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2007

Whose Public, Whose Order? Imperium, Region, and Normative Friction

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Article

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I.   INTRODUCTION: AFTER THE END OF HISTORY

Theories of international law and politics are a product of their times. They focus on the issues of the day (or of the immediate past) and their assumptions are often the assumptions of the society in which they were born. Perhaps that it is why so many international relations scholars were surprised by the end of the Cold War: Their theories were so informed by bipolarity that they were unable to see the actual changes that would transform the state system. As international relations scholars are re-assessing their theories in a post-Cold War world, lawyers may do the same concerning international legal jurisprudence. Throughout the Cold War, the New Haven School of policy-oriented jurisprudence attempted to describe how law was actually used in the policymaking process and to suggest how it should be used towards the goals of securing human dignity and the spread of free societies.[1] But with the titanic struggle between competing world orders being replaced by parochial fights and feuds, whither the New Haven School? What insights does it have for today's world? Does the New Haven School's theory need to catch up to the practice of international law?

This Article considers the strengths and weaknesses of the New Haven School in light of the competition among multiple conceptions of "world public order" that exist today. As a test case, I will look at the competition on the "grand chessboard" of Eurasia. At one time called the "world island" by geo-strategists, Eurasia today is home to seventy-five percent of the world's population, sixty percent of the global GNP, and contains about seventy-five percent of known energy sources.[2] It is also a geographic space where multiple conceptions of public order, including those of the United States, the European Union, Russia, and Islamic fundamentalists, overlap, interact, and at times compete. This is especially so in the unstable arc of states bordering Russia: from Belarus, Moldova, and Ukraine in the West; down to the Caucasian countries of Georgia, Armenia, and Azerbaijan in the Russian southwest; and ultimately the Central Asian republics of Kazakhstan, Uzbekistan, Turkmenistan, Tajikistan, and Kyrgyzstan to the Russian south.

In Part II, I will introduce the idea of "diverse systems of public order" described in policy-oriented jurisprudence. I will also situate the New Haven School as part of the liberal modernist tradition that attempts to find universal

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1.   *See* Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959) [hereinafter McDougal & Lasswell, *Diverse Systems*]; for other examples of key texts of policy-oriented jurisprudence, see also HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992); Myres S. McDougal, Harold D. Lasswell & Lung-chu Chen, *Human Rights and World Public Order: A Framework for Policy-Oriented Inquiry*, 63 AM. J. INT'L L. 237 (1969); Harold D. Lasswell, Yale Law School Professor, Universality in Perspective, Address Before the American Society of International Law (Apr. 30, 1959), *in* 53 AM. SOC'Y INT'L L. PROC. 1 (1959) [hereinafter Lasswell, *Universality*]; Myres S. McDougal, President of the American Society of International Law, Perspectives for an International Law of Human Dignity, Address Before the American Society of International Law (Apr. 30, 1959), *in* 53 AM. SOC'Y INT'L L. PROC. 107, 107 (1959) [hereinafter McDougal, *Perspectives*].

2.   ZBIGNIEW BRZEZINSKI, THE GRAND CHESSBOARD: AMERICAN PRIMACY AND ITS GEOSTRATEGIC IMPERATIVES 31 (1997). The term "world island" was most notably used by British geographer Harold Mackinder. *Id.* at 38. *See also* JOHN AGNEW, GEOPOLITICS: RE-VISIONING WORLD POLITICS 28-29 (2d ed. 2003) (discussing Mackinder's world view).

norms and/or techniques to address questions of political or normative conflict. Part III will examine the different public orders in today's multipolar, multinormative world. In Part IV, I will propose the concepts of *systemic borderlands*—states that are the geopolitical crossroads between two or more normative realms—and of *normative friction*, the process in which competing conceptions of public order interact in these borderland states, as a means of describing the normative interactions in a multipolar world. Part V will consider examples of systemic borderlands and normative friction in Eurasia. In Part VI, I will propose ways in which the New Haven School can build on some of its own original insights on the existence of diverse systems of public order in light of changes in international politics. As this short Article can only scratch the surface of so many issues, I will also set out questions for further investigation.[3]

II.   THE NEW HAVEN SCHOOL AND DIVERSE PUBLIC ORDERS

The strengths and weaknesses of the New Haven School derive in part from its placement as an inheritor of the rationalist project of the European Enlightenment. Keeping in mind that much of the normative conflict in the post-Cold War world derives from a debate over Enlightenment ideals and concepts, seeing the New Haven School's place in this tradition is of importance.

The New Haven School is a jurisprudence born of the Cold War but informed by the experiences of World War II and the previous interwar period. In those years, so soon after World War II, Harold Lasswell and Myres McDougal "were acutely aware of the dominant position of the United States in the postwar world . . . [and] sought to develop a jurisprudence that could help U.S. lawyers and policymakers meet their newfound responsibilities, advancing a just and democratic image."[4] In part, they sought to define a jurisprudence which could help policymakers pursue the goal of a just and democratic society and international system. But, in part they were also trying to devise a jurisprudence to evade the possible futures of totalitarianism or destruction.[5]

The result is a pragmatic methodology that shuns formalism in favor of an attempt to describe how law actually operates in the world.[6] As Michael

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3.   The issues posed by systemic borderlands and normative friction are foci of my current research and the subjects of forthcoming articles.

4.   Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 77 (2006).

5.   *See* MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960, at 474 (2001) (concerning the "shadow of catastrophe") (quoting Myres McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 133, 138 (1953)); Lasswell, *Universality, supra* note 1, at 6 (concerning the risk of non-totalitarian states being "rolled back"). *See also* Carl Landauer, *Deliberating Speed: Totalitarian Anxieties and Postwar Legal Thought*, 12 YALE J.L. & HUMAN. 171, 230-34 (2000) (arguing that in various essays "it is unquestionable that McDougal and his associates were fighting the Cold War in print").

6.   LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW: A POLICY-ORIENTED PERSPECTIVE 14 (2d ed. 2000) (explaining that the New Haven School "is a theory *about* international law rather than a theory *of* international law"); *see also* Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991, 1991 (1995) (reviewing

Reisman has written: "From the standpoint of the New Haven School, jurisprudence is a theory about making social choices. The primary jurisprudential and intellectual tasks are the prescription and application of policy in ways that maintain community order and, simultaneously, achieve the best possible approximation of the community's social goals."[7]

The New Haven School is a mid-twentieth century iteration of the Enlightenment's belief that the world could be improved through the judicious application of reason in order to dispel myths and superstitions.[8] It contends that the appropriate observational standpoint (or how an academic or policymaker should approach a problem) is to be "as free as possible from parochial interests and cultural biases . . . [and thus able to] clarify for the active participants in the different communities common interests that these participants are otherwise unable to perceive."[9] Lasswell and McDougal argued that all people try to fulfill eight similar values: power, wealth, respect, well-being, skill, enlightenment, rectitude, and affection.[10] Ultimately, there is a shared goal across humanity of pursuing and preserving human dignity. The New Haven School thus attempts to give scholars and policy-makers the tools to describe the world as it is and prescribe principles and procedures necessary to building "a universal order of human dignity."[11]

Towards this end, the New Haven School seeks first to establish minimum order—freedom from coercion and the protection of expectations that derive from international agreements and customary international law—and build from there to optimum order—"the greatest production and widest distribution of all demanded values that can be attained with available resources."[12]

Although Lasswell and McDougal's *goal* was a world public order that recognized human dignity, they found that "[e]ffective, comprehensive universality, despite the faint shadows of worldwide organization, does not now exist" and decried "the invocation of spurious universalism."[13] They discerned numerous systems of public order, including "Western European (and North Atlantic), American (North, South), Soviet (European, Asian), British Commonwealth, Islamic, Hindu, Burmese, [and] Southeastern Asian,"

HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992)) (asserting that Lasswell and McDougal break with positivism's formalism and offer a comprehensive framework of inquiry grounded in factual circumstances).

7.   W. Michael Reisman, Yale Law School Professor, The View from the New Haven School of International Law, Address Before the American Society of International Law (Apr. 2, 1992), *in* 86 AM. SOC'Y INT'L L. PROC. 118, 120 (1992); *see also* Falk, *supra* note 6, at 1991 (concerning the interplay of rules and social processes).

8.   *See* BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 39 (2004) (concerning the Enlightenment); Falk, *supra* note 6, at 2002 (arguing that the New Haven School is in the modernist tradition of accessing unconditional truth through social science); *see also* Kurt Wilk, *International Law and Global Ideological Conflict: Reflections on the Universality of International Law*, 45 AM. J. INT'L L. 648, 661 (1951) (stating that natural law writers assumed universal rationality leading to a universal law).

9.   CHEN, *supra* note 6, at 16.

10.   McDougal & Lasswell, *Diverse Systems*, *supra* note 1, at 12-13. *See also* Steinberg & Zasloff, *supra* note 4, at 77; CHEN, *supra* note 6, at 15-16.

11.   McDougal & Lasswell, *Diverse Systems*, *supra* note 1, at 11. *See also* Lasswell, *Universality*, *supra* note 1, at 4.

12.   CHEN, *supra* note 6, at 86.

13.   McDougal & Lasswell, *Diverse Systems*, *supra* note 1, at 3.

among others.[14] Thus, rather than international *law*, they saw international *laws* in an anarchy of diverse, contending legal orders.[15] However, Lasswell and McDougal also perceived a deep relationship between these diverse systems, as the major systems of public order were "rhetorically unified . . . [because all] systems proclaim the dignity of the human individual and the ideal of a worldwide public order in which this ideal is authoritatively pursued and effectively approximated."[16]

Lasswell and McDougal nonetheless understood that it would be difficult to build such a universal order in the face of existing parochialism.[17] However, for all of its difficulties, the conflict that Lasswell and McDougal described was ultimately a conflict between two universalist ideologies.[18] The question facing policy-oriented jurisprudence today, though, is what happens if these diverse public orders reject the Enlightenment project of universalism altogether and seek instead parochialism, particularity, and the depth of historical tradition? The assumption of a rhetorical unity across public orders has gone untested and is controversial.[19] When we speak of world public order, whose public are we assuming? Which conception of order?

In Part III, I will turn to how the idea of "public order" relates to multipolar, post-Cold War, international relations.

III. MULTIPOLARITY AND MULTINORMATIVITY

In this Part, I will first turn to the idea of public order in a state system defined by regional powers and an over-arching superpower. I will then focus on the role of law in defining such public orders. Finally, I will describe four conceptions of public order.

A. *The World and the Region in Defining Public Order*

We live in a world of nested public orders: various regional public orders and (at least) one global public order. Regional public orders can be thought of in two manners: They occupy a physical, geographic space, but they are also regions of normative similarity. Our inquiry into regional public

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14. *Id.* at 1.
15. McDougal, *Perspectives, supra* note 1, at 107 (describing "a variety of 'international' laws and an anarchy of diverse, contending orders"); Lasswell, *Universality, supra* note 1, at 1-2 (arguing that international law, as constituted, did not constitute a universal public order but rather that there was an "anarchy of public orders"); McDougal & Lasswell, *Diverse Systems, supra* note 1, at 10.
16. McDougal & Lasswell, *Diverse Systems, supra* note 1, at 5; *see also* McDougal, *Perspectives, supra* note 1, at 132 (concerning "contending, incompatible systems of public order").
17. McDougal, *Perspectives, supra* note 1, at 132.
18. *Id.* at 108 (describing the struggle between totalitarian orders and non-totalitarian orders with a democratic core).
19. *See* Detlev Vagts & Edward McWhinney, Book Review, 87 AM. J. INT'L L. 335, 338 (1993) (reviewing HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY (1992)) (discussing the high degree of abstraction of the eight values). *See also* McDougal, *Perspectives, supra* note 1, at 112 (stating that there is an increasing unity in values that are sought, as demonstrated by the substance of treaties, the clauses of constitutions, the platforms of political parties, and other such normative declarations); Myres S. McDougal, *The Comparative Study of Law for Policy Purposes: Value Clarification as an Instrument of Democratic World Order*, 61 YALE L.J. 915, 915 (1952) [hereinafter McDougal, *Comparative Study*] (stating that people increasingly want common values and cooperation).

orders can thus be assisted with a turn towards ideational political geography. As political geographer Harm de Blij has observed: "The world map of international boundaries reveals legality and conceals reality. Everyone who travels internationally knows that some borders are crossed with ease, others with great difficulty."[20]

De Blij argues that if one maps these "easy" and "difficult" boundaries, "[t]he world seems to be divided into about a dozen realms within which boundaries are usually, though not always, reasonably 'easy,' but between which they tend to be tough to cross, surface or otherwise."[21] De Blij's realms are North America, Middle America (Mexico and Central America), South America, Europe, North Africa/Southwest Asia, Subsaharan Africa, Russia, South Asia, East Asia, Southeast Asia, the Austral realm (Australia/New Zealand), and the Pacific realm (the Pacific islands).[22] Each is a geographic space, but each is also a normative realm.

Each of these realms can also be thought of as being related to at least one great power, or hegemon, that plays a crucial role in defining the "rules of the game" for state relations within that realm.[23] Or, for certain realms, there is active competition for hegemonic status (see Table 1).

Table 1: Realms and Hegemons

Realm	Regional Hegemon or Competing Powers
North America	United States
Middle America	United States
South America	United States; Venezuela; Brazil
Europe	European Union (economic, domestic affairs); United States (security)
North Africa/Southwest Asia	Saudi Arabia; Iran; (Russia and China towards Central Asian republics)
Subsaharan Africa	South Africa; France; China
Russia	Russia
South Asia	India; Pakistan
East Asia	China
Southeast Asia	China
The Austral realm	Australia
Pacific realm	United States; China

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20. HARM DE BLIJ, WHY GEOGRAPHY MATTERS: THREE CHALLENGES FACING AMERICA: CLIMATE CHANGE, THE RISE OF CHINA, AND GLOBAL TERRORISM 120 (2005).

21.   Id. at 121.

22.   Id. at 122-23. A similar mapping of civilizations was made by Samuel Huntington. See SAMUEL P. HUNTINGTON, THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER 26-27, 45-48 (1996). Using either de Blij's list or Huntington's mapping, it is important to note that while one or more states may contend for primacy in each realm or civilization, each of these is not necessarily defined primarily by the state(s) claiming leadership, but rather by the norms of each realm or civilization. As such, although much of the discussion will relate to the interaction of states within or across realms, the core of this analysis is not so much state-centric as norm-centric.

23.   For some, the term hegemon has a negative ideological connotation. I do not use it with any such negative implication; rather, I use the terms hegemon and hegemony merely to recognize relative power and leadership.

Although the United States is listed as a regional hegemon or competing power in four of these realms, one must keep in mind that this is only in terms of the regional public orders. As will be discussed momentarily, the United States is the only state that can make a claim to being a global hegemon.

Be they regional or global, hegemons have certain similarities. At their most brusque, hegemons use "material incentives," essentially carrots and sticks, to alter the political and economic incentives of other states.[24] However, hegemony is not only about physical power, it is about the control of ideas, of norms. It is not just about domination but, to use Max Weber's term, it is about *legitimate* domination in which "every such system attempts to establish and to cultivate the belief in its legitimacy."[25] Hegemonic states are supported by "universal norms, institutions, and mechanisms which lay down general rules of behavior for states and for those forces of civil society that act across national boundaries."[26]

Consequently, each actual or potential hegemon has a particular conception of norms that it enforces, and hopefully socializes others into viewing as legitimate, within its sphere of influence. These norms could relate to the particular issues of importance within the region—self-determination, the relation of great to lesser powers, norms of intervention, the protection of ethnic minorities, the relation of states to markets, etc.

Besides expanding on this concept of normative regionalism, we must also consider the special role of the United States, not only as a regional hegemon but as a globe-spanning superpower. In this sense, international relations theorist Peter Katzenstein has described the current system as "a world of regions, embedded deeply in an American imperium."[27] This imperium is not a nineteenth century styled territorial empire, but (to use the description of Michael Hardt and Antonio Negri) a new form of rule based on the expansion of markets and neoliberal institutions.[28] As Katzenstein concludes, "[t]erritorial 'empire' and nonterritorial 'Empire' are analytical opposites or ideal types."[29]

Before turning to different conceptions of public order, I will first briefly introduce the relationship of law to public order.

B.   *The Role of Law in Defining a Public Order*

In international affairs, law follows power. The structure of the state system affects the normative content of international law. When German historian Wilhelm Grewe analyzed the role of the United States in the Western hemisphere, the role of Japan's Greater East Asia Co-Prosperity Sphere in Asia, as well as the roles of the European hegemonies of Spain, France, and

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24.   G. John Ikenberry & Charles A. Kupchan, *Socialization and Hegemonic Power*, 44 INT'L ORG. 283, 285 (1990).

25.   MAX WEBER, 1 ECONOMY AND SOCIETY 213 (Guenther Roth & Claus Wittich eds., 1978); *see also* Ikenberry & Kupchan, *supra* note 24, at 289.

26.   Ikenberry & Kupchan, *supra* note 24, at 288 (quoting ROBERT W. COX, PRODUCTION, POWER, AND WORLD ORDER 172 (1987)).

27.   PETER J. KATZENSTEIN, A WORLD OF REGIONS: ASIA AND EUROPE IN THE AMERICAN IMPERIUM 1 (2005).

28.   MICHAEL HARDT & ANTONIO NEGRI, EMPIRE (2000).

29.   KATZENSTEIN, *supra* note 27, at 4.

Britain, he found that (as paraphrased by Detlev Vagts), "[t]he hegemon in each case led the way in formulating the international law rules of the time."[30] The transformation of the international system from a bipolar competition into one of multipolar competition with an overlay of a single superpower is reflected in the evolution of international law. The specifics of these changes will be considered in the next Section. First, though, we will consider the relationship of law to hegemonic political power.

In some instances, "powerful states tend to use international law as a means of regulation as well as of pacification and stabilization of their dominance"; in others, "faced with the hurdles of equality and stability that international law erects, they withdraw from it."[31] Dominant states do not usually maintain static approaches to international law, but rather "oscillate" between instrumentalization and withdrawal.[32]

Attempts to use international law as a method of direct rule is problematic because, in the decentralized international state system, the "law-makers and subjects of international law are usually identical."[33] Rather, international law serves the hegemon in three ways. First, it provides a mantle of respectability to the naked exercise of power. Once dominance is regarded as legitimate, it becomes authority.[34] Second, the indeterminacy of international law is used to provide leeway for hegemonic action. Finally, international legal rules that favor the strengths and weaknesses of a particular hegemonic state may protect that state, or at least soften the landing, when that state is no longer a hegemon.[35]

However, besides being a tool for the hegemon, one must keep in mind that an international legal order remains stable only to the extent that it provides benefits to the small and medium powers as well. Once a hegemon subverts a system by being less willing to play by similar (if not the same) rules and more interested in "exploit[ing] its hegemonic status for its own narrowly defined purposes," it can be thought of as a "predatory hegemon."[36] History has shown the United States that this is an inherently unstable situation due to the ability of second and third tier powers to join together in reaction. Consequently, prudent management of a regional or world public order requires the leader to keep in mind what benefits second and third tier states hope to gain from being within a particular international public order.

C.   Four Conceptions of Public Order

With this as a backdrop, I will turn now to four conceptions of public order. I will note a few issues that imply the major characteristics of each

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30.   Detlev F. Vagts, *Hegemonic International Law*, 95 AM. J. INT'L L. 843, 844 (2001); *see* WILHELM G. GREWE, THE EPOCHS OF INTERNATIONAL LAW (Michael Byers trans., 2000).

31.   Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 371 (2005).

32.   *Id.* at 379.

33.   *Id.* at 378.

34.   *Id.* at 374.

35.   Concerning the decline of hegemony and its relationship to regime theory, see generally ROBERT KEOHANE, AFTER HEGEMONY 182-216 (1984).

36.   ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS 345 (1987).

system and give benchmarks for comparison to other conceptions of public order.

1.   *The U.N./WTO System*

When commentators refer to the international legal system as a global, unified system, they are often focusing on the law and process emanating from the United Nations and the World Trade Organization (WTO). Together, these two institutions cover the most pressing topics of international security, human rights, trade, and commerce. It is the system of public order taught in most general international law courses in most law schools. While there has been a concern recently that there may be a fragmentation of international law among these various substantive systems (the law of human rights, the law of trade, etc.), there are active attempts at preventing such a fracturing of what is generally seen as a more-or-less cohesive whole.[37]

The first main characteristic of the international system is multilateralism and robust global international organization. The period immediately following World War II was one of international institution building like few other times in history. Not only the United Nations, but the World Bank, the International Monetary Fund (IMF), the General Agreement on Tariffs and Trade (GATT), the Organization of American States, the European Community, and the North Atlantic Treaty Organization (NATO), were established, to name a few. Today the United Nations and the WTO, the successor to the GATT, act as the pre-eminent global rule-making institutions.

The second main characteristic is the regulation of the use of force: the use of managerial techniques based on Security Council authorization, rather than just war theory and the like, to prevent conflict. Sir Hersch Lauterpacht said that the world's legal system was grounded in an absolute rule: "'There shall be no violence' by states."[38] He called this the "'primordial duty of the law.'"[39] The U.N. system prohibits the use of force between states in Article 2(4). It envisions the Security Council managing the use of international violence and, through a determination that there is a threat to international peace and security, authorizing the use of force in certain instances.[40] The Charter also allows for individual and collective self-defense when the United Nations is unable to act.[41]

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37.   *See* International Law Commission, Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* U.N. Doc. A/CN.4L.682 (Apr. 13, 2006); *see also* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003); Jonathan I. Charney, *Is International Law Threatened by Multiple International Tribunals?*, 271 RECUEIL DES COURS 101 (1998). Elsewhere, I have argued that methods of resolving treaty conflicts are inadequate for the substantive conflicts at hand and that there is a deeper systemic incoherence than is generally recognized. *See* Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573 (2005).

38.   THOMAS M. FRANCK, RECOURSE TO FORCE: STATE ACTION AGAINST THREATS AND ARMED ATTACKS 1 (2002) (quoting HERSH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 64 (1933)).

39.   *Id.* (quoting LAUTERPACHT, *supra* note 38, at 64).

40.   U.N. Charter art. 42.

41.   *Id.* arts. 51, 52.

Third, besides the construction of global international organization, international law was also "individualized" both through increasing attention to human rights and also through the use of international criminal law to punish individuals for their actions, as in the cases of the Nuremberg and Tokyo Tribunals after World War II, the Yugoslav and Rwandan Tribunals, and the International Criminal Court (ICC).

The 1990s were also a time of unprecedented growth of international tribunals. Criminal tribunals for Yugoslavia and Rwanda, the ICC, the institutionalization of trade dispute settlement in the WTO, and the International Tribunal for the Law of the Sea were all new.[42] There were more courts covering more topics with more cases than ever before. Dispute resolution in the international system is thus becoming more legalistic and technical, using third-party dispute resolution to an ever greater extent.[43]

The U.N. system thus attempts to build a consensual world public order in which the use of force is cabined by a Security Council-led managerial system, political differences are addressed in open fora, and erstwhile diplomatic matters gradually formalized via codification, regulation, and legalistic dispute settlement.

2.   *The United States Imperium*

In contrast to the U.N. system is the world public order as it is being redefined by the United States. If the U.N. system is about restraining state power, the U.S. system is about according leeway of action to the United States as hegemon.

Robert Kagan described U.S. exceptionalism in his article, *Power and Weakness*. First, he described Europe as having no traditional security threats and encompassing a sort of "post-modern paradise."[44] It is inward-looking and satisfied that it has found a set of rules that foster peace and prosperity, at least within Europe. However, there are, by contrast, the tough places in the world—swaths of Africa, the Middle East, and Asia—that are definitely outside of this post-modern paradise; they are still mired in the modern and the pre-modern world of Hobbes. The United States is the exception; it has to navigate between these worlds, maintaining security for the post-modern world by remaining engaged with the modern and the pre-modern. Consequently, the United States has not incorporated the relatively rigid legalism of those who live their lives within the post-modern paradise because it needs flexibility to address the problems emanating from the rest of the world. Across administrations—Republican or Democrat—there are certain similarities in the U.S. style of foreign policy and public order because regardless of the party in power, the United States is attempting to maintain stability in the fractious regions of the world. The United States has a world view that emphasizes flexibility over legalism. Following Peter Katzenstein, I

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42.   Concerning the proliferation of tribunals, see YUVAL SHANY, THE COMPETING JURISDICTIONS OF INTERNATIONAL COURTS AND TRIBUNALS 1-11 (2003).

43.   *See generally* Laurence R. Helfer & Anne-Marie Slaughter, *Why States Create International Tribunals: A Response to Professors Posner and Yoo*, 93 CAL. L. REV. 899 (2005).

44.   Robert Kagan, *Power and Weakness*, POL'Y REV., June-July 2002, at 3, 25 (internal quotation omitted).

will refer to this as American "imperium," not because it is classically imperial in the sense of territorial conquest and management, but rather to reflect the systemic description that there is no other level of leadership higher than the imperial.

The United States's conception of world public order is hierarchical—hegemony has its privileges. Many often forget that in the nineteenth century, besides declaring in the Monroe Doctrine the exclusion of outside powers from the Western hemisphere, the United States also assumed a right to unilateral military intervention.[45] So while U.S. power during much of the Cold War at least nodded towards multilateralism, the current President picks up threads from America's imperial maneuvers of a century ago. By this view, the United Nations does not so much set rules for all states as it is a mechanism to (a) legitimize the application of hegemonic power and (b) coordinate burden-sharing to prevent excessive strain on the hegemon's resources, known as "imperial overstretch."[46]

For example, the United States has attempted to rework international law to include new rights of intervention by means of the "hegemonic capture" of the U.N. Security Council.[47] Jose Alvarez points to the Security Council revamping the rules of the use of force with three new general norms: (a) the reconfiguration of certain types of terrorist violence as an "armed attack for purposes of U.N. Charter" Article 51 rights of self-defense; (b) the harboring of terrorists as justification for the use of military force against a state; and (c) although an ongoing terrorist threat may be unpredictable, the use of force against a state harboring terrorists does not necessarily "become impermissible retaliation or illegal anticipatory self-defense, or exceed the rules of proportionality." [48] These new rules are "exceptionally indeterminate"[49] and the use of the Security Council's Chapter VII powers essentially legislates for the international system as its mandatory nature circumvents the web of existing multilateral treaties (as well as the need to formulate new treaties to make a legally binding rule).[50]

The U.S. maneuvering concerning the rules for the use of force also exemplifies a growing skepticism concerning the role of international institutions. Although the United States was the primary architect of the United Nations and of other international organizations, it is now seen as somewhat hostile to the institutions and the United Nations in particular.[51] To

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45.   Vagts, *supra* note 30, at 846. For example, after the 1965 intervention by the United States in the Dominican Republic, Leonard Meeker, the Legal Adviser of the Department of State "asserted a general right to use military force by the United States in the Western hemisphere against 'foreign ideologies.'" KOSKENNIEMI, *supra* note 5, at 413.

46.   PAUL KENNEDY, RISE AND FALL OF THE GREAT POWERS 515 (1987).

47.   Concerning the "new rights," see Krisch, *supra* note 31, at 395. Concerning "hegemonic capture," see Jose Alvarez, *Hegemonic International Law Revisited*, 97 AM. J. INT'L L. 873, 873-74 (2003).

48.   Alvarez, *supra* note 47, at 879.

49.   *Id.* at 881.

50.   *See id.* at 874-75.

51.   Consider the politicking around the payment of U.S. dues to the United Nations. *See generally* JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 350 (2004) (noting the refusal to pay U.N. dues as an example of the United States undermining a treaty to which it is a member); Suzanne Nossel, *Retail Diplomacy: The Edifying Story of UN Dues Reform*,

the extent that the United States does use international institutions, it is to leverage its own power (and prevent imperial overstretch) or to reinforce its hierarchical position. United States practice at the United Nations has focused on using disproportionate power available via the Security Council. In international finance, the United States has focused its energies on the World Bank and the IMF, two institutions in which the United States has significant control due (in the case of the IMF) to voting rights being based on levels of funding. The United States does not give such levels of support to UNCTAD, which has a flatter decision-making structure.[52] Similarly, in international criminal law, the United States pressed for the International Criminal Tribunals for Yugoslavia and for Rwanda, which were used in resolving regional conflicts, but the United States has had little enthusiasm for the ICC, which could bring the United States itself into its jurisdictional sweep.[53]

Although the United States had in previous decades been a proponent of the use of third-party dispute resolution, as its power has grown, its enthusiasm for using such tribunals has generally decreased.[54] The key turning point was the International Court of Justice's 1986 decision in *Nicaragua v. United States*.[55] Now the United States either attaches reservations to treaties with dispute resolution mechanisms or does not sign additional protocols that allow for such dispute resolution.

Seeking to maximize the flexibility of informal understandings and also to decrease the extent of domestic effects of international law, the United States has either rejected many recent multilateral treaties or let them lie moribund in the Senate.[56] In other instances, the United States has started to reinterpret treaty language—ranging from the prohibitions of the ABM Treaty to the meaning of the Geneva and Torture Conventions—in a manner to increase the United States's room to maneuver. Rather than treaties and formal third-party dispute resolution, the United States tends to favor informal processes that allow for greater flexibility.[57]

The legal order of U.S. imperium thus favors flexibility over formalism and practicality over coherence. Rules are primarily to keep the system stable, not to rein in the hegemon. In this view, systemic stability requires a hegemon with greater freedom of movement.

NAT'L INT., Winter 2001-02, at 94, *available at* http://www.democracyarsenal.org/RetailDiplomacyTNI.pdf (giving an insider's account of the dues renegotiations).

52. *See, e.g.*, Krisch, *supra* note 31, at 398.

53. *Id.*

54. *Id.* at 391. Exceptions remain, such as WTO and NAFTA anti-dumping and investment disputes.

55. *See, e.g.*, JOHN F. MURPHY, *supra* note 51, at 351 (arguing that the U.S. reaction to the *Nicaragua* case exemplifies how the United States dislikes constraints on its security prerogatives); *see also* Military and Paramilitary Activities In and Against Nicaragua (Nicar. v. U.S.), Jurisdiction and Admissibility, 1984 I.C.J. 392 (Nov. 26).

56. David Kaye, K. Russell Lamotte & Peter Hoey, *Pacts Americana*, N.Y. TIMES, Dec. 15, 2006, at A41.

57. MURPHY, *supra* note 51, at 351-52.

3. *The EU Regional Order*

The legalism of the European conception of public order stands in contrast to the norms of the United States's world order. One can say that the history of Europe since World War II is largely a story of increasing reliance on, and comfort with, regional and other international institutions. The rise of European economic power and the securing of the European peace can be crafted as the story of the evolution from the European Coal and Steel Community to the European Union. Regardless as to whether such a narrative would tell the whole story (it does not), it nonetheless is a narrative that engenders a respect for international institutions. As Martti Koskenniemi put it, "[w]e Europeans share this intuition: the international world will be how we are. And we read international law in the image of our domestic legalism: multilateral treaties as legislation, international courts as an independent judiciary, the Security Council as the police."[58] The result is that nations of Europe have in the European Union the deepest pooling of sovereignty of any international organization, and the European Union is thus somewhere between being a regional arrangement among countries and a proto-state.

The wave of institution-building after World War II was defined by the United States—through the construction of the United Nations, the GATT, the IMF, and the World Bank. However, as the Cold War ended, besides supporting the creation of the WTO and the regional international criminal courts, the United States stuttered in its support for international institutions. European nations became the primary institution-builders, supporting not only these institutions (and in particular being a prime mover for the creation of the WTO) but also the ICC and the Kyoto Protocol, two of the defining institutions of the post Cold War era.[59]

However, the European Union, as regional hegemon, has its difficulties. A rising economic superpower, it nonetheless seems confused and reticent in the realm of foreign and military policy. In part, the problem is that the European Union is not a single state; it still is (as of this writing) twenty-seven sovereign states that rarely agree completely on diplomatic and military issues (as will be discussed below regarding the Iraq War) and yet with decision-making structures that operate on a consensus basis. But the institutional challenges of the European Union are not the focus of this Article; rather our concern is with how the European Union (and other European institutions), shortcomings and all, define the normative space of Europe.

By way of example, consider how the European Union has managed successor state issues in Yugoslavia and the former-USSR since the 1990s. The general international law of recognition of new states is declaratory, that is, once a state meets the basic requirements for statehood under customary

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58. Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EUR. J. INT'L L. 113, 117 (2005). He also asked: "I often wonder to what extent international law is becoming a political theology in Europe . . . ." *Id.* at 120. By contrast, Koskenniemi situates the U.S. view as being one of rational choice: "Legalization, is just a policy choice, a matter of costs and benefits—with no *a priori* reason to believe that the latter would outweigh the former." *Id.* at 117.

59. *See* MARK LEONARD, WHY EUROPE WILL RUN THE 21ST CENTURY (2005).

international law, there is an assumption (though not an absolute requirement) that it would be recognized by other states.[60]

While the European Union has not denied the declaratory nature of recognition, it established preconditions to recognition that exemplify the normative concerns of the region in the Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union[61] and the Declaration on Yugoslavia. [62] For example, the Declaration on the Recognition of New States required states seeking recognition to respect and support conceptions of rights set out in the Helsinki Final Act and various treaties, guarantee minority rights, and commit to a democratic form of government.[63] None of these factors are requirements for recognition under international law, but the European Union is using its economic power to change the effective norms in its region, encompassing non-member states as well as its members.[64]

The EU order is thus based on using international institutions to extend a zone of peace and prosperity. While implying that the United States is more adept at bullying than persuading, the European Union itself holds out the promise of recognition (and the threat of non-recognition), a special relationship, and/or accession as a means to persuade/entice/force its neighbors to reorganize their domestic polities and international politics.

4.   *The Russian Regional Order*

While the legalistic style of European public order can be traced to the reliance of European states upon institutions to prevent a return to the era of great wars in Europe, one can similarly connect the Russian style of regional leadership to its history of invasion and insularity. The end of the USSR stripped Russia of layers of buffer states. The loss of the Caucasus and Central Asia also renewed old fears of Turkish and Islamic power. [65] This was compounded by the European Union and NATO expanding their organizations into Eastern Europe. In the ashes of the USSR, and amidst the chaos of economic reforms, the sense of security of the average Russian plummeted.

The response of the Russian leadership was to attempt to regain influence and status and define itself as the protector of its weaker neighbors against Western and Islamic encroachment.[66] This was an agenda that found support from Communists, Nationalists, and "Westernizing" Liberals. For

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60.   Jochen A. Frowein, *Non-Recognition, in* 3 ENCYCLOPEDIA PUB. INT'L L., at 627 (R. Bernhardt ed., 1992). Recognition itself is not a formal requirement of statehood. Rather, recognition merely accepts a factual occurrence. Thus, recognition is "declaratory" as opposed to "constitutive." Nonetheless, no state is required to recognize an entity claiming statehood.

61.   European Political Cooperation Press Release 129/91, Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union," 31 I.L.M. 1485, 1486 (1992) [hereinafter Recognition Declaration].

62.   European Political Cooperation Press Release 129/91, Declaration on Yugoslavia, 31 I.L.M. 1485 (1992).

63.   Recognition Declaration, *supra* note 61, at 1486, 1487.

64.   For example, concerning the use of the promise of accession as a carrot encouraging the adoption of domestic legislative changes in Turkey, see LEONARD, *supra* note 59, at xi.

65.   BRZEZINSKI, *supra* note 2, at 88-89.

66.   JANUSZ BUGAJSKI, COLD PEACE: RUSSIA'S NEW IMPERIALISM 11 (2004).

example, one "relatively moderate" 1992 report by Russian officials and policy experts would have Russia play the role of "regulating the situation in Eastern Europe, Central Asia and the Far East."[67] In 1993, Boris Yeltsin, who was generally viewed as being open to reforms and cooperation with the United States and the European Union, oriented Russian foreign policy towards "converg[ing]" much of the former Soviet Union into "a single political, military, and economic 'space.'"[68] Yevgeny Primakov, former Foreign Minister and Prime Minister of Russia (in 1998 and 1999), described this as a struggle between "Atlanticists" (led by the United States) and "Eurasianists" (led by Russia) for supremacy in Eastern Europe.[69] The Near Abroad policy was becoming less and less about good relations with other sovereign states as it was about the perceived security needs of Russia and an attempt to reconstitute something like the former Soviet Union.[70]

Beyond protection of the Russian heartland, Russia's public order is also linked to the protection of the interests of the twenty million ethnic Russians living in other states throughout the region, usually as an ethnic minority.[71] This, in turn, affects how Russia addresses such issues as self-determination, sovereignty, and the norm of nonintervention in the domestic affairs of another state. For example, Russian "[o]fficials argued that Russians could not maintain their identity outside a Russian state; hence the re-creation of a larger unit to incorporate these territories was vital for the survival of the Russian people."[72] This often meant setting aside the standard international legal rule that favored the domestic protection of minority rights over allowing secession and instead becoming an advocate for a robust re-interpretation of the rights of ethnic minorities and the espousal of claims of external self-determination and sovereignty by Russians in Georgia and Moldova, to name two prominent examples. The normative implications of this Near Abroad policy emphasize Russia's security prerogatives. In some ways that are similar to the U.S. style of public order, it revives an older conception of international law that makes a sharp distinction between great powers and weak states.

Soviet and Russian legal scholarship needs to be understood as providing the legal basis for Russian/Soviet foreign policy.[73] In the early days of the Soviet Union there was a tension in trying to apply Marxism to international law, which proved to be theoretically difficult.[74] Soviet

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67. BRZEZINSKI, *supra* note 2, at 106-07 (quoting Council for Foreign and Defense Policy, A Strategy for Russia (1992)).
68. BUGAJSKI, *supra* note 66, at 8.
69. *Id.* at 10. Charles Clover, *Dreams of the Eurasian Heartland: The Reemergence of Geopolitics*, 78 FOREIGN AFF., Mar.-Apr. 1999, at 9-10 (describing Eurasianism as "an umbrella philosophy, absorbing all that is radical in the bubbling cauldron of post-Soviet political thought"); *see also* Sergei Kortunov, *Is the Cold War Over?*, 44 INT'L AFF. (Moscow) 141, 151-152 (1998), *quoted in* TARJA LÅNGÖSTROM, TRANSFORMATION IN RUSSIA AND INTERNATIONAL LAW 5-6 (2003) (concerning Russia surviving various "onslaughts" only to bow to America in the post-Cold War).
70. See statements by Andrei Kozyrev and description of 1995 Kremlin policy statement which would have given Moscow control of external borders of the Commonwealth of Independent States (CIS), *discussed in* BRZEZINSKI, *supra* note 2, at 107-09.
71. BRZEZINSKI, *supra* note 2, at 89.
72. BUGAJSKI, *supra* note 66, at 8.
73. *See* LÅNGÖSTROM, *supra* note 69, at 169 (explaining that legal scholars are concerned mostly with supporting, rather than criticizing, government actions).
74. *See id.* at 165-66.

international lawyers emphasized the particularity of the USSR, arguing that the version of international law that the USSR viewed as binding was not the same as the version of international law postulated by other states.[75]

In the post-Stalin years, when the inevitability of war with capitalist states was no longer an ideological given, Soviet international law scholars could then assume there was a single international legal system.[76] Their arguments often turned on showing how the West violated the norms of that system. In the era of perestroika, the state-centric view began to be set aside for a new cosmopolitan humanism.[77] Scholars began focusing on human rights and decrying the state-centric view that prevented the Soviet Union from seeing the individual as a subject of international law.[78] The Western-oriented policies that were adopted soon after the end of the USSR were then overtaken by a new assertiveness of Russian prerogatives and Russian conceptions of legality.[79]

Perhaps this new assertiveness was best exemplified by Russian attitudes towards the use of force. Russian troops became involved in conflicts in Georgia and Moldova.[80] Together, this showed that while Russia jealously guarded its own sovereign prerogatives, it also exercised a policy as if the states in its Near Abroad had "only a diminished sovereignty."[81]

This focus on maintaining control over the states on its borders informed other aspects of Russia's approach to international law, such as its use of treaties. Soviet international law had been positivist, focusing on the explicit consent of agreements rather than on customary international law as a source of law.[82] In the post-Soviet era, Russia shrewdly used treaties and the ratification process for political leverage. Bugajski contends that:

> Treaties and other interstate agreements are manipulated to exert pressure on specific governments. Even when bilateral treaties were signed with several neighbors, their ratification by parliament was delayed or indefinitely postponed without presidential opposition. The resistance displayed by the Russian legislature at vital times was a smokescreen for government noncompliance with an existing international agreement.[83]

Moreover, since the mid-1990s, caught between fears of domestic chaos and international encirclement by foreign powers, the Russian leadership and public have turned from Western conceptions of human rights. For his part,

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75.   Wilk, *supra* note 8, at 650.

76.   LÅNGÖSTROM, *supra* note 69, at 167.

77.   *Id.* at 108.

78.   *See, e.g., id.* at 115-16.

79.   *Id.* at 120. Many Kremlin watchers believe that the recent spike in oil prices has emboldened Putin to act in such an autocratic manner. *See, e.g.,* Michael McFaul, *Political Transitions: Democracy and the Former Soviet Union,* HARV. INT'L REV., Spring 2006, at 40, 45.

80.   The legal issues surrounding Russia's foreign policy towards Moldova are discussed at length in a report I authored for the New York City Bar. *See* The Special Committee on European Affairs, *Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova,* 61 REC. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 196 (2006), *available at* http://www.abcny.org/Publications/record/vol_61_2.pdf.

81.   Stephen Blank, *American Grand Strategy and the Transcaspian Region,* 163 WORLD AFF. 65, 66 (2000). This in turn has led to states openly discussing leaving the CIS and also the establishment of new subgroupings to counter-balance the CIS, such as GUAM, made up of Georgia, Ukriane, Azerbaijan, and Moldova.

82.   CHEN, *supra* note 6, at 90.

83.   BUGAJSKI, *supra* note 66, at 32.

Vladimir Putin has spoken about the rule of law on the one hand but also "asserted his belief in a strong state as a 'traditional Russian value' while rejecting the 'Anglo-Saxon model of liberal governance' because it was 'ill-suited for Russia.'"[84] Perhaps more alarming was that when Putin appointed a special representative to address the human rights situation in Chechnya, the representative began by saying that Russia and the West would first have to agree on a *definition* of human rights,[85] calling into question over fifty years of jurisprudence and state practice.

In conclusion, international law in Russia is defined by deep cultural traits and persistent concerns. Tarja Långöstrom thus wrote:

> [T]he history of international law in Russia appears as a narrative concerning Russia's entry into the European states-system in the beginning of the 18th century and the ensuing intellectual challenge about Russian identity. Thus, Russian international law writings contribute to this ongoing debate, in these writings—or in the discourse that they provoke—a central question is Russia's position in the world, in particular, its relation to the West.[86]

D.   *Conclusions*

While these conceptions of public order are not inapposite, they are organized around different concerns and issues. The U.N. system seeks to restrain the use of force by states and, to a certain extent, increase equity among member states. The United States's conception of public order is based on its view that it is in an exceptional position—both in terms of power and responsibility—and that it must be accorded the flexibility to act. The EU system is one that grew out of Europe's peculiar post-war history of deep institutionalization as a means to restore order and foster prosperity. And the Russian system reflects Russia's overarching concerns over security, defense of its borders, and the desire for international prestige. Each of these public orders has a different conception not only of what is "right" but even of what is a desirable society.

Public orders are not static. Their growth and atrophy is played out in and among sovereign states. How public orders expand and contract and what happens where two or more public orders overlap are the issues for Part IV.

IV.   SYSTEMIC BORDERLANDS AND NORMATIVE FRICTION

A.   *Normative Colonization and Systemic Borderlands*

Norms matter. Socializing other states to norms that are beneficial to a hegemon can increase legitimacy, decrease the costs of power projection, and leverage power through the availability of allies. If a hegemon can cause the spread of its norms, it may be able to avoid the deployment of its armies. But how do norms actually spread from one country to another?

Robert Axelrod described the process in game theoretic terms. He called the description "territoriality." Territory, in Axelrod's usage, may be physical

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84.   BUGAJSKI, *supra* note 66, at 20.
85.   LÅNGÖSTROM, *supra* note 69, at 126.
86.   *Id.* at 8-9.

space, but it can also be a group of characteristics or norms.[87] If we use territoriality in the physical, geographic sense, then the proximity of two states plays an important role in defining each state's norms due to their frequency of interaction.[88] At times, one actor will copy the strategy of his neighbor.[89] Thus, "colonization" occurs when the strategies—or in this case the norms—of one territory spread to another territory. Axelrod's idea is that "neighbors interact and the most successful strategy spreads to bordering locations."[90]

Yet while Axelrod's game theoretic territoriality explains certain aspects of why geography matters in normative diffusion, it essentially sets aside the question of how a particular norm is socialized (the assumption being it was rational to set aside one strategy and adopt another, more successful strategy). Here we see the limits of game theory in describing normative diffusion: While norms may be considered as akin to strategies, they actually represent much more, and the abandonment of one set of norms and the adoption of another cannot be explained away by utility maximization. Rather, we need to consider how and why people change their beliefs and states change their norms.

Ikenberry and Kupchan describe three mechanisms of normative socialization. *Normative persuasion* is where compliance occurs without using material sanctions or inducements. It is "beliefs before acts," such that "normative persuasion → norm change → policy change (cooperation through legitimate domination)."[91]

External inducement, by contrast, uses various political, military, and social incentives or sanctions to cause a change in policy. It is "acts before beliefs," which they map in a causal chain: "external inducement → policy change (cooperation through coercion) → norm change (cooperation through legitimate domination)."[92]

Finally, *internal reconstruction* is direct intervention into another state and the transformation of one or more domestic institutions. Although Ikenberry and Kupchan in 1990 suggested that "[s]uch extensive intervention can occur only in the aftermath of war or as a result of 'formal' empire,"[93] they had not yet witnessed the massive political reconstruction of Eastern Europe and certain South American and East Asian states by the World Bank, IMF, and other lenders in the 1990s (giving credence to Hardt and Negri's new formulation of "empire").[94]

Perhaps the two greatest examples of normative diffusion and empire (in terms of lasting effect) are how European colonialism assisted the spread of European concepts of statehood[95] and the successive caliphates and the spread

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87.   For example, a legal system may have certain norms concerning expropriation; its "neighbors" (in the normative sense of territoriality) are those systems that have similar, though not identical, norms on expropriation. ROBERT AXELROD, THE EVOLUTION OF COOPERATION 158-59 (1984).

88.   *Id.* at 158.

89.   *Id.*

90.   *Id.* at 159.

91.   Ikenberry & Kupchan, *supra* note 24, at 290.

92.   *Id.* at 290-91.

93.   *Id.* at 292.

94.   KATZENSTEIN, *supra* note 27, at 4 (citing HARDT & NEGRI, *supra* note 28, at xii, 146).

95.   DE BLIJ, *supra* note 20, at 110.

of Islam from the seventh to the fifteenth centuries. As norms spread there are boundaries between one normative realm, or system, and another. At times a state can be on one side or another of a normative border: West Germany was in the Atlantic Alliance, East Germany was in the Warsaw Pact. If normative boundaries coincide with national boundaries the situation is thus somewhat simplified. But, particularly in today's Eurasia, there are many states that are themselves the boundaries between two normative systems and they themselves have aspects of both.[96] I call these countries or regions *systemic borderlands*. In these cases we are concerned with what happens when the edges of normative regions overlap.

B.   Defining Normative Friction

Physical proximity and history can cause normative friction and/or norm adoption within a country. Adoption is easier to notice: This is when a country adopts a new normative framework that places it solidly within a particular public order. But some states are unable to completely move from one public order to another. Such cases can lead to *normative friction*.

Normative friction in Eurasia is caused by one of two mechanisms: (a) the pulling on systemic borderland states by different hegemons, each of which wants that state firmly within its normative realm; or (b) the pulling on a borderland state by one hegemon and the resistance to that pull by the state itself, even though it is not contested by another hegemon.

Normative friction can relate to domestic laws, such as whether a particular conception of property rights or of human rights will be adopted. It can also concern international legal norms, such as to which treaties a state will become a signatory, which international organizations a state may join, the recognition of national borders, and issues of non-intervention.

Along the arc of instability that was once the Silk Road and is now the Russian Near Abroad are a series of systemic borderlands facing such normative friction.

V.   SILK ROADS, GREAT GAMES, AND NORMATIVE FRICTION IN EURASIA

I will focus on two types of normative friction in Eurasia: (a) friction between regional, partially overlapping, public orders; and (b) friction between regional orders and world orders.[97] I will use two examples to illustrate these conflicts: the competition over Eastern Europe and the various conflicts concerning states in the Black Sea/Caspian Sea region.

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96.   Regarding borderlands as opposed to boundaries, see Julian V. Minghi, *European Borderlands: International Harmony, Landscape Change and New Conflict, in* 3 EURASIA: WORLD BOUNDARIES 89 (Carl Grundy-Warr ed., 1994). But note that Minghi focuses on the literal borderlands around the border dividing two or more states and on transactions across borders as relationships become harmonious, *id.* at 90-92. I am concerned with *states as borderlands* between larger systems and the interactions that take place because of conflict or competition.

97.   There is also the normative friction between mainstream international law and U.S. imperium. However, this is the competition between two conceptions of world public order. It is a much broader topic not confined to the issues of the Russian Near Abroad and a proper analysis is beyond the scope of this Article.

A.   *The Borderlands of Eurasia: Normative Friction Along the Silk Road*

In writing about the "new world order," Peter Katzenstein has also given an apt summary of modern Eurasian politics, writing that "[t]he end of the cold war has moved world politics from centrally organized, rigidly bounded environments that are hysterically concerned with impenetrable boundaries, to ones in which territorial, ideological, and issue boundaries are attenuated, unclear, and confusing."[98] In the arc of the Russian Near Abroad, we will consider two groups of borderland states.[99] The first are the East European states that were never part of the Soviet Union and now seek (or have achieved) membership in the European Union. The second group of states is in the region bounded by the Black Sea and the Caspian Sea. These states had been part of the USSR and now face the question as to whether they should be part of the European public order or the Russian public order.

Normative friction occurs in states where public orders clash with each other without definitive resolution. I will first set out three examples of normative clashes in Eurasia as a sort of tour of the horizon.

1.   *The East European States*

a.   *The Geopolitical Region*

This region is primarily comprised of the former Warsaw Pact members to Russia's west that had been independent states and not members of the USSR. At one time (and perhaps again) considered the center of Europe, the East European states of Hungary, Bulgaria, Romania, and Czechoslovakia were the buffer states between the USSR and the NATO countries. In addition to this, the Baltic Republics, which were annexed by the USSR in 1945, are also typified as East European states under this analysis due to historic similarities.

b.   *The Normative Conflict: Europeanists, Atlanticists, Revanchists*

There are three struggles of varying intensity. One is the jostling between the European Union and the domestic politics of East European states over the changes that are needed for integration into the European Union. While the countries of Eastern Europe are eager to enter the European Union, they are not necessarily enthusiastic about the number of domestic normative changes that are expected. In one study of how the OSCE, the Council of Europe, and the European Union encouraged the governments of Latvia, Estonia, Slovakia, and Romania to pass certain ethnic minority legislation in the 1990s, Judith Kelley concluded that socialization-based methods were not

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98.   KATZENSTEIN, *supra* note 27, at 11.
99.   A third group—the Central Asian republics comprised of Kazakhstan, Turkmenistan, Kyrgyzstan, and Uzbekistan—is beyond the scope of this Article. I will consider them in a future article as they are the site of a new "Great Game" including not only Russian and Turkish influence, but Islamist, Persian, American, and Chinese attempts to play a decisive role in shaping the region.

very effective when used on their own and that rational choice based concerns such as barriers to membership in these institutions were more effective.[100] In other words, this is an example of what Ikenberry and Kupchan would term external inducement: where acts were changed first and (hopefully) a change in beliefs follows.

Since 1996 the European Union has detailed country-specific policy expectations for countries seeking accession.[101] Romania's recent entrance into the European Union was marked by a deep division over Romanian laws concerning adoptions and, in particular, how easy it was for foreigners to adopt Romanian children. Romanians in part responded that these rules stemmed from Romanian cultural practices which disfavored adoption. Yet there were many orphans without families. Since Romanians themselves did not generally adopt, they made it easier for foreigners to adopt these children. At issue was whether there were adequate safeguards for the children themselves.

While the European Union may have been motivated by the best of concerns, the issue became a heated political topic in Romania. Romanians viewed it as Brussels not understanding their own culture and their attempts to solve a difficult problem. But, in the end, before gaining accession, Romania put a moratorium on all foreign adoptions until the process could be more fully reviewed.

While the accession process may have caused some muted normative friction within Eastern Europe, it also sparked political arguments between the European Union and Russia. Russia was used to a public order in which the sovereignty concerns of the states on its borders were often ignored. However, as certain of these states—particularly the Baltic states that actually bordered Russia—entered into the EU accession process, the European Union took a greater interest in how Russia conducted relations with these countries. After a series of economic threats to the Baltic states (which are nothing new in the Russian Near Abroad), then-EU Commissioner for External Affairs Hans van den Broek said in 1998: "We've made it clear to Russia that we do not accept their attempts to mix political and economic issues . . . . We resist unjustified pressure on an E.U. candidate."[102] With this statement, the European Union essentially set down a marker that the Baltics were no longer part of the Russian regional public order, they had become part of the European Union's public order.

Finally, there has been a dispute between the European Union and the United States over the foreign policies of East European nations. The most public iteration of these ongoing tensions was the support of Poland, Romania, Hungary, and Bulgaria (then awaiting accession) for the United States's Iraq policy. This led to two famous quips: French President Jacques Chirac's comment that these states had missed an opportunity to keep their mouths shut (which greatly offended the East European states) and Donald

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100. Judith Kelley, *International Actors on the Domestic Scene: Membership Conditionality and Socialization by International Institutions*, 58 INT'L ORG. 425, 426 (2004).

101. *Id.* at 429.

102. Kelley, *supra* note 100, at 434 (quoting Hans van den Brock, citation omitted).

Rumsfeld's contrasting of the "Old Europe" and the "New Europe" (which offended the Old Europe).[103]

This debate is between "Atlanticists"—who see a role for the United States in European policy—and "Europeanists" who would prefer that the European Union becomes an independent base of power. The United States, transcending regions in building coalitions, may support the "construction of Europe" but not to the extent that it is prevented from building ad hoc alliances to pursue its goals.

2.   The Black Sea/Caspian Region

a.   The Geopolitical Region

The Black Sea region is a blind spot of the western imagination—a region where traditional concepts of Europe faded into the undefined region that included Russia, Turkey, and Georgia.[104] Not quite Europe, not quite Asia. And this is all the more true when one includes in a broader definition of the region, states traditionally associated with the Caspian Sea: Armenia and Azerbaijan.[105] But the broader Black Sea region is a "decisive crossroads for the future of the Wider Europe. . . . [and it] is a civilisational crossroads, at the confluence of Orthodox, Muslim and, increasingly so, Western political and societal cultures."[106] This region is not only the meeting point of cultures, but it was also the historic borderland of the Russian, Persian, and Ottoman Empires.[107]

Today the Black Sea/Caspian Sea region is the crossroads of the European, Eurasian, and Middle Eastern security spaces.[108] Bulgaria and Romania are members not only of the European Union, but NATO as well. Turkey is a NATO member. Russia is its own center of power and Turkey, Moldova, Georgia, Armenia, and Azerbaijan are all being pulled between one or more centers of power. And, perhaps because this region is not fully integrated into any of the definable security spaces (or normative realms), the wider Black Sea region had been largely ignored by experts on Europe, Eurasia, and the Middle East.[109]

Moreover, the region is also a confluence of energy interests. During the Soviet era the Caspian Sea and its oil resources were a "Russian lake" with a small part on Iran's perimeter; now "[w]ith the emergence of the independent and strongly nationalist Azerbaijan—reinforced by the influx of eager Western oil investors—and the similarly independent Kazakstan [sic] and

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103. Concerning President Chirac's remark, see *Chirac Lashes out at 'New Europe,'* CNN.COM, Feb. 18, 2003, http://www.cnn.com/2003/WORLD/europe/02/18/sprj.irq.chirac/. Regarding Secretary Rumsfeld's "Old Europe" comment, see *Outrage at 'Old Europe' Remark,* BBC NEWS.COM, Jan. 23, 2003, http://news.bbc.co.uk/2/hi/europe/2687403.stm.

104. *See* Ronald D. Asmus & Bruce P. Jackson, *The Black Sea and the Frontiers of Freedom: Towards a New Euro-Atlantic Strategy,* POL'Y REV., June-July 2004, at 17, 18.

105. *See id.* at 20.

106. Fabrizio Tassinari, *A Synergy for Black Sea Regional Cooperation: Guidelines for an EU Initiative,* CEPS POLICY BRIEF, June 4, 2006, at 1.

107. Asmus & Jackson, *supra* note 104, at 19.

108. *Id.* at 18.

109. *Id.*

Turkmenistan, Russia became only one of five claimants to the riches of the Caspian Sea basin."[110]

b.   *The Normative Conflict: Finding the Borders of Europe*

Except for its western section, this region has not been an historical part of Europe. However, with changes in interests and perceptions, the Black Sea/Caspian region may become so. As two policy analysts wrote: "Reaching out to the Black Sea countries is the natural next step in completing our vision of a Europe whole and free."[111] This is the source of friction: The "gradual geographic (and ideational) advancement of Euro-Atlantic community in the region . . . is resisted by Russia's efforts to retain its traditional influence."[112]

Even before September 11, the United States was interested in the region as a source of energy and a path for oil and gas pipelines. Consequently, the United States has had an interest in tying the region to an Atlanticist security regime and denying Russian hegemony.[113] As then-NATO Secretary-General (and future EU Commissioner for External Affairs) Javier Solana said, "[w]hat we are expanding is a European, indeed Atlantic, civil space. I deliberately include our military arrangements into this definition of 'civil space.' The postwar experience in Western Europe suggests that political and economic progress and security integration are closely linked."[114]

Since September 11, we can add the U.S. interest in forward basing in the region for the Global War on Terror. Moreover, "[t]he traditional trade routes of the Silk Road are now used to bring heroin to European markets and dangerous technologies to al Qaeda terrorists."[115] As two analysts explained in 2000:

> The Black Sea region is at the epicenter in the grand strategic challenge of trying to project stability into a wider European space and beyond into the Greater Middle East . . . . Instead of appearing as a point on the periphery of the European landmass, it begins to look like a core component of the West's strategic hinterland.[116]

Related, but not identical to U.S. interests, are those of the European Union. The European Union's main tool is the European Neighborhood Policy (ENP) and its Action Plans. The European Union's policy in the area has three aspects: (a) enlargement into Romania, Bulgaria (which has occurred as of 2007), and possibly Turkey; (b) the European Neighborhood Policy (ENP) for Ukraine, Moldova, Georgia, Armenia, and Azerbaijan; and (c) an EU-Russia

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110.   BRZEZINSKI, *supra* note 2, at 93. *See generally* Kamyar Mehdiyoun, *Ownership of Oil and Gas Resources in the Caspian Sea*, 94 AM. J. INT'L L. 179 (2000) (arguing disputes over Caspian mining rights have shifted from *whether* the seabed should be divided into *how* it should be divided); Faraz Sanei, Note, *The Caspian Sea Legal Regime, Pipeline Diplomacy, and the Prospects for Iran's Isolation from the Oil and Gas Frenzy: Reconciling Tehran's Legal Options with its Geopolitical Realities*, 34 VAND. J. TRANSNAT'L L. 681 (2001) (concerning the legal disposition of claims for Caspian resources).

111.   Asmus & Jackson, *supra* note 104, at 23.

112.   Tassinari, *supra* note 106, at 1.

113.   *See* Blank, *supra* note 81, at 65.

114.   *Id.* at 66 (quoting Javier Solana) (footnote omitted).

115.   Asmus & Jackson, *supra* note 104, at 21.

116.   *Id.* at 22.

"strategic partnership."[117] The ENP Action Plans have been used as a method of the transfer of norms from the European Union to these borderland states. The Moldova, Ukraine, Armenia, Azerbaijan, and Georgia plans all had significant sections on Justice and Home Affairs.[118]

In reaction to this widening of "European space" and, even worse, the "Euro-Atlantic space," Gleb Pavlovsky, an advisor to Russian President Putin, explained: "Russia is currently revising its policy in the post-Soviet space and the mechanisms of its implementation." He stated that "any country [that would] promote the doctrine of Russia's rollback will certainly create a conflict in relations with this country."[119]

The "color revolutions" of Ukraine, Georgia, and Kyrgyzstan from 2003-2005 were seen by Russia as being part of a process that included expansion of the European Union and of NATO.[120] This may be why 2006 began with a crisis over energy exports from Russia to Ukraine and also trade sanctions and increased energy prices by Russia against Georgia and Moldova (which had also tilted westward in the previous years).[121] Moreover, Azerbaijan is under combined Russian and Iranian pressure "to restrict its dealings with the West."[122]

The conflict over the public order governing the Caspian states is particularly harsh, probably due to their status as oil producers competing with Russia and Iran over Caspian Sea oil reserves. Azerbaijan, Kazakhstan, and Georgia have sought NATO's direct participation.[123] Armenia, which is in a conflict with Azerbaijan over the ethnic Armenian region of Nagorno-Karabakh within Azerbaijan, allied itself to Moscow. Azerbaijan, a Turkic nation, sought closer ties to the United States and Turkey via NATO.[124] This is also indicative of the role of Turkey as a possible future regional hegemon for the Turkic states in the region. But it is a tough neighborhood. In 1993, Turkey had implied it might intervene on the side of Azerbaijan in the war in Nagorno-Karabakh; Russia responded by threatening a nuclear response.[125]

117. Tassinari, *supra* note 106, at 1-2.

118. *See id.* at 9; European Commission, EU/Azerbaijjan Action Plan (Nov. 14, 2006), *available at* http://ec.europa.eu/world/enp/pdf/action_plans/azerbaijan_enp_ap_final_en.pdf; European Commission, EU/Georgia Action Plan (Nov. 14, 2006), *available at* http://ec.europa.eu/world/enp/pdf/action_plans/georgia_enp_ap_final_en.pdf; European Commission, EU/Armenia Action Plan (Nov. 16, 2006), *available at* http://ec.europa.eu/world/enp/pdf/action_plans/armenia_enp_ap_final_en.pdf; *see also* European Commission, *Communication from the Commissioner to the Council and to the European Parliament On the General Approach to Enable ENP Partner Countries to Participate in Community Agencies and Community Programmes* (Dec. 4, 2006), *available at* http://ec.europa.eu/world/enp/pdf/com06_724_en.pdf (outlining both the strengths and weaknesses of the current program); European Commission, *European Neighbourhood Policy Strategy Paper* (May 12, 2004), *available at* http://ec.europa.eu/world/enp/pdf/strategy/strategy_paper_en.pdf (providing an overview of program goals and methods).

119. Graeme P. Herd, *Moldova & the Dniestr Region: Contested Past, Frozen Present, Speculative Futures?*, 14 CONFLICT STUD. RES. CENTRE, CENT. & E. EUR. SERIES 05/07 (Feb. 2005), at 14, *available at* http://www.defac.ac.uk/colleges/csrc/document-listings/cee/05%2807%29-GPH.pdf.

120. *See* Tassinari, *supra* note 106, at 1.

121. *Id.* at 2.

122. BRZEZINSKI, *supra* note 2, at 129; *see also* Blank, *supra* note 81, at 71 (describing U.S. policy against the creation of an Iranian and Russian "sphere of influence").

123. Blank, *supra* note 81, at 66.

124. *Id.* at 73.

125. *Id.*

B. *Overlapping Institutions, Interests, Ethnicities, and Conflicts*

The conflicts in Russia's Near Abroad show that modern maps may obscure more than they enlighten. The world of normative friction is only partially one of the borders on a map. It is also about the overlay of alliances, of treaty systems, and of regional organizations.[126] Where these normative systems overlap, there may be friction.

The U.S., EU, and Russian systems all overlap to varying degrees in the Russian Near Abroad. Although these states had previously been within the sphere of Soviet power, as Soviet strength waned that of the European Union and the United States grew. The result was an overlay of European, American, and (now) Russian public orders jostling for ascendancy in the same space. The resulting friction has either fed—or at least hampered the resolution of—conflicts throughout the region: the Russian-backed separatist movements in Georgia and Moldova, the Azeri-Armenian conflict over Nagorno-Karabakh, the destabilization of governments, and the pipeline politics.

Most of these conflicts can be seen broadly as the EU and U.S. systems working together in opposition to attempts at re-imposing the Russian public order upon these systemic borderlands. While the European Union seeks to act like a regional hegemon for Eastern Europe and perhaps the Black Sea/Caspian regions, a more accurate description may be that the western strength there stems from the Euro-Atlantic partnership. Still without a credible foreign policy or a military force, the European Union acts under the security umbrella provided by the U.S.-led NATO. NATO's Partnership for Peace program provided the sought-after security guarantees that stabilized Eastern Europe and may someday do the same in the Black Sea/Caspian region.

For all of its strength, the European Union is still a misshapen hegemon. If the Soviet Union had been an economic dwarf with the gigantic arms of a military superpower, the European Union is an economic giant with stunted arms. As the European Union was unable to meet the tests of Bosnia or Kosovo, American leadership through NATO solved these ostensibly European problems. In this manner a world public order (U.S. imperium) supports a regional public order (the European Union).

But within the common cause of the United States and the European Union, there are some disagreements and differences. The European Union seeks U.S. compliance with formal rules concerning the use of force, human rights, and so on, embodied in the U.N. system. In this manner a regional public order (the European Union) supports a global public order (the United Nations).

These rivalries—this normative friction—are the result of multiple conceptions of public order jostling in the same space. They are the result of different conceptions of what constitutes order and what is needed for human dignity. It is, at its base, the result of different people wanting to be part of different communities and not believing in, or even attempting to seek a

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126. "The Black Sea region is already a jungle of agreements, alliances, and acronyms. Existing organizations often have overlapping activities, and their composition reveals a number of soft-spoken rivalries and competitions within the region." Tassinari, *supra* note 106, at 11.

universal optimum order. We are not at the end of history. But we may be able to imagine the "Last Map":

> Instead of borders, there would be moving "centers" of power, as in the Middle Ages . . .
> . Replacing fixed and abrupt lines on a flat space would be a shifting pattern of buffer entities, like the Kurdish and Azeri buffer entities between Turkey and Iran, the Turkic Uighur buffer entity between Central Asia and Inner China (itself distinct from coastal China) . . . . To this protean cartographic hologram one must add other factors, such as migrations of populations, explosions of birth rates, vectors of disease. Henceforward the map of the world will never be static. This future map—in a sense, the "Last Map"—will be an ever-mutating representation of chaos.[127]

The New Haven School is a modern reflection of the ideas and ideals of the Western European Enlightenment. However, the Western European Enlightenment itself is not fully accepted in some of these normative borderlands. Is the policy-oriented jurisprudence that was devised during the Cold War appropriate for the world of the "Last Map?"

VI.   THE ROMANCE OF BLOOD AND SOIL: THE TURN FROM THE GLOBAL TO THE LOCAL

In the wake of the Cold War, people around the world have remembered the old romance of blood—ethnicity—and of soil—parochialism. Yet ironically, although the Soviet Union is dissolved, the New Haven School, a jurisprudence of U.S. cold warriors, has an outlook similar to that sought by Lenin: individuals without an excessive attachment to a particular place or people, who act as a vanguard for the universal good. But, as we know, any conception of the universal is actually rooted to a particular history. It is time for the New Haven School to take root, accept that it is merely one among many conceptions of the good, and develop a new set of techniques for the multipolar, multinormative world.

A.   Public Order Diversity After the Cold War

Ironically, although the New Haven School had punctured the balloon of international law's false normative universalism, it ended up defining a process that had certain universalist assumptions. Although its scholars saw a world actually divided among diverse public orders, as time passed policy-oriented jurisprudence became focused on questions of bipolar superpower conflict. Now that international politics is defined by the diversity of systems the New Haven School originally described, the school's jurisprudence should return to its original insights and refashion its techniques for what the world has become.

The New Haven School needs to address how the idea of diverse views of the good—and especially of particularism—will affect its methodology. Political leaders involved in today's conflicts use the trappings of ethnicity, locality, and history to motivate. This rhetoric affects public perceptions of law and of rights. The Cold War was a battle of universalisms, two cosmopolitan worldviews trying to convince the world that they each had the

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127.   ROBERT D. KAPLAN, THE COMING ANARCHY 50-51 (2000).

key to prosperity and justice. But today, there is relatively little enthusiasm for any doctrine that claims to be universal. The dominant rhetoric concerns respect for different cultures, for different traditions, and rejects "assimilation" into an international norm. And, in their more virulent and violent forms, these arguments become calls for cultural purity or ethnic separation.

This is vastly different from the challenges faced by the founders of the New Haven School. Lasswell and McDougal sought a method of finding and fostering a law that would support "the global common interest." Today we ask whether there is even a common perception of what that common interest would be.

The value placed on protecting cultural difference—including different conceptions of the right and the just—was not adequately addressed by the New Haven School. As one scholar argued, "[a]ttenuated conceptions of common interest" are sustained by and also sustain a world-view that favors loyalty to state rather than to humanity as a whole.[128] But attenuated concepts of common interest *are the norm* in most of the world.

This Article has considered how Europe, Russia, and the United States—globally speaking, three relatively similar cultures—can nonetheless have significant clashes over the nature of public order. Beyond the examples from this Article, one can also consider the friction among cultures that have even greater disparities.[129]

There was, for example, the so-called "Asian values debate" that was prevalent in the mid-to-late 1990s. But the roots of this debate can be traced back to the time that Lasswell and McDougal were first formulating their policy-oriented jurisprudence. Chung-Shu Lo of China said in the debate over the Universal Declaration of Human Rights at the United Nations that "[t]he basic ethical concept of Chinese social political relations is the fulfillment of the duty to one's neighbour, rather than the claiming of rights."[130] This position is not singular to China; other Asian leaders have noted that the Asian conception of human rights is different than what has evolved in Western Europe. [131] One Chinese author recently described Asian values as emphasizing "consensual solutions, communitarianism rather than individualism, social order and harmony, respect for elders, discipline, a paternalistic state, and the primary role of government in economic development."[132] While Asian cultures obviously believe in "human dignity"

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128. CHEN, *supra* note 6, at 419.

129. Besides the examples discussed here, see also Josef L. Kunz, Editorial Comment, *Pluralism of Legal and Value Systems and International Law*, 49 AM. J. INT'L L. 370, 374-75 (1955) (discussing the emergence of non-Western legal and value systems). Also, concerning challenges to international law from a Third World perspective, see, for example, Makau Mutua, *What is TWAIL?*, 94 AM. SOC'Y INT'L L. PROC. 31, 31 (2000) ("The regime of international law is illegitimate. It is a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West.").

130. CHRISTIAN TOMUSCHAT, HUMAN RIGHTS: BETWEEN IDEALISM AND REALISM 69 (2003).

131. *See* TAMANAHA, *supra* note 8, at 139 (stating that some Asian leaders object to the application of Western, individualized human rights doctrine to Eastern, communitarian societies).

132. TOMUSCHAT, *supra* note 130, at 70.

the issue, of course, is how to operationalize such a term across vastly different social, economic, and political terrains.[133]

Then there is the current focus on Islam. There is a "virtual inseparability of Islam and the culture that is both its cause and its effect."[134] Consequently, predominantly Islamic societies have shown hostility towards the transplantation of norms that are considered foreign.[135] Some Muslim nations have reserved the right not to be ruled by international law, and have declared that Shari'a will always have precedence.[136]

But let us set aside Islam, the varied religion with many different conceptions and types of adherents, and focus instead on Islamism, the fundamentalist public order that is challenging secular governments and monarchies throughout the greater Middle East and South-East Asia. Is there a "rhetorical unity" between Islamism and Western European secularism? With Slavic Eurasianism? It is telling that the target of jihadists is not the infidel, who is a member of the community who has gone astray, but the outsider, who is not a member of the community at all.[137] Islamism and other fundamentalisms, be they religious or political or ethnic, thrive on defining the community and the outsider.

More generally, even in public orders that are not based on some sort of fundamentalism, communities around the world are seeking to define themselves based on their own cultures and not on a western perspective (with universal pretensions) of what is just and of what is good. Muslim Middle Easterners have not been moved by the rhetoric from the Bush Administration concerning the march to freedom. If anything, according to some analysts they "have a distinct vision of freedom: defined largely as the ability to reject the guidance of the world's superpower. [The U.S.] desire to build liberal nation-states conflicts with a Middle Eastern desire to exercise sovereignty and self-determination independent of infidel outsiders."[138] For some, human freedom may be the ability to be different than what the United States wants them to be.

While the New Haven School recognized in some of its early writings the problem of universalist ideology competing with particularist ideologies, this issue was not emphasized during the Cold War. Consequently, policy-oriented jurisprudence has not adequately addressed what to do in a world defined by competing parochialisms, as opposed to competing universalisms. As political philosopher Gray Dorsey wrote in debate with McDougal in 1988,

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133. *See, e.g.*, Liu Huaqiu, Head of Delegation of the People's Republic of China, Remarks at the World Conference on Human Rights (June 15, 1993), *quoted in* Michael C. Davis, *Human Rights in Asia: China and the Bangkok Declaration*, 2 BUFF. J. INT'L L. 215, 226-27 (1996) (stating, among other things, "[t]he concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture, and values of a particular country.").

134. ROBERT F. DRINAN, S.J., CAN GOD & CAESAR COEXIST? BALANCING RELIGIOUS FREEDOM & INTERNATIONAL LAW 181 (2004).

135. *See* BENJAMIN R. BARBER, JIHAD VS. MCWORLD 206-07 (1995).

136. DRINAN, *supra* note 134, at 182. Although Westerners may react critically to the decision by Muslim nations that the Shari'a cannot be superseded by international law, the result is not very different from the U.S. decision that, in internal matters, the Constitution trumps international law.

137. Ximena Ortiz, *Geopolitical Jihad*, NAT'L INT. 6, Spring 2006, at 5, 6.

138. *Id.* at 8.

"[t]o the extent that McDougal and Lasswell proposed building a world public order (society) that would not be culture-dependent, it must be concluded that the proposal is not feasible."[139] Dorsey argued that the various systems of public order that exist have "different operative meanings of 'dignity' and of 'human individual.'"[140] As a child of the Enlightenment, the New Haven School emphasizes rationality and commonality in pursuit of a universal set of ends. But various regional public orders around the world—Russian and Islamist particularly come to mind—reject part or all of the key features of the Enlightenment project. The New Haven School has not fully addressed this.

The New Haven School needs to jettison the baggage of the Cold War struggle between market democracy and totalitarianism and address the complexity that animates the post-Cold War world. It should refocus itself not on the goal of world public order but rather on the existence of diverse—and I would say divergent—public orders.

B.   *Reconsidering the New Haven School*

If proponents of policy-oriented jurisprudence choose to reframe their analysis of the diversity of public orders to suit a multipolar, multinormative world, then I suggest four issues that, though beyond the scope of this Article, they may want to consider.

1.   *America's Place in the World*

First, one should consider how the role of the United States has changed from the 1950s to today. The New Haven School was pitched as a tool that American policy-makers could use in confronting the threat of totalitarianism.[141] But many people in the world today perceive—rightly or wrongly—the main threat of destabilization as coming from the United States. In part, they are wary of U.S. attempts to make them conform to its rules and mores. If the goal of policy-oriented jurisprudence had been, in part, to devise a methodology that was meant to promote a vision of the good similar to that found in liberal market democracies, then how can such a method be squared with the fact that many people the world over resent attempts at such persuasion? Due to its teleology, the New Haven School faced the twin criticisms as being either "an old-fashioned naturalism in disguise or a smoke screen for a defense of American foreign policy."[142] It must find a way to be neither.

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139. Gray L. Dorsey, *The McDougal-Lasswell Proposal to Build a World Public Order*, 82 AM. J. INT'L L. 41, 49 (1988).

140. *Id.* at 50.

141. Moreover, Lasswell's analysis had a distinctly anti-Soviet tone: "There are no reasonable grounds for asserting that the core countries of the non-Soviet world are as devoid of the traditions and operating institutions of human freedom as the core countries of the Soviet world." Lasswell, *Universality, supra* note 1, at 6.

142. KOSKENNIEMI, GENTLE CIVILIZER, *supra* note 5, at 476.

2.   *The Nature of Public Orders*

This leads to the second issue requiring reconsideration: the nature of public orders. Taking diversity seriously may require decoupling the concepts of minimum order from optimum order. Minimum order, as described here, can be seen as being akin to non-intervention, but optimum order is a specific conception of the good life itself. [143] Different cultures have different conceptions of optimum order; however, they may each access the idea of minimum order to tell others to stay out of their affairs.

What do Russian citizens and leadership, with their concerns that their society is on the verge of chaos and threatened by various "others," consider to be an acceptable minimum order or an optimum order? How would these ideas have been defined by a man or woman on the street in Afghanistan? Or in Georgia? In Georgia's breakaway region of Abkhazia? In Venezuela?

One of the problems of the New Haven School is that, while it pays lip service to the existence of diverse systems of public order, it still defines optimum order through the optic of U.S. values and norms. However, taking seriously that there are diverse public orders means that there are multiple and probably conflicting ideas as to what is an optimum order. And, if we describe a minimum order as freedom from external coercion, then bridging the gap from minimum order to a particular conception of optimum order becomes a serious problem. This leads to the third issue requiring reconsideration.

3.   *The Nature of Conflict*

Although normative friction may be cast as a zero-sum game, it does not have to be. Envisioning systemic conflict as a winner-take-all enterprise is easy: A country is a member of the European Union or it is not. It joins NATO or it does not. But, negotiated solutions may allow for greater complexity. Perhaps a country joins the European Union but, to quell Russian fears, it stays out of NATO.

Over the long run, though, it is unlikely that the citizenship and leaders of a state would want their country to simply remain a borderland. While systemic conflict does not have to be zero-sum, states will likely feel a pull (or an internal desire) to integrate with one system or another so as to fully be a member of a particular community. Moreover, Russia and Islamist factions so far have treated systemic friction as a zero-sum game: either a state is with them or it is against them.

Going forward, the New Haven School has to appreciate the value given to local or cultural traditions, realize that people may fight to maintain their own way of doing things, and accept that one person's rationality may not be another's. Conflict may be the result, but it does not have to be.

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143. *See* CHEN, *supra* note 6, at 415; *see also* Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 324 (1999) (discussing minimum order and optimum order).

4.   *The Nature of Cooperation*

The fourth issue that I would highlight as warranting reconsideration by the New Haven School is the nature of cooperation. Concerning the possibility of global cooperation, McDougal wrote that one "can observe that there is in fact . . . a comprehensive earth-space community of the whole of humankind, transcending all national boundaries, in the sense of interdetermination and interdependence in the shaping and sharing of all values, even that of survival."[144] But this confuses interdependence with cooperation.

The Prisoner's Dilemma, for example, assumes interdependence (each player's final result depends in part on the other player's choice), but not a community (there is no communication, nor are there necessarily shared values). Such a relationship can be formed whenever survival of two or more actors is interlinked. Consider the famous trope of many action movies where the hero and the villain end up with their guns pointed at each other's heads. If one begins to pull the trigger, the other may have time to do so as well. This is called a "security community"—as was the United States and the USSR during the era of Mutually Assured Destruction—but I think Lasswell and McDougal would both agree that this is not equivalent to the type of normatively thick community that was implied by Lasswell in his description of a "community of the whole of humankind" forged by interdependence. So, which image is closer to reality—the world as village or the world as competitors with their guns to each other's heads?

As Robert Kagan had suggested, perhaps we have both simultaneously. Within a particular culture, within a normative realm, cooperation may be "thick." However, absent special circumstances, cooperation across cultures would be thinner. Put another way, what we seem to see is more cooperation *within* normative realms and more competition *between* or *across* normative realms.

One possibility to consider is that the key to fostering cooperation is not in attempting to convince others that your conception of the law is more rational than theirs but rather to use international law to facilitate small, concrete plans for cooperation that may one day grow into larger endeavors. The European Union began not as an enterprise to build a continent-spanning proto-state, but rather as a coal and steel market. Perhaps the New Haven School should set aside the plans of building a theoretical mechanism to rationalize law into an optimum public order and instead focus on how people with different, deeply-held beliefs can use the law to address issues of mutual interest.

Building networks and fostering interaction across systemic borders will not conjure up world peace. Nor will these activities make unjust orders just. But they may reduce the friction along the margins. And that, at least, is a start.

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144.   Myres S. McDougal, *The Dorsey Comment: A Modest Retrogression*, 82 AM. J. INT'L L. 51, 52 (1988).

VII. AFTERWORD

Although their comments to my Article are appreciated, I think that at times Professors Reisman, Wiessner, and Willard misconstrue what I do—and do not—argue. My Article points to the New Haven School's conception of "diversity of systems of public order" and asks how it might apply to post-9/11 geopolitics. I make no "plea" for diversity; [145] like Lasswell and McDougal, I simply note that it exists. I have no "antipathy" towards cosmopolitanism;[146] rather, I contend that we live in a time when the idea of cosmopolitanism is rejected by numerous societies.

I do argue that this latter claim poses a problem for policy-oriented jurisprudence because the New Haven School uses a methodology that assumes a willingness of (most) interlocutors to enter into a discursive process in seeking universal rights. While the New Haven School scholars may claim "an undeniable process of communication" between cultures that is "one of the central enterprises of law,"[147] a perusal of the statements of scholars and leaders from various states in the former Soviet Union (the focus of this paper), Islamist groups, and others, show that such cross-cultural exchange is not central but *antithetical* to their conception of legal process. Or, at the very least, they find so little as to be of common value with other cultures as to make the result of such a process thin and wispy, rather than the robust affirmation of a universal conception of the good claimed by Professor Reisman and his colleagues.

Professor Reisman and his colleagues miss the point by brushing this off with the comment that "[t]here always has been" normative friction between cultures.[148] Of course there has, but in the Cold War most normative friction was subsumed by the battle of two universalisms: liberal democracy and Marxism-Leninism. I simply ask the resultant question: whether and how the tools of the School may need to be adapted for the post-Cold War, post-9/11, world of resurgent *parochialisms*. It is a question that Professor Reisman and his co-authors chose not to engage in their critique.

They seem to be taken aback by my query but I ask it out of greatest respect for the work of Lasswell, McDougal, and their colleagues. I also ask it with the appreciation that among my contemporaries, very few scholars use policy-oriented jurisprudence as described by Professor Reisman and his co-authors. To the contrary of being an attack on the New Haven School's enterprise, my Article argues that policy-orientation jurisprudence as originally conceived had important insights in international legal relations that may be particularly useful today, with proper adjustments.

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145.   W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575, 582 (2007).

146.   *Id.*

147.   *Id.*

148.   *Id.*