The global social order would seem to be in jeopardy, not only because of the contemporary confluence of ecological, economic, and military challenges, but also because of the failure of social scientists to answer their founding questions on human nature, method, and progress. In trying for answers they have shown empirically a gap between what the law says and what its subjects do. More specifically, legal scholars have argued that rules, to be rules and thereby regulate behavior to maintain social order, must not be entirely descriptions of the present behavior. Both social scientists and legal scholars agree that rules inferred solely from descriptions of the present will fall behind change in behavior and will, like rules postulated too far ahead of behavior, detract from faith in the legal order by undercutting the law’s predictive capacity. In the name of global order, legal and social, one wonders just where to strike a pose between contemporary international behavior and a nascent system of global law.

This investigation addresses the supposed gap between public international law and the behavior of its subjects. It suggests, first, that any significant gap may be a function of an observer's intellectual starting point as well as his methods of posing questions and seeking answers. It argues that whether one conceives law and legal systems as existing to manage conflict or to eradicate it is as much a matter of philosophical assumptions as of logic or empirically buttressed argument. It challenges the effectiveness of the myth of sovereignty which has been the ideological base of public international law and proposes a contrary myth. It questions whether the adversary proceeding, a means of institutional-
izing and ritualizing conflict, will sufficiently mobilize cooperation to preserve the global order. Concluding that the adversary proceeding is a global hazard, this investigation offers an alternative process for minimizing conflict.

PHILOSOPHICAL PREDISPOSITIONS

Social scientists investigating international relations have argued for most of this century over whether assertions about human nature can contribute to an understanding of international law and if they can, how to convert such assertions to testable propositions. Those who professed faith in a "value free" social science, to be produced by "sticking to the facts," appear to have lost to those of the human-nature-matters school. The further from their original intentions the social scientists of the value free school moved, the more they proclaimed their scientific objectivity, the less enlightening their findings became. In their attempt to escape the metaphysics of political philosophy that combined descriptive and prescriptive law, value and fact, self-examination and social analysis, they increasingly focused either on relationships of persons and settings in particular events or on creating a system of propositions logically entailed, consistent, or dialectic. Either way they lost track of the rules by which persons arrange their associations. They repeatedly had to choose between coherence and accuracy in their theories. Refined far enough to be accurate a theory lost its abstract quality of general application; it became a set either of sterile premises or causal but irrelevant explanations.

Among those for whom human nature matters, there remains disagreement about how to engage the question of what that nature is and how it matters. "Positivist" social scientists operate on a faith that enough accumulated data will provide a reliable base from which to infer the valid generalizations about human nature, to determine whether it is fundamentally good, evil, or variable. From their empirical, case by case development of generalization or legal precedent the "positivists" would then prescribe for policy makers the norms, ethics, and rules for creating and managing institutions to order the political life of this planet, Earth. More disturbing was the "positivist" determinist posture toward life and history. One might describe the non-determined experience of re-

ality that defies the "positivist" as the "felt meaning" or the "subjectivity" of social relationships. But with the continuing attack on the positivist epistemology and the shrinking of federally-funded social research in the wake of the United States involvement in Southeast Asia and supply-side economics, the positivists have been confessing to each other the futility of their efforts.

Once a social scientist grants that what an actor thinks about human nature, events, or the legal order is an important element in one's understanding of an actor's behavior, that observer enters a new cognitive world. Rational theorizing no longer means abstracting from the particular to the general. And rational behavior is no longer necessarily that governable by or reducible to abstract principles. The particulars of experience take on new importance. The particulars affect the behavior through philosophical clusters variously called models, paradigms, predispositions, or attitudes; clusters of these sorts give shape and meaning to reality. "Normativist" social scientists give weight to these clusters and are winning their philosophical battle with the positivists. While normativists cannot agree what is politically important in human nature or its moral impact, they concur on the relationship of clusters to action. They recognize, for example, that attitudes are more basic than opinion; attitudes remain behind when opinions about political issues change. Issues of political life come and go, and opinions with them, while an attitude remains behind waiting to be the source of other opinions about other issues. The attitude, or predisposition, is general while the opinion is particular. Attitudes or predispositions that tend to reinforce each other cluster into a package of images and beliefs about the world that enables a person to give coherent meaning to events in life, to filter an otherwise overwhelming assault by a noisy, undifferentiated reality.

10. Unger, Law, p.23: "Our theories of culture and social organization depend on the view we have of human conduct and of interpersonal relations"; pp. 23, 23: "Each [doctrine] of social order ... has a more or less hidden moral component from which the doctrine can never be entirely separated. In every case there is an indissoluble reciprocal link between beliefs about what society is and beliefs about what it ought to be."
Being incomplete and inaccurate as reflections of reality, such packages can limit the questions one can ask of reality and what one will accept as appropriate answers. But the "normativists" cannot agree what philosophical packages conduce to the successful building of legal systems.\(^1\)

Philosophical predispositions are of at least two kinds: assumptions and perspectives. The structuring assumptions are about human nature, society, and the interaction of the two—about the "natural order." These appear in association with formal religion or ideology and are the bases for judgments about "good" and "bad" in human relationships. Second are the possible perspectives of observable phenomena. A perspective is one's aesthetic or logic of history, the order and meaning of events. It bears on beliefs about what one can know and how one comes to know it. Each perspective is a set of expectations about history: what, given the character of historical knowledge, can one learn when using proper tools? To write about philosophical predispositions is not to advocate them at this stage, merely to describe them; not to wish their abolition (no matter how often one says, "let's look at this in perspective"), but to accept and learn from them. They are incomplete and inaccurate representations of reality and, thus, evidence of humanness.\(^2\)

In their prescriptions for legal order, normativists diverge, this investigation asserts, because normativists' predispositional packages differ. Each theorist operates from a unique package or worldview that encloses, first, noninferential assumptions or beliefs and, second, inferential presuppositions, images or perspectives. One's assumptions about human nature, society, and how these interact lean toward one end of a spectrum; being in the middle is impossible, though intensity of conviction varies among persons, or, within a person, depending upon what the conviction is about. One's cluster of images of "what is" produces order and meaning in one's observations and expectations; images develop from previous observation and instruction or indoctrination. These presuppositional perspectives limit what one can see; assumptions condition how one may feel about that which is seen.

---


2. Steiner, "Human Nature," finds that persons of differing predispositional packages contradict each other in significant ways that make merging two or more packages, for most social purposes, impossible. Persons with opposing preferences tend to be opposite in cognitive styles as well as particular opinions. See Isabel Briggs Myers, *Introduction to Type* (Gainesville, Florida: Center for Applications of Psychological Type, 1976).
Each person has preferred ways of approaching asking questions and rather well formed, if not verbalized, beliefs about many aspects of answers: potential, size, trends, change, repetition, and the like. History for each observer has a special configuration of perceived, if not expressed, shape, weight, speed, and complexity. While each potential historical configuration is unique, the possible spectrum can be broken into four categories: linear, cyclical, discrete, and analytical.

NONINFERENTIAL ASSUMPTIONS: MODELS OF MAN AND SOCIETY

The impact of combinations of assumptions and perspectives on approaches to explaining legal order will be more salient if one first enlarges on the content of each kind of predisposition.

One can discover philosophical assumptions about legal order by asking whether human beings are aggressive by nature. Far from being irrelevant, one's answer to this question has tremendous import for one's opinions about global legal order. Regardless of how sophisticated one's research techniques, how lofty one's theoretical frameworks, how prestigious one's place in the foreign ministry or academia, the opinions one forms depend upon where one starts using the tools of analysis. Unasked questions cannot be answered. Answering the aggression question in the affirmative leads to an affirmation of the danger of war or other severe disruptions of the legal order. One's observations about the inevitability of war always build upon one's assumptions about human nature. This is also true regarding opinions about the possibility of order or peace; if one believes human nature is basically maleable, an assertion as yet neither provable nor disprovable scientifically, then one will believe peace is possible; if unmaleable, impossible. The question of human nature is only one springing from the philosophical assumptions. Others include "Who is in charge here?" dealing with political authority. Or, "Are we going to let them get away with that?" dealing with governmental legitimacy. Or, "I am certain they will fight/cooperate, for they always have," pertaining to law and order.

To distinguish one end of the spectrum of assumptions from the other one may ask these questions: Does hope weigh more heavily in my life or does fear? Is life a variable-sum game or zero-sum game; that is, can all win or only one? Is it possible for the proportion of good in life to increase or, if someone has gained something desired, must someone else have lost an equivalent
Is it possible for the amount of power to increase or, if the USSR increases its overall power to pursue its goals in global politics, have the United States (or other states) then lost some former power? One's answers to these questions can indicate toward which philosophical pole one leans. Affirmative responses to the interrogative clauses before the "or" in each question cummulate to the pole herein called harmony; those following the "or," to the pole of contention. While some of the apparent differences in one's expressions of views may be semantical, as in discussions of the concept "power," semantics may mask real differences as well.

Contentionists opine that human beings live permanently close to a condition of nature where individuals behave like the literary image of beasts of prey. In the language of theology, the contentionist would hold that all are born evil, selfish, prideful. In the language of the political theorist, all pursue self interest.

As opposed to "rational, self-interested" choice, Stephen Ross has developed a model for what he calls "altruistic" choice; it allows for non-zero sum outcomes as a matter of policy rather than happenstance. Rational models deny the possibility of altruistic choice the way theologians attribute all human motivation to pride. Where an actor complies with community guidelines, not by conscious calculation, but because the actor has internalized them or simply receives direct satisfaction from the act undertaken, he is motivated by something other than "interest" that the consumer model posits. To the extent that the internalized guidelines upon which an actor as agent acts reflect the values of this agent's principal, these guidelines are altruistic as well as the agent's decision. See Ross, "An Economic Theory of Altruism," pp. 181-197 in Klaus Krippendorff, ed., Communication and Control in Society (New York: Bordon and Breach Science Publishers, 1979).

Readers familiar with the literature of international relations will note similarity between the "contention/harmony" dichotomy used here and the "realism/idealism" (or "realism/utopianism") dichotomy. See, among many, E.H. Carr, The Twenty Years' Crisis: 1919-1939 (London: Macmillan, 1939), Part Two; Arnold Wolfers, Discord and Collaboration: Essays on International Politics (Baltimore: The Johns Hopkins Press, 1962), Chapter Six, "The Pole of Power and the Pole of Indifference"; John H. Herz, The Nation-State and the Crisis of World Politics (New York: McKay, 1976), Chapter Two. The term "realism" implies a grasp on reality while "idealism" seems to deny the importance of the world of objects in favor of some utopian future. "Idealism" implies that those who endorse it hold a monopoly on good intentions while suggesting that "realists" lack imagination. Instead, those of the so-called "realist" school neither lack imagination, whether fertile or fatal, nor necessarily are more in touch with reality than so-called "idealists," whose imaginations may be fertile but also futile and even fatal. Moreover, the terms, as used commonly, confound their former homes in philosophy. The "realists" claim to separating "is" from "ought" fails because the separation becomes an "ought". See Harry W. Jones, "The Practice of Justice," Washington University Law Quarterly (1966): 133-146. To reduce the unhappy connotations of the older terms, this investigation proposes (1) to substitute "contentionism" and "harmonism"; (2) to recognize these as assumptions about "purpose," as distinguished from forms of action; (3) to show more clearly why a collectivity experiences diverse expectations of what can be and is being done in the global legal order. With this newer formulation, on the level of action, "pragmatism" is conceptually available for purchase by either assumption; and the "legitimation process" commonly called "morality" is inescapable.
power. Freedom in this construct means being able to control one's surrounding physical and social environments. Individual expressions of wants (political demands) are the sole source of social interaction and, hence, of law. Autonomy, an operating premise, means the absence of any felt need to adapt to any change occurring outside oneself. But to escape the ever-imminent war of all against all when all pursue freedom and autonomy as self-interested ends in themselves, human beings yield portions of their autonomy to an outside authority, the state; they do this in the name of order, predictability, and legal competence. The United States Constitution declares such competence in the state, promises it by contract. An individual obeys the state's rules instrumentally, that is, because the benefit of obeying (order) exceeds the burden of disobeying (disorder or state punishment); the individual's calculation here is based on how obeying efficiently moves him toward achieving his goals.

One goal, certainly, is survival; contentionists assume that for individuals to survive, the state must survive. States survive globally in a fragmented, mercantilist system by cancelling out or balancing among themselves their mutual rapaciousness. But the equilibrium is delicate; anarchy and war disrupt it repeatedly. Peace is a truce; order, a stalemate.

Harmonists argue that the norms of global society and the rules and procedures of organizations such as the United Nations have restricted the range of ends that individuals and states may pursue and that such restriction can and should increase. (Though the United Nations has also broadened the means states have to serve their peoples' interest, harmonists would say states are too blinded by fear to see this.) Because of his concern with consensus, a harmonist would more often than a contentionist begin discussing life-ordering assumptions at the level of shared values and images as has been done in this paragraph. These make a legal order possible; in fact, they demand its existence if there is to be society of any kind. Shared values, not self interested individual expressions of wants, give a legal system its legitimacy. In any society these values in the legal sphere are *ius cogens* (inherent ordering principles such as a prohibition of murder or destruction.


of a state), a stipulation that agreements are binding, and a procedural reciprocity; these principles seem to exist across cultures and to undergrid even traditional international law. Such values are supraordinate to any utilitarian cummulation of individual self interests, greater than the sum of the parts. And the sharedness is made possible by human nature's being, if not unalterably good, then certainly receptive to change. "If he who bases his hopes on human nature is a fool, he who gives up in the face of circumstances is a coward." Camus and other harmonists claim that human nature responds humanely to education, that human beings can internalize others' expectations, make them their own.

Harmony is strong in the secular religion of the United States, in the Declaration of Independence, the writings of Thomas Jefferson, and in the Fourth of July professions of faith in the possibility of a more perfect world. Certainly individual human beings, either innately or through education, can perceive the intersection of their own and group interests and can, if properly inspired, act in accord with the good of the group. "It is only a general sense of the common interest ... which induces them to regulate their conduct by certain rules." Within each individual is the seed of global community; it can be watered by self-abnegation by states. The state and other contrivances of governing are meant to serve the peoples' interest of harmony and justice; states as institutions should be willing to step aside from their historical assertions of sovereignty in the greater interest of global peace and order. This faith expresses the United States vision of a single, integrated, self-managing global system.

These contentionist and harmonist assumptions, as the starting points of analyses of legal order, carry implications for how one will assess the presence or extent of any gap between expectation and performance in both normative and positivist international law. Contentionism cannot explain how persons, whose goals are assumed to conflict, can associate enough to create rules of procedure (even if only instrumental ones), how they come to value solidarity or, most importantly, by what calculus they choose between long and short range self interest. Harmonism cannot easily explain conflict, how the supposed "sharedness" can be missing, how

18. Albert Camus, Neither Victims Nor Executioners (Chicago: World Without War Publications, 1972), pp. 52-55; this essay was published originally in 1946.
a regime can lose legitimacy. It assumes that individuals internalize each other's expectations. Pushed to its ultimate this assumption would obviate the need for any rules. Hence allowing for the existence of rules may make a harmonist contradict himself.

In the global system contentionism allows for variations in state behavior only after asserting that all states are the same. Harmonists, in contrast, allow for differences among states and other actors at the outset, but they would like to overcome these differences; they may go so far as attributing all conflict to the existence of states and the sovereignty of states. In their drive to eradicate conflict, some harmonists, the radical Marxists, even advocate violent conflict; like the contentionist logic that would lead to a drive for global empire to achieve a final preponderance of power and freedom, the harmonist logic would do the same in the name of peace. The premise of autonomy is the contentionist's vulnerable spot. The weak of the globe, or the inherent physical limits of a globe assaulted by self interested individuals and states, can crash through the conceptual, even military barricades of the contentionist state system (especially if it continues on its adversary proceeding path). Those who command an order that embodies their preferred values face persons who feel they could advance their values by rearranging social relationships and the political-legal order.

The bottom line for the social scientist is not that one order is inherently preferable to another, but that demands for “just” change have to be met by those in authority if the community is to remain orderly. The seeds of a new order are in any protest about a current one. Any would-be replacement authority is condemned to using the existing order to achieve any subsequent one. The substantive issues of a day can be the grist for changing the existing order. Both substance and order are fluid. The notion that order is a solid, with all social relations compressible within it, is historically false. It is a delusory prediction of what one can reasonably expect, either in the hope of preserving what one values or achieving what one values, in the name of change, believing that only wholesale or radical explosion will make satisfying one's values possible. Thus, regardless of their differences over form or its operational outcome, anyone breaking a rule, ethic, or norm that seems “inconvenient” or “unjust” risks arousing within the order questions about the importance to the violator of the existence of the group and its protective guidelines. So long as the members of the group perceive the guidelines as a consistent framework for
order, the order is an effective support system.\textsuperscript{20} The members of the group may conform to the guidelines because they fear unrestrained conflict, out of habit or inertia, or in the longterm interest of collaborating with the group.\textsuperscript{21}

Both outlooks raise significant questions about the future of global order and the efficacy of any legal system attempting to serve it. Global legal regimes respond to environmental change, though not necessarily promptly or effectively; change in the law is a function of the modes of communication and the interplay of persons of the differing philosophical assumptions. Though a contentionist is not inherently protective of a status quo, regarding the present global scene he is more apt to perceive change as threatening the state and to advocate moves to avert such a calamity. Harmonists usually perceive a need for suprordinate values, to produce or maintain cooperation in an environment generally free of military threat but showing promise for wrestling with challenges of community purpose, ecological surroundings, or economic relationships. A contentionist, inherently conservative on international law, builds upon his primary unit of analysis, the state, and therefore is more inclined to recognize positive law; he risks positing the legal order somewhere behind the system's actual performance. A harmonist, impatiently attending those incremental changes in behavior that pace customary law, may stretch ahead of behavior by reasoning that what the legal order needs in the way of law, the order should have. He will fault regimes for failing to specify rules with appropriate latitude and for failing to recognize changes in role players or roles or the rate of change; but he then risks outdistancing the players' expectations.

\textbf{INFERENTIAL PERSPECTIVES: MODELS OF KNOWLEDGE, MEANING, AND HISTORY}

How one looks at history—at what one can know—affects how one will construct or evaluate a legal order.\textsuperscript{22} Each of the perspectives on history described here is a compound of many concepts, but especially of notions of purpose and the meaning of progress. A most prominent view of history in Western society assumes that history is the \textit{linear} unfolding of events, that history proceeds

\textsuperscript{22} Oswald Spengler, \textit{The Decline of the West} (New York: Knopf, 1932), Vol. 1, p. 93, wrote that history "is an image, a world-form radiated from the waking consciousness of the historian..."
from some fixable point or primeval beginning to the present and into the future toward the apocalypse or some ultimate synthesis. Whether Judeo-Christian or Marxist, this linear perspective preaches a faith in progress. Whether progress represents visible improvement in human nature or society is a matter of philosophical assumption; but linearists concur that progress is a matter of constant change guided by an unfolding, overarching purpose, only ever partially understood or achieved.23

Of equally strong intellectual roots is the cyclical view of history as the repeated turnings of a great wheel in which the constants and repetitions outweigh any particulars of events. Anything popularly called "progress" is only a minor bump in the movement of life around the orbit of the spheres that will bring posterity to no ultimate truths or conclusion. Any purpose in history is that read into it by a given age, culture, or civilization. One day every social order collapses, fades or otherwise gives way to another. The wheel of history inexorably rolls on.24

In another view the situations and actions of human society are neither repetitive nor cumulative; they are just discrete happenings. To look for meaning or purpose in history would destroy the essence of human beings, dehumanize them, make them smaller than they are. History that could apply to the present is what a person knows from his own doing. "Lessons of history" is an empty phrase offering no understanding of purposes or forces at work in current policy situations; the uniqueness of an immediate problem outweighs any general assessment. History is an empty bottle, useful for putting something current in; it is ornamental, not a tool for solving problems.25

The final view to be considered here, the analytical, combines the linear and the cyclical. The result is a view typical of the social scientist: history is normative; the interaction of human beings is purposive and sufficiently repetitive that it can be cumulated, generalized about, and applied against an understanding of purpose to produce policy prescriptions or rules.26 Behavior or events need not be isomorphic to be cumulated; generalizations build

---

on the likenesses of parts, not wholes. This analytical view makes possible predictions based on its generalizations though it tries to allow for the ways unique qualities of events limit the generalizations’ reliability.

The analytical perspective posits mental images of what a social science researcher is to look for and where and how to store it when finding it. This means classifying and repeatedly reexamining both the statics and dynamics of the world’s legal order. It means determining who creates, promulgates, interprets, enforces the law and what procedures assure the efficacy of principles of predictability and reciprocity. In legal substance the analytical perspective treats ius cogens, and the normative behavior of courts or bureaucracies and their executives, as politically-conditioned action and asks: who does what to whom with what effect? An ordering norm is a prediction: that an agent will respond positively or negatively to a class of action in a relationship that exhibits certain character.

Whether careful adherence to any view, but especially the analytical, can improve or will merely sustain a social actor’s success rate is, to close the circle on the dissection of attitudes, a matter of one’s philosophical assumptions. A harmonist might argue that were all to believe improved success possible, improved success would be possible; a contentionist would respond that no matter how many believed, success defined as increase in happiness would not occur, for there is not enough to go around.

The assumptions about human beings and society and the perspectives on history combine in a number of competing worldviews. A contentionist who approaches history and legal order with an analytical view of history is different from a contentionist who sees history as a collection of unrelated discrete instances. The same is true for the harmonist, whether linear or analytical, cyclical or discrete in orientation. The combinations most important in this investigation’s examination of the complementarity of social science and global law are the “analytical contentionist” and the “analytical harmonist.”

In a world of competing states, the analytical contentionist concerns himself primarily with “high politics,” the security issues of great military and economic import. All other issues take their rank in response to the national security strategy. Descriptions of

27. For a broad examination of “cummulativeness” and “repetition” questions, see Rosenau, ed., Search, Part Two.
limited resources, military threats, deterrence, and guerrilla war
bulk large in this view's agenda—in the name of social order.
While conditions and values may be in flux, legal order is a result
of opposition groups forming, breaking, and reforming in informal
cohorts and formal alliances. The duties of the managers of legal
order are decisions regarding timing: when to arbitrate; when to
demure; when to obfuscate; when to clarify—to achieve state goals.
In the contemporary global legal system the analytical contention-
ist focuses sharply on two features: (1) the demands by newcomer
states, the former colonies or non-self governing territories, for full
status at a cost in control by the older states and (2) the continuing
claim of certain states to the appropriateness of "wars of national
liberation." This worldview downplays or actively seeks to under-
cut any sign of legitimacy appearing in any organization other than
a state. Any non-state organization is seen as either a means for
state use for state ends or as a threat to be restrained. For the
analytical contentionist the new visibility of transnational organi-
sations and movements, transgovernmental communication
among subordinates, or supranational agents does not diffuse the
vitality or ultimate importance of the state.29

By contrast the analytical harmonist views the world as a sin-
gle, loosely integrated organization. Within this organization the
processes of education and communication are crucial for the de-
sired and necessary cooperation, coordination, and regulation of
behavior requisite to improving the health, prosperity, and confi-
dence of peoples. Certain features of contemporary behavior
among the states as well as other entities and actors are seen by
this worldview to aggregate in support of a thesis that states now
share sovereignty rather than holding it as their monopoly. Even
in as conservative a field as international law, where once one
could speak of a small club as the creating and enforcing body, the
analytical harmonist now finds, in terms of the analogy, at least a
village or small town with a potential fast-growing suburb filled
with fertile "families" threatening an explosion in the number of
"law-makers." By concentrating their research on questions treat-
ing the globe as an integrated social unit, treating the globe as an
entity equivalent in structure to an individual state, analytical har-
omists are producing evidence of perhaps weak but nonetheless
viable operation of a political system, with a supporting legal sys-

29. For a treatment of the balancing of the vitalities of the parts against the
harmony of the whole see the writings of Reinhold Niebuhr in Harry R. Davis and
Robert C. Good, eds., Reinhold Niebuhr on Politics (New York: Scribners' Sons,
1960), at Chapter Ten.
tem, that is global in scale. What, then, to the analytical contentionist, is a threat of disorder, to the analytical harmonist is evidence of an expanding sense of global community.

THE MYTH OF SOVEREIGNTY

One’s assessment of public international law’s maintenance of global order is a function of both one’s philosophical assumptions and one’s ability to adopt an analytical perspective. If one sees global conflict and expects it, one is more apt to conclude that any changes needed in the legal system would be modest ones, to facilitate greater achievement of aggregate individual interests. If one sees global conflict, but believes it avoidable or unworthy of the social order, one might advocate a new legal system, or, at minimum, a substantial alteration of the mode of managing conflict and internalizing rules deriving from *ius cogens*. In either persuasion, only through an analytical perspective can one examine public international law’s rationalizing myth of state sovereignty. Linearism would assert sovereignty’s days are numbered; cyclicalism would hold it inevitable, if not constant. In the discrete view, sovereignty might be simply another of the indefensible ideologies human beings continually take to be facts. Only an analytical perspective can ask for both the myth’s origin and the efficacy of its current service.

The state boundary is the break point in traditional international law. It is coterminous with the mutually exclusive state sovereignties and is underwritten by the myth of sovereignty. Inside the state, order is subordinate to the superior rule of the state; outside, it is the voluntary contractual coordination of states.

*Unless states have made them the subject of law between them,* international law does not govern non-governmental international organizations . . . ; [it] does not deal directly with multi-national corporations, conglomerates, or other companies; and [it] does not govern domestic matters that may be of international interest. . . . International law is a discrete, comprehensive, legal system and the law of an international political order.30

Such a definition restricts law to one category of actors called states and binds only a state that wishes to be bound; and it is, in contentionist fashion, limited in scope (rather than, in harmonist fashion, viewed as weakly enforced but fully comprehensive in

---

scope). This traditional, and contentionist, definition may restrict
an observer's potentional understanding of the nature and sources
of order in global life. If the law applies only to states, what pre-
vents anarchy among other actors or tyranny of the states over
other actors? If nothing outside the state compels it to accept a
particular interpretation of the legal aspects of a given situation,
what, other than other states, will compel a state? If the scope of
the law is only what a state or the states say it is, why is not the
entirety of global life a free-for-all outside that scope? If the pur-
pose of the law is to provide order for a community or society, and
only the players enforce the law, how can one's view of law in this
context not be impressed by its hypocrisy? If non-state actors owe
no respect to law in their own sovereign capacities, what is to con-
trol them? Or, how does one explain the regularities of their be-
behavior and their concern about other actors' expectations?

While "[a]nalogies, and nomenclature, from domestic law are,
of course, deceptive,"31 Hedley Bull notes that order is "morally
prior" to the system of states, that this state system is continually
subject to test by humanity, the test of order.32 Is not this same
humanity, then, the "superior" rule's source? In the harmonist as-
sumption it is. If humanity cannot exercise its right to test as ef-

31. Ibid., LVIII.
32. Bull, Anarchical Society, p. 319. One might argue that the entirety of the
purpose of a governing unit is to assure legal order in the face of social and eco-
nomic change. (See Samuel Huntington, Political Order in Changing Societies
(New Haven: Yale University Press, 1968), Chapter Two.) Or one might argue that
the primary role of law is to promote social order by promoting values such as
human rights or social justice. (See David Forsythe, "Law, Morality, and War After
Vietnam," World Politics, 28 (1976): 450-472.) This second view is expedi-ent in
that it says that "when social justice is widely perceived to be absent, there will be a
significant increase in the number of actors who will seek that goal through an in-
strumental disorder—viz., violence." (Forsythe, p.451.) A third view would hold
that order is a result of an authority's successfully balancing the expectations of a
group, expectations about a potentially wide range of human and social needs and
wants. Order, then, would be a function of social balance between desires and ca-
pabilities. Rather than the first notion (Huntington's) that assuring the state the
"capacity" to satisfy wants will assure order, this third position would argue that
"capacity" does not assure "will." Rather than the second view (Forsythe's) that
order is the first charge, the third position would argue that the second view slips
too easily into the first: give the state "order" first and then let it worry about ab-
stract balancing acts like justice. The third position, then, argues that any agent
seeking authority will conform to the expectations embodied in law by pursuing
achievement of the desires of the principals. Order will depend upon mutual com-
patibility of expectations which will make coordination of choices possible, even
voluntary. Disorder would occur in the absence of commonly accepted values. Or-
der would result from conditions exhibiting a complex of rules, ethics, and norms:
rules such as distributing to the members of the group the right to participate in
making and executing other rules; ethics such as preserving the group by restrict-
ing violence; and norms such as agreements are binding.
fectively in the interstate as in the intrastate realm, the harmonist finds this a situation that is potentially remediable, indeed, may be remedied, by revolution.

To keep the contentionist at bay and restrain the revolt of the harmonist, one may call the attention of both to the "domestic" sources of the interstate "disorder": that states' constitutions fail to express the will of their people or to constrain leaders to behaving in an orderly fashion in pursuit of long range purposes is correctible within states. The global system may need further institutionalizing. But much of the pressure for it would drain off were intrastate law as responsive to its constituencies as is international law. One result, contrary as it may seem, would be an increase in the stability of intrastate law, for it would concern itself increasingly with regime maintenance and decreasingly with regime creation.

Contentionism reduces "morality" to pursuing conditions of "well being" by absenting it from consideration by states regarding their survival and security. Order precedes justice in this formulation. Since ordering may require "unjust" behavior, ordering receives the rank of superior ethic. Yet order is only one human goal. Preservation of the state as the institutional source of rules, their promulgation, interpretation and enforcement—consecration of the power of state—the global harmonist can lay alongside his sense of security associated with the "good life." Just as justice is "enough equality to achieve other goals" and not an end in itself, order is enough predictability to permit planning and investment of effort. The amount of predictability could conceivably become sufficiently great that all risk, hence possibility of change, would be removed. However, such a system would eventually die of suffocation. Life is not risk-free.

Traditional international law is not the less credible because of the violability of sovereignty, for its record is fairly good, measured in its own terms. Rather, its perceived attachment to the state system circumscribes its world ordering utility. But this weakened credibility is reparable by recognizing the existing sources of order, their creation, and their maintenance procedures. There is apparently a large number of rules and institutions of adjudication and negotiation pertinent to the application and revision of the legal order. Even those who would like to change the law tend to abide by the existing formulations in the interest of order and pre-

dictability and developing procedures of revision. And the costs of not abiding by the expectations of others in the community, that is, by the law, are included in the capability calculations of all actors, after the act (during evaluation of the outcome of action) if not before the act.

However, rather than the absolute it is commonly treated as, sovereignty viewed analytically refers to the control of those who participate in making decisions affecting the legal order. A review of how sovereignty attached to states may reveal how relative sovereignty is. How its attributes are attaching to additional global political actors in this century may be signalling the transformation of public international law into a multi-faceted global legal system.

The notion of there being a legal order encompassing the known world is not new. In Western civilization Assyrian, Hittite, Mesopotamian, Persian, Greek, and Roman civilizations have crossed the historical screen; in the east there have been the, Han, Cham, Mongol, Indus, Siam, Annam, and many others. While some record of interaction of empires in the east among themselves and of those of the west among themselves exists, only fragmented records hint of any sustained interaction of east and west. Aztec, Inca, and hinterland African peoples were apparently unknown to the others. Not until the imperialism of commerce and religion of the seventeenth century did one civilization bring the entirety of the globe into the beginnings of one system. That civilization, rooted in the Tigris-Euphrates Valley, grew through the Greek city-states, the Roman Empire, the feudal synthesis of politics and religion, the Renaissance and religious wars, and finally the bureaucratization and eventual centralization of peoples in nation-states.

At points in this progression one may find significant parallels to the present. For example, the hierarchical organization of the Roman Empire, in giving way to the Christian Commonwealth of feudal times, incorporated not only new actors in important roles but drew into the system groups not previously part of the Empire. Newer actors included the papacy, kingdoms, principalities, duchies, baronies, religious orders, bishoprics, abbots, guilds, universities, and national groups. In some senses today's global order seems to have supplemented or replaced the system of states and the United States-dominated hierarchy of territorial units; added are functionally-diverse and non-territorially based coterminous organizations. The alteration is not unlike that which the Christian Commonwealth performed on the Roman Empire. The new
system includes states, transnational enterprises, regional military
organizations, supranational economic mechanisms, a universal
hortatory body, scores of budding state and national units (many
within existing states), and a bureaucratization and routinization
of conflict similar to that accompanying the appearance of the na-
tion states originally, but on a global scale.

States themselves began as collectivities challenging existing
tribal bodies and feudal kingdoms. Sovereignty in the age of states
was the transference of the right of kings to the rights of states.
The government of a state assumed the position of sole designer,
arbiter, and maintainer of order for all within recognized borders.
Such a system served the interests of state governments. By
granting territorial sovereignty to each other, and with that, the
promise not to interfere in each other's internal affairs, they could
minimize their external security problems and concentrate on or-
dering life inside the states. Only sovereign states could enter
treaties, join interstate organizations, or be subjects of interna-
tional law. Law applied only to equals, to sovereigns, and only
state governments could be sovereign. And only those laws to
which states gave their consent, expressly or by their own actions,
could bind them in their mutual relations.

In the twentieth century sovereignty's traditional marks seem
significantly rubbed out. States penetrate each other's territory
frequently. Non-state actors enter treaties and even create as-
sociations and organizations membered by more than or other
than states, making and meeting "security contracts" as if states
did not matter or because states have not gotten around to it.
What is unclear is how all these units together have formed and
use, as theory would say they must use, an integrated regime for
making decisions that works by procedures having the normative
buttressing of a shared view of the world and relations of the indi-
vidual to the group which is sufficiently similar that the regime and
procedures work. Perhaps the contention between the United
States and the Union of Soviet Socialist Republics, or between
these as a team and the proposers of a New International Eco-
nomic Order, indicate a competition for authoritative phrasing of
the purposive world view that will rationalize and further routinize
the way citizens of the globe make global decisions about global
order. If this be true, then international law as the traditionalists
and the analytical contentionists have known it will be giving way
to what might be called global law. Already there are attempts to
gather evidence of such a law, under the rubrics of transnational
law, international commercial law, international administrative
GLOBAL LAW: TO PRESERVE GLOBAL ORDER

The sense of political efficacy turned loose in the world by the Enlightenment, now spreading across the globe, is a powerful force for social reordering. As non-state actors increasingly assert their sovereign rights to participate in decisions affecting their security and welfare, the currently predominate mode of conflict management, the adversary proceeding, may prove unable to maintain social order. A new mode, the tool of a new global law, may be fashioned.

Because the state was created and continues to have as its ultimate justification the providing of security, it is constrained from transferring the security function away from itself to another organization, whether a collective security or more functionally specific one. When stimuli originating outside the states but internalized and projected from inside upon the states lead states to create international regimes, such regimes sometimes grow; they can serve both states and their population, link together administratively to improve their delivery of service or augment or preserve their resources, grow again, and so on. Such regimes may contribute to the growth of global order by increasing that order's predictability, increasing the recognized interlocking of habits and patterns of communication, producing or promising a fairer distribution of burdens and benefits, and taking on an image of permanence if not also of reliable responsiveness. Functional success of high enough intensity could breed public belief in the possibility of such organizations' being able to provide security or could dilute the felt need for security. Then the states' claims to the monopoly right and ability to provide security could themselves become a threat to security in the eyes of the public and be the grounds for rebellion against state leaders.35

The contemporary global arena, seen through analytical harmonist eyes, exhibits patterns of behavior that suggest that the gap between legal order and political reality need not be considered disruptively great. It may be amenable to procedural closing. A multitude of actors, including more than states, exhibit related-

---


35. The author thanks William Elder and Daniel Gengler, Creighton University, for their research of the functionalist thesis of international integration.
ness of several forms: purposive, ecological, and exchange, for example, could provide sufficient bases in shared values to underwrite important, perhaps necessary, changes in how the system manages conflict.

Purposively there are actions analogous to "public lands" law of the intrastate setting which suggest a trend toward attempting to shift global jurisdiction from "no one"—the high seas—to national jurisdiction of coastal states. This contemporary "enclosure movement" in sea resources law is an expression more of unwillingness to grant regulatory monitoring and administration duties to an international regime than rejection of a responsibility for a "common heritage." The principles of conservation and management of the resources "enclosed" are still the purview of the international regime. It thus suggests a commonality of purpose in a global community. The increasing postulation of technology, as knowledge in a special form, as also part of the "common heritage of mankind," may stretch purposive relatedness too far at this time; but the apparent merging of concepts of civil and social rights into a common, global "human rights" does not. As for outer space, the concept of "effective use" seems to have been accepted as a guiding principle in the interest of legal order.

Ecologically the principles of due diligence and abatement, long standing in international law, are now increasingly recognized as foundations for rulemaking for preservation of the global commons. Public international organizing efforts began in the common interest of preserving or improving the planet's environmental envelope: the Rhine River Commission of the nineteenth century, the continued joint planning for the use and protection of the Great Lakes on the North American continent, or the conservation and development programs on the Mekong River Basin that continued with little interruption even during the fighting in Southeast Asia. Acid rain, clogging of communication channels, piloting unsafe craft in the air or on the seas, and other such threats are accepted as legitimate matters for the agenda and regulatory actions of international institutions. While such formal regimes may seem the agents of states, examination of their operation in human terms can reveal processes decreasingly under the control of states as states. Members of delegations to international conferences, for example, collaborate repeatedly to advance


their personal (albeit, technical) understanding of the issues on the conference agenda and thereby shortcut national decision making hierarchies.38

Thinking in terms of exchange rather than wins and losses can carry analysis of the global legal order beyond the narrow thesis of economic determinism. In this day a popular model for interpreting the relations of legal subjects assumes that a core of states controls all others; if nothing else this dependency model is a base of appeal for compensatory action from the supposed beneficiaries of the dependents' lower status.39 Yet the transactions that in technical terms may be economic ones can be aggregated with transactions between the same parties in other than economic arenas and be shown to be exchanges. Some exchanges may appear asymmetrical and the charge of dependency would still hold. Others, however, are close to symmetry and therefore form a base for further cooperation; they are effective in containing or reducing the contention arising from ideological closemindedness.

The contemporary global arena, through analytical contentionist eyes, exhibits procedures not only including courts, diplomats, and leaders of corporate enterprises, but also coercive combat that is, potentially, a trial by ordeal thoroughly final in its judgment. The contentionist cites espionage as a violation of the principles of sovereignty, yet excuses it as necessary for preservation of the state. He cites propaganda as violative of the principle of freedom from interference in domestic affairs; but he rationalizes it as an expression of self-defense. And while the taking of hostages is not new—indeed, the first diplomats were formal hostages voluntarily—terrorist activities targeted on state apparatuses would seem to challenge the present legal order at its very foundations.

Yet conflict, even in open armed warfare, is itself subject to interpretation from contrasting assumptions and perspectives.40 A contentionist views conflict in a balance of power model; the parties balance one another, as parties. Parties are the focus rather than issues. All legal rules apply to party relationships; or, taken a conflict at a time, they apply to two parties.41 Ritualistic restraint, to preserve legal order, depends upon the effective substitution of

40. On the ritualizing of conflict, see Gould and Barkun, International Law, Chapter 5.
the adversary proceeding in the courtroom; the two parties square off in a socially-approved dance of litigation. But a number of conflicts, allowed to grow between two parties or groups of parties, would thwart global integration and, coupled with technological change, march humankind toward global disintegration.

A harmonist would try to manage conflict by differentiating it, diffusing and suffusing it so that different conflicts exist between different combinations of groups. Conflicts may thus tie the affected groups together for one’s enemies in one battlefield would be one’s allies in another; hence preservation of the players is a fundamental norm. Escalation is held in check by shared common interests in the future. Supraordinate values would evolve to rationalize any procedures employed to assure tolerance, agreeing that disagreeing is acceptable behavior. Regime change may include opening new channels (implying changes in control) for conflict to prevent killer floods; one channel cannot handle the additive, party versus party conflicts of the contentionist model. The chambers of peers and superiors, such as the United Nations General Assembly and Security Council, may be the ritual hearing places where conflict is transferred to the verbal level.

Conflict, then, rather than being a lapse of the law and evidence of the failure of the current legal order, can itself be viewed as a producer of new norms and rules. Issues or differences become visible where before they lay hidden; they become subjects of the legal order. Law aids the global system in both cooperative pursuit of order and the managing (containing) of any disorder. Legal systems themselves tend to incorporate conflict, or at least presume it. The adversary proceeding may be an institutionalizing and ritualizing of conflict, a step beyond the feud and the “just war.” But one may wonder whether such a process, writ globally large, setting alliance against alliance in ideological schism, will sufficiently mobilize cooperation to channel conflict to keep it below the ceiling of global annihilation and within a range acceptable to the global community.

Analytically, “governance” is the perpetuation and enhancement of the rewards of social order and not necessarily an imposition of fixed forms of social control from a central point. In this setting instrumentalist (private interest), adversary proceeding occurs where the level of consensus in the group falls below the

minimum necessary for order. A contentionist argues that attempting to prevent or rectify instrumentalist treatments of law fly in the face of the limits of time, difficulties of communication, greed (visible in state interest, or the wish of governors to remain governors), or ignorance—that states now central in global governance do not perceive any need for change.

Harmonists might respond that human beings are sufficiently rational to agree enough among themselves on what constitutes "the good life" to create regimes to produce, sustain, and enhance it. When an institution or regime fails, society creates replacements. Needed now are myth and procedure components to knit into whole cloth the proliferating strands of functionally specific, sometimes regionally associated, human organizations designed to achieve governance and order. A myth of sovereignty enlarged to legitimate all the contributors to the new global law, and education in the ways of consensus, may represent general tendencies in the ways persons view their circumstances, select their goals, and calculate their choices of means. If so it will be a sign of a global recognition of the global applicability of ius cogens and a community it preserves. Contentionists will not be persuaded. But perhaps they will admit to their being in contention with more actors over more issues than ever before.

Several features of the new global order may be visible in conference diplomacy of the 1970s and 1980s. For example, in the Stockholm Environment Conference of 1972 the agenda, much of the substantive preparatory research, and frequently the debate itself were the work not of states or their official representatives but of private persons, scientific specialists, and spokesmen for transnational associations. In the Sixth Special Session of the United Nations General Assembly in 1974 the original designers of the United Nations system were effectively dethroned. While the formal constitution of the body has not been recast to reflect the ascendancy of the authors of the New International Economic Order, the spirit of the Charter has obviously been filled from a different bottle since then.

The contents of that bottle may be most intriguingly analyzed where they appear in the consensus proceedings of the extended United Nations Conference on the Law of the Sea. Though the United States brought a cork to the lips of this bottle just as the conference neared a conclusion in 1981, the pattern of cooperation developed in resolving the complex, cross-cutting, and undeniably contentious sea law issues demands careful attention by anyone purporting to describe the dynamics of the contemporary global
legal order. Until 1981 the only vote taken in this seven-year-long
meeting was to elect the presiding officer. Throughout deliberations,
taking on the roles of traffic director, teacher, editor, and negotiator,
the presiding officer aided the conferees in arriving at the point of “consensus” (with no votes) on issue after issue, on clause
after clause, building up more than 300 paragraphs of substance
and procedure for global regulation of more than two-thirds of the
globe's surface. No votes meant no interim public litmus testing of
ideological purity or state fidelity; it meant concentrating on points
of agreement. That the United States moved in 1981 to negate this
achievement in response to the expression of private interest (af-
fecting fewer than 200 words of the treaty) rather than enhance
global order was an ironic example of the tension between the cur-
rent adversary proceeding and the impending consensus proceed-
ing for managing conflict.

In striving to improve the institutions of governance a legal
scholar should question: shall I take counsel from existing expec-
tations that net advantage inheres in retaining the less than com-
prehensive legal order based on states; or do global order and
justice require a theory beyond traditional sovereignty and a pro-
cedure beyond that of determining adversaries? Certainly nothing
about the increased economic or material interdependence of peo-
ples and states requires that rules of conflict and change be al-
terred, despite numerous pleas to the contrary. Of course a shared
sense of fear or hope might. Rather than objective study of the be-
havior and conditions of the global arena, of the gaps between law
and action, social science’s special contribution to legal order at
this time would seem to be to discover a new supraordinate set of
values: “self-fulfilling prophecies” parading as theory, norm, ethic,
or rules. These would seem essential to preserving not only
emerging global regimes, but life on this planet.