dignity, and does not have to be justified, since McDougal and Lasswell simply postulate it to avoid the complicated struggle of seeking an objective justification for it. McDougal and Lasswell postulate the human dignity precept and invite others to join them in the conviction that this is compelling normative proposition. Here Dworkin's work in providing a more elaborate and simple theory (based on his two ethical principles and the moral understanding derived from that) clearly strengthens the postulated preference given by McDougal and Lasswell. Additionally, Lasswell and McDougal have from to time suggested that the value analysis they give suggests that a rational, responsible individual would prefer that his dignity be secured rather than that he be a victim of human indignity. Finally, Dworkin's book provides a great deal of clarity relating to the ostensible incompatibility of values such as liberty and equality. His approach clarifies many of the misconceptions that deal with the problem of the distribution of value indulgences. In this, I think he has provided an important analysis, which clarifies (perhaps better than McDougal and Lasswell have done) what the sharing of values means.

THE GLOBAL CONTEXT OF SEN'S IDEA OF JUSTICE AND DWORKIN'S ONE BIG THING (HEDGEHOG THEORY OF JUSTICE)

JUSTICE AND GLOBAL SOCIETY: CONFRONTING THE DEFICITS

The idea of justice in its comprehensive reach must account for context and contextual challenges that are a part of the state of the global social process. The socio-political reality of globalism may be symbolized by numbers and statistics. For example, the tensions between the right to life and the right to a higher quality of life may be given a distinctive perspective when it is considered that every day 365,000 babies are born in the world. Ninety percent of these babies are born in poor, underdeveloped countries. Notwithstanding the scope of global poverty, over two billion people worldwide have significantly improved their standard of living over the past 10 years. India, a country long seen as an economic development basketcase has the world's largest middle class (200 million). However, there are still are 750 million who live in dire poverty. China with a population of one billion two-hundred sixty-one million people has one-fifth of the earth's population. And finally, in this regard it is estimated that in 1804, the world's population stood at 1 billion. In 1927, it was estimated to stand at 2 billion. In 2027, it is projected to increase to about 8 to 9 billion. The connections between population, development and criminal deviance may be one of the important challenges

confronting the harsh reality of globalism.[102] In other words, what exactly will be the role of the Rule of Law in the new vision of global order? We list some of globalism's harsh realities:

- Law and global apartheid or global poverty (development, poverty, income distribution, economic equity, population policy, etc.);
- Law and the global public health crisis (e.g., Aids);
- Law, emerging markets, and the trend toward corruption and fragmentation;
- Law and proliferation and threat of nuclear arsenals;
- Law and the global war system (arms race, armed conflict, ethnic conflict, etc.);
- Law and basic human rights (the epidemic of gross abuse of human rights and human atrocity);
- Law and global constitutional crisis;
- Law and the crisis of the rule of law (failed states, corrupt states, drug controlled states, terrorists states, garrison states, authoritarian states, totalitarian states);[103]
- Law and the threat of organized transnational criminal behavior.

Let us now connect the ideas of global justice implicit in Sen and Dworkin's works to the nature of the International Rule of Law and its promise of lofty ideals of a global conception of justice.

JUSTICE AND THE INTERNATIONAL RULE OF LAW PRECEPT

In September 2000, President Jacques Chirac of the French Republic said, "The Charter of the United Nations has established itself as our 'World Constitution.' And the Universal Declaration of Human Rights adopted by the General Assembly in Paris in 1948 is the most important of our laws."[104]

Like all law, the United Nations Charter has been under constant pressure to affirm its promise and its universal lofty ideals. There has also been insistent pressure sought to limit the effect of the Charter as a critical, indispensable framework for a defensible world order. It was a former Secretary of State[105] of the United States who suggested that in the aftermath of the atomic age, the Charter itself had become a near obsolete instrument of world order. Indeed, assertions of power to intervene by the superpowers as they declared exclusive zones of security-based extra-territorial interests created real tensions between the letter and the spirit of the Charter, and the exigencies of claims to expanded spheres of national security influence.

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[102] For a skeptical appraisal of the economic foundations of neo-liberal 'globalism' *see* NOAM CHOMSKY, PROFIT AND PEOPLE: NEO LIBERALISM AND GLOBAL ORDER (Seven Stories Press 2003).

[103] The literature on these crises themes in international law is extensive. For a general orientation *see* RICHARD A. FALK, REVITALIZING INTERNATIONAL LAW (Iowa State University Press 1989); MOHAMMED BEDJAOUI, TOWARDS A NEW INTERNATIONAL ECONOMIC *Order* (Holmes & Meier 1979); Gernot Köhler, *The Three Meanings of Global Apartheid: Empirical, Normative, Existential*, 20 ALTERNATIVES 403 (1995); Richard A. Falk & Elliott Meyrowitz, *Nuclear Weapons and International Law*, 29 JULIAN J. INT'L. L 541 (1980); Winston P. Nagan, *Nuclear Arsenals, International Lawyers, and the Challenge of the Millennium*, 24 YALE J. INT'L LAW 485 (1999); C. G. WEERAMANTRY, NUCLEAR WEAPONS AND SCIENTIFIC RESPONSIBILITY (Martinus Nijhoff Publishers 1999); Hilary Charlesworth, et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Nigel Purvis, *Critical Legal Studies in International Law*, 32 HARV. INT'L. L. J. 81 (1991); Richard A. Falk, *The World Order Between Interstate Law and The Law of Humanity: The Role of Civil Society Institutions*, *in* INTERNATIONAL LAW AND WORLD ORDER 49 (Weston, Falk & Charlesworth, eds. 1997).

[104] Jacques Chirac, "Universal Values," Millennium Summit (United Nations, New York, 6-8 September 2000), p. 6.

[105] The tension between the technological advances of nuclear weapons and the U.N. Charter is indicated in Dulles's idea that the U.N. Charter was "a pre-atomic age" constitution—it was, he held:

> obsolete before it actually came into force. As one who was at San Francisco, I can say with confidence that if the delegate s there had known that the mysterious and immeasurable power of the atom would be available as a means of mass destruction, the provisions of the Charter dealing with disarmament and the regulation of armaments would have been far more emphatic and realistic.

John Foster Dulles, *The Challenge of Our Time: Peace with Justice*, 39 A.B.A. J. 1063, 1066 (1953).

I suspect that even if one believes that the end of the cold war represents a demise of 'history,' its legacy for the International Rule of Law will linger long after its causes are forgotten. Events confronting international legal order after the cold war brought back a sobering reality. There is indeed a harsh socio-political reality in global society. Moreover, this reality represents a real threat to the United Nations Charter system if it is not effectively confronted.

The harsh reality of the deficits of globalization confronts us with the public policy challenge of how to change the harshness, which includes the widespread suffering humanity experiences under current world order conditions. This makes the discourse about justice of vital global salience. The challenge requires a more articulate normative road map—and a more explicit form of normative guidance. Such guidance may be rooted in many sources of comparative, cross-cultural, and moral experience, as well as in the U.N. Charter's promise of a deepening awareness of the importance of human dignity as a universal moral, ethical and juridical imperative. It should be noted that theorists such as McDougal and Lasswell, Sen, Dworkin, and even Rawls, share a commitment to some version of human dignity.

Normative guidance found in this scholarly discourse of morality, ethics, and value analysis appears to provide incentives to real world policy-makers, which guidance might influence the prospects of transformation. This may point in the direction of a global public and civic order that is founded on the universal ethic of respect for the dignity and worth of all of humanity, as well as for the earth-space environment, which makes human survival and transformation possible. The prospect of an improved human future is therefore an important expectation of the normative guidance based on an ethic of universal human dignity. Modern scholarship clarifying the scope and content and justification of the idea of justice, therefore, has an indirect but vital influence on the prospects of global justice.

The central problem some modern philosophers and moralists have grappled with is that human dignity based on universal respect, is in fact a cluster of complex values and value processes. In order to enhance human dignity in practical contexts, integration of many of these values is required. Specific prescription and application of values to enhance human dignity is indeed a complex matter.[106] At an abstract philosophic level, these values may indeed seem to be incommensurable.[107] The incommensurability of fundamental values was a cardinal perspective of Sir Isaiah Berlin, from whom Dworkin borrows the 'Hedgehog' title. In context of actually grounding value preferences operationally, ostensibly conflicting values may have to be contextualized and more deeply analyzed in light of broader, more abstract formulations of value judgment. Thus, values such as power, respect, rectitude, affection, enlightenment, well-being, skill, and wealth must be construed and interpreted in terms of their enhancement of a more abstract human dignity/human rights postulate. In this sense, Dworkin's 'one big value'—the respect for human dignity—provides the guidance, through interpretive techniques, by which ostensibly pluralistic values, which seem to be incommensurable, may be reconciled with the animating force of the moral principle of human dignity.

A practical decision-maker seeking enhancement of the ethic of universal dignity must develop complex techniques of decision-making, including sophisticated standards of construction and interpretation.[108] If, for example, one elevates the value of liberty, will not one be sacrificing the value of equality? It is at this 'operational' level that practical lawyers, social scientists, and real world policy-makers must make critical decisions about how to integrate often ostensibly conflicting values and norms to enhance genuinely the universal moral of human dignity. I provide a practical illustration: In South Africa, the Constitutional Court

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[106] Values considered widely to implicate the human dignity precept are deemed to be implicit in the Universal Declaration. These values include power, wealth, respect, rectitude, enlightenment, well-being, health, skill, affection, rectitude and possibly aesthetics. *See* MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (Yale Univ. Press 1980); Winston P. Nagan, *Africa's Value Debate: Kaunda on Apartheid and African Humanism*, 37 ST. LOUIS L.J. 871 (1993); Winston P. Nagan, *African Human Rights Process: A Contextual Policy-Oriented Approach*, 21 SW. U. L. REV. 63 (1992); Winston P. Nagan, *African Jurisprudence*, *in* THE PHILOSOPHY OF LAW: AN ENCYCLOPEDIA (Christopher Berry Gray, ed., 2000).

[107] *See* JOHN GRAY, ISAIAH BERLIN (Princeton Univ. Press 1996), especially Chapters 2, 3, 4 (*Pluralism*, *History*, *Nationalism*).

[108] *See generally* Vienna Convention on the Law of Treaties, 1155 U.N.T.S.331; 1969 U.N.J.Y.B. 140;1980 U.K.T.S. 58, Cmnd.7964; reprinted in 8 I.L.M. & 1 Weston I.E.

was confronted with a claim by a political party actively involved in the struggle against apartheid that the "Truth and Reconciliation" statute, which provided amnesty for those who should otherwise be prosecuted for grave violations of human rights, was both unconstitutional and a violation of international law.[109] In effect, the court was confronted with a truth and reconciliation procedure, which was a critical component of the internal peace process as well as the process whereby the disenfranchised mass of South Africans could gain their political freedom. This procedure was, however, in ostensible conflict with universally accepted norms of international law, which do not provide derogable excuses for heinous crimes against humanity.

Does the ethic of universal respect and human dignity demand absolute, universal compliance at the expense of other universally accepted values? To ensure that the values of respect, democratic entitlement and humanitarian law standards are honored requires fine tuned analysis and great subtlety in the structure and process of decisional interventions. Rules of construction and 'interpretation' are painfully worked out which hold, for example, that even if a peremptory principle (*ius cogens*) of international law embodies an obligation *'erga omnes'*, it should be evaluated, appraised and construed so as to enhance rather than disparage similar rights which may also have to be accommodated. The currency behind the universal ethic of essential dignity and respect is that it provides practical decision-makers with goals, objectives and working standards that permit the transformation of law and practice into a greater and more explicit approximation of the basic goals and standards built into the U.N. Charter system itself, which prescribes a public order committed to universal peace and dignity for the people of the entire earth-space community.

Practical decision makers and interpreters might gain much normative guidance about the universal ethic of human dignity since this is expressed in six keynote concepts embodied in the U.N. charter. These concepts embody the global community's fundamental expectations about global constitutive and public order priorities.[110] The ideas of justice are especially relevant to international legal order. Indeed, these concepts are vital if the interpretation of international law is to be guided by explicit standards of normative understanding built into the ethic of universal respect for human dignity. In short, the construction and interpretation of modern international law (i.e., its specific prescription and application) may be rootless, arbitrary, and even quixotic if it is not subject to explicit standards of normative guidance, which are expressed, inter alia, in the concrete terms of the U.N. Charter itself.

KEYNOTE U.N. CHARTER PRECEPTS AND VALUES

The international constitution, the U.N. Charter, contains a preamble that is *explicit* about the normative principles that are to inform the understanding and interpretation of the Charter. Thus, the Charter's Preamble and its chapter on 'purposes' appear to codify central principles of moral priority for the world community. The opening of the preamble expresses the first precept that the Charter's authority is rooted in the perspectives of all members of the global community, i.e., the peoples. This is indicated by the words, "[w]e the peoples of the United Nations."[111] Thus, the authority for the international Rule of Law, and its power to review and supervise important global matters, is an authority not rooted in abstractions like 'sovereignty,' 'elite,' or 'ruling class' but in the actual perspectives of the people of the world community. This means that the peoples' goals, expressed through appropriate fora (including the United Nations, governments and public opinion) are critical indicators of the principle of international authority and the dictates of public conscience as they relate to the conditions of harsh global realities, as well as aspirations encompassing lofty ideals. The fact that the authority of the U.N. Charter is rooted in 'we the people' clearly sets out to include people who are scholars and jurists like Sen and Dworkin, whose work on global justice carry the authority of participation in a 'we the people' project.

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[109] *See* Azanian People's Organization v. President of the Republic of South Africa, CCT 17/96; *see also* Winston P. Nagan & Lucie Atkins *Conflict Resolution and Democratic Transformation: Confronting the Shameful Past—Prescribing a Humane Future*, 119 SOUTH AFRICAN L. J. 174 (2004).

[110] *See* Legality of Nuclear Weapons, 1996 I.C.J. at 443 (Weeramantry, J., dissenting).

[111] U.N. Charter pmbl.

The Charter's second key precept embraces the high purpose of saving succeeding generations from the scourge of war.[112] When this precept is seen in the light of organized crime syndicates' involvement in the illicit shipment of arms, the possibility that they might have access to nuclear weapons technologies, and chemical and biological weapons, we see that the reference to 'war' in this precept must be construed to enhance the principle of international security for all in the broadest sense. The suffering generated by war is a virtual institutionalization of the principle of human indignity.

The third keynote precept is the reference to the "dignity and worth of the human person."[113] The eradication of millions of human beings with a single nuclear weapon or policies or practices of ethnic cleansing, genocide and mass murder hardly values the dignity or worth of the human person. What is of cardinal legal, political, and moral import is the idea that international law based on the law of the U.N. Charter be interpreted to enhance the dignity and worth of all peoples and individuals, rather than be complicit in the destruction of the core values of human dignity. Justice therefore demands that there be fundamental security for the human person.

The fourth keynote precept in the preamble is emphatically anti-imperialist. It holds that the equal rights of all nations must be respected. Principles such as non-intervention, respect for sovereignty, including political independence, and territorial integrity are issues that remain under constant threat of penetration by organized criminal activity.

The fifth keynote precept in the U.N. Charter preamble refers to the obligation to respect international law (this effectually means the Rule of Law) based not only on treaty commitments but also on "other sources of international law."[114] These other sources of law include values that complement efforts to promote ethical precepts built into expectations of the universal ideals of morality. International law recognizes as well the contributions of *juris consults* in the making and application of international law. In this sense, scholars like Dworkin, McDougal, and others make their contributions as an appropriate, recognized source of international law and a source of normative guidance.

The sixth keynote precept in the preamble of the U.N. Charter contains a deeply rooted expectation of progress, improved standards of living, and enhanced domains of freedom and equality. Organized crime represents the antithesis of this prospect.

U.N. CHARTER VALUES, JUSTICE, AND THE RULE OF LAW

The idea of the Rule of Law built in these U.N. Charter keynote precepts is as controversial, or indeed, obvious and non-controversial, as the idea of law. What then is the idea of law from a historic, cross-cultural, international perspective that inspires these keynote concepts? It is simply this: Human beings belong to communities. Communities cannot exist without some culturally approved and supported rules of conduct. There is no law without the idea of community and there is no community without the idea of law. Law is a condition and a consequence of community and community is a condition and a consequence of law. Justice Oliver Wendel Holmes once indicated that the notion of a legal right was so basic to the idea of law and community that without it, a "dog will fight for his bone."[115] One might add to Holmes' insight that, in this 'fight,' the big dog would 'win' and acquire all of the bones, the marrow, and the meat. The smaller dogs would get nothing. Sigmund Freud understood this point and the relevance of the rule of law. He put it this way: "Replacement of the power of the individual by the power of the community constitutes a decisive step

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[112] *See id.*

[113] *Id.*

[114] *Id.*

[115] OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS 341 (1920). See Winston P. Nagan, *Conflicts Theory in Conflict; A Systematic Appraisal of Traditional and Contemporary Theories*, 3 J. Int'l & Comp. L. 348, 421-35 (1981-1982), for an extended exploration of this metaphor with regard to the theory of vested rights.

in civilization…The first requisite of civilization, therefore, is that of justice.—That is, the assurance that law once made will not be broken in favor of an individual…The final outcome should be a rule of law…which leaves no one…at the mercy of brute force."[116]

A way to understand this almost 'symbiotic' relationship between law and community is to ask the reader to imagine a society without an expectation that

- agreements and exchanges made in good faith and according to law will be honored;
- wrongs (delicts) inflicted upon innocent parties will be compensated;
- basic interests and expectations of entitlement as in fundamental property (yours and mine) will be honored;
- conduct which violates the basic fundamental norms of right and wrong shall be sanctioned by a collective community response; and
- basic structures of governance and administration respect the rules of natural justice such as "nemo judex in sua causa" or "audi alteram partem," and in general, constrain the abuse of power and thus the prospect of caprice and arbitrariness in governance.

The idea of law (based on a comparative, cross-cultural, historic reality) is that human beings interact within and without community lines. In so doing, they exchange, they commit wrongs intentionally or unintentionally, they require some security over their possessions and entitlements, and their systems of governance aspire invariably to constrain the impulse for abusing power. In this anthropomorphic sense, law protects or secures the most elementary conditions of social coexistence. Let us describe this as the function of minimum order and assume that it is an aspect of both 'law' and of 'justice.'

It is also in the nature of human beings that they are transformative in their capacity for growth and in their relations with others. Human beings exist not only spatially but also in terms of the duration of time and events. There is hopefully a tomorrow, a next week, next month, next year, or next century. Human beings are transformative agents who make things happen. Human beings have capabilities and need opportunity. Capability and opportunity freedom are central to Sen. On the other hand, Dworkin insists "we need a statement of what we should take our personal goals to be that fits with and justifies our sense of what obligations and duties and responsibilities we have to others."[117] We may read into both of these perspectives the idea that justice requires individual responsibility and effort. That is to say, the individual's life "should be a successful performance rather than a wasted opportunity."[118] Dworkin would thus require capability and process freedoms, if life is not to be a 'wasted opportunity.' There is a genius in joining opportunity and capability with a responsibility to take one's life serious as an aspect of both personal and community justice. The idea that the self has a right to a life of self-respect and authenticity to be operationalized by capability and opportunity freedoms moves, as we saw, from that of an ethical commitment to that of a moral principle (in the sense that self-respect, authenticity, capability, and opportunity freedoms are encapsulated in the universal principle of human dignity).

The concept of justice in these views has an important dynamic quality to it. Dynamism is rooted in the responsibility and obligation of the person to respect oneself; such respect is sustained by the idea that the self is truthful to the self and, therefore, expresses to the self its self-validating authenticity. This means that the subjects of the idea of justice are meant to be active participants in the shaping and sharing of justice, and, moreover, to be active participants in the transformational dynamics of the principle of justice.

Such factors underline the question also embedded in the nature of law and community, viz., whether we can change things for better or worse, for the common good or the special interests, for the sense of

[116] SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 42 (W.W. Norton and Company 1961).
[117] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 122 (Apr. 17, 2009) (unpublished manuscript, on file with the Boston University Law Review) (forthcoming 2011).
[118] *Id.* at 128.

expanding human dignity or the prospect of a negative utopia, the rule of human indignity. It is in this sense that law as minimum order confronts the idea of justice and potentiality. It is commonly thought that minimum order is a critical—but not absolute—condition of a more just, decent, and optimistic human prospect. The Rule of Law precept is uncontroversial in the sense of minimum order and its 'boundaries.' Peace, security, and minimal standards of human rights are reflections of these values in international, constitutional, and municipal law.

The Rule of Law idea in the above sense protects both the individual and the community (the village). By seeking to secure the conditions of basic security for human co-existence, by seeking to ensure that co-existence will not be subjected to arbitrary and capricious exercises of power, the Rule of Law provides a constitutive architecture which permits human beings to transform themselves in terms of the ethical principles of self-respect and authenticity as well as the freedoms of opportunity and capability. The great British political scientist Leonard Shapiro, was once asked what the real difference was between a totalitarian state and one committed to the culture and morality of democracy? He unhesitatingly responded that it was the Rule of Law, in the sense that it was the basic mechanism for constraining the prospect of arbitrariness in governance. In short, the Rule of Law is the protective shield against the abuse of power by arbitrary means, by both private and public actors. The Rule of Law (in the sense of minimum order) is the critical myth that sustains the ability of the self to self-realize the self's life values, and to do so authentically. Moreover, arbitrariness and repression are the killers of opportunity and capability freedoms.

Our contemporary conceptions of global justice face a continuing challenge of how to merge the global rule of law idea with the idea of global justice conceived of as a public order of human dignity. The following statement expresses the challenge well:

> The "rule of law" describes a state of affairs in which the state successfully monopolizes the means of violence, and in which most people, most of the time, choose to resolve disputes in a manner consistent with the procedurally fair, neutral, and universally applicable rules, and in a manner that respects fundamental human rights norms (such as prohibitions on racial, ethnic, religious and gender discrimination, torture, slavery, prolonged arbitrary detentions, and extrajudicial killings). In the context of today's globally interconnected world, this requires modern and effective legal institutions and codes, and it also requires a widely shared cultural and political commitment to the values underlying these institutions and codes.[119]

What then, is the relationship of the Rule of Law to the idea of justice as evidenced in the U.N. Charter? The first problem we confront as a challenge to human dignity is the abuse of the sovereignty of the state. One of the most important values embedded in the United Nations Charter is the obligation of national sovereign states to cooperate in the achievement of the purposes and objectives of the United Nations Charter. This includes the obligation to respect human rights in the most comprehensive sense. This means that the concentration of absolute power in the sovereign state is no longer consistent with the principles of justice and good governance. The international system has replaced this with an obligation on sovereign states to *cooperate*. This Charter precept is codified in the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations.[14] Thus, the principle of cooperative sovereignty recognizes the limits of traditional sovereignty and sees the prospect of strengthening the sovereignty of the state through cooperation to realize common objectives and common interests. The culture of international cooperation, which requires a restraint on sovereignty, also implies that restraining sovereignty may be a demand of the normative salience of further justice. States may also see that a state that solidifies the foundations of global justice represents a body politic of strength and capacity and capability. In short, a commitment to justice strengthens the authority foundations of the state by strengthening the quantum of justice and self-respect of all of its citizens.

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[119] JANE E. STROMSETH, et al., CAN MIGHT MAKE RIGHTS? BUILDING THE RULE OF LAW AFTER MILITARY INTERVENTIONS 78 (Cambridge Univ. Press 2006).

[14] *See* GA Res 2625, U.N. GAOR, 25th Sess., Supp. No. 28 at 21, UN Doc A 8028 (1971).