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Bringing the Insights of Behavioral Science to International Rules

Michael Barkun

I. EFFECTS OF CRUMBLING SECURITY, POWER, AND CONFIDENCE UPON THE ROLES OF INTERNATIONAL LAW (1892-1917)

THE PERIOD on either side of 1900 has exercised a morbid fascination for social and intellectual historians, not simply because historians think in round numbers, but because at the turn of the century fundamental changes in international relations and

in our ideas about them moved to a level of visibility. There remains the feeling that the twenty-five years between 1892 and 1917 witnessed the crumbling of a century of security, power, and confidence.¹ As always, observable changes in political arrangements had their counterparts in the intellectual sphere. However much inter-

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national law may act as a determinant of state behavior, it is also a system of ideas, tied to broad streams of general jurisprudential thought and social philosophy. Through these linkages, law can be anchored in the empirical world through the generalizations men hold concerning human behavior. In other words, international law can potentially be related to the world of sense experience in two ways: through its effect as a factor in the process by which international political decisions are reached, and through the relationships it establishes with the science and philosophy of its time.

On the political level, three developments haunted succeeding decades: the end of a successful European balance of power; the reversal of the "Europeanization" of the world; and the recognition that the state, of all institutions, constituted a threat to human values. It is perhaps immaterial at which point one deems the balance of power to have finally collapsed, whether with the Crimean

¹The atmosphere of *fin de siècle* decadence and impending disaster is admirably conveyed in TUCHMAN, *THE PROUD TOWER* (1966).

War, the Franco-Prussian War, or the First World War.² In any event, its death came by stages, such that it can be said to have operated with genuine efficacy only from 1815 to about mid-century.³ From then on, the ability of the Great Powers of Europe to equilibrate continental politics declined. Alliances ceased to be the products of temporary convenience and became rigidly held commitments. The threat increased that a single state could effectively achieve continental hegemony without the other powers having sufficient sense of community security to do much to prevent it, short of a major war.

Again in retrospect, at the same time Europe was losing control of its immediate political destiny, it was losing its hold over the non-European world.⁴ The ability of a state to preserve its territorial integrity and if possible to extend its reach hinged less and less upon the attenuated mercantilism of the imperialist period. The possession of colonies ceased to be the "idiom" in which effective power was expressed, although the belated imperialisms of the United States, Germany, and Italy demonstrated the hold the idea still had. In fact, what mattered was an industrial and technological base and a relatively large population that could exploit it. The significance of the Russo-Japanese War lay in the fact that Japan established its power position through a manipulation of Western technical skills rather than from a colonial base. England, heavily industrialized from the early nineteenth century, began diminishing in capabilities relative to Germany when, in the latter part of the century, Germany outstripped England as a center of technological innovation.⁵

Finally, whatever else the state was deemed to be, it was thought of as the protector of those within its borders — indeed, as their only protector. This view reflected the reality of a world of states, but it also was reinforced by the energies of European nationalism, the belief that full human potential depended upon the coinciding of national and state boundaries. The rude fact was, however, that the state more and more appeared as the violator of human rights — at least as those rights appeared to Edwardian sensibilities.

² For detailed descriptions of the collapse of the balance of power, see BINKLEY, *REALISM AND NATIONALISM: 1852-1871* (1963); ROSECRANCE, *ACTION AND REACTION IN WORLD POLITICS* (1963).

³ Barkun, *Integration, Organization, and Values*, in *FUNCTIONS OF THE UNITED NATIONS SYSTEM* (Gregg & Barkun ed.) (in press).

⁴ MCNEILL, *THE RISE OF THE WEST* 621 (1965).

⁵ *Id.* at 802.

These violations were perceived, as might be expected, at the margins of Europe, in Belgian colonial policy and Russian and Turkish minority policies.

These three tendencies had immediate international repercussions. But the line between *international* and *intranational* developments is never an easy one to maintain.⁶ A reciprocal relationship usually obtains between activities within and between states. Industrialization and urbanization brought their own problems to the domestic arena, even as they created new international configurations. Consequently, when we look at the nexus between action and ideas, it is necessary that we see changes coming out of both national and international settings. Very real alterations in thinking about international law have been connected as much with internal as with external developments. The paradox is that the structural differences between municipal and international law have not prevented both from being affected by the same social, economic, and political trends.

Late-nineteenth century social and legal philosophy was permeated with a conception of linear human progress. Evolutionary theory of one kind or another was the model taken for human biological and social existence.⁷ It was, in a way, also the behavioral science of its day. That is a matter we might now dispute, since the evolutionary theory of that era strikes us as a support for the maldistribution of national wealth. Nonetheless, it was firmly believed to be the law of human life that societies moved, as it were, ever upward toward more complex and presumably therefore more advanced states of existence. That broad school of thought permeated the legal sphere. It became one of the channels through which the behavioral science of the day entered legal thinking. For this reason, it is difficult to separate social philosophy and behavioral science at that point in time. Certainly, from a purely institutional standpoint there was little in the way of an autonomous behavioral science. But, insofar as men drew distinctions between what was true of the world and what they wished to be true, they saw in evolutionary theory factual propositions about the way of the world. For them, the Western state stood then at the apex of a long human ascent.⁸ It is fair, then, to say that basic attitudes

⁶ See FARRELL, *APPROACHES TO COMPARATIVE AND INTERNATIONAL POLITICS* (1966).

⁷ A. KAPLAN, *THE CONDUCT OF INQUIRY* 384 (1964).

⁸ If there is anything jarring in Sir Henry Maine, it is that, as perceptive as he was,

toward social institutions tended on the whole to reinforce a belief in the essential rightness — indeed, in the inevitability — of a world of competing nation-states. That this world was periodically disrupted by wars was simply taken as evidence on a macrocosmic scale of the struggle for survival that characterized life at all the lower levels.⁹

This view comported fairly well with the observable world, in which the West enjoyed the fruits of technological advantage and where indigenous non-Western cultures and legal systems were effectively suppressed, modified, or ignored. However, reform was in the air. A new empiricism had entered legal calculations, of which — again paradoxically — the evolutionary perspective had itself been a part.

Two major jurisprudential revolutions over roughly the last two hundred and fifty or three hundred years may be discerned. In the first, positivism turned aside from the long, prestigious tradition of natural law. By seeking legal rules in the sovereign's documented pronouncements, the positivists moved legal thought onto a considerably broader stage, since it no longer depended upon the ambiguous testimony of human reason. Disparaged as positivism has been since, it was originally a substantial empirical advance. The second — and more germane — revolution moved beyond documentary evidence of legal rules to a direct examination of the relationship between those rules and society. In this effort, evolutionary theory itself played a part. By justifying law in terms of the development of the larger social framework, law was freed from its formerly exclusive concerns with its own substance and methods. Further, the development of positivism had been quietly accompanied by the separate development of an historical jurisprudence. Writers such as Savigny, Maine (both historical and evolutionary), and Vinogradoff saw law as grounded in and affecting such diverse social factors as land tenure, the kinship system, and religious beliefs.

This historical school was largely confined to Europe, where there seemed to be profit in tracing legal origins. The social prob-

he felt that England and its world represented the pinnacle of human achievement. See MAINE, *ANCIENT LAW* (1861).

⁹ Social Darwinism gave to war a status far higher than it ever received by way of the traditional law of war. HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 170-71 (1955). A contemporary discussion of social evolution suggests that global international law, as a manifestation of international integration, presents law at a higher stage of development than does municipal law. Ginsberg, *Social Evolution*, in *DARWINISM AND THE STUDY OF SOCIETY* (Banton ed. 1961).

lems of industrialized America suggested a different form of empirical jurisprudence, exemplified by Holmes, Pound, and Cardozo. It is unimportant whether one regards them as precursors of "legal realism" or as exponents of "sociological jurisprudence." Both terms describe moods far more than definable schools. What is important is that there was an increasing disposition to combine legal and social calculations, if only because the apparent failure to do so in the past had rendered legislation and court decisions irrelevant to the problems of an industrialized, urbanized society.

These writers, familiar enough, were not explicitly concerned with international law; the problems of municipal law were quite enough to absorb their energies. Their aims, however, proved to be endlessly adaptable. In fact, they, along with the positivists and the evolutionists, were part of the intellectual world of 1892-1917. As such, they in part determined the shifting fate of international law in this period, for the political trends discussed earlier — affecting European equilibrium, the world distribution of power, and the liberties states took with their nationals — created some profound intellectual difficulties.

The first of these was that however much positivists like Austin might wonder whether international law really was law at all,¹⁰ there was always a clear presumption that it existed and played a role. In fact, much of international law was simply a codification of the rules by which European states governed their intercourse. As such, it constituted the "rules of the game" for the balance-of-power system.¹¹ As long as that system prevented a continent-wide war, international law was validated. Even the major breakdown, the Napoleonic wars, only generated the desire to quickly repair the system. But the major escalations we know as the Crimean, Franco-Prussian, and First World Wars gradually eroded the belief that after a conflict, the Great Powers had simply to put the pieces together again and the system would be set right.

Second, the successful operations of the European Concert (itself a suggestive term) depended upon the ability of the powers to communicate among themselves, depended, that is, upon common terms and common values. So long as the arena to be considered was Europe itself or Europe and its colonies and dependencies, this was a valid presumption since there could be effective communica-

¹⁰ AUSTIN, LECTURES ON JURISPRUDENCE, OR, THE PHILOSOPHY OF POSITIVE LAW (1873).

¹¹ M. KAPLAN & KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 30-55 (1961).

tion because there was some degree of cultural homogeneity. However, the slow but steady recession of European power threatened the cultural foundations of international law, the foundation of consensus taken for granted since the Roman Empire.

Third, the procession of human rights violations (more accurately, events perceived as human rights violations) to a significant degree undercut traditional notions of sovereign immunity. Under these notions, the inviolability of a state's territory was indistinguishable from its being a state; it was merely an attribute of the state form of political organization. The gap was small between traditional sovereignty and Max Weber's definition of the state as having the legitimate monopoly over the use of physical force in a territory.¹² Furthermore, a series of normative judgments concerning the moral worth of sovereignty developed which dovetailed with nineteenth century nationalism. It was these concepts which suffered a rude jolt when state behavior exhibited traits at odds with municipal morality, as in colonial policy.¹³

The above three developments were by and large seen as incompatible with a unilinear conception of human progress. The progressive destabilization of European politics, while it could have been seen in the long view as a transition to a yet more advanced form of social organization, instead appeared merely to signal the decay of worthy institutions. Thus the presumably empirical foundation of evolutionary theory seemed less relevant; nor was traditional positivism seen as an answer, for its attitude toward non-legal factors was one of studied unconcern. The law was a system sufficient unto itself, manipulable through the rules of legal logic and analysis and, from the jurist's standpoint, effectively cut off from social, economic, and political developments. The one obvious current of legal thought applicable to the changing conditions of the period was "sociological jurisprudence," which was imprecise and suffered from the general weakness of the behavioral sciences of the time. The greatest limitation, however, lay in the fact that the work of the American sociological jurists took place within the confines of American law; hence it was not immediately recognized as a resource through which international law could be kept in phase with its environment.

The immediate burden of keeping world law in phase fell upon the community of international legal scholars, in some ways one of

¹² BENDIX, MAX WEBER, AN INTELLECTUAL PORTRAIT 390, 417 (1962).

¹³ See generally ARENDT, THE ORIGINS OF TOTALITARIANISM 266-301 (1951).

the most interesting and unusual groups in Western law. It is difficult to think of any other legal area of the West in which the smooth functioning of the legal system depends so much upon the continuity of scholarship. Here, the line between the scholar's and the practitioner's role blurs almost to invisibility. This, of course, results from the customary character of international law, and however much custom is supplemented by treaties, the system seems always to retain its original stamp. In any customary system it is necessary to know what has happened in the past and what is happening in the present. Since rules develop out of accumulated practice, some way must be found to slowly alter the understanding of the rules as practice changes. Therefore, a lag is always possible between behavior and the rules that are supposed to regulate it. In a "unicentric power system"¹⁴ such as a state, the normal mechanisms of legislation act to reduce this gap. In a "multicentric power system" such as international law, the sheer diffusion of power makes legislation on a regular basis an impossibility. Hence, change comes by increments as behavior alters.

Subsequent to the publicists of the seventeenth century, it has fallen upon international legal scholars to perform the function that in non-Western customary systems is frequently performed by the elders of the society.¹⁵ This results from the fact that no legal institution existed under traditional international law to undertake normative revision. As long as behavioral change took place at a relatively slow rate, the mechanism functioned well, but the international perturbations of 1892-1917 exceeded its capacity to assimilate change. The reaction to this perceived crisis situation was a strong drive toward radical institutional innovation. This was, of course, the highwater mark for the movement to make compulsory and universal the pacific settlement of disputes through arbitration. The manifest failures of the balance of power suggested that force be voluntarily read out of international affairs, and this the Hague Conferences of 1899 and 1907 attempted to do.

In a sense, the dilemma can be conceived in terms of commu-

¹⁴ For the dichotomy of unicentric and multicentric power systems, the author is indebted to P. Bohannan, *The Differing Realms of the Law*, in *LAW AND WARFARE* (Bohannan ed. 1967).

¹⁵ L. Bohannan, *A Genealogical Charter*, 22 *AFRICA* 301 (1952). The term "primitive" is the subject of endless misunderstandings. Anthropologists themselves disagree as to the name applied to that class of societies they have generally examined. "Primitive" seems still to have a considerable durability, particularly in the literature of legal anthropology, and it is herein used solely to denote the subject matter of that literature.

nications. Elaborate institutional arrangements were not required when nations shared a common set of values, even if those values dealt only with stability and the preservation of the status quo. Consensus on the need to maintain international equilibrium allowed policy-makers, albeit within limits, to correctly predict what their counterparts in other states would do in particular situations. Indeed, when international law has functioned best, it has served as a predictive device, the imperative that "States ought" being translated into the forecast that "States will." This shared predictive apparatus was buttressed by the communications network of traditional bilateral diplomacy, occasionally and in extraordinary circumstances further supplemented by multilateral diplomatic congresses.

Thus, the world upon which international law had been predicated since the Renaissance was perceived to be at an end, though it would be foolish to pretend that historical boundaries can be neatly drawn. The attempt to restore its efficacy through arbitration agreements masked the fact that the sources of future development were even then growing within the embrace of municipal law. It proved to be the vague but more viable concepts of "sociological jurisprudence" and "legal realism" that brought international law again into phase with the environment it sought to regulate.

II. SOME OF THE FIRST RESULTS OF THE SHIFT TO INTERDISCIPLINARY ANALYSES (1967)

A half-century has now elapsed since the aforementioned transitional period. With this passage a measure of disillusionment has come,¹⁶ for the expectations aroused by arbitration, the World Court, and, for that matter, the League of Nations and the United Nations proved impossible of fulfillment. In part this results from the excessive desire for quick and substantial accomplishments, but a contributing factor is that the more explicitly legal institutions were constructed in frequent disregard for the demands of their environment. Sociological jurisprudence taught few precise lessons, but one was certainly that legal institutions draw support from their immediate milieu. This marked a reaction from the Austinian premise that a legal institution prospered precisely by virtue of its ability to impose its will on the world outside it.

In fact, even within municipal law, the role of physical sanc-

¹⁶ STONE, *THE QUEST FOR SURVIVAL* 8 (1961).

tions is still frequently overemphasized.¹⁷ Consensus and acquiescence have surely played a substantial role, although their operations are less strikingly observable. The frequency of mass disobedience in otherwise stable societies and of competing pretenders to sovereignty in less stable ones¹⁸ establish the point that force is but one of a repertoire of techniques and by no means the single most important one. It is, at least in principle, possible to centralize physical coercion in a state system; that is one way of defining "state." Contemporary political science makes clear that this is merely an ideal type and that in practice even a state concedes often substantial power to non-governmental groups and institutions.¹⁹

If the foregoing is true of the state, it is all the more true of international relations, lacking even the mythology of centralization. International relations is a "multicentric power system,"²⁰ that is, power is widely distributed through it, such that a hierarchy of command is not even in principle possible. Even in the eras of great multinational empires, the global distribution of power always made centralization an impossible dream. The world politico-legal system has never been the state writ large. Rather, it has resembled more than anything else the stateless societies of anthropological literature.²¹

International law continues to operate in an environment different from that of municipal law because the distribution of power is different. Whether the difference is one of degree or of kind, the maxims and generalizations of municipal law have a diminished utility in the refractory international arena.²² Nevertheless, one observation made of state law can equally be made of international law — it enjoys a reciprocal relationship with the society in which it is embedded. The more we understand that society, the more we know about legal potentialities and limitations. In the past, as we have seen, empirical knowledge of the social framework entered,

¹⁷ This theme has been developed by H. L. A. Hart in HART, *THE CONCEPT OF LAW* chs. 1-4 (1961).

¹⁸ BRINTON, *THE ANATOMY OF REVOLUTION* 139-44 (1952).

¹⁹ For discussions of pluralism in American society, see DAHL, *A PREFACE TO DEMOCRATIC THEORY* (1953); TRUMAN, *THE GOVERNMENTAL PROCESS* (1960).

²⁰ See note 14 *supra*.

²¹ The structural similarities between international and primitive societies are described in Barkun, *Conflict Resolution Through Implicit Mediation*, 8 *J. OF CONFLICT RESOLUTION* 121 (1964); Masters, *World Politics as a Primitive Political System*, 16 *WORLD POLITICS* 595 (1964).

²² Refractory, when used to describe a society or political system, means that for every function a corresponding institution exists. *International Relations as a Prismatic System*, in *THE INTERNATIONAL SYSTEM* 149 (1961).

as it were, by osmosis, from the rudimentary behavioral science of the day. In part, this was due to the state of knowledge at the turn of the century and to the vagaries of institutional boundaries, for only in civil law countries did law and the behavioral sciences co-exist within the same faculties.²³

Today the interchange of knowledge and ideas between international law and the behavioral sciences benefits from the growth of international relations theory and the gradual blurring of boundaries among disciplines. By and large, international relations theorists have not been explicitly concerned with law,²⁴ but they have been vitally interested in establishing behavioral regularities, which is to say, law-like behavior. Consequently, some of the most advanced theory, particularly of systems analysis,²⁵ is predicated upon the belief that states interact with each other in routinely patterned fashions, even though from time to time the patterns change. The idiom of the legal literature is not itself utilized, but knowingly or not, these writers have come to grips with some basic jurisprudential questions: Why do states behave as they do? Is obedience to norms in a state's interest? How do norms develop? Another body of literature focuses on the processes of bargaining and negotiation, suggesting that scarcely visible mechanisms for peaceful accommodation exist outside of international legal institutions and frequently even outside of regular diplomatic channels.²⁶ When the latter are nonexistent or inefficient, the actions of states themselves become the message-carriers of international communications.

Reality is a seamless web; hence the division of scholarship into autonomous disciplines is an admission of our very human limitations of perception. We can only see a limited segment of the world at any one time and never seem to grasp fully its underlying unities. Unable to take the world in as a totality of interrelated parts, we concentrate on "disciplines," sectors of it, in the hope that thereby knowledge can be made accessible. But disciplinary boundaries must constantly alter to keep pace with extensions of human knowledge. The division of the behavioral sciences into disciplines and the division between behavioral sciences and international law,

²³ Villey, *Law and Values — A French View*, 14 CATHOLIC U.L. REV. 158 (1965).

²⁴ An obvious and eminent exception is Morton A. Kaplan, whose theoretical framework guides M. KAPLAN & KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* (1961).

²⁵ E.g., the work of Morton Kaplan, Richard Rosecrance, and Charles McClelland.

²⁶ E.g., IKLE, *HOW NATIONS NEGOTIATE* (1964); SCHELLING, *THE STRATEGY OF CONFLICT* (1960).

rests upon the fiction that the world is divided in the same manner as scholarship, *i.e.*, that there are discrete mutually exclusive sets of phenomena corresponding to each developed field of study.

As soon as we confront the contemporary relationship between the behavioral sciences and international law, we simultaneously reach the question of disciplinary boundaries. The question posed until very recently was, What have the social sciences to contribute to international law? Posed in this starkly utilitarian form, the query often elicited uncertain, defensive replies. However, the more we learn about the reasons that academic disciplines take on particular institutional forms, the more irrelevant the question appears. In the first place, individual disciplines such as political science or sociology are often unsure of their own boundaries.²⁷ Second, how meaningful is it even to speak of "the behavioral sciences"? At best, the phrase is definable in terms of how it is actually used or in terms of often irrelevant indices, such as the content of pedagogy.

In other words, the boundaries that are seen to divide one behavioral science from another and the collectivity of behavioral sciences from international law are largely matters of convention, and conventions change. For those working on the frontiers of any discipline, boundaries become less and less relevant. Over the last few decades the systematic study of human behavior has made the goals of sociological jurisprudence more than mere good intentions. It is now clear that disciplines are not distinguished by the fact that each studies different "things." The problems of international order are now seen to cut across disciplines, producing an interdisciplinary community of scholars from international law, international relations, sociology, anthropology, and economics. The greater the sense of common interest, the more likely it is that we shall have something like a complete picture of the international environment, what might be called an "ethnography" of international relations.²⁸

In retrospect, the absence of a clear understanding of the law-society relationship rendered international law vulnerable in the pre-World War I period and the problems beginning to appear at that time have understandably assumed greater proportions since. International politics has been globalized to such an extent that its

²⁷ CHARLESWORTH, A DESIGN FOR POLITICAL SCIENCE: SCOPE, OBJECTIVES, AND METHODS 1-17 (1966).

²⁸ SNYDER & ROBINSON, NATIONAL AND INTERNATIONAL DECISION-MAKING (1961).

non-European manifestations are no longer simply extensions of European rivalries. As Western influence recedes, the world assumes once again its multicultural appearance.²⁹ The legal consequences of this are considerable, for a postulate of international law has always been cultural homogeneity. The experience of multicultural states indicates that a common legal system either arises out of common patterns of behavior across cultures or it is imposed by force. There is a dilemma inherent in these alternatives, for the former results in a set of norms far more rudimentary than proponents of international order have traditionally desired, while the latter is a structural impossibility, given the configurations of international relations. There has been an evident time-lag between international law created in a culturally homogeneous setting and the current reality of a multicultural world. If, indeed, law depends upon consensus more than upon force, this is a problem not easily set aside.

Thus, the socio-political changes implicit in the world of 1892-1917 have created needs for new legal techniques. The ability of international law to cope with a rapid rate of change has never been great, but devices have arisen from time to time to ease its passage through the transitional periods and to assure its future smooth functioning. Two have already been alluded to: bilateral diplomacy through resident representatives, and the community of legal scholars.³⁰ The first solved a pressing communications problem created by the Renaissance world of states closely impinging upon one another.³¹ The treatise writers also formed an element in a communications system, for they integrated current information about state practice with an ongoing legal literature. But both were predicated upon a relatively leisurely pace of events, when messages could be sent back and forth between governments and scholars might reach a consensus concerning change in international customary law.

Present rates of international interaction preclude full reliance upon the classical diplomatic-legal apparatus. We now see the growth of a supplementary, multilateral apparatus centered in in-

²⁹ A recent survey of the business of the World Court vividly demonstrates that independent non-Western states wish to disengage themselves from Western values and institutions when these seem to threaten indigenous cultures or place them in a subordinate position. Coplin, *The World Court in the International Bargaining Process*, in *FUNCTIONS OF THE UNITED NATIONS SYSTEM* (Gregg & Barkun ed.) (in press).

³⁰ See text accompanying note 15 *supra*.

³¹ MATTINGLY, *RENAISSANCE DIPLOMACY* 55-70 (1955).

ternational organizations. The genuinely revolutionary nature of international organizations may not lie in their presumed function as catalysts of international political integration,⁸² but rather as a means of pulling together norms and actions. Certainly it is the most far-reaching development in international discourse since the resident ambassador. The ability to conduct international diplomacy quickly among all of the relevant groups of governments suggest a communications device at the level of efficiency that political developments demand.

If historical precedent is any guide, major changes in diplomatic procedures bring with them major procedural and substantive changes in international law. Resident ambassadors required a set of rules by which their work would be protected and routinized.⁸³ It is also fair to say that in less precise terms this diplomatic revolution stimulated a general expansion of the legal corpus simply by expanding international interactions. No doubt the relationship was reciprocal: resident ambassadors were necessary *because* interstate contacts increased. But they also were causal factors, leading to new types and magnitudes of commercial, cultural, and political contacts. Indeed, the breach of diplomatic relations itself became an index of international tension.

Contemporary multilateral diplomacy takes four principal forms so far as law is concerned: (1) there is a developing law of international organizations themselves,⁸⁴ comparable to the earlier law of diplomacy; (2) increasingly frequent use is being made of multilateral treaties, since the communications network now makes this feasible;⁸⁵ (3) the aggregate total of diplomatic transactions has increased, and this expansion of communications permits the somewhat more rapid revision of customary law;⁸⁶ and (4) improved means of gathering and processing information on state behavior and attitudes has led to a major attempt at the codification of international customary law through the International Law Commission of the General Assembly.⁸⁷ In other words, the problems of international law are more and more seen to be *informational* problems:

⁸² Barkun, *supra* note 3.

⁸³ See MATTINGLY, *op. cit. supra* note 31, at 101-07.

⁸⁴ BOWETT, *THE LAW OF INTERNATIONAL INSTITUTIONS* (1963).

⁸⁵ Rohn, *Institutionalism in the Law of Treaties: A Case of Combining Teaching and Research*, 1965 PROCEEDINGS AM. SOC'Y INT'L L. 93.

⁸⁶ See Singer & Small, *The Composition and Status Ordering of the International System: 1815-1940*, 18 WORLD POLITICS 236 (1966).

⁸⁷ Hoyt, *The Contribution of the International Law Commission*, 1965 PROCEEDINGS AM. SOC'Y INT'L L. 2.

What do we know about the international environment? How can that situational knowledge be translated into legal terms? How can rapid environmental change be reconciled with the incremental change of customary international law? These problems are neither purely "legal" nor purely "sociological," and to so categorize them would be to miss the essential common purpose of lawyers and behavioral scientists.

It is in the nature of all legal systems to resist tampering. Whether directed by statutes, past court decisions, codes, customs, or a combination of these, law looks simultaneously forward and back. The necessary element of temporal continuity takes on the appearance of an obstacle when events themselves create discontinuities. Law in general assumes that past, present, and future will differ from each other only in marginal respects. Law itself is presumed to help assure that change does not get out of hand. Even in municipal systems where law takes an innovative role, the innovation only affects small sections of the law at any time, leaving the body of it intact. Consequently, the legal system always appears at a disadvantage when societal change begins to overwhelm it. That is what has happened in international law since the late nineteenth century. Through a new capacity of the international legal system to collect and absorb new data about its environment, it may well be possible to bring the "is" and "ought" of international relations once more into meaningful juxtaposition.

III. COMMON VALUES AS THE BASIS FOR ONE OR SEVERAL "INTERNATIONAL LAWS" (1968-1992)

It is a perilous business to gaze into the future, whether one looks one year or twenty-five years ahead. Consequently, it is well to make clear at the outset what can and cannot be said predictively — the more so because the behavioral sciences speak so often about the dual tasks of explanation and prediction. It is one thing to say that if certain circumstances occur, certain other events or characteristics will be observed, and quite another to trace the outlines of events at some specified future time. In principle, explanation of the first variety need not refer to future events at all but can be used to "predict" events in the past, so-called "retrodiction."³⁸ To say "if this, then that" is simply to assert an association between one circumstance and another, hoping always that the association

³⁸ A. KAPLAN, *op. cit. supra* note 7, at 349.

is sufficiently general so that it will hold true in the future as well as in the past and present.

What follows is the second type, and it is in the nature of a forecast, not a scientific prediction,³⁹ or, to use Bertrand de Jouvenel's vivid phrase, an exercise in "the art of conjecture."⁴⁰ Hopefully, it is conjecture grounded on some sound picture of the present. In any case, we shall be looking at some problems implicit in the earlier sections, along with some educated guesses about the paths international law and the behavioral sciences are likely to take over the next quarter-century. At best, it is possible only to chart some "alternative futures," by no means exhaustive of future potentialities, but indicative of the configurations we can perceive in a state of frustratingly incomplete knowledge.

One problem posed at the turn of the century and manifestly present now, still goes in search of an answer. That is how to cope with the increasingly multicultural character of international relations. It might well be argued that the paraphernalia of multilateral diplomacy cannot survive it any better than the World Court, that institutions share vulnerabilities, and that the hopes expressed for multilateral communication require a level of understanding not yet present. It is, however, also suggested that international organizations themselves socialize states to a common system of values.⁴¹ Thus, international organizations, by providing opportunities for diplomats to function together, develop in their participants a vested interest — both material and emotional — in a minimal level of international amity. The United Nations proper is then differentiated from the World Court because it has provided interaction opportunities which the Court has not. Then, too, the same states that interact organizationally may also pursue economic and social ties.

This is surmise; the balance is not decisively tipped in either direction. There is much to be said for a healthy skepticism with regard to institutional potentials.⁴² Of all areas of international relations, diplomatic norms seem the lowest common denominator

³⁹ See generally Sibley, *The Limitations of Behavioralism*, in *THE LIMITS OF BEHAVIORALISM IN POLITICAL SCIENCE* 68, 83-87 (Charlesworth ed. 1962).

⁴⁰ DEJOUVENEL, *THE ART OF CONJECTURE* (1967).

⁴¹ Alger, *Decision-Making Theory and Human Conflict*, in *THE NATURE OF HUMAN CONFLICT* 274 (McNeil ed. 1965).

⁴² Generally, the more complex a society, the more varied and complex its institutions. The failure to recognize the difference in complexity between international and national societies has led to the construction of elaborate but poorly based international institutions.

with the ability to bridge considerable cultural gaps. The possibilities thus are twofold. The first is that international organizations and multilateral diplomacy may in fact generate a world political culture sufficiently strong to supplant the earlier one provided by European expansion. The second, and less remarked upon, possibility is that in the future it will no longer be accurate to talk about international law in the singular but of international *laws*. We have since the Middle Ages been in thrall to the ideal of global law, transmitted from the Roman Empire. There has been the persistent image of a golden age to be recaptured when Europe, the "known world," was one. In such diverse forms as the Roman Empire, Christendom, the Holy Roman Empire, natural law, and international law, this ideal has remained alive, and traditional international law has always been assumed to be globally valid.

As difficult as it is to wrench free from a concept as elevated as this, it seems necessary that over the next few decades we will have to do so, should the current international institutional apparatus prove unable to deal with cultural diversity. The possibility therefore exists that some areas of international law — *e.g.*, diplomatic representation — will remain virtually global in extent, but in addition to these there can be regional international legal systems, some of which may overlap. A world of "diverse public orders"⁴³ repays empirical relevance for additional complexity. It also suggests that the traditional division between international and comparative law may not in the long run prove tenable. We may find it necessary to conceive international law as being at least in part culturally determined, not the product of a single value consensus or of unaided human reason. Wherever states habitually interact, *an* international law will develop. From the standpoint of the behavioral sciences, the resources with which to understand this kind of world are meager. It requires a law-mapping, the division of the earth's surface into legally homogeneous regions, that has yet to be systematically undertaken.⁴⁴ A world of diverse orders also suggests that for the future it may prove disadvantageous to deal separately with states' internal and external affairs. Already, political scientists find it less and less meaningful to speak of discrete fields of "comparative politics" and "international relations." Surely domestic developments constrain or liberate a government in

⁴³ See McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959).

⁴⁴ One of the few systematic common law attempts to do so is WIGMORE, *A PANORAMA OF THE WORLD'S LEGAL SYSTEMS* (1928).

its conduct of foreign relations, just as international relations determine the domestic allocation of resources, the degree of permissible dissent, and political stability.⁴⁵

We thus return to an idea touched upon earlier,⁴⁶ that the flow of ideas about law is often across rather than within conventional lines. Calls for "sociological jurisprudence" and "legal realism" were made in response to the internal problems of industrialized societies, yet they in time were extended to international law. For example, the growing international law of human rights would be literally inconceivable without prior extension of protections within municipal legal systems. There is a spillover effect at work, a transfer of norms from the intrastate to the interstate sphere. This may allow for the accurate forecasting of: (1) shifts in the boundaries and content of global and regional international legal systems; (2) opportunities for planned international legal change; and (3) international legal requirements. Further, the socialization potential of international organizations and of communications media might in certain situations produce a degree of world cultural "levelling"; industrialization can reduce economic and political discrepancies;⁴⁷ and, finally, if regional legal systems are found to be divided from one another along cultural, economic, or political lines, it may be possible to discover *internal* trends which presage either the merging or fissioning of systems. The present crisis of cultural diversity could have been predicted in this manner. We are now prone to see customary law as the outgrowth of behavior.⁴⁸ Without denying the basic truth of this assertion, additional factors concerning the internal characteristics of the states involved might have to be added before we have a full understanding of "norm-building" situations.

As we have seen, attempts to consciously manipulate the international legal system have achieved mixed results. More than brilliant legal draftsmanship is necessary for success. Even genuinely innovative aspects of the United Nations system, such as the International Law Commission, are in a constantly precarious position. Nonetheless, fuller knowledge of the law-society relationship can allow the exploitation of certain leeways. In a sense, it has always

⁴⁵ On the relationship between internal and external conflict, see Rummel, *Testing Some Possible Predictors of Conflict Behavior Within and Between Nations*, 1 PEACE RESEARCH SOC'Y INT'L PAPERS 79 (1964).

⁴⁶ See text accompanying note 28 *supra*.

⁴⁷ The economic and social conditions for democracy are analyzed in LIPSET, *POLITICAL MAN* 45-96 (1960 ed.).

⁴⁸ GOODENOUGH, *COOPERATION IN CHANGE* 254 (1963).

been possible to achieve modest conscious legal changes through treaties.⁴⁹ So long as these remained bilateral instruments, the areas they covered were small. Multilateral changes in legal relationships, however, demand a fuller knowledge of what can and cannot be accomplished outside the dominant customary framework. It is not always realistic to expect states to support internationally what they do not acquiesce in domestically. Since this is the case, it may well turn out that in certain substantive areas attempts at conscious legal change have been overly ambitious, while in others the system may be considerably more tolerant of conscious alterations.

In light of the fact that internal characteristics determine what a state can and cannot do vis-à-vis other states, it ought to be possible to gauge international legal needs in advance. For example, Western Europe after World War II was ready for a high degree of economic integration, with a correspondingly complex system of international legal regulation; it does not now seem ready to carry this integration into the unambiguously political sphere.⁵⁰ If the latter forecast is true, further attempts at European integration would be temporarily fruitless. In any event, the readiness of groups of states to form new legal relationships may well be dependent on internally generated capacities to enter into ties with others. This suggests that any anticipation of future legal needs is dependent upon recognition of the tie between internal politics and law on the one hand and international politics and law on the other (again, maintaining the heterodox position that international law need not presume to global validity).

Those customary legal systems that work best are those that need to change the least. That is why, despite the structural similarities between primitive and international politics, primitive law seems to function so much more efficiently than its international counterpart. International law is likely in the immediate future not to be able to return to any imagined past of unity and global incremental change. Whatever the nobility of the motives behind them, attempts to centralize legal decision-making have largely failed, for it is impossible to centralize decisions in a system without a center. The United Nations has functioned intermittently for the purpose of achieving consensus and exchanging messages but hardly after the manner of a national government. Since our abil-

⁴⁹ See generally Rohn, *supra* note 35.

⁵⁰ See Deutsch, *A Summary Report, Integration and Arms Control in the European Political Environment*, 60 AM. POL. SCI. REV. 354 (1966).

ity to deal with international order in this conventional way is so limited, it seems prudent to accept rather than fight against the structural constraints of international relations. Consequently, the time may be coming when we must either retain our attachment to global law and accept its immediate unattainability or abandon it in favor of normative decentralization that can achieve success in circumscribed geographical and substantive areas.

It has often been said that nations can accept all manner of laws that do not affect their "vital interests." Another way of putting it is that "non-political" laws are the only ones that are politically palatable. Laws regulating international economic processes have been among the most long-lived and successful, perhaps for this very reason. Is it likely that international law of this type will expand or contract over the next twenty-five years? But when is law "non-political"? For a long time, after all, American constitutional law was thought to inhabit a realm above politics. From a rule-of-thumb standpoint, we say that international law that is readily accepted is non-political and that whatever is controversial is political. In other words, the test in practice is agreement rather than substantive characteristics of particular rules. This suggests that there is a flexibility available in the "politicization" of rules of law.

Rules can be given a non-controversial appearance when legal questions hinge on technical expertise. This is familiar enough in American law, with the increasing use of expert witnesses. It is likely to increase also in international law. This is one point at which technological change reinforces rather than undercuts legal efficiency. More and more conflict situations depend — or, more accurately, are perceived to depend — upon the judgment of non-lawyers. The "depoliticization" of legal problems occurs when the legal corpus itself and its manipulative techniques are deemed insufficient for a solution, and when the parties both agree that the determinative facts and decisions lie in non-legal areas. The role of the expert here is in general an unstudied one,⁵¹ perhaps because in a society of experts the phenomenon is taken for granted. In any event, the physicist becomes a significant legal actor when his opinion is sought on the provisions of a disarmament treaty, just as the psychiatrist has been in municipal legal systems. The effect of deference to the opinions of experts is to blunt controversy. The conversion process at work makes the lawyer into simply another

⁵¹ But see Kelly, *The Expert as Historical Actor*, 92 *DAEDALUS* 529 (1963).

layman and turns legally conceptualized issues into problems susceptible of non-legal, usually scientific, forms of analysis.

Again, we see the transfer from municipal to international law, the growth of new forms of accepted evidence, and new reliance on non-legal experts in national contexts, followed by their adoption in international contexts. The entrée they have had into the courts has been in the order in which their disciplines have achieved society's respect, beginning with the physical and life sciences and eventually including the behavioral sciences, beginning with economics and psychology and only in recent years extending to sociology and political science. Now, obviously the transfer to the international sphere which we are likely to witness will work some changes in this process. The major arena of public international law is diplomacy, not the courts. Thus it is much less easy to measure the ingress of non-legal experts into the system, for they make themselves felt throughout the policy-setting process.⁵²

It is fair to say that the role of the expert will be more prominent in international than in national law. Because power is diffused internationally, no single state or institution has been able to make normative choices that all other states regard as binding. In the absence of true legislation, the ability to make *apparently factual* choices becomes significant. He who has it within him to say what *is*, thereby determines in large part what *ought* to be, for he determines which customary rule is to be invoked. States willingly bow to objective knowledge where they would never dream of submitting to the mere "national interests" of other states. It is likely, then, that over the next few decades behavioral scientists, already receiving a hearing in some national courts, will become increasingly prominent in the shaping of attitudes toward international rules of conduct. Inevitably, however, the insertion of behavioral science expertise into the international legal process will assume a form different from that in municipal law, for more than an alteration in evidentiary practice is required. It is unlikely that international tribunals will, over the next quarter-century, assume a position substantially more prominent than the one they presently occupy. What is likely is that new kinds of data will enter the policy-making process.

It is unduly arbitrary to draw a sharp line between policy and law, for law is policy, expressed in a technically precise manner in order to achieve predictable future behavior in oneself and others.

⁵² See WHITE, THE USE OF EXPERTS BY INTERNATIONAL TRIBUNALS (1965).

Consequently, the addition of behavioral science materials and personnel at policy-making levels in no way limits their legal effectiveness.

Furthermore, it should in the future be possible to predict within tolerable limits the kinds of rules different states are likely to observe under stated circumstances. If it is impossible to engage in experiments upon the substance of international relations to make such determinations, the technology of simulation provides a promising substitute.⁵³ The inability to accurately predict the success of international legal institutions turns out not to be an absolute limitation. While states do not lend themselves to the experimental manipulations of the behavioral sciences, "surrogate international systems" do. In effect, we can create operating miniatures of international relations in the laboratory, incorporating premises previously culled from direct observations. Utilizing either individuals in the role of decisions-makers or computers manipulating information in a like manner or perhaps through a combination of the two, the patterns of international conduct can be represented with a strikingly high degree of verisimilitude. To the present time, simulation techniques have been taken up for their ability to illuminate economic behavior, to study markets; national politics, to chart the course of political campaigns; pedagogy, to stimulate student empathy with policy-makers and to sharpen the judgment of policy-makers themselves; and international relations research, to develop and, hopefully, to test hypotheses concerning international politics.

As more and more explicitly legal elements are built into international simulations, it will become feasible to answer some currently obscure problems in the gray area shared by law and politics: What constraints does international law place upon national policy decisions? In what situations is international law most meaningfully invoked? Are there areas of state behavior amenable to legal regulation which have hitherto been ignored? The meshing of disciplines which this portends will eventually produce a radically altered concept of international law. In the past, international law was defined solely in terms of a clearly bounded field of study, rather than in terms of certain patterns of behavior. Conversely, political scientists, whenever they studied constraints upon state be-

⁵³ See generally GUBTZKOW, *SIMULATION IN SOCIAL SCIENCE: READINGS* (1962); GUBTZKOW, ALGER, BRODY, NORTH & SNYDER, *SIMULATIONS IN INTERNATIONAL RELATIONS: DEVELOPMENTS FOR RESEARCH AND TEACHING* (1963). The apparent absence of international law from international simulations is discussed in Coplin, *International Simulation and Contemporary Theories of International Relations*, 60 *AM. POL. SCI. REV.* 562, 576 (1966).

havior and the persistent patterns of international politics, dealt with international law without calling it such.⁵⁴ Political science, too, succumbed to the belief that its objects of study were unique to itself. It is now clear that international order is a matter of concern to many disciplines, even when verbal conventions demand that it be given different labels. The behavioral science tendencies of the 1960's suggest the growing disillusionment with arbitrary lines of demarcation between disciplines.⁵⁵ Consequently, a synthesis of mainstream legal materials with the insights of other fields concerning the generation of normative patterns of behavior between states will become the hallmark of international law over the short-term future.

⁵⁴ For example, one of the most important recent attempts to understand the genesis of international norms barely mentions the word "law." SCHELLING, *op. cit. supra* note 26.

⁵⁵ An example already exists in the publication by the University of Michigan's Center for Research on Conflict Resolution of its *Journal of Conflict Resolution*. The American Society of International Law has in process a bibliography of behavioral science materials on international order: GOULD & BARKUN, *THE SCIENCE OF ORDER* (forthcoming).