Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights

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Communications Theory and World Public Order: The Anthropomorphic, Jurisprudential Foundations of International Human Rights

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I. INTRODUCTION

This Article seeks to integrate different strains of knowledge and enlightenment from contradictory and often contentious jurisprudential perspectives. Our approach is to use elements of modern jurisprudence as tools and markers for a more adequate description and intellectual justification of the foundations of modern human rights law. This focus integrates existing literature that surveys law-making outside the context of the State, including the law of non-State groups, such as Jewish Law and Gypsy Law. It also examines the relevance of communications theory to law generated (in a functional sense) by individual interaction on a face-to-face basis (which Professor Harold Lasswell1 has identified

1. Harold Lasswell was co-founder of the New Haven School of International Law and the sub-discipline known as the Policy Sciences. He was Ford Foundation Professor of Law and Social Science at Yale Law School. His important public positions included the presidency of both the American Society of International Law and the American Political Science Association.
as the micro-social level, and is thus known as "micro-law"), small group law, and international law (which Lasswell has identified as the macro level, and is thus known as "macro-law"). Indeed, the communication of human rights perspectives and operations channeled by signs and symbols are a part of the more general theory of human communications. Communications theory—used either implicitly or explicitly—is a tool to which diverse jurists and legal scholars have continually returned to authoritatively explore human connectivity. This Article explores the implications of a more explicit use of modern communications theory to give focus and orientation to the anthropomorphic foundations of human rights law.

Lasswell was the first to realistically delineate a global process of communication. His groundbreaking approach to the study of communication adds previously unascertained depth to contemporary understandings of how power operates in society and the State. Indeed, this approach presupposes an understanding of the social process of communication. This insight has significantly broader implications; it is an accurate commentary on the way that the State figures into the context of international relations. Accordingly, the global community might accurately be viewed, in Lasswell's nomenclature, as a global "manifold of events." Lasswell theorized extensively about this "manifold," or continuum, on which, he argued, all political variables are interconnected by reference points. This Article suggests that those reference points are linked despite their various trajectories (vertical or horizontal, global, or local) by human communication. In moving along the continuum (which is thoroughly explored later in this Article) from local to intermediate structures of authority and control, and back to the local context, the ultimate unit of social process of communication is apparent: it is the individual self system.

Lasswell's communications theory resurrects the central dynamism of the concepts of community and social interaction. The individual is thus a critical component of the realistic study of power and society. It therefore becomes clear that in the national or global environment, the

3. Lasswell's notion of the State as a "manifold of events" was based on his concept of political communications. We believe that his groundbreaking theory permits an inevitable expansion, which would include the idea that the global community is a component of a communications event manifold, which moves from the individual and the local to society, to the State, and to the global community and its social processes. The key conceptual and descriptive linkage is a deeper theory of the social processes of communication itself. See Lasswell, supra note 2.
individual is the critical focus of both description and normative analysis. This insight—an important conceptual breakthrough for social theory and law—permits the rational inquirer to identify, both empirically and normatively, the centrality of the individual in accounting for the rights and obligations of the individual in the national and global environment.

This Article submits that Lasswell’s communications theory and its explanation of reference points and their divergent trajectories as events in State and global social process is based ultimately on the individual human being as the triggering mechanism of politically and legally relevant communication. It further submits that recognizing that the individual is central to law and politics, as well as to communication and decision, and understanding that the individual to be a responsible, rights-bearing, political and legal actor provides critical insight into the foundation of international human rights law. This Article explores these concepts and linkages more fully to strengthen the understanding and relevance of international human rights law. To conduct a coherent study, the necessary knowledge integration must include many trajectories of communication, which function as conceptual maps of jurisprudential discourse. These maps have heuristic value because they guide the development of a more effective and accurate theory of human rights. The conceptual map associated with micro-law—the theory which applies to so-called micro-social situations, such as individual relationships and interactions—is one that has great implications for the study of human rights. This Article in part seeks to integrate these strands in the application of communications theory

4. A principal orientation which guides inquiry into human rights is stated in the configurative jurisprudence of Lasswell and McDougal. The conceptual map or orientation is summarized as follows:

1. the identification of the scholar or observer in relation to the events being observed, with specification of his standpoint and purposes;
2. the delineation of relevant foci for inquiry, with location of the particular events being subjected to inquiry in the larger context of events with which they interact;
3. the postulation and explicit disclosure of the comprehensive goal values assumed in, or sought to be served by, inquiry;
4. the specification of a range of intellectual tasks pertinent to inquiry about any aspect of social process, including: clarification of goals, description of trends, analysis of conditions, projection of future developments, and invention and evaluation of alternatives; and
5. the development of dependable and economic procedures for performing the intellectual tasks regarded as relevant.

within a broad framework of jurisprudential orientation and clarify the concept of human rights and its foundations in legal theory and practice.

Human rights is a field that has the unusual distinction of being simultaneously affirmed rhetorically, avoided in practice, and often left under-explored in theory. Many human rights law practitioners are particularly impatient with theory; they thus avoid it because they do not see its importance in paradigmatic terms. However, theory is crucial because it generates sustainable institutions and expectations about rights and obligations, which are critical to even the most elemental ideas of justice and decency. Legal theory might be used as an epistemological tool of inquiry to explore a deeper sociology of human relations, as well as to generate and improve the articulation and understanding of basic moral commitments. Each successive, close analysis of what law is and how it operates brings the participants in the continuing discourse ever closer to one of the most universal of human priorities: a comprehensive understanding of how to best identify, promote, and defend fundamental human interests.

This Article seeks to integrate concepts from a variety of disciplines, including diverse schools of legal theory, and to explore the foundation of what counts as law, with particular regard to international human rights law in terms of Harold Lasswell's phenomenology and theory of communication. Part II examines the origins of international human rights law and the critical importance of theory to notionally introduce the significance of communications theory to the international human rights regime. Part III examines the way in which conventional jurisprudence has reconstructed contemporary ideas of what comprises a State, including the notional basis of State absolutism and sovereignty. It further examines the key insights of Harold Lasswell, the architect of a revolutionary approach to communications theory, and takes his communications model a step further to demonstrate that the same network of communication that binds the individual to the State and the State to the individual vests each individual with human rights. Part IV

5. Fundamental precepts of human rights law have been seemingly avoided—or obviously ignored—by various respected legal scholars, which is usually predicated on convenience or special circumstances. See J.S. Watson, Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law, 1979 U. ILL. L.F. 609 (stating that many international law scholars ignore blatant human rights violations perpetrated by States); Eric Lane, Mass Killing by Governments: Lawful in the World Legal Order?, 12 N.Y.U. J. INT’L L. & POL. 239 (1979) (arguing that some human rights proponents misunderstand the true nature and purpose of international law); see also LORD DENNING, THE FAMILY STORY 240 (1981) ("Jurisprudence was too abstract a subject for my liking. [It is] [a]ll about ideologies, legal norms and basic norms, ‘ought’ and ‘is,’ realism and behaviorism: and goodness knows what else.").
then explores the further development of communications theory, its influence on the development of law (particularly international law and human rights), and international politics through the lens of Lasswell's groundbreaking identification of the law of micro-social interaction, or "micro-law." Part V examines the application of communications theory to the process of lawmaking in international law. Finally, Part VI offers crucial future implications of how micro-law will continue to influence the process of lawmaking in the global context.

II. THE JURISPRUDENTIAL FOUNDATIONS OF HUMAN RIGHTS LAW: THE CROSSROADS OF THEORY AND STATE PRACTICE

Human rights norms became a fixture in the political and juridical landscape of Western Europe in the years following World War II. The distinctive jurisprudence of the European Court of Human Rights, for instance, provides palpable evidence of this postwar transformation. 6

6. See, e.g., Soering v. United Kingdom, 161 Eur. Ct. H.R. (ser. A) (1989) (determining that extraditing a criminal suspect sought by U.S. authorities to the United States would constitute "inhuman treatment," a direct violation of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, if that criminal suspect were to face the death penalty, and finding that this criminal suspect might be sentenced to death, and thus face the "death row phenomenon"—the process of waiting on death row for years prior to being executed; because of this, extradition would constitute a human rights violation). The ECHR generally remarked on the ubiquitous tension between national interest and human rights when it stated: "[Inherent in the whole of the [European Convention for the Protection of Human Rights and Fundamental Freedoms] is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights." Id. at ¶ 89; see also Streletz v. Germany, 33 Eur. H.R. Rep. (2001) (unanimously confirming the treatment of German Democratic Republic (GDR) leaders with regard to their official orders that people trying to escape the GDR be killed and deciding that a retroactive application of criminal laws was without merit, based on the international law principle, nullum crimen sine lege ("no penalty without a law") which, stated otherwise, requires than an individual cannot be penalized for engaging in acts that are not prohibited by law); Lopez Ostra v. Spain, 303-C Eur. Ct. H.R. (ser. A) (1994) (holding that a town's governing body failed to sufficiently moderate its pollution levels violated the European Convention for the Protection of Human Rights and Fundamental Freedoms because the governing body's conduct violated the rights had by the town's citizenry—specifically, the right to respect for one's private and family life); Funke v. France, 256-A Eur. Ct. H.R. (ser. A) (1993) (recognizing the significance of the right of the accused to remain silent to avoid self incrimination); Kokkinakis v. Greece, 260-A Eur. Ct. H.R. (ser. A) (1993) (overturning the conviction of a Jehovah's Witness, Mr. Kokkinakis, who was arrested and convicted under Greece's anti-proselytism law); Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) (1988) (holding similar to Dudgeon v. United Kingdom); Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser. A) (1981) (disapproving of British legislation that outlawed sodomy); Airey v. Ireland, 32 Eur. Ct. H.R. (ser. A) (1979) (overturning a decision by the highest court of Ireland that denied the appellant, Mrs. Airey, a woman who lacked sufficient resources to hire an attorney to defend her interests, access to a free attorney); Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) (1978) (raising the standard for permissible interrogations).
Human rights law thus became a conventional part of European law, and European constitutional systems were consequently much transformed. Positivist pronouncements made way for inalienable demonstrations of respect for human dignity. Hence, the theory and doctrine of human rights jurisprudence have provided a firm juridical foundation for the making and application of human rights law in the European context. The European approach was a constructive beginning to the continuing, problematic, theoretical, and foundational aspects of human rights.

In South Africa, the policies and practices of apartheid were thought to be the complete antithesis of international law, international human rights law, and indeed the international rule of law itself. From these centralized, positivist institutions of control came a dramatic process of political and juridical transformation, and the world witnessed a new South African constitutional order firmly grounded in contemporary international law perspectives. The movements in South Africa of

7. An example of the way in which international human rights law regimes have been adopted and applied in the sovereign rule of law dictates of individual European nations has occurred in the United Kingdom. Three British soldiers (members of the Queen's Lancashire Regiment participating in the 2003 war in Iraq) have been charged with committing war crimes following the death of an Iraqi detainee. The three soldiers allegedly beat and kicked nine Iraqi civilians in September 2003 during the course of a security operation in Basra, Iraq. One of these detainees, a hotel receptionist named Baha Musa, died from his injuries while in British custody. Under the International Criminal Court (ICC) Act of 2001, the actions allegedly perpetrated by the British soldiers constitute "inhuman treatment" of civilians, behavior which the Geneva Conventions categorize as a "war crime." No British soldier has ever been formally charged with a war crime before and if the three are convicted, they each face up to 30 years in jail. See Editorial, UK Soldiers Face War Crimes Trial, BBC NEWS, July 20, 2005, available at http://news.bbc.co.uk/1/hi/uk/4698251.stm.


9. The South African Constitution states:

When interpreting the Bill of Rights [of the Republic of South Africa], a court, tribunal or forum must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill. S. AFR. CONST. 1996 ch. 2, § 39, available at http://www.info.gov.za/documents/constitution/
opposition and the civil society generated an articulate, informal, evolving bill of rights arguably inaugurated by the African National Congress’ Petition of Right during World War II, and later by the Freedom Charter, which was adopted by the People’s Congress in Kliptown in 1958. In short, human rights’ perspectives were becoming the living law of South Africa’s liberation movement. These non-State informal perspectives deeply influenced the new South African Constitution, which virtually codified the International Bill of Human Rights as conventional constitutional law. These developments may be contrasted with what occurred in Southeast Europe, Rwanda, and


12. In 1991, the ethnically diverse and formerly peaceful Balkans rapidly descended into State-induced brutal warfare and State-sanctioned ethnic cleansing campaigns which resulted in the killings of thousands of people. Groups in the region fractured along ethnic and religious lines because of a series of tactical decisions made by governing elites:

[Former President of Serbia and the Federal Republic of Yugoslavia] Milosevic and [former Croatian President] Tudjman held a meeting in March 1991...on the partition of Bosnia-Hercegovina between Croatia and Serbia, leaving the Bosniacs, who comprised the largest ethnic group in the country, with little territory. Under this scheme, a Greater Croatia and a Greater Serbia would be carved out of what was formerly known as Bosnia-Hercegovina. [The result of this meeting of government elites was that] [i]n Bosnia-Hercegovina alone millions of people were displaced by the fighting.... UN soldiers...[dealt] with the aftermath of massacres in which bodies of men, women and children would be found either shot, stabbed with knives, or in some cases burnt alive.


13. Upon the political independence of Rwanda in 1962, ethnic Hutus enjoyed Rwanda’s seat of power even through 1990 when the ethnic Tutsi-dominated RPF (Rwandese Patriotic Front) launched coordinated attacks on the oppressive ethnic Hutu military government, which responded by declaring a series of “norpoons” or “pogroms”—the State encouragement of the wrecking of unreserved havoc—until the Arusha accords brought about a mutual cease-fire. See BRUCE D. JONES, PEACEMAKING IN RWANDA: THE DYNAMICS OF FAILURE 1, 38 (2001). The
later in countries such as Sudan\textsuperscript{14} and Zimbabwe.\textsuperscript{15} As mentioned

assassination of Rwandan President Juvenal Habyarimana in April 1994 swiftly ended the cease-
fire; it was the event which the ethnic Hutu government employed to spark the Rwandan
Genocide of between 800,000 and one million ethnic Tutsis and Hutu moderates between April
and July of 1994 at the hands of Hutu authorities, military forces, militia, and even ordinary
Rwandan men and women. \textit{See Philip Gourevitch, \textit{We Wish To Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda}} (1998). This
genocide has been described as "planned, coordinated, directed, \textit{and} controlled." \textit{Jones, supra,}
at 39. The State-encouraged genocide was largely implemented with rudimentary weapons,
knives, sticks, and \textit{panga} and "\textit{some were shot or killed by grenades. Most were chopped to
death with machetes, knives, or farm hoes. Others were thrown down pit latrines, or wells, or
were bound and tossed into rivers or down ravines or even buried alive.}" Robert F. Van Lierop,
(1997).

14. The violence in the Darfur region of the western Sudan is rooted in a lasting and violent
conflict between nomadic ethnic Arab livestock herders and ethnic African farmers. The violence
intensified in 2003 when two organized groups in Sudan, the Justice and Equality Movement and
the Sudan Liberation Movement, each initiated an independent armed rebellion against the
Sudanese Government; the power base in each group individually chose to rebel against the
Sudanese government to combat their perceived exclusion from recent national negotiations
regarding the distribution of wealth and political power in Sudan. The Khartoum-based Sudanese
government violently responded to the groups, particularly in its increased direct and indirect
geographically localized support for ethnic Arab militias called the \textit{jinjaweid}, which perpetrated
extensive human rights violations first against ethnic non-Arab rebels and then against the larger
ethnic African civilian population, rebels or not. \textit{See Gerard Prunier, \textit{Darfur: The
1504 (2002)} (concluding that the government of Sudan had committed genocide). The Sudan
Peace Act further directed the U.S. Secretary of State to extensively monitor the Darfur Conflict
and to gather comprehensive information on any incidents of genocide, war crimes, or other
human rights violations that transpired in Sudan. \textit{See § 11. The result was a report delivered on
September 9, 2004, by former U.S. Secretary of State Colin Powell to the U.S. Senate Foreign
Relations Committee regarding what is commonly referred to as the \textit{Darfur Conflict}. Former
Secretary Powell remarked on the findings of the State Department’s extensive information-
gathering efforts, which found: “A consistent and widespread pattern of atrocities (killings, rapes,
burning of villages) committed by \textit{jinjaweid} and government forces against non-Arab villagers;
Three-fourths (74\%) of those interviewed reported that the Sudanese military forces were
involved in the attacks; \textit{and} Villages often experienced multiple attacks over a prolonged period
before they were destroyed by burning, shelling or bombing, making it impossible for villagers to
return.” Former U.S. Secretary of State Colin Powell, Written Remarks Before the Senate Foreign
Relations Committee: The Crisis in Darfur (Sept. 9, 2004), \textit{available at http://www.state.gov/
secretary/former/powell/remarks/36032.htm}. Former Secretary Powell continued his remarks:
“When we reviewed the evidence compiled by our team, along with other information available
to the State Department, we concluded that genocide has been committed in Darfur and that the
Government of Sudan and the \textit{jinjaweid} bear responsibility—and genocide may still be
occurring.” \textit{Id.; see also H.R. Con. Res. 467, 108th Cong. (2004)} (enacted) (declaring genocide in
Darfur).

15. Robert Mugabe has occupied the Zimbabwean seat of power as President since 1987. \textit{See}
U.S. Department of State, Background Note: Zimbabwe, \textit{http://www.state.gov/r/pa/ei/bgn/
5479.htm} (last visited March 16, 2007). Various government actions designed by Mugabe
resulted in an economic crisis in Zimbabwe in 1997, which intensified for years thereafter. In
February 2000, calls for Mugabe to step aside as leader of the Zimbabwe African National Union-
above, under the cover of State sovereignty, governing elites have acted without restraint, particularly against domestic populations. Accordingly, in different ways, these contemporary examples of abuse

Patriotic Front increased in both scope and intensity. Mugabe responded by referring back to what may have been the most delicate, sensitive, and precarious political issue in Zimbabwe to distract the public: the confiscation and distribution of farmland owned by white Zimbabweans. See David Blair, Pressure Mounts for Mugabe To Quit Party Post, DAILY TELEGRAPH (London), Feb. 18, 2000, at 20. Mugabe quickly had the constitution of Zimbabwe amended to permit his governing regime to strip white Zimbabweans of their farmland without compensation. See Anton La Guardia, Vote Gives Mugabe a Free Rein To Seize White Farmer's Land, DAILY TELEGRAPH (London), Apr. 7, 2000. By levying public threats against landowning Zimbabwean whites and ostensibly promising to redistribute this land to his supporters, Mugabe won the general election of June 2000 by a slim margin. See Anton La Guardia & David Blair, Mugabe Still Plans To Grab White Farms: Unity Call After Narrow Election Win, DAILY TELEGRAPH (London), June 28, 2000. By the early 2000s, white Zimbabweans numbered less than fifty thousand, approximately four thousand of whom were farmers. See U.S. Department of State, Background Note: Zimbabwe, supra. Mugabe continued to threaten white farmers with great harm and his rhetoric gained in its wrathful intensity. See, e.g., David Blair, Mugabe Warns Farmers of 'Severe' Violence, DAILY TELEGRAPH (London), Mar. 30, 2000, at 19. See also Anton La Guardia and David Blair, 'White Farmers are our Enemy': Mugabe Inflames Hatred as Second Zimbabwe Landowner is Killed by Invaders, DAILY TELEGRAPH (London), Apr. 19, 2000. Mugabe began to refer to white Zimbabwean farmers as “enemies of the state [of Zimbabwe].” Id. Mugabe further charged that peace in Zimbabwe was being subverted by “some white persons of British extraction who have been planted in our midst to undertake acts of sabotage aimed at affecting the loyalty not just of people in general but also that of the vital arms of Government like the army, so that these can turn against the legitimate Government of this country.” See Martin Meredith, Our Votes, Our Guns: Robert Mugabe and the Tragedy of Zimbabwe 154 (2002). By the beginning of 2001, Mugabe’s government had confiscated over one thousand farms owned by white Zimbabweans and promised that the remaining land held by white Zimbabweans would soon be taken as well. See David Blair, Mugabe Told To Halt Land Grab or Face Isolation, DAILY TELEGRAPH (London), Jan. 7, 2001, at 24. This confiscation had largely reached its end by the close of 2002. Strong links exist between groups perpetrating violence against white Zimbabwean farmers and Zimbabwe President Robert Mugabe’s government, such as mass deaths, government-sponsored rapes, and widespread kidnapping of white Zimbabwean farmers, female relatives, and individuals in favor of democratic reform in Zimbabwe. See Martin Meredith, Mugabe: Power and Plunder in Zimbabwe 167–70 (2002); see also Peta Thornycroft, Rape Gangs Targeting Whites in Zimbabwe, DAILY TELEGRAPH (London), Feb. 2, 2004, at 17; Michael Wines, Reports of Rape and Torture Inside Zimbabwean Militia, N.Y. TIMES, Dec. 28, 2003, at 3. It has been suggested that the actions of Mugabe’s government, when taken in conjunction with the (at least) extremely violent and (at worst) arguably genocidal acts of groups affiliated with Mugabe’s government, collectively approach the definition of genocide. See, e.g., Gregory H. Stanton, Genocides, Politicides, and Other Mass Murder Since 1945, with Stages in 2006, GENOCIDE WATCH, 2006, http://www.genocidewatch.org/about genocide/genpolmmchart.htm. It is perhaps arguable that Mugabe’s continued rhetoric, which urged violence and suspicion of white Zimbabweans, contravened the Genocide Convention to which Zimbabwe is bound as both a signatory and ratifying State, because he “deliberately inflict[ed] on the group [of white Zimbabwean landowners] conditions of life calculated to bring about its physical destruction in whole or in part.” See Convention on the Prevention and Punishment of the Crime of Genocide art. 2(c), Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951).
are at least implicitly supported by a jurisprudential theory of sovereignty, which is often self-servingly construed as strengthening claims to State absolutism. The central point, we would submit, is that theory influences perspectives, and perspectives in turn influence identifications, demands, and expectations about human rights, State sovereignty, and the scope of international obligation.

Theory deeply influences practice. It is indeed critical to the comprehension of problems to which law must respond, particularly in the context of human rights abuses. Such comprehension is also a vital element of law-motivated action and intervention, which is critical to the culture of human rights. In the world of human rights, the inadequacies of theory may contribute to the depreciation of human dignity. There is much contemporary truth in Moses Moskowitz's insight that:

> [I]nternational human rights is still waiting for its theoretician to systematize the thoughts and speculations on the subject and to define desirable goals. Intelligent truisms do not necessarily add up to a theory. No one has yet arisen to draw together into a positive synthesis the facts and fancies which emerge daily from events of bewildering complexity and to carry on an authentic debate. International concern with human rights is still very much a theme begging for a writer. And the scholar has not yet appeared to redress the distortions through a calm and systematic application of facts, to ground abstractions in the specific, and to define the limits of discourse.

Outside of the specialists in government, the world of human rights is populated by practitioners who consistently engage in the practical work of investigation, coordination, and active interventions. Overwhelmingly, the most effective of these human rights investigators, practitioners, and activists function on a full-time basis, though they


18. Various investigatory bodies have been charged with or have assumed the charge of searching for perpetrators of human rights violations throughout the world, from UN Special Rapporteurs and a unit of special investigators under the directorship of the UN High Commissioner for Human Rights to non-governmental organizations, such as Amnesty International and Human Rights Watch. See generally STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY (2d ed. 2001) (comprehensively appraising twentieth century investigative and prosecutorial efforts to hold individuals accountable for human rights atrocities).
often coordinate their work with a volunteer universe of actors.\textsuperscript{19} This world is characterized by inevitable ambiguity in decision-making regarding international pressure to intervene in particular human rights crises, which is applied by academics who largely cannot carry an institutional base of sufficient effective strength in the public arena.\textsuperscript{20} However, this does not mean that academics cannot in some anecdotal way, practically intervene in complex human rights situations and do some good.\textsuperscript{21} Academics have long been adept at both helping to create

\textsuperscript{19} See, \textit{e.g.}, \textsc{Yves Beigbeder, The Role of and Status of International Humanitarian Volunteers and Organizations: The Right and Duty to Humanitarian Assistance} (1991); \textsc{Marvin E. Frankel \& Ellen Saideman, Out of the Shadows of Night: The Struggle for International Human Rights} (1989) (discussing generally the impact of work by non-governmental human rights organizations on the international human rights climate, and acknowledging that the success of such NGO work is due in part to a significant international volunteer base); \textsc{Henry J. Steiner, Diverse Partners: Non-Governmental Organizations in the Human Rights Movement} (1991); Laurie S. Wiseberg, \textit{Protecting Human Rights Activists and NGOs: What More Can be Done?}, 13 \textit{Hum. RTS. Q.} 525 (1991); see also \textsc{Henry J. Steiner \& Philip Alston, International Human Rights in Context} 456–99 (1996); Felix Ermacora, \textit{Non-Governmental Organizations as Promoters of Human Rights, in Protecting Human Rights: The European Dimension} 171 (Franz Matscher \& Herbert Petzold eds., 1990).

\textsuperscript{20} See \textsc{Simon Chesterman, Just War or Just Peace? Humanitarian Intervention and International Law} 7 (2001) (“Much of the historical analysis of humanitarian intervention suffers from a lack of precision as to what that term embraces.”). Chesterman suggests that significant tension exists between opposing sides of the humanitarian intervention dialogue—the result of a continuing scholastic conflict between proponents of so-called “just wars” and adherents to non-interventionist philosophies based on various geopolitical concepts, such as sovereignty, legal positivism, etc. \textit{id.} at 7.

\textsuperscript{21} Pro-interventionist scholarly arguments are generally predicated on the supposition that most transnational crises are at least partly attributable to the absence of normative legal guidelines in certain parts of the world, such as vacuums where international law, functional and effective domestic governance, and outside assistance from State and non-State support regimes should exist. Indeed, these pro-interventionists perceive a continuing demand for humanitarian action—in different forms—by the international community. See \textsc{Thomas G. Weiss, On the Brink of a New Era? Humanitarian Interventions, 1991–94, in Beyond Traditional Peacekeeping} 3, 15 (Donald C.F. Daniel \& Bradd C. Hayes eds., 1995). Such action might include: peacekeeping, the provision of sustenance to starving parts of the developing world, efforts at democratization, or peace-building initiatives—depending on the context of the challenge in question:

\[1\] In light of genocide, misery, and massive human rights abuses in war zones around the world, should Pontius Pilate be the model for...the international response? The fatalism and isolationism that flow from most objections to humanitarian intervention are as distressing as the situation in the countries suffering from ethnic conflict where such an action is required...[because a] purely noninterventionist position amounts to abstention from the foreign policy debate.

a coherent framework within which to ground a culture of human rights law, as well as raising contextual pressure for practical intervention when human rights deprivation reaches levels of moral depravity that are quite simply sickening.\(^{22}\)

Thus, despite what amounts to a series of contemporary human rights constitutional guarantees throughout the world—indeed, human rights is widely recognized as an inextricable part of international law—in practice, human rights is typically mandated up to a fairly flexible point. By removing the human rights discussion from the generally mandatory and placing it in the contextually specific, perhaps progress might be made on more fronts. This is because a contextual discussion might better permit the identification and reconciliation of what is ostensibly exclusive and personal, and what is inclusive and internationally relevant. It may thus be of value to engage in a more adequate exploration of general human rights problems from a communications-oriented, theoretical, and foundational point of view.\(^{23}\) More than that, it may be that in these everyday—or micro-social—interactions that we begin to see the critical role of subjective perspectives,\(^{24}\) which emerge from the human agents who constitute the basic unit of society. These

\(^{22}\) Various scholars employ different criteria to arrive at different justifications for certain forms of intervention. Many agree, however, that egregious human rights violations necessitate some form of international action. \textit{See Morton H. Halperin & David J. Scheffer with Patricia L. Small, Self-Determination in the New World Order} 62 (1992) ("[T]he legal principle of non-interference in the internal affairs of states is beginning to be eclipsed in Europe by a commitment to promote democratic pluralism, human rights, and fundamental freedoms."); Vladimir Kartashkin, \textit{Human Rights and Humanitarian Intervention, in Law and Force in the New International Order} 202, 208–09 (Lori Fisler Damrosch & David J. Scheffer eds., 1991) (arguing that only the UN Security Council—as opposed to individual nation-States—has the legal authority to sanction a humanitarian intervention into a sovereign State).

\(^{23}\) \textit{See infra} Part IV.

\(^{24}\) Since micro-law must per force deal with individual human subjectivity, the inevitable concern is that it will introduce excessive subjectivity and instability when it informs the foundations of human rights. This concern is misplaced because it ignores sophisticated methods developed to measure human subjectivity. The key methodology was inspired by William Stephenson and has more recently been developed by Steven Brown. \textit{See Steven R. Brown, A Primer on Q Methodology}, 16(3/4) OPERANT SUBJECTIVITY 91 (1993); William Stephenson, \textit{Perspectives in Psychology: XXVI. Consciousness Out—Subjectivity In}, 18 PSYCHOL. REC. 499–501 (1968).
micro-social relationships might bring additional, significant perspectives to the human rights debate, which lend support to the foundations of respect and essential dignity. Indeed, by studying these relationships, further insight into the true source of human rights law might be garnered. In short, communications theory may well disclose that human rights does not fit in the conventional, hierarchical, jurisprudential mold because it is a norm-generating enterprise that originates and operates from the bottom-up.

One important reason for scholastic emphasis on the jurisprudential foundations of human rights is that this field is identified with currently unfashionable "natural law." Conventional legal theory in the form of either analytical positivism or the distinctively utilitarian version of pragmatic jurisprudence has tended to be skeptical about the possibility of human rights as a juridical construct. Jeremy Bentham, the

25. Natural law claims that legal conditions and principles derive from good and proper human order in both widespread and individual conduct. See H.L.A. HART, THE CONCEPT OF LAW 152 (1961) ("[T]he Thomist tradition of Natural Law...comprises a twofold contention: first, that there are certain principles of true morality or justice, discoverable by human reason without the aid of revelation even though they have a divine origin; secondly, that man-made laws which conflict with these principles are not valid law."). The intellectual underpinnings of natural law rest on the argument that analytical jurisprudence can otherwise "have no critically justified criteria for the formation of general concepts." See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 18 (1980). It has been argued that human rights in particular is endowed with natural law content because these rights are inherent in humanity and not brought into being by States or legal norms. See RICHARD A. FALK, REVIVING THE WORLD COURT 116 (1986). Perhaps best declared in the Universal Declaration of Human Rights, natural law embodies various theoretical perspectives, from Rousseau's notions of social contract, to Locke's philosophy of human autonomy from the State. See Jerome J. Shestack, The Jurisprudence of Human Rights, in HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 69, 85–99 (Theodor Meron ed., 1984) (exploring an assortment of theoretical perspectives associated with both natural law and human rights); see also JOHN RAWLS, A THEORY OF JUSTICE (1971) (detailing the Rawlsian approach to justice, which identifies a natural law basis for human rights by balancing precepts of liberty and human equality). Claims that morality is rooted in human biology, which have more recently been expounded by such commentators as Francis Fukuyama, Charles Murray, and James Q. Wilson, have long encountered heavy criticism. See, e.g., ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 66 (1990); Oliver Wendell Holmes, Natural Law, 32 HARV. L. REV. 40, 40 (1918) ("[Natural law comprises the jurist's search for criteria of universal validity.").

26. It is important to note that there are different versions of the policy discourse in the universe of theoretical elaboration, although some versions of policy-directed pragmatism may indeed provide excuses for exploitation, or human deprivations of basic human rights and respect. See Winston P. Nagan, Professor Langbein and Social Investing: A Comment, 4 HUM. RTS. ANN. 81 (1986); see also LASSWELL & MCDougAL, JURISPRUDENCE FOR A FREE SOCIETY, supra note 4, (discussing law as an instrument of policy and a matter of problem-solving, which should have the goal of furthering human dignity). Rectifying this problem does not call for the rejection of all forms of pragmatism in law. A pragmatic, policy-oriented approach is an important starting point to eradicate these human deprivations. The central element of this policy-oriented approach is its
grandfather of utilitarianism, described natural law as “nonsense upon stilts.” More recently, U.S. Supreme Court Justice Antonin Scalia, assuming the natural law implications of human rights in international law, described the application of international human rights norms in the domestic American jurisprudential context as “nonsense upon stilts.”

Skepticism that accompanies the orientation of law toward what is popularly perceived as normal science seeks to radically limit what actually counts as law. Among the first casualties of this skepticism was international law. Nineteenth century legal positivist John Austin described international law as “positive morality” rather than what he referred to as “law properly so-called.” His imperative theory of law stated that a sovereign could not be bound by an extrinsic legal obligation since the sovereign was the ultimate source of law. In this view, international law was not law. This and similar skeptical focus on the many different components of policy thinking—required for effective problem solving—which yields sophisticated decision-making and is thus an innovative approach to contextualizing problems and setting out solutions. Accordingly, policy-oriented pragmatism is a significant advancement of unhelpful forms of popular contemporary legal pragmatism. A distinctive contribution of the New Haven School is the notion that pragmatism cannot be value-free; it further postulated that certain fundamental values of a defensible public order may be used to guide inquiry and intervention. See id.

28. See Sosa v. Alvarez-Machain, 542 U.S. 692, 743 (2004) (Scalia, J., dissenting) (“In Benthamite terms, creating a federal command (federal common law) out of ‘international norms,’ and then constructing a cause of action to enforce that command through the purely jurisdictional grant of the [Alien Tort Statute], is nonsense upon stilts.”).
29. The complexities associated with the term, “law” in the study of public international law and municipal law were carefully analyzed by Glanville Williams in his celebrated essay, International Law and the Controversy Concerning the Word “Law.” See Glanville L. Williams, International Law and the Controversy Concerning the Word “Law,” 22 BRIT. Y.B. INT’L L. 146 (1945). Specifically, Williams suggests that meaningful discourse about these two fields of law would be essentially factual and not verbal. Law may thus be defined by reference to a relevant context, which might further indicate the limits of verbal communication when employed in an essentially formal sense to define meaning and discourse. Id. at 163. Hart also insisted that the word law has meaning in certain largely conceptual contexts, which are meant to be descriptive of an operating legal system. See H.L.A. Hart, Definition and Theory in Jurisprudence, 70 L.Q. REV. 37 (1954). According to the New Haven School, the term, “law,” including international law, derives its meaning from a radical idea of contextuality in terms of social process, be it domestic or global. See Myres S. McDougal & Harold D. Lasswell, The Identification and Appraisal of Diverse Systems of Public Order, 53 AM. J. INT’L L. 1 (1959) (detailing the interplay between law and power in the context of global politics).
perspectives about international law deeply influence and limit the scope of international obligation today; indeed, it has long been a significant limitation on the inclusion of human rights law as a component of general international law.\textsuperscript{31}

In the treatise, HUMAN RIGHTS AND WORLD PUBLIC ORDER, authors McDougal, Lasswell, and Chen provide a coherent answer to the Austinian notion that international law is simply positive morality. They developed a theory about human rights law accounting for the realism of power in Austin's system, yet providing a more elaborate description of the authority component, which the Austinian model lacks. In a sense, they affirm Vattel's postulation that an important distinction must be made between positive law and what Vattel termed, the "necessary Law of Nations," which results from cross-applying natural law to sovereign States.\textsuperscript{32} Vattel essentially suggested that the very rules Austin considered to be positive morality were actually law on a horizontal plane in the international system. In short, positive morality was not relegated to juridical irrelevance. What Austin called "positive morality" is thus a part of the critical normative expectations in the structure and process of law when it is viewed in terms of process and decision. In this sense, McDougal, Lasswell, and Chen provide a disciplined and inter-related, yet distinct set of intellectual tasks that are critical to human rights decision-making, including: normative analyses of positive morality and its relevance to human rights decision-making, insistence on the power of adequate and coherent descriptions of trends, and the salience of prediction and the creative alternatives in the

\textsuperscript{31} Some of the United States' greatest jurists have notionally rejected the legitimacy of international human rights norms. See Letter from Oliver Wendell Holmes, Jr. to Harold Laski (Oct. 23, 1926), in 2 HOLMES-LASKI LETTERS 887–88 (Mark DeWolfe Howe ed., 1953) ("I utterly disbelieve all postulates of human rights in general. Those established in a given society stand on a different ground."). Similarly, Justice Joseph Story, historically an advocate of natural law, once stated:

No [state] has a right to sit in judgment generally upon the actions of another; at least to the extent of compelling its adherence to all the principles of justice and humanity in its domestic concerns.... It would be inconsistent with the equality and sovereignty of nations, which admit no common superior. No nation has ever yet pretended to be the custos morum of the whole world; and though abstractedly a particular regulation may violate the law of nations, it may sometimes, in the case of nations, be a wrong without a remedy.

United States v. La Jeune Eugenie, 26 F. Cas. 832, 847 (C.C.D. Mass. 1822) (No. 15,551).

challenges of making and applying human rights law. Strengthening the theoretical coherence and justification of human rights theory effectually strengthens international law. In a broader sense, it strengthens the foundations of the rule of law concept itself.

This skepticism about international law is built into modern positivism and the reality of the State as a prime instrument of governance. The identification of law with sovereignty has had a profound impact on the development of international law and still commands great influence in the international system; it is obvious that a theory that defines law in terms of the State will have difficulty in accounting for law outside of the State. Moreover, a theory that roots all law in the sovereign State will have difficulty accounting for circumstances where the State is subject to international law and international concepts of obligation. This difficulty was obvious to nineteenth century theorists as well as more contemporary figures.

33. John Austin perceived law as those commands which emanated from a sovereign. According to Austin, to interpret a legal system, one must first identify a sovereign (or a person or organization which habitually obeys no one), whose commands are habitually obeyed. See AUSTIN, supra note 30, at 199–212. Indeed, analytical positivism teaches us that the practices of the State's highest law-applying organ are the best indicators of what constitutes the normative content of the official legal order. See JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM: AN INTRODUCTION TO THE THEORY OF LEGAL SYSTEM 6 (1970). Cf. HART, supra note 25, at 97–114 (1961) (suggesting that the "rule of recognition" is the primary rule that establishes the certain parties or organizations as rulemaking institutions).


Indeed, different generations of political commentators and international law scholars, such as Thomas Erskine Holland and Hersch Lauterpacht, individually remarked on the ostensible appropriateness of international law as a branch of law, and conceded that international law was the vanishing point of jurisprudence. It was generally conceded that something called international law existed, which was apparently stripped of a theory to account for it, or indeed to justify it. The approach is reasonably straightforward: Without the sovereign’s consent, there can be no international obligation. As applied to human rights, this logic suggests that there can be no human rights other than those explicitly adopted by the sovereign. Despite its inadequacies, this statist approach to law sets out an infrastructure of command and control that many political elites find comprehensible and justifiable. Sadly, this theory has a legacy of unrestrained State absolutism—a key factor that underpinned the devastating conflicts of the twentieth century. Accordingly, for human rights to be firmly grounded in the current reality of international legal order, it must provide a more coherent account of its conceptual and normative bases, which are comprehensible and amenable to rational application in specific instances.

III. TOWARD UNPACKING CONTEMPORARY EFFORTS TO GROUND A CULTURE OF HUMAN RIGHTS IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: FROM POSITIVISM TO HUMAN DIGNITY

It is possible to look at human rights as simply a contemporary expression and codification of the substantive and procedural foundations of the natural law tradition. However, as indicated earlier, natural law has tended to be unfashionable in an age of strident secularism where the modern State finds a comfortable fit in the


37. Some fundamental tenets of international law, particularly the law of individual human rights, derive in part from principles of natural law. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. VII, intro. note (1987) (stating that international law, including human rights law, is “derived from historic conceptions of natural law, as reflected in the conscience of contemporary mankind and the major cultures and legal systems of the world”).
philosophy of science known as positivism, and where great controversy continues to undermine the place of human rights as an important part of the rule of law in the world community. There are contemporary natural law conceptions of human rights, which are often problematic because they do not effectively grapple with the reality of the State or the operational distribution of power within and outside of the State. The positivist version of human rights provides a weak if not awkward justification for human rights. Sophisticated versions of positivism concede the scope of international obligation, but still stridently proclaim the principle that international obligations themselves are only obligations to which the State consents. Even though the influence of positivism on human rights is reflected in the vast treaty-based regimes which States must ratify and then adapt into municipal law, the mechanisms of making human rights law positive meet with many sovereignty-mandated hurdles.

38. See Louis Henkin, The Rights of Man Today 5-23, 148-52 (1978) (chronicling how international human rights law is continuing to develop into what might be referred to as the “new natural law”). The treatment given to fundamental human rights in the UN Charter is arguably “supra-positive,” and is thus based on natural law. See Theodore C. van Boven, Distinguishing Criteria of Human Rights, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 43, 53-57 (Karel Vasak ed., 1982); see also Francisco de Vitoria, On the Power of the Church, in POLITICAL WRITINGS 45, 84 (Anthony Pagden & Jeremy Lawrance eds., 1991) (advancing the notion that a universal community of nations exists, over which a natural law predominates that is common to all cultures―also known as a “law of nations” or, ius gentium―and that is a part of a larger declaration of human rights); Lon L. Fuller, Positivism and Fidelity to Law―A Reply to Professor Hart, 71 HARV. L. REV. 630 (1957) (offering a natural law alternative to positivism in the international context).

39. For an analysis of the positivist implications of particular human rights, see Richard A. Falk, Theoretical Foundations of Human Rights, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 31 (Richard Pierre Claude & Burns. H. Westin eds., 2d ed. 1992). Falk suggests that “the protection of human rights...is an outcome of [the] struggle between oppos[ing] social forces and cannot be understood primarily as an exercise in law-creation or rational persuasion.” Id. at 32. Professor Falk further refers to the typically problem notion of positivism, where the “positivist idea of sovereignty shield[s] abuses of [human] rights committed within State territory,” as a kind of “statist logic.” Id. at 32-33. Falk suggests that such “statist logic” is actually “[t]he predominant ordering logic since the Peace of Westphalia [which] has been associated with the ‘will’ of the territorial sovereign state.” Id. at 32. He goes on to recount that “[t]he government of a State has been its exclusive agent with respect to formulating its will in external relations. The juridical framework of relations worked out in the West has been gradually generalized to apply throughout the globe.” Id.

40. See J.L. Brierly, The Law of Nations: An Introduction to the International Law of Peace 51 (6th ed. 1963) (“[The legal philosophy of positivism] teaches that international law is the sum of the rules by which states have consented to be bound, and that nothing can be law to which they have not consented.”).
A. Harold Lasswell's Reconceptualization of the State and Society Through the Lens of Communications Theory: The Core Foundation of Human Rights

This section deals with celebrated political scientist Harold Lasswell's powerful deconstruction of the State. In 1930, Lasswell wrote *Psychopathology and Politics*. At that time, the study of politics was largely a matter of understanding the institutions of government, yet Lasswell’s book took a radically different approach. Lasswell described the State as a “manifold of events,” or a continuum, on which political variables—including the individual and the State—are interconnected. It might be useful to think of this continuum and its interconnected variables in the following way:

![Diagram of political processes](image)

Accordingly, actions which originate from one variable ripple out and affect other variables in both directions on the continuum. The meaning and significance of this continuum, very crudely expressed above, is not obvious. But if properly understood, it represents a significant breakthrough in understanding overarching concepts, including “the State,” “society,” “the individual,” “the collective,” and, by implication, the notion of an international community—all of which Lasswell considered to be interacting systems. We contend that the thread that binds these variables together is communication. It is thus crucial to recognize that conventional international law moves in one direction: downward; it seeks to provide for—and thus affect the lives of—individuals. Lasswell’s model, on the other hand, demonstrates that communication moves from the global level to the local level and back. Accordingly, while the individual is lost in conventional international law, the individual is not lost in Lasswell’s model.

Communication thus links the individual to the State, and the State to the individual. The State radiates a peripheral system of nerves of communication, or government, which either regulate or control all people who interact within contextual demarcations, such as a territory or an organized body politic. Of critical importance to Lasswell’s model

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41. *LASSWELL, supra* note 2.
42. *Id.*
is identifying who controls the central nervous system—who is the central emitter of a State’s authoritative communication?

The growth of industrial civilization led to the expansion of professional and skilled elites. These elites, funded by the success of industrial civilization, pioneered many new fields of inquiry, including important developments in the physical and psychological sciences. The ascendance of a security elite—the specialist players in the State who manage war and ostensible security—are silently becoming the central nervous system of the State. This emerging central nervous system is thus capable of entirely co-opting the nerve infrastructure of State power and authority within the body politic or event manifold. Focusing on communications and on the channels of the transmission of signs and symbols of authority and control thus provides a compelling insight into the reality of the body politic and the changing dynamic of its central nervous system.

Philosophical idealism indicates that the State is sometimes conceptualized as the embodiment of reason and an unfolding, perhaps trans-empirical, rationality. In this sense, as introduced above, the discourse about the State preempts the process of conceptualizing it and indirectly gives the State an unqualified normative justification as a preferred instrument of authority. The legal effect of such a characterization suggests that the individual, as well as non-State groups, are actually objects and not subjects of legal decision-making. Even if we see the State’s population as its empirical constitution, it still comprises more than the sum of the population’s component characteristics; the State is not seen as a multi-individual phenomenon, but as a super-individuated phenomenon. Accordingly, the problem posed by juxtaposing the State and the individual represents an empirical distortion with disastrous potential; it is how dictatorships are born. Lasswell maintained that the dualist assumption that the State and

43. Some of history’s most notorious minds have articulated, in their Manichean approaches to political dualism, incredible faith in the rightness of the State (in some cases subject to certain criteria). See, e.g., GEORG WILHELM FRIEDRICH HEGEL, PHILOSOPHY OF RIGHT (T.M. Knox trans., 1952) (1821) (arguing that, to even approach the actualization of freedom, every citizen—though Hegel likely referred only to males—must participate in various aspects of the life of the State); KARL MARX, DAS KAPITAL, reprinted in THE MARX-ENGELS READER 294–442 (Robert C. Tucker ed., 2d ed. 1978) (attempting to scientifically establish that the political economy—the labor movement—is key to the successful operation of the State and its society, by which the State might solve social problems such as poverty and class division); see also Winston P. Nagan & Craig Hammer, Commentary: Patriotism, Nationalism, and the War on Terror: A Mild Plea in Avoidance, 56 FLA. L. REV. 933, 954–55 (2004) (deconstructing unquestioning patriotism in favor of what might be referred to as “thinking allegiance”).
the individual operate on different levels was fictitious. He viewed this not as a matter of deep philosophical principle, but rather as a mistake that is easily corrected by an appropriate investigation of a new understanding of law, with new tools of investigation using rigorous methods of observation and analysis.

Lasswell's examination of psychopathology was an early and brave effort to deal with this theoretically difficult problem—the solution of which would yield practical knowledge on how our society is organized and effectively governed in ways that promote security rather than the conflagration of war and insecurity. In effect, the focus on forces such as personality, and, indirectly, culture, which constitute the inner reality of the State, provided deeper insight into the problems of managing the concentrations of power in the modern State system and particularly the near monopoly of the State over the instruments and use of violence.

In exploring the reality of the personality behind the State, Lasswell was in fact revisiting a powerful distinction establishing a resilient dualism between the State and the individual, the collective and the self-system, and the community and the person. This distinction had powerful normative and cognitive implications.

44. The designation, "the State," is indeed a powerful expression about how society is organized politically. It is also a convenient political or legal unit of analysis. Since the concept of State in effect includes a vast reductionism about the dynamic of power and authority and how these concepts actually work, reductionism is a symbol of convenience and economy of expression for both theorists and real-world decision-makers. Thus, opinion-making newspapers could record headlines that simply state, "Great Britain has Declared War on Germany!" A statement of this kind would silently include expectations for citizens who might face conscription or other obligations on the part of the State because wars are not fought by political abstractions, they are fought by individuals—members of the armed forces and the institutions organized to economically and politically maintain a war effort. Indeed, Lasswell first touched upon the idea that the State is a manifold of events as he researched the implications of propaganda during World War I. He posited that the State is not a static body politic; during war, a State does not manifest the same day-to-day characteristics as it does during a time of peace. While State infrastructures might appear largely intact, war nevertheless significantly changes a State. For example, national security values influence or preempt many critical functions of governmental decision-making. The prime value in the body politic in a war-crisis is security and survival of the State. See Winston P. Nagan & Craig Hammer, The New Bush National Security Doctrine and the Rule of Law, 22 BERKELEY J. INT'L L. 375, 390–94 (2004). One of the outcomes of the Great War (World War I) was that the State was transformed from an institution of security, to one of great insecurity at all levels of social experience. Lasswell connected these concepts and explored the personal human implications of national and international politics. After World War I, intellectual responsibility in opinion-influencing circles tended to focus on such questions as how wars are precipitated, how they are conducted, how they might be terminated, and what must be done to prevent them. Implicit in these kinds of concerns is the notion that the State as an actor or unit of analysis obscured matters of decision-making transparency, responsibility, and an appropriate level of accountability about the agents who act on behalf of the State. See id.
Lasswell’s overarching argument was that the human personality is at the center of politics. As a practical demonstration of this phenomenon, he described how personality dysfunctions in political leaders, including pathologies, have large scale impacts on political symbols and social organization, including the waging of war.\textsuperscript{45} Lasswell bucked convention at a time when the international political climate was memorably characterized by positivism. In essence, he posited that the State—ubiquitously heralded as the great allocator of values, deprivations, violence, security, and insecurity—is in reality a political abstraction, which obfuscates the true nature of the seat of national power: an aggregation of personalities in interaction.\textsuperscript{46}

B. Communications Theory and the State as a Manifold of Events

To understand Lasswell’s notion that the State and the individual operate on the same level necessitates observation of the political reality that the collective (the State) reflects a continuum of events,\textsuperscript{47} as mentioned above, which is permeated by reference points that link the

\textsuperscript{45} \textit{See} LASSWELL, \textit{supra} note 2 at 183–93.

\textsuperscript{46} It is important to note that several international scholars have suggested that there exists an organic unity between an individual and his/her State. \textit{See} PHILLIP JESSUP, A MODERN LAW OF NATIONS 9 (1948). Accordingly, there has long been a State-oriented basis of international law, such that an individual’s legal significance is derived from his/her relationship to a single State by way of citizenship or nationality. \textit{Id.} However, the interrelatedness of the world community has shifted the focus off of the individual and the State, and onto the society of States. \textit{See} PHILLIP C. JESSUP, TRANSNATIONAL LAW 2 (1956). Hence, Jessup coined the phrase “transnational law,” to incorporate “all law which regulates actions or events that transcend national frontiers.” \textit{Id.} Accordingly, sovereignty is a principle of transnational law. \textit{See}, e.g., DE VATTEL, \textit{supra} note 32.

\textsuperscript{47} \textit{See} ALFRED NORTH WHITEHEAD, SCIENCE AND THE MODERN WORLD 83–186 (1931). Whitehead introduced the notion that events have trajectories in time and space. He posited that these events emerge and endure in a continuum. Regarding space, Whitehead stated that “duration is the field for the realised pattern constituting the character of the event.” \textit{Id.} at 183. Whitehead’s concept of endurance requires “a succession of durations, each exhibiting the pattern.” \textit{Id.} The concept of time in this view is simply a “sheer succession of epochal durations.” \textit{Id.} Whitehead encapsulated the notional basis of all events which occur in the continuum: A “relationship enters into the essence of the event; so that, apart from that relationship, the event would not be itself.” \textit{Id.} at 180. Whitehead also suggests that “the meaning of endurance presupposes a meaning for the lapse of time within the spatio-temporal continuum.” \textit{Id.} at 175. Regardless of how Whitehead was technically using these concepts in the discipline of theoretical physics, Lasswell apparently found these ideas of value in the context of the State and its inner relationships. In other words, Lasswell articulated that the State manifests relationships with spatial and temporal characteristics that are linked by the notion of events in time and space. Events in this sense are related to each other by the concepts of endurance and emergence. These concepts in turn are usefully related to each other on a time space continuum. Lasswell’s use of these ideas to improve our understanding of the nature of the State, communications theory, and world politics must rank as one of the most creative recasting and cross-applications of a disciplinary concept in recent history.
individual to the collective. The multiple trajectories of individuals and groups are interconnected by these reference points within the larger event manifold, or continuum, of social process. In other words, these trajectories come together at certain points on the continuum in the form of collaboration and integration. From the point of view of the State, these trajectories are reflected in the principle of territorialism, which is chiefly attributable to a State's recognition of its individual spatial dimensions. Social process often yields reference points, or those events which typically form around human aggregates, such as small communities or mass populations. Reference points also emerge in institutional contexts as instruments of organized decision-making (or governance), which have the competence to manage external structural threats and opportunities. In this model of the State, it is useful to think of the event manifold as having a membrane that permits some permeation as additional group reference points and trajectories manifest, which in turn influence the political nature of the State.

Issues of control, authority, and decision-making influence the event manifold by creating ever more fluid and realistic notions of what a State is and how it is a politically organized, territorially-based body politic. The dynamism with which Lasswell conducted analyses of the

48. John Rawls subsequently took the position that democratic political culture is the foundation upon which power is created because it provides the point from which politics—the mechanism by which power is exercised—is "constructed." Specifically, Rawls suggests that the language in which politics is carried out is "public reason." He held that "[t]he idea of public reason...belongs to a conception of a well ordered constitutional democratic society. The form and content of this reason...is part of the idea of democracy itself." John Rawls, The Idea of Public Reason Revisited, 64 U. CHI. L. REV. 765 (1993). Accordingly, the seat of democratic power is democratic political culture. Rawls clarifies that the concept of political culture comprises "[t]he fundamental political relation of citizenship [in a democracy that] has two special features: first, it is a relation of citizens within the basic structure of society, a structure we enter only by birth and exit only by death; and second, it is a relation of free and equal citizens who [create and] exercise ultimate political power as a collective body." Id. at 769–70.

49. According to Mark Buchanan, "there can be no more than a few links separating any two individuals." Mark Buchanan, Nexus: Small Worlds and the Groundbreaking Science of Networks 197 (2002). Buchanan analyzes terrain explored by Stanley Milgram, and details the significance of Small Worlds Theory, which posits that all people are to some extent interconnected on a nexus (or continuum) of social interaction and communication. He states that "[a] wealth of...evidence points to the likelihood that the small-world property is a general feature of social networks of all kinds." Id. at 28.

50. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) (defining a State as an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities).

51. John Foster Dulles wrote that global peace and stability "depends most of all upon the existence of an adequate body of international law." John Foster Dulles, War or Peace 198 (1950). It is within this body of international law where there exists "implicit or explicit
State as a manifold of events is perhaps well captured in this more general statement about the problem of observing fluctuating contexts and presumptions of stability:

Now the whole world of "causation" is implicated in any event, and the whole number of significant mechanisms which may be discerned in the "mind at a moment" is infinite. So our hypothetical volume might conclude by accepting the assumption that some events can be brought about by more than chance frequency, subject to the reservation that experimental confirmation is never reliable as to the future. The critical configurations may never "reappear." We commonly say that the probability of an event's future repetition is greater if it has been oft repeated in the past. But there is no means of demonstrating that the future contains analogous configurations to the elapsed. The probability of the future repetition of an event is "no probability." If events appear to be predictable, this is so because our knowledge of contingencies is limited, and our sequences of similar configurations may still be treated as special instances of "no sequence." The stable is a special case of the unstable, to put the ultimate paradox.52

In short, for Lasswell, a key outcome of the event manifold is the notion of causation, which drives State actions, human agency, and the links

principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations," which might be used to describe the political organization of a State, and which are intuitively formulated power processes to promote the common good. See Stephen D. Krasner, Structural Causes and Regime Consequences: Regimes as Intervening Variables, in INTERNATIONAL REGIMES 1, 2 (Stephen D. Krasner ed., 1983). A contextual map designed to clarify the interrelations of social power and the constitutive process must perforce account for the notions that constitutional expectations are outcomes of social and power relations, and that power is an outcome of social interaction. A precise, contextual appreciation of power must take into account the contextual outcomes of social processes. See RAYMOND WILLIAMS, MARXISM AND LITERATURE 112 (1977) (arguing that power is constantly produced by habitual practices that comprise social interactions because it "does not just passively exist as a form of dominance," because "[i]t has continually to be renewed, recreated, defended, and modified," and because "[i]t is also continually resisted, limited, altered, challenged by pressures not at all its own"). The technique of mapping employs a series of concept markers, which may permit a description of the social and power processes, or any discreet aspect of them, and may permit levels of generality and particularity, depending upon the purpose of the inquiry. See Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, The World Community: A Planetary Social Process, 21 U.C. DAVIS L. REV. 807 (1988) (holding that a more realistic conception of world order must incorporate a more comprehensive map of the global social process from which problems (especially violence) typically emerge).

52. LASSWELL, supra note 2, at 260.
between them.\textsuperscript{53} Causation (the notional foundation of this manifold) figures significantly in various disciplines. For example, the proposition that events are reference points on a continuum is certainly reminiscent of fundamentals of the physical sciences.\textsuperscript{54} It is true that Lasswell was deeply influenced by Alfred North Whitehead—the metaphysician, mathematician, and philosopher.\textsuperscript{55} It might be the case that Lasswell was very receptive to the emerging signs and symbols of modern scientific discourse, and that he sought ways to use these forms of communication to give coherence to his evolving ideas about personality, culture, science, politics, and legal theory.

How then might one make sense of Lasswell's political sociology of the State as a manifold of events with individual trajectories? He sought to develop a conceptual orientation in psychopathology and politics in part as an outgrowth of his 1927 doctoral dissertation, \textit{Propaganda Technique in the World War}.\textsuperscript{56} In his study of the politics of World War I, Lasswell observed that signs and symbols were generated in response to certain events, which communicated very specific messages to the public, which thus became central to maintaining the war effort.\textsuperscript{57} This process was a powerful instrument of communication and social control, which deftly exploited the symbols of insecurity and heroism, and effectively pitted "us" against "them."\textsuperscript{58} Lasswell concluded that the

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\textsuperscript{53} Felix Cohen shared this understanding with Lasswell. Cohen viewed law in social process terms, the implications of which are fundamentally oriented toward cause and effect in the real world. See Felix S. Cohen, \textit{Transcendental Nonsense and the Functional Approach}, 35 COLUM. L. REV. 809 (1935). Cohen later explained that his rationale for viewing law through the lens of human interaction was "because each of us operates in a value-charged field which gives shape and color to whatever we see." Felix S. Cohen, \textit{Field Theory and Judicial Logic}, 59 YALE L.J. 238, 242 (1950).


\textsuperscript{55} See WHITEHEAD, \textit{supra} note 47.

\textsuperscript{56} See HAROLD D. LASSWELL, \textit{Propaganda Technique in the World War} (1927).

\textsuperscript{57} These events on the propaganda continuum were indispensable to maintaining the "modern" war political economy, and were therefore an indispensable part of defending the event manifold, which in this case was the United States. These signs and symbols were particularly potent in the guise of mass advertising, which significantly influenced public attitudes toward the war. See id. at 185–213.

\textsuperscript{58} See Harold D. Lasswell, \textit{The Function of the Propagandist}, 38 INT'L J. ETHICS 258 (1928); Harold D. Lasswell, \textit{The Theory of Political Propaganda}, 21 AM. POL. SCI. REV. 627
most critical role of these communicative signs and symbols—propaganda—was the preservation of the manifold (which, in the context of Lasswell's dissertation, was the United States) from destruction.

Lasswell recognized that the study of propaganda is a focus of inquiry with very broad implications for social and psychological theory and methods of inquiry.\(^5\) The theory and the associated methods and technologies of propaganda must be explored to precisely understand how State decision-making processes are radically changing even as the

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State itself maintains the appearance of stability and normality. Propaganda is best understood with an analysis of the theory and methods of the social and political processes of communication. Propaganda is a distinctive communications process. It is maintained and intensified by operations and practices that control, regulate, or suppress the critical symbols and signs of manipulated collective affect, solidarity, and insecurity. This is an important insight into the anatomy of the State. The larger insight derived from Lasswell's study is that propaganda is a component of a more ubiquitous process of communication and collaboration in the interest of the governing elite or class in the State.

Propaganda clearly targets the individual, for it is designed to reinforce a psychological sense of who is included in the symbolic "we," and who is included in the symbolic enemy, the "other." It is particularly designed to elicit solidarity based on the threat symbolized by the "other." But how does a threat elicit feelings of solidarity? To be successful, propaganda communicators had to send simultaneously complex messages. For example, solidarity is reinforced by idealizing the symbols of "we" and "us." This is meant to enhance levels of affect and loyalty to the symbols of authority that need solidarity and enhanced loyalty (patriotism). On the other hand, the enemy must symbolize a threat—a threat to the sense of personal security. The more intense the perception of the threat from the enemy, the more personal insecurity will be produced; the greater the threat perception is from the "other," or the enemy, the greater the need for security within the "we" group or nation of primary identification. Lasswell's examination of the State as a manifold of events thus clarified the trajectories of propaganda during World War I. His analyses of the wide-ranging effect and resultant solidarity created by this propaganda definitively

60. French political theorist, Jacques Ellul, suggested that the phenomenon of propaganda is essentially comprised of four primary qualities. Specifically, propaganda: 1) manifests a focused, purposeful manipulation of individuals in a society and the society at large; 2) must be far-reaching to be effective; 3) must be perpetrated in a continuing, lasting fashion through political power brokering characterized by marked regulation; and 4) must be characterized by "orthopraxy," or a sense of task-mindedness which leads to a specific goal that is not contingent on traditional deductive logic. See Jacques Ellul, Propaganda: The Formation of Men's Attitudes 9-17 (1965).

61. See Carl Coon, One Planet, One People: Beyond "Us vs. Them" 30 (2004) (generally discussing the ethical implications of how a global society develops, functions, and regulates conflict, and noting that "[t]he 'us versus them' syndrome is an essential element of any community").

62. See Nagan & Hammer, supra note 43.

63. See id. at 943.
establish that twentieth century processes of communication telescoped the boundaries of space and time. For the first time in human history, the continuum of global events, as portrayed in the content of the propagandist communication, transcended the individual State and broadened the manifold to encompass the globe.

The core conceptual basis of the study of propaganda lies in the communications process. The communications process cuts across all traditional boundaries of the social and psychological sciences, and underscores the relevance of approaching inquiry into social process from an interdisciplinary point of view. Lasswell's pioneering work on communications theory had an important impact on our interpretation and appreciation of law as a process of communication. Events in each contextual manifold have meaning and socio-political relevance through complex channels of communication in social interaction and social process. As stated above, the modern State, particularly during war and other crises, generally seeks to control the channels of opinion-forming communication. Lasswell sought to map the pathological features of perpetrators of this manner of political undertaking. It was from these beginnings that the New Haven School of Jurisprudence subsequently sought to comprehensively map the social process of communication.

C. Extending the Manifold of Events to the World Community: The Expansion of Communications Theory

One of the great constitutional lawyers of the late nineteenth century, A.V. Dicey, noted sardonically that jurisprudence (or legal theory)

64. Professor Lasswell's remarks on the nature of propaganda are both insightful and memorable. For instance, he stated that "all governments are engaged to some extent in propaganda as part of their ordinary peace-time functions. They make propaganda on behalf of diplomatic friends or against diplomatic antagonists, and this is unavoidable." LASSWELL, supra note 56, at 14.


66. See Harold D. Lasswell, The Function of the Propagandist, 38 INT'L J. ETHICS 258, 267 (1928) ("[T]he propagandist is constrained to think of society as a process of defining and affirming meaning. His chief preoccupation is with the modes of presentation which redefine meanings.").

67. See LASSWELL, supra note 2, at 38–64 (analyzing the psychopathological implications of various types of political actors).

68. RUDOLPH B. SCHLESINGER, HANS W. BAADE, MIRJAN R. DAMASKA & PETER E. HERZOG, COMPARATIVE LAW: CASES—TEXTS—MATERIALS 40 (5th ed. 1988) (stating that the word "jurisprudence" means "general theory of law," or "legal theory").
“stinks in the nostrils of the [practitioner].” 69 Apparently, legal theory was resisted by operative practitioners. The distinguished Federal Judge Richard Posner—himself an architect of the jurisprudence of political economy—has suggested that much conventional legal theory is intellectually worthless. 70 To others however, legal theory is a mode of inquiry, and a process by which the nature and quality of public order might be better understood, secured, defended, and promoted in the common interest.

Legal theory must make rational inquiries about law, particularly international law and human rights law; it must guide policy construction as well as the normative clarification of the conceptual foundations of international legal order. Theory construction is likewise crucial for providing apposite actors with improved processes of intervention and appraisal, because when properly understood, theory is critical for understanding the conditions and future implications of public order. Accordingly, jurisprudential theory is a key tool of inquiry into international human rights; to employ this tool we must first comprehend both historic trends and essentials of theory construction, which necessarily includes understanding the implications of creating theories that are consistent with the universal dignity of man. At the core of this inquiry is the salience of the individual, as well as his or her relationships with non-self others. This important concept is extraordinarily demonstrated by the ubuntu principle—the concept of human dignity as an expression of the crucial goals of African public order. 71 This perspective places the human being at the center of legal analysis, and advances the notion that the worth of a human being is expressed by his or her relationships with others. In the words of Archbishop Desmond Tutu:

A person with ubuntu is open and available to others, affirming of others, does not feel threatened that others are able and good, for he or she has a proper self-assurance that comes from knowing that he or she belongs in a greater whole and is diminished when others are humiliated or diminished, when

70. See e.g., RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).
others are tortured or oppressed, or treated as if they were less than who they are. 72

Indeed, the *ubuntu* principle is consistent with the emphasis of this Article that the value of a defensible jurisprudence may be its capacity to focus on actual human relationships. 73 If the worth of jurisprudence is gauged by its focus on human relationships and expressed with precision, it is indeed a powerful tool to protect and sustain human interests. This human character of jurisprudence is particularly important to theorists and practitioners dedicated to exploring the empirical and normative roots of the crown jewel of international law—human rights.

General communications theory was introduced to the practice of international law by the New Haven School of Jurisprudence. 74 According to the New Haven School, the social process of communication is explained in terms of using signs and symbols. This

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72. DESMOND MPLIO TUTU, NO FUTURE WITHOUT FORGIVENESS 31 (1999).
73. In the *Bhe* case, (a recent, transformative decision), the Constitutional Court of South Africa held that male primogeniture—an antiquated rule which exclusively permits male issue to inherit property of an intestate decedent—is unconstitutional. While the *Bhe* judgment operates practically to the tangible advantage of women and children, its theoretical implications are extremely compelling. The judgment expressly recognizes living law—or in the words of now Chief Justice Pius Langa, “living customary law”—as authoritative jurisprudence within the legal system of South Africa. In so doing, the Constitutional Court required South Africa to turn away from traditional custom in favor of human rights principles. This transformed the Constitution of South Africa into a vibrant example of the living law. See *Bhe & Others v Magistrate, Khayelitsha & Others* 2005 (1) SA 580 (CC) (S. Afr.).
is because "[s]igns are materials or energies that are specialized to the task of mediating between the subjective events [(perspectives)] of two or more persons."75 Of the signs that are key to human communication, words are certainly the most ubiquitous, but they are by no means the penultimate communicative mechanism. Word-signs are invariably "supplemented by gestures, and by such equivalents as written characters and pictures."76 Symbols are references that give some degree of meaning to signs.77 According to Lasswell and his colleagues, "[t]he subjective events that are called up by the signs of a system of communication are symbols. In the most generalized sense, symbols are often referred to as 'interpretations' of signs."78 While Lasswell and his colleagues use the term "interpretation" in a legal context, (which is narrower than the generalized definition of a symbol), they also make the point that "it is a pertinent step toward objectivity to perceive the role that a similar though more generalized definition has played in the

75. MYRES S. McDOUGAL, HAROLD D. LASSWELL & JAMES C. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER xii (1967). The idea of rooting the legal and social processes in the subjectivities of participants might seem counterintuitive because it conflicts with the jurisprudential assumption that law must ultimately be an objective enterprise. See, e.g., HEGEL, supra note 43, § 215 ("[Law] must be made universally known."). Lasswell and McDougal, however, approach the problem of interpretation and subjectivity from a perspective requiring the realism of subjectivity as an important indicator of human wants and needs: An interpretation is not normatively justified if it self-consciously seeks to distance itself from precisely the subjectivities of its essential consumers. The problem of arbitrariness is avoided and the interpreter is able to cabin discretion by developing articulate principles of content and procedure to clarify value judgments and to guide interpretation in specific cases using procedures that are explicit guides to choice. The strategies of communication implicate familiar ideas as to how the meaning or context of a statement might be interpreted. Lasswell, McDougal, and Miller suggested that "[s]tatements can be analyzed syntactically and semantically. In the former case the problem is to disclose the interrelations among statements when they are viewed as a closed universe.... Semantic analysis, on the other hand, is concerned with the references found in statements regardless of the location of the referent inside or outside of the total message." McDOUGAL, LASSWELL & MILLER, supra, at xiv–xv. The functional explanation of the communications process underlines the importance of a contextual, problem-oriented, goal-guided, and decision-focused view of law. See RICHARD BANDLER & JOHN GRINDER, REFRAMING: NEURO-LINGUISTIC PROGRAMMING AND THE TRANSFORMATION OF MEANING 2 (1982) ("In general communication theory there is a basic axiom that a signal only has meaning in terms of the frame or context in which it appears."). The transmission aspect of the communication function relates to the expectations about both law and culture conditioned by recognizing and responding to problems. These ideas collectively comprise the foundation on which the distinctive, policy-centered jurisprudence for a free society was developed.

76. McDOUGAL, LASSWELL & MILLER, supra note 75, at xiii.


78. McDOUGAL, LASSWELL & MILLER, supra note 75, at xii.
A key problem for the legal applier or interpreter of law-conditioned communication primarily deals with the limits of word-based statements. Since these statements do not exhaust meaning, how is communication and subsequent interpretation to be done? If a major purpose of interpretation is to bring communicators to the same communicative plane, with shared starting points, subjectivities, and understandings, then words alone are arguably inadequate. Indeed, relying solely on words may even be irresponsible if the stakes of such communication are high, or if there lurks an even remote possibility of misconstrued interpretation in the absence of some additional communicative mechanism. Accordingly, if textured construction and interpretation is itself a final version of communication, genuine expectations and public interest values may be undermined. Indeed, "[t]extuality stops short with [mere] words."80 We submit that all communication must be viewed in terms of the context associated with the interpreting authority, particularly if this authority is a legal applier of human rights norms and expectations; it is this interpreter's task to approach the same shared subjectivities81 of the parties and the integration of the communication into more general expectations of the public interest. This requires a careful and articulate specification of the protocol governing how such interpretation must occur, as well as a review of the general goals of public order to further guide specific interpretative applications.

The foundation of human rights is a matter of critical legal inquiry. Articulate theory about human rights within the international constitutional system might provide a more insightful and rational balance to our understanding of the global constitutional system and its appropriate rule of law foundations. This Article assumes that one of the legitimate tasks of academic lawyers in the human rights field is to provide a coherent theoretical account of the foundations of human

79. Id.
80. Id. at xviii.
81. There is an assumption that subjective behavior cannot be justified by objective criteria, and that subjectivity accordingly carries a strong element of arbitrariness. This concern is of critical importance to fields such as moral philosophy and conventional jurisprudence. The scientific literature dealing with the problem in social and human relations of accounting for the inter-subjectivities of human beings—and thereby giving these inter-subjectivities a sufficiently coherent basis for reasoned elaboration—is highly influenced by the work of William Stephenson, who held doctorates in both physics and psychology. See William Stephenson, Quantum Theory and Q-Methodology: Fictionalistic and Probabilistic Theories Conjoined, 33 PSYCHOL. REC. 213 (1983).
rights itself. Such an account must grapple with the challenges presented by international human rights from the theoretical foundations of the rule of law itself. Coherent theory is relevant to the practical development of human rights, which must be culturally based on some rational model of legal development.82 A necessary element of formulating coherent theory regarding the contemporary international human rights regime is the contextual mapping and interpretation of relevant communication. Indeed, the tasks of theory and practice are clear: They must make the culture of human rights an integral part of the legal culture of both national communities and the larger world social processes.83

However, the importance of language cannot be gainsaid. Theorists and public policy makers have in fact considered the extent to which language, or more broadly, the signs and symbols of international law, might be more broadly appropriated in the general fields of international relations and international diplomacy.84 Perspectives on the intersection

82. Winston Nagan, co-author of this Article, has long been a proponent of the practical import of theory, which is far more useful in most all circumstances—of both the academic and non-academic varieties—than is often appreciated. Professor Nagan heartily disagrees with Friedrich Engels’ assertion that “[a]n ounce of action is worth a ton of theory,” JOEL WEISS, THE QUOTABLE MANAGER: INSPIRATION FOR BUSINESS AND LIFE 200 (2006), unless that theory is not sound, in which case Professor Nagan has stated, “[bad theory] generally leads to bad practical results.” See HUMAN RIGHTS AND GOVERNANCE IN AFRICA 89 (Ronald Cohen, Goran Hyden & Winston P. Nagan eds., 1993).

83. For a cross-disciplinary analysis of how topics in human rights might be more effectively integrated into national and transnational legal cultures, see 1 C.G. WEERAMANTRY, JUSTICE WITHOUT FRONTIERS: FURTHERING HUMAN RIGHTS (1997); and 2 C.G. WEERAMANTRY, JUSTICE WITHOUT FRONTIERS: PROTECTING HUMAN RIGHTS IN THE AGE OF TECHNOLOGY (1998). In Judge Weeramantry’s first volume, FURTHERING HUMAN RIGHTS, he explores human rights from both general and specific standpoints. In the section entitled “General Perspectives,” the Judge generally chronicles human rights issues and gives particular regard to human rights education. He argues that human rights must be integrated into all disciplines, including jurisprudence, the geo-political discourse, religious practices and education, world history, the social sciences, philosophy, the natural sciences, world literature, and more. See 1 WEERAMANTRY, supra, at 3. The volume goes on to detail particular human rights issues requiring immediate global redress, such as international poverty alleviation, sustainable development, the universal right to be free from torture, the universal right to education, and the immediate eradication of racism. See 1 WEERAMANTRY, supra, at 171. In the Judge’s second volume, PROTECTING HUMAN RIGHTS IN THE AGE OF TECHNOLOGY, he explores both general and specific human rights issues in the context of international technological developments. He addresses the complicated and sometimes problematic link between democracy, science, and the advancement of human rights in an ever-changing world. The Judge has been an outspoken proponent of the development implications of technology, and he is a leading critic of destructive technology, such as nuclear weapons, chemical weapons, and other armaments. See 2 WEERAMANTRY, supra.

84. Thomas Erskine Holland sought to create a generalized jurisprudence, which might function as the foundational grammar of all human legal regimes. See HOLLAND, supra note 36;
of communication and interpretation are indeed critical to the discourse about the general nature of law as a means of communication. These insights into the communicative aspects of law—particularly human rights law-making, application, and enforcement—might deepen our understanding of law as an instrument to bring about an improved world order. In this regard, the work of the New Haven School of Jurisprudence becomes particularly pertinent. Professors Lasswell and McDougal in particular sought to recast developing ideas in policy-centered jurisprudence in the direction of a controverted and difficult international law problem: how is international law actually and realistically created and applied? Scholarly literature has long sought

see also WILLIAM TWINING, GLOBALIZATION AND LEGAL THEORY 26–29 (2000).

85. Lasswell’s general theory of communication is applied to the disputed and important area of international interpretation. His approach importantly corresponds with general principles of Hermeneutics—the formal study and interpretation of texts, performances, and human events—particularly with the perspective of Jürgen Habermas. Habermas argued that while law will never resemble moral truth in terms of its underlying principles and motivation, law nevertheless is more than the mere illustration of the historical contingency of shared ethical traditions. See JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 105 (William Rehg trans., 1996) (1992). He suggested that the fundamental difference between law and morality was that law binds individuals only in an external, interpersonal sense, while morality binds individuals internally and externally; law is thus subject to pragmatic restrictions, particularly in terms of gauging its operational effectiveness. Id. at 112, 194–230. Essentially, Habermas used modern communications theory to interpret social events. Understanding was meant to be critical and central to providing a deconstruction of ideological myth systems. Lasswell’s approach to the same problem seems not to have been as convoluted as its evolution in the German tradition. He cut to the quick as follows: The political personality is driven by private motives, displaced on public objects, and rationalized in the public interest. There is no more skeptical or critical concept of ideology in the literature of law or philosophy. The ideological myth carries no presumption of intrinsic social worth. Ideology is rationalization, and not a real justification for moral or social worth. See HAROLD DWIGHT LASWELL, POWER AND PERSONALITY 38, 65–88 (1948).


87. See, e.g., LASWELL & MCDOUGAL, supra note 4; McDougal & Reisman, The Prescribing Function, supra note 74; Myres S. McDougal, Harold D. Lasswell & W. Michael
determine how sources of international communication that emanate from the vast growth of international organizations, as well as domestic and municipal authorities, might actually count as law. Scholars have thus employed metaphors, such as international "hard" law and "soft" law, as handy tools to determine what comprises international law.

Professor McDougal, together with his colleagues from the New Haven School, set out the following general model of communications theory which, when properly contextualized, provides clarity about how international prescription functions and how to contextually delimit the legal currency of specific prescriptions:

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88. For example, and from a technical standpoint, the Universal Declaration on Human Rights is not a treaty. Does it have any legal force or currency? If it does have some degree of currency, how can it be coherently assayed? See John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in *HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION* 21 (B. G. Ramcharan ed., 1979).

89. Generally, "hard law" is intentionally created to establish lasting, legally binding obligations, whereas "soft law" is created in steps, beginning with recommendations, which might—in the fullness of time—be construed as effective ways to interpret international agreements and custom, or may itself comprise a basis for eventual forms of "hard law." "Soft law" might also be regarded in terms of what "hard law" is not. Specifically, "soft law" may be defined as treaties that have not come into force, but which nevertheless manifest some broad consensus regarding its substance. "Soft law" might also be comprised of provisions from an otherwise binding international document—such as a treaty—that are hortatory or aspirational. In short, these provisions indicate that signatories or participants understand that they are obliged to adhere to the ethical or otherwise political commitments embodied in the provision, even though the document itself is technically nonbinding at law. See Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT’L ORG. 421, 421–22 (2000) (exploring "hard law" in terms of "legally binding [precise] obligations" and "soft law" in terms of "the dimensions of obligation, precision, and delegation"); see also Cynthia Crawford Lichtenstein, *Hard Law v. Soft Law: Unnecessary Dichotomy?*, 35 INT’L L. 1433 (2001) (generally exploring whether a functional difference exists between "hard law" and "soft law"); *SOFT LAW IN GOVERNANCE AND REGULATION: AN INTERDISCIPLINARY ANALYSIS* (Ulrika Mörth ed., 2004); C. M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT’L & COMP. L.Q. 850, 851–52 (1989); Dinah Shelton, *Compliance with International Human Rights Soft Law*, in *INTERNATIONAL COMPLIANCE WITH NON-BINDING ACCORDS* 119, 120–27 (Edith Brown Weiss ed., 1997); Dinah Shelton, *Law, Non-Law and the Problem of “Soft Law,” in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* 1, 2–7 (Dinah Shelton ed., 2000); Remarks at the American Society of International Law Proceedings: A Hard Look at Soft Law (Apr. 22, 1988), in *82 AM. SOC’Y INT’L L. PROC. 371* (1988) (a panel discussion by W. Michael Reisman, Bruno Simma, Gunther F. Handl, Christine Chinkin, and Pierre-Marie Dupuy).
This model operates as a gloss on how law is viewed through the functional, contextually informed communication lens mentioned above. The model further demonstrates how and why communicators are authorized to communicate, as well as who comprises the collective target of such communication—a target audience. Thus, it is plain to see that international lawmaking, or prescription, is itself a process of communication that is comprised of a communicator, a target audience, and varying degrees of interpretation. This communication exists as signs or symbols of policy content, authority, and of controlling intention. Specifically, these signs or symbols might be distilled to the three communication and interpretation variables in the stated model: (1) the “policy content,” which is the prescription; (2) the “authority signal,” which is the legitimate basis from which to prescribe; and (3) the “control intention,” which is the enforcement power. In short, to be considered law, international law and human rights regimes must have a prescriptive policy content, which must be accompanied by signs or symbols indicative of widespread community acceptance—under international law, the community is the notional basis for authority—and it must also convey that some degree of institutionalized control exists to ensure that the prescribed law is real.

The model also sheds light on the extent to which communications must have a prescriptive content to determine whether they connote authority, as well as whether they are supported by the communicator’s controlling intention. Effective legal communications will generate clarity regarding the specific rule or policy that the communication

90. See Reisman, International Lawmaking, supra note 74, at 108–10 (discussing these three key aspects of prescriptive communication); McDougal & Reisman, The Prescribing Function, supra note 74, at 250; see also McDougal, Lasswell & Reisman, The World Constitutive Process, supra note 74.


92. See id. (discussing the three aspects of prescriptive communication, which collectively convey legal norms because they establish policy that emanates from a competent authority and creates in the target audience an expectation that the policy content of the communication is itself designed to control); see also McDougal & Reisman, The Prescribing Function, supra note 74, at 250–54; McDougal, Lasswell & Reisman, The World Constitutive Process, supra note 74; Nagan & Hammer, supra note 16, at 151 (exploring how the constitutive process generally shapes communication associated with conflict management to set out and preserve fundamental political and juridical institutions of decision-making).
prescribes. These communications must be clear, they must emanate from a recognized authority, and they must be accompanied by an expectation of controlling efficacy. Lasswell developed a similar model years earlier, which distills his theory of communication into the following six sequential questions:

- **Who?**
- **Says What?**
- **About What?**
- **In Which Channel?**
- **To Whom?**
- **With What Effect?**

The question, "Who?" examines the character of the participant initiating communication, (i.e. a control analysis). The question, "Says What?" examines the content of the communication and, together with the ostensibly implicit "About What?" question, provides a broader context for content analysis. The question, "In Which Channel?" examines the relevant channels of analysis (i.e., a medium analysis). The "To Whom?" question examines the target of the initiators' communication (i.e., a target-audience analysis). Finally, the intersection of the impact of communication on a target audience, the mode of transmission or exchange, and the further impacts upon the initiators' perspectives collectively comprise the subject matter of the "With What Effect?" question.

When we apply Lasswell's model directly to law at any level (local, national, and international), the relevance of these questions becomes immediately apparent. The "Who?" question is of chief importance:

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Does the law (created or interpreted) emanate from a government official? Is that official a judge, an administrator, a legislator, or an international civil servant? Or does the law emanate from the private sector? Is it actually rooted in political pressure exerted by a political party, a corporation, or a non-governmental organization? An honest answer to the "Who?" inquiry provides key insight into the power, competence, authority, and expertise of the government system from which the law emanates, as well as a keen understanding of the law itself. In the context of international law, the "Who?" question is critical for all participants because the communicator of the law indicates the extent to which States are bound to obey it. Law that emanates from the United Nations General Assembly, as opposed to the United Nations Security Council, or a statement by the Secretary General, or by the European Union, are each accompanied by understandings about the law's area of effect.

Lasswell's second question, "Says What?," designates the content of communication. Should this communication emanate as a prescriptive statement, the form thus communicates wrongdoing by certain participants and an expectation regarding those participants' future conduct. While the next logical question, "About What?," was not expressly stated by Lasswell, it was, by necessary implication, the next communicative step, which indicates the primary importance of the participants' comprehension of communication content within the appropriate context within which it is communicated. Only by asking "About What?" might these participants be able to determine the expectations that accompany a prescriptive statement, or whether the communication is accompanied by expectations of authority and coercion; it thus provides key information into how these participants might react.

The inquiry, "In Which Channel?" permits the target audience of the communication to understand both its efficacy and its intended effect in either practice or theory. Advanced mechanisms of communication are ever more widespread and available to diverse sections of humanity, resulting in a continuing exponential explosion of available interpersonal channels. This, for example, means that there is a growing series of channels devoted to the communication of human rights prescriptions. Indeed, the communications revolution has compressed both space and time in the development of expectations regarding universal human rights law.

The question, "To Whom?," specifically designates the aforementioned participants—the target audience of the communication.
For example, "To Whom" is a Security Council Resolution addressed? By comparison, "To Whom" is an Advisory Opinion of the World Court addressed? From a human rights point of view, curious scholars might wish to know whether the Universal Declaration of Human Rights is addressed exclusively to those States who have signed and ratified the United Nations Charter, or whether it is addressed to every member of the international community.

Finally, the question, "With What Effect?" obligates the target audience to both act on the content of the communication, and to further gauge the value of the communication in terms of its ultimate effect. If the audience recognizes some direct or indirect effect that results from the audience’s action pursuant to the communication, critical legal implications might result. It is important to note that the effect of audience action might be zero change to the status quo, but this itself is valuable information. If the effect of audience action means something for law, it is crucial to determine the critical indicators in this process, which might indicate that the communication has created some distinct expectations regarding what is effective and what is ineffective under the law.

As communications theory became a distinct field of social science inquiry, the research objectives of the discipline became increasingly well articulated. According to Bruce Lannes Smith, the objectives of communications research are as follows:

[T]he central purpose of communication research theory and methodology is to enable us to view as clearly as possible a given communicator-communication-reaction process, from beginning to end, in the frame of reference of general socio-psychological ("behavioral") theory. A new theory or methodological wrinkle is of interest if it enables us to probe more deeply into the aims and perspectives (conscious and unconscious) of a communicator; to express in a relatively terse but accurate formula the main psychological, cultural and social referents (to all those involved in the communication process) of the content of his communication; to state unambiguously what audiences (intended or fortuitous) he reached; how they reacted (consciously and unconsciously) on the psychological, cultural, and social levels; and what the effects of "feedbacks" of these reactions were upon the communicator as he thereupon started a
new cycle of the communication process.⁹⁵

Lasswell’s interest in the effects of communication on social process was suggested early on in WORLD POLITICS AND PERSONAL INSECURITY, where he concluded:

In face-to-face experience over a protracted period personalities with parallel biopsychic structures and cultural technique may communicate extensively. An act of communicating is bilaterally complete when two autobiographies knowingly concur in the frame of reference of symbols.⁹⁶

Lasswell recognized that these ideas required further scientific refinement, which resulted in his pioneering work on the necessary relationship between communications theory and a general theory of “attention.”⁹⁷ The communication of relevant signs and symbols means little if it cannot garner such “attention.” Lasswell summarized the core functions of communications theory in light of the three fundamentals of attention theory:

(a) surveillance of the environment, disclosing threats and opportunities affecting the value position of the community and of the component parts of it;
(b) correlation of the components of society in making a response to the environment;
(c) transmission of the social inheritance.⁹⁸

Thus attention, context, and interpretation are processes of communication that often occur in a legal context where law-conditioned participants construe and interpret words, texts, codes, statutes, constitutions, agreements, decided cases, and other sources of law. The connection between interpretation and decision-making, especially law-conditioned decision-making, is evident.⁹⁹ In their 1967

⁹⁹. The decision-making regimes of transnational governments and organizations must “make as explicit as possible the principles of interpretation and application which influence their decision making processes.” MCDOUGAL, LASWELL & MILLER, supra note 75, at 64. Also with
book, *The Interpretation of Agreements and World Public Order*, Lasswell, McDougal, and Miller introduce readers to a decidedly interdisciplinary, goal-oriented approach to interpretation that is itself a component of decision-making. The authors describe the social process of communication as a "comprehensive process in which communicators and audiences are both involved."\(^{100}\) This is further explained as relational in the sense that relevant parties "play two supplementary roles, one that of the initiator of messages, the other that of the recipient."\(^{101}\) It follows that contextually, "the characteristic that distinguishes a social interaction that is chiefly to be regarded as an act of communication from what is primarily to be viewed as something else."\(^{102}\)

In part, the limitations on human rights are driven by practical exigencies of the exercise of effective power, which occur both nationally and internationally.\(^{103}\) A significant element of effective power is explained and justified, however, by the theory of positivism,

Regarding how words, texts, codes, statutes, constitutions, agreements, and decided cases should be interpreted, Justice and Professor Aharon Barak, current President of the Supreme Court of Israel, argues in *Interpretation in Law* that the authoritative examination of constitutional provisions—and by extension other sources of law—must be done in order to:

not...freeze [an] existing situation...[because these sources] attempt[ ] to direct human experience. Accordingly, it must be interpreted from the standpoint of a broad outlook and not in a technical manner...[because] interpretation from a broad outlook is an interpretation which seeks to implement the objective purpose of the...text.... A broad outlook is an outlook which observes the past, the present and the future. It is an interpretation which entails an overall conception of the law at a given time and in a given society.... The meaning of the...text is not fossilized...[and] is not static but is dynamic, and the understanding of it changes with the generations.


100. McDougal, Lasswell & Miller, supra note 75, at xii; see also id. at 40 (seeking to advance communication and interpretation to a policy-oriented and configurative approach, which is influenced by "the genuine shared expectations of the particular parties to an agreement," as well as by "efforts to further the realization of the basic pattern of value distribution and the fundamental institutions that are compatible with the preferred system of public order").

101. Id. at xii.

102. Id.

103. See MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 23 (2001) (stating that the organic relationship between human rights and State sovereignty incidentally creates limitations on national and international efforts to advance human rights, and arguing that States which evoke some degree of stability comprise "the most important protector[s] of individual human rights"). A balance between the collective claims based on State power and sovereignty and individual claims to respect individual human rights has been explicitly grappled with in Nagan & Hammer, supra note 16.
which, as detailed earlier, makes sovereignty a central part of law based on claims relating to international human rights by weakening efforts to limit sovereignty.\(^{104}\) Despite the permeability of the event manifold, which, as indicated above, is a designation that Lasswell attributed both to the State and the international community as a distinct entities, sovereignty cannot be eclipsed.

Despite various arguments to the contrary,\(^{105}\) however, sovereignty is susceptible to reasoned deconstruction using communications theory. H.L.A. Hart deconstructed sovereignty using tools familiar to conventional jurisprudence, to which he ascribed a sharp analytical edge by simultaneously employing tools of ordinary language analysis originally developed by the Oxford philosopher, J.L. Austin. Hart postulated that the question, "What is law?," cannot be answered unless the word "law" is understood as a system of social rules that presupposes a context.\(^{106}\) In short, legal language assumes a context, and this assumption reduces law to a specific form of language communication, which is the concept of "rule."\(^{107}\) Hart recognized that when the concept of sovereignty is thus reduced to orders backed by threats, it effectively reduces the twin concepts of law and State to raw power and has a markedly communicative effect.\(^{108}\)

Hart's deconstruction of sovereignty grew out of a version of modern communications theory which focuses on the ordinary use of words as a critical indicator of meaning. A side-by-side examination of Lasswell's later work against that of Hart demonstrates that Lasswell, too, sought to deconstruct sovereignty using processes of human communication. Specifically, Lasswell, together with Myres McDougal, sought to deconstruct sovereignty by identifying a "world social process" that identifies the individual as the chief participant who interacts with other individuals using various processes of communication, including "looking and listening; and more."\(^{109}\) Lasswell and McDougal state that "[t]he participants in the world social process are acting individually in their own behalf and in concert with others with whom they share

\(^{104}\) See supra Part III (examining the negative human rights implications associated with positivism).

\(^{105}\) See Nagan & Hammer, supra note 43; Nagan & Hammer, supra note 16.

\(^{106}\) See HART, supra note 25, at 80.

\(^{107}\) See id.

\(^{108}\) See id. at 79–88 (setting out the argument that a distinction exists between being obliged, which hinges on the threat of force, and having an obligation, which hinges on the existence of some accepted legal legitimacy; Hart thus warned against confusing prescriptive power with obligation).

\(^{109}\) McDougal & Lasswell, supra note 29, at 7.
symbols of common identity and ways of life of varying degrees of elaboration.” Both Hart and Lasswell essentially harmonized on the importance of liberty and individual freedom, and each yielded valuable insights into how iterations of communications theory might be used to perform critical intellectual tasks in deepening our understanding of empirical aspects of national and international politics.

Correspondingly, positivism weakens the normative component of general international law as a critical world order variable. In short, international law and human rights still experience a major theoretical problem—the intersection of legal positivism and sovereignty—which has crucial practical consequences. The theory of positivism is itself a significant condition of the definition and scope of both human rights and the exercise of effective power among members of the international community. Nevertheless, it is widely claimed that human rights law is a fundamental part of international law, the observance of which is

110. Id.

111. The normativity of certain principles might be effectively expressed by reducing them to practical imperatives. Certain statements of theory arguably have normative and deontic force because they are contextually applicable in both micro levels (as in most social interaction—such as interpersonal communication), and macro levels (as in the international legal system). Thus, the content of certain theoretical arguments determines the force and scope of certain practices. The practical implications of micro-law theory are extremely significant because they are limitless. See Harold D. Lasswell, The Qualitative and the Quantitative in Political and Legal Analysis, in QUANTITY AND QUALITY: THE HAYDEN COLLOQUIUM ON SCIENTIFIC METHOD AND CONCEPT 103, 108–11, 113–14 (Daniel Lerner ed., 1961).

"persuaded," "induced," or "compelled"\textsuperscript{113} by State agreements and practices. This generates expectations associated with the authority foundations of human rights, which is supported in part by the principle of reciprocal tolerances and complex components of coercion to ensure effective prescription, application, and enforcement. In actuality, many more direct and indirect participants are involved in the process of making and applying human rights law in the world community. The trajectories of both human rights law and general international law are structurally vertical and horizontal, and they also incorporate a multitude of trajectories that encompass communicative relationships in contexts large and small; indeed, to understand the international human rights legal process, one must look at global versus local communication.\textsuperscript{114}

The policy-oriented approach to law has developed an articulate general jurisprudential framework. According to Lasswell and McDougal, all jurisprudence comprises a collective theory for inquiry about law. Considerable effort has been given to the development of jurisprudence from international, cross-cultural, and comparative perspectives; the policy scientist is particularly concerned with the role of law in the context of world public order. In the study of international law and human rights, the policy-oriented approach focuses on a distinct challenge for relevant academic inquiry. Specifically, the approach accepts the importance of theory in relation to practice. Through the prism of international law, theory guides world public order. Noting the inadequacy of past theories, the New Haven School developed an applied form of its general theory of jurisprudence to the theory of international law as a critical component of world public order, which overarchingly sought to establish a universally applicable theory of human dignity. This systematic development of jurisprudence as a theory for inquiry about human rights was itself an important intellectual achievement not only for the New Haven School, but also for the human rights field of study. Importantly, this continuing study demonstrates that with the appropriate investigatory tools, the current world order system might yield a powerful theory about human rights that would have descriptive power, analytical sophistication, prescriptive force, and normative justification.

Probing more deeply into the specific questions concerning what international law and human rights law are, and how they are made, applied, and enforced, are of central importance to the New Haven School. The paramount importance placed on international law and human rights law led to important developments in the description and analysis of critical decision functions that have markedly communicative characteristics, such as prescription, application,

115. See supra Part II.
116. See generally LASSWELL & MCDOUGAL, supra note 4 (describing how international law is derived from theories associated with authoritative processes of decision-making). McDougal spent much of his auspicious career arguing that this authoritative process of decision-making is designed to articulate and bring about a central policy objective—ubiquitous human rights norms to which all peoples adhere. See MYRES S. MCDOUGAL ET AL., STUDIES IN WORLD PUBLIC ORDER 987–92, 992 (1960) (“The values we recommend for postulation as the goal values of human dignity are...merely the traditional values of humanitarianism and enlightenment bequeathed to us by most of the great religions and secular philosophies prevailing in recent centuries.”). For writings analogous to the policy oriented approach, see FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY 11 (1988) (“[A]n international legal customary rule ‘requires’ a reliance on a value judgment which in turn can only be understood within the framework of a broader moral-political theory.”).
termination, invocation, intelligence, and more. These decision functions comprise tools to investigate the signs and the symbols of international law and human rights law by chiefly exploring the actual dynamics of how signs, symbols, and other forms of communication operate.

Language—a primary channel of communication—is also a process of interpretation; indeed, one that is well-developed in conventional law and literature. Still, for the New Haven School, interpretation amounts only to a starting point for inquiry. Deeper analyses are required to understand more precisely the operational currency of forms of communication in the actual practice of making, applying, and enforcing international law and human rights law.

The ubiquity of communications in social process has micro and macro implications in the study of international law, particularly human rights law. The New Haven School has demonstrated that international law might best be understood when practitioners employ tools of communication to study it, because international law is the framework for all human interaction. Thus, communication—in both theory and practice—is critical to legal discourse, and functions as a crucial point at which law and human behavior intersect. Exploring this intersection from a new angle might further develop current understandings of human rights law.

117. Professor Robert Drinan’s critical analysis of the communicative power of shaming reveals that human rights regimes might be characterized by various, sometimes subtle, levels of communication—typically beneath overt calls for action by the international community or non-governmental organizations. See ROBERT F. DRINAN, THE MOBILIZATION OF SHAME: A WORLD VIEW OF HUMAN RIGHTS (2001). Compelling a State to act not out of self-interest but out of certain pressures incidental to public shaming comprises an excellent example of how micro-social behavior is effective on the international level. For analogous analyses, see, for example, JAMES AVERY JOYCE, THE NEW POLITICS OF HUMAN RIGHTS (1978); and Oscar Schachter, Remarks at the Proceedings of the Eighty-Fifth Annual Meeting of the American Society of International Law: Compliance and Enforcement in the United Nations System (Apr. 19, 1991), in 85 AM. SOC’Y INT’L L. PROC. 428 (1991).

118. Professor Reisman’s contribution to the ongoing discourse on the nature of law is his book, LAW IN BRIEF ENCOUNTERS; it functions as an introduction to an interesting perspective of the New Haven School. Each successive contribution by the New Haven school seemingly calls for continuing analytical attention to the intersection of formal and informal law, particularly in common situations and everyday life. Reisman’s perspective, for example, advances the landmark notion that all day-to-day social intercourse—in other words, all civil human interaction that is beyond the purview of official State law—is actually governed by systems of “norms,” “judgments,” and “sanctions.” See REISMAN, LAW IN BRIEF ENCOUNTERS. supra note 74, at 39, 54. He builds on the New Haven School’s previous efforts to set out a detailed analysis of how situations—when measured against conventional notions of law that seem unregulated—actually conform, at times quite subtly, to archetypal patterns of “micro-law.” See id. at 158–59.
IV. A RETREAT FROM FORMALISTIC POSITIVISM: THE MICRO-LAW IMPLICATIONS OF INTERNATIONAL LAW AND HUMAN RIGHTS

Among Harold Lasswell’s greatest achievements was his startling connection in World Politics and Personal Insecurity, where Lasswell explored the idea that since the manifold is permeable, certain key component parts of the manifold are vulnerable to influence. Specifically, he found that events triggered in the global manifold can do penetrate the boundaries of the State and profoundly influence the identity of the individual.119 Thus, certain world events characterized by uncertainty, instability, and the possibility of conflict can affect national security by being manipulated into signs and symbols of communication that penetrate the manifold and are used to attack the personal security, or insecurity, of the individual. Lasswell’s insight employs communications theory to examine unvarnished weaknesses of the State; it was indeed an extremely advanced theory. He subsequently sought to develop this major theoretical insight; he soon founded the notion that world politics and individual human relationships function by using parallel rules, in what he characterized as macro-social and micro-social contexts.120 In short, Lasswell had a revolutionarily insight. He established the proposition that decision functions comprise a comprehensive, global array of activities that appear in every decisional context in existence, from interpersonal human relationships (micro-law) to geopolitics (macro-law), which Lasswell collectively referred to as “multivalued models of the social process.”121

119. See Lasswell, supra note 96, at 217 (“Clearly, insofar as politics is the management of symbols and practices related to the shape and composition of the value patterns of society, politics can assume no static certainty; it can strive for dynamic techniques of navigating the tides of insecurity generated within the nature of man in culture.”).


121. Lasswell, supra note 111, at 113. All subsequent analyses of micro-law are entirely predicated on assumptions set out by Lasswell in this ground-breaking, foundational work. See, e.g., Reisman, Law in Brief Encounters, supra note 74, at 2 (“The law of the state may be important, but law, real law, is found in all human relations, from the simplest, briefest encounter between two people to the most inclusive and permanent type of interaction.”); Tina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale L.J. 1545, 1556 (1991) (“The norms that govern microlegal systems are unwritten and often not consciously perceived, but they are always present.”); Michael Reisman, Lining Up: The Microlegal System of Queues, 54 U. Cin. L. Rev. 417, 418–19 (1985) (“Like most other social situations, mundane microsituations—
Lasswell's concept of micro-social law—or "micro-law"—recasts the starting point of legal theory. This approach supports the proposition that law does not begin with the State, but rather it has humbler, more anthropomorphic beginnings; it starts with the individual person as a communicative being. This approach therefore inverts not simply the priority given to hierarchy, but roots a great deal of law in the human subjectivities of ordinary persons—at least as a starting point and focus of legal inquiry. To make the individual the starting point of legal analysis and theory construction in law is also, coincidentally, to give a literal meaning to the terms, "human" and "rights."

A great deal of human rights grapples with the problematic model whereby States monopolize law-creation and, in an arguably counterintuitive sense, human rights are meant to limit the State's power to act arbitrarily or capriciously. Many States hold that human rights are not rights unless they are specifically adopted by the State. The reduction of much of the human rights prescription to treaty-based instruments reflects how firmly this jurisprudential assumption is grounded in a world dominated by sovereign States. What, then, is the relationship between the law of the State and the law of micro-legal systems?

Micro-legal systems are ubiquitous phenomena to which little attention has been paid in traditional or conventional jurisprudence. An analysis of micro-legal systems must begin with micro-social relations, with an emphasis on the nature, scope, and legal relevance of human communication systems. The focus of micro-law is not simply confined to individual-to-individual communications. It is also historically influenced by the tenuous position of small groups in social processes, particularly identifiable out-groups and subgroups, which also constitute a part of the State. Excellent examples are the Romani cultural group and Jewish peoples. The Romani have long been victimized by

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122. The Romani are also referred to as "Gypsies." See generally GYPSY LAW: ROMANI LEGAL TRADITIONS AND CULTURE (Walter O. Weyrauch ed., 2001) (compiling essays that describe various aspects of Romaniya).

123. For thousands of years, Jewish peoples in the Diaspora have kept Jewish traditions and Jewish law alive despite the minority character of Jewish peoples in the Middle East. See Calum Carmichael, Gypsy Law and Jewish Law, 45 AM. J. COMP. L. 269, 269–73 (1997).
dominant classes or groups. Romani law is vibrant, alive, and well, even though the Romani are typically a minority group, and have been victims of racial prejudice in the States where they reside. If we are at all sensitive to the law of non-State groups, why should we not be concerned about the nature of the face-to-face relations they generate?

A. International Law and Small Group Dynamics: Toward a Theory of International Micro-Law and Human Rights

Foundationally, many classic canons of legal thought hold that the State "possesses the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."

In short, a State's identifiable, objective, formal decrees and authoritative communications comprise what is generally regarded as "the law." Micro-law theory effectively reverses the order of such traditional conceptions of priority and attention. Society and culture are not pre-State and pre-law—they are indeed the true repository of law itself, including human rights law. The traditional emphasis on the ostensible objectivity of law is

124. Convention on Rights and Duties of States art. 1, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19. see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) ("Under international law, a State is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.").

125. Many international scholars agree that all law is rooted to some extent in culture and society. There is, however, much dissent on how the specific character of law should be understood in the context of culture and society. The differing ranks of authoritative international commentators might generally be divided into two groups: those who perceive law as a wholly autonomous manifestation, which might be transplanted among every type of State and society, and those who perceive law as a manifestation rooted in very particular social, geo-political, economic, or religious contexts, which cannot be transplanted into other contexts or which would reject efforts to reform or replace such central contexts in favor of a different, transplanted form of law. With regard to the former group, see ALAN WATSON, THE EVOLUTION OF WESTERN PRIVATE LAW 261 (expanded ed. 2001) (arguing that while law is not created outside of social contexts, it nevertheless does not reflect society). In short, this group argues that law is not necessarily tailored to particular social or cultural contexts because law is an amalgam, created by borrowing elements from a variety of other legal and governmental systems, and thus is not particularly reflective of the expectations or ideals of the individual society or cultural group for which such law was created. See id. Professor Daniel Visser describes this process, stating that "lawyers...have been trained to look in books...[and make] law and constructed dogma by reading other lawyers...." D.P. Visser, The Legal Historian as Subversive, or: Killing the Capitoline Geese, in ESSAYS ON THE HISTORY OF LAW 1, 18 (D.P. Visser ed., 1989); see also William Ewald, Comparative Jurisprudence (II): The Logic of Legal Transplants, 43 AM. J. COMP. L. 489 (1995); Alan Watson, From Legal Transplants to Legal Formants, 43 AM. J. COMP. L. 469 (1995). With regard to the latter group, see JOHN P. DAWSON, THE ORACLES OF THE LAW 451 (1968), for a discussion on the concept of Volksgeist ("national character") in the German juridical and scientific tradition, which holds that law can only truly be understood if it is
somewhat subverted by the centrality given to human subjectivities, such as the recognition that common human perspectives of identity, demand, and expectation are expressed through complex human channels of human communication, as opposed to formulaic State channels. In short, human subjectivities such as needs, wants, and claims, as well as expectations of civility and change, are brought within the focus of effective inquiry into law and human communication. This does not mean that classic jurisprudential questions are unimportant, but it does mean that they are not quite as viewed though the lens of a particular group, in this case the German people. This approach generally argues that law is the product of a particular State's entire history, the manner of its genesis, and the evolving character of its societal development and common experience. See JOHN HENRY MERRYMAN, THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF WESTERN EUROPE AND LATIN AMERICA 59–67 (2d ed. 1985). Celebrated United States Supreme Court Justice Oliver Wendell Holmes, who once stated that "[t]he life of the law has not been logic: it has been experience," arguably subscribed to this school of thought. Steven J. Burton, Introduction, in THE PATH OF THE LAW AND ITS INFLUENCE: THE LEGACY OF OLIVER WENDELL HOLMES, JR. 2 (Steven J. Burton ed., 2000); see also Winston P. Nagan, Not Just a Descending Trail: Traversing Holmes' Many Paths of the Law, 49 FLA. L. REV. 463 (1997). Despite these divergent approaches, these groups might arguably agree that human rights law is sufficiently universal in that the rights it affords are simultaneously couched in society and culture, and are still transcendental and absolute. It is not difficult for these international scholars to adopt such a Kantian standpoint because it is well accepted that, while human rights law is derived from social and cultural contexts, no room exists for cultural relativism with regard to its application. See MIECZYSŁAW MANELI, JURIDICAL POSITIVISM AND HUMAN RIGHTS (1981) (referring generally to the positivist theory of human rights law, which is based on contextual social and political realities and is a universal part of positive international law). Human rights scholars have distilled from copious sources of international law a number of sufficiently universal, peremptory human rights norms—or jus cogens principles—which overcome culturally relative arguments to the contrary. The Restatement (Third) provides that a State contravenes jus cogens principles in the event that:

- it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987); see also Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (describing these jus cogens principles as "accepted and recognized by the international community of States as a whole as...norm[s] from which no derogation is permitted and which can be modified only by...subsequent norm[s] of general international law having the same character"). This consensus is reflected in the Universal Declaration of Human Rights, which affirms that "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." Universal Declaration of Human Rights, G.A. Res. 217A, pmbl., U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

126. See REISMAN, LAW IN BRIEF ENCOUNTERS, supra note 74, at 2 ("Law is a property of interaction. Real law is generated, reinforced, changed, and terminated continually in the course of almost all of human activity.").
central. There is continuing fascination among international scholars about why a norm, a rule, or even a gesture might qualify as real law; how law is differentiated from non-law; and how in the deep structures of human behavior, moral and ethical experiences may control behavioral rules, and might very well count as law.\(^{127}\) Indeed, some participants in the ongoing dialogue regarding the relationship between communications theory and the rule of law, particularly human rights proponents, might wonder if it is a fruitless exercise to drive an inflexible wedge between communication, values, and what counts as law.\(^{128}\) To respond to these concerns, it would be useful to provide a broader jurisprudential background to the themes that animate the theory of micro-law and human rights.

A vigorous and interesting body of literature addresses how the law of small groups functions in a variety of contexts. During the 1960s, NASA engaged in research regarding small group normative structures to select cohesive groups comprised of compatible individuals for future missions to the far reaches of space. Studies such as Walter Weyrauch's *The "Basic Law" or "Constitution" of a Small Group*\(^{129}\) and *Law in Isolation—The Penthouse Astronauts*\(^{130}\) are examples of the interest of legal scholars and anthropologists in law outside the normative and

127. The Sophists of ancient Greece contended that law and elements of social intercourse were dictated by human wants, needs, and expectations, as opposed to arbitrary convention or general custom. *See* CHARLES S. SEELEY, *PHILOSOPHY AND THE IDEOLOGICAL CONFLICT* 104 (1953). Indeed, the quote famously attributed to Protagoras—"[M]an is the measure of all things: of those which are, that they are, and of those which are not, that they are not"—has been interpreted to mean that humanity ("man") is the standard by which all things are created and judged, including and perhaps particularly law, and thus only that which appears to the individual is at the heart of all things. PLATO, *THEAETETUS* 16 (John McDowell trans., 1973). For more on Protagoras and relativity, *see* CRANE BRINTON, *IDEAS & MEN: THE STORY OF WESTERN THOUGHT* 38-39 (1950). *See also* RICHARD LEMPERT & JOSEPH SANDERS, *AN INVITATION TO LAW AND SOCIAL SCIENCE: DESERT, DISPUTES, AND DISTRIBUTION* 27-30, 60-66 (1986) (arguing that human wants, needs, and expectations form the basis for law, as well as for accountability in the event that such law is contravened). For international recognition that human wants, needs, and expectations must be respected, *see* U.N. Charter arts. 1, ¶ 3, 55, 56.

128. The eminent judge and professor Guido Calabresi has suggested that social forces are implicated to some extent in what counts as law because private preferences, social norms, and what counts as law are interrelated. *See* GUIDO CALABRESI, *IDEALS, BELIEFS, ATTITUDES, AND THE LAW: PRIVATE LAW PERSPECTIVES ON A PUBLIC LAW PROBLEM* 84 (1985) (stating that law is "fundamentally concerned with shaping tastes").

129. Walter O. Weyrauch, *The "Basic Law" or "Constitution" of a Small Group*, 27 J. SOC ISSUES 49 (1971) (documenting an experiment in which several Berkeley students were locked in a penthouse for three months; the focus of this experiment was the evolutive character of law). Professor Weyrauch recounts some details of this experiment in Walter O. Weyrauch, *Unwritten Constitutions, Unwritten Law*, 56 WASH. & LEE L. REV. 1211, 1215-20 (1999).

political boundaries of the State and the tolerance of multiple legal systems of such groups within a State.\textsuperscript{131} Indeed, legal scholars identify unofficial indigenous law, Islamic law, Hindu law, and Jewish law as sources of unofficial law, along with a discrete system of "people's law."\textsuperscript{132}

Living law is remarkable because its very existence indicates that a body of law has resisted State legal absolutism and has managed to flourish, as well. Moreover, it is remarkable because it is found not only in situations where obvious sub-groups are identified, but it is also an intrinsic component of social organization in its widest possible reach. As mentioned above, a prime illustration of this phenomenon is Jewish law, which asserts that a tradition of oral communication—delineating laws and doctrinal interpretive instructions—was adopted by Moses, and was subsequently developed and elucidated in the central document of Judaism: the Torah.\textsuperscript{133} Continuing Jewish persecution forced rabbinic leaders to put these oral traditions into writing, resulting in the Babylonian and Jerusalem Talmuds.\textsuperscript{134} Adaptation and endurance in the face of extreme adversity are key aspects of the living law. Indeed, the very idea of a living law attests to the dynamism and vibrancy of the structure of social organization, even in situations of extreme repression. This too is quite simply an indicator of judicial philosophy.

In exploring the broader implications of Hart's identification of the social ubiquity of rules and precepts in human communication systems, we suggest that there are implications in this insight of normative significance. One of the important foundations of human rights—as a jurisprudentially justifiable aspect of law—is the possibility that the roots of social rules and precepts may indeed reflect the deep microstructure of moral experience. If social rules and precepts are functions of human interaction on a face-to-face micro-level within

\textsuperscript{131} A key anthropological work on law in tribal societies is BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY (1926), which generally made the revolutionary arguments that every society—Western and non-Western—is governed by some form of law, and that field ethnography—an exploratory technique previously limited to anthropology—can also be employed to explore the use of such law from society to society. \textit{See also} MAX GLUCKMAN, THE IDEAS IN BAROTSE JURISPRUDENCE (1965); E. ADAMSON HOEBEL, THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS (1954); K. N. LLEWELLYN & E. ADAMSON HOEBEL, THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE (1941); LEOPOLD POSPISIL, ANTHROPOLOGY OF LAW: A COMPARATIVE THEORY (1971).

\textsuperscript{132} See G. J. VAN NIEKERK, Legal Pluralism, in INTRODUCTION TO LEGAL PLURALISM IN SOUTH AFRICA: PART I: CUSTOMARY LAW, 8–12 (J.C. Bekker, J.M.T. Labuschagne & L.P. Vorster eds., 2002).


\textsuperscript{134} See \textit{id. at} 187.
society, and if these rules reflect deeply rooted expectations about the production and distribution of desired values, then these rules implicate moral experience at its most elementary level. The study of human beings in micro-social relationships may tell us a great deal about the identification of the cultural rules that form patterns of cultural behavior and about the origin of the value preferences and moral rules that are embedded in the deep structure of social relations and psychological experience.

Micro-law pushes small group law to the outer edges of the group. It can be observed in face-to-face, ordinary behavior, such as looking, queuing, or communicating deferentially with professional superiors. Micro-law is complex, ubiquitous, and upon reflection and analysis, interesting. Its interest and complexity is rooted in an idea made fashionable early in the last century—that observers with appropriate foci could discern a law beyond the law of the State in social relations; the observer could witness "living law." This intellectual debt is owed to Eugen Ehrlich, who famously coined the phrase, "living law." Hoebel and Llewellyn gave operational effect to Ehrlich's living law idea in their famous collaborative work, THE CHEYENNE WAY. Among the important behavioral insights in that great work was that a non-State tribally organized body politic could have, upon focused observation, a living constitutional system that generates a system of law with authority, prescriptive content, and components of efficacy and sanctions. Perhaps this tradition is not quite as theoretically fashionable as it once was. But it is this tradition and

135. See Reisman, LAW IN BRIEF ENCOUNTERS, supra note 74, at 21–50 ("Chapter 1: Looking, Staring, and Glaring").
136. See id. at 51–96 ("Chapter 2: Standing in Line and Cutting In"); see also Reisman, supra note 126.
137. See Reisman, LAW IN BRIEF ENCOUNTERS, supra note 74, at 97–148 ("Chapter 3: Rapping and Talking to the Boss").
138. The pater familias of legal sociology, Eugen Ehrlich articulated the concept of lebendes Recht, or "living law." Ehrlich posited that jurists must learn law from actual observation; law must be gleaned from the way in which it is expressed in social conduct or contemporary custom, as opposed to teasing it out of codes or academic papers. See EUGEN EHRLICH, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 497 (1936). Ehrlich asserted that "[t]he living law is not the...content of the document that the courts recognize as binding when they decide a legal controversy, but only that part which the parties actually observe in life." Id.
139. LLEWELLYN & HOEBEL, supra note 131 (exploring the "law-ways" and the "juristic beauty" of the Cheyenne).
140. The use of ethnography in the study of law was greeted with marked skepticism from the academic legal community of the early twentieth century. See LAURA KALMAN, LEGAL REALISM AT YALE, 1927–1960, at 18 (1986). Fascinating results eventually encouraged academics to conclude that the approach was revolutionary, and it was thus celebrated. See WILLIAM TWINING,
perspective that in part inspires the general theory of micro-legal systems.\textsuperscript{141}

\textbf{B. The Intersection of Communications Theory, Small Group Law, and Micro-Law: Critical World Order Lessons}

Micro-law builds on communications theory and the living law of small groups, and it may be compared and contrasted with more fashionable currents of conventional legal theory.\textsuperscript{142} In an elemental sense, the signs and symbols of law encapsulate its substantive and procedural meanings. In this perspective, law is tied to the core ideas behind the process of interpersonal and inter-community communications that only occur through the management and transfer of signs and symbols.\textsuperscript{143} This not only makes communication a central

\begin{footnotesize}
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\item Reisman addresses these concepts in \textit{Law in Brief Encounters}. See \textit{Reisman, Law in Brief Encounters}, supra note 74, at 2 ("The law of the state may be important, but law, real law, is found in all human relations, from the simplest, briefest encounter between two people to the most inclusive and permanent type of interaction."). See also Walter O. Weyrauch & Maureen Anne Bell, \textit{Autonomous Lawmaking: The Case of the "Gypsies."}, 103 \textit{Yale L.J.} 323, 326–29 (1993) (exploring the existence of oral legal traditions within the meaning of normative examples of the rule of law).

\item Reisman challenges the idea still critical to conventional legal theory that law is essentially the product of the State, though his work does not extensively deal with the international law and human rights implications of micro-legal systems. See \textit{Reisman, Law in Brief Encounters}, supra note 74, at 156–58.

\item The conceptual underpinnings of micro-law theory might be based in part on semiotics, the study of signs and symbols. As Roberta Kevelson suggests, semiotics—and perhaps, by extension, micro-law—explores ideas that are in and of themselves "intellectual signs" and indeed:

the meaning of a sign is based on the mutual agreement between users of the sign...[so that][s]igns designate aspects of the real world through contractual action, through a kind of trust...[and] an individual fact is meaningless.... Thus to speak of a fact is to speak of a community of qualitative likenesses and differences, and therefore to make a judgment through reason.

\textit{Roberta Kevelson, Charles S. Peirce's Method of Methods} 5–6 (1987). In another book, she continues that societies characterized by effective legal systems:
\end{enumerate}
\end{footnotesize}
part of what it is to be a lawyer, but it also highlights an important aspect of what it means to be human and thus part of a social unit or community. The self is partly defined by non-self others and vice versa—a crucial component of what a person is and how a community functions—and thus much of human identity is rooted in the way that people communicate. To the extent that law is an outcome of community interaction, law will doubtless reflect patterns of communication characteristic of the group and the participants who constitute it.

All communication is not law, but all law partakes of the signs and symbols of communication. Jurisprudence does not always emphasize the fact that whatever else law is, it is a process whereby certain signs and symbols are vested with juridical meanings. Perhaps it would be

rest[1] not on the assumption that the world is fully created once and for all, but rather on the belief in the possibility of real change in the world, that is, on the conviction that the universe becomes and not that it is, that something really new may be created, and that this real novelty is not manifest in the actual order of things but is present in the evolving concepts of signs which stand for a reinterpretation of values and meanings of relationships between things.


144. United States Supreme Court Justice Louis Brandeis once asserted that “a lawyer who has not studied economics and sociology is very apt to become a public enemy.” Louis D. Brandeis, The Living Law, in THE CURSE OF THE BIGNESS: MISCELLANEOUS PAPERS OF LOUIS D. BRANDEIS 316, 325 (Osmond K. Fraenkel ed., 1934) (quoting Professor Charles Henderson).

145. See John L. Austin, The William James Lectures at Harvard University, Lectures VII, IX (1955), in J.L. AUSTIN, HOW TO DO THINGS WITH WORDS 83, 108 (1962) (exploring elements of verbal communication, such as how words might be employed in a “constative” as well as a “performative” sense, and delineating different forms of verbal communication: “locutionary acts,” “illocutionary acts,” and “perlocutionary acts”); see also Peter Andersen, Cues of Culture: The Basis of Intercultural Differences in Nonverbal Communication, in INTERCULTURAL COMMUNICATION: A READER 244 (Larry A. Samovar & Richard E. Porter eds., 8th ed. 1997) (exploring proxemics—the study of how people use space, distance, and other body language to communicate—from a cross-cultural standpoint).

146. Law is highly conditioned by the nature of the human communications process. See, e.g., MARK VAN HOECKE, LAW AS COMMUNICATION (2002) (discussing how human interaction and communication make and legitimatize law, and how democratic legal systems, as well as judges, legislators, and legal scholars, must reflect pluralism and various levels of communication to be effective).

147. See Herbert H. Clark & Thomas B. Carlson, Hearers and Speech Acts, 58 LANGUAGE, June 1982, at 332, 344 (“[A]ddressees are the ostensible targets of what is being said... [because] they are the participants for whom the speaker has the most direct and obvious goals in designing his utterances.”); see also Willem J. Witteveen, Significant, Symbolic and Symphonic Laws: Communication Through Legislation, in SEMIOTICS AND LEGISLATION: JURISPRUDENTIAL, INSTITUTIONAL AND SOCIOLOGICAL PERSPECTIVES 27, 30 (Hanneke van Schooten ed., 1999) (stating that, in order to be effective, some forms of law must be tailored to designated groups of people, who Witteveen generally designates as “the citizenry, and that, “[i]n order for meaningful information processing to take place, the same codes must be used in sending and receiving”).
more accurate to talk about law-conditioned communication as communication vested not simply with signs, markers, and symbols, but also simultaneously with meanings that are distinctive from other culturally developed markers, signs, and symbols. For example, legal communication may have an articulate prescriptive content; it may be supported or seen as being derived from a symbol of authority, making the sign or marker one supported by symbols of authority and legitimacy in the society. 148 Additionally, it may hold an expectation of some level of efficacy, and some measure of coercion, however “symbolic,” may be deployed in support of the relevant marker, sign, or symbol. 149 All of the above would seem to be anthropomorphically obvious, but it is not that obvious to legal culture. Human beings communicate their interactive signs and symbols using words. 150 Words can often stabilize meanings in ways that non-verbal signs and symbols cannot approximate. Words are vital to lawyering, and they are vital to being human. They do not exhaust the possibilities of human communication of meaning, let alone meanings vested with the signs and symbols of a non-verbal nature. Nonetheless, non-verbal communication—or “meta-communication”—is expressive of wants, desires, moods, ideals, and aesthetics, as well as taboos and totemized ritual rules and expectations. 151 It will be apparent that communications

148. The substance of prescriptive communication is comprised of the signs or symbols of: (1) the “policy content,” (i.e., the prescription), (2) the “authority signal,” (i.e., the legitimate position from which to prescribe), and (3) the “control intention,” (i.e., the enforcement power). In short, law must have a prescriptive policy content, and, since the community is the notional basis for the authority of law, it must be accompanied by symbols or signs indicative of widespread community acceptance. Further, it must be accompanied by a conception that some institutionalized control exists to ensure that the prescribed law is real. See McDougal, Lasswell & Reisman, The World Constitutive Process, supra note 74; Reisman, International Lawmaking, supra note 74, at 108–10. According to Professor F. Reed Dickerson, communication is possible only when the response habits and collateral assumptions otherwise necessary to understanding it are shared by the author and his particular audience. Furthermore, in the case of a legal communication such as a statute or regulation, it cannot be officially interpreted or applied unless the underlying response habits and collateral assumptions are shared also by the enforcing or interpreting authority.


150. See GARTH GILLIAN, FROM SIGN TO SYMBOL 7 (1982) (“The sign defines its spread and signifying extension in and through the interpretant toward which it looks for its essential clarification and for its ultimate grounding as a significant utterance within human discourse.”).

151. See, e.g., RAY L. BIRDWHISTELL, KINESICS AND CONTEXT: ESSAYS ON BODY MOTION COMMUNICATION (1970); RANDALL P. HARRISON, BEYOND WORDS: AN INTRODUCTION TO NONVERBAL COMMUNICATION (1974); MARK L. KNAPP & JUDITH A. HALL, NONVERBAL COMMUNICATION IN HUMAN INTERACTION (5th ed. 2002); DALE G. LEATHERS, NONVERBAL
theory is not only critical to a realistic jurisprudence, but it is also critical to the jurisprudence of human rights itself.


The rules, norms, precepts, and concepts that govern ordinary human interactions and exchanges are far more important for law and legal theory than has been generally understood. Since micro-social relationships may be complicated and at times difficult to observe, the observer is left with the task of developing a disciplined focus on actual behavior that is simultaneously respectful of particular, cultural detail, yet still broad enough to yield interesting insights into the processes of micro-social behavior in general, which is accepting of the notions that such behavior is conditioned by tacit culturally and geographically relative rules, understandings, and moral and ethical standards. Further, an authoritative analysis must pay particular attention to the consequences of these behaviors with regard to any implicit, though typically misunderstood, precepts that shape the general give-and-take character of human communication across class, gender, culture, religious, age, state citizenship, and other lines of human demarcation. An effective way to approach such an analysis might be to concentrate on a central feature of human exchange that is itself central to law: the process of human communication.

At the risk of oversimplification, it seems that policy-oriented communications theory gels with proponents of micro-social law with regard to placing importance on law-based communications as opposed to those created by the State. The policy orientation also emphasizes the conditions and consequences of human exchanges and human interactions in society: the rules, norms, precepts, and concepts that govern human interaction and exchanges are to be fleshed out by focusing on actual interactions and relationships.\textsuperscript{152}

\textsuperscript{152} In appraising international law as a process of communication, members of the New Haven School have drawn on law-conditioned communication in domestic and international contexts. See McDougal, Lasswell & Reisman, supra note 87; Reisman, International Lawmaking, supra note 74; W. Michael Reisman, The View from the New Haven School of International Law, Address at the Eighty-Sixth American Society of International Law Proceedings: The Jurisprudence of International Law: Classic and Modern Views (Apr. 1-4, 1992), in 86 AM. SOC'Y INT'L L. PROC. 118 (1992). For example, W. Michael Reisman focuses on the protection of foreign investment and the role of domestic fora in projecting and influencing the development of international standards in this area. This study provided a careful approach to the question of whether certain norms meet criteria of authority, content, and efficacy. See W.
It will therefore be seen that international law, which we may designate as macro-law, is effectively reducible to a functional communications model. Human rights law is a part of macro-law in the sense that it is a part of international law, but it is rooted in the individual and is not a by-product of the State. This suggests that the international legal system and its human rights components represent a more complex and interesting challenge for theory and practice. Indeed, the distinction classically held between public law and private law seems to be subverted when we recognize the realism of the proposition that public international law, human rights law, and private international law are really indispensable and complementary components of a broader process of legal ordering in the world community. Law, in this view, might be as legitimately derived from the vast context of a global community process as from the behavior and dynamics of small group behaviors and interactions. There is abundant literature on lawmaking in small groups outside of the State, and micro-law complements this literature and brings together a coherent theory related to the communications process to distill the outlines of micro-legal systems comparatively, cross-culturally, and in a sense, universally. The central insight of micro-law is that behaviors, even in micro-situations, involving only two actors and of the briefest duration, may generate outcomes that are of normative importance and that might have all of the characteristics of law in functional terms. These track the complexity of expectation-creating behaviors:

1. expectations, shared by the people in the situation, that in that situation, there is a “right” way of acting, a “norm”;
2. expectations that defections from the “right” way will lead to a shared judgment that the defection was “wrong”; and
3. expectations that the injured party is authorized to undertake certain responses that may hurt or sanction the offending actor but at the very least must reaffirm the norm that has been violated.  

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Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 742 (“In international law, one of the traditional controls on the exercise of power by states in which foreign investments had been made was the insistence that putative applications of local law be subject to international review under a variety of criteria.”); see also W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR (1992).

153. REISMAN, LAW IN BRIEF ENCOUNTERS, supra note 74, at 39. For the private law view, see Winston P. Nagan & Danie Visser, *The Global Challenge to Legal Education: Training*
Micro-law may on the surface appear to be grappling with ordinary, uninteresting phenomena. Ordinary people often have "brief" encounters with law. Driving forty miles per hour in a thirty-five mile-per-hour zone might generate a response from a traffic officer. This officer might issue a warning in place of a moving violation citation, depending on the race, gender, or appearance of the driver in question. Each manner of encounter—be it couched in a stern warning, sexual flirtation, racial profiling, etc.—would likely be contextually relevant to its outcome. Indeed, the brevity of such an encounter might govern its outcome. There may even be no eye contact (or "eye encounter") at all. These encounters may not be particularly interesting, unless one notes the obvious that race, gender, and other symbols of identity may influence the brevity or length of the encounter. It would hardly be a deep sociological or legal insight. In fact, it is intellectually challenging and distinctive in its contribution to legal theory, particularly in its capacity to broaden our understanding of legal theory and to provide a flexible focal lens for the legal inquirer. Moreover, it deepens our understanding of the foundation of human rights law.

The idea of micro-law radically expands the boundaries of law in a functional sense. However, micro-law covers a great deal more than simply expanding the boundaries about what counts or should count as law. Indeed, micro-law is an outcome of the deep structure of human relations. This emphasis has important insights of value to social and behavioral scientists as well as to moral philosophers. Let us briefly assay the context from which such inquiry emerges to appreciate its originality and salience.

The structure and function of small groups, such as kinship units, affection units, friendship circles, or even relations between agents and principals and other forms of relatively institutionalized human associations, is a well-traveled path for social and behavioral theory and law. But to assay and give coherence, structure, and meaning to barely discernable forms of human relations—relations that are institutionalized only in a diffuse and opaque sense—is in fact a significant step forward in social theory, and for that matter, legal theory. The central focus of inquiry is into social events and situations—"brief encounters"—that with the right focal lens will disclose certain universal characteristics, the most important of which is

that even in brief encounters or situations, there are prescriptive norms that actually operate, whether from conscious or unconscious behaviors or motivations. A central feature of what we call "law" is also characterized by a prescribing process,\textsuperscript{154} although for conventional law this is usually deemed to emerge from the State or the sovereign.\textsuperscript{155} But prescription is ubiquitous in micro and macro situations. If we merely look around us, we shall see, hear, and feel prescriptive behavior; we shall note that we participate regularly in making, creating, confirming, or changing social norms and prescriptions. These prescriptions emerge as understood norms, and come with the expectation of contingent sanctions of some sort.\textsuperscript{156} Prescription of norms and the expectation or

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\item \textsuperscript{154} The New Haven School of Jurisprudence generally views lawmaking—or prescription—as a process of communication that is comprised of signs or symbols of policy content, an authority signal, and symbols of controlling intention. Essentially, law has a prescriptive policy content, which is accompanied by signs or symbols that indicate widespread community acceptance. This acceptance must be accompanied by a conception that some institutionalized control exists to ensure that the prescribed law is real. See McDougal, Lasswell & Reisman, \textit{The World Constitutive Process}, supra note 74.
\item \textsuperscript{155} See AUSTIN, supra note 30, at 1-25.
\item \textsuperscript{156} Another example of interest emerges from a meeting between Justice Albert "Albie" Sachs of the South African Constitutional Court and a Special Branch Operative who was tasked with assassinating Justice Sachs in 1988, when Sachs was a part of the anti-apartheid movement. Justice Sachs describes the encounter as follows:

He phoned me in my chambers before giving evidence to get amnesty from the Truth Commission. And it was quite an intense moment, as you can imagine, opening the security door in our building and being face to face looking into his eyes, 'So this is the man who tried to kill me', and I can see him looking at me, 'So this is the man I tried to kill.' And when we walked down to my chambers I remember he had a stiff military stride, and I put on my best judge's ambulatory stroll, to be in command even of that situation. And we spoke for a long time, and eventually I stood up; and his name was Henry, and I said, 'Normally when I say goodbye to somebody I shake their hand, but I can't shake your hand. But your [sic] help the Truth Commission, help South Africa, give the information that you've got to give, maybe we'll meet one day, who knows.' And when we walked back down the corridor I noticed he was shuffling along, really like a defeated soldier on retreat. And I closed the security gate and he disappeared.

Months later, I was at a party and I hear a voice saying, 'Albie, Albie'. My God, it's Henry, I couldn't believe it, that he should be...[among] a party of journalists and radio people and film makers, and he was beaming, he was very excited. And I said, 'What happened, what happened?' [and] we got into a corner to get away from all the dance music and...he's using first-name terms, he's calling me Albie, as though he's kind of a mate.... And he said, 'And I helped them [at the Truth and Reconciliation Commission] as you said.' And I said, 'Henry, I've only got your face to say that you're telling me the truth,' and I put out my hand and I shook his hand. He went away absolutely elated, I almost fainted, I felt very heavy.

I discovered afterwards that in fact he went home and cried for two weeks. And that had more impact on me than if he'd been sent to jail. He was part of a generation, working in the way that they did, defending an evil system in an evil way. It wouldn't make my arm grow to put him in jail, to be vindictive against him, but the thought that
he had contributed the little bit he had to contribute which was information knowledge, that he was willing to make a step to acknowledge what he’d done, and that he had had that feeling of introspection that had caused him to re-examine his whole life and feel the total moral defeat of the things that he’d stood for, that was very powerful, and I felt stronger for it. I didn’t feel I’d been weak, I felt if anything, I’d grown a little bit. That I can live in the same country with that person. That somehow we inhabit the same moral territory, that if he sits down next to me in a bus I’m not going to feel there’s some hidden agent out there that tried to exterminate me, that’s still around in this country, that dreadful mystery has gone. And there’s a real person who’s come up, a person like me, back in that world, back in the country, and we can be citizens living under the same constitution.

Damien Carrick, *Submitted Heroes—Albie Sachs: From Freedom Fighter to Judicial Powerhouse*, Universal Rights Network (May 6, 2004), http://www.universalrights.net/heroes/display.php?id=68 (last visited Mar. 28, 2007). This example not only indicates the deep structure of normative experience and the competition about which norms are licit or not, but it also puts the competition for these norms in a micro-social situation that has clear sanctioning components. In the case of Justice Sachs, his initial unwillingness to shake the hand of Henry is not a vindictive emotion as he later suggests, but rather a form of micro-sanction that seeks to defend a core value of dignity and respect which Henry had outrageously breached. Walking authoritatively in front of Henry and subsequently declining the handshake are highly communicative micro-sanctions. His later offer of a handshake was a tremendously significant moment for Henry, and though Justice Sachs did not articulate his approval of Henry’s ostensible desire to support the goals of the Truth and Reconciliation Commission, his action communicated volumes in the micro-law realm. Another insight garnered from this event might be the importance of competitive normative priorities in micro-social situations, and how norms may be confirmed, modified, or even changed in the deep structure of human relations, which might later emerge as culturally accepted axioms of social coexistence.
interact directly with civil society in developing States using micro-social approaches to poverty alleviation. Kreszentia Duer, the World Bank’s Program Manager for New Bank Practices in Civic Engagement, Empowerment, and Respect for Diversity, has pioneered an expansion of micro-social development all over the world. Duer’s program designs and implements important norm-generating activities that have practical benefits in providing development assistance from the bottom up because the program seeks to advance community voice and promote community engagement, gender empowerment, and a significant range of other compelling components of empowerment and economic development at the grassroots, micro-social level in civil society from country context to country context. The success of these initiatives underscores the theoretical importance of understanding the process of functional law-making in the context of face-to-face encounters, brief and fleeting connectivity, expanded interactive networks of kinship or community structures, the larger global process of living, and dynamic and challenging law-making for the improvement of the human prospect.157

157. Specifically, Duer’s Program for New Bank Practices in Civic Engagement, Empowerment, and Respect for Diversity (CEERD) seeks sustainable, interactive avenues for poverty-stricken populations to promote the give-and-take of informed dialogue, encourage civic engagement, enhance governmental transparency, and access information. Program activities are designed to encourage community voice and empowerment, and thus foster community debate on critical issues, facilitate access to government meetings and events, and help community members to organize themselves to identify and benefit from development opportunities. In the context of undertaking technical assistance activities to establish community radio broadcasting stations in certain developing States, including Ghana, Kenya, and Nigeria, the CEERD Program tailors a two-part development strategy to the cultural, geographical, and economic contexts within each developing State. The first prong of the approach is a comprehensive analysis of the enabling environment for community radio in each developing State (generally, on a region-by-region basis) and, if feasible, for the development of the broadcasting sector as a whole, including non-profit community broadcasting, commercial broadcasting, and national/regional public service broadcasting, by collaborating with renowned experts in the discipline to detail possible legal and regulatory reforms. The second prong is the prototyping of how community radio programs can help deliver community-driven development goals, such as strengthening community empowerment and local government accountability, and then familiarizing project management and World Bank staff with the practical implications of integrating support for community radio in lending earmarked for community-driven development. See The World Bank Group, Civic Engagement, Empowerment & Respect for Diversity (CEERD), www.worldbank.org/ceerd (last visited Mar. 28, 2007); The World Bank, Participation and Civic Engagement: Social Accountability and Public Voice Through Community Radio Programming, 76 SOC. DEV. NOTES (Apr. 2003), available at http://siteresources.worldbank.org/INTCEERD/Resources/RADIO_sd76.pdf (last visited Mar. 28, 2007); The World Bank Institute, Civic Voice: Empowering the Poor Through Community Radio, http://siteresources.worldbank.org/INTCEERD/Resources/RADIObrief.pdf (last visited Mar. 28, 2007); World Bank CEERD External Advisory Committee, Report of the Community Radio Working Group (June 12–13, 2003), available at
It is often the case that when lawyers invoke the relevance of context

http://siteresources.worldbank.org/INTCEERD/Resources/RADIO_EACreport.pdf (last visited Mar. 28, 2007); Bruce Girard & Jo van der Spek, The Potential for Community Radio in Afghanistan: Report of a Fact-Finding Mission to Afghanistan, October 5–22, 2002, available at http://siteresources.worldbank.org/INTCEERD/Resources/RADIOafghanistan.pdf (last visited Mar. 28, 2007). This form of bottom-up development might be traced back to the self-sustaining process of development and community empowerment pioneered in the Peruvian hacienda of Vicos in 1952 by Harold Lasswell, Paul Doughty, and Allan Holmberg. The Vicos experiment involved limited but targeted interventions into a community of peasants whose agrarian production had been expropriated by a patron in an absentee landlord system under which the peasants were reduced to serfs. The experiment was an exercise in transferring a comprehensive set of decision-making skills to the community on the ground. The transfer was guided by a functional understanding of the interdependence of a complex, but comprehensive, understanding of basic human rights. Lasswell, Doughty, and Holmberg gave the concept of human rights an anthropomorphic gloss; the social process of the Vicosinos was descriptively organized around social relations covering a functional view of the desired values in human rights. These human rights values were restated in functional anthropomorphic terms, including power, wealth, respect, health and well being, enlightenment, skill, rectitude, and aesthetics. This conceptualization provided a framework within which interdependent decision-making competencies were transferred with a concern for their contextual influence and importance with regard to all values. The key insight of the Vicos project was that the transfer of decision-making skills with regard to critical value-institutional problems was successful in having the Vicosinos use those skills as empowerment, enlightenment, and wealth-generating tools for self determining their own cultural ownership of individual and collective dignity. Equally important was the fact that the self-conscious acquisition of decision-making skills widely diffused in the community generated micro-social norms, expectations of authority about those norms, and a critical controlling intention that gave efficacy to the living law of the Vicosinos. In short, the Vicosinos would be able to generate an internal micro-social legal system to define and secure their common interests, notwithstanding social and political forces allied to defeat and expropriate their power of community and individual decision. See HAROLD D. LASSWELL, THE FUTURE OF POLITICAL SCIENCE 95–120 (1963); Ronald D. Brunner, Context-Sensitive Monitoring and Evaluation for the World Bank, 37 POL’Y SCI. 103 (2004); Paul L. Doughty, Vicos: Success, Rejection, and Rediscovery of a Classic Program, in APPLIED ANTHROPOLOGY IN AMERICA 433 (Elizabeth M. Eddy & William L. Partridge eds., 2d ed. 1987); Allan R. Holmberg, The Role of Power in Changing Values and Institutions of Vicos, in PEASANTS, POWER, AND APPLIED SOCIAL CHANGE: VICOS AS A MODEL 33 (Henry F. Dobyns, Paul L. Doughty & Harold D. Lasswell eds., 1971); see also HAROLD D. LASSWELL, A PRE-VIEW OF POLICY SCIENCES, 34–57 (1971) [hereinafter LASSWELL, A PRE-VIEW OF POLICY SCIENCES]. The World Bank has also undertaken micro-economic activities, including micro-enterprise finance, which offer limited economic incentives for the grassroots development of norm-generating expectations regarding enterprise creation in some of the world’s poorest States. Indeed, the World Bank has experimented to some extent with the anthropomorphic value of wealth to promote these enterprisory developments from which, it has been envisioned, some degree of poverty reduction might be achieved in certain contexts with potentially broader implications. See, e.g., Amit Dar & Zafiris Tzannatos, Active Labor Market Programs: A Review of the Evidence from Evaluations (Jan. 1999), http://info.worldbank.org/etools/docs/library/206518/ALMP%20review%201999.pdf (last visited Mar. 28, 2007); Erica Field, Entitled to Work: Informal Enterprise in Urban Peru, DEV. OUTREACH (Mar. 2005), http://www1.worldbank.org/devoutreach/mar05/article.asp?id=284; World Bank, Electricity, Productivity, and Empowerment in Char Montaz, PROMISING APPROACHES TO ENGENDERING DEV. (Aug. 2002), http://siteresources.worldbank.org/INTGENDER/Resources/electricity.pdf.
to their craft, they also are looking implicitly for help from social or technical scientists or other experts to delineate aspects of a particular context and thus define a problem that requires legal intervention. A harder look at the prescribing function yields important insight into the structure of micro-social relations. A theory might be crafted from such an investigation, which does not simply account for law, but rather designates law as a central element of social inquiry. In this sense, law can also be the theoretical basis of societal inquiry, which is much akin to longstanding efforts to view society as a foundational basis for inquiries about law.\textsuperscript{158} Whether social or behavioral scientists believe there is little they can learn from lawyers to improve the theoretical understanding of human relations may be a difficult professional gap to bridge. On the other hand, if we truly believe that disciplined foci for inquiry from many disciplinary vantage points might yield important insights for theory construction and further inquiry, then micro-law has made interdisciplinary inquiry an important agent for broadening existing knowledge about law and human relations.

The larger jurisprudential implication of this insight into micro-social relations and law is that whether one is observing macro-law (international law), conventional law (municipal law), the law of small groups (kinship, affection, and friendship circles), or micro-law (the law of brief human interaction), each human relationship contains the functional criteria of micro-law. From the vantage of the disengaged observer, all law is rooted in human relations at every level of human association and experience. Law is most realistically found in the shared subjectivities of individual human personas and in their interactions with others. Humans are more accurately seen in this view as objects rather than empowered participants in the prescription of law; it is a

\textsuperscript{158} Oliver Wendell Holmes recognized that even the traditional legal scholar must inform himself or herself about various aspects of social intercourse in order to measure law and legal institutions. See O.W. Holmes, Jr., The Common Law (1881); Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897) (pointing out that law is a tool to achieve social ends and thus, comprehending law first requires an understanding of social conditions and other disciplines of study: "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics"). Similarly, Judge Richard Posner chronicled the decade-by-decade decline of law as an "autonomous discipline." See Richard A. Posner, The Decline of Law as an Autonomous Discipline: 1962–1987, 100 Harv. L. Rev. 761 (1987). Posner argues that the days when law was a subject within the sole purview of "persons trained in law and in nothing else" are no more, and that for better or for worse, the social implications of law require substantially different treatment by practitioners and lay-people than ever before. \textit{Id.} at 762. For an alternate viewpoint, see Alan Watson, Legal Transplants: An Approach to Comparative Law 108 (2d ed. 1993) ("[E]ven in theory there is no simple correlation between a society and its law.").
dangerous jurisprudential myth to identify the lawmaking process exclusively with the State. This view is not only myopic; it is dangerous because it narrowly defines the universe of law-making so as to marginalize civil society and operative human relations generally.

Law is more correctly understood as an intrinsic part of the process dealing with the authoritative allocation of values that may or may not be desired. Law trains its focal lens on the human agents involved in the give-and-take of claiming, confirming these claims, and also resisting some claims within social processes. A law that cannot survive the claims-forming process is not effectively responsive to human needs; in many cases, this brief litmus test is sufficient to diagnose a law that abuses human rights. Ultimately, what we call "law" is little more than a response to human problems. Micro-social situations comprise the fundamental stage for all segments of humanity where normative experience is contested, rejected, accepted, and finally honed. Understanding this allows us to see the professional relevance of micro-law to broader legal theory, and also the relevance of micro-legal theory to the jurisprudential foundations of human rights. Indeed, how human beings treat each other on a face-to-face basis is, in reality, a normative claim beyond the basic conventions of human rights; its objectives are an even deeper and ubiquitous claim for essential and genuinely universal human dignity.  

D. Additional Philosophical Considerations: Fresh Remarks on the Implications of Micro-Law

Micro-law also raises an interesting and serious question for political philosophy, constitutional law, and jurisprudence: If micro-social
relations are the real repositories of law, then there is little in social coexistence that is not law. One is reminded of Grant Gilmore’s stunning conclusion to his Storrs lectures at Yale in the 1970s that the more law that exists, the less just a society would be; the less law there is, the more just that society might be. He then concluded that “in Hell there will be nothing but law, and that due process will be meticulously observed.” Gilmore also asserted that “we will do well to be on our guard against all-purpose theoretical solutions to our problems.”

Gilmore, a great commercial lawyer, would have doubtlessly been aware of the living law role that merchants have played in the development of commercial law rules. The State is, in most respects, an after-the-fact player in the history of commercial law and practice. Indeed, the role of the American Law Institute (ALI) in the development of the Uniform Commercial Code is itself an indicator of the crucial role of a non-State actor in the law-making process. Curiously, Gilmore seems to have suggested that what is not covered by the State as law is left to social anarchy. Indeed, Gilmore apparently made the hasty assumption that for the living law to be actual law, it must be under the majesty of the sovereign State. In Gilmore’s view, there is no role for civil society as a discrete, law-making and law-applying repository of social value. So, is micro-law really promoting a Gilmorian kind of due process shaped “hell” on earth? We think not. However, Gilmore’s point must be more carefully appraised against the theory of micro-law as the starting point of communications theory, with particular regard to the paramount importance of international human rights. Such an analysis must carefully avoid Gilmore’s trap of succumbing to jurisprudential myopia. To summarize, Gilmore’s clever and verbally felicitous formulation rests on the well-known dualism between the State and the individual—a concept to which we earlier referred. Recall, however, Lasswell’s suggestion that instead of a rigid divide between these two zones, a connective continuum exists, which binds the self and non-self. The regime of micro-law rejects rigid hierarchical versions of law, and in so doing, changes the popular understanding of the word “law” itself. Effective law, which exists both formally and informally, is created by and functions from multiple trajectories of communication. There is a world of difference between

161. Id.
the way Gilmore used the word "law," and the way in which it figures into micro-law. Authoritative commentators must choose which version is more scientifically descriptive and normatively satisfying.

Chief among the critical jurisprudential insights into human rights law presented by micro-law is the notion that power may be abused on all levels of human intercourse, which effectively disparages the essential dignity of the individual. Without some form of tacit or institutionalized restraints, the abuses of power can be real and damaging to those who are on the receiving end of its abuse. Although the importance of international law in general would seem to be far removed from micro-law because of the diametrically opposite scope of each approach, in reality, a significant link exists between them, which deeply strengthens the position and long-term protection of the individual in the global legal arena. Perhaps Lasswell's deepest insight is that legal and moral experiences are deeply rooted in the business of simply being human.

V. TOWARD CONFRONTING THE ULTIMATE CHALLENGE: ARE INTERNATIONAL LAW AND INTERNATIONAL HUMAN RIGHTS LAW BETTER UNDERSTOOD AND JUSTIFIED AS PROCESSES OF COMMUNICATION AND COLLABORATION FOR WORLD ORDER PURPOSES?

The importance of language in a multi-lingual world places unusual stress on determining what international law is and how exactly it is applied and enforced. It is thus crucial that international law be understood for its multi-cultural, multi-language implications. It is commonly assumed that legal language, with its distinctive and internal structure of meaning, will often represent misunderstandings or self-serving constructions with significant consequences for the major public policy issues of our time. It is for this reason that we submit a broader concept of communications theory based on functional conceptions about how law is made, applied, and enforced across State and national lines may facilitate our understanding and grounding of human rights law as an important part of a defensible world order.

During his tenure as Secretary-General of the United Nations, Boutros Boutros-Ghali organized the UN Congress on Public

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163. See Holland, supra note 36, at 373 ("[States are] [t]he Persons known to International law.").
164. See, e.g., Fred RodeLL, WOE UNTO YOU, LAWYERS! (1939).
International Law. The general theme of the Congress was “Towards the Twenty-first Century: International Law as a Language for International Relations.” Boutros-Ghali saw in the language of international law a certain coherence that was somewhat lacking in the general language of international diplomacy and international relations. The central point of Boutros-Ghali’s intervention is that words carry messages; if these messages are misunderstood or distorted, the implications for international public order can be far reaching. Constructively, language is capable of generating interpretative stability within the legal profession that is beyond dispute. Indeed, “'jus cogens' mean[s] ‘the compelling law’ and, as such, a jus cogens principle holds the highest position in the hierarchy of all other norms, rules, and principles.”

However, thoughtful observers of international politics are certainly aware that the vocabulary of international law is not without ambiguity. Yet, despite the limitations of language in international law circles, they are less significant when contrasted with the exuberance of the language characteristics of world politics and international relations. Boutros-Ghali suggested that “there is an international scientific community that desires to establish international law as the language of international relations.” International law does not, of course, have an exclusive internal set of official languages within the discipline. But it does have conventions and professional understandings, and thus appropriates language to advance particular purposes. This appropriation has become


quite comprehensive. The use of language in international law is accompanied by discrete intrinsic understandings, and employs signs and symbols of communication within an institutional framework in a global effort to express stable and well-understood messages. These messages contain certain understood expectations, which require some precision in content as well as implicit or explicit references to symbols of authority and efficacy. Although international law is not technically a language in its own right, international law obviously has features characteristic of language. In a sense, the “language” of international law represents a coherent code of important communications. According to Professor James Boyd White:

The language that the lawyer uses and remakes is a language of meaning in the fullest sense. It is a language in which our perceptions of the natural universe are constructed and related, in which our values and motives are defined, and in which our methods of reasoning are elaborated and enacted. By defining roles and actors, and by establishing expectations as to the propriety of speech and conduct, it gives us the terms for constructing a social universe.\(^{169}\)

Indeed, the study of international law is arguably analogous to linguistics in a number of ways. Like language, international law might be studied synchronically, diachronically, and comparatively. Functionally, neither are static mechanisms of communication; both are subject to certain interpretations and limitations; each enjoys a multitude of authoritative sources; and both exist in a “continuum of complexity,” with structural rules that range from fluid to rigid.\(^{170}\) We submit that, essentially, international law comprises its own forms of syntax, semantics, and pragmatics. In basic terms, the characteristics of language in international law indicate a process of collaborative communication. It has been argued by followers of Rawls that the formation of international law is in part predicated on shared rules of practice, and its application is thus subject to the constructions of the

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168. But see Dino Kritsiotis, The Power of International Law as Language, 34 CAL. W. L. REV. 397, 407 (1998) (stating that “international law is referred to as something of a ‘new’ lingua gentium for state interaction and dialogue, even though its origins may be traced back to the year of 1648 and the Peace Settlement of Westphalia”).


Communications theory makes a near-identical pronouncement with regard to micro-law.\(^{172}\)

International law has developed important methods of interpretation for its prescription and application. The construction and interpretation of customary international law is accompanied by signs and symbols that indicate comprehension and largely broad acceptance on the part of the international community. Comprehensive epistemological studies have been made of how it has been and is used in socio-political contexts, and how such use effects its interlocutors by manipulating State behavior.\(^{173}\)

The international law language (as it were) is highly stylized. It encompasses styles of argument and of linguistic expression. A 1999 Symposium on Method in International Law organized by the editors of 80–86 (1999).

See ANTHONY CLARK AREND, LEGAL RULES AND INTERNATIONAL SOCIETY (1999).

See Reisman, supra note 126, at 419 (“It is appropriate to refer to...microsystems as legal systems because, for all of their informality, there is a rule and an attendant set of expectations about proper subjective and objective responses to norm violation, intimating some sort of system for enforcing the norm.”); see also COMMUNICATION AND LANGUAGE: NETWORKS OF THOUGHT AND ACTION 16 (Gerald R. Barry et al. eds., 1965) (remarking on the social, collaborative aspects of communications theory); Myres S. McDougal, Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry, in 2 THE STRATEGY OF WORLD ORDER: INTERNATIONAL LAW 116, 129 (Richard A. Falk & Saul H. Mendlovitz eds., 1966).

See, e.g., Jutta Brunée, COPing with Consent: Law-Making Under Multilateral Environmental Agreements, 15 LEIDEN J. INT’L L. 1, 34 (2002) (suggesting that international law is created by assessing patterns of international practices that create certain expectations over time, which, in turn, are broadly comprehended by the international community); Reisman, International Lawmaking, supra note 74, at 111, 114 (exploring the signs and symbols of international law which, like language, indicate widespread comprehension of its general authority and acceptance of the subject matter it communicates). For recent treatments of how international law is interpreted, applied, and how it affects State behavior, see, for example, C. F. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS (2d ed. 2005); ANTONIO CASSESE, INTERNATIONAL LAW (2d ed. 2005); IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY (2005); EXPANDING THE HORIZONS OF HUMAN RIGHTS LAW: NEW AUTHORS, NEW THEMES (Ineta Ziemele ed., 2005); 4 GLOBAL GOVERNANCE AND THE QUEST FOR JUSTICE: HUMAN RIGHTS (Roger Brownsword ed., 2004); OONA A. HATHAWAY & HAROLD HONGJIU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (2005); IMPERIALISM AND INTERNATIONALISM IN THE DISCIPLINE OF INTERNATIONAL RELATIONS (David Long & Brian C. Schmidt eds., 2005); CHRISTOPHER C. JOYNER, INTERNATIONAL LAW IN THE 21ST CENTURY: RULES FOR GLOBAL GOVERNANCE (2005); and JEREMY A. RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (2005); see also HELENA TORROJA MATEU, LA ASISTENCIA HUMANITARIA EN LA ORGANIZACIÓN DE LAS NACIONES UNIDAS: FUNDAMENTOS Y PERSPECTIVAS ACTUALES (2004); JANNE ELISABETH NIJMAN, THE CONCEPT OF INTERNATIONAL LEGAL PERSONALITY: AN INQUIRY INTO THE HISTORY AND THEORY OF INTERNATIONAL LAW (2004); SHABTAI ROSENNE, THE PERPLEXITIES OF MODERN INTERNATIONAL LAW (2004); BRION Z. TAMANAH, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004); and C.G. WEERAMANTRY, UNIVERSALISING INTERNATIONAL LAW (2004).
the American Journal of International Law sought to "establish a firm relationship between that language and the world that it is assumed to reflect." Professor Martti Koskenniemi, a participant in this symposium, expounded on his analysis of international law as a language:

I described international law as a language that was constructed of binary oppositions that represented possible—but contradictory—responses to any international legal problem. I then reduced international legal argument—what it was possible to produce as professionally respectable discourse in the field—to a limited number of "deep-structural" binary oppositions and transformational rules. To this matrix I added a "deconstructive" technique that enabled me to demonstrate that the apparently dominant term in each binary opposition in fact depended on the secondary term for its meaning or force. In this way, an otherwise static model was transformed into a dynamic explanation as to how the binary structures of international law (rule/exception, general/particular, right/duty, formalism/realism, sovereignty/community, freedom/constraint, etc.) were interminably constructed and deconstructed in the course of any argument, through predictable and highly formal argumentative patterns, allowing any substantive outcome. I felt I had reached a scientific optimum where I had been able to reduce a complex (linguistic) reality into a limited set of argumentative rules.

What Koskenniemi describes as a "deep-structural" binary of oppositions and transformational rules" seems a bit convoluted and pretentious. In terms of general jurisprudence, Hohfeld, who first introduced a kind of ordinary language analysis to legal communication, demonstrated that when the term, "right," is unpacked, it yields a number of jural opposites and jural correlatives. In short, the foundational words used in any legal paradigm are going to be relational by necessity. In Hohfeldian terms, the conceptual existence of a "right" is predicated on the assumption that there exists the jural opposite: the "no right." The concept of a right also correlative assumes the

175. Id. at 355.
176. See WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS: AS APPLIED IN JUDICIAL REASONING 48 (Walter Wheeler Cook ed., 1946) (deconstructing the word "right" as a way to generally communicate "freedom" as opposed to what is notionally and fundamentally granted by constitutions and jurisprudence).
existence of the concept of a duty owed, which is its jural correlative. Put simply, all prescriptive communication in law exists in the form of jural opposites or jural correlatives; legal and normative prescriptions come in pairs of balanced complementarity.\footnote{177} For example, the juridical complementary to the UN Charter’s principle of international jurisdictional concern is the principle of exclusive jurisdiction or non-intervention, whereby each State reserves its sovereign domain from all externality.\footnote{178} In the law of treaties, the foundational principle is \textit{pacta sunt servanda}.\footnote{179} The complementary principle is \textit{rebus sic stantibus}.\footnote{180} More controversially, today in international law there exists the continuing, perennial conflict between rules which prohibit the use of force—the forbidding of acts of aggression\footnote{181}—and those which permit the use of force—the sanctioning of acts of self-defense.\footnote{182} Also, rules that define the right to protect the environment and ecosystem\footnote{183} are complemented by rules concerning the right to development; permanent sovereignty over resources and political self-determination.\footnote{184} These principles are

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\item 177. The war of words in modern analytical jurisprudence has worked on a crucial distinction: Some forms of communication have an internal character and some have an external character. Prescriptive statements of law in the form of rules are special because they come vested with distinctive internal meanings for legal operators and their constituencies.
\item 178. \textit{See} Nagan & Hammer, supra note 16.
\item 180. \textit{See id.} art. 62 (setting out the principle that a State party to a convention may be excused from performing treaty obligations in the event of certain unanticipated changes of circumstance).
\item 181. \textit{See U.N.} Charter arts. 1, 53.
\item 182. \textit{See id.} art. 51.
ubiquitous. The rules defining common crimes are complemented by the rules establishing appropriate defenses or excusing circumstances for the defendant. In the field of private international law the traditional rules such as \textit{lex loci contractus} or \textit{lex loci delictus} are complemented by the rules that negate the \textit{lex loci}, including the principles of characterization, substance, and procedure (renvoi, depecage, public policy, and more).\textsuperscript{185} Stone reminds us that legal precepts in the form of rules tend to come in pairs, which are challenging because “they often hunt in veritable packs.”\textsuperscript{186} This phenomenon mirrors a fundamental aspect of language—the “meaning” versus “no meaning” paradigm. In all forms of language, an individual communicative mechanism either has a meaning or it is without meaning. This might be generally and cross-disciplinarily referred to as primitive data-typing, based on the duality of values: one and zero. Language and international law further harmonize in that this binary character of communication is only the beginning because both have far more outside meaning.

Words are a key source of reasoned elaboration. Lawyers are trained to interpret, construe, and otherwise find rational meanings for words. This puts significant social power in the hands of any interpreter of words. In the American tradition, perhaps the greatest victory for this view is \textit{Marbury v. Madison}.\textsuperscript{187} In \textit{Marbury}, Chief Justice Marshall found that the authority to interpret or construe the Constitution of the United States is exclusively in the hands of American jurists, the profession trained to tease reason from the signs and symbols in the Constitution. This argument also established the principle of judicial review and the idea of the supremacy of law, which implies reasoned


\textsuperscript{185} See Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force Jan. 27, 1980) (setting out \textit{jus cogens} principles as supreme peremptory norms that supersede even international treaties and custom); see also RAPHAEL LEMKIN, \textsc{Axis Rule in Occupied Europe: Laws of Occupation—Laws of Occupation—Analysis of Government—Proposals for Redress} 79 (1944) (famously expanding the signs and symbols of international law by coining the term, “genocide,” from the Greek root, \textit{genos} (meaning “kind” or “race”) and the Latin affix, -\textit{cide} (meaning “to kill”), which, he wrote, “signif[ies] a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves”); MCDougal ET AL., \textit{supra} note 116, at 987 (exploring another crucial addition to the international law as language discourse: “human dignity”); McDougal & Reisman, \textit{The Prescribing Function}, \textit{supra} note 74, at 273, 275 (arguing that international law must be motivated by the primary policy goal of global respect for and protection of “human dignity”).

\textsuperscript{186} JULIUS STONE, \textsc{Legal System and Lawyers’ Reasonings} 254 (1964).

\textsuperscript{187} \textit{Marbury v. Madison}, 5 U.S. 137 (1803) (setting out the precept of judicial review of all cases arising under the Constitution of the United States).
elaboration of the critical "signs" and "symbols" reposing in the Constitution.188

Conventional legal theory has thus made important contributions using modern language analysis in the development of law. From a world history standpoint, perhaps one of the greatest insights of the early Western legal tradition was undoubtedly the one orchestrated by St. Thomas Aquinas.189 The great saint insisted that law (natural law) was a product of reason, which emanated from God.190 Aquinas also pointed out that law might be an apparatus of social virtue, particularly in the promotion of truth. Human beings, he maintained, should voluntarily communicate—perhaps by using law as well as language—to focus and express inner good, and not to use these gifts to explore the nature of God, which is beyond humanity’s reach.191 This communicative concept of law evolved in the fullness of time. The early nineteenth century was an age of science, and the natural law implications of interpreting the signs and symbols of law-conditioned words confronted the hardheaded approach of science-based meaning. God was no longer the nucleus of law. John Austin suggested that all law emanated from a sovereign.192 Specifically, true law, from a scientific standpoint, must be accompanied by certain signs and symbols, which are the product of an identifiable source—a sovereign—and this source communicates law using a command structure created to guide a community.193 Austin correctly predicted that individuals subject to law must be able to identify which signs and symbols count as law, as well as those that do not. This scientific objective served as the basis for the positivist analytical or scientific school of jurisprudence. Austin’s groundbreaking linguistic approach to law194

188. See id.
189. A useful biographical note on St. Thomas Aquinas is found in GEORGE C. CHRISTIE, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF LAW 86–89 (1973) (citing excerpts from the SUMMA THEOLOGICA).
190. See 2 ST. THOMAS AQUINAS, SUMMA THEOLOGICA, Question 94, art. 6 (Fathers of the English Dominican Province trans., 1948) ("T[he natural law, in the abstract, can nowise be blotted out from men’s hearts."); see also RALPH MCINERNY, ST. THOMAS AQUINAS 63–70 (1977) (exploring St. Thomas Aquinas’ philosophy that natural law emanates from God).
191. See AQUINAS, supra note 190, Question 13, arts. 1, 2.
192. See AUSTIN, supra note 30.
193. See id. (exploring the “command theory law,” where law is dictated by an uncommanded commander).
194. See J.L. AUSTIN, PHILOSOPHICAL PAPERS (J.O. Urmson & G.J. Warnock eds., 2d ed. 1970). Several of Austin’s essays, such as The Meaning of a Word, id. at 55–75, and Truth, id. at 117–33, are particularly compelling.
was later supplemented by immense contributions from Hohfeld\footnote{See HOHFELD, supra note 181.} and the analytical philosophy embodied in Ludwig Wittgenstein’s work at Cambridge.\footnote{See LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS (G.E.M. Anscombe trans., 1953) (providing an excellent representation of Austin’s ideas regarding ordinary language philosophy).}

Jurisprudence within the analytical school became a war of words, as jurists such as H.L.A. Hart demonstrated a common sense view of law through the prism of ordinary language analysis.\footnote{See HART, supra note 25, at 89–96.} The ordinary language method explored in Hart’s celebrated work was soon applied to many other aspects of law such as the law of causation,\footnote{A critical element of Hart’s version of analytical jurisprudence was to uncover the ordinary language—the precise conventional form of language—that is used by lawyers. Hart’s model of rules has broad significance for communications theory. He defined law as a complex system of rules, and identified—for the purposes of constructing a defensible analytical model of law—a concept of law as defined uniting rules with primary and secondary characteristics. One of the most important insights in Hart’s work was his identification of primary rules, which seem to have the characteristics of customary law. Modern jurisprudence would see such law as a kind of \textit{lex imperfecta}. The importance of Hart’s insight was that he recognized that rules created by custom have some form of efficacy. The implication is that social organization is governed by rules, whether or not any codification exists. Hart’s additional critical insight into the nature of rules in law and social organization is that when rules function outside the framework of the State, or without the specific midwifery of a secondary rule of recognition, some element of law in social relations must nevertheless be conceded, albeit abstractly. See H.L.A. HART & A. M. HONORÉ, CAUSATION IN THE LAW (1959).} the theory of punishment,\footnote{See generally H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW (1968) (examining the necessity and principles of justification for punishment using a common language approach).} as well as the problems in general of law and morality.\footnote{See generally H.L.A. HART, LAW, LIBERTY AND MORALITY (1963) (using common language to argue against the legal regulation of morality).} Broader controversies outside the confines of positivist disputation pitted the analytical school against those who saw it as imperative to broaden the moral basis of law,\footnote{See Ronald Dworkin, \textit{Lord Devlin and the Enforcement of Morals}, 75 YALE L.J. 986 (1966).} those who saw it as critical to broaden the economic foundations of law,\footnote{See Richard A. Posner, \textit{The Economic Approach to Law}, 53 TEX. L. REV. 757 (1975).} those who sought to free law from the parochial chauvinism of national “sovereignty,” and those who saw law as a quintessential inquiring system. Within these broad parameters, vast conflicts and disputes arose concerning the role of words in law, the scope of interpretative versus non-interpretative decision-making, the role of moral experience or social change in law, and the role of gender, race, and basic human
rights in the calculus of law.

In this context, micro-law might seem quixotic. If this is true, then the human rights roots in micro-legal systems might be similarly quixotic. However, when we contrast this with analytical jurisprudence, the focus of this approach requires that we pinpoint and study practical contexts where law is made and applied. The science of model building, which is somewhat intolerant of the newer science of complexity, requires that law, as a rigorous and analytical discipline, be employed as a tool to examine and provide for the finest of details. This might explain why some believe that conventional legal theory may actually be subversive of human rights law. Human rights law requires lawmakers and law-appliers to see more; they must transcend the functional and theoretical boundaries of the State. If we as thoughtful observers step back for a moment, we might discover that this failure to transcend the veritable ocean of contextual details associated with making and applying human rights rules comprises an enormous failure of human values, to say nothing of breaching conventional duties that require the vast majority of the world to safeguard global human dignity. Indeed, human rights legal culture has been sacrificed for too long. Words are not an end in and of themselves. Declaring that human rights are important and taking actual action are not the same. Austin demonstrated that ordinary language was rich in complexity and insight; micro-law demonstrates that ordinary non-verbal behaviors, too, are rich in complexity and insight into the experience of being human. We contend that a primary lesson must be to use this sensitivity to human experience to better demonstrate the absolute import of human rights. Employing international law as a means to engage in this continuing discourse is the best way to achieve this superlative principle.

International lawyers are the primary participants in these continuing discourses, employing the ostensible language of international law in their central functions within the "(local to global) global law paradigm."\(^\text{203}\) International lawyers do more than merely work within or clarify the sources of international law; they mold the signs, symbols, and channels of communication of practical international law.\(^\text{204}\)

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203. Nagan, supra note 36, at 149; see also id. at 142 ("The [international] lawyers roles are emerging in some degree as part of a shift from the Westphalian (sovereignty dominated) model of international law to a much more fluid context in which many actors influence the system in addition to the State.").

204. See Doreen McBarret, Law, Policy, and Legal Avoidance: Can Law Effectively Implement Egalitarian Policies?, 15 J.L. & SOC'Y 113, 118 (1988) ("[International] [l]awyers are not simply means to the implementation of statutory or other ready-made rights, but creators of
Operationally, international lawyers create international law, which generates expectations that are simultaneously transformative and stabilizing components of world order. They are the makers of the language, as it were.

Conventional international law dictates that professionalism and functionalism value language as the primary mechanism of communication. From the perspective of the New Haven School, language might mask certain important components of what counts as law because it arguably provides an effective cover by which the exercise of naked power is disguised by a myth system of authority, and power and control are thus open to abuse. This means that much more is required to appropriately understand the communications process, which underlies the global public order system to ensure that its untenable myths are challenged; myths that are productive or useful for human understanding might thus be similarly promoted. Were it conceded that international law functions analogously to language, it would be crucial to point out that it is incomplete—which is in part due to its lens of inquiry—which tends to obscure more than it reveals. The international legal process still carries the freight of its Eurocentric underpinnings; omnipresent political and cultural dominance at times provokes confrontation, misunderstanding, and a depreciation of the most productive role for the international legal system in the major issues of our time. Chief among these issues is the status of human rights.

Perhaps the most egregious fallout from inconsistencies between international law and actual practice has been a wavering legal infrastructure resulting in flexible human rights standards among the legal techniques, definitions, and devices.

White, supra note 169, at 690 (“[I]n speaking the language of the law, the lawyer must always be ready to try to change it: to add or to drop a distinction, to admit a new voice, to claim a new source of authority, and so on.”).

205. Having looked at language in particular as an important channel of communication in both international law and custom, we must enter a small caveat about the limits of language apart from the problems of ambiguity, incompleteness of meaning, logical circularity, and the challenges of prescriptive complementarity. This lies in the concept of using language to create a myth system, which may often be incompatible with the operational code of a society. The most obvious example of such abuse in international law reposes in the word, “sovereignty.” The term reflects the principle that law includes the notion of constituted authority and control. Often, sovereignty is used as an instrument of governmental abuse and repression. Under the theory of sovereignty, Hitler’s regime organized global aggression and the holocaust. Under the theory of Soviet sovereignty, Joseph Stalin orchestrated a mass murder of people within the Soviet Union spanning decades. See generally Nagan & Hammer, supra note 16 (examining the evolutive concept of sovereignty in terms of effective political power, the nature of law, and political culture in the twin contexts of international law and international relations).
international community. This atmosphere of compromise has no place in the ongoing international human rights discourse. It demonstrates the necessity for increased attention to the language of international law as a mechanism to better support these crucial principles and do away with destructive myth systems, which permit regimes around the world to formulate their own rules. The international law "language" must do more in practice to communicate the value of individual rights. The broader lens of communications inquiry may therefore serve the important function of broadening the framework of operative words, signs, and symbols that are a part of the foundational give-and-take of human interaction, which generate norms and practices, in which purer foundations of what ultimately counts as human rights law might eventually be rooted.

VI. CONCLUSION

Humanitarian law and human rights law consistently resurrect the problem that the individual has almost no identity in the international legal system. This is because the individual is not widely viewed as a subject of international legal order and therefore has limited, if any, rights and duties which derive from the international legal system without the consent of the sovereign State. Multiple versions of the same general jurisprudential assumption exist, which are largely influenced by the legacy of Austinian jurisprudence. This dominant statist paradigm of international law only begrudgingly admits that the individual has a legal identity in international law for the purpose of protecting individual human rights. From this vantage, human rights are not actually rights, but rather demonstrations of sovereign beneficence. But we believe that the State, however important, is not an artifact of absolutism sanctified by unreflective legal theory. We thus re-examined how those who have been influenced by the scientific and behavioral revolution in the social sciences, chief among them Harold Lasswell, have approached the nature of the State, the community, and the individual.

As we indicated above, Lasswell viewed the State in radically phenomenological terms, which stemmed from his deconstruction of propaganda and subsequent precocious development of the framework for modern communications theory and research. Our examination of communications theory in light of both macro-law and micro-law, as well as through the lens of diverse theories concerning law, society, and science, has demonstrated that it is a useful tool for understanding how
human perspectives and subjectivities are deeply implicated in the generation of rules that have both normative and moral salience. A primary ideological implication of this point of view is that our starting point of analysis is not grounded in an abstraction called the State, and it does not solely vindicate the values and morals of the dominant class or group.

By observing the State through the lens of communication, we begin to see the complex trajectories of human interaction behind both the State and the international community. We might functionally examine law from the micro- to macro-levels of human communication, which yields valuable lessons about interpersonal and individual-State interconnectivity. Implicit in this approach is a general acceptance of the human or anthropomorphic foundations of law, which have large-scale interpretational implications for modern jurisprudence and human rights. Since the very existence of law is contingent on the existence of human interlocutors, it is impossible to divorce the significance of human experience from the law. Even positivist approaches to law, which champion the authority of the State, cannot explain away the significance of the individual in the processes of law-creation. This suggests that any jurisprudence that ostensibly seeks to purge itself of the human agents of decision might be dangerous from a normative standpoint. This approach to law thus suggests that inquiries into law be rooted in human experience; we must use communications theory to understand how human rights perspectives are formed, affirmed, depreciated, or destroyed.

Accordingly, Lasswell's breakthrough recognition that micro-social communication might count as law offered the key to unlocking large world order problems. In short, moral understandings, prescriptive experience, and awareness of rudiments of authority and control are visible at every level of social interaction. By extension, when the State legislates or otherwise executes a matter of public importance, this process might actually reflect the final iterative steps of a more complex and dynamic framework of conflict and collaboration to ensure the foundations of decency and to constrain the impulse to abuse. If our description and analysis is correct, then one of the core problems of the jurisprudence of human rights is effectively solved—individuals are indeed the ultimate unit of legal description and analysis and the emergence of the artifact known as the State cannot simply wrest law-creation away from its human foundations. Micro-law humanizes the ideas of justice, respect, empathy, and dignity; it advances the notion that human beings are the generators of norms that demarcate good and
evil. Not only are we the source of our values, we are the judges of the extent to which we identify with them, value them, and how committed we are to promoting and defending them. The micro-law foundations of human rights therefore provide a mandatory but lonely walk for all human rights-sensitive individuals. It underscores just how important human rights is to the deep underlying structures of freedom and justice, and how threatened human rights might actually be in a global system that does not adequately theoretically describe and justify them, and thus cannot truly understand them.