CONFIGURATIVE JURISPRUDENCE AND CONTEMPORARY THEORIES OF JUSTICE

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 chapter, 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.[1] 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

[1] 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).

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.[2]

For many traditional positivists, there has long been a belief that law is 'objective' while morality is 'subjective.'[3] 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.[4] 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.[5] Dworkin has simply pushed this point much further than Hart would have imagined—indeed, to the point of severely undermining Hart's rules-based paradigm![6] 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

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[2] 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). We may compare Dworkin's retreat from the specificity of rules to more abstract levels of law-based communication from which decisions may be constructed according to principles that have a closer proximity to fundamental value commitments. The comparison is to judge Weeramantry's dissent in the ICJ case concerning the threat and or lawfulness of the use of nuclear weapons. The majority focused on the fact that there were no specific rules governing certain aspects of the control and regulation of nuclear weapons. Weeramantry discovers the relevant normative guidance in the six keynote principles of the U.N. Charter. Most of these principles incorporate fundamental value commitments of the world community. It is via these principles that we can juridically distill the rights of humanity to declare as unlawful in any circumstances the threat or use of nuclear weapons. In this sense, Weeramantry's approach to interpretation has some parallels to those of Dworkin.

[3] 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.

[4] 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 chapter.

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

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

(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*[7] 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 disrespect 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.[8] Holmes further determined that the practical meaning of law lies in predicting what judges do.[9] 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

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[7] *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).

[8] *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.

[9] *Id.*

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.

Holmes' celebrated essay, "The Theory of Legal Interpretation," is a good illustration of these distinctions.[10] 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."[11] It seems Holmes tried to invent an ideal "speaker of English" for the interpretation of language embodied in legal instruments.[12] 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."[13]

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….[14]

Holmes' insights into the nature of law also inspired the legal realist version of the revolt against formalism.[15] 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

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[10] Oliver Wendell Holmes, *Theory of Legal Interpretation*, 12 HARV. L. REV. 417 (1899).
[11] *Id.*
[12] *Id.*
[13] *Id.* at 418.
[14] Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L. QUARTERLY 161, 164 (1965).
[15] 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).

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.[16]

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 objectively defining the proper judicial role in a working rule of law-governed democracy.[17] The Legal Process School provided a more flexible approach to the question of "What is law?"

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[16] *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….
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> 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.

[17] *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).

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, the outlines of which have been previously discussed in this book.[18] Hart, of course, reinvented and gave new life to traditional questions like: What validates a law?[19] 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.[20] 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.[21] 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.[22]

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

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

[19] *Id.*

[20] 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).

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

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

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.

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…"[23] 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.[24] 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'[25] 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.[26] 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.

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[23] 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.

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

[25] This 'umpire' approach to judging was expressed in Chief Justice Roberts' confirmation hearings before the Senate Judiciary Committee. In his opening remarks to the confirmation hearing, the judicial nominee Roberts declared that, "Judges are like umpires. Umpires don't make the rules; they apply them." Bruce Weber, *Umpires v. Judges*, THE NEW YORK TIMES, July 12, 2009, at WK1.

[26] As a practical example of this proposition, consider the concerns expressed in the dissenting opinions of the recent U.S. Supreme Court decision permitting corporations to fund election ads. *See* Citizens United v. FEC, 130 S. Ct. 876, 929 (dissenting opinion of Justice Stevens, joined by Justice Ginsburg, Justice Breyer, and Justice Sotomayor, concurring in part and dissenting in part.)

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.[27] 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.[28] 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.[29] 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.[30] 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.

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.

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[27] *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).

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

[29] *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).

[30] 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).

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.[31]

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 productivity.

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.[32] 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.[33]

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[31] 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).

[32] *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).

[33] 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.[34] 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.[35]

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."[36] 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,

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[34] *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.

[35] *Id.*

[36] *Id.*

> 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.[37]

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 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.[38] Moreover, when appraising the distinctions between the generational types of human rights, the

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[37] *Id.* (internal citations omitted.)

[38] 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).

application of Q methodology appears to be relevant in determining the shared prioritizations, which are a function of shared subjectivities.[39]

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 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

[39] *Id.*

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.[40] 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.

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

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 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 CONTRIB UTIONS 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.[41] 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.

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

Sen's approach is influenced by this commitment to social choice theory.[42] 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.[43] 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.[44] 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 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 principal 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.

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[42] 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.

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

[44] 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.

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*.[45] 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 regarding 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.[46] 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.

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[45] *See* AMARTYA SEN, THE IDEA OF JUSTICE 169, 182, 238 (Belknap Press of Harvard Univ. Press 2009).

[46] MARTHA CRAVEN NUSSBAUM, et al., THE QUALITY OF LIFE (Clarendon Press; Oxford Univ. Press 1993).

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 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 environment. (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 judgments in instances of particular application, and developing a coherent theory and method for the clarification and procedural grounding of such values.[47]

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 policies and practices that secure real capability for functioning in an environment of real opportunity.

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[47] *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).

SEN ON THE NATURE OF HUMAN RIGHTS

Like Lasswell and McDougal, Sen has made important contributions to the conceptual basis and justification of human rights.[48] 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."[49] The attractiveness of this proposition 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,"[50] is seen by many critics to be entirely without any kind of reasoned foundation. The questions 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 equal in rights"), such evidence of objective human rights foundations became the target of Jeremy Bentham's assault on "anarchical fallacies."[51] According to Bentham, "Natural rights is simple nonsense: Natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts."[52] Bentham makes the connection between the legal fallibility of natural inalienable rights ("nonsense upon stilts") and human rights, and consigns 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

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[48] *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).
[49] *Id.* at 355.
[50] *Id.*
[51] 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).
[52] 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)).

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."[53]

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 significantly asserts that the nature of an instrument like the Universal Declaration of Human Rights is "the ethical assertion...about the critical importance of certain freedoms...and, correspondingly, about the need to accept some obligations to promote or safeguard these freedoms."[54] 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."[55] Here, Sen's approach is compatible with configurative jurisprudence, which 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

[53] AMARTYA SEN, THE IDEA OF JUSTICE 357 (Belknap Press of Harvard Univ. Press 2009).
[54] *Id.* at 358
[55] *Id.* (emphasis in original).

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 may be reduced to claims involving eight values. These are (1) respect, (2) power, (3) enlightenment, (4) well-being, (5) wealth, (6) skill, (7) affection, and (8) rectitude. Empirically, one may detect a rising specter of common demands that these 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.[56]

Professor Sen responds to the choice about human rights claims by suggesting application of what he calls "open and informed scrutiny"[57] and his method of "open impartiality"[58] 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 observer's 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 Professor Sen and Professors 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)

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[56] 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).

[57] AMARTYA SEN, THE IDEA OF JUSTICE 358 (Belknap Press of Harvard Univ. Press 2009).

[58] *Id.*

have an influence on the process of making law. For example, Sen refers 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.[59] 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*.[60] And the implications of lawmaking in informal settings influencing the grounding of human rights norms and values would, we believe, provide important additional insights for Professor Sen to consider.[61]

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.[62] 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."[63]

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

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[59] *Id.* at 363.
[60] *See generally* W. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS (Yale Univ. Press 1999).
[61] *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).
[62] AMARTYA SEN, THE IDEA OF JUSTICE 366 (Belknap Press of Harvard Univ. Press 2009).
[63] *Id.*

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.[64]

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.

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*.[65] In this article, Lasswell addressed the problem of clarifying the

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

[65] *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 & Myres 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

(footnote continued)

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.[66] 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.
>
> 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.[67]

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.

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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).

[66] 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)).

[67] 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).

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

(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.[68]

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

[68] *See* Harold D. Lasswell & Myres 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).

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, assesses 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.
>
> 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'.[69]

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

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

community or any of its component parts.[70] Additionally, a significant part of *Human Rights and World Public Order*[71] focuses on the multidimensional claims of individuals relating to "fundamental freedom of choice."[72] 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.

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 well-being, 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.[73] 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.[74]

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

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[70] *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).
[71] *See generally id.*
[72] 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).
[73] *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).
[74] AMARTYA SEN, THE IDEA OF JUSTICE 371 (Belknap Press of Harvard Univ. Press 2009) (citations omitted from original).

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 chapter. Dworkin's most recent contribution to the objectification of moral precepts in philosophical and legal 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."[75]

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."[76] 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

[75] ISAIAH BERLIN, THE HEDGEHOG AND THE FOX; AN ESSAY ON TOLSTOY'S VIEW OF HISTORY (Simon & Schuster 1953). Isaiah Berlin (1909-1997) was a Russian-British philosopher, lecturer, essayist, historian of ideas, and leading liberalist of his generation, whose belief in the incommensurate clashing of values provoked much of his endorsement of the social embrace of pluralist values. For a collection of essays testifying to the profundity and charm of Berlin's thought and expression, *see* ISAIAH BERLIN: A CELEBRATION (Edna Ulmann-Margalit & Avishai Margalit eds., Univ. of Chicago 1991).

[76] *Id.* at 1.

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, 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."[77] This distinction, which was central to the jurisprudence of H.L.A. Hart, discards the skepticism of legal realism as an '*about* law' external perspective, and insists that the internal '*of* law' perspective was essentially the boundaries of the critical discourse of legal theory. Dworkin has made a similar distinction between internal and skeptical external metaphysical discourse, which seems to parallel 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 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

[77] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 6 (Apr. 17, 2009) (unpublished manuscript, on file with the Boston University Law Review) (forthcoming 2011).

> 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.[78]

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 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.[79]

It may be that Sen's ethical objectivity and reasoned scrutiny have a parallel in Dworkin's possibly 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

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[78] *Id.* at 9.

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

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?"[80] 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 one's life should be "a successful performance rather than a wasted opportunity."[81] 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 one's life may be tested by one in terms of whether it contributes to the narrative that one consciously or subconsciously endorses for oneself.

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. 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

[80] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 8 (Apr. 17, 2009) (unpublished manuscript, on file with the Boston University Law Review) (forthcoming 2011).
[81] *Id.* at 128.

power or any other fundamental value such as wealth, respect, enlightenment, affection, health and well-being, skill and rectitude. When generalized, these values are conveniently formulated as the values that contribute to a public order of human dignity. Dworkin, as well as McDougal and Lasswell, require methods and procedures in the grounding of moral or value precepts. However, it is important to note that all three professors 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.[82] 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.[83]

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 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![84]

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[82] *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).
[83] *Id.* at 89.
[84] *Id.* at 89, 92.

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.[85]

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."[86] 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

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

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

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 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."[87] 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

[87] *Id.* at 101.

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.[88] 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).

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

[88] *Id.* at 86, 99.

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 which 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.[89] I presume that what

[89] 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

(footnote continued)

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 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

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for *conversation aimed at persuasion*." Ronald Dworkin, *Response*, 90 B.U. L. REV. 1059, 1078 (2010) (emphasis added).

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 basket case 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 justice deficits may be one of the important challenges confronting the harsh reality of globalization.[90] In other words, what exactly will be the role of the Rule of Law as an aspect of global justice? We list some of globalization's justice deficits:

- Global apartheid or global poverty (development, poverty, income distribution, economic equity, population policy, etc.);
- Global public health crisis (e.g., Aids);
- Emerging markets (and the trend toward corruption and fragmentation);
- Proliferation and threat of nuclear arsenals and other weapons of mass destruction;

[90] 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).

- The global war system (arms race, armed conflict, ethnic conflict, etc.);
- Disparity in basic human rights (the epidemic of gross abuse of human rights and human atrocity);
- Global constitutional crises;
- The crisis of the rule of law (failed states, corrupt states, drug controlled states, terrorists states, garrison states, authoritarian states, totalitarian states);[91]
- 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 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."[92]

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 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.[93] Indeed, assertions of

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[91] 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).

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

[93] 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:

(footnote continued)

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.

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.

The reality of the deficits of globalization confronts humanity with a global public policy challenge of how to minimize injustice, 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 and universal human well-being.

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 progressive global change. 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 a morality of universal human dignity. Therefore, modern scholarship clarifying the scope, content, and justification of the idea of justice 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

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> obsolete before it actually came into force. As one who was at San Francisco, I can say with confidence that if the delegates 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).

of values to enhance human dignity is indeed a complex matter.[94] At an abstract philosophic level, these values may indeed seem to be incommensurable.[95] The incommensurability of fundamental values was a cardinal perspective of Sir Isaiah Berlin's 'Fox' perspective (Berlin being the author from whom Dworkin borrows the 'Hedgehog' title). In context of actually grounding value preferences, 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.[96] 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 genuinely enhance the universal moral of human dignity. I provide a practical illustration: In South Africa, the Constitutional Court 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. The party claimed the reconciliation statute was both unconstitutional and a violation of international law.[97] 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

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[94] 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).

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

[96] *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.

[97] *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).

not provide derogable excuses for heinous crimes against humanity. In this case, the Court upheld the constitutionality of the statute and integrated the ostensibly conflicting international values by giving rational priority to the critical importance of a peace settlement, which would lead to a rule of law, human right sensitive, democratic dispensation.[98]

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 morality 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 morality 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.[99] 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 morality 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. A profoundly remarkably illustration of the successful deployment of intellectual tools for the advancement of human dignity is found in the legality of nuclear weapons case, the dissenting judgement of J. Weeramantry. Weeramantry found that he could derive principles from which rights could be articulate from the keynote values of the U.N. Charter. This was a bold interpretive step in the highest traditional organ of the international community.

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[98] *Id.*

[99] *See* Legality of Nuclear Weapons, 1996 LC.J. at 443 (Weeramantry, J., dissenting).

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. Influenced by the Weeramantry construction given to the values in the U.N. Charter for the purpose of specific prescription and application, I develop those themes in this section.

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."[100] 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.

The Charter's second key precept embraces the high purpose of saving succeeding generations from the scourge of war.[101] 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."[102] 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.

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[100] U.N. Charter pmbl.
[101] *See id.*
[102] *Id.*

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."[103] 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. It is not too charitable a reading into Sen, Dworkin, McDougal and Lasswell, and Rawls that their ideas of justice require progressive change consistent with the sixth keynote principle.

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."[104] 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 in civilization….The first requisite of civilization, therefore, is that of justice.—That is, the assurance that law once made will not be

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[103] *Id.*

[104] 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.

> 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.[105]

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.' Sen's capability and opportunity freedoms are absolutely essential conditions of justice in these minimal terms. Additionally, Dworkin's ethical principles, which culminate in his moral principle of self-respect and authenticity, similarly require for minimal fulfillment these minimum conditions of social organization.

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

[105] SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 42 (W.W. Norton and Company 1961).

personal goals to be that fits with and justifies our sense of what obligations and duties and responsibilities we have to others."[106] 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."[107] 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 the views of Sen, Dworkin, and McDougal and Lasswell 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. In this sense, these contemporary theories of justice—viewed globally—provide a stimulus as well as essential normative guidance for the challenges of progressive global change.

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 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. It is therefore apparent that the Rule of Law concept is an indispensible component of contemporary theories of justice as well as a critical component of a global system of human dignity.

The Rule of Law concept 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, and 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

[106] RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 122 (Apr. 17, 2009) (unpublished manuscript, on file with the Boston University Law Review) (forthcoming 2011).
[107] *Id.* at 128.

terms of the moral 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.[108]

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 U.N. 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

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[108] 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).

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, 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. The contemporary discourse about justice is effectually a demand that the unlimited powers of the state be restrained and that the collective powers of the community at all levels—local or global—assume a responsibility for the defense and promotion of a public order of human dignity.

MORALITY, VALUES, AND PERSONAL COMMITMENT: THE POSTULATION PROBLEM

In addressing the issue of postulating the idea of human dignity as a guide to inquiry, we should note at the beginning that the concept of postulation is generally used in two senses. First, postulation may be used in the sense that it is self-justifying postulation. Second, it may be used in the sense that it is a completely arbitrary statement. Moral philosophers generally frown on the latter use of the concept. We have seen from Chapter 13 that the configurative use of postulation comes close to the self-justifying analysis of Professor Dworkin. It may, therefore, not be necessary to discuss the currency of postulation as used in configurative legal theory. Nevertheless, even if it may be that self-justification is insufficiently compelling, I argue in this chapter that the configurative use of postulation—if it is arbitrary—is arbitrary in an extremely 'weak' and inconsequential sense. In this chapter, I address these issues.

Configurative jurisprudence is sometimes described as 'normative jurisprudence.'[1] This is due to its insistence that jurisprudence cannot be value free, and more specifically, its explicit commitment to the postulation of human dignity as the proper guide to inquiry about law. However, the clarification and postulation of the goals of public order of human dignity are only part of the intellectual structure and process of policy thinking. Indeed, it has long been insisted that the focus on decision making must secure a balanced emphasis between perspectives and operations. Perspectives about the values of human dignity are a central component of this emphasis.[2]

In configurative jurisprudence, there are five intellectual tasks which are used to inquire into the nature of law. The intellectual tasks represent the tools critical for a

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[1] A configurative jurisprudential approach requires one to perform intellectual tasks. Such tasks include goal clarification, trend projection, value identification and prescribing policy. For example, through analyzing the situation confronting her, including the relevant case and statutory law and the 'tenor of the times', the lawyer can ascertain what course of action is likely to be successful. She can project the trend of the law's development based on case and statutory evolution. She must be sensitive to the underlying values of the 'law' to best explain what the law means and why. On that basis, the lawyer is better positioned to predict and prescribe the best policy for the client, e.g., whether to litigate or settle or try something else. Professors Myers McDougal, Harold Lasswell and W. Michael Reisman (of Yale Law School) developed the configurative approach to jurisprudence over a number of years. *See, e.g.,*
Harold D. Lasswell & Myres S. McDougal, *Particular Value-Institution Processes, in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 375, 549-52 (New Haven Press 1992).

[2] Myres S. McDougal, et al., *Theories About International Law: Prologue to a Configurative Jurisprudence, in* INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE [pc] (MYRES S. MCDOUGAL & W. MICHAEL REISMAN eds., 1981).

jurisprudential theory for inquiry about law. One of the important intellectual tasks involves the question of goal clarification and the techniques that are to be deployed in advancing this task. Goal clarification essentially means clarification of values and, importantly, the postulation of an overriding master value for guiding inquiry. Essentially this task is necessary because of the core jurisprudential assumption that the configurative approach makes about the nature of law. In this approach, law is a process of authoritative and controlling decision making whereby members of the community seek to both clarify and implement the common interest. The critical question here is—How does one clarify the common interest and what precisely is the connection between common interest and values?

In essence, law (in the form of decision) is a response to problems. Problems are about conflicting claims for values. Thus, value conflicts represent the critical challenge for decision. Defensible decision making are choices about values that approximate the ideal of a common interest. This of course means that there is a critical intellectual task of clarifying the common interest in terms of the conflicts about values which require legal responses. Doubtless, advocates asserting value based claims will seek to justify these claims by arguing that their claims are ones that should be honored because they represent the common interest. We are thus confronted with the task of clarifying and specifying what the common interest is in order to vindicate it in the context of actual practice. In engaging with this task, the inquirer effectively seeks a preferred value orientation that might guide choices about value conflicts. The inquirer is invariably led to the domain of discourse about the most important and preferred fundamental value commitments in the community. The basis fundamental value commitments are what moral philosophers tend to call the basic moral standards of a community. The preferred status therefore of a fundamental value commitment or the moral order of a community requires a further criterion to assure its status as a morally preferred or preemptory principle of justice. Thus, law challenges moral philosophy in terms of the need to specify and justify the preferred fundamental value or moral commitments in the community. This discourse will represent the ideals of justice as a morally preferred perspective. Producing a morally preferred perspective represents a broad and socially responsible intellectual task. There may be narrower versions of this task. In any case, such a clarification is also important for a theory for inquiry.

The social scientist Gunnar Myrdal[3] stressed the importance of the moral or value 'ideal' in social scientific research.[4] According to Myrdal, the 'ideal'

[3] Gunnar Myrdal (1898-1987) was a Swedish Nobel Laureate economist, sociologist, and politician. In the United States, Myrdal is best known for his study on race relations, *An American Dilemma: The Negro Problem and Modern Democracy* (1944), which was influential in the 1954 landmark U.S. Supreme Court decision *Brown v. the Board of Education*. In 1974, Myrdal received the Nobel Memorial Prize in Economic Sciences with Friedrich Hayek, for their pioneering work in the theory of money and economic fluctuations and for their penetrating analysis of the interdependence of economic, social and institutional phenomena.

[4] *See* GUNNAR MYRDAL, AN INTERNATIONAL ECONOMY: PROBLEMS AND PROSPECTS x-xl (Greenwood Press 1978) (1956). A sophisticated overview of the importance of values to social-

(footnote continued)

represented a set of defined value premises.[5] Its salience lay in the fact that it provided "a fixed view point from which social reality can be studied."[6] It is my contention that McDougal and Lasswell's use of postulation as representing the common interest aspiration of law which is found in the postulate of a public order of human dignity is designed to provide a fixed view point from which social and legal reality may be studied. According to Myrdal, "the ideal works through peoples' evaluations and their political attitudes. Whether we can hope for a gradual attainment of the ideal, and with what speed and to what degree depends on great measure on how strongly entrenched the ideal becomes in this sphere of human evaluations."[7]

Myrdal also provided a compelling justification for the salience of postulating ideal valuations as a guide to social scientific inquiry, which (I submit) is also valid for legal inquiry. According to Myrdal,

> [i]t has been a misguided endeavor in social science for little more than a century to make "objective" our main value load of concepts by giving them a "purely scientific" definition, supposedly free from any association with political valuations. To isolate them from such association new and innocent synonyms were often invented and substituted, on logical grounds these attempts were doomed to failure. The load of valuations was not there without a purpose or function, and they soon pierced through the strained "purely scientific" definitions and even crept back into the specially fabricated synonyms.[8]

Myrdal concluded that there was no way of studying social reality other than "from the viewpoint of human ideals."[9] As Myrdal explains, "a disinterested social science has never existed and for logical reasons cannot exist. The value connotation of our main concepts represents our interests in a matter, gives direction to our thoughts and significance to our inferences. It poses the questions without which there are not answers."[10] To McDougal and Lasswell, social process is infected with the contestation for values. Law is a response to this contestation. Hence, value ideals guide research and inquiry into the domain of both the rigor and relevance. Central to the approach of Myrdal and McDougal is the idea that values can only be clarified initially by taking into account what people desire, claim, or want. The question of whether a postulated ideal is an appropriate technique for guiding inquiry is what this chapter addresses.

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scientific inquiry is presented in Chapter 43 of ABRAHAM KAPLAN, THE CONDUCT OF INQUIRY 370-84 (1964). It should be noted that, on the question of objectivity and values, Kaplan is in essential agreement with the view of Myrdal (quoted above). *See id.* at 387.

[5] *See* GUNNAR MYRDAL, AN INTERNATIONAL ECONOMY: PROBLEMS AND PROSPECTS ix (Greenwood Press 1978) (1956).

[6] *Id*.

[7] *Id*.

[8] *Id.* at 336.

[9] *Id*.

[10] *Id.*

It is also suggested that the normative label may mask the operative emphasis of configurative jurisprudence that underscores the relevance of power. Configurative jurisprudence has a normative component as well as an efficacy dimension that deals with control—that is to say, effective power. It also has an authority component rooted in the expectations of community members themselves. In this section, I focus on the theoretical problems of fundamental value commitments of the scholar and the theoretical and practical complexity this poses for theory.

In styling configurative jurisprudence a jurisprudence of human dignity,[11] other elements of this frame have been submerged by the very overt challenge to the theory and practice of law, viz., that law is or should be an instrument for defending and promoting the dignity of our species on an all-inclusive, worldwide basis. The directness of the phrase 'human dignity,' as well as the commitment to a jurisprudence of global reach, have attracted the attention of critics who doubtless believe that this is the Achilles heel in the configurative approach.

In short, there is skepticism about a legal science of human dignity. First, the obvious and powerful methodological objection to a jurisprudence of human dignity is that jurisprudence cannot be a science specifying the law as it 'is' and concurrently specify law as it 'ought' to be. Second, even if we seek to have a procedure that rationally connects law to value, where do these values come from? Whose values are they? How are they validated or objectively justified? Third, since the sense that the term *value* is used in configurative jurisprudence is in part descriptive of value processes in society, the meaning given to values is partly causal. This can be confusing because conventional discourse designates values as 'ought' propositions, not as descriptive 'is' statements. However, in configurative jurisprudence values are causal in the sense that peoples' perspectives are a social fact.[12] Human interaction is infected with value-conditioned perspectives of identity, demand, and expectation. This is empirically verifiable.

Values are, however, normative in the sense that social participants and observers make evaluative preferred propositions about them. Thus, to stress the causal dimension of value-conditioned behaviors, which infect all decision processes, the empirically verifiable proposition would be—What is the nature of the public order in terms of the actual production, distribution, consumption and generation of values? The normative proposition would be: The preferred public order system is one that promotes and defends a public order that secures the widest and most productive outcomes for the shaping and sharing of all desired values, viz., a public order of human dignity. Values are peoples' preferences—an observable

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[11] Frederick Samson Tipson, *The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity*, 14 VA. J. INT'L L. 535, 536 (1974).

[12] *See* LONGZHI CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 65 (Yale Univ. Press 1989) ("New Haven School" undoubtedly refers to the paradigm Lasswell and McDougal developed during their association with the Yale Law School in New Haven, Connecticut).

datum. Values are vindicated through institutions—also an observable datum. Values are additionally secured by using bases of power, authority, and other values and institutions. Institutions are patterns of practices specialized to securing or enhancing the production and distribution of values. Thus, power is specialized to governance, affect to families, wealth to business associations, etc.; and these power distribution patterns are also observable. In this sense, a value scheme is descriptive; acknowledging that human behaviors are infected with values as well as conflicts about participation, shaping, and sharing, and indeed even conflicts about the values that ought to condition observation itself.

The key theoretical problem here is that the observer is part of the very event process that is observed, raising important questions about the observers' values and how these values influence what is observed and given juridical meaning. Additionally, the observer is not without some sense of identity, however, inchoate this may be to the awareness of the self. In other words, the observer comes to observation, not as a *tabula rasa*, but as a person with reason and emotion, with cognitive skill and intuitive capacities, with unconscious predispositions as well as self-conscious commitments and professional training. In short, the observer holds perspectives of identity, demand, and expectation, which perspectives must be accounted for in developing a scientific approach for observation.

A scientific observer, if professionally trained in the culture of scientific detachment, will nonetheless realize that detachment does not absolve the observer of scientific integrity, moral sensitivity, or civic responsibility for the products of scientific observation, experimentation, and more. This means that observation cannot avoid the twin problems of both detachment and responsibility (for values). Value preferences are a component of the self of an observer who, if true to a scientific integrity, must concurrently call for detachment and responsibility. After all, scientific observation informs enlightenment. People act on information, data, and intelligence in law and other decision-making contexts. This may lead to practical consequences about whose values are preferred and whose are disparaged on the ground. Even the most insensitive of observers are, as an existential matter, stuck with a choice about values.

Apart from the importance of a self-conscious awareness of the value predispositions *of* the observer *for* the observer, it has been long recognized that value clarification and specification are critical guides to the scientific study of human and social phenomena. Indeed, Myrdal has noted that, in economics, there are terms and phrases that appear to be ostensibly value neutral, but which are in fact value loaded. However, the scientists in this field who avoid these terms do so without a clear recognition that they are, in fact, subconsciously guided by value presuppositions, which they (of course) deny. Denial, here, is part of a culture that insists upon a fictitious objectivity. According to Myrdal,

> It has been a misguided endeavor in social science for a little more than a century to seek to make "objective" our main value-loaded concepts by giving them a "purely scientific" definition, supposedly free from any association with

> political valuations. To isolate them from such association, new and innocent-looking synonyms were often invented and substituted. On logical grounds, these attempts were doomed to failure. The load of valuations was not there without a purpose and a function, and they soon pierced through the strained "purely scientific" definitions and even crept back into the specially fabricated synonyms.[13]

It is in this sense that the jurisprudence of inquiry, inquiry does not purge itself of value premises, which may implicitly guide it anyway. There is no effective way for the study of the nature of law, without understanding the importance of ideals embedded in the idea of 'law.' Similarly (according to Mydal), there is no way of studying social reality other than from the viewpoint of human ideals. There is no such thing as a 'disinterested' jurisprudence. Such a form of legal theory has never existed, and, indeed *cannot* exist. Indeed, Myrdal maintains that, "a disinterested social science has never existed and, for logical reasons cannot exist."[14] The value implications of our organizing concepts and ideas represent our interest in these issues, and direct our thoughts, speculations, and observations in a direction that gives significance for our inferences and conjectures.

According to Myrdal, "the recognition that our very concepts are value loaded implies that they cannot be defined except in terms of political valuations. It is, indeed, on account of scientific stringency that these valuations should be made explicit."[15] He continues: "They represent value premises for scientific analysis; contrary to widely held opinions, not only the practical conclusions from scientific analysis but the analysis itself depends necessarily on value premises."[16] These insights from Professor Myrdal fully support the technique of the configurative jurisprudence in making explicit by postulation the fundamental value premises that are to guide inquiry into law.

In agreement with the configurative approach, the critical question of how value premises are chosen is important. Myrdal believes that the choice must not be arbitrary. In the configurative approach, it has been alleged that the choice of a preference for human dignity on a wider scale is an arbitrary postulate.[17] I address this concern in the latter part of this chapter. However, it is worthy of note that both Myrdal and McDougal and Lasswell see as the starting point of analysis a focus on the values that people desire. In this sense, values used to guide research are not arbitrary, in the sense that they reflect the shared subjectivities, which include perspectives regarding the values that people desire or want. This focus, of course, adds a level of subjectivity to the framework of legal analysis. However, according to Myrdal,

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[13] GUNNAR MYRDAL, AN INTERNATIONAL ECONOMY: PROBLEMS AND PROSPECTS 336 (Greenwood Press 1978) (1956).
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *See* Myres S. McDougal, et al., *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

> A value premise should not be chosen arbitrarily: it must be relevant and significant in relation to the society in which we live. It can, therefore, only be ascertained by an examination of what people actually desire. People's desires are to some extent regularly founded on erroneous beliefs about facts and causal relations. To that extent a corrected value premise—corresponding to what people would desire if their knowledge about the world around them were more perfect—can be construed and has relevance.[18]

The configurative approach is partly guided by the ability to 'map' demand and desires in terms of empirically determined value premises. It is a core jurisprudential responsibility to identify problems as value demands or claims as the initial step in bringing decision-making interventions regarding the appropriate allocation of values. This approach has similarities to the approach of Myrdal, in the context of economic analysis. Consider Myrdal's description:

> The proper method to proceed, instead, would be to seek the foundation for the analysis in an empirical study of people's opinions on the matter under investigation. We should map the field of interests and ideals as they exist and should confront these volitional forces with each other and with all other facts of the political, social, and economic situation of the world. I believe that the future of practical social science lies in seeking this foundation of a very much modernized political science, making full use of empirical sociology and social psychology.[19]

Commenting on the postulation of the goal values of human dignity, Myrdal explains that:

> The first step, as we have repeatedly indicated, is commitment to an inclusive map of values. The fundamental choice is in terms of human impact. Should policy aim at the realization of human dignity or indignity? Our recommended postulate of human dignity is much easier to accept and to explicate today than ever before. The contemporary image of man as capable of respecting himself and others, and of constructively participating in the shaping and sharing of all human dignity values, is the culmination of many different trends in thought, secular as well as religious, with origins extending far back into antiquity and coming down through the centuries with vast cultural and geographic reach. The postulate of human dignity can no longer be regarded as the eccentric doctrine of lonely philosophers and peculiar sects. This postulate, as we have defined it in terms of demands for the greater production and wider sharing of all values and a preference for persuasion over coercion, has been incorporated, as our study of constitutive process demonstrates, with many varying degrees of completeness and precision into a great cluster of global prescriptions, both conventional and customary, and into the constitutional and legislative codes of many different national communities. The prescriptions in this huge contemporary authoritative postulation are of course formulated at many different levels of abstraction and employ many different complementarities of meaning, both explicit and implicit. The opportunity

[18] *Id.*
[19] *Id.* at 337.

> is, however, open to responsible decision makers to clarify and apply prescriptions that give expression to the rising common demands of peoples throughout the globe.[20]

The configurative approach takes it as self-evident that the observer's sense of the self (if the person is capable of rational discernment) would predispose the observer to a value framework that secures the observer's dignity as a human being. This means that some kind of choice or commitment at least for the self must be made about values. The choice could be for empowerment or powerlessness, for affection over hatred, for incompetence over skill, for sickness over well-being, for immorality over rectitude, for discrimination and repression over respect, for poverty over wealth, for ignorance over enlightenment, and so on. Here they see the choice about values as seemingly self-evident. The self-conscious self would choose a value frame that optimizes her human dignity. Since that kind of choice is self-evident, it is in effect self-justifying. Dworkin, for example, grounds the notion of human dignity in the concepts of respect and authenticity.[21] The concept of self-respect that one accepts as a matter of importance—that one's life is a successful performance rather than a "wasted opportunity"—seems to throw light on the observer's serious self-appraisal of the idea that the commitment to human dignity avoids the disappointment of a "wasted opportunity."[22] Thus, the first step of configurative jurisprudence seems to find support in Dworkin's analysis.

The next step the observer must undertake is however a substantial one. If a value-scheme that seeks to reproduce individual human dignity is a recommended commitment for the self, is it not the case that all non-self others are entitled to a similar entitlement or aspirational entitlement? Perhaps in the view of some, this is still self-evident, meaning it is self-justifying, but it is surely philosophically problematic.

To pursue this line of reasoning, an outline of the basic features of moral analysis may help to clarify the problem and the adequacy of the configurative response to it. Here, Dworkin's analysis appears to provide support for the configurative commitment to human dignity. The ethical principle of being "authentic" and committed to self respect—in order that life not be a "wasted opportunity"—suggests ineluctably a vital moral principle, namely that "a person can achieve the dignity and self-respect that are indispensible to a successful life only if he shows respect for humanity itself in all its forms."[23] The objective importance of the observer's (and social participant's) life leads that participant to recognize the importance of other people's lives as requiring the same status of

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[20] MYRES S. MCDOUGAL, et al., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 376-78 (Yale Univ. Press 1980) (citations omitted).
[21] The approach has an affinity to that described in RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (Apr. 17, 2009) (unpublished manuscript, on file with the Boston University Law Review) (forthcoming 2011) at 28.
[22] *Id.*
[23] *Id.* 15.

respect and dignity. In this sense, "you see the objective importance of your life mirrored in the objective importance of everyone else's."[24] Additionally, the principle of "authenticity" requires the social participant and observer to be ethically responsible and to exhibit "ethical independence."[25] Thus, we may conclude that the commitment to universal human dignity is part of the construction of the coherent narrative including both observer and social participant, which narrative both the observer and participant has chosen and endorsed. In Dworkin's view, the observer or social participant who lives 'authentically' is also in the business of constructing a life and in the business of creating an identity.[26] This approach, in general, is consistent with the idea that the observer not only identifies with the values of human dignity but also that those values become an intrinsic part of the self and part of the construction of the narrative of the self. To the extent that there is implicit (in the idea of postulation in configurative jurisprudence) the explanation and justification amplified in Dworkin's theory, it may be suggested that the justification for the human dignity postulate in configurative jurisprudence also meets the standards of objective justification of conventional moral philosophy.

As suggested, one of the most controverted issues of modern jurisprudence is the relationship between the 'is' (science) and the 'ought' (values, moral order). In somewhat simplified form, the boundaries of this debate have distilled two dominant views: First, there is the natural law-inspired view, which holds that law is critically informed by moral order. Law without a moral element cannot have the character of the 'legal.' Second, law and morality are entirely distinct phenomena; and efforts to secure necessary and sufficient interrelations breeds confusion or worse. Although, in a flexible sense, the term *morality* is sometimes seen as coextensive with the term value, their similarity seems to rest more on their mutual 'ought' implications.

In classical positivism, a legal proposition is true or false according to its congruence with a criterion that secures the validation of a precept in search of its pedigree. Thus in Austin's scheme the criterion of validation is the sovereign.[27] In Kelsen's scheme it is the *Grundnorm*.[28] In Hart's scheme, it is the rule of

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[24] *Id.* at 164.
[25] *Id.* at 132-33.
[26] *Id.* at 113.
[27] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED; AND, THE USES OF THE STUDY OF JURISPRUDENCE 11 (Noonday Press 1954) (1832).
[28] *See* HANS KELSEN, PURE THEORY OF LAW (Univ. of California Press 1967). Kelsen calls his version of the fundamental law a "*Grundnorm*" ("basic norm"). *See* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115 (Russell & Russell 1961). A 'basic norm' is a norm which authorizes the creation of other norms. Because this *Grundnorm* is what empowers the government to make other norms, including the Constitution, it must have a source outside of the government. *Id.* Thus, in order for a legal system to operate, the *Grundnorm* must be presupposed; and the *Grundnorm*'s authority rests on the general acceptance of the citizens. HANS KELSEN, PURE THEORY OF LAW 217-19 (Univ. of California Press 1967).

recognition.[29] A moral proposition is not validated by the test of its formal pedigree. It is validated, so to speak, by the discourse of justification.

Justification means advancing reasons (external to the statement maker) that justify the status of a moral norm in social order. Again, there are two dominant perspectives about moral discourse. First, there is the search for the content and process of moral codes. Here moral discourse is exacting since the implicit criterion of a moral 'ought' is its universality. In the view of some, universals cannot be meaningfully stated. In the view of others, morality is radically reduced to something like the core minimal needs that make human existence possible: moral minima. The second view regards morality as essentially a discourse about some of the most difficult if not intractable problems of the being and becoming of humanity. I randomly list twenty of such issues, as follows:

- The lawfulness of homosexual behaviors?
- The lawfulness of prostitution?
- The lawfulness of sex out of wedlock?
- The lawfulness of abortion?
- The lawfulness of incest?
- The lawfulness of suicide?
- The punishment of the insane?
- Capital punishment?
- Euthanasia?
- Drug use?
- Alcohol use?
- The right to die?
- War?
- Nuclear war?
- Pollution?
- Prejudice?
- Affirmative action?
- Taxation?
- Discrimination and cultural dominance?
- Three people are marooned in a lifeboat capable of supporting two—who drowns and why?

At the back of the debate about anecdotal but serious problems, and the nature of moral order, is the search for reasons other than the divine (or the trans-empirical) for the justification of the moral ought. Effectually, this means that one seeks to secure an objective moral order as an important part of rational discourse. This in turn means an objective sense of justice garnered through rigorous analysis and careful attention to logical syntactical methods of exposition. Whether we can create a universe of objective ought propositions that meet the test of external justification

[29] *See* H.L.A. HART, THE CONCEPT OF LAW 79 (1962).

will remain an important task of moral philosophy and certain schools of jurisprudence.

The classical concern with objective 'ought' propositions lies in both the uses and abuse of their ideological derivatives. Thus, many totalitarian ideologies have embraced a pseudo scientific aura of objectivity to support Fascism or Marxism. It was perhaps for this reason that Lasswell described the political personality in terms of private motives (the subjective) displaced on public objects (external) and rationalized in the public interest (objective ought). True to this pragmatic inspiration, Lasswell's ideas here are skeptical of great ideological/moral systems. 'Oughts,' morals, ideas, and ideals are products of human experience and have in the end an indeterminate quality. An inquiring system that opens the entire process of conceptualization to the lessons and insights of experience—even if given normative guidance by critical postulations—does not ultimately settle ultimate questions.

As earlier suggested, configurative jurisprudence makes the distinction between 'ought' propositions and statements of volitional preference about values. This latter statement makes values causal. Human beings exhibit behaviors in society that are infected with value-demands. The choice about fundamental value commitments is what would loosely be designated in statements about the 'moral' or 'immoral' aspects of value deprivations or indulgences. The choice about these value commitments is not expressed as an exercise apart from the human agents who express them. They are not objective statements about preferred value outcomes; instead, they are subjective statements for which the statement-maker must assume responsibility. The fundamental value commitments that Lasswell and McDougal recommend are the ones they are personally committed to: the public order of human dignity. This commitment is recommended to others.

The technique of postulation reveals the basis of any commitment to public order of human dignity. It may be asked at a superficial level—By what process does the statement-maker choose to prioritize a particular commitment over other kinds of possible commitments as the postulated preferences? The answer could be that the commitment is arbitrary, or self-evident, or justifiable by still other reasons. If postulation is arbitrary, it confronts two problems as a technique of value clarification and guidance (normative) in a problem-solving decision-making context. First, if the purpose of inquiry is to improve the prospect of rational interventions, rather than to base one's initial value postulations on an arbitrary technique of clarification (postulation), it appears to have a kind of inelegant inconsistency. Reason and arbitrariness are not compatible ideas. Second, if the postulate is arbitrary, it runs against the grain of the vast terrain of modern moral philosophy, which remains a quest for an objective, not subjective, moral order.

POSTULATION AND JUSTIF ICATION IN CONF IGURATIVE JURISP RUDENCE

As modern literary critics suggest, one cannot separate the critic from what is being critically examined, nor the interpreter from the text, nor (in more poetic terms) can we totally separate the dancer from the dance. So, too, in configurative jurisprudence we cannot separate the observer completely from the what, how, and why of observation. This suggests that the scientific observer of legal or other phenomena is not a person apart from the grist of socially and legally important observation. If we accept as an empirical datum the idea that all participants in social process hold perspectives of identity, demand, and expectation (who they are, what they want, what they might reasonably anticipate), it will be readily appreciated that no observer of anything is bereft of these subjectivities (perspectives). Since both these perspectives have normative implications it is important for the observer to know what they are and to explicitly self-appraise them.

This kind of perspective effectually builds on another philosophic tradition—namely, existential philosophy. Values and moral experience are in this tradition a product of the very human 'existences'. In short, moral order and value commitments are products of human choice in social process and include the weaknesses, frailties, strengths, imperfections, and genuine insights of human choice. The moral order (or, more precisely, value preferences) we promote and defend ultimately come from us. We are responsible for them and we must take responsibility for them, however, awesome the idea of responsibility for human moral order, values, ideals, and justice may appear.

The central issue of values and personal integrity lies not in the choice of preferred values or public order systems as such. Indeed, this goes on all the time. The issue of integrity reposes in being explicit about the commitment. By being explicit, the ostensibly arbitrary value assumptions of the statement-maker are weakened since they are subject to the further 'process values' of:

- being transparent;
- making the statement maker accountable or responsible for those value commitments;
- encouraging and permitting other commitments to be put on the table of enlightenment discourse, as well as policy-making processes; and
- facilitating critical scrutiny of the postulation itself, which is a part of the culture and discourse about fundamental values and morality in social organization.

If postulation is 'arbitrary' in this sense, it is also informed by the principle of existential necessity. That is to say, we postulate about basic values all the time, but we pretend that the preferences are not value-laden, or pretend that the ideologies we promote are objective truths or we believe that we have a discrete hotline to the almighty. In other words, our personal subjective values are often displaced on public objects and then elaborately rationalized in the public interest. As the famous Yale televangelist, Pat Robinson might tell you, it is easy to sell values and beliefs if their basis is allegedly independent of self-seeking human agency! I thus conclude that postulation (when put in to the context of an existential perspective) means that, if it is 'arbitrary,' it must be 'arbitrary' in a very weak sense.

HOW WEAK IS THE ARBI TRARY HUMAN DIGNITY POSTULATE?

To identify with the human dignity and equal respect of the self may be viewed as self-evident. It may thus be viewed as self-justifying. In this sense, there would be no traditional problem with such a commitment since justification serves the function of either objective validation or what is effectually subjective validation supported by the self-evident element of reasonableness or rationality. The next step requires the statement maker to take personal responsibility for a commitment relating to a self-evident statement about human dignity and the reach of self-identification, expanded to all members of the human community. This is not, in my view, entirely self-evident; and some further reasons must be adduced to support the commitment of responsibility for all non-self others. (Dworkin's ethical and moral analysis is of value here.)

Configurative jurisprudence holds that the value of human dignity as a goal or objective or jurisprudence as an inquiring system should be postulated for both the self and all non-self others. It is in effect a guidance device for directing goal-guided advocacy and decision making. It responds with clarity to the implicit question: goals for what? Configurative jurisprudence answers as follows: for advancing the cause of human rights, for defending and promoting processes and goals of a public order whose prime purpose is the condition of freedom, democracy, and equality—in short, human dignity. This conclusion should also be considered in the light of Dworkin's ideas of self-respect and authenticity.

Because the human dignity postulate is derived from a proposition concerning the self's identity with the self in terms of the self's demand or claim for self-respect, authenticity, and dignity, the postulate that there is personal responsibility for such a commitment for all non-self others may hold an objection that postulation is arbitrary, although we see it in a weak or negligible sense. There certainly is an important concern about a framework of inquiry that seeks to maximize reason and rationality in law and public order, studies, and practice, if that framework makes the linchpin of the approach stand or fall on an arbitrary postulate. Such a framework would certainly be questioned in conventional academic circles.

In fact, Lasswell and McDougal have insisted upon postulation as an explicit (and, therefore, clearer) starting point of inquiry, suggesting that in a sense all systems of inquiry have starting points that at the minimum do not meet Popper-like standards of objectivity. Moreover, it may be suggested that an explicit postulation is: (i) better than an implicit one; (ii) better than the claim that denies any value influenced point to an inquiring system; (iii) better because explicit postulation provides us a working proposition which is tied to the authenticity, self-respect, as well as the professional and civic responsibility of the statement-maker; and (iv) better because if implicit postulation is inevitable, it is less arbitrary to make explicit what one's working postulation actually is and by implication invite others to make explicit their unarticulated preferences for themselves and for the larger community. These views have been earlier indicated and suggest at the minimum, postulation as incorporating an arbitrary element is not used in a strong sense.

Having suggested the benefits of postulation for an inquiring system, I would continue to argue that the sense of postulation used in configurative jurisprudence contains implicit efforts at justification—suggesting that, if it is arbitrary, it is in a very weak sense with which it is used, and is further softened. Indeed, Lasswell suggested in an earlier piece that taking these kinds of factors into account that the "the value commitments of the individual need not be arbitrary."[30] This is acceptable for the self, but what about the self's commitment to the rest of us? This as earlier suggested is indeed a more serious question—one which may have been effectively answered by Dworkin.

In my view, Lasswell and McDougal (in actual reference to the above stated commitment) used postulation in a very weak sense. A strong, absolutist sense of the arbitrary would not acknowledge the idea of 'progress'—that is to say, the insistent demand for freedom over tyranny, democracy over absolutism, or the great revolutionary movements of the nineteenth and twentieth century, which demands derive their energy from the intense value of liberty. Moreover, a strong sense of the arbitrary fails to encompass the ethical and moral equivalents indicated in natural law, and allied theological or religious traditions—the strong beliefs in most major religious systems wherein some form of the respect of the person is acknowledged. This smacks of justification, even if it is only incidentally acknowledged that the postulated preference coincides fortuitously with these perspectives about the being and becoming of humanity. Let us concede the coincidental component of the relation between the 'postulate' of human dignity and its coincidence with political, ideological, legal, and theological views on the dignity of humanity as a preferred value. Even given this relation, it may still be maintained that Lasswell and McDougal are using postulation in a weak and qualified sense because, however, coincidentally, they do recognize a convergence of perspectives from different inquiring and contemplative systems; and they see in the International Law Bill of Rights an explicit convergence of international law and the human dignity precept that they 'arbitrarily postulate'. As McDougal and Lasswell present it, human

[30] Harold D. Lasswell (1968: 182).

dignity (as a precept) is clearly indicated in the International Bill of Rights. From their practical point of view, the concern about the philosophical basis of the human dignity precept is more pedantic than practical. Still, other values remain in the endeavor of more firmly establishing the nature of postulation that is used in configurative jurisprudence.

As earlier suggested, theorists sometimes use postulation in a not very strong sense or in a very weak sense. This seems to be deliberate, for it permits an element of arbitrariness (used in a correspondingly weak sense) to emphasize the commitment of the scholar, viz., that the scholar holds some responsibility for the defense and promotion of values essential to human freedom and justice. This responsibility is consistent with the ideas of self-respect, authenticity, and the idea that one's life should not be a 'wasted opportunity' but rather a 'constructive narrative.' However, some coincidental justification is preferred as a matter of clarity, methodological convenience, and coherence, as well as indicating a convergence of perspectives. That is to say, the scholar, however detached, should not pretend the scholar's in a value-free vacuum. This is not to say that the scholar is bound by value preferences that are observable. Rather, some of these preferences coincide with the preferences of the scholars' postulate. This means that McDougal and Lasswell clearly use postulation mainly in a weak sense, and therefore use the notion of arbitrariness in weak sense as well. Coincidental justification is presented to suggest ambiguously that the scholar's choice is not 'off the wall,' but commitment does not stand or fall on this addendum as such.

The weak sense of explicit postulation may be more realistically seen in the light of the clarification, specification, and grounding of value judgment as a working hypothesis that permits other critical tasks of defending and promoting the freedom and dignity of humanity though law be expeditiously and seriously undertaken. I suspect, because configurative jurisprudence postulates in relatively weak sense, that the further qualification about postulation viz., that it must be contextually located as one important element of specific intellectual tasks for problem specification, goal clarification, decisional interventions, predictions, and change means that the very meaning of postulation is in part contextually delimited to a framework of procedures for inquiring about law. Perhaps, in the view of some, what is overlooked then is the scientific gloss on the postulated 'ought.' The 'ought' is simply a working hypothesis made explicit, as science requires, to guide inquiry in a universe where reality dictates that science and value do infect inquiry systems. This suggests that the arbitrary character of postulation used by configurative jurisprudence is even weaker than earlier supposed. I further suggest that the objection to the human dignity postulate as arbitrary and subjective is an intellectually acceptable critique but in a weak, extremely technical, and formal sense.

I have discussed the question of postulation and justification in the context of the human dignity proposition. I have also referred to the International Bill of Rights—the hard-soft law of human rights for the entire world community. Post-war

developments in the sphere of human rights have seen a progressive and ambitious prescriptive agenda with important challenges for application and enforcement of human rights values. If it was originally the case that human rights was not law but positive morality, that position, even if the assumptions behind it are accepted, is no longer sustainable. Practice has made the distinction only of abstract, intellectual interest. This seems to have influenced recent scholarship in a substantial way, a development anticipated by Lasswell and McDougal in their effort to enunciate a jurisprudence of operational human rights.

Such distinguished philosophers as Rawls have re-examined the philosophic and moral basis of human rights.[31] Rawls' insights are particularly striking. Rawls does not see great philosophic value in the deep philosophical justification. Without postulating an operational human rights starting point, he nonetheless suggests a common sense starting point that presumably Rawls believes all others can agree represents a set of minimal postulates that meet essential 'needs.' I would suggest that here Rawls is postulating in a weak sense, and relies either on the proposition that the starting point is self-evident, i.e., self-justifying, or that if the starting point of human rights inquiry is arbitrary, it is in the weak sense that I have suggested influences how Lasswell and McDougal use the technique. In the previous chapter, I made reference to the work of theorists who measure subjectivity using the so-called Q methodology. Measuring subjectivity would appear to provide an additional scientific gloss on the scope of a shared perspective indicating a commitment to human dignity on a global basis. In this sense, the measurement of subjectivity may weaken the claim that the postulate of human dignity is arbitrary.

Finally, the literature of scientific theory is replete with the use of 'postulation' as a device of guiding inquiry. To illustrate, Hawking reminds us that, "Newton

[31] Rawls contends that any reasonable society will embrace human rights, including "such basic rights as the right to life and security, to personal property, and the elements of the rule of law, as well as the right to a certain liberty of conscience and freedom of association, and the right to emigration." ROBERT E. GOODIN & PHILIP PETTIT, CONTEMPORARY POLITICAL PHILOSOPHY: AN ANTHOLOGY 660 (Blackwell Publishing 2nd ed. 2006). The role that Rawls gives to human rights is simultaneously too broad and too narrow. His conception is too broad because Rawls gives no reasons, other than liberal reasons, for tying reasonableness to human rights. Why must every 'reasonable' society honor human rights? What about a society whose culture and religion eschew human rights as the liberal conceives them? What if its people are perfectly satisfied with the absence of human rights? Why should a society whose people do not clamor for human rights necessarily be unreasonable? Rawls' conception works only if he can provide some general non- liberal reason for insisting on human rights. Rawls might reply that the above skeptical argument is question begging because it implies that any society honoring human rights is a Western society even if it is significantly different from western societies in important ways, such as, it is non-democratic, non-egalitarian, or non-meritocratic. This criticism would be accurate if the argument used the similarity in human rights as an argument entailing or implying their identity as Western. Instead, the above argument is a skeptical challenge querying why a non-Western society must honor human rights to be reasonable. In short, the argument casts doubt on the claim that there are other non-Western values that underlie the importance of human rights. Rawls' conception is too narrow because from a Western perspective it appears to guarantee only basic rights. In short, in Rawls' view, some very nasty countries might be reasonable.

postulated a law of universal gravitation."[32] Whatever the normative content and process of the human rights/human dignity proposition, it remains at its core a plausible 'postulated' guide to inquiry about law. It is an indispensable element of a theory about law, which makes reason and rationality an important jurisprudential aspiration. Moreover, this proposition sees in law a critical repository of the moral and existential experience of the being and becoming of humanity. In this sense, configurative jurisprudence invites a continuing and important discourse that indeed takes law seriously.

[32] STEPHEN HAWKING, A BRIEF HISTORY OF TIME 4 (Bantam Books 1988).

VALUES UNDERLYING LAW, POLITICAL PHILOSOPHY, AND THE PUBLIC INTEREST

INTRODUCTION

The interrelationship of social process to values discloses that all human interaction is "infected" with values and value consequences. In Chapters 13 and 14, we focused on the question of justification and postulation in value discourse. Both of these techniques may function as guides to inquiry about the production and the allocation of values. When the inquirer is engaged in either the justification or postulation of basic values, that inquiry invariably comes to value clarification with some element of a prior value predisposition or consciousness. It may that religion, with its focus on ethics and morality, has provided some traction for the ubiquity in human subjectivity of a prior value consciousness. In this Chapter, we explore the emergence and transmission of values that emerged from diverse religious traditions. These traditions have transmitted ethical and moral values cross-culturally, virtually on a global basis. The survey in this Chapter indicates that crucial values, such as empathy, compassion, affection, respect, enlightenment, healing, and skills of some sort, pervade all religious experience. In this Chapter, we try to underscore the importance or religious signs, myths, Miranda, and symbology, which trough narrative are transmitted cross-culturally and trans-generationally, and which have given some traction to the basic values that from a secular point of view we identify as representing basic human dignity.

One of the important insights of configurative jurisprudence is that human beings are stirred to action by ideas. Since human action has a symbiotic relationship with the processes of decision making, which are the link between ideas and choices, it is important that we provide a closer description and appraisal of the influence of myth systems and folklore (*miranda*) on the clarification of values, which inform our ideas, and which we, in turn, operationalize in terms of decision process. The critical question then is to understand the different forms through which myth is expressed. Thus, in addition to myth in the generic sense, myths generate subcategories such as *doctrine, formula,* and *miranda* (lore).[1] According to Lasswell and McDougal, a general description of myth is that it includes "stable patterns of personal as well as group perspectives."[2] Thus, to clarify the idea of

[1] One can discern complex patterns that interrelate the several features of a myth. 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, 353 (New Haven Press 1992). Moreover, specific elements may be classified into sub-systems that relate to the total problem-solving situation in which persons or groups find themselves. *Id.* Specific elements comprising a myth include: *doctrine, formula*, and *miranda* (or lore). *Id.*

[2] *See id.*

perspectives here, we recognize that myth implicates the system of identification, the animus of value demands, and the expectation of how such demands are to be managed.[3]

The subcategory of *doctrine* and its connection to myth is that doctrine, in general, reflects abstract articulations, which affirm the perspectives of the group. According to Lasswell and Mcdougal, "such propositions make use of basic symbols of identification, together with the formulation of fundamental goal values and expectations concerning the past, the present, and the future."[4] The idea implicated in the subcategory of *formula* in relation to myth suggests that formula generally includes prescriptive communications that the community will seek to enforce. In this sense, formula tends to resemble such technical communications as rules, principles, and standards.[5] Moreover, myth embraces *miranda* (lore),[6] which are "the popular legends, anecdotes, poems, and other folk elements embellishing the basic themes of the myth."[7]

Myths may coexist with ideas of a counter-myth. Thus, if a society is stratified, the upper class may hold to one myth while the lower class may hold to a counter-myth. At this level of the discourse, myth encapsulates ideological systems and counter-systems. A counter-myth (or counter-ideology) is meant to be an explicit rejection of the established myth or ideology. In the context of social process of social process involving perspectives influencing value articulation, and value specialized institutions, the political myth may be a significant factor in the political and legal culture of the group. Lasswell and McDougal explain:

> The myth of every political group is a means of stabilizing the behavior of the members by regularizing the inner lives of all concerned. For persons of a philosophical bent the doctrinal system provides an articulate guide to policy decision. The formula clarifies a structure of duties and obligations, and a support set of sanctions. For young people, and for adults with little gift of abstraction, the miranda supply maxims, admonitions, warnings, heroes and villains. Considered in its entirety the myth of a group is a map that may be voluntarily followed by each individual, and that also outlines the measures to be taken in concert when voluntary compliance does not suffice.[8]

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[3] *Id.*

[4] *Id.*

[5] "The 'formula' of the myth includes the prescriptions which are generally regarded as enforcible." *Id.* at 354. For examples of formula, *see id.* Note that the "formula includes the 'shalt' and 'shalt not' components of the self-system." *Id.* at 355.

[6] *Id.* at 354-55. L&M have noted that they adapted the term *formula* from GAETANO MOSCA, et al., THE RULING CLASS (ELEMENTI DI SCIENZA POLITICA) (McGraw-Hill 1st ed. 1939); and they adapted the term *miranda* from CHARLES EDWARD MERRIAM, POLITICAL POWER: ITS COMPOSITION AND INCIDENCE (McGraw-Hill 1934). *Id.*

[7] For a thought-provoking collection of short academic works on *miranda* (arranged by geography), *see* MYTHOLOGIES (Yves Bonnefoy ed., Univ. Chicago Press 1991).

[8] Harold D. Lasswell & Myers S. McDougal, *Particular Value-Institution Processes, in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 375, 424 (New Haven Press 1992). For elaboration, *see* ROBERT EDWARDS LANE, POLITICAL IDEOLOGY: WHY THE AMERICAN COMMON MAN BELIEVES WHAT HE DOES (Free Press of Glencoe 1962); RICHARD L.

(footnote continued)

The ideological importance of the dominant myths of our time has been understood in terms of the generation and the distribution of value indulgences centered on wealth. The two dominant myths have been the myth of capitalism and the myth of socialism.

> According to the dominant myth of capitalism, economic progress—understood as capital accumulation—is fostered by allowing for private ownership and management of production. [According to *doctrine*,] [s]ince the enterpriser takes the risk of failing to supply the market with a product that is actually purchased, he is believe to be justified in retaining the surplus between what he is in fact able to obtain from purchasers and the amount that he pays to those who furnish the productive factors....The *formula* of capitalism includes prescriptions that are viewed as necessary to the practical operation of the doctrine. It is evident, for example, that the profit seeking ventures of the enterpriser must not be excessively interfered with by legal or other arrangements that limit his freedom to "buy cheap and sell dear"....The popular image of capitalism (the *miranda*) emphasizes the unexcelled productivity of the system, and seeks to dismiss apparent failures as deviations from the pure doctrine.[9]

> The socialist myth has taken its modern form as a protest against the operation of what are conventionally called capitalist systems. The fundamental socialist *doctrine* is 'production for use, no profit.' Hence the management of the several factors of production is taken out of the hands of private owners and made a responsibility of the body politic as a whole. Instead of the 'irrationality' of a market that is supplied by competitors who try to guess what purchasers will buy, a socialist economy is said to plan in advance for production by entrusting public officials with authority to decide what is to be produced during a given period, and who is to be allocated what facilities to meet the scheduled quotas. Incomes are supposed to be distributed according to need, not according to bargaining position in a free market....The *formula* put forward by the socialist myth makes explicit the prescriptions that are believed essential to effective production for use. The individual is advised to merge his conception of personal interest with concern for the success of the total system....The *miranda* of contemporary socialism presents the socialist economy as liberating the worker from the nightmare of the unemployment which is alleged to be built into the capitalist system of unequal income and "non-rational" production.[10]

In an age in which secular and scientific values have gained ascendance, there has been an emergence of the idea of grounding the important political and legal myth in the idea of the fundamental law that constitutes a society. That is to say, its

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MERRITT, SYMBOLS OF AMERICAN COMMUNITY: 1735-1775 (Yale Univ. Press 1966); HAROLD DWIGHT LASSWELL, et al., THE COMPARATIVE STUDY OF SYMBOLS (Stanford Univ. Press 1952); GABRIEL A. ALMOND & SIDNEY VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS (Princeton Univ. Press 1963); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (Harper 1957) (exploring ideology and uncertainty); and RAYMOND A. BAUER, AMERICAN BUSINESS AND PUBLIC POLICY; THE POLITICS OF FOREIGN TRADE (Atherton Press 1963).

[9] Harold D. Lasswell & Myers S. McDougal, *Particular Value-Institution Processes*, *in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 375, 478 (New Haven Press 1992) (emphasis added).

[10] *Id.* at 478-79 (emphasis added). Lasswell and McDougal also address the myth structure of a less popular economic system—that of cooperative economy. *See id.*

constitutive process. In this sense, the constitutive process (seen in terms of a myth system) also contains the subcomponents of formula, doctrine, and miranda. Thus,

> [t]he political formula interacts directly with the other component of political myth (doctrine and miranda). The positive task of statesmen in a free society is to protect the political formula as an aid to sustaining doctrinal assent and popular understanding; and also as a means of invigorating both miranda and doctrine in order to obtain compliance with the formula.[11]

A central insight into the value of myth in social process is that myth is often the critical frame of reference of social participants.[12] Myth facilitates an understanding of social goals, encourages an appreciation of the historical panorama implicated in the evolution of the myth, formulates assumptions about scientific factors that shape the contours of the myth, influences futuristic thinking, and may stimulate the invention and evaluation of alternative behaviors.[13] It is particularly useful to understand the intensity with which myths and their subcategories are embraced in the social universe. For example, if you broke down myth systems in terms of value institutional practices, we could begin to isolate a multitude of myths that, in the aggregate, constitute the myth system of the body politic.

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[11] Harold D. Lasswell & Myers S. McDougal, *The Overriding Principles of the Constitutive Process*, *in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 1131, 1138 (New Haven Press 1992).

[12] For an exploration of this insight from a classical scholar's perspective, *see* LUC BRISSON, HOW PHILOSOPHERS SAVED MYTH: ALLEGORICAL INTERPRETATION AND CLASSICAL MYTHOLOGY (Univ. Chicago Press 2004). For reconnection of contemporary culture to its classical Western traditions in ancient Greek identity, *see* FRANÇOIS HARTOG, MEMORIES OF ODYSSEUS: FRONTIER TALES FROM ANCIENT GREECE (Univ. Chicago Press 2001). For a mythological exploration of ancient (and still contemporary) social taboos from a particularly modern perspective, I recommend the plays of Euripides, which stand out for their depiction of impressive female characters, intelligent slaves, and counter-myth satirization of mythic heroes. *See, e.g.*, GILBERT MURRAY'S EURIPIDES: THE TROJAN WOMEN AND OTHER PLAYS (James Morwood ed. Univ. of Chicago Press).

[13] As Lasswell and McDougal describe:

> The myth of every political group is a means of stabilizing the behavior of the members by regularizing the inner lives of all concerned. For persons of a philosophical bent the doctrinal system provides an articulate guide to policy decision. The formula clarifies a structure of duties and obligations, and a support set of sanctions. For young people, and for adults with little gift of abstraction, the miranda supply maxims, admonitions, warnings, heroes and villains. Considered in its entirety the myth of a group is a map that may be voluntarily followed by each individual, and that also outlines the measures to be taken in concert when voluntary compliance does not suffice.

Harold D. Lasswell & Myers S. McDougal, *Particular Value-Institution Processes*, *in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 375, 424 (New Haven Press 1992). For elaboration, *see* ROBERT EDWARDS LANE, POLITICAL IDEOLOGY: WHY THE AMERICAN COMMON MAN BELIEVES WHAT HE DOES (Free Press of Glencoe 1962); RICHARD L. MERRITT, SYMBOLS OF AMERICAN COMMUNITY: 1735-1775 (Yale Univ. Press 1966); HAROLD DWIGHT LASSWELL, et al., THE COMPARATIVE STUDY OF SYMBOLS (Stanford Univ. Press 1952); GABRIEL A. ALMOND & SIDNEY VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS (Princeton Univ. Press 1963); ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY (Harper 1957) (exploring ideology and uncertainty); and RAYMOND A. BAUER, AMERICAN BUSINESS AND PUBLIC POLICY; THE POLITICS OF FOREIGN TRADE (Atherton Press 1963).

> Among the current myths of power are liberal democracy, totalitarianism, racism. The principal enlightenment myth presents a scientific view of man and nature, and a demand for freedom of information. Among the ideologies of wealth are private capitalism, socialism, and consumers' cooperation. Well-being myths differ in their degree of reliance on scientific methods of inquiry and on the inclusion or exclusion of subjective events as significant factors in disease. Skill myths glorify various forms of excellence as ends in themselves ('art for art's sake'), or as indispensable contributors to other social outcomes. Affection myths magnify the importance of love and loyalty in individual and group relations, often seeking to direct love along the conventional channels provided by the established patterns of sex and family relations. Respect myths characteristically glorify individual human beings and meritorious achievement or claim recognized for racial or other castes. Rectitude myths include the many religious and ethical systems of the globe.[14]

The last of these value categories is the category dealing with rectitude. The rectitude myth has been deeply rooted in the religious traditions of humanity; and, in terms of the historic panorama, the religious myths retain enduring powers of influence over human choice and decision. Although we live in a culture in which the scientific myth looms large, we frequently revisit conflicts whose ostensible bases still reflect the influence of religious myths and counter-myths. On the one hand, embedded in these myths are often the shared ideals of human morals and ethics that one faith shares with another. On the other hand, religious elites themselves stress the distinctiveness and uniqueness of each religious myth and how much it differs from an alternative religious myth. We therefore continue this chapter by examining the fundamental ideas behind the myth systems of dominant religious experience in the world community.

RELIGIOUS MYTH, VALUES, AND IDEALS

The configurative approach to law stresses the importance of myth systems. The participants in every social process act in the frame of reference of a myth.[15] The dynamic aspect of human myth includes the goals and ideals and myth of religious experience. This emphasizes the struggle to experience and affirm the fundamental moral commitments that are included in the goals and ideals of the religious myth. The religious myth (however skeptical humanity may be in an age of science) continues to have a compelling durability as a part of human development and understanding. Human beings often find meaning and understanding of the self in

[14] Harold D. Lasswell & Myers S. McDougal, *Toward a General Theory of Directed Value Accumulation and Institutional Development, in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 1379, 1402-03 (New Haven Press 1992).

[15] "The subjective events of individuals (perspectives) can be classified according to the symbols of identity (I, we, you, they), of demand (value preference or volition), and of expectation (matter-of-fact reference to past, present, and future events). The myth is the pattern of stable perspectives among the members of a collectivity. The myth clarifies goal, provides a historical panorama of trend, formulates assumptions about conditioning factors, projects the future course of events, and foster the invention and evaluation of policy." Harold D. Lasswell & Myers S. McDougal, *Toward a General Theory of Directed Value Accumulation and Institutional Development, in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 1379, 1402 (New Haven Press 1992).

relation to others through the guidance of religious myth. We often equate the great value of the freedom of conscience as having an important connectivity with the right of confessional freedom. Indeed, it is often the case that confessional freedom itself is an essential component of that distinguishing characteristic of being human: consciousness and responsibility. However, it is important to recognize that consciousness and responsibility is intricately related to the form and function of the religious myth.

The American Revolution was partly fueled by the philosophy of rationalism identified with the Enlightenment. It was also influenced by religious values that were felt to be consistent with many of the main value tenets of the Enlightenment. The American Revolution gave birth to the U.S. Constitution. The U.S. Constitution sought to protect the integrity of religion and human consciousness from the state and conversely it sought to protect the state from religious abuse for political ends. Thus, the U.S. Constitution prescribed a separation of church and state. The U.S. Constitution effectually sought to protect the integrity of confessional outlook by protecting the diversity of a multitude of religious myths.

The practice of constitutional interpretation has often been justified on the basis that the indicators to guide choice should be consistent with the supremacy of law principle. The justification of the supremacy of law principle has often been grounded in the notion that there is a discoverable notion of a higher law. That higher law itself is discoverable by the God-given gift of human reason. It was therefore unsurprising that shortly after the Constitution was adopted, a higher law Bill of Rights was adopted. The Bill of Rights represented rights that vested in individuals and associations of individuals and set limits on the power of government to compromise or abridge those rights.

To some, these rights were the expression of revealed natural law. To others, the rights reflected the influence of natural law on the enlightenment idea of human natural rights. Of course, natural human rights compose a more secular myth. Still others saw such rights as having their basic authority in 'the people themselves.' Regardless of how we justify the codification of rights beyond the ostensible power of political authority, it cannot be denied that religious idealism and the selective appropriation of important values inspired by religion had an important energizing influence in the crystallization of dynamic human demands for justice and dignity. The partial realization of those demanded values is in the codification of the Bill of Rights. Without the cultural transmittal of religious ideals that would include demands for justice, liberty, and fairness, there would have been no drive for the American Revolution. Indeed, there would be no revolutionary Constitution and, equally important, there would have been no revolutionary Bill of Rights. Moreover, despite the comprehensive the codification of the Bill of Rights, it was also deemed prudent to include within the Ninth Amendment other fundamental rights that had not been explicitly written into the Bill of Rights.

The expression of fundamental human rights in an objective document given a powerful juridical imprimatur has not been lost on subsequent generations. It created a constitutional myth on its own. Constitutional language is in fact influenced by profound animating myths as well as doctrines and formulas. The concrete expression of such ideals has served to generate a higher level of expectation about the fundamental rights of man within the United States as well as in the larger world community. Today, the global constitution (the U.N. Charter), as well as the International Bill of Rights, is replete with the promise of human rights and dignity for all. Thus emerged the idea that the meaning of the Constitution itself carries a promise of higher goals and ideals to which there is a commitment and obligation to struggle and realize. Modern constitutions influenced by the ideals embedded in the International Bill of Rights find their essential legitimacy in the concrete expression of ideals and goals that coincide with what today we understand to be human rights and dignity.

It is a mistake to follow the route of the Enlightenment and existential thinking to regard the values, ideals, and inspirations in modern human rights as separate from the historic experience of man with religion and religious myth. However, the intensity with which groups have been committed to a particular religious outlook has often meant that religious ideals often served as a justification for the use of any unlimited and unrestrained means to secure them. Religion can never be completely divorced from political perspectives; and neither can political perspectives be divorced from some degree of the idealization of myth concerning the desired values to improve the human prospect.

This is an uncomfortable insight. It provides a powerful caution concerning both the intrinsic value and universality of goals and ideals, but also reminds us that beautiful and eminently valued goals and ideals may be misused because of the imperfections of the human condition and the dysfunctions and limitations of human personality in the quest for justification of or the fanatical quest for power. In short, although myths facilitate stability in perspective, counter-myths consolidate an alternative to such expectation of stability. This latter quest might pre-empt the symbols of idealism and rectitude in the cause of the claim to power and dominance. In short, idealism and specific ideals, although a critical inspiration for human struggle and change, might be subverted. That is to say, powerful historical figures driven by the drive to control and dominate or the existential fact of psycho-pathological predispositions might indeed use religious myth to justify heinous atrocities as is sometimes observed in what is today called ethnic conflict.[16]

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[16] "The myth and technique of all cultures provide doctrines, formulas and miranda that standardize the categories of persons who are eligible targets of positive and negative affection, and the range of interactions that may be permissibly engaged in. These relations are spelled out according to gender, age, and other variable to which significance is assigned in the context." Harold D. Lasswell & Myers S. McDougal, *Particular Value-Institution Processes, in* JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 375, 541 (New Haven Press 1992).

The reference to ethnic conflict suggests that if group identity is defined by exaggerated religious myth, it is sometimes claimed that such experience—based on such a myth—is superior, universal, and (by its very witness) a condemnation of other religious myths. In fact, the fundamental values and goals of comparative religious myths may invariably reflect a deeper level of common interests in the ideals and values of religious ideals and morals supported by the overarching principle of human rectitude: good conduct in thought and deed.

The abuse of religion as a method of depreciating moral virtue should not be seen as a condemnation of religion. Nor should it be seen as minimizing the genuine value of spiritual inspiration, revelations, and its cultural contribution to moral virtue and human experience. A preferred religious myth may see man as developing in all spheres that may be reconciled and justified with moral experience, the common good, and the deepest spiritual yearnings of all of humankind. Thus, at the level of myth systems, there remains a contentious possibility of challenging counter-myths. This may be a good or bad thing.

MAJOR WORLD RELIGIONS AND UNIVERSALITY OF MYTH - INF LUENCED VALUES

The focus and orientation on spiritual experience has undoubtedly had an influence on what man is and what man might become. The ideals of spiritual experience fuel the human perspective of essential identity. This orientation sustains the impulse to human activism by its stress on the foundations of basic human needs, values and demands; and it secures a sense of identity that transcends the self. The force of religious idealism in general broadens the 'I' to include a broader selfless vision of human aspiration and sacrifice.

In this chapter, we describe and briefly explore some of the broader ideals and values that have inspired religious insight comparatively and cross-culturally. This exercise reflects more on the notion of knowledge integration than an approach which deep scholastic emphasis demonstrates how precisely one aspect of religious experience differs from another.

The experience of major world religions from the perspective of the ideas of what is good, moral, aspirational, and important to human consciousness is driven by goals, ideals, and purposes. It is through such perspectives that human beings generate the desire to act in the common interest and common good. This does not mean that human beings are all moved by the best ideals and goals of spiritual culture. Cultural and religious traditions provide a yardstick to measure experiences that we must avoid and experiences that we must struggle to affirm.

The expression of ideals including religious and moral ideals is not an inert, abstract matter that simply captures the human imagination and the dynamics of human behavior. On the contrary, there is always contestation for the ideals or the negative ideals and this is part of the struggle of humanistic dynamism. The modern

development of human rights that emphasizes the crystallization of values thought to be secular, in fact, owes a great debt to many spiritual traditions, including the Christian natural law tradition. The specific contribution of the natural law tradition is more explicitly developed in a later chapter that is complemented by the philosophy of individualism and the historic experience of the Celtic/Scottish struggle for dignity and freedom, a matter that has been neglected in the literature of human rights.

However, the significant value of the Western natural law tradition for universal human dignity may imply that modern human rights are an exclusively a Western invention and are alien to non-Western cultures. This is, in effect, undermines the inclusive, global importance of human dignity. Comparative religious myths generate an obvious similarity about the goals and ideals of what constitutes 'the good' and the essence of moral experience. Second, in most of these comparative myth systems, religion provides a perspective of the aims and objectives of the human struggle subjectively and individually, as well in community in terms of duty and obligation.

Havel, the political activist, human rights eminence, and former Czech President has explicitly tied the issue of the survival of humanity to human rights and the experience of affirmative religious ideals and values. Consider the following:

> The only real hope of people today is probably a renewal of our certainty that we are rooted in the Earth and, at the same time, the cosmos. This awareness endows us with the capacity for self-transcendence. Politicians at international forums may reiterate a thousand times that the basis of the new world order must be universal respect for human rights, but it will mean nothing as long as this imperative does not derive from the respect of the miracle of being, the miracle of the universe, the miracle of nature, the miracle of our own existence. Only someone who submits in the authority of the universal order and of creation, who values the right to be part of it, and a participant in it, can genuinely value himself and his neighbors, and thus honor their rights as well.[17]

The durability of comparative religious values and ideals as a component of human aspiration and struggle is in fact astonishing. For example, Hinduism, the oldest religion in the world, continues to inspire humanity with its wisdom and the concrete expression of its ideals. For Hinduism, life is a struggle on many levels, and yoga (or the multitude of yogas) seeks to provide a path suited to every individual's prospective realization. We continue to recognize in Hinduism a 5,000-year-old tradition. Judaism has a continuity of 3,000 years. Christianity has a continuity of 2,000 years. Islam has a continuity of 1,400 years. The tradition of Buddhism, Confucianism, the various forms of shamanism are able to record a powerful heritage of spiritual inspiration.

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[17] President Václav Havel (Czechoslovakia 1989-92, Czech Republic 1993-2003), *The Need for Transcendence in a Postmodern World*, Speech at Independence Hall, Philadelphia (July 4, 1994), http://www.worldtrans.org/whole/havelspeech.html.

DOMINANT RELIGIOUS MYTH SYSTEMS, VALUES, AND IDEALS

HINDUISM

Oliver Wendell Holmes once said that the life of the law has not been based on logic, but on experience. Law and experience often reflect the creation of rules of conduct, duty, obedience, and obligation. In an historic and cross-cultural perspective, rules of right conduct and its corollary, the abstention from wrong conduct, are often reflected in the religious experience of human communities. What constitutes right and wrong is a matter of moral experience. Moral experience itself is ubiquitously rooted in religious or transcendental experience. Thus, the rules of religion were also the rules that human communities enforced through the agency of the religious elite and their control, direction, or influence over the secular elite.

A powerful expression of this interplay between received religious moral rules and the application of religious rules in the day-to-day business of human interaction is to be found in one of the oldest religions in the world, Hinduism. Hinduism functions as a religion that tailors itself to each individual's own consciousness and possibilities. This expresses itself in the Bhagavad Gita in which Lord Krishna outlines the multiple paths to self-realization and God-consciousness. These paths are described as the various yogas. Krishna points out that some paths are incredibly difficult and not recommended for all. Regardless, every person can aspire to transcendence and the grace of God using a yoga that is appropriate to the life position and temperament of the believer. Perhaps, a practical example will illustrate this.

Many years ago on a visit to India, I visited one of the holy cities of the India, Kanchipuram. I visited the beautiful city sites with the assistance of a young Brahmin priest. After the tour, I asked the priest about access to the temple's beautiful inner sanctum, which was underground. The Brahmin replied that "only a Hindu could enter the sanctum." I responded, "But aren't we all Hindu?" The Brahmin scholar thought for a moment (remembering the Bhagavad Gita), and said, "Yes, but you look like an Indian and you can come. Your wife and daughters look like white foreigners and that would be something of a problem to get them in. Not everyone's consciousness is as developed as yours with regard to the physical appearance of people." This anecdote indicates the spiritual and intellectual flexibility of Hinduism as well as the limits that cultural constraints may impose upon the universality that underlies the Hindu experience.[18]

In the Hindu tradition, all human beings come to this life clothed in material body. The material body sometimes described as an aspect of Maya is actually to be cared for and treated with appropriate deference and sacredness. An aspect of the

[18] The diversity of India's social experience and religious paths is illuminated in a collection of traditional narratives and scholars of India in general. *See* FOLKTALES OF INDIA (Brenda E. F. Beck, et al, eds., Univ. of Chicago Press 1987).

Hindu life is the development of the body and the mind and various forms of yoga have been revealed for the benefit of all. In addition, the great healing traditions from Aruvedic medicine provide healing for both the mind and the body. What is critical to the Hindu tradition at least in the phenomenal world is the notion of *dharma*. Rooted in dharma is the idea of love to be embraced as a practical living ideal. It is sometimes said that dharma is pure obligation and no rights. In point of fact, the idea of obligation or duty as a community ideal always comes with its correlative of the concept of the right. Thus, dharma is as essentially individual as it is social.

The obligations of dharma are in the first instance the feeling and communication of love and compassion for those who are most close to the person, namely the family. Thus, love is the glue of the individual and the micro-social group. The second aspect of dharma is the capacity to extend this love to the extended family, relatives, friends, and neighbors. This of course is the greater challenge and it is very difficult to meet this challenge if the individual has been deprived of compassion and love in the micro-social unit. The third aspect of dharma is the expansion of love to the larger community and persons in the external world of profession, skill, business, labor relations, and the public at large. Thus, love would infuse the dealings one has as one charts the life path hopefully to prosperity and compassion for all sentient beings.

In Port Elizabeth, South Africa, there is a non-Hindu tribute to this principle. It is of a soldier kneeling with a bucket of water that is being given to his horse. This is known as the horse memorial. It is a memorial to the sacrifices that horses made for their riders during the Anglo-Boer War. The caption below the statue reads: "The greatness of a nation consists not so much in the extent of its territory or the number of its people but in its commitment to justice and compassion."

The fourth aspect of dharma is meant to be evolutionary in the sense that it builds on the dharma of the evolution of love. Love, here, involves the love of culture, art, intellectual, and scientific achievement, the beauty of music, drama, and dance, and a deeper understanding of the fullness and joy of spiritual inspiration that moves the human impulse to create as a profound development of the human mind. The fifth aspect of dharma is the expression of love as compassion in the sense of kindness, generosity, charity, and sacrifice to the human condition and religious traditions that sustain the love ideal in the dharma of the person. It would thus be seen that the idea of dharma distills the framework of human dignity in terms of multiple trajectories of reciprocity suggesting that the successful working out of dharma is not purely ego-defined but is designed to transcend the 'me' and the 'I' in order to include the 'other' in the ultimate divine conception of self-realization.

Hinduism holds that the Bhagavad Gita is the revelation of God—the ultimate Self—to a warrior on the eve of a great conflict. The revelation emphasizes the religious obligation of duty and of dharma, the rule that mandates the performance of duty. It is the religious outlook that defines human capacity and defines the law

that must be followed to express successfully human capacity in both a spiritual and a socio-political sense. Rooted in the Gita is the fundamental question of values and their application as an aspect of the broadest conception of the law as developed in the concept of individuated and collective dharma (law).

The normative guidance and challenges provided in the Bhagavad Gita are numerous. Certain values and ideals as challenges are concretely expressed by Krishna. Krishna lists certain qualities as God-given ideals for man's guidance: non-injury, equanimity, contentment, austerity, charity, and emotional tranquility regarding the vicissitudes of life. For the self's critical development of personhood and transcendence, Krishna prescribes the importance of understanding the following: intellect, wisdom, non-delusion, patience, truth, self-restraint, calmness, pleasure, pain, birth, death, fear, and fearlessness.[19]

It will be seen from these precepts that they are both guides as to principles of morality (purity of heart, almsgiving, non-injury, truth, and compassion) as well principles of action, fearlessness, steadfastness in knowledge, control of senses, straightforwardness, austerity, and non-violence. Thus, the Bhagavad Gita sees not simply the understanding of moral insight as an end in itself but it prescribes action and struggle as intrinsically a component of the complete identification with the moral order of God. In short, the yoga, the path, and the method of the path are themselves instruments of unfolding knowledge, spiritual understanding, and growth.

In our time, Mahatma Gandhi and Martin Luther King Jr. rediscovered the concept of struggle and the integrity of struggle as vested with profound moral implications. Thus, to resist tyranny or confront oppression by active non-violent methods, they believed, was an approach that ultimately transforms the victim and the victimizer. In many ways, the model of Gandhi and King remains one of the most significant strategies for promoting and defending human dignity on a universal basis.

The specialists in action, including war, in the Bhagavad Gita has a spiritual and legal obligation to act to prevent injustice, and to use force to do so as a last resort. The values of religious myth are meant to provide prescriptive guides and duties for the problems of organized social life and governance as well as provide a stepping-stone for individual spiritual development. Recognizing human complexity, the Hindu tradition recognizes multiple 'Yogas' providing for right conduct, spiritual purification and the capacity to both sacrifice and to act without the expectation of any temporal fruitive or material reward. It may be that the cosmological aspect of Hinduism is so complex and philosophical that, in its practice, ritual and fragmented deities provide a more amenable framework of morality and religious values.

[19] *See* Swami Nirmalananda Giri, *Bhagavad Gita Commentary–Sixty-Four*.

What is often overlooked in this tradition is the fact that its morality is, in effect, often situational, processional, and indicative of a continual working through and working out of a shifting framework of man's existential and spiritual development. This is clearly expressed in the great Hindu epic poem called the Mahabharata.[20] The Bhagavad Gita is merely a fragment of this epic work. Central to the Mahabharata is the purpose of search for the realization of human dignity. A commentator on this epic poem summarizes this as follows:

> We seek the dignity of man, which necessarily implies the creation of social condition which would allow him freedom to evolve along the lines of his own temperament and capacities; we seek the harmony of individual efforts and social relations, not in any makeshift way, but within the frame-work of the Moral Order; we seek the creative art of life, by the alchemy of which human limitations are progressively transmuted, so that man may become the instrument of God, and is able to see Him in all and all in Him."[21]

This text is an unfolding of story after story, with each story a working through of a specific moral dilemma. Each story is both a narrative as well as an unfolding of a technique for the analysis of moral and spiritual consciousness. Moral answers in situational context are not simple. Understanding moral experience requires the use of the faculty that has been given man by providence or his Creator to work through, to work out, and to understand that experience as a component of man's unfolding moral awareness.

One illustration of this is the situation in which Mahatma Gandhi found himself as a citizen and colonized beneficiary of the British Empire. Gandhi was confronted with the question of whether he should support the Empire at the outbreak of World War I. Gandhi determined that although he was an anti-colonial, it was inappropriate to attack one's political adversary in time of a war-exacerbated crisis. Gandhi therefore supported the war effort, but in a morally interesting way.

By this time, Gandhi had developed the principles of non-violent resistance as a form of political action. How then could a modern apostle of non-violence support his adversary in his adversary's war? Gandhi worked on the creation of an ambulance and medical corps for service under British rule. Thus, his contribution to the war effort was a contribution that sought to provide healing to the troops in battle, rather than contributing to the promotion of violence itself. Stretcher-bearers and persons who actually retrieve wounded combatants under fire often confront the most dangerous and lethal aspects of combat. This fundamental idea is clearly in the narrative of the Bhagavad Gita. Arjuna, the great warrior, is reluctant to fight a just war although he is a warrior and therefore carries a social obligation to defend the community against unjust aggression. Krishna, the incarnation of the Lord, seems to enhance respect for religious obligation. He therefore advises Arjuna to fight as a

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[20] *See* THE MAHABHARATA, VOLUMES 1-7 (James L. Fitzgerald ed., translator, Univ. of Chicago Press 2004).

[21] Bharatiya Vidya Bhavan, Kulpati's Preface, paragraph 6 (Kulapati K. M. Munshi Marg 1963).

religious obligation. However, he is not directly involved in the fighting. He has had a leading role in attempting to prevent the war, and he has done everything possible to that end. Now on the field of battle, he still has not taken sides directly. Rather, he serves as a humble charioteer. He carries no weapons; he simply drives the chariot for the warrior. Both situations represent complex moral subtlety and clearly indicate just how complex the specific application of moral judgment may be in actual and concrete situations.

I provide two specific illustrations from the Mahabharata that resonate with contemporary human dignity salience and compassion. The first narrative is that of the fate of queen, Draupadi, the wife of King Yudhishthira. This epic poem begins with King Yudhishthira in the position of a guest of a rival king and relative. As a guest, he must meet the requirements of etiquette defined by the host. The host wants him to gamble. Gambling is a sin. On the other hand, the guest must be gracious in the home of the host.

King Yudhishthira resolves this, not by rejecting the offer and then leaving the host. On the contrary, he continues to accept hospitality and gambles. The dice are loaded. He continues to lose; and eventually he loses his kingdom. The host King insists that he continues to gamble since he still has a wife. The King 'loses' his wife at the betting table. Despite this 'loss', however, the Queen Draupadi protests that she is a woman and a wife—and *not* property that could be disposed of by gambling. Draupadi has personhood and dignity. She claims it; and God protects her in her dignity. The law protects her from enslavement by human trafficking (sale of oneself in another's claim to transfer as a piece of gambling property). Thus, we see a critical human dignity dimension with a gender message.

The second story concerns King Yudhishthira in his later years. He has been a pious model ruler and spiritual aspirant. He has suffered but never lost his spiritual and human integrity. He now determines that it is time to remove himself from society, live in a remote place, and prepare for death. In his remoteness, he finds himself accompanied by a stray dog. The dog is profoundly loyal and the King develops a genuine affection and compassion for the dog. The king experiences a vision in which God appears and tells him that he will not die in a temporal setting. He will be simply permitted to ascend to a higher-level plane of existence—a higher loca. As the king prepares to go on this journey of spiritual beneficence, he remembers his faithful companion, the dog. He asks the almighty whether his faithful companion will be permitted to accompany him to this elevated destination. The Lord replies that he is sorry but that loca is not a place for dogs. The dog cannot accompany the king. The king responds that, under these circumstances, he must regrettably decline this privileged offer. He will not abandon his faithful and loving sentient companion. In this moving incident a powerful moral insight is given. The man (the 'I') and the dog (the 'it') become man ('I') and dog ('Thou'). One cannot find a more moving and telling expression of the morality of environmental values than the understanding of a sentient being in terms of 'Thou' rather than 'it'. It is a profound, universal lesson of timeless value. Thus, the Lord responds by saying that

the refusal to permit the dog to accompany the king was the last of his earthly tests. The king had responded correctly. His compassion extended to sentient dog companion. Of course the dog would accompany the king on his spiritual journey. In fact, the dog was an incarnation of the Lord himself.

Today, human rights are tied to the nature of the struggle for dignity and love and charity and forgiveness and generosity. It is a struggle that is rooted in a growing and changing framework of identity in which compassion transcends greed, parochialism, or lust. Compassion extends not only to human beings but also to all sentient creatures inclusively. In fact, the concept of human dignity is also given an eco-social dimension.

BUDDHISM

The Buddhist tradition, which has many points of similarity with Hinduism, provides a more accessible framework for moral understanding and religious experience, and to guide the conduct and influence the development of ordinary people. Buddhism provides very specific guidelines for conduct, guidelines which does not stress extreme suffering, penances, and extremist deprivations for the purpose of the development of human consciousness and spiritual sensitivity. A central element of Buddhist thought was the recognition of the ubiquity of human suffering.[22] In this way, Buddhism provides a deep insight into the human predicament, namely the universality of human suffering.

Human dignity, in its most fundamental expression, is concerned with human suffering, which is the outcome of the human mind collectively expressing itself in ignorance, darkness, and extremism. Buddhism presumes that enlightenment cannot be achieved by the extremes of excessive indulgences in pleasure or extreme exercises of ascetic torture of body and mind. The Buddhist literature explains this as follows:

> The Noble Path, that transcends these two extremes and leads to Enlightenment and wisdom and peace of mind, may be called the Middle Way. What is the Middle Way? It consists of the Eightfold Noble Path: right view, right thought, right speech, right behavior, right livelihood, right effort, right mindfulness, and right concentration.[23]

The relative specificity of the path in Buddhism, its concern for moderation, the middle way as a more accessible approach to both the alleviation of suffering and the path to enlightenment, provided a rather important secular gloss. That secular

[22] Another important human rights-related aspect of Buddhism is its unwillingness to embrace the concept of Dharma in terms of specifically assigned caste categories. Although the categories themselves were meant to be categories of respect and guidance, practice intended to result in a social process of invidious discrimination and deprivation. Buddhism has an appeal that was rooted in the foundations of respect.

[23] The Path to Enlightenment..

gloss was simply to derive edicts of right and compassionate conduct as an obligation of the king or the state. It was the great Monarch Aśoka who first put into secular form the Buddhist-inspired edicts,[24] which in many ways are one of the earliest recorded developments of the normative guidance of religious practice into the positive law of an enlightened ruler.

What is surprising is that how modern, or even postmodern, Aśoka's edicts seem today. For example, Aśoka has the equivalent of a state ombudsman to ensure that the laws of the state are not violated by state officials, or result in the oppression of the people by the state officials. Aśoka had sensitivity to the health needs of people and so rest stops were provided where people could acquire herbs and medicines while they were traveling. Aśoka had a concern for animals and how they were to be treated. He recognized that you could not stop people killing and eating animals, but he set the example in the court that there should be regulations concerning animals that are being killed to make curries and other dishes. If people had to eat meat, they ought to eat it in moderation and not gratuitously inflict suffering on animals as a matter of extreme human indulgence. I reproduce some of the key Aśoka edicts below:

> It is my desire that there should be uniformity in law and uniformity in sentencing. I even go this far, to grant a three-day stay for those in prison who have been tried and sentenced to death. During this time their relatives can make appeals to have the prisoners' lives spared. If there is none to appeal on their behalf, the prisoners can give gifts in order to make merit for the next world, or observe fasts.[25]

> Twenty-six years after my coronation various animals were declared to be protected—parrots, mainas, 'aruna,' ruddy geese, wild ducks, 'nandimukhas,' 'gelatas,' bats, queen ants, terrapins, boneless fish, 'vedareyaka,' 'gangapuputaka,' fish, tortoises, porcupines, squirrels, deer, bulls, 'okapinda,' wild asses, wild pigeons, domestic pigeons and all four-footed creatures that are neither useful nor edible. Those nanny goats, ewes and sows which are with young or giving milk to their young are protected, and so are young ones less than six months old. Cocks are not to be caponized, husks hiding living beings are not to be burnt and forests are not to be burnt either without reason or to kill creatures. One animal is not to be fed to another.[26]

The Edicts of Aśoka are not the product of a deeply religious scholar or a spiritual recluse. The Edicts represent a practical guide to governance that seeks to practically minimize suffering and maximize the possibility of adepts developing the spiritual side of their nature in terms of the paths and guidelines of the Buddhist tradition. Central to these approaches is the principle that every human being has inherent dignity. From a human rights perspective, one does not need to go further

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[24] For an enjoyable academic translation of the edicts, *see* EDICTS OF AŚOKA (N.A. Nikam & Richard McKeon eds., Univ. of Chicago Press 1978) (1958).

[25] Pilar Edict Nb4 (S. Dhammika). *See* EDICTS OF AŚOKA 61 (N.A. Nikam & Richard McKeon eds., Univ. of Chicago Press 1978) (1958).

[26] Pilar Edict Nb5. *See* EDICTS OF AŚOKA 56 (N.A. Nikam & Richard McKeon eds., Univ. of Chicago Press 1978) (1958).

in the uplands of spiritual contemplation in determining the deeper spiritual truths of Buddahood. However, it may be of value to express caution about how terms and phrases are used cross-culturally.

Literally, the term *human rights* stresses an idea of right that may well be culture-bound or perhaps sufficiently inflexible to capture the fullness of a shared cultural appreciation of human dignity in terms of fundamental values and moral understandings. The term *human rights* may well be a symbol that is designed to capture these ideals leaving to culture and spiritual traditions a precise working out in terms of space, time, and the variables of existential diversity.

Buddhism stresses the notion of nobility, insight, and truth as a function and goal of human experience. The idea of the truth, nobility of the norm, and the insight required to understand it, provides a cultural background to the idea that human rights have preemptory nobility in terms of human goals and aspirations. They represent a certain universal truth about the human prospect and they represent a critical insight into the human situation that has a universal, cross-cultural validity.

The approach to Buddhism in terms of human understanding and obligation is to recognize the impermanence and fragility of human experience, and to note that from birth to death, there is the ubiquity of human suffering and no one is spared from it. That suffering in part is driven by a desire to acquire control of things and relationships in order to possess them indefinitely in the face of the impermanence of experience that is defined in part by time. The modern analogue to this is the drift toward globalization, which is driven by the compulsive attachment to consumerism. The ideal consumer is driven by the need to satisfy a strong impulse towards instant gratification. This applies not only to material goods, but also to human relations, which often become matters of impermanence, suffering, and, like used automobiles, are discarded generating enhanced matters of material and psychological suffering.

These ideas are expressed in Buddha's famous four-fold "Noble Path" that comprehends and expresses the truth of human suffering.[27] Like human rights, if we do not know the problem of suffering, the problem of the depreciation of human rights and dignity at all levels, we cannot provide the spiritual, juridical, or cultural apparatus to ameliorate suffering and to universalize compassion. The Four Noble Truths are succinct, but often are taught with explanations:

1. The Noble Truth of the Nature of Suffering (or *Dukkha*):
   "Birth is suffering, aging is suffering, illness is suffering, death is suffering; sorrow, lamentation, pain, grief and despair are suffering; union with what is displeasing is suffering; separation from what is pleasing is suffering; not

[27] The Four Noble Truths are classically taught in the *Dharmacakra Pravartana Sūtra*, which is traditionally framed as Buddha's first discourse after he reached enlightenment.

to get what one wants is suffering; in brief, the five aggregates subject to clinging are suffering."[28]

2. The Noble Truth of Suffering's Origin (*Dukkha Samudaya*):
"It is this craving which leads to renewed existence, accompanied by delight and lust, seeking delight here and there, that is, craving for sensual pleasures, craving for existence, craving for extermination."[29]
3. The Noble Truth of Suffering's Cessation (*Dukkha Nirodha*):
"It is the remainderless fading away and cessation of that same craving, the giving up and relinquishing of it, freedom from it, nonreliance on it."[30]
4. The Noble Truth of the Path Leading to the Cessation of Suffering (*Dukkha Nirodha Gamini Patipada Magga*):
"It is the Noble Eightfold Path; that is, right view, right intention, right speech, right action, right livelihood, right effort, right mindfulness and right concentration."[31]

The Four Noble Truths are complemented by the eight-fold path, which is the pathway to compassion and dignity, both of which are essential for the evolution of the enlightened dimension of man. The Four Noble Truths are the foundation for the eight-fold path to alleviate suffering and to develop compassion and understanding for the improvement of life in both temporal and spiritual terms. The eight-fold path focuses on the path of right knowledge; the path of human development and aspiration; the path of communication and right speech; the path of right behavior and the ethical norms that touch on respect for life, truth, the goods of others, management of sexual drives and intoxication. The other paths include the right livelihood; the right effort; the right development of the mind and the right understanding and absorption of the lessons of the path. When we take Buddhism's method of compassion and respect for all forms of life, its antipathy to violence, and its understanding of the human predicament, and a practical pathway to understanding and development, Buddhism provides a way of thinking, living, and struggling that may be seen as having a resonance with the cultural background of modern human dignity.

The most critical connection between the Buddhist tradition and human rights is the concept of inclusive love. When the Buddhist talks about an egoless spiritual existence, what is really meant is that the self dissolves into the transcendence of inclusive love, compassion, and empathy. These ideas carry not function in a defensible moral order of boundary limitations of self-interested egotism. On the more practical level, another critical contribution of this tradition is the confrontation of suffering. Buddhism sees suffering as deprivation and that the critical path and struggle for knowledge and understanding is to conquer suffering for the self and all others.

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[28] Dhammacakkappavattana Sutta (SN 56.11), trans. Bodhi (2000), pp. 1843-47.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1844.

Concisely, the global human dignity problem is the magnitude of human suffering. The concept of 'human dignity' is effectually an incarnation of this Buddhist insight into the human prospect, its being, and it's becoming.

JUDAISM

One cultural foundation of human dignity as expressed in contemporary human rights is rooted in a modern tragedy: the horrors of World War II, which generated the Genocide Convention of 1945. The term *genocide* was a neo-logicism that literally means 'species extinction.' It is a factual reference to the Holocaust. The triumph in creating this universal human rights law was a product of tragedy and struggle. World War II was a struggle about a life and human rights-denying ideology, i.e., the Nazi *Herrenvolkism*. The trauma for the Jewish people, a people driven from their homeland by an alien imperialist occupier, i.e., the Roman Empire, who spent some two thousand years living on the margins of other communities, and who struggled to survive and resist discrimination and oppression, confronted the ultimate price of suffering in their adopted countries as parts of the Diaspora. The European Jews, relatively small in number, confronted the might of a mechanized, organized, industrialized enemy with a political will to exterminate every Jewish man, woman, and child. The human rights that we have today are (conceptually and normatively) ideas whose current vitality is owed to the price in blood that paid by the Jewish people in Europe and by all other '*Untermenchen*' (sub-humans) who were victimized by the Nazi extermination machine, as well as by those who fought to protect them against a machine fueled by the principle of racial supremacy as a supreme moral obligation of the atheistic Nazi myth system.

To some extent, the Nazis had an insightful understanding of Jewish culture and tradition. Jewish culture extends from the roots of civilization, moral integrity, and essential humanism; and these very qualities—qualities born of spiritual and scholastic insight as well as the experience of suffering deprivation—are the core universal values of respect and the sanctity and dignity of human life were precisely the qualities and values that the Nazis rejected and sought to extinguish. The racism and anti-Semitism of the Nazis were deeply antithetical to the moral integrity, the tolerance and the value of respect and dignity that was critical in broad terms to the cultural and religious traditions of the Jewish people.

I will not focus here on all of the elements of monotheism and Jewish history. Rather I will distill the commonly-accepted value tenets of the Judaic tradition and their importance to contemporary human rights. The Judaic tradition is one of the most important global religious myth systems, as it directly influenced Greco-Roman views of political values and Christianity itself; consequently, Judaism is widely understood to be an integral part of the Western tradition. Moreover, the Judaic tradition has deeply influenced the tradition of Islam. Although religious scholars and leaders vested in the discreetness of their particular religious myth systems see differences between Islam and Judaism and between Christianity and Judaism, both Islam and Christianity share many common points of spiritual understanding and many elements of moral prescription. For example, to the devout

Muslim, Allah is compassionate, merciful and loving. This is a feeling shared by devout Christians. In the Judaic tradition, YHWH is a God of love, and God loves his beloved children. Consider the words of Hoseah:

> I taught Ephraim to walk, I took them up in my arms....I led them with cords of compassion, with the bands of love....How can I give you up, O Ephraim! How can I hand you over, O Israel! My heart recoils within me; my compassion grows warm and tender.[32]

The Judaic tradition is one that reflects spiritual insight and direct personal connection with God. For example, God gave Moses the Ten Commandments as a code that made social living and community responsibility possible. In the historic experience of the Jewish people, there are other factors that have tended to strengthen the character of certain values, certainly those that are thought to be revealed by God. Among these are the sanctity of life itself and its intrinsic value; the critical meaning of the idea of justice as an appropriate code in macro- and micro-social contexts; the critical meaning assigned to morality as the core support for the idea of justice and the value of life; the contemplation of suffering, the meaning of suffering, and how the idea of suffering itself generates compassion and identification with the suffering of others; and finally, the tradition of scholarship, which notably developed during the Diaspora, a tradition that tempers divine revelation with written expression which requires reason and reasoned elaboration in understanding the concepts of love, life, justice, morality, and suffering.

The Jewish mystical tradition described as the Kabbalah has many parallels in the mystical traditions of the Hinduist, Buddhist, Sufist, and Sikh, as well as Christian mystical traditions. In that tradition as in the others, life must also be seen as a path to enlightenment (*tzaddik*). This pathway is partly introspective and is suggestive of different forms of meditation as a pathway to enhance human consciousness. The pathway to enlightenment is the path of scholarship and learning as found in the Talmud and the Torah; the path of respect (*zhiruth*); the path of generosity (*zrizuth*); the path of loving kindness (*gemulit chesed*); the path of moderation (*haprishut*); the path of purity (*tehora he*); the path of joy (*kelippot*); the path of selflessness (*anavah*); the path of awe; the path of equanimity (*hishtavut*); the path of extraordinary mind-states (*ruach ha-kodesh*); and the path of life eternal.

The pathway to a transcendent life is a personal challenge, which puts into the context of the historical suffering of the Jewish people, which serves to clarify the core values of a life that is meant to be hallowed and to be more than the sum of its temporal parts. What is manifestly clear is that the values in the Judaic myth system represent a standard to which human beings must struggle in order to aspire and to achieve the realization of human rights, dignity, and justice—both in the local community and on the international stage. These same values also represent a shared subjectivity for all observant Jewish people who take their faith and values

[32] Hosea 11:8.

seriously. More than that, these values, when viewed comparatively, are also observable with varying degrees of specificity, in most other major religious myth systems.

CONFUCIANISM

Confucianism is a secular philosophical myth system that is deeply rooted in Chinese history and tradition. Confucius's (551-479 BC) early life was one of hardship and poverty. He is an example of a person who, through his mind, his ability to learn, and his appreciation for all interesting aspects of life be they scholastic or athletic, set himself on a path of understanding that is prescient in its message for modern systems of governance and human rights. A central theme in Confucius' public life is his concern with good governance. It is for this reason that he held only high office for a short period. Since he represented the joining of common sense, integrity, and rational judgment, he was praised in public and avoided in private by the ruling class of his time. Everyone agreed with the wisdom of his opinions and judgments.

Politically and morally suspect rulers feared the ideas of integrity in governance and the management of the state without corruption and exploitation. An anecdote gives an example of his insights into the problem of decent governance. When informed that there was a dramatic growth in a particular state in China, he was asked by officials how the government should respond to this demographic fact. His answer was simple: "Enrich them." The satisfaction of basic material wants of an increasing population was an important step towards social stability. When he was queried as to what was to be done after the enrichment process, he replied famously, "Educate them."

A central element, therefore, of the Confucian myth system is the concern for the well-being of ordinary people and the responsibilities of governance to secure that end. This brought into political theory an idea that is tied to governance accountability and democratic entitlement. His focus on education is a complement to this idea. Uneducated or ignorant people are the most likely to be exploited, or they become so alienated that they themselves become a danger to the public order. Implicit in Confucius' work is that educated people will be inclined to be more productive in terms of social, political, and economic values. His focus on education has a modern ring to it.

Confucius founded his progressive ideas about governance and education in terms of the notion of deliberate tradition. The central ideas are the notion of the *jen* (love, human-heartedness, and virtue) which is a complex idea touching on the model of the ideal relationship between human beings. This idea has some affinity with the African idea, *Ubuntu,* which idealizes the notion of human dignity, and states that people respect each other and their dignity in their interrelationships with each other. From Confucius' perspective, ideas such as goodness, benevolence, human heartedness, and related virtues are central to human integrity and behavior.

As a standard of conduct, the general framework of human rights is compatible with the foundations of Confucius' thinking. A central element in the justification of human rights is often expressed in terms of the notion of rational self-interest. If a person does not want to be a victim of a torture chamber, it is in that person's interest to oppose torture because at least in doing so he minimizes the possibility that he may be a torture-chamber victim. Confucius makes this point more positively when he says, "The man who possesses his *jen*, wishing to establish himself, seeks also to enlarge others."[33]

The second major Confucian idea is that of *chun-tzu*. Whereas *jen* relationship is the relationship of interaction between human beings, the *chun-tzu* idea sees the evolving man as a man who embodies the greatness of ideas and whose sense of compassion and charity show a spirit of great ideals in every sphere of life. The idea is that in life a person moves to a complete and comprehensive idealization of the most important temporal and spiritual values. That idealization in fact represents an expansion of the ego and identity to the entire commonwealth of persons. The following are the central ideas behind this principle:

> If there be righteousness in the heart, there will be beauty in the character.
> If there be beauty in the character, there will be harmony in the home.
> If there be harmony in the home, there will be order in the nation.
> If there be order in the nation, there will be peace in the world.[34]

The third concept in Confucianism is the concept of *li* in which Confucius uses history selectively. The tradition that must be produced is not vulgarity or the lowest levels of behavior of the past, but indeed the aesthetic of culture, the rootedness of stability, the capacity for graceful relationships and civil communications and ties between all.

These three ideas of *jen*, *chun-tzu*, and *li* are the central foundations and background for developing a culture in which dignity and respect are given operative effect in the actual operations of human interaction. What distinguishes the work of Confucius is that he was constantly involved in the community and therefore had to work out a framework of expectations that correspond roughly to responsible governance today. One of the most important and difficult matters that confronts human rights today is the problem of sovereignty and governance itself.

Confucius' approach was that the governors needed to be educated to perform their tasks effectively, and that education itself would be a foundation for governance that is responsible, transparent, and accountable, and meets standards of reason and rationality. As Confucius set out these ideas and sought to give them practical application in the real world, he directly confronted one of the great challenges, and that is how to articulate the aspirational goals with precision and

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[33] Analects of Confucius, Book II.
[34] Confucian proverb.

how to apply them in the real world in specific instances of application. Confucius was persistently kept out of governance, at least most of the time, because his brilliance, imagination, integrity, and his incorruptibility would have been a handicap to corrupt governance. This is still one of the great problems of our time, which has led to the most egregious abuses of human rights.

It is quite clear that the secular philosophical myth system of Confucius provides a critical understanding to the modern problem of human dignity, which regularly encounters the state as an abuser and a major source of human rights deprivations. It is the unaccountable state, the corrupt state, the state run by incompetents, and the state that is run without transparency, responsibility, accountability that depreciates the responsibility and good governance. Thus, the idea that the power of a state may in fact be constrained by reason and competence, and enlightenment is without a doubt a critical insight into the contemporary problems for human dignity.

CHRISTIANITY

Christianity is a religious myth system with a commanding presence over the entire planet, covering people from radically different cultures, traditions, and experiences. As a formal religion, Christianity has a long historical tradition of continuity. Its beginnings are profoundly simple and humble. Jesus Christ was born in a manger, the son of a poor carpenter, but (by faith and tradition) divinely conceived in a humble family. The extraordinary and ordinary are inexplicably combined. There is also a cross-cultural factor—Christ's birth is predicted by three wise men from the East, astrologers, in effect his birth is affirmed not from the Messianic tradition of Judaism but also seemingly of the broader universal mystical tradition of the East. There is the symbol of the star of Bethlehem, a symbol of galactic imagery, guiding strange and alien wise men, from an alien community to a stable in the city of Bethlehem. It is difficult to find in any religious text so disarming, and yet powerful a narrative, which touches on the birth or incarnation of the Christ: a man claiming to be of both man and God.

The traditional narrative is so compelling that even the mystery of the historical Jesus—what he looked like, and even more, the scope of his human feelings in terms of love in a personal sense as well as the love of humankind—remains very much a mystery. The narrative is powerful and his life—as one who 'went around doing good'—resonates across the ages as an example of human aspiration. His baptism is an exercise that rivets in the sense that Christ is baptized by John the Baptist, who Jesus calls Elijah. It is here that one perceives the first and most compelling lesson in humility, equality, and the impermanence of hierarchy.

Then there are parables with a staying power. The Good Samaritan parable is universal. There we see the concise meaning of life. In the Good Samaritan, it is the other, the non-self other, who dissolves the bonds of Martin Buber's 'I' and 'Thou.' In a telling metaphor, the bonds of ego are dissolved in the bonds of selfless empathy. The truly human side of Christ surprises us as he expresses all too human

anger at the moneychangers the house of God. The point of the story is not simply the defense of God's space on earth, but more than that, it is the human response to God of devotion and the defense of the house of devotion from being despoiled by thoughtless, greedy human action. Then there is Christ the intellectual, skillful in debate, when he ties up his interlocutors in mental knots. Every Christian recalls the trap set for him about God's superiority to Caesar. His reply: "Very well, give to Caesar the things that are Caesar's—and give to God that which is God's."[35]

Finally, there is Christ's death. Christians understand that his life was a sacrifice and that the purpose of the sacrifice would necessarily result in his death. Nothing evokes the notion of empathy, tragedy and the many dimensions of love and loss to see both God and an innocent, blameless, sinless man on the cross man, genuinely suffering, for the sake of all others. As a theological matter, Christianity only makes sense if Christ really was God, man, and without any sin.

The history of Christ's life and the history of Christianity have had a powerful and enduring appeal which have touched on the inner well-springs of human feelings, emotions, empathy, suffering, tragedy, resurrection, and hope. As one mourns the death of the Savior, one also experiences the exhilaration of resurrection, hope, and joy. It is perhaps for this reason that we can confront human rights problems in terms of a paradigm of human emotions and see through the struggle within our own souls and within the social and political environment that there is an expectation of hope of human improvement ineluctability supported by the spirit of love, compassion, joy, and hope for the future. As Christ so simply put it, "suffer the little children to come unto me."[36] Yes, it is the children who are the hope and future, and in whom Christ as the Father and as all Christians as Fathers, writ large, nurture the heritage, take responsibility for the present and especially responsible for the generations to come.

The human dignity message finds a resonance with Christianity as it does with the other major faiths. Bishop Tutu notes that

> we should have deep reverence for [the] person. The New Testament claims that the Christian person becomes a sanctuary, a temple of the Holy Spirit, someone who is indwelt by the most holy and blessed Trinity. We would want to assert this of all human beings. We should not just greet one another. We should strictly genuflect before such an august and precious creature. The Buddhist is correct in bowing profoundly before another human as the God in me acknowledges and greets the God in you. This preciousness, this infinite worth is intrinsic to who we all are and is inalienable as a gift from God to be acknowledged as an inalienable right of all human persons.[37]

[35] Mark 12:17.
[36] Luke 18:16.
[37] Bishop Desmond Tutu.

Yet, there is much that is distinctive in Christianity and the struggle for human dignity. It is Christ, in his persona and in his words, that profoundly challenges us. In truth, Christ was a radical and a revolutionary. He was more radical than any of the so-called revolutionaries of our time. Christ's message was the notion of equality. Essential to this idea was his depreciation and condemnation of sectarianism and the concomitant social inequality: the Good Samaritan and the woman at the well. These ideas were radical in his time and they are radical today, but Christ pushes the moral boundaries far beyond mere social and political equality. His ideas are so radical that even today in our personal lives we find it difficult to learn to turn the other cheek, to do good to those who hate us, or his warning to those who worship at the altar of materialism who make greed an end in itself, that such persons have the possibility of entrance into salvation as likely as a camel has in trying to pass through the eye of a needle. In the Sermon on the Mount, Christ vests the highest moral favor in the wretched of the earth: "Blessed are the poor in spirit...Blessed are the meek...Blessed are those who seek justice...Blessed are they who are persecuted for the sake of righteousness...."[38]

It is in the Lord's Prayer, a prayer as beautiful as it is powerful, that many contemporary commentators on human rights see as containing within its code, the substantive aspects of the Universal Declaration of Human Rights. The Lord's Prayer is about justice, a form of justice that is obtainable by us, that can and, Christ argued should, guide us in our conduct and in our decision-making responsibilities. In many respects, this Prayer brings together not simply the quintessence of the Christian tradition, but also in its simple and utter genius, it captures the fundamental values that can be extracted or interpolated from all the other dominant religious traditions. Like the Universal Declaration of Human Rights, it has profound intellectual content, the application of its precepts requires thought and reason, it is a pathway to deeper spiritual contemplation as well-being a profoundly compact summation of social conduct.

International Court of Justice Judge C.G. Weermantry, in his profoundly important book *The Lord's Prayer, A Bridge to a Better World,* demonstrates that within the Prayer there is the most profound moral exposition of equality and dignity. In addition, there is the idea that certain rights may not be vitiated by political authority. There is the clear concept of the universal equality viz., the idea of a higher law and the concept of social rights and duties, etc. Perhaps for today's world there is no more profound theme for the survival of humanity than the importance of forgiveness, a belief in God, and the universal necessity of mutual respect and love.

We have belatedly discovered that endless conflicts will endlessly endure unless there is a practical application of the concept of forgiveness, a notion reflected in Truth and Reconciliation Commissions. This means that truth and forgiveness are the most important values for reconciling human beings in the bonds of empathy

[38] Matthew 5:3, 5:5, 5:6, 5:10.

and solidarity as means of ending conflict and tragedy. Today, we talk about transitional justice in which societies like South Africa, once involved in lethal conflict, but which are now reconciled through the complex process of forgiveness, acknowledgement and reconciliation for hope in the future. In some senses, there are societies that have followed this model and can be truly regarded as societies that have been resurrected. From the Christian perspective, that is the good news, that is the hope, that is the future, and that future is based on the foundations in the Lord Prayer's itself touching upon equality, dignity, and so forth and reflected as well in the UDHR's promise of the future.

ISLAM

Islam is also one of the great religions of the world and, like Christianity and Judaism, is identified with monotheism. Islam's view of God is that God (*Allah*) is an all-pervading benevolent and merciful creator. God is the ultimate idealization of the norms that govern the faithful. God's expectation of man is that he be virtuous and embody the good life through piety and through submission to the Lord, i.e., orthopraxy.

Scholars hold that Islam is sustained by five symbolic pillars. This is generally identified with the Sunni perspective. It is also maintained that Shiites identify eight pillars, although these eight pillars or practices are thought to overlap with the five pillars mentioned earlier. The five pillars of Islam focus very much on prayer and worship that is constant and community-oriented and designed to reinforce the belief that man exists to serve a beneficent God.

Shahadah: The first pillar of Islam is clear and unequivocal: "There is no God but Allah and Mohammed is his prophet."[39] There is an insistence that no Muslim worships the Prophet Mohammed (PBUH)[40] for he was simply God's messenger. This pillar expresses humility, guided by faith. It is a critical factor in a world of unrestrained egotism, frequently in the powerful who express no humility in their domination and control over others. Thus, the concept of humility clearly has resonance with the modesty required by the Hindu tradition and the control and submission of the ego to a higher purpose found in both Hinduism and Buddhism. It is a critical and universal insight that may well be the foundation by which humanity secures the foundations of human rights.

Salah: The second pillar of Islam also reinforces the idea of piety and prayer. The Koran enjoins the faithful to pray constantly. Thus, the Koran instructs the Muslim to "be constant" in prayer. The typical prayer emphasizes that God is the helper of the afflicted, and the reliever of distress. God consoles the broken hearted and is a constant help to his servants. God is the helper, and man is the beseecher. God is merciful and all loving as well as the epitome of forgiveness. Man is the

[39] Shahada, Five Pillars of Islam.
[40] "Peace be upon him."

sinner seeking forgiveness. The normal prayer captures the ideals of consistency of commitment to the ideals of Islam, to the ideals of piety, humility, the problems of distress and suffering, and the importance of love and forgiveness. The daily prayer is in fact a sacrifice and a reminder that we are spiritual beings and that God's compassion and beneficence given to us through piety and prayer is an example to be universally replicated. It represents in this sense a tool of personal transformation in the direction of piety and compassion. These are central to human rights as well.

Zakat: The third pillar of Islam is a reflection of Islam's concern with kindness and generosity. Kindness is the opposite of repression and is an antidote to suffering. It is impossible to be both kind and human rights sensitive. Thus, the principle of *Zakat* is another deeply rooted precept of critical value to human rights in the here and now. It has broader salience in the world of today. It touches on the practical issues of governance and social equity. *Zakat* recognizes that some people are very rich and others very poor [social stratification/class]. One of the central pillars of Islam is to promote an idea of proximate social equality. The prophet Mohammed (PBUH) instituted the welfare state with a graduated tax so that the 'haves' could share their excessive abundance with the 'have-nots'. The prophet Mohammed (PBUH) was probably the first world leader to think in terms of a new deal for the 'have-nots', a deal that would be done peacefully according to the word of God. Islam provided the initial outlines of a pre-modern welfare state, a state that focuses on not simply civil and political rights, but also social and economic rights.

Sawm: The fourth pillar of Islam stipulates a period of fasting during the month of Ramadan. This period is important because it is a reminder of the notion of sacrifice, obligation and duty. It does this in a practical way. The fast performs the function of purification both physically and psychologically. When it is time for a broader framework of piety and submission, it represents commitment to the transformation of the person in personal terms as well as in solidarity with the community of the faithful. Fasting is also an act of self-discipline and sacrifice. It is a critical part of the spiritual transformation of the human being. It is significant in the sense that this form of sacrifice and struggle is a personal obligation of every single Muslim. It is therefore a powerful tool of self-reflection about the moral and spiritual foundations of faith and submission to God. What is central here is that the obligation on all to participate in the fast is one of the most practical mechanisms for bringing the faithful to a deeper understanding of the inherent dignity of all the faithful and the moral and spiritual foundations that inform this moral and spiritual precept.

Hajj: The *Hajj* occurs during the month of *Dhu al-Hijjah* which is focused on a pilgrimage to the holy city of Mecca. The *Hajj* is a powerful concrete expectation of action. The ritual requires planning, a time-line, a degree of spiritual and psychological preparation, and a communion with all those of the faith in the holiest sanctuaries of Islam. This experience is of extraordinary importance to ordinary people. It presents a practical form of action to be proximate to God as well as to self-reflect on past imperfections and the needs of others. This clearly is an

experience that is meant to change individuals fortunate enough to experience it. It counts therefore for much of the internal solidarity and unity in the diversity of those who profess the faith. In a sense, the Hajj itself gives much more concrete expression to the notion of this struggle to overcome one's own weaknesses and to advance spiritually, in terms of submission to God. Thus, Islam has a very practical aspect to the challenge of individuated struggle and commitment to the ideals of religion and its principles of mercy, compassion, generosity, and inner integrity.

Jihad: The sixth possible pillar is the *jihad*. The *jihad* is meant to be an omnipresent symbol or norm of the challenge that the faith poses for the individual adherent. That challenge requires the person to be aware of the moral responsibility and importance of the personal struggle. The struggle involves the struggle against evil. The temptations may be personal. Thus, the obligation of the *jihad* is for the believer to strive and overcome the temptations of the devil and sin and not to deviate from the path of God. As we have seen in other religious traditions, struggle is critical to the spiritual self and the spiritual self is the foundation of the fundamental value of personhood under the grace of God. What is distinctive about the *jihad* is that it falls within a tradition that insists on ritual and practice providing a concrete expression and form of action as an omnipresent function of submission to God.

The *jihad* in the form of struggle may be an intensely personalized internal struggle but it may also be a struggle in support of the integrity and well-being of all believers. In the Bhagavad Gita, for example, Krishna insists that it is the duty of Arjuna, a warrior, to fight a just war, to fight against evil. This is a sense a broader social obligation and also one mandated by religion. *Jihad* may also have an analogous aspect in the sense that the call for a *jihad* may be a call for the commitment to a just war or cause which is central to the integrity and well-being of the community. Thus, a *jihad* could well be an obligation that requires the faithful to struggle against oppression or aggression. In the UDHR, there is a reminder in the Preamble that human rights should be respected so that man does not resort to revolution to secure fundamental rights.

I am not making more refined distinctions about the scope of *jihad* and the problems of construction and interpretation of its ultimate or essential meaning. It is perhaps sufficient to note that what defines it is the struggle to defend and promote the ideals of the faith and these ideals are shared with other confessional traditions and the values behind these ideals inform the scope and content of human rights.

RELIGIOUS VALUES AND SECULAR VALUES COMPARED

This survey of dominant religious myths and their attendant values has sought to stress the congruence of the values and ideals of some of the important religious traditions. When the religions are viewed in the concept of the struggle for approximating the ideals and values that are symbolized by transcendent grace, the fundamental value of human dignity becomes clearer. The central values coalesce

around the principle of mutual, reciprocal respect for all. The values focus on critical indicators of love as an aspect of identity that is dynamic and in the context of struggle evolves inclusively. The most important humanistic aspect of the practical embrace of inclusivity is that man is indivisible and that human solidarity remains a critical challenge to the struggles that sidetrack or fragment our capacity to see all of humanity in us. Religious truths therefore stress the importance of the complexity of struggle and aspiration through multiple paths and techniques the purpose of which is to use inclusive love and solidarity as a foundation for an even deeper spiritual unfolding of submission to God in which all boundaries of "otherness" disappear. Modern human rights appear to bring these fundamental values and ideals together in an irresistible paradigm and challenge. That the 'I,' the 'we,' and the 'other' are one in ideals, integrity and respect. The processes that animate the struggle remind us of other critical values such as empathy, kindness, compassion, generosity, non-violence, truthfulness, piety, and our capacity for humility in the presence of the spirit of humanity.

Today, a global discourse continues under the institutional framework of the Parliament of the World's Religions. This process of global communication has given birth to a critical inter-confessional dialogue. It is an institutional reminder of the spiritual bonding of all of humanity regardless of the particular faith or sect.

The critical question concerning the commitment to foundational values of human dignity that are found in the important religious experiences do not solve the issue of strategies that different faiths mandate to enhance the spiritual and moral aspects of individual and community experience. It is largely in this area where contentious debates emerge about whether the cultural practices that sanction diverse guidance in the context of cross-cultural experience that we confront the problem that human rights have sought to solve—that of cultural universality of moral virtue versus the cultural relativity of moral virtue in a diverse world. Under the influence of rigorous analytical philosophy, modern philosophers tend to be skeptical that universal moral propositions can be justified by objective methods of reasoning or can be self-justifying by close analytical appraisal. Some go so far as to hold that universals such as the universal right to human dignity cannot be meaningfully stated and, therefore, the concept of human dignity itself can only be justified on the basis of subjective non-rational factors associated with confession and belief.

Thus, if human rights and dignity are simply matters of cultural and moral relativity, we concede that any claim to universality inherent in modern human rights is based on fragile foundations and fails the test of objective justification. This is no simple matter. The UDHR contains the word *universal*. It has obtained the status of customary international law and therefore is meant to articulate obligations that encompass all of humankind. Perhaps there is a pathway that provides some degree of reconciliation and understanding of human rights that preserves its global reach but does not seek to establish a justification based on an individual's subjective intimacy with the Creator. Indeed, such an outlook presents a distinct

challenge to the skeptic of who or which Creator is the justifier of all moral virtue which if mistaken may lead to abuse and decrepitude that religion and morality seek to constrain.