

January 2008

## Legal Formalism Meets Policy-Oriented Jurisprudence: A More European Approach to Frame the War on Terror

Julien Cantegreil

Follow this and additional works at: <https://digitalcommons.mainerlaw.maine.edu/mlr>



Part of the [International Law Commons](#), [Military, War, and Peace Commons](#), and the [National Security Law Commons](#)

---

### Recommended Citation

Julien Cantegreil, *Legal Formalism Meets Policy-Oriented Jurisprudence: A More European Approach to Frame the War on Terror*, 60 Me. L. Rev. 97 (2008).

Available at: <https://digitalcommons.mainerlaw.maine.edu/mlr/vol60/iss1/3>

This Article is brought to you for free and open access by the Journals at University of Maine School of Law Digital Commons. It has been accepted for inclusion in Maine Law Review by an authorized editor of University of Maine School of Law Digital Commons. For more information, please contact [mdecrow@maine.edu](mailto:mdecrow@maine.edu).

LEGAL FORMALISM MEETS POLICY-ORIENTED  
JURISPRUDENCE: A MORE EUROPEAN APPROACH  
TO FRAME THE WAR ON TERROR

*Julien Cantegreil*

- I. INTRODUCTION
- II. THE NHSIL'S GENERAL THEORY OF LAW
- III. THE APPLICATION OF NHSIL JURISPRUDENCE TO INTERNATIONAL LAW
- IV. THE IMPORTANCE OF LANGDELL AND LLEWELLYN
- V. THE FUTURE OF THE NHSIL

## LEGAL FORMALISM MEETS POLICY-ORIENTED JURISPRUDENCE: A MORE EUROPEAN APPROACH TO FRAME THE WAR ON TERROR

Julien Cantegreil\*

### I. INTRODUCTION

Myres S. McDougal,<sup>1</sup> the leader of the New Haven School of International Law (NHSIL), advanced a comprehensive and iconoclastic conception of international law and its goals, one whose continuing influence is well-known today: a visceral rule-skepticism that even his least fervent disciples would never renounce. McDougal's conception of international law and its goals is fundamentally different from the normativist view of Hans Kelsen, which has been and continues to be enormously influential throughout continental Europe, particularly in France.<sup>2</sup> In the portion of his 1953 course at The Hague Academy of International Law devoted to Kelsen's canonical *Legal Technique in International Law*,<sup>3</sup> McDougal said that the jurist's function as "a responsible interpreter of the policy commitments embodied in legal prescriptions and procedures," and the jurist's status as a "skilled specialist" of the intimate workings of such prescriptions and procedures, prohibits the jurist from limiting himself to the mere analysis of the "logical interrelations among legal

---

\* École normale supérieure (Paris)/Université Paris I (Panthéon-Sorbonne). Editor of *Pour une Théorie des "Cas Extrêmes"* (2006). Many thanks to Deans Harold Koh, Anthony Kronman, and Guido Calabresi of the Yale Law School, as well as to Professors Bruce Ackerman, Pierre-Marie Dupuy, and Owen Fiss for the numerous stimulating discussions and debates on the personal vision presented here. Lia Brozgal's responsiveness, culture, and sharp-minded skills exemplify the best of friendship. This Article elaborates on ideas I either expressed at the Eighth International Summit on Transnational Crime, held in Monte-Carlo, Monaco, in November of 2006, or will discuss in my forthcoming article, entitled *Les Ages de New Haven*, to be published in volume 51 of *Archives de Philosophie du Droit* (2007). This Article is dedicated to W. Michael Reisman. *Pandere vela oratiōnis*.

1. (1906-1998) Sterling Professor of International Law, Yale University; President of the American Society of International Law; Member of the Institut de Droit International; and representative of the United States at numerous diplomatic conferences. See generally W. Michael Reisman, *Myres S. McDougal, Biographical Essay*, in 18 INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES 479 (David L. Sills ed., 1980).

2. Hans Kelsen's views have generated considerable scholarly commentary. See, e.g., CARLOS MIGUEL HERRERA, *THÉORIE JURIDIQUE ET POLITIQUE CHEZ HANS KELSEN* (1997); Otto Pfersmann, *Contre le néo-réalisme juridique. Pour un débat sur l'interprétation*, 50 REVUE FRANÇAISE DE DROIT CONSTITUTIONNEL 279 (2002); Michel Troper, *Un système pur du droit: le positivisme de Kelsen*, in LA FORCE DU DROIT 117 (Pierre Bouretz ed., 1991). Cf. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995) (confirming, by omitting any reference to Kelsen's views in this comprehensive survey, that his views have largely failed to find adherents in the United States).

3. HANS KELSEN, *LEGAL TECHNIQUE IN INTERNATIONAL LAW: A TEXTUAL CRITIQUE OF THE LEAGUE COVENANT* (1939). Kelsen claims that "jurists' . . . determin[ation of] the social ends to be attained" is a "usurpation of competence" insofar as the "question is not juridical but specifically political," even "the domain *par excellence* of the politician." *Id.* at 15. At times, however, Kelsen has formulated policy for application in a legal context. See, e.g., HERRERA, *supra* note 2 (presenting a policy-oriented appraisal of Kelsen's work); HANS KELSEN, *La Technique du droit international et l'organisation de la paix*, in HANS KELSEN: ÉCRITS FRANÇAIS DE DROIT INTERNATIONAL 251 (Charles Leben ed., 2001) [hereinafter *KELSEN, Technique*].

propositions.”<sup>4</sup> He called for jurists to extend their roles “to the further tasks of inquiry into and advice about the possible effects upon overall community values of the various alternatives that the legal forms afford.”<sup>5</sup> In addition, he imposed on legal scholars the responsibility to “identify or invent and to recommend the prescriptions, organizations, and decisions” that would converge in the effective development of an international “law of human dignity.”<sup>6</sup> By replacing the Kelsenian analytical distinction between “lawful and . . . unlawful” with a different programmatic distinction—between “a law promoting human indignity or a law promoting human dignity”<sup>7</sup>—the NHSIL was uniquely equipped to fulfill the function that McDougal ascribed to all useful jurisprudential theory: “the formulation and the establishment of an international law of human dignity.”<sup>8</sup>

It is no surprise that this approach, diametrically opposed to the Kelsenian spirit, has had the effect of distancing the NHSIL from the central concerns of French doctrine of public international law,<sup>9</sup> which is “entirely concerned with the internal functioning of the legal system,”<sup>10</sup> and the interrelationships that bind together the various elements of the international legal order. As Professor Prosper Weil masterfully articulated, French doctrine permanently demands quality in the normative apparatus.<sup>11</sup> When the NHSIL was not busy mocking the French dualistic approach,<sup>12</sup> it simply ignored its doctrinal debates, such as those dealing with the improvement of the normative apparatus, interpretation,<sup>13</sup> the ideas of “the unity of the international legal order,”<sup>14</sup> and *jus cogens*.<sup>15</sup> This ignorance was reciprocal. For its part, French

4. Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 157 (1953).

5. *Id.*

6. *Id.* at 140.

7. *Id.*

8. *Id.* at 257.

9. French doctrine is unified in the sense that its central functions are, according to Prosper Weil, the establishment and maintenance of nation states’ territoriality, coexistence, and cooperation. Prosper Weil, *Le Droit International en Quête de son Identité*, 237 RECUEIL DES COURS 25, 35-38 (1992).

10. Jean Combacau, *Le droit international: bric-à-brac ou système?*, 31 ARCHIVES DE PHILOSOPHIE DU DROIT 85, 86 (1986) (translation by the author).

11. Weil, *supra* note 9, at 38 (“In a word: give me good normativity and I will give you good law.”) (translation by the author).

12. See, e.g., Myres S. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, in STUDIES IN WORLD PUBLIC ORDER 157, 161-62 (Myres S. McDougal ed., 1960) (criticizing dualists’ attempts to “rigidify the fluid processes of world power interactions into two absolutely distinct and separate systems or public orders, the one of international law and the other of national law”).

13. See generally SERGE SUR, L’INTERPRÉTATION EN DROIT INTERNATIONAL PUBLIC (1974).

14. See generally Pierre-Marie Dupuy, *L’Unité de l’ordre juridique international*, 297 RECUEIL DES COURS 25 (2002); Emmanuelle Jouannet, *Le juge international face aux problèmes d’incohérence et d’instabilité du droit international. Quelques réflexions à propos de l’arrêt CIJ du 6 novembre 2003, Affaire des Plates-formes pétrolières*, 108 REVUE GÉNÉRALE DE DROIT INT’L PUB. 917 (2004) (demonstrating her understanding of the *Oil Platforms* ICJ case); Karl Zemanek, *The Legal Foundations of the International System*, 266 RECUEIL DES COURS 23 (1997). See also U.N. GENERAL ASSEMBLY [GAOR], Study Group of the Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ¶¶ 46-222, U.N. Doc. A/CN.4/L.682 (April 13, 2004) (prepared by Martti Koskenniemi) (outlining the debates on Article 31(3)(c) and its potential as an integrating principle in treaty law, and the debates on *lex specialis* in customary law).

15. Although *jus cogens* may have been a topic of interest in the United States—see, for example, Egon

doctrine turned a blind eye to this new jurisprudence that seemed in a way to limit itself to marshaling various critiques aimed at prevailing American doctrine.<sup>16</sup> The NHSIL's new way of conceiving juridical order as a desacralized, instrumentalized, and contingent tool of law provoked a discourse of resistance and defense of traditional romano-germanic values.<sup>17</sup> The NHSIL's defense of universalism was deemed to be ideological, moralistic, and the archetype of a dogmatic and quasi-missionary attitude. It would be difficult indeed to find a better illustration of the absence of a "shared legal culture."<sup>18</sup>

As a result, French doctrine lost its capacity to understand certain developments in American jurisprudence, from Law and Economics and Critical Legal Studies<sup>19</sup> to the more recent Transnational Legal Process School.<sup>20</sup> Strategically, French doctrine was particularly impoverished by its inability to engage with a philosophy that was developed by McDougal's academically and professionally successful student-disciples from the Yale Law School.<sup>21</sup> Among his protégés were Michael Reisman, future Professor of Law at the Yale Law School and future President of the Inter-American Commission on Human Rights of the Organization of American States; Florentine Feliciano, future President of the Supreme Court of the Philippines and future Chairman of the Appellate Body of the World Trade Organization; and Dame Rosalyn Higgins, future President of the International Court of Justice. Regardless of one's jurisprudential orientation, it is a problem to ignore such a major contribution,<sup>22</sup>

---

Schwelb, *Some Aspects of International Jus Cogens As Formulated by the International Law Commission*, 61 AM. J. INT'L L. 946 (1967)—no comparison can be drawn with French academics' interest in the issue. For progression from the initial rejection of *jus cogens* to its eventual promotion in France, see Combacau, *supra* note 10, at 102-04 (advocating the creation of an objective system of international norms) and Weil, *supra* note 9. See generally Dupuy, *supra* note 14, at 213 (highlighting the universality of international law); Pierre-Marie Dupuy, *L'individu et le droit international (Théories des droits de l'homme et fondements du droit international)*, 32 ARCHIVES DE PHILOSOPHIE DU DROIT 119 (1987) (analyzing international law's shift in focus from policing the relations between states to protection of individual human rights).

16. When compared with one another, American theories of international law are apparently diverse. See Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291 (1999). However, the diversity of these approaches is substantially less distinct when viewed from a European perspective. See UNITED STATES HEGEMONY AND THE FOUNDATION OF INTERNATIONAL LAW (Michael Byers & Georg Nolte eds., 2003); GEORG NOLTE, *LE DROIT INTERNATIONAL FACE AU DÉFI AMÉRICAIN* (2005); Emmanuelle Jouannet, *French and American Perspectives on International Law: Legal Cultures and International Law*, 58 ME. L. REV. 291 (2006); Richard H. Pildes, *Conflicts Between American and European Views of Law: The Dark Side of Legalism*, 44 VA. J. INT'L L. 145 (2003).

17. Horatia Muir Watt, *Propos liminaires sur le prestige du modèle américain*, 45 ARCHIVES DE PHILOSOPHIE DU DROIT 29, 33-34 (2001).

18. Jouannet, *supra* note 16, at 297.

19. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 201-09, 249-54 (1993).

20. See Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 183-94 (1996).

21. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* (1963); W. MICHAEL REISMAN ET AL., *INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY* (1981).

22. See MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962); MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND THE MINIMUM WORLD PUBLIC ORDER* (1961); MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY* (1980); MYRES S. MCDUGAL, HAROLD D. LASSWELL & JAMES

one that “soon [contributed to] the defining tradition within which most American postwar international law scholars began to operate.”<sup>23</sup> It is still a greater problem to ignore a doctrine that has been explicitly endorsed by the President of the International Court of Justice, who once defined international law as “a process, a system of authoritative decision-making. It is not just the neutral application of rules. . . . The role of international law is to assist in the choice between . . . various alternatives [arguably prescribed by existing rules]. International law is a process for resolving problems.”<sup>24</sup>

Understanding the doctrinal importance of the NHSIL is nonetheless not an easy task. Once deemed “seminal”<sup>25</sup> and until recently considered to be of principal importance in American doctrine, the NHSIL today boasts few explicitly faithful adherents. Neither anecdotes<sup>26</sup> nor internal critiques—often limited to the field of public international law—have managed to explain or erase the paradox of this influence, which, while once clearly major, seems to have fallen from favor today. In order to understand the NHSIL’s impact on international law, it is necessary to consider American legal philosophy more generally because the NHSIL’s current status is in large part the result of dynamics created by the opposing forces that have driven the evolution of American legal philosophy. In this Article, I endeavor to explain why American legal philosophy should engage in a reconsideration of what can be termed a European conception of public international law. To some degree, this engagement is presently underway at Yale Law School.

I will begin with an internal analysis of McDougal’s legal thought in Part II, where I will show that McDougal proposed a general, or “systematic,” jurisprudence that might even be called a “general grammar of law.”<sup>27</sup> In Part III, I will demonstrate that McDougal’s international law writings are simply specific applications of his general jurisprudence. It is important to remember McDougal not only as the international lawyer (even if of a nationalist sort) that he was often seen to be, but also as a theoretician whose project was to develop “a jurisprudence that takes *systemic account* of all aspects of social reality relevant to the processes and structures of making

---

C. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967); MYRES S. MCDUGAL, HAROLD D. LASSWELL & IVAN A. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); TOWARDS WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL 591-93 (W. Michael Reisman & Burns H. Weston eds., 1976).

23. Harold H. Koh, *Why do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2620 (1997). Although Dean Koh carefully mixes the theory of the NHSIL with those theories developed by Professors Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld, all of whom contributed to the work of the International Legal Process School, it should be noted that the latter theories never attained the doctrinal coherence of the NHSIL. *See id.* at 2617-24.

24. *Id.* at 2618 n.82 (alteration in original) (quoting ROSALYN HIGGINS, *PROBLEMS AND PROCESS* 267 (1994)).

25. Richard A. Falk, Rosalyn C. Higgins, W. Michael Reisman & Burns H. Weston, *Myres Smith McDougal (1906-1998)*, 92 *AM. J. INT’L L.* 729, 733 (1998).

26. *See, e.g.*, Remarks by Richard A. Falk, *McDougal’s Jurisprudence: Utility, Influence, Controversy*, 79 *AM. SOC’Y INT’L L. PROC.* 266, 281 (1985) (delivering a harsh appraisal of McDougal’s “uncanny capacity to apply [his jurisprudential method] in a manner that consistently accords with U.S. foreign policy”).

27. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 *VA. J. INT’L L.* 188, 261 (1968).

*rational* decisions about legal policy alternatives.”<sup>28</sup> It has too often been forgotten that his theory encompasses the training of lawyers in domestic law, particularly the law of property and constitutional law.<sup>29</sup> Moreover, his theories draw on a vast variety of sources, such as Whiteheadian contextualism, Freudian psychology, organizational theory, and policy science. McDougal’s “‘policy-oriented’ approach to the study of law” must therefore be understood and evaluated in the context of a “comprehensive guiding theory.”<sup>30</sup>

Although it is perhaps surprising, it is helpful to compare McDougal’s approach with the legal realism of Professor Karl Llewellyn, as I will do in Part IV. In the light shed by this comparison, which serves as the key to understanding how McDougal’s theory came to occupy a central place in American doctrine and also why it ultimately did not survive, I will examine McDougal’s unique advancement of both formalist and realist agendas. A clear focus on the formalist-realist dualism of the NHSIL will permit us to rediscover a critical aspect of its genius. In Part V, I will argue that the resolution of the legal issues arising from the international fight against terrorism demonstrates that after decades of mutual ignorance, this formalist-realist dualism of McDougal’s jurisprudence provides common ground for rapprochement between European and American conceptions of international law.

## II. THE NHSIL’S GENERAL THEORY OF LAW

*“Most of what passes for realistic  
jurisprudence is, of course, true.  
But where do we go from there?”*<sup>31</sup>

The NHSIL’s philosophy of law is a general theory that is driven by two principal considerations: one critical (its post-realism) and the other prospective (its value-centered normativism). The thorough-going realism of the NHSIL is usually taken for granted<sup>32</sup> insofar as McDougal considers that it is “not merely formulations *de lege ferenda* . . . but even applications allegedly *lax lata* that require policy choices.”<sup>33</sup> The relegation of “formal authority without effective control” to “illusion” and not “law” led McDougal to incorporate into his analysis, in a realistic manner, those who “look behind [the] apparent decision-makers to [the] real decision-makers.”<sup>34</sup>

28. Richard A. Falk, *International Legal Order: Atwyn V. Freeman vs. Myres S. McDougal*, 59 AM. J. INT’L L. 48, 70-71 (1965).

29. See, e.g., HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY (1992); W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW (1987).

30. McDougal, *supra* note 4, at 140.

31. Myres S. McDougal, speaking at the thirty-first annual meeting of the Association of American Law Schools, held in Chicago, Illinois. 31 ASS’N AM. L. SChS. PROC. 120 (1933).

32. Emmanuel Jouannet even refers to the NHSIL solely as a “realist tradition.” Jouannet, *supra* note 16, at 330.

33. McDougal, *supra* note 4, at 156.

34. *Id.* at 182. Compare McDougal’s understanding with Kelsen’s remarks on “validity” and “efficiency” in HANS KELSEN, GENERAL THEORY OF LAW AND STATE 39, 118-19 (Anders Wedberg trans., Russell & Russell 1961) (1945).

This realistic tenor is clearly paradoxical, as McDougal often criticized all former realist jurisprudence.<sup>35</sup> He was particularly severe with the Yale Realists<sup>36</sup> for the circuitous nature of their reasoning, and for leaving certain matters unresolved, including the context in which decisions are made, semantic limitations, and the essential complementary nature of legal rules.<sup>37</sup> Against the realists' implicit idea that legal decisions are made by courts, McDougal argued that "decision-making is a dynamic process in which decision-makers are located in many different institutional positions and contexts."<sup>38</sup> He sought to move beyond Jerome Frank's tortured psychological explanation for the persistence of the positive myth.<sup>39</sup> Nevertheless, these criticisms did not prevent McDougal from incorporating the fundamental sociological insights of the realists<sup>40</sup>: a critique of legal rules as simple "conventional justifications"<sup>41</sup> that judges were accustomed to making and refocusing attention from rules to decisions<sup>42</sup> founded on diverse social and personal stimuli.<sup>43</sup> Instead of regarding the decision as illustrating the rule, the NHSIL took the realist view—similar to that of the Law and Economics and Critical Legal Studies movements<sup>44</sup>—that the rule was only one element in the analysis of the decision.<sup>45</sup> Michael Reisman expresses this view as follows:

American legal scholars [do not] seriously believe that a rule conception contributed to understanding or effective operation in the international law, much less that rules have magical properties that enable them to constrain naked power. . . . [The] NHS[IL] has organized the reasons for its rejection of the rule approach to make explicit where affirmative contributions were required. In most general terms, the utility of this intellectual approach is that it permits the scholar and lawyer to see law as a secular artifact created by human beings to achieve certain social consequences; it legitimizes and facilitates the appraisal of the legal system in terms of goals and makes explicit the social engineering function of the lawyer.<sup>46</sup>

---

35. See Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971).

36. For two attempts to synthesize the arguments against realism, see Hermann Kantorowicz, *Some Rationalism About Realism*, 43 YALE L.J. 1240 (1934), and KRONMAN, *supra* note 19.

37. See Myres S. McDougal, *Perspective for an International Law of Human Dignity*, 53 AM. SOC'Y INT'L L. PROC. 107, 112 (1959).

38. McDougal, *supra* note 4, at 182-83.

39. See generally JEROME FRANK, *LAW AND THE MODERN MIND* (Doubleday & Co., Inc. 1963) (1930).

40. See LASSWELL & MCDUGAL, *supra* note 29, at 13-17.

41. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 240 (1943). See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in the Judicial Decision*, 14 CORN. L.Q. 274, 278 (1929) (discussing judicial approaches to decision-making).

42. See Lasswell & McDougal, *supra* note 41, at 237; Myres S. McDougal, *Preface* to LASSWELL & MCDUGAL, *supra* note 29, at xxii.

43. See FRANK, *supra* note 39, at 108-26.

44. See Edmund W. Kitch, *The Intellectual Foundations of "Law and Economics"*, 33 J. LEGAL EDUC. 184, 184 (1983) (noting that "law and economics evolved out of the agenda of legal realism"); Mark V. Tushnet, *Perspectives on Critical Legal Studies: Introduction*, 52 GEO. WASH. L. REV. 239, 239 (1984) (reasoning that a "sustained attack on formalism . . . makes critical legal studies the heir to legal realism").

45. See LASSWELL & MCDUGAL, *supra* note 29, at 8-11; see also Myres S. McDougal, *Fuller vs. The American Legal Realists*, 50 YALE L.J. 827 (1940).

46. Remarks by W. Michael Reisman, *McDougal's Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC'Y INT'L L. PROC. 266, 279 (1985).

There are different types of realism.<sup>47</sup> It was due precisely to the theoretical framework of the Yale Realists of the 1930s that the NHSIL was able to ensure the continuing influence of Oliver Wendell Holmes's perspective,<sup>48</sup> and sustain Wesley Hohfeld's transformative vision, which Professor Robert Gordon has characterized as a call to shape "activist law reformers on the public stage."<sup>49</sup> The NHSIL's first initiatives date back to the moment when three corrosive movements had already begun to pull apart the Langdellian synthesis between English analytical jurisprudence and German historical jurisprudence.<sup>50</sup> At Columbia, the functionalist development of empirical methods had allowed for an analysis of rules with respect to their social effects.<sup>51</sup> At Yale, Deans Robert Hutchins and Charles Clark had begun the process of recruiting the future theorists of Yale Realism.<sup>52</sup> And finally, at Harvard, after the promotion of sociological jurisprudence by Dean Roscoe Pound, empirical research in areas like administrative law and public utilities law prospered under the direction of Professors Bruce Wyman, Felix Frankfurter, and James Landis.<sup>53</sup> Yet it was the first New Haven School in the 1930s that succeeded in combining these three heterogeneous developments, and it was thanks to this synthesis that McDougal then embarked on his early research program.

Nevertheless, the realists of the 1930s could not craft "much more than preliminary [solutions to] the affirmative problems of jurisprudence,"<sup>54</sup> because at that time legal science was limited to anticipating judges' behavior.<sup>55</sup> However, well before Harold Lasswell and Abraham Kaplan published their influential *Power and Society* in 1950,<sup>56</sup> McDougal was already seeking to develop "the conscious, deliberate use of law as an instrument of policy."<sup>57</sup> It became essential for him to move "from Legal Realism to Policy Sciences,"<sup>58</sup> in order to "establish an observational standpoint,

47. See generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* (1992); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (1986); EDWARD A. PURCELL, JR., *THE CRISIS OF DEMOCRATIC THEORY* (1973); WILFRID E. RUMBLE, JR., *AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS* (1968); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1986); WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

48. See, e.g., OLIVER WENDELL HOLMES, *The Path of the Law*, in *COLLECTED LEGAL PAPERS* 167, 173 (1920) (famously defining "the law" as "prophecies of what the courts will do in fact").

49. Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in *HISTORY OF THE YALE LAW SCHOOL* 75, 83 (Anthony T. Kronman ed., 2004) (discussing in general Wesley Newcomb Hohfeld, *A Vital School of Jurisprudence and Law: Have American Universities Awakened to the Enlarged Opportunities and Responsibilities of the Present Day?*, 14 *ASS'N AM. L. SCHS. PROC.* 76 (1914)).

50. See generally *id.*; KALMAN, *supra* note 47, at 3-144.

51. See KALMAN, *supra* note 47, at 67-97.

52. See *id.* at 67-144; SCHLEGEL, *supra* note 47, at 81-146 (discussing the empirical approach of Charles Clark and William Douglas).

53. See KALMAN, *supra* note 47, at 45-66.

54. See LASSWELL & MCDUGAL, *supra* note 29, at 15.

55. See, e.g., Lee Loevinger, *Jurimetrics*, in *JUDICIAL BEHAVIOR* 72 (Glendon Schubert ed., 1964).

56. HAROLD D. LASSWELL & ABRAHAM KAPLAN, *POWER AND SOCIETY* (1950).

57. Myres S. McDougal, *Preface* to LASSWELL & MCDUGAL, *supra* note 29, at xxii.

58. Myres S. McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 *YALE L.J.* 1345, 1345 (1947).

for both scholarly inquirers and decision makers, in identification with all the relevant communities of humankind and to outline a framework of inquiry about law, a jurisprudence, that would be more helpful than our inherited frames of jurisprudence in clarifying and securing common interests.”<sup>59</sup> McDougal took great care in “formulating community or social process in terms of people, with varying perspectives, in varying situations, employing base values, by practices (myth and technique), to effect a redistribution among people of certain demanded or ‘scope’ values.”<sup>60</sup> It is therefore this prescriptive dimension—far more than realism—that lends the NHSIL’s theory its specificity. The NHSIL defines the stakes organically, insofar as its definition of law, as the sum of total processes,<sup>61</sup> was based on the conjunction of common expectations concerning authority with a high degree of corroboration in practice,<sup>62</sup> thereby making the principle of legal certainty more difficult to defend and common goals more difficult to define.

The innovative character of McDougal’s methodology<sup>63</sup> derives from its integration of the realist critique of formalism with its comprehensive and systematic analysis of the entire social process.<sup>64</sup> This led him to conceive legal decision-making as a choice among eight values: *power*, or effective participation in the making of important decisions; *wealth*, the control over economic assets; *enlightenment*, access to the knowledge on which rational choice depends; *skills*, proficiency in the exercise of talents; *well-being*, the enjoyment of physical and psychic health; *affection*, enjoyment of congenial human relationships; *respect*, access to other values on the basis of merit; and *rectitude*, the sharing of common standards of conduct.<sup>65</sup> Every legal decision-maker, McDougal tells us, prioritizes one of these values, and because “power” tends to be the most common, McDougal devotes a major portion of his theory to it.

McDougal’s conception of the “world social process” as “a series of interrelated value processes”<sup>66</sup> led McDougal to describe the legal process in terms of seven

59. Myres S. McDougal, *Preface to LASSWELL & MCDUGAL*, *supra* note 29, at xxi.

60. McDougal, *supra* note 4, at 168.

61. See HENRY M. HART & ALBERT SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (William N. Eskridge, Jr. & Philip P. Frickey eds., 1958). McDougal would add to Hart and Sacks’s “notion of law as a process of decision . . . a more comprehensive conception of processes of authoritative decision and the systematic relation of such processes to their context in social and community processes.” LASSWELL & MCDUGAL, *supra* note 29, at 28 n.39. See also Myres S. McDougal, *Law as a Process of Decision: A Policy-Oriented Approach to Legal Study*, 1 NAT’L L.F. 53 (1956).

62. See Harold D. Lasswell & Myres S. McDougal, *Trends in Theories About Law: Maintaining Observational Standpoint and Delimiting the Focus of Inquiry*, 8 U. TOL. L. REV. 1, 23-50 (1976); LASSWELL & MCDUGAL, *supra* note 29, at 26.

63. See Harold D. Lasswell & Myres S. McDougal, *Trends in Theories About Law: Comprehensiveness in Conceptions of Constitutive Process*, 41 GEO. WASH. L. REV. 1 (1972).

64. See MCDUGAL, LASSWELL & CHEN, *supra* note 22, at 161-363.

65. McDougal, *supra* note 4, at 168. See also LASSWELL & MCDUGAL, *supra* note 29, at 336-388; Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988); Myres S. McDougal, *The World Constitutive Process of Authoritative Decision*, in *THE FUTURE OF THE INTERNATIONAL LEGAL ORDER: TRENDS AND PATTERNS* 73 (Richard A. Falk & Cyril E. Black eds., 1969).

66. McDougal, *supra* note 4, at 169.

functions: the *intelligence function*, “[p]ractices by which decision-makers keep themselves informed and clarify and project future plans of action”; the *recommending function*, “[p]ractices by which initiative is taken and pressure exerted to secure specific decisions”; the *prescribing function*, “[p]ractices by which policy is formally enacted into authoritative community prescription”; the *invoking function*, “[p]ractices by which community machinery is set in motion for the application of prescriptions in concrete instances”; the *applying function*, “[p]ractices by which authoritatively prescribed community policy is administered in concrete instances”; the *appraising function*, “the detailed examination of the consequences of prescriptions and applications”; and the *terminating function*, “[p]ractices by which obsolete prescriptions are put to an end.”<sup>67</sup> Finally, McDougal identified five “intellectual tasks” for use by legal decision-makers,<sup>68</sup> the performance of which would facilitate the “implementation of a universal order of human dignity.”<sup>69</sup>

Admirable for its modernity, McDougal’s Copernican double revolution in jurisprudence—both post-realist<sup>70</sup> and normative<sup>71</sup>—allowed him to establish his particular theory about the process of making social choices. This theory was unique in a number of ways: its reformative force far surpassed that of the realists;<sup>72</sup> it incorporated a social anthropology<sup>73</sup> in which agents maximize their individual positions while at the same time remaining strongly influenced by the communities to which they belong;<sup>74</sup> and it described law as a process of decision that permits the integration of policy considerations without reducing law to politics.<sup>75</sup> But the essential characteristic of the NHSIL is its often overlooked generality. Leaving international law aside for the moment, it is impossible to conceive of a theory that is applicable in a broader social context or is applied with a broader goal—the furtherance of a public order of human dignity. It is in these respects that McDougal departs from the jurisprudence of Hans Kelsen.

67. *Id.* at 177-78.

68. The five tasks include (1) clarification of goal, (2) description of trend, (3) analysis of conditioning factors, (4) projection of future goals, and (5) invention and consideration of policy alternatives. Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, in *STUDIES IN WORLD PUBLIC ORDER* 3, 16-17 (Myres S. McDougal ed., 1960).

69. *Id.* at 16.

70. See W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 *YALE L.J.* 935, 937 (1999) (describing the principal impact of McDougal’s jurisprudential revolution as “unseating rules as the mechanism of decision and installing the human being—all human beings, to varying degrees—as deciders”).

71. See Falk, Higgins, Reisman & Weston, *supra* note 25, at 731 (noting that McDougal “rejected any natural or transempirical content to law and specifically *postulated* the goals of human dignity; he did not attempt to discover or derive them”).

72. See Reisman, *supra* note 70, at 938.

73. See BENT ROSENTHAL, *ÉTUDE DE L’OEUVRE DE MYRES SMITH MCDUGAL EN MATIÈRE DE DROIT INTERNATIONAL PUBLIC* 33-44 (1970).

74. For example, McDougal conceived of property not as “‘land’ but [as] the aggregate of a community’s spatial resources,” and believed that the goal of law was the optimization “of the common interests of the community.” Reisman, *supra* note 1, at 484.

75. See DUXBURY, *supra* note 2, at 171-72; Harold D. Lasswell & Myres S. McDougal, *The Relation of Law to Social Process: Trends in Theories About Law*, 37 *U. PITT. L. REV.* 465, 465-85 (1976).

## III. THE APPLICATION OF NHSIL JURISPRUDENCE TO INTERNATIONAL LAW

Without attempting a critique of the NHSIL from the perspective of international law,<sup>76</sup> I will limit my presentation here to a demonstration of how the application of McDougal's jurisprudence to international law represents a specific application of his systematic, general theory of law, focusing on its two principal tendencies: realism and value-orientation. The application of McDougal's jurisprudence to international law is no less "revolutionary" than its application in other contexts.<sup>77</sup>

McDougal certainly would not have left the field of property law, where he began his career, to devote himself to international law if he had not been living in the global climate that followed the Second World War.<sup>78</sup> McDougal explains that the existence of new weapons of destruction, people's new awareness of the world, and the urgent need to institute a freer society that would be more respectful of human dignity all played a role in his change of heart.<sup>79</sup> Nevertheless, even if the war had reawakened the world to the problems generated by the gap between the "myth system"<sup>80</sup> and the "operational code,"<sup>81</sup> it had certainly not created them. Whereas work on systems of coordination of formal authority and on effective political power had led many theorists to reaffirm the realist critique of formalist positivism in the domestic legal order, the idea that the international legal order was fundamentally different from the domestic legal order prevented them from extrapolating their critical insights to the international level.<sup>82</sup> It is not unreasonable to think that McDougal's interest in international law resided in the fact that the international domain rendered traditional theory even more obsolete and increased the NHSIL's visibility exponentially.<sup>83</sup> It is with respect to international law that the NHSIL has made its greatest impact.

McDougal described with great care the perspectives and exigencies of the participants in the international order, the situations in which they interact, the fundamental values that govern their substantive choices, and the practices by which they seek to exercise their influence.<sup>84</sup> The adoption of the functional approach to the analysis of the international order reveals the fundamental tension at that level between a "constitutive process," which is dynamic and reflects interactions that bind the

76. See generally ROSENTHAL, *supra* note 73.

77. See Michael Reisman, *A Jurisprudence from the Perspective of the "Political Superior,"* 23 N. KY. L. REV. 605, 623 (1996) (discussing the democratic dimension of this revolution).

78. See Ellery C. Stowell, Commentary, *The Juridical Significance of World War II*, 38 AM. J. INT'L L. 106 (1944) (arguing for the necessity of developing international law in the United States). McDougal's return to academic life was accompanied by the publication of Myres S. McDougal & Asher Lans, *Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy*, 54 YALE L.J. 181 (1945), an article addressing the position of the United States with regard to international organizations.

79. See McDougal, *supra* note 4, at 138-39.

80. See generally W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES, AND REFORMS* 15-36 (1979).

81. But see K.N. Llewellyn, *McDougal and Lasswell Plan for Legal Education*, 43 COLUM. L. REV. 476 (1943) (refusing to join in McDougal's sensitivity to the difference between these two concepts).

82. The seminal book by Mirjan R. Damaška, which built on Max Weber's analytical tools and marked a change in this trend, came out much later. See MIRJAN R. DAMAŠKA, *THE FACES OF JUSTICE AND STATE AUTHORITY: A COMPARATIVE APPROACH TO THE LEGAL PROCESS* (1986).

83. See LASSWELL & MCDUGAL, *supra* note 29, at 39-48 (discussing the trends in theories about law).

84. *Id.*

participants together, and a static “public order,” which seeks to protect the fundamental characteristics of that order, such as the process of law formation.<sup>85</sup> Without belaboring this point, I want to indicate how these features result in three principal differences between the NHSIL and classical internationalist analyses.

First, McDougal adopted a fully sociological approach<sup>86</sup> to identifying the source of the obligatory force of international law.<sup>87</sup> This approach substantially comported with the realists’ refusal to recognize any obligatory force of law independent of individual decision-makers acting within particular contexts.<sup>88</sup> Far from seeing international law as “naked power or unlawful coercion,”<sup>89</sup> McDougal’s approach carves out an essential place for “communication” among the decision-makers of all nations and their “target audience[s].”<sup>90</sup> That legal subjects, who comprise any given decision-maker’s target audience, have an understandable interest in an organized social life explains why they have a corresponding right to expect decisions to be implemented in practice.<sup>91</sup> This pre-constructivist<sup>92</sup> approach afforded McDougal the opportunity to expose the means—more complex than those existing in the internal legal order—by which decision-makers, who proceed according to “a disciplined and contextual mode of analysis,”<sup>93</sup> can promote cooperation in the service of human

85. *Id.* at 28-31.

86. *See, e.g.*, MCDUGAL & BURKE, *supra* note 22, at 578-79 (“[T]he reasonableness, and hence lawfulness . . . of states’ claims to . . . exclusive competence in contiguous [coastal] zones must . . . be appraised [according to a disciplined multifactoral analysis that comprehends the] terms of the more general policy underlying the whole public order of the oceans”).

87. *See* Lasswell & McDougal, *supra* note 62, at 23 (discussing the divergence of theories regarding authority and control, and the resulting confusion over the interrelations of the two in the creation and observance of legal norms); McDougal, Lasswell & Reisman, *supra* note 27, at 194 (suggesting that “mankind has not yet created the legal institutions, or processes of authoritative decision, adequate to clarify and secure common interests under conditions of contemporary interdependence”).

88. As is evident from his writings on the International Court of Justice, W. Michael Reisman remains an exponent of this view. *See* W. Michael Reisman, *International Incidents: Introduction to a New Genre in the Study of International Law*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 3, 15-17 (W. Michael Reisman & Andrew R. Willard eds., 1988) (arguing that international incidents—“overt conflict[s] between two or more actors in the international system”—become the “epistemic unit” of international law precisely because they are resolved by non-judicial processes).

89. McDougal, *supra* note 61, at 57. *See also* McDougal, *supra* note 4, at 157-60 (criticizing Ambassador George F. Kennan and Professor Hans J. Morgenthau for both attacking a “legalistic-moralistic” approach to foreign policy” and expounding what McDougal characterizes as a “pure theory of power” in international law).

90. Myres S. McDougal & W. Michael Reisman, *The Prescribing Function in World Constitutive Process: How International Law is Made*, 6 YALE STUD. WORLD PUB. ORD. 249, 250 (1980).

91. *See* MCDUGAL & FELICIANO, *supra* note 22, at 276-78 (“[T]he clarification of fundamental policy and the explicit relating of specific alternatives in decision to the basic demands, expectations, and identifications of peoples constitute . . . much the more effective way of organizing, channeling, and harnessing their perspectives to the implementation of minimum order and . . . international law generally”).

92. *See* Anthony C. Arend, *Do Legal Rules Matter? International Law and International Politics*, 38 VA. J. INT’L L. 107, 125-40 (1998), for an illuminating analysis of constructivist theory’s unique conceptualization of the dynamic relationship between state actors and the socially constructed international system.

93. McDougal, *supra* note 37, at 109.

dignity by crafting decisions that are “both authoritative and controlling”<sup>94</sup> and lead to necessary and proportional action.

Second, McDougal’s analysis of the connection between national and international law is also sociological. He recognized that “proponents of a policy-oriented theory about law will seek an accurate empirical account of the reciprocal impact or interaction, in the distribution of inclusive and exclusive decisions and in consequences for values, of the interpenetrating processes of national and transnational authority and control.”<sup>95</sup> This prompted him to stress the primordial attention to be given to the individual<sup>96</sup>—both as a sociological reality and as a normative source—in order to understand the interpretation of national and international processes.<sup>97</sup> Thus, and this is not the least forceful of his formulations, McDougal explained that the unity of international law derives from two characteristics: formality—the existence of effective authority and control despite the lack of a decreed institutional articulation; and materiality—the capacity to promote human dignity.

Finally, because the NHSIL maintains that international relationships are transformed by the desire of the people “to maximize their values,”<sup>98</sup> it calls into question the values that underlie both its own general analysis and those of international law itself. This question is all the more urgent because “the trend toward interaction throughout the world community will continue.”<sup>99</sup> Judicial decisions are complicated by a variety of valid demands, which are themselves a result of the diversity of national communities. The NHSIL foregrounds the prescriptive role of jurists working at the international level for three reasons<sup>100</sup>: first, members of national elites traditionally have struggled to find common symbols of authority; second, judges have great difficulty finding effective sanctions to maintain social order; finally, doctrine has the difficult task of conceiving intellectual tools that are adapted to life in the international community.<sup>101</sup> The jurist, far from being able to confine himself to a technical role, must instead clarify the common interests of the participants.<sup>102</sup> Although the jurisprudence of the NHSIL introduces potential problems resulting from its particular emphasis on values, it also sets limits. Even though the jurist is charged with advancing the interests and values of a particular state, he must—because the NHSIL stipulates that he can<sup>103</sup>—promote the “common interest,” understood as

94. McDougal, *supra* note 61, at 58.

95. LASSWELL & MCDUGAL, *supra* note 29, at 32.

96. See generally H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950).

97. See Myres S. McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOL. 337, 352 (1960); ROSENTHAL, *supra* note 73, at 99-101.

98. MCDUGAL, LASSWELL & VLASIC, *supra* note 22, at 148.

99. HAROLD D. LASSWELL, *THE WORLD REVOLUTION OF OUR TIME: A FRAMEWORK FOR BASIC POLICY RESEARCH* 29 (1951).

100. See Lung-chu Chen, *In Affectionate Memory of Professor Myres McDougal: Champion for an International Law of Human Dignity*, 108 YALE L.J. 953 (1999) (discussing the NHSIL’s approach to the protection of human rights).

101. See MCDUGAL & FELICIANO, *supra* note 22, at 278-79.

102. *But see* Remarks by Oscar Schachter, *McDougal’s Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC’Y INT’L L. PROC. 266, 266-73 (1985) (taking issue with this proposition).

103. According to McDougal, Lasswell, and Vlastic, “interests compatible with human dignity are common; interests incompatible with this criterion are special.” MCDUGAL, LASSWELL & VLASIC, *supra* note 22, at 148.

maximum order, the greatest production of values,<sup>104</sup> and minimum order, cooperation and peacekeeping.<sup>105</sup>

#### IV. THE IMPORTANCE OF LANGDELL AND LLEWELLYN

The preceding reformulation of the NHSIL as a general theory of law allows us to perceive the implicit paradox evoked by Yale Law School Dean Harold Koh, who notes that “the New Haven School’s overriding focus on value-orientation came to trouble even those who sympathized with its methodological ambitions.”<sup>106</sup> The interpretation defended here would suggest that values are indeed essential to the NHSIL. How then can one explain this disaffection for the NHSIL? I argue that this disaffection can be accounted for neither by the obsolescence of NHSIL jurisprudence, nor by the explicit nationalist formulation of values defended by McDougal, but rather by looking at recent developments in American legal theory. I will attempt to demonstrate this by reference to the taxonomy of contemporary American legal theories recently articulated and explored by Judge Guido Calabresi: legal formalism, “law and . . .,” “legal process,” and “law and status.”<sup>107</sup>

I have already stressed the NHSIL’s opposition to legal formalism.<sup>108</sup> However influential legal formalism may have been in the development of the Kelsenian normative approach to jurisprudence, legal formalism lay fallow for most of the twentieth century, only recently to reemerge, especially in the United States, in the fields of contract law, constitutional interpretation, legislation, and even international law.<sup>109</sup> Although it may be hasty to conclude that the NHSIL’s opposition to formalism is complete and true, it can be said fairly that the NHSIL maintained close affinities with the three other principal trends in American legal thought. For example, the NHSIL naturally followed the “functionalist” approach, characterized as “Law and . . .” by Judge Calabresi, which considers the law to be neither independent nor

104. See Reisman, *supra* note 46, at 273-80 (1985).

105. MCDUGAL, LASSWELL & VLASIC, *supra* note 22, at 227.

106. Koh, *supra* note 23, at 2622-23.

107. See Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2113 (2003).

108. Formalism, like any doctrine, has not remained static, but instead has experienced substantial transformation over time. For ideas on the evolution of legal doctrines see Otto Pfersmann, Université Paris I, *The Path of Legal Change and the Doctrinal Paradox* (Nov. 16, 2006) (paper presented at the Legal Theory Workshop of Yale Law School) (on file with author). See generally Neil MacCormick, *Contemporary Legal Philosophy: The Rediscovery of Practical Reason*, 10 J.L. & SOC’Y 1 (1983) (suggesting that legal philosophy scholars should, in the future, reflect on the mechanics of the fact-finding process and focus their research on “practical reason”); Robert S. Summers, *The New Analytical Jurists*, 41 N.Y.U. L. REV. 861 (1966) (discussing the history and various branches of jurisprudence, and speculating as to the future of a “new analytical jurisprudence”).

109. See, e.g., Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity and Authority*, 142 U. PA. L. REV. 549 (1993); John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869 (2002); Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988). Indeed, Judge Calabresi suggests that even Robert Unger of the Critical Legal Studies movement has in essence “appealed for a return to a doctrinalism of the most formalistic sort” by “advocating an approach called ‘deviationist’ or ‘expanded’ doctrine.” Calabresi, *supra* note 107, at 2130 & n.71 (citing ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 15-22, 88-90 (1986)).

autonomous, but rather amenable to illumination by other fields of study.<sup>110</sup> Even though the NHSIL elevated sociology to a favored position,<sup>111</sup> other disciplines, including history, philosophy, psychology, psychoanalysis,<sup>112</sup> and economics,<sup>113</sup> have routinely been brought to bear by proponents of the various iterations of the “Law and . . .” approach.<sup>114</sup> This willingness to enrich legal analysis by reference to other disciplines differentiated the NHSIL from realist theorists like Professor Arthur Corbin, who predicted failure for “those who hope to find answers [to legal problems] in the social sciences.”<sup>115</sup>

Furthermore, the NHSIL was greatly, albeit implicitly, nourished by the Legal Process School, which, after its first efflorescence at Harvard<sup>116</sup> and its expansion at Yale under the influence of Alexander Bickel and John Hart Ely, is currently undergoing a second renaissance in the form of the New Legal Process School. The NHSIL’s methodological proximity to this comparative institutional approach is the outcome of a common concern for transforming the law by selecting the institution most likely to define the norm and to determine the values that orient the legal system. Finally, the NHSIL is not without certain similarities to the fourth and final movement identified by Judge Calabresi as Law and Status, a critical analysis of the way in which the judicial system affects certain categories of people.<sup>117</sup> With the exception of his early studies of property law, McDougal used this approach in an implicit and normative way to optimize recourse to appropriate institutions, thereby promoting human dignity.

110. Calabresi, *supra* note 107, at 2119-20 (noting that advocates of the “Law and . . .” approach seek a “greater role for scholars, and frequently for courts as well, in the criticism and reform of law”).

111. See LASSWELL & MCDUGAL, *supra* note 29, at 11 (“The various emphases subsumed under ‘sociological jurisprudence’ and ‘the sociology of law,’ . . . have had the common aspiration to bring inquiry about law, as well as law itself, into a more realistic relation to the facts of social process.” (citing Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911))).

112. See, e.g., JAY KATZ, JOSEPH GOLDSTEIN & ALAN M. DERSHOWITZ, *PSYCHOANALYSIS, PSYCHIATRY, AND LAW* 3-420 (1967) (attempting to find a definition “of [Freudian] psychoanalysis for law purposes” through juxtaposed analysis of psychoanalytic and legal materials).

113. See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1973); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

114. For an outline of a non-vocational legal education focused on applications of “scientific methods to the study of law,” see Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A.J. 303 (1927).

115. Calabresi, *supra* note 107, at 2121 (citing Arthur Corbin, Retirement Talk Delivered to the Faculty of the Yale Law School (1942)). *But cf.* Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 821 (1935) (sympathizing with Holmes, Cook, Oliphant, Moore, Frank, and Llewellyn, among others, in their “disrespect for . . . legal magic and word-jugglery”—practices that amount to a jurisprudence of “transcendental nonsense”—and describing a “functional” solution as a project of “eliminating supernatural terms” from the legal vocabulary, an effort similar to that which physicists and mathematicians have undertaken in their respective fields).

116. See William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to HART & SACKS*, *supra* note 61, at cxxv-cxxxiv.

117. Calabresi, *supra* note 107, at 2127-29 (gathering and analyzing works of the Law and Organized Labor movement in the 1930s, the Race and Law movement before and after *Brown v. Board of Education*, and studies on sexual orientations following the Gender Studies and the Feminist Jurisprudence movements).

These affinities and external dynamics help to explain how the NHSIL was able to evolve so easily within the field of American legal theory. Both share the same major concerns. It goes without saying, however, that the affinities with the four major movements identified by Judge Calabresi are diverse and uneven. For example, the NHSIL's use of the analyses provided by the Law and Status and the Legal Process movements is limited. Recent developments in the Legal Process movement, however, have enlarged the number of institutions studied, and have considered the contributions of institutions and judges to the protection of societal values.<sup>118</sup> This evolution has given rise to the New Legal Process School, which seems to have more in common with the NHSIL than did the original Legal Process School. Yet the acknowledgment of these affinities does not in and of itself explain how the NHSIL was able to evolve at the nexus of the formalist and the "Law and . . ." trends, an apparently paradoxical nexus that may be explained by the observation that the realists' rejection of Langdellian formalism was only partial. In the strict sense, the NHSIL is a post-Langdellian post-realism. It is here that the explanation for its development appears to be located.

First of all, Langdell draws on both logic and experience and provides a theory of law that is both descriptive and normative.<sup>119</sup> Although he maintained that judicial decisions were the heart of the science of law, his theory is geometrical—"anti-Aristotelian," according to Dean Anthony Kronman<sup>120</sup>—in the sense that he promotes the idea that the law evolves according to a logic inherent in the common law, which holds that conflicts resolve themselves naturally. This Darwinian idea was strongly influenced by the codification movement begun by Jeremy Bentham and John Austin.<sup>121</sup> The principles of the common law, which Langdell believed could only be illuminated by inference as opposed to logical derivation,<sup>122</sup> are organized into a system of rules that have normative value.<sup>123</sup> Refusing to accept the central hypothesis of the common law according to which the law contains more than the typical rationalizations for decisions, Langdell would continue to disapprove of decisions he believed to be pathological. He substituted an historical and inherent logical development for a logic based on praetorian decision, with reliance on a variety of

118. See generally William N. Eskridge, Jr. & Gary Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707 (1991).

119. See KRONMAN, *supra* note 19, at 170-74; Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 1-11 (1983) (discussing Langdell's seminal 1880 work, entitled *Summary of the Law of Contracts*, and Oliver Wendell Holmes's views thereon).

120. KRONMAN, *supra* note 19, at 174-80 (tracing the evolution of the idea of a geometry of law from Aristotle to John Austin and Jeremy Bentham through Thomas Hobbes's canonical *Leviathan* and *A Dialogue between a Philosopher and a Student of the Common Laws of England*); see also Jeffrey Barnouw, *Prudence et science chez Hobbes*, in THOMAS HOBBS: PHILOSOPHIE PREMIÈRE, THÉORIE DE LA SCIENCE ET POLITIQUE 107 (Yves Charles Zarka & Jean Bernhardt eds., 1990); Paulette Carrive, *La conception de la loi chez Hobbes, Bacon et Selden*, in THOMAS HOBBS: PHILOSOPHIE PREMIÈRE, THÉORIE DE LA SCIENCE ET POLITIQUE 305 (Yves Charles Zarka & Jean Bernhardt eds., 1990).

121. See KRONMAN, *supra* note 19, at 180-81.

122. See generally ADOLF REINACH, *ZUR PHÄNOMENOLOGIE DES RECHTS* (1953); Julien Cantegreil, *D'une voie phénoménologique en théorie du droit. Remarques sur le réalisme d'Adolf Reinach*, in LES ETUDES PHILOSOPHIQUES 99, 99-112 (2005).

123. See generally John Langbein, *Blackstone, Litchfield, and Yale: The Founding of Yale Law School*, in HISTORY OF THE YALE LAW SCHOOL: THE TERCENTENNIAL LECTURES (Anthony T. Kronman ed., 2004).

external factors.<sup>124</sup> It is this that allows the judge to derive the “right answer” in different judicial situations.

Karl Llewellyn provides two reasons that together form the missing link in the chain—a link systematically ignored by the formalists and the various strands of the “Law and . . .” movement. Following Jerome Frank, Llewellyn proposed to limit law to decisions made and to exclude the rules intended to govern those decisions.<sup>125</sup> Llewellyn’s proposed limitation on the concept of law was an immensely productive refutation of Langdell’s central idea of a “geometry of law,” which assumed law’s conformity to rules,<sup>126</sup> and which accordingly prevented Langdell from ever fully articulating what the law should be. All that Langdell’s geometry afforded was a system against which the correctness of any judicial decision could be measured. Llewellyn’s opposing conviction—that the “sphere of individual ideals and subjectivity”<sup>127</sup> does not allow for consideration of normative questions with a sufficient degree of scientific rigor—prompted a return to the realist view that no descriptive science of law can mandate how judges should decide cases. Unlike Langdell, Llewellyn distinguishes what the law “is” from what the law “ought” to be.<sup>128</sup> Moreover, unlike the realists, particularly Jerome Frank, Llewellyn does not consider decisions to be purely idiosyncratic, as his empirical studies convinced him that identical situations lead to identical results. Yet it seemed to him that legal science, which had become a science of observation,<sup>129</sup> must take into account knowledge acquired as a result of such contemporary studies. This post-realism, which led him to formulate laws of behavior comparable in rigor to the laws of economics, brought him to embrace the original Langdellian desire for a true science of law. In other words, by accepting Jerome Frank’s realist principles, Llewellyn joined in the spirit of Langdell’s theoretical program, divested of its normative focus.

The 1930s realists shared Llewellyn’s conviction that the definition of law should be limited to decisions. Although Jerome Frank maintained that the decisions of judges did not satisfy the two prerequisites of geometry—independence and determinacy<sup>130</sup>—he continued to hope, along with Llewellyn and the first group of realists, to “increase the ‘actual legal certainty’ of the adjudicative process as a whole.”<sup>131</sup>

We are now able to understand how the two alternative paths of the New Haven School of the 1930s could suggest a way of moving beyond Langdellian geometry. The two post-realist trends—the NHSIL and the Law and Economics School—would thus re-appropriate the Langdellian project and distinguish themselves from Llewellyn

124. See KRONMAN, *supra* note 19, at 181.

125. See Karl N. Llewellyn, *A Realistic Jurisprudence—the Next Step*, 30 COLUM. L. REV. 431, 439-43, 464 (1930); Karl N. Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931).

126. See KRONMAN, *supra* note 19, at 196-97.

127. KARL N. LLEWELLYN, *Legal Tradition and Social Science Method—A Realist’s Critique*, in JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 77, 86 (1962).

128. KRONMAN, *supra* note 19, at 197.

129. LLEWELLYN, *supra* note 127, at 85-86.

130. KRONMAN, *supra* note 19, at 189-93.

131. *Id.* at 193-94 (quoting FRANK, *supra* note 39, at 171).

by developing both prescriptive and descriptive agendas.<sup>132</sup> To paraphrase Dean Kronman, the great unifying feature of “Law and . . .,” the NHSIL, and even Critical Legal Studies,<sup>133</sup> can thus be described as “anti-prudentialist” or “anti-Llewellyan.”<sup>134</sup> All of these schools of thought posit that, along with the tenets of formalism, a normative science makes sense.<sup>135</sup> In their seminal 1943 article entitled *Legal Education and Public Policy*, McDougal and Lasswell refuse to base legal training solely on “legal technicality” that would limit the law to a “closed, automatic, [and] syntactical system.”<sup>136</sup> In their article they called for the study of law to be re-centered on “values” so as to provide rigorous guides for descriptive research.<sup>137</sup> The training that they defined was conceived to allow future lawyers to gain insight into the international legal order in a disciplined manner, rather than calling on past judgments as prescribed by the tenets of the common law.<sup>138</sup> At the same time that it rejected the naïve Langdellian equation of law and geometry and the practical confusion that such an equation engendered between “is” and “ought,” the NHSIL maintained—in a very Langdellian fashion—an ideal of legal science as a policy-oriented framework.<sup>139</sup> Rejecting the traditional science of law for its inability to ground itself on decisions alone, the NHSIL also rejected the New Haven School’s doctrine, and Jerome Frank’s theories in particular, because of their inability to treat decisions scientifically. McDougal and Lasswell’s uniqueness came from their interest in the structural evolution of the law and in structural processes, leading to their rejection of Langdell’s geometry. Rather than reduce judgments to analysis, they would underscore the importance of choices among contested alternatives based on external factors.

The major unifying factor of the Law and Economics School and the NHSIL is found in their common belief that a science of law should be capable of determining with a high degree of accuracy both what the law is and what it ought to be.<sup>140</sup> These

132. Because “Llewellynism” is today a doctrine without disciples, the contours of this doctrine will not be described here; for a thorough explanation of Llewellyn’s approach, see KRONMAN, *supra* note 19, at 214-25.

133. See DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION 82-92 (1997).

134. See KRONMAN, *supra* note 19, at 169, 201 (noting that the realists’ argument for the establishment of a “normative legal science” was part of their overall goal of “restor[ing] the dimension of legal science that Llewellyn had eliminated”).

135. See Calabresi, *supra* note 107, at 2115 n.4; KRONMAN, *supra* note 19, at 168 (emphasizing that the “scientific branch of realism” is an alliance between Law and Economics and Critical Legal Studies).

136. Lasswell & McDougal, *supra* note 41, at 234-35.

137. *Id.* at 206.

138. See *id.* at 266. Arguably, because McDougal and Lasswell implicitly characterize Langdell’s “values” as “legal concepts of high level abstraction,” *id.* at 232, it is impossible for them to develop a normative political science on Langdell’s foundation. However, the creation of a “general political science,” *id.* at 275 n.100, always appeared possible because given a fairly limited number of ultimate values it is logically possible to make arguments both for and against values. Having accepted this premise, McDougal and Lasswell argue that it is possible for an American student to find legitimate reasons to accept the values of individualism and that it is therefore possible to construct a system for the application of these values. *Id.* at 212-13.

139. *Id.* at 265.

140. While this is clear for Law and Economics, it is less so for Critical Legal Studies, even though the latter, like the realists, refused a simple logic of law. See KRONMAN, *supra* note 19, at 167-68. Kronman noted that “[c]ritical legal studies thus has a more ambivalent relationship to prudentialism than does law and economics.” *Id.* at 241. See also ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990).

two doctrines embrace the general project of constructing a systematic theory enriched by their anti-prudentialist conception of “is” and “ought,” and by their confidence in the rationality of the social sciences.<sup>141</sup> This fascinating and unexplored theoretical proximity explains the ease with which the NHSIL, not necessarily on the basis of its own insights, was able to win adherents. But while recourse to the social sciences took place according to a sociological model in McDougal’s writings, for other authors who would form the dominant trend, such as Guido Calabresi, recourse was to an economic model.<sup>142</sup> The economic paradigm, which is even more anti-prudentialist, sought to resolve the questions concerning the normative significance of the principle of efficiency through the most abstract of arguments. It is this theoretical divergence that explains the progressive isolation experienced by the NHSIL, in spite of its proximity to other social-science-based theories. In other words, it is the “process methodology”—and not the NHSIL’s “social ends or policy values”—that explains the paradox of this essential but often neglected school.<sup>143</sup>

The NHSIL’s detractors often emphasized McDougal’s nationalist political convictions or certain anecdotes, but it is clear that the stakes of the NHSIL’s theoretical program were far more complex and were indissolubly linked with American legal theory.<sup>144</sup> It is therefore rather surprising that the NHSIL could benefit from what has been called “French doctrine.” In the final part of this Article, I argue that it is urgent to realize the full potential of this beneficial alliance in the context of the American legal system’s response to international terrorism.

## V. THE FUTURE OF THE NHSIL

*“[T]he necessary conditions for the development of legal technique are still lacking.”<sup>145</sup>*

---

141. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 42-48, 57-60 (1977) (demonstrating that this general project is Langdellian thinking in its purest form); KRONMAN, *supra* note 19, at 176-77 (describing prudentialism as an Aristotelian trait of character akin to practical wisdom, and Hobbesian anti-prudentialism as the substitution of abstract thought for empirically-based understanding).

142. In other words, economist Kenneth Arrow’s scholarship would eventually appear more compelling to American legal theorists than Parsons’s original sociological analysis.

143. Koh, *supra* note 23, at 2620.

144. *Id.* at 2620-21; see also *supra* note 26.

145. KELSEN, *Technique*, *supra* note 3, at 261 (translation by the author). The following quotation from Kelsen’s *Pure Theory of Law* makes plain the incompatibility of McDougal’s belief—that policy science should influence legal theory—with Kelsen’s, namely that jurisprudence should remain uncontaminated by such non-legal considerations:

[The] exclusive purpose [of the Pure Theory of Law] is to know and to describe its object. The theory attempts to answer the question what and how the law *is*, not how it ought to be. It is a science of law (jurisprudence), not legal politics.

It is called a “pure” theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.

HANS KELSEN, *PURE THEORY OF LAW* 1 (Max Knight trans., Univ. of California Press 1967) (1934); see also MICHEL TROPER, VÉRONIQUE CHAMPEIL-DESPLATS & CHRISTOPHE GRZEGORCZYK, *THÉORIE DES CONTRAINTES JURIDIQUES* (2005).

As far as legal theory is concerned, the NHSIL and “French doctrine” represent opposite ends of the legal spectrum. Just as the analysis of American legal theory cannot be understood without reference to Langdell, the French perspective requires an understanding of the ideas of the generation of French civil law experts who came into their own around 1900.<sup>146</sup> In spite of the differences in the details of their theories, the major theoreticians of that time—Raymond Saleilles, François Gény, Marcel Planiol, Adhémar Esmein, and Édouard Lambert—were united in elevating the importance of the judge and limiting his freedom in the realm of subjective interpretation. In their view, the traditional deductive approach based on a variety of legal techniques must give way to an inductive approach in which the meaning of the law is derived from observing the law and judicial decisions, a thesis that Langdell had maintained before them. These theoreticians’ interest in enhancing the role of the judge and in the relationship between judicial decisions and legal doctrine led them ultimately to stress the importance, not of the “jurist” in the broad McDougalian sense, but of “*la doctrine*” in the sense coined by Philippe Jestaz and Christophe Jamin.<sup>147</sup> The major French theoreticians of that time considered the appropriate source of “*la doctrine*” as the sole authority able to express the principles emerging from a careful study of the law and to organize them into a general theory.<sup>148</sup> Whereas in the United States the emergence of Yale Realism ended any idea that the law could be reduced to a few readily-systematized principles, prominent proponents of “French doctrine” would systematically exclude all critical and pluri-disciplinary developments from their research, such as those that defined the evolution of American jurisprudence in the twentieth century and in which the NHSIL had participated.<sup>149</sup>

---

146. See generally PHILIPPE JESTAZ & CHRISTOPHE JAMIN, *LA DOCTRINE* (2004) (framing the historical construction of a French doctrine); Christophe Jamin, *La construction de la pensée juridique française: interrogations sur un modèle original à l'aune de son anti-modèle*, in *L'ARCHITECTURE DU DROIT* 501 (Michel Troper et al. eds., 2006). But see Gérard Timsit, *Éléments pour une théorie des cas extrêmes*, in *POUR UNE THÉORIE DES “CAS EXTRÊMES”* 11 (Julien Cantegreil ed., 2006); Gérard Timsit, *Sur l'engendrement du droit*, 1988 *REVUE DU DROIT PUBLIC* 39 (championing a deliberately less unified understanding of French legal doctrine).

147. JESTAZ & JAMIN, *supra* note 146 (advancing an understanding of “*la doctrine*” that is amenable to elaboration by professors, the members of the Council of State for domestic public law, and the international judge for public international law).

148. The continuation of this trend with regard to compliance with international law is exemplified by Elisabeth Zoller, who notes that “the absence of a theory of remedies makes the unilateral application of international law unjustifiably suspect.” ELISABETH ZOLLER, *ENFORCING INTERNATIONAL LAW THROUGH U.S. LEGISLATION* 1 (1985).

149. Philippe Jestaz and Christophe Jamin have demonstrated this masterfully in civil law, but it is equally valid in domestic public law and international public law. See JESTAZ & JAMIN, *supra* note 146, at 147-57. In the words of Jean-Pierre Cot,

[u]nfortunately, to my knowledge, the dialogue never took place. I have the impression that our community of international lawyers, by its utter indifference to the ideas of [Raymond] Aron, passed up a good opportunity to open the dialogue . . . . But at that time, ‘pragmatic positivism’ objected with a *non possumus* which it considered decisive in any debate between jurists and realists. The jurists simply were not interested.

Jean-Pierre Cot, *Tableau de la pensée juridique américaine*, 90 *REVUE GÉNÉRALE DE DROIT INT’L PUB.* 537, 553 (2006) (translation by the author).

Although the need to go beyond the traditional beaten paths of legal theory is becoming increasingly evident in France,<sup>150</sup> the NHSIL's rule-skepticism and the resulting "negation of international law as a set of obligatory norms" suggest that the NHSIL needs to return partially to what we might call a *European* way of looking at law.<sup>151</sup> Let me be clear: with the McDougalian revolution now in vigor in the American mainstream, the NHSIL alone can no longer claim that "[f]or policy sciences jurisprudence, 'law' is the process through which members of a community seek to clarify and secure their common interest."<sup>152</sup> Since the critical, demystifying work of the NHSIL is deeply entrenched, the NHSIL must now better utilize the "myth of rules" and better articulate and reinforce the relationship between law and rules.<sup>153</sup> On the one hand, it would be dangerous to state, imprecisely, that "[an entity subject to the law] cannot assert as a matter of law that its own political interest is a sufficient ground to deny the application of an accepted rule of law."<sup>154</sup> Even if the idea of law as a body of obligatory rules is a myth, as Michael Reisman has brilliantly demonstrated,<sup>155</sup> the lawyer, and to a certain degree the judge, must function with this myth. Thus, it is a myth that must be constructed from within in order to reinforce the common goal of human dignity. One of the most significant strengths of the NHSIL is its ability to denounce the mythical nature of the rules in international law, while at the same time promoting an effective use of this very same myth. This would appear, in any case, to be the ideal program for what would become the *New New Haven School of International Law*, as I will now explain in the context of an analysis of the United States' legal response to terrorism.

From a European perspective, the United States doctrine on counterterrorism is striking in its parochialism, which is certainly a consequence of its high degree of technicality. Up to now, United States doctrine has concentrated mainly on the new criminal procedures introduced into American law after 2001.<sup>156</sup> As Dean Koh has pointed out, the United States' research agenda has been focused in three areas.<sup>157</sup> First, the promotion of a "constitutional theory of unfettered executive power, based on extraordinarily broad interpretations of both the Article II Commander in Chief Clause and the Supreme Court's decision in *United States v. Curtiss-Wright Export*

---

150. See generally JESTAZ & JAMIN, *supra* note 146 (insisting on legislative inflation, increasing importance of supra-state jurisdictions, jurisprudential development of constitutional law, and new issues of laws).

151. See Cot, *supra* note 149, at 554.

152. Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, in THE METHODS OF INTERNATIONAL LAW, STUDIES IN INTERNATIONAL LEGAL POLICY, 47, 51 (Steven R. Ratner & Anne-Marie Slaughter eds., 2004).

153. In his seminars, Professor Michael Reisman mixes the highly policy-oriented approach of the NHSIL with an extremely precise black-letter law reading of texts and court decisions. Such an approach demonstrates one of the great strengths of the NHSIL—its ability to evaluate the myth system while playing games with it at the same time.

154. Schachter, *supra* note 102, at 272.

155. See REISMAN, *supra* note 80, at 15-36.

156. See generally John T. Parry, *Terrorism and the New Criminal Process*, 15 WM. & MARY BILL RTS. J. 765 (2005).

157. See Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350, 2354-56 (2006).

*Corp.*”<sup>158</sup> Second, the current tendency of the executive to “infringe on civil liberties without any clear legislative statements” authorizing such action.<sup>159</sup> This problem could range from the National Security Agency’s secret surveillance program to the indefinite detention and torture of foreign detainees.<sup>160</sup> Third, the increasing distinction between citizens and aliens, notably Muslim aliens, within American society.<sup>161</sup>

Because courts have adjudicated some claims arising from the effects of these trends in recent constitutional litigation,<sup>162</sup> American academic debates have focused on manifest “errors” in these decisions. Among the “errors” that have been most thoroughly scrutinized are the United States Supreme Court’s use of the *Mathews v. Eldridge*<sup>163</sup> balancing test in *Hamdi* and other courts’ use of a proportionality test in similar cases,<sup>164</sup> and general judicial deference to executive decisions in foreign affairs.<sup>165</sup> To their credit, American academics have sometimes underlined the paradoxical effects of these instances of judicially policed, competency-sensitive cooperation between the executive, legislative, and judicial branches of government in areas of the law unrelated to terrorism.<sup>166</sup> These debates have also raised normative

158. *Id.* at 2355. Compare *Dames & Moore v. Regan*, 453 U.S. 654 (1981) (confirming this theory) with *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). See, e.g., Draft Memorandum from John Yoo, Deputy Assistant Attorney Gen. and Robert J. Delahunty, Special Counsel to William J. Haynes II, Gen. Counsel, Dep’t of Def. (Jan. 9, 2002); Memorandum from Jay S. Bybee, Assistant Attorney Gen. to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep’t of Def. (Jan. 22, 2002); Memorandum from Jay S. Bybee, Assistant Attorney Gen. to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002); see also *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR* 93-96 (1990).

159. Koh, *supra* note 157, at 2355.

160. See Norman Abrams, *Developments in US Anti-Terrorism Law: Checks and Balances Undermined*, 4 J. INT’L CRIM. JUST. 1117 (2006) (summarizing recent developments).

161. Koh, *supra* note 157, at 2355-56.

162. For three occasions on which the United States Supreme Court has ruled on the merits of assertions of unilateral executive power and imposed significant limits thereon, see *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

163. 424 U.S. 319 (1976).

164. See *Hamdi*, 542 U.S. at 529 (“[T]he process due in any given instance is determined by weighing ‘the private interest that will be affected by the official action’ against the Government’s asserted interest, ‘including the function involved’ and the burdens the Government would face in providing greater process.” (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976))); Owen Fiss, *The War Against Terrorism and the Rule of Law*, 26 OXFORD J. LEGAL STUD. 235, 241-45 (2006); Michel Rosenfeld, *Judicial Balancing in Times of Stress: Comparing the American, British, and Israeli Approaches to the War on Terror*, 27 CARDOZO L. REV. 2079, 2079 n.2 (2006) (observing that “the American and British ‘balancing’ approach and the Israeli and British ‘proportionality’ analysis are not completely equivalent, but they largely overlap”).

165. See, e.g., *Arar v. Ashcroft*, 414 F. Supp. 2d 250, 283 (E.D.N.Y. 2006) (noting that the judiciary must be careful not to “threaten our ‘customary policy of deference to the President in matters of foreign affairs’” (quoting *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 348 (2005))); see also Samuel Issacharoff & Richard H. Pildes, *Between Civil Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES L. 1, 5-6 (2004) (questioning whether the American judiciary’s preference for “process-based approaches” to resolution of constitutional claims in times of crisis bespeaks role abdication or practical accommodation).

166. Jeffrey Segal et al., *The Effect of War on the Supreme Court* 1, 16-18 (N.Y. Univ. Sch. of Law, Hauser Global Law Sch. Program, Global Law Working Paper No. 03/04, 2004), available at <http://>

questions, such as how the United States should adapt to this so-called “deference”: Should this judicial posture in any given case be accepted because its impact on future adjudications is likely to be minimal?<sup>167</sup> Or, in contrast, should the conditions under which the judiciary is required to defer to certain executive or legislative actions during short-term emergencies be somehow prescribed by an “emergency constitution,” a discrete framework meant to produce predictable results in similar cases?<sup>168</sup> The stakes in the American “War on Terror” are undoubtedly high and complex enough to cause American academics to focus almost exclusively on the *American* aspect of international counterterrorism.

Michael Reisman’s work on the war on terror illustrates the comparative theoretical strength of the NHSIL to illuminate the United States’ approach by bringing back into the equation a truly global perspective.<sup>169</sup> Reisman explains: “international law affects the shaping of government responses to international terrorism by prescribing generally or particularly the contingencies, procedures, and scope of response—be it unilateral or multilateral—lawfully available to a target; and second . . . exploring the reasons for the rather spotty record of achievement.”<sup>170</sup> Reisman takes into account governments, intergovernmental organizations, non-governmental organizations, and the media.<sup>171</sup> According to him, these are “all the actors who participate in assessing, retrospectively or prospectively, the lawfulness of international actions and whose consequent reactions constitute, in sum, the international decision.”<sup>172</sup> By taking all of these actors into account, he is able to evaluate and elaborate the appropriate responses by targets, “not simply in terms of certain rules that are supposed to form part of a black-letter code of international law, but in terms of the acceptability of those responses, in different contexts, to the contemporary international decision process.”<sup>173</sup> More than any other judge-centered approach or United States-centered analysis, this McDouglian approach is essential when one is “engaged in an ongoing process of inventing futures and developing capacities for ‘proacting’ or ‘prospending’ to them, rather than ‘reacting’ or

---

[www.nyulawglobal.org/workingpapers/detail/documents/GLWP0304Segal.pdf](http://www.nyulawglobal.org/workingpapers/detail/documents/GLWP0304Segal.pdf) (discussing the Court’s role in allocating war powers among the elected branches).

167. See Mark Tushnet, *Defending Korematsu? Reflections on Civil Liberties in Wartime*, in *THE CONSTITUTION IN WARTIME* 124, 136 (Mark Tushnet ed., 2005) (“Judges should refrain from giving in to an understandable urge to make exercises of emergency powers compatible with constitutional norms . . . to avoid normalizing the exception.”).

168. See BRUCE ACKERMAN, *BEFORE THE NEXT ATTACK* 77-121 (2006).

169. The United States could easily mix with the traditional French interest for traditional International Public Law, on issues such as the crucial question of responsibility for private terrorist action. Compare Michael Reisman, *International Legal Response to Terrorism*, 22 *HOUS. J. INT’L L.* 3, 56-57 (1999), with Pierre-Marie Dupuy, *State Sponsors of Terrorism: Issues of International Responsibility*, in *ENFORCING INTERNATIONAL LAW NORMS AGAINST TERRORISM* 3, 3-16 (Andrea Bianchi ed., 2004), and TAL BECKER, *TERRORISM AND THE STATE* 332 (2005) (outlining an interesting causal model to State responsibility for private acts).

170. Reisman, *supra* note 169, at 5.

171. *Id.*

172. *Id.*

173. *Id.*

‘responding’ to a series of actual presents.”<sup>174</sup> Although historical factors explain both the unique status of the NHSIL in American legal theory and its difference from twentieth-century French jurisprudence, it appears that the NHSIL approach on the terrorism question would benefit from further reflection, as is presently under way at Yale and in Europe.

First, the issue of *compliance* with international law is at the heart of the NHSIL’s traditional concern for promoting a law of human dignity.<sup>175</sup> The NHSIL relies on an extension of classical theories of international relations,<sup>176</sup> notably power, coercion, interest,<sup>177</sup> liberalism,<sup>178</sup> and constructivism.<sup>179</sup> By giving new life to classic works from the Legal Process and Transnational Legal Process Schools<sup>180</sup>—defined as both theory and practice with respect to how public and private actors interact in a variety of forums, such as public and private,<sup>181</sup> and domestic and international<sup>182</sup>—jurists would have a better framework for analysis and action with respect to the enforcement of human rights in domestic law, a condition *sine qua non* for the realization of the common goal of human dignity.<sup>183</sup> The work done at the Yale Law School that combines doctrines, an approach to coercive action, and a “blueprint” for political action by decision-makers allows for a more accurate picture of how a complex play

174. *Id.* at 13. See also Michael Reisman, *New Scenarios of Threats to International Peace and Security: Developing Legal Capacities for Adequate Responses*, in *THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS—NEW LAW?* 13, 13-38 (Jost Delbrück ed., 1993).

175. See *INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS* (W. Michael Reisman & Andrew R. Willard eds., 1988); ZOLLER, *supra* note 148; Harold H. Koh, *Bringing International Law Home*, 35 *HOUS. L. REV.* 623 (2003); Harold H. Koh, *The Value of Process*, 11 *INT’L LEGAL THEORY* 27 (2005).

176. See Moshe Hirsh, *Compliance with International Norms in the Age of Globalization: Two Theoretical Perspectives*, in *THE IMPACT OF INTERNATIONAL LAW ON INTERNATIONAL COOPERATION: THEORETICAL PERSPECTIVES* 166 (Eyal Benvenisti & Moshe Hirsch eds., 2004); Kenneth W. Abbott, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 *YALE J. INT’L L.* 335 (1989); Arend, *supra* note 92, at 125-40; Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT’L L.* 503 (1995).

177. See Abbott, *supra* note 176; Kenneth Abbott, *The Trading Nation’s Dilemma: The Functions of the Law of International Trade*, 26 *HARV. INT’L L.J.* 501 (1985); Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 *CAL. L. REV.* 1823 (2002); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 *MICH. J. INT’L L.* 345 (1998).

178. See Slaughter, *supra* note 176.

179. See Arend, *supra* note 92.

180. See *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* (Oona A. Hathaway & Harold Hongju Koh eds., 2005); Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 *YALE L.J.* 1935 (2002); Koh, *supra* note 23; Harold Hongju Koh, *Internalization Through Socialization*, 54 *DUKE L.J.* 975 (2004) (discussing the continued exploration of a “sociological model of sovereignty” undertaken in Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 *STAN. L. REV.* 1749 (2003)).

181. See Monica Hakimi, *The Media as Participants in the International Legal Process*, 16 *DUKE J. COMP. & INT’L L.* 1 (2006) (presenting a McDougalian perspective on the role of media); Koh, *supra* note 175, at 647 (discussing transnational norm entrepreneurs); Cass R. Sunstein, *Social Norms and Social Roles*, 96 *COLUM. L. REV.* 903 (1996) (discussing normative entrepreneurs).

182. See generally Koh, *supra* note 20.

183. See Harold Hongju Koh, *The “Haiti Paradigm” in United States Human Rights Policy*, 103 *YALE L.J.* 2391 (1994) (presenting a canonical example of the Transnational Legal Process); Harold Hongju Koh, *Transnational Public Law Litigation*, 100 *YALE L.J.* 2347 (1991); Koh, *supra* note 20, at 186.

of interactions and interpretations<sup>184</sup> can accelerate the internalization of international norms.<sup>185</sup> The model of interactions postulated by the Transnational Legal Process School is undoubtedly internal to the mythological system, yet it is no less “jurisgenerative”<sup>186</sup> in that it promotes, via certain reinterpretations of rules, the transformation of the body of original rules. The analyses of legal techniques of the Transnational Legal Process School, often grounded in sociology and statistics and focused on human rights and economic law,<sup>187</sup> are thus perfectly suited to the achievement of the policy-oriented goals of the NHSIL.

Nevertheless, the NHSIL must go further. As Michael Reisman has remarked, “many of the international efforts to prescribe appropriate international responses to terrorism have been stalemated by conflicting priorities as to which sanctioning goals should be pursued.”<sup>188</sup> Besides fostering the implementation of minimum international human rights standards, the NHSIL should now tackle—specifically in the context of the fight against international terrorism—the twin tasks of defining and implementing the best values as well as providing individuals with the protection of the fundamental rights accorded to them by their legal order. The lack of consensus or homogeneity on these issues keeps jurists, as McDougal noted, from confining themselves to a technical role and leads them instead to actively seek to clarify and promote these outcomes. The procedures for coordinating values and standards of protection for

---

184. There are recognized ideological differences between the two schools, even if the NHSIL can support commitments on both sides of the political chessboard, as shown by Richard Falk’s work. Recent judicial default judgments in the wake of the 1996 amendment to the FSIA and the Civil Liberty Act have “broadened the scope for judicial action and of potential liability for acts of terrorism.” W. Michael Reisman & Monica Hakimi, *Illusion and Reality in the Compensation of Victims of International Terrorism*, 54 ALA. L. REV. 561, 567 (2003). These judgments,

while producing unprecedented awards, were, in a sense, empty victories. . . . The new wave of international human rights suits in United States courts seemed to have become exercises of judicial therapy for the families of the victims, and, perhaps, for the courts that entered default judgments in their favor. From an international legal standpoint, the decisions had an eerie, autistic national character.

*Id.* at 573. See, e.g., *Anderson v. Islamic Republic of Iran*, 90 F. Supp. 2d 107 (D.D.C. 2000) (allowing for \$24.54 million in compensatory damages and \$300 million in punitive damages to the family of an American citizen who was kidnapped and tortured by a terrorist organization); *Eisenfeld v. Islamic Republic of Iran*, 172 F. Supp. 2d 1 (D.D.C. 2000) (awarding punitive damages in excess of \$300 million to families and estates of American victims of terrorist suicide bombing on an Israeli passenger bus); *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (awarding to the estate of a university student killed in a suicide bomber attack on a tourist bus in Israel over \$227 million, including loss of accretion, pain and suffering, and punitive damages); *Cicippio v. Islamic Republic of Iran*, 18 F. Supp. 2d 62 (D.D.C. 1998) (awarding former political hostages \$9 million, \$16 million, and \$20 million each, with additional award of \$10 million to each victims’ spouse for tortious injuries by a terrorist organization); *Alejandre v. Republic of Iran*, 996 F. Supp. 1239 (S.D. Fla. 1997) (awarding each victims’ estates compensatory damages in excess of \$16 million and \$45.9 million in punitive damages against the Cuban Air Force for the killing of victims flying on a humanitarian mission in unarmed, civilian airplanes); see also W. Michael Reisman, *An International Farce: The Sad Case of the PLO Mission*, 14 YALE J. INT’L L. 412 (1989).

185. See, e.g., Harold Hongju Koh, *Jefferson Memorial Lecture: Transnational Legal Process After September 11th*, 22 BERKELEY J. INT’L L. 337, 339-34 (2004); Koh, *supra* note 20.

186. See generally Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

187. See generally Hathaway, *supra* note 180.

188. Reisman, *supra* note 169, at 7.

various rights<sup>189</sup> require that decision-makers and scholars have a system “for clarifying basic goal values for themselves and others, if they are to test specific doctrines and practices for compatibility with conceptions of human dignity.”<sup>190</sup> Some NHSIL scholars may certainly find the European confidence in the myth of rules somewhat outdated<sup>191</sup> or mythical. Nevertheless, European law and the European conception of public international law provide the NHSIL scholar—charged with “the responsibility of proposing alternative arrangements so that a better approximation of political and legal goals can be achieved in the future”<sup>192</sup>—with a remarkable arsenal of analytical techniques that may protect fundamental rights, produce diversity of values, and advance a common goal. As the following two examples illustrate, the integration of this European perspective proves crucial when the question turns to fostering a “system of world public order, along with the international law that sustains it.”<sup>193</sup>

First, with regard to values, the NHSIL not only must continue “to make as explicit as possible the goal values it postulates,”<sup>194</sup> but also must investigate innovative ways to coordinate rules with a diversity of values under a common goal. Antiterrorist strategies, for instance, have understandably infringed on privacy, mostly, but not exclusively, within the domains of electronic surveillance, the interception of telecommunications, and the collection, storing, and processing of data.<sup>195</sup> While American academic debates have focused on excessive infringements within the United States’ legal order, they have underestimated problems generated by transnational cooperation in these areas. Transnational cooperation in these domains has led to problems like those produced by the Aviation and Transportation Security Act of 2001<sup>196</sup> and the Enhanced Border Security and Visa Entry Reform Act of 2002,<sup>197</sup> both of which compelled airlines to release passenger information. The European Community and the United States entered into international agreements whereby, under the penalty of stricter controls and even fines, all airlines must provide passenger information (the “Passenger Name Record”) to customs agents and American security officials.<sup>198</sup> On May 20, 2006, the European Court of Justice in

189. See generally ANTONIO CASSESE, *INTERNATIONAL LAW IN A DIVIDED WORLD* (1986) (observing distinctions between universal, general, and particular norms).

190. McDougal, *supra* note 4, at 189. Cf. Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 *EUR. J. INT’L L.* 566, 577 (1997) (“[T]here is no given hierarchy between universal and local but which is to prevail is always relative to a measure outside the dichotomy, a measure whose validity is equally relative to what one isolates as the significant elements of the individual instance.”).

191. See Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 *EUR. J. INT’L L.* 113, 117 (noting that notwithstanding diminished European power in the international arena, Europe’s academics still speak “the language of universal international law,” and focus on “*jus cogens* and obligations *erga omnes* as the antidote to a fragmentation of the law into special regimes representing special interests”).

192. Reisman, *supra* note 169, at 6.

193. W. Michael Reisman, Editorial Comment, *In Defense of World Public Order*, 95 *AM. J. INT’L L.* 833, 833 (2001).

194. McDougal, *supra* note 4, at 186.

195. See Emanuel Gross, *The Struggle of a Democracy Against Terrorism—Protection of Human Rights: The Right to Privacy Versus the National Interest—The Proper Balance*, 37 *CORNELL INT’L L.J.* 27, 36-45 (2004) (cataloguing various anti-terror intelligence methods that infringe privacy rights).

196. Pub. L. No. 107-71, 115 Stat. 597.

197. Pub. L. No. 107-173, 116 Stat. 543.

198. Commission Decision 2004/535, On the Adequate Protection of Personal Data Contained in the

Luxembourg declared null and void the accord that had been reached on May 28, 2004, between the European Community and the United States authorizing the release of Passenger Name Records.<sup>199</sup> The court did not find it necessary to examine the other grounds suggested by the European Parliament in its request for the annulment—in particular, whether the agreement violated either the principle of proportionality or fundamental rights protected by Article 8 of the European Convention on Human Rights.<sup>200</sup> The judgment, as rendered, did not create an obstacle to future bilateral agreements between the European Union Member States and the United States. The success of any future agreements of this kind, however, likely depends on reconciling the differences between American and European perceptions of individual privacy and appropriate means of its protection.<sup>201</sup> Robert Post has convincingly suggested that this difference stems from American conceptions of liberty and European conceptions of dignity.<sup>202</sup> Following in his footsteps, James Q. Whitman has gone the furthest in rejecting the shallow universalist intuitionism present in the legal arena to propose the idea of a juridified intuitionism, a differentiation of American privacy law as a body of law caught in the gravitational orbit of values of liberty and a European privacy law as a body of law caught in the orbit of dignity.<sup>203</sup> Antiterrorist measures will not only blur but also deeply transform the distinction between the two orbits of privacy. Whereas Samuel Warren and Louis Brandeis, in their seminal work on the right of privacy,<sup>204</sup> sought to introduce a continental-style right to privacy into American law, it may be asserted, at least for the moment, that antiterrorism is increasingly Americanizing the European conception of privacy. In this respect, the New Haven School would do well to engage more actively in the definition and promotion of rules for the diversification of values.

In a closely-related domain, one concept in particular comes to mind: the “national margin of appreciation,”<sup>205</sup> by which international courts exercise both restraint and flexibility when reviewing the decisions of national authorities. The European Court

---

Passenger Name Record of Air Passengers Transferred to the United States Bureau of Customs and Border Protection, 2004 O.J. (L 235) 11 (E.C.); Council Decision 2004/496, On the Conclusion of an Agreement Between the European Community and the United States Department of Homeland Security, Bureau of Customs and Border Protection, 2004 O.J. (L 183) 83 (E.C.).

199. Joined Cases C-317/04 & C-318/04, *Parliament v. Council*, *Parliament v. Comm'n*, 2006 E.C.R. I-04721 ¶¶ 67-74.

200. *Id.* ¶¶ 50, 61, 70.

201. See Heike Krieger, *Limitations on Privacy, Freedom of Press, Opinion and Assembly as a Means of Fighting Terrorism*, in *TERRORISM AS A CHALLENGE FOR NATIONAL AND INTERNATIONAL LAW: SECURITY VERSUS LIBERTY* 51, 53-60 (Christian Walter et al. eds., 2004) (juxtaposing the European and United States approaches to privacy protection by comparing *Rotaru v. Romania*, 2000-V Eur. Ct. H.R. 156 (holding that storage and use of personal information in a police file, together with refusal of right of correction, amounts to interference with private life under Article 8), with *Whalen v. Roe*, 429 U.S. 589, 598 (1977) (holding state statute requiring that physicians share prescription drug information with the state constituted a “reasonable exercise of [the state’s] broad police powers,” and thus did not violate patients’ constitutionally protected privacy rights)).

202. Robert C. Post, *Three Concepts of Privacy*, 89 GEO. L.J. 2087 (2001).

203. See generally James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151 (2004).

204. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

205. For integration of this idea into a more systematized arrangement, see MIREILLE DELMAS-MARTY, *LES FORCES IMAGINANTES DU DROIT—LE RELATIF ET L’UNIVERSEL* 64-74 (2004).

of Human Rights has applied this doctrine extensively, beginning as early as its 1976 decision in the *Handyside* case in which the Court set forth its conception of the limited power of appreciation of parties to the European Convention on Human Rights, with supervision of the exercise of that power by the Court and the European Commission on Human Rights.<sup>206</sup> Subsequently, the Court indicated several elements to be taken into account, such as the comparative advantage of local authorities, the indeterminacy of the applicable standard, and the nature of the contested interests. Although several recent judgments and opinions of the International Court of Justice—the *Oil Platforms*<sup>207</sup> and *Avena*<sup>208</sup> cases, and the advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*<sup>209</sup>—“highlight the uncertain status of the margin of appreciation doctrine in the Court’s jurisprudence,”<sup>210</sup> this doctrine should be introduced firmly into general international law. Following his emphasis on legal technique, the NHSIL scholar could focus on defining the appropriate norms to which this concept could be applied and the degree of judicial deference to be accorded in the application of the doctrine.

Second, the internationalization of the fight against terrorism<sup>211</sup> has been reduced to a number of domestic matters: the definition of terrorism, the criminalization of terrorism, terrorism financing, participation in a terrorist group, and extradition of suspected terrorists.<sup>212</sup> The real difficulty, however, is that the internationalization of the fight against terrorism is forcing even the most formalist thinkers to reinvent the techniques of rule application so as to accommodate the coexistence of conflicting standards. Research surrounding the implementation of United Nations Security Council resolutions to freeze the assets of alleged terrorists exemplifies the need to invent new ways for the implementation of rules to promote the common goal.<sup>213</sup> If it is obvious that some human rights obligations are opposable to both the United Nations and to its Member States, “it remains to be seen how the UN and its Member

206. *Handyside v. United Kingdom*, 24 Eur. Ct. H.R. (Ser. A) (1976).

207. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 90 (Nov. 6). In his separate opinion, Judge Buergenthal noted that the majority’s opinion represents a regression on the part of the Court from its application of the doctrine in the *Nicaragua* judgment. *See id.* ¶ 37 (separate opinion of Judge Buergenthal).

208. *Avena and other Mexican Nationals (Mex. v. U.S.)*, 2004 I.C.J. 128 (Mar. 31).

209. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136 (July 9).

210. Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 EUR. J. INT’L L. 907, 907 (2005).

211. Jean-Paul Laborde & Michael DeFeo, *Problems and Prospects of Implementing UN Action Against Terrorism*, 4 J. INT’L CRIM. JUST. 1087 (2006).

212. *See* Andrea Bianchi, *Security Council’s Anti-Terror Resolutions and their Implementation by Member States*, 4 J. INT’L CRIM. JUST. 1044 (2006).

213. *See* ERIKA DE WET, THE CHAPTER VII POWERS OF THE UNITED NATIONS SECURITY COUNCIL 352-57 (2004). Following the attacks of September 11, 2001, the Security Council adopted several resolutions calling on all the Member States of the United Nations to freeze the funds and other financial resources of persons and entities associated with the Taliban, Usama Bin Laden, and the Al-Qaeda network. *Id.* The Security Council gave a Sanction Committee responsibility for identifying the persons concerned and for keeping the list up to date; resolutions were put into effect within the European Community by Council Regulations ordering the freezing. *Id.* This approach should be compared with cases in the United States, where the federal government is in charge of defining who is listed. *See, e.g., Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003); *Humanitarian Law Project v. Reno*, 205 F.3d 1130 (9th Cir. 2000).

States should implement SC anti-terror resolutions in a manner that can be deemed consistent with human rights law.”<sup>214</sup> In resolving this difficulty, the NHSIL scholar would have to define the maximum extent of the discretionary powers of the Security Council under Chapter VII of the U.N. Charter after almost two decades of constant expansion.<sup>215</sup> Once the NHSIL scholar comprehends the true extent of the Security Council’s discretion, and recognizes that the Council’s Chapter VII powers to act in diverse arenas create a sort of “legality of exception,” the NHSIL scholar will be ideally positioned to define a standard of review to be applied to Security Council actions. Decision-makers have approached this question under various circumstances, three of which are relevant here. First, in at least one instance, the International Court of Justice prudently declined, or at least postponed, exercise of its power to review Security Council action.<sup>216</sup> Second, in deciding matters relating to its establishment and jurisdiction pursuant to Security Council Resolution 827, the International Criminal Tribunal for the Former Yugoslavia (ICTY) explicitly acknowledged that although the Security Council’s Chapter VII powers are not “unlimited,” they are adequate to establish the Tribunal.<sup>217</sup> Finally, in several cases,<sup>218</sup> The Court of First Instance of the European Communities has, without reference to a specific enabling rule, found itself competent to review the internal legality of Security Council resolutions under a *jus cogens* standard,<sup>219</sup> while at the same time finding that it was not competent to review such internal lawfulness according to either European

---

214. Bianchi, *supra* note 212, at 1063.

215. See Bore Eveno, *Le contrôle juridictionnel des résolutions du conseil de sécurité: vers un constitutionnalisme international?*, 90 REVUE GÉNÉRALE DE DROIT INT’L PUB. 827 (2006); CATHERINE DENIS, *LE POUVOIR NORMATIF DU CONSEIL DE SÉCURITÉ DES NATIONS UNIES: PORTÉE ET LIMITES* (2004). Both authors would likely endorse the Kelsenian idea that in terrorism, as in peace, the Security Council may not limit itself to the application of the rules of international law but should strive to create new ones. See HANS KELSEN, *THE LAW OF THE UNITED NATIONS* 294-95 (4th prtg. 1964).

216. See Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. U.K.), 1992 I.C.J. 3, 15 (Provisional Measures, Order of Apr. 14) (noting that the court’s refusal to grant Libya’s request for provisional measures—based on a recognition that doing so would be prejudicial to the rights enjoyed by the United Kingdom by virtue of the Security Council’s adoption of Resolution 748—did not in any way amount to a ruling on the legal effect of the Resolution 748 and that “whatever the situation previous to the adoption of that resolution, the rights claimed by Libya under the Montreal Convention cannot now be regarded as appropriate for protection by the indication of provisional measures”).

217. Prosecutor v. Tadic, Case No. IT-94-I-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 28 (Oct. 2, 1995). Although the Appeals Chamber’s affirmation of jurisdiction relied on the Security Council’s powers under Article 39 to “determine the existence of any threat to the peace” and to recommend remedial measures, the court also noted that a predicate determination by the Security Council “is not a totally unfettered discretion, as it has to remain, at the very least, within the limits of the Purposes and Principles of the Charter.” *Id.* ¶ 29.

218. See, e.g., Case T-49/04, Hassan v. Council, 2006 E.C.R. II-00052; Case T-253/02, Ayadi v. Council, 2006 E.C.R. II-02139; Case T-306/01, Yusuf v. Council, 2005 E.C.R. II-03533; Case T-315/01, Kadi v. Council, 2005 E.C.R. II-03649.

219. *Yusuf*, 2005 E.C.R. II-03533 ¶¶ 277-82 (defining *jus cogens* as a form of higher international law, inviolable by any state, and inferring that such internationally recognized peremptory norms would limit the binding effect of any Security Council resolution); but see Bianchi, *supra* note 212, at 1068 (noting that undesirable results may flow from a decision-maker’s pronouncement that a Security Council Resolution is contrary to *jus cogens* in any particular case).

Community law<sup>220</sup> or the U.N. Charter.<sup>221</sup> Such a *jus cogens* inquiry would ultimately lead to a definition of the pertinent standards for review: they could promote either a “microconstitutional” sort of review,<sup>222</sup> such as in the *Tadic* case where the ICTY refers to the U.N. Charter as the constitutive act pursuant to which Security Council resolutions are deemed lawful or not, or a “macroconstitutional” sort of review that would refer beyond the Charter itself to international society in its entirety, whose structure would be defined by the Charter, and to norms like *jus cogens*, whose content should then be more precisely defined. With respect to this and other matters, the fight against terrorism requires even the most rigorous legal positivists, in the Kelsenian normativist tradition, to rethink the relationship between different types and orders of rules. At this stage of its own development, the NHSIL should tackle this issue, for only by doing so will it effectively promote the common goals and values it stands for. No other theory can so easily understand how these rules are part of a myth system and simultaneously use and transform this myth system to promote its own goals.

In the same way that the NHSIL took up and furthered the perspectives of the New Haven School of the 1930s, it is likely that a New NHSIL will take up and further the work of the NHSIL. Complying with international norms, unifying the international legal order, and diversifying values are without doubt the major tasks that would face a New NHSIL. While their progress has at times been thwarted before it reached maturity, it is important to remember that these goals are the brainchildren of the classic NHSIL, which had the monumental and historic merit not only of identifying them, but also of making them the center of its activities. It is at this moment, when French doctrine is open to less formalism and to a “second principle of unity,”<sup>223</sup> that the opportunity to open this dialogue—one that was never truly begun—should be seized.<sup>224</sup> After having been manipulated by myth for far too long, as Jerome Frank reminds us, and since “the necessary conditions for the development

---

220. *Yusuf*, 2005 E.C.R. II-03533 ¶¶ 266-69.

221. *Id.* ¶ 270. The general approach taken in *Yusuf* has similarities to the judicial approach described as a “Solange story” by Wojciech Sadurski. See Wojciech Sadurski, “*Solange, Chapter 3*”: Constitutional Courts in Central Europe—Democracy—European Union 1 (European Univ. Inst., Dep’t of Law, Working Paper No. 2006/40), available at <http://ssrn.com/abstract=963757>. The German term *Solange* (so long as) is borrowed from the name of two judgments of the German Constitutional Court: *Solange I*, which held that because European law had not yet reached a level of protection of fundamental rights equivalent to that provided by national constitutional law, the German Court would continue to review European Community law according to the standards of the national Constitution; and *Solange II*, which later held that because such a level of protection had been reached, the Court would no longer review European Community legislation according to national-constitutional standards. *Id.* at 1-2. Sadurski coins the term “*Solange, chapter 3*” to refer to the paradoxical positions taken by the Central and Eastern European courts of countries that have more recently joined the European Union, which seem to return to the reasoning of *Solange I*, despite the fact that *Solange II* has also already been decided. *Id.* at 5-6. While rejecting the *Solange*-type approach of analyzing Security Council action under a European Community legal framework, The Court of First Instance of the European Communities seems to be creating a sort of “*Solange, chapter 4*” by embracing this *jus cogens* standard with no explicit rule to enable such a review. See *supra* note 219 and accompanying text.

222. See Eveno, *supra* note 215, at 835.

223. See Dupuy, *supra* note 14, at 207.

224. This way out of strict formalism is expressed in a great deal of French works, although very differently. See *id.*; MIREILLE DELMAS-MARTY, TOWARDS A TRULY COMMON LAW: EUROPE AS A LABORATORY FOR LEGAL PLURALISM (2002); Jouanet, *supra* note 14.

of legal technique are still lacking,” as Hans Kelsen said,<sup>225</sup> it is now time for doctrine to benefit from and improve the mechanics of rules in light of the McDouglian common goal of promoting values with a view to a respect for diversity.

---

225. KELSEN, *Technique*, *supra* note 3, at 261 (translation by the author).