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Kennan and Human Rights

Gordon A. Christenson

George Kennan, the distinguished historian, scholar, and elder statesman, recently has reconfirmed and explained his initial assault against dangers from what he saw as the "legalistic-moralistic" approach to the United States foreign policy.¹ Soon after taking leave from the foreign service and moving to Princeton, Kennan delivered a series of lectures at the University of Chicago in 1951. Forming the basis of his first book on diplomacy, the lectures concentrated on American diplomacy during the first fifty years of the twentieth century.² Kennan drew extensively upon examples of the use of supposed idealistic purposes that concealed failure in dealing consciously or realistically with the dilemmas of substance in the international relations of a nation thrust into world power.

Surprised in pursuing the contrast between the lucid, realistic thinking of early American statesmen and the "bombast" of their later successors, Kennan found a form of utopianism in the rationale and rhetoric of foreign policy which began after the Civil War and held sway until World War II. He described this style as "utopian in its expectations, legalistic in its concept of methodology, moralistic in the demands it seemed to place on others, and self-righteous in the degree of high-mindedness and rectitude it imputed to ourselves."³ This style found expression in too much reliance upon arbitration treaties, world disarmament conferences, multilateral treaties outlawing war such as the Kellogg-Briand Pact, and illusions about the hope of world

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1. George Kennan, *American Diplomacy, 1900-1950* (Chicago: University of Chicago Press, 1951), 93. "I see the most serious fault of our past policy formulation to lie in something that I might call the legalistic-moralistic approach to international problems." Ibid. His memoirs explain how he came to assemble from extensive notes a polemic against morality in foreign policy, which remained unfinished until he presumably completed it in his recent article. George Kennan, *Memoirs 1950-1963* (Boston: Little Brown, 1967), 71-72; George Kennan, "Morality and Foreign Policy," *Foreign Affairs* 64 (1985): 205.
 2. Kennan, *American Diplomacy*, note 1 above, 95-103.
 3. Kennan, *Memoirs 1950-1963*, note 1 above, 71.

peace through international organizations such as the League of Nations and the United Nations. These pretensions and assertions of idealistic purposes, Kennan thought, concealed a failure of substance in those efforts and reflected immaturity in those responsible for the foreign policy of the period.⁴

In Kennan's view, the responsibility of governments in foreign policy is to act from a realistic appraisal of the "national interest." The difficulty of this kind of calculation is illustrated by the skepticism of David Hume, who explained that while it is in the interest of nations to have laws of nations and an obligation for all to obey them, it is not necessarily in the interest of a single nation to obey them. "What is in the interests of every nation is that other nations obey them, while it does not."⁵ Hume's utilitarian premise, while not free from criticism, illustrates Kennan's dilemma in calculating the national interest as if it were in contrast with "moralistic-legalistic" thinking. That Hume's (and possibly Kennan's) premise may not be valid can be shown at the outset from the imperatives Kennan himself addresses.

Two great perils, nuclear weapons and destructive changes in the global ecology (a third may involve the global economy), require an international regime of cooperation transcending the interests of any single nation-state, according to Kennan. A moral imperative drives or ought to drive the United States to address these problems. The reason is that the threat is common to all and jeopardizes the survival of all, requiring cooperation even if national sovereignty has to yield to the common interest. On the other hand, Kennan does not believe that the same moral obligation for governments follows from the concern for individual human rights in other countries, especially when it means intruding in the legal and political relationships between another country and its nationals or residents.

In a system of nation-states each having autonomous sovereign power, the structure necessary for the effective resolution of the twin perils requires international control or regulation that intrudes into the power of any single state. Why does Kennan make the case for intrusive international control to reduce the grave dangers from nuclear and environmental threats, but choose not to make it for the threats to civilization by the brutalization of human beings by some of those governments?

Understanding the formulation of this interpretation and the intellectual basis for Kennan's critique and distinctions reveals the implications of his realism for a jurisprudence of international human rights.⁶ Such an inquiry

4. *Ibid.*, 71.

5. Jonathan Harrison, *Hume's Theory of Justice* (Oxford: Clarendon Press, 1981), 233.

6. Richard Falk seems to share Kennan's realism in addressing human rights morality from national perspectives: "[I]t is as revealing as it is disquieting to note that the international concern of governments for human rights, realized after it became a goal of American foreign policy at the outset of the Carter presidency, has receded as quickly as it was stimulated, here and elsewhere." Falk is doubtful whether the contemporary structures of

also requires self-recognition. In Kennan's view, limits within the human predicament ought to restrain a foreign policy of "moralistic meddling." Like Butterfield, Kennan is not driven by the moral vision of the City of God or its utopian secular equivalents to insist that the world be transformed into it.⁷ What statesmen wisely can do with the worldly city does not and ought not depend on the heavenly or utopian vision. St. Augustine thought a Christian conception of the City of God does not and ought not require that a statesman impose that vision on the world. As Alberto Coll interprets St. Augustine's view, dealings among noble pagans in service of the state and informed by human experience and worldly calculations, even if held to the possibility of original sin, would ultimately do less harm and less violence than if a utopian city were brutally imposed.⁸

For Kennan, understanding human conditions realistically, choosing policy prudently, and acting wisely might avoid disaster, or great harm, and yet lead to unpleasant consequences. He thought the national interest required intervention in Korea to contain aggression from the north and avert or deter further propensities for expansion by other aggressive nations. He also thought it imprudent of MacArthur to push beyond the *status quo ante* toward the Yalu River, inviting greater disaster by upsetting the Chinese. The lives sacrificed, the unpleasant human consequences of the war, were worth the cost only to a point, Kennan thought. How does a government, in its foreign policy, handle these kinds of moral dilemmas? Knowing the limits of the human condition is a beginning. As Kennan explained to the student left during another, more difficult, dilemma involving the Viet Nam war, a deepened sadness about suffering might replace anger. An acute sense of the tragic in the human condition might temper brutality. Humor and grace in

power, global and national, can tap the humanizing potential of human rights norms. Richard Falk, *The End of World Order: Essays on Normative International Relations* (New York: Holmes & Meier, 1983), 29–30. Thus he shares Kennan's skepticism about the claims of human rights diplomacy but for widely divergent reasons. Falk believes that such advocacy merely reinforces the nation-state system that allows nationalistic goals to be pursued in their territories so long as they will abide by the most minimal decencies required by international law. Until structural transformation allows human rights to become part of a new Grotian global synthesis, the "faddish prominence temporarily accorded human rights diplomacy as a pathetic reenactment of the Grotian quest" will be overcome by "statist logic." *Ibid.*

Kennan agrees but proposes to work within the traditional statist system to achieve precisely what realistically can be achieved in the national interest, "reasonably conceived," with human rights in other countries being of lesser concern. Curiously, they both agree that two of the most overriding global concerns that nations now face are nuclear weapons, including the problem of major war, and the massive abuse of the ecological planetary system. These problems are relatively new and require global cooperation as a matter of national self-interest. Kennan, "Morality and Foreign Policy," note 1 above, 216–217.

7. Herbert Butterfield, *The Origins of History*, ed. Adam West (London: Eyre Muthaen, 1981), 181.
8. See Alberto Coll, *The Wisdom of Statecraft: Sir Herbert Butterfield and the Philosophy of International Politics* (Durham, N.C.: Duke University Press, 1985), 27–28.

living without illusion become ways to remain active in the harsh world, without giving up, even in the face of the consequences of our actions, refusing the self-righteous vision as justification for ignoring the harm we may cause to our institutions by destructive protest.⁹

Though inadequately stated above, this orientation of Kennan to the world, to his thesis and to his self-knowledge, shapes the inquiry. This essay seeks understanding of his view of normative thinking in foreign policy, whether moral or legal, and the implications from the perspective of human rights in an unfriendly world. It criticizes his conceptual presuppositions to gain clarity, posing paradoxes and dilemmas regarding their normative quality within the present structure of international relations.

I. THE CRITICAL-REALIST VIEW OF LAW AND MORALITY

Kennan penned that felicitous phrase, the “legalistic-moralistic” approach to foreign policy, in his last lecture at Chicago. Hans Morgenthau, himself an accomplished international lawyer, had earlier laid the intellectual foundations in his unrelenting attack on the legalistic-moralistic approach to international relations.¹⁰ From the time Kennan made the term popular, it has become widely known and often misunderstood. The phrase for decades has been the foil against which international legal scholars in particular have launched a major defense of the role of international law in foreign policy.¹¹

The critical realists identified with Kennan and Morgenthau differ from the pure “scientific” normativists associated with the theory of Hans Kelsen.¹² While both the realists and the normativists distinguish political from moral or legal imperatives, they differ in their view of law and morality. For Kelsen, the pure norm of law differs conceptually from subjective morality. For the political realists, both law and morality, at least in the international arena, are subjectively normative. Most post-war American legal

9. See in particular Kennan’s plea to the student left during the late 1960s, in *Democracy and the Student Left* (Boston: Little, Brown & Co., 1968), 216, 227.

10. Hans J. Morgenthau, *Politics Among Nations*, 5th ed. (New York: Alfred A. Knopf, 1973), 4–15; Hans J. Morgenthau, *In Defense of the National Interest* (New York: Alfred A. Knopf, 1951), 144 (“legal obligations must yield to the national interest”).

11. See, for example, Richard Falk, *Legal Order in a Violent World* (Princeton, N.J.: Princeton University Press, 1968), 257; Richard Falk, *The Status of Law in International Society* (Princeton, N.J.: Princeton University Press, 1970), 497; and John Moore, “Law and National Security,” *Foreign Affairs* 51 (1973): 408. “On one side were international relations theorists such as Hans J. Morgenthau and George F. Kennan, who saw only a small role for international law and who opposed their ‘realist’ position to what they believed were dangers of a ‘legalistic-moralistic’ approach in dealing with national security issues. On the other side were jurists such as Hardy C. Dillard and Myres S. McDougal, who warned that the realists had an incomplete understanding of the role of international law and that their view, if influential, could be costly for American foreign policy.” *Ibid.*

12. Hans Kelsen, *Principles of International Law* (New York: Rinehart & Co., 1952), 380–386.

scholars have remained centrist and Grotian, allowing moral reasoning to influence the structure of international law but relying on positive state practice for evidence of what particular norms exist objectively.¹³ They have accepted the realist criticism¹⁴ but have claimed a longer tradition of law as a limitation or guide to action based upon custom and consent.¹⁵

The Kennan-Morgenthau school of realism in power politics has been criticized both as contrary to the rule of law and as condoning naked power in the service of the national interest.¹⁶ Kennan's lonely voice was heard often from his isolation from and disagreement with much of the making and expression of foreign policy then under way after World War II. He called for hard analysis of particular interests quite apart from moral posturing made into universal doctrines for domestic political consumption. He was not averse to American intervention, for example, for the protection of specific vital interests, as in the Korean war to repel the attack to the 38th Parallel (but not to the Yalu). He would first require, however, a rigorous and precise understanding of national interests. His most biting criticism was saved for the American penchant for trying to conform behavior of others in the world to a set of universals drawn from a projected idealistic legal vision. The examples he used in the Chicago lectures covered the Spanish-American war, the Open Door policy for China with Hays scolding the wicked Europeans, the two world wars and the Korean conflict (seeking "victory" over all Korea) and the events leading to it. Kennan severely challenged this belief structure. While it seems quaint to us now, philosophical idealism flowering at the

13. See Hersch Lauterpacht, "The Grotian Tradition in International Law," *The British Yearbook of International Law* 23 (1946): 1.

14. See Falk's conclusion in his review of the work of Kenneth S. Carlston. Falk, *The Status of Law in International Society*, note 11 above, 497.

15. Positive international law is traditionally determined by reference to evidence drawn from state practice, treaties, decisions of international tribunals, general principles of law common to all nations, and *opinio juris* from respected publicists.

Representative American international legal scholars holding this view in separating positive international law from both morality and politics are identified in Francis Boyle, *World Politics and International Law* (Durham, N.C.: Duke University Press, 1985), 3-57. For an earlier statement of the English influence, see Lassa Francis Lawrence Oppenheim, "The Science of International Law: Its Task and Method," *American Journal of International Law* 2 (1908): 313. Later British positivism is found in Arthur Nussbaum, *Concise History of the Law of Nations* (New York: Macmillan, 1954); H. L. A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961), 221 (distinguishing international law from morality); and Ian Brownlie, *Principles of Public International Law*, 3rd ed. (Oxford: Clarendon Press, 1979). Hans Kelsen propounds the clearest conceptual distinction among these in *Principles of International Law* note 12 above. See also Wolfgang Friedmann, *Legal Theory*, 5th ed. (New York: Columbia University Press, 1967), 579; Wolfgang Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964).

16. See critical comments from students and academics, together with Kennan's response, in Kennan, note 9 above. Even Myres McDougal, no stranger to the power process, thinks that political realism made fundamental errors in its lack of comprehensiveness or understanding of authority from community expectations. See Falk, note 11 above.

ime, as symbolized by Josiah Royce at Harvard, was a pervasive influence and was easily associated with utopian legal thinking. It was easy to construct and destroy such an association, given the emerging American pragmatism championed by Royce's colleague and rival, William James. Morgenthau and Kennan obliged.

The dangerous propensities of governments cannot be restrained by a system of legal rules and limitations in the same way they can be domestically where the aggressive instincts of individuals are repressed directly, Kennan thought.¹⁷ What was possible for thirteen colonies in a different period, moreover, might not be possible for nations.¹⁸ A naive belief in the rule of law among nations, if acted on, meant in his estimation that statesmen might and most often would avoid facing the intractable conflicts in interests of nations by finding some formal criteria to define the permissible behavior of states juridically. This avoidance operated to conceal the conflicts by placing the burden and function of determining outcomes on formal rules or process. Competent judicial bodies or international organizations and good offices would measure governmental behavior against those criteria and decide whether or not that conduct was acceptable. The objective and impartial application of autonomous rules idealistically agreed to and codified in positive law under the Hague Conventions and others would narrow conflict and reduce hostility.

The assumption would have to be made, as Kennan pointed out, that other peoples would want to subordinate their own positive aspirations or ambitions and demands to this abstract and idealistic code of treaty law or custom for the pacific settlement of international disputes. With proper submissiveness the destructive manifestations of national ego and aggressiveness might be contained or composed by making conflict narrowly less substantial.¹⁹ Kennan thought there lay behind this innocence a classic

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17. In this conclusion, Kennan agreed with Freud, who in *Civilization and Its Discontents*, trans. Joan Riviere (New York: J. Cape & H. Smith, 1930) began to explore the collective social pathologies and to speculate on the taming of the destructive instincts through interpersonal and family psychological arrangements.
 18. But see the precise question put in the Constitutional Convention by Patterson of New Jersey, as chronicled by Samuel Eliot Morison, *The Oxford History of the American People* (New York: Oxford University Press, 1965), 308. The proposal on sanctions if a state ignored or failed to enforce an Act of Congress was that the Executive should have power "to call forth the power of the Confederate States . . . to enforce and compel an obedience." Hamilton and Madison objected for reasons still compelling in international relations: "The larger states will be impregnable, the smaller only can feel the vengeance of it. . . . It was the cobweb which would entangle the weak, but would be the sport of the strong." Ellsworth called the proposal "coercion by force." The Convention rejected it by substituting "coercion by law" whereby the national power would be applied directly to individuals by judges under the supremacy clause, differing from earlier federal governments by affording "complete and compulsive operation" on the individual citizen.
 19. Roscoe Pound frequently used the term "composition" to mean the termination of a dispute by an adjustment that might reduce fighting and increase security by buying off vengeance with compensation, thereby trivializing the conflict. Roscoe Pound, *Introduction to the Philosophy of Law* (New Haven: Yale University Press, 1922), 74-75, 136.

American avoidance, the denial that other peoples have interests or aspirations more important than the uniquely American, possibly Wilsonian, vision of world peace. It is implausible to the American mind, according to Kennan, that other people should have objectives and a vision of order more important to them than the American dream of international peace and harmony.²⁰

American statesmanship, influenced in large part by the legal profession, is driven by these biases to seek structures for composing international disputes by agreed criteria called rules that embody the universal ideal.²¹ This structural approach to international disputes is an American style that defers substantive conflict to a later institutionalized process using abstract doctrine that all appear to accept.²²

In addition to being misguided at home, Kennan believes this American view of world peace fuels resentment and hostility elsewhere.²³ His most recent piece in *Foreign Affairs*, "Morality and Foreign Policy," explains why worldly national interests, reasonably conceived, not moral judgments about the goodness or wickedness of behavior of other nations, ought to be the guiding principle in the making and execution of foreign policy. He writes in the Butterfield tradition:

It would be a policy that would seek the possibilities for service to morality primarily in our own behavior, not in our judgment of others. It would restrict our undertakings to the limits established by our own traditions and resources. It would see virtue in our minding our own business wherever there is not some overwhelming reason for minding the business of others. Priority would be given, here, not to the reforming of others but to the averting of the two apocalyptic catastrophes that now hover over the horizons of mankind.²⁴

In this separation of morality from realistic national interests, Kennan has long associated the legal with the moral. He does not distinguish international law from morality in his critique. It is unclear whether Kennan would make such a distinction if he thought about it, and thus merely describes an association others make, or if he would agree with others that the two cannot be separated. In either case he would see that this association contains dangers. By linking moralistic with legalistic thinking, a foreign policy sets in motion a propensity to carry into the affairs of states notions of right and

20. Kennan, *American Diplomacy*, note 1 above, 94.

21. Seven of the eight U.S. Secretaries of State from 1898 to 1920 were lawyers, among whom were John Sherman, William Rufus Day, John Hay, Elihu Root, William Jennings Bryan, and Robert Lansing. Undersecretaries or legal advisers included James Brown Scott, J. Reuben Clark, Jr., and John Bassett Moore, all influential on both positive international law and foreign policy.

22. In present jargon, no structural approach is possible without dealing at some point with the hidden preferences entailed in the deep structures of systems of order, as Marx sought to understand.

23. A recent account and appraisal of the Reagan doctrine may be found in Stephen S. Rosenfeld, "The Guns of July," *Foreign Affairs* 64 (1986): 698.

24. Kennan, "Morality and Foreign Policy," note 1 above, 217-218.

wrong, "the assumption that state behavior is a fit subject for moral judgment."²⁵ This conclusion flows from a different kind of prior morality, the moral obligation to obey the law. Those who invoke a law thus might feel moral superiority to the lawbreaker.

Kennan's view of domestic law clearly rests on a moral obligation to obey the law if one is accepting its protection and advantage.²⁶ When applied to state behavior inappropriately, as Americans often do, such moral indignation over another country's illegal actions can easily spill over into legal sanctions, or military contest.²⁷ Now backed by military force, the claim "knows no bounds short of the reduction of the lawbreaker to the point of complete submissiveness—namely, unconditional surrender." Military coercion in the name of right easily leads to some form of domination, a paradox for international law. While rooted in a hope for doing away with war and violence, the legalistic approach to world affairs "makes violence more enduring and destructive to political stability than did the older motives of national interest."²⁸ Far greater in moral virtue would be a United States that maintained integrity and consistency in its own domestic morality and in its calculation of foreign policy from interests more narrowly fashioned from national security and national well-being.²⁹

Whatever the intellectual validity of Kennan's own appraisal of the role of law in international relations and its connection, if any, to morality, his position has been consistent and coherent over the years.³⁰ It rests on explicit assumptions that partake of a rich Western intellectual tradition, from St. Augustine to Machiavelli and, beyond, to the political realists such as But-

25. Kennan, *American Diplomacy*, note 1 above, 98.

26. Kennan, note 9 above, 167–170. "The central function of government, as I see it, is the assurance of the public order. This is something for which nobody has ever found any suitable means that do not include, at some point, the devices of coercion. This is true of the democracy as it is of the dictatorship. Whoever relies on these devices—on the police and the courts and the prisons—as instruments for the assurance of his own protection and his own enjoyment of civil rights—has no moral basis, as I see it, for denying his contribution to their maintenance." *Ibid.*, 169.

27. For example, the Reagan military response of April 1986 against Libya for exporting revolutionary violence was justified on the basis of self-defense.

28. Kennan, *American Diplomacy*, note 1 above, 98–99. For a recent expression of the propensity to convert a moral position in foreign policy into a compulsion to prevail, see Rosenfeld, note 23 above, 713: "Moral considerations and the political pressures they generate will keep pushing the President toward escalating and trying to win" (in the low-cost support of anti-communist insurgencies in Nicaragua, Afghanistan, Cambodia, and Angola).

29. Alan Tonelson, "The Real National Interest," *Foreign Policy* 61 (1985–86): 49; Christopher Layne, "The Real Conservative Agenda," *Foreign Policy* 61 (1985–86): 73. Layne rejects both universalism and crusading ideological internationalism, while supporting the realist tradition of Robert Taft, Dwight Eisenhower, and George Kennan in resisting the promotion of human rights and support of international organizations as major elements of U.S. foreign policy.

30. Serious criticism continues. For criticism from a positive international law perspective, see Boyle, note 15 above, 3–57.

terfield and Morgenthau. Especially now that Kennan's warning is heard once again, when the place of international law in foreign policy seems in decline in influence and respect in recent years, a clearer look at a few central ideas seems urgent.³¹

II. HUMAN RIGHTS LAW AND MORALITY

George Kennan never has developed explicitly a studied position on the use of human rights norms in foreign policy. His writings are replete, however, with specific conclusions and examples warning against projecting domestic conceptions of a morality that seems to underpin much of the human rights movement. Sometimes he refers to human rights documents and the Helsinki Final Act.³² His analysis based on national interests' predominating morality or legality repeats his Chicago lectures' theme. Human rights interventions or interferences by one state in the domestic affairs of another are based on a displaced universalism encroaching into the relations of governments with their own nationals.

The international human rights movement, which Kennan applauds when private, has increased its pressure on government policy. This fact, Kennan agrees, has to be considered in foreign policy decisions, but only because public opinion requires attention for domestic political consumption and not because the nation has any obligation to act according to a moral code in relation to other governments.³³ Nowhere, to my knowledge, does Kennan ask whether it may be in the national interest to use human rights initiatives as an instrument of foreign policy in more sophisticated ways to help a people find a more humane alternative than repressive government from either the left or the right and thereby avoid the kind of polar-

31. While Kennan has not repudiated his intellectual position separating political realism from legality and morality, as Hans Morgenthau arguably did before his death, he has come close to adopting a utopian plea in preventing nuclear war based on an approach of self-interest using the international law and organization model. The Morgenthau story as well as a rigorous criticism of the realists' metaphysical construction of the "legalistic-moralistic" approach they then deconstruct appears in Boyle, note 15 above, 70.

32. George Kennan, *The Cloud of Danger* (Boston: Little Brown, 1977), 154, 212-214; Kennan, "Morality and State Sovereignty," note 1 above.

33. For recent attempts to apply concepts of basic human rights and morality to foreign policy issues, see Stanley Hoffmann, *Duties Beyond Borders: On the Limits and Possibilities of Ethical International Politics* (Syracuse, N.Y.: Syracuse University Press, 1981); Richard Falk, *Human Rights and State Sovereignty* (New York: Holmes & Meier, 1980); Jack Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy: Law, Morality and Politics," *Journal of International Affairs* 37 (1984): 311-328; Robert Matthews and Cranford Pratt, "Human Rights and Foreign Policy: Principles and Canadian Practice," *Human Rights Quarterly* 7 (1985): 159; David Carleton and Michael Stohl, "The Foreign Policy of Human Rights: Rhetoric and Reality from Jimmy Carter to Ronald Reagan," *Human Rights Quarterly* 7 (1985): 205; and Jeane Kirkpatrick, "Establishing a Viable Human Rights Policy," *World Affairs* 143 (1981): 323.

ized reaction that places the United States in a dilemma.³⁴ This reasoning leads to a consideration of the explicit separation of morality from the international law of human rights as well as from foreign policy.³⁵

The first consideration in light of Kennan's association of legalistic with moralistic thinking is whether there is any conceptual difference between international human rights law (I here assume that it qualifies as international law) and human rights morality.³⁶ If there is such a distinction, does it make any difference? If one means that, with John Austin, all international law is positive morality only, then the difference is without meaning. The implementation of human rights policy in domestic law by sovereign states would not be obligatory in either case. A human rights foreign policy as morality would be suspect. If one distinguishes positive international law from morality, as Hart does, however, might that conceptual difference have operational effect on the behavior of governments if human rights law formed part of a nation's foreign policy? The distinction might make a difference in how it relates to the foreign policy of the United States, for a claim that positive international law is part of foreign policy is in effect an auto-limitation on the state, too.³⁷ If foreign policy is based on positive international law, including justification for counterintervention to aid a democratic regime or insurgency,³⁸ might Kennan's objections be answered? If morality influences law and law foreign policy, would it make any difference? Wouldn't the question be an empirical one: What are the expectations of the international community?

A second consideration deals with Kennan's argument about an inner morality of duty, of responsibility for the effective use of national resources and restraint in action that will best serve real national interests. Part of this kind of morality is the reciprocity of acting in such a way that rivals will not

34. A recent shift toward a more even-handed use of human rights rhetoric in foreign policy by the United States in such a direction can be seen in President Reagan's message to Congress of 15 March 1986. "Freedom, Regional Security and Global Peace, Presidential Message to Congress," *New York Times*, 15 March 1986, p. 4.

35. For a thorough examination of both the moral and political considerations of human rights in foreign policy, see Stanley Hoffmann, "Reaching for the Most Difficult: Human Rights as a Foreign Policy Goal," *Daedalus* 112 (1983): 19 (recommending a normative use of international human rights in the foreign policy of liberal-democratic states as a strategy based on both moral and political reasons for transforming a nation-state system into an international system of states that respect human rights).

36. Henkin clearly distinguishes between law and morality both in the international system and in United States domestic law, in his article, "International Human Rights and Rights in the United State," in Theodor Meron, *Human Rights in International Law* (Oxford: Clarendon Press, 1984), 25. The distinction between international law and morality generally is considered by H. L. A. Hart, note 15 above, 221-226 (no necessary relationship between a sense of moral obligation of states and the existence of international law or the motivation to adhere to it).

37. See Boyle, note 15 above, 58, for an argument that in effect converts the auto-limitations and nihilism of positivism into a functional approach.

38. Cutler, "The Right to Intervene," *Foreign Affairs* 64 (1985).

use one's actions against one's national interests. Another part of this question is a nation's responsibility for the consequences of the effects of its foreign policy used to change human rights conditions in other countries. Kennan considers it morally reprehensible for a policy to demand human rights reforms within specific countries but to assume no responsibility for the human consequences (if conditions actually worsen) because the cost of further intervention is too high or the will is missing.³⁹

That Kennan is a political realist in the tradition of Machiavelli, Hobbes, Bentham, and other Europeans is scarcely a revelation. A foreign policy of realism of interests in a world dominated by the sovereign nation-state is a fact of life, not likely to change in the foreseeable future. The traditions of philosophical realism and logical positivism or legal realism and legal positivism, each of which also separates a kind of "is" of reality from an "ought" of ontology or of a more just world, have not occupied as much of Kennan's attention as thinking clearly about distinguishing the moral from the political in international relations.⁴⁰

Kennan's theoretical assumptions about the political realism he uses in thinking about foreign policy in human rights can be adapted to diplomacy without projecting moralistic self-righteousness. Idealizing a merged moral

39. Kennan, "Morality and Foreign Policy," note 1 above, 210. "We are demanding, in effect, a species of veto power over those of their practices that we dislike, while denying responsibility for whatever may flow from the acceptance of our demands." *Ibid.*

40. Not having studied law in the United States (his academic study of law was in Germany), Kennan did not have available (I can find no reference to it in his writings) that body of emerging critical thought called legal realism which makes precisely the same, although more penetrating, critique of domestic legalisms as he makes in the international sphere. One of the most lucid works of that period of legal realism is Felix S. Cohen, "Transcendental Nonsense and the Functional Approach," *Columbia Law Review* 35 (1935): 809. Kennan studied in Germany in the 20s, when the great German legal tradition of the historical school was influential. The legal positivists of the Vienna circle were then emerging in Europe to attempt a normative science distinct from morality to match the analytical and radical empirical thinking then challenging idealism by Russell, Wittgenstein, and Ayer. See Alfred Jules Ayer, *Philosophy in the Twentieth Century* (New York: Random House, 1982), 108–140 for an account of the times.

Were Kennan to study law in the 1980s in America, he might find illuminating an emerging post-realist and post-structuralist American legal criticism. Thinkers in this tradition in law faculties use deconstruction and demystification discourse about legal doctrine drawn from various European intellectuals in ways surprisingly similar to Kennan's own critique in exposing the avoidance of the substantive conflict or contradiction in formal criteria for resolving major international disputes. For an excellent comparative review of legal realism and critical legal studies, see Twining, "Talk About Realism," *New York University Law Review* 60 (1985): 329.

H. L. A. Hart credits Bentham for the first critical demystification of the law to show that laws are simply "commands or prohibitions or permissions to act or to forbear to act. But this fundamentally imperative character of law is, according to Bentham, 'clouded and concealed from ordinary apprehension' by an illusion that there are laws which are not imperative at all." H. L. A. Hart, "The Demystification of the Law," in *Essays on Bentham, Studies in Jurisprudence and Political Theory* (Oxford: Clarendon Press, 1982), 23. Kennan's demystification of the "legalistic-moralistic" approach to foreign policy might be viewed similarly, as a recognition of the role of power for effective law.

and political order is a psychological operation. It arises from the denial of harsh realities of outrageous acts against human beings such as official torture or brutalizing violence seen regularly on television or the horror of thinking about a nuclear annihilation. It arises, too, from the avoidance of taking responsibility for substantive decisions that do not fit into the vision of world order projected from national perspectives. The Truman doctrine (to aid free governments opposing communist domination, especially Greece and Turkey), the Nixon doctrine (to aid friendly regimes against externally sponsored subversion), the Reagan doctrine (to sponsor insurgencies against Marxist, Third World regimes)⁴¹ and similar pronouncements of policy, all rest on the undue influence of legalistic-moralistic intellectual attitudes that put responsibility for determining results on "doctrine," a form of deferral or denial of political realism, according to Kennan. This excessively self-righteous national egocentrism harms the long-term national and common interests. It denies the reality of the world as it is, seeking to coerce it into conformity with right. It confuses tough moral actions based on the obligation or duty to act to prevent or ameliorate basic deprivations of human rights in other countries (as in sanctions against them seeking to change internal behavior or in supporting insurgent movements to overthrow unjust totalitarian regimes)⁴² with hard appraisals and actions necessary for the na-

41. Rosenfeld, note 23 above. "The Reagan Doctrine goes over to the offensive. It upholds liberation, the goal of trying to recover communist-controlled turf for freedom. In theory, its reach is universal. In practice, the places to which the Reagan Doctrine has been applied are a particular set of Third World countries where the Marxist grip is relatively recent and therefore presumably light. This puts Ronald Reagan firmly in the older American anti-communist tradition of Woodrow Wilson, who, preaching nonintervention, put American troops ashore at Archangel and Vladivostok. That effort to strangle the Russian Revolution conferred a Wilsonian pedigree on subsequent attempts to undo Marxist regimes." *Ibid.*, 699. Ideologically, the Reagan doctrine challenges the Brezhnev doctrine, supporting the socialist legal obligation to come to the aid of communist regimes under counter-revolutionary attack, and attempts to demonstrate that it can be reversed.

42. Consider this merged moral and political justification in the context of Nicaragua. Elliott Abrams, Assistant Secretary of State for Inter-American Affairs (formerly Assistant Secretary of State for Human Rights) gives an archetypic expression in his public defense of the United States support of the *contras* in their attempt to overthrow the Sandinista government: A central justification is "our moral responsibility to the people of Nicaragua, who fought so hard to win their freedom, only to see their revolution betrayed by a small band of Marxist-Leninists. . . . In Nicaragua, our moral goals and our security interest are identical: Democracy in Nicaragua will reinforce democracy throughout Central America, while a totalitarian regime in Nicaragua threatens those fragile democracies. Thus, the only sensible policy is to continue and increase the pressure on the Sandinistas to accede to the wishes of the Nicaraguan people—for democracy, for freedom and for peace." Abrams, "Keeping Pressure on the Sandinistas," *New York Times*, 13 January 1986, p. 15, cols. 2–5.

Stanley Hoffmann similarly opposes the nineteenth century brand of liberalism of John Stuart Mill that was unreservedly anti-interventionist abroad, but for different reasons. He gives moral and political arguments in favor of intervention "within very strict limits" for carefully tailored ends, fully recognizing the possibility for abuses leading to actual harm for the victims whose autonomy is sought. His moral argument is that a policy of interven-

tional interest as in a clear policy of non-first use of nuclear weapons.⁴³ Sanctions or punishments against aberrant conduct of other governments not in harmony with the national vision of peace and order are confused with decisions based upon knowledge of the world of power and its control. If hard analysis of interests shows that human rights interventions are powerful alternatives to polarized internal political and military struggles in friendly dictatorships, foreign policy initiatives carefully crafted can prevent an untenable alliance with a repressive regime while being on the politically "correct" side of an internal struggle for power. Kennan would argue that unless the interventions were effective, they could do more harm than good by unleashing unforeseen consequences or loosening internal structures of authority for keeping order, leading to polarized internal struggle with no option but greater military force.

tion "would aim not only at spreading the benefits of liberal democracies, but also at overcoming the antimony between what has been called 'the morality of states' (based on the principle of state autonomy and on the mutual recognition of a range of states' rights) and a cosmopolitan morality that subordinates these rights to the human rights of individuals and groups." Hoffmann, note 35 above, 36-37.

Kennan's critique implies disagreement with both views for the very reason that they are difficult to distinguish. The temptation is to confuse rhetorically Hoffmann's view that "noninterventionism abandons the victims of illiberal regimes to their masters" with Abrams' justification of moral duty for ideological reasons of state morality (Hoffmann calls it moral Manichaeism) See Kennan, note 32 above, 44, for his view that the selection in foreign policy decisions of countries in which the concern "for other people's liberties" finds expression, is arbitrary and hence suspect. But note his views of the responsibility of governments for consequences of foreign policy interventions for human rights reasons that might place a burden on, for example, the United States to the extent that its human rights policy was responsible for weakening the traditional forms of government permitting the rise of repressive regimes and more serious victimization of human beings than its policy foresaw. Kennan offers imperative arguments of his own. Kennan, "Morality and Foreign Policy," note 1 above, 212-217.

43. Kennan was probably the first to advocate and explain a U.S. policy against the first use of nuclear weapons. See Kennan, *Memoirs 1950-1963*, note 1 above, 110: "Considering such weapons to be suicidal in their ultimate implications, destructive in a degree which no purely national objectives could ever justify, and wholly unsuitable as instruments of national policy, I had always opposed the basing of our defense posture upon them, and particularly the adoption of the principle of their 'first use' in any major military encounter. I had pleaded in vain, only two years before, against the decision to proceed to the development of the hydrogen bomb before at least renouncing the principle of 'first use' and then having another try at international negotiations looking to the outlawing of these and all other weapons of indiscriminate mass destruction." He argued that competition of indefinite duration in weapon development would not be in the national interest, driven by the "false mathematics of relative effectiveness" of the inflexible Pentagon thinking that became an absolute value. *Ibid.*, 111. His position was developed as he was leaving the Policy Planning Staff of the State Department in 1949, but it was a personal position only. Contrary to what many contemporary critics of the no "first use" policy believe, Kennan's thinking was not soft (*identified with moral wishes*) but was based on a hard-headed analysis of political realism and an assessment of confusion in using nuclear weapons for defensive purposes, ensuring a policy of their first use regardless of "whether they had been or might be used against us, in any major military encounter." George Kennan, *Memoirs 1900-1950* (Boston: Little Brown, 1967), 472-473.

Nothing is as simply understood from the standpoint of Kennan's criticism of the effects of this confusion as official human rights positions of the national government, manifested in the Helsinki Accords, in tying most-favored nation treatment to Jewish emigration, in conditioning aid on country reports showing progress in eliminating gross human rights deprivations, and in seeking democratization in Third World countries. Each of these positions is an official act meant to detect and correct variances from the national moral vision projected onto the world in order to transform it. This vision is not sufficiently driven by political realism and fails because it appears to be tough when it is naive. Each action in part is ineffective because it uses power for a moralistic vision which governments have no proper mandate to impose and because it engenders hostility and awkwardness in relations with other countries. Moreover, it dissipates vital national energy and resources best marshalled for more strategic and focused policies.

III. KENNAN'S STRUCTURE OF INTERNATIONAL RELATIONS

Kennan frames his analysis and appraisal using three conceptual presuppositions. The first distinguishes between the behavior of governments and that of individuals or peoples, the well-known problem of dualism.⁴⁴ Only governments are responsible for foreign policy. They may choose to be influenced by private moral considerations of public opinion, and are bound by valid domestic law, but their responsibility is of a wholly different order. Second, the moral obligations of governments, or their commitments, differ from those of individuals. This problem of dual morality is also well known.⁴⁵ Government's primary obligation is to represent the national interests, not its moral impulses. These interests are military security, political integrity, and the well-being of its people. They arise from the very existence of national sovereignty and are necessary to national existence. These needs are neither good nor bad. They simply are. No moral justification for acting on the basis of those interests is needed. No moral reproach for actions in furtherance of them is required. No moral obligation to other governments arises except to concede the same legitimate interest in national security for their own people and, with rival powers, to understand their intentions and capabilities reciprocally.

The third general clarifying point Kennan makes is that there are no internationally accepted standards of morality which governments could invoke even if they ought to behave morally. There are certain high-sounding words and phrases that most governments readily accept when asked. Sub-

44. Lauterpacht, note 13 above.

45. *Ibid.*

scribing to the carries no danger of curtailing freedom of action, because they are so vague or ambiguous. While Kennan does not mention the Universal Declaration of Human Rights or the four human rights treaties that President Carter signed and sent to the Senate for advice and consent to ratification, nor any other of the international or regional machinery set up for handling human rights disputes, it is a fair conclusion that these agreements fall into this category for Kennan's purposes of analysis.⁴⁶ He does include in the pronouncement category the Kellogg-Briand Pact, the Atlantic Charter, the Yalta Declaration on Liberated Europe, and preambles of many international agreements. He also relegates to this category the human rights provisions of the Helsinki Accords of 1975, and presumably the treaties of human rights binding on the parties referred to in the Final Act.⁴⁷ While signatory governments might be held to specific obligations, these international instruments use words and phrases that have different meanings for different people and are but another example of using the Accords to hold others to United States or Western political and moral standards.⁴⁸

Kennan's criticism of the use of vague generalities in various foreign policy initiatives reflects his realism about the relativity of values in diverse cultures, not any inherently amoral personal philosophy.⁴⁹ Indeed, Kennan's own moral positions are highly developed. While not explicitly saying so, he suggests that there are moral bases for the nation-state system itself – namely, in the practical way to keep order most effectively; in the independence of the diverse national cultures that provide protection for and expect alle-

46. The Helsinki Final Act, which Kennan views with skepticism, refers to many human rights agreements. See Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accords) signed 1 August 1975, *Department of State Bulletin* 37 (1975): 323–350, reprinted in Comm. on Foreign Affairs, 98th Cong., 1st Sess., *Human Rights Documents: Compilation of Documents pertaining to Human Rights*, 229–282, and reprinted in *International Legal Materials* 14 (1975): 1292–1325.

47. Helsinki Final Act, note 46 above.

48. For a complete history of the Soviet-bloc view of human rights agreements as “different concepts” for different social systems, see Farrokh Jhabvala, “The Soviet-Bloc’s View of the Implementation of Human Rights Accords,” *Human Rights Quarterly* 7 (1985): 461. Confirming Kennan’s conclusions, whether the agreements are legally binding or are declarations, Jhabvala shows how the Soviet-bloc governments’ view theoretically and in practice allows them to claim full compliance while resisting internal accountability invoking the U.N. Charter respecting the sovereignty and domestic jurisdiction of states. Indeed, under Soviet theory of international law, Western liberal conceptions can be used as the instruments to attack the internal economic and social conditions in countries where liberation movements are encouraged while also resisting Western interventions to stop or reverse such movements.

The contradiction between international human rights and cultural relativism is fully explored in Allison Renteln, “The Unanswered Challenge of Relativism and the Consequences for Human Rights,” *Human Rights Quarterly* 7 (1985): 514, and in Jack Donnelly, “Cultural Relativity and Universal Human Rights,” *Human Rights Quarterly* 6 (1984): 400.

49. These dilemmas are a theme of Clarence Crane Brinton, *A History of Western Morals* (New York: Harcourt, Brace, 1959), 10–11.

giance from citizens; and in the resistance to the implications of a single world order.⁵⁰

Kennan distinguishes between morality of nations in the external arena, where sovereign states play out their national interests cooperatively and competitively, and morality of individuals within a national society in their relationship to the state and each other. David Hume made the same distinction.⁵¹ Kennan's sense of a citizen's duty to obey the law rests on three Hobbesian qualities that Kennan accepts as the basis for law in a national system. First, the social contract forms the theoretical basis for order. It provides state protection for citizens against the brutish war of each against all in exchange for their obedience to law and government.⁵² Second, states as well as individuals exist in a natural condition of hostility. Without the protection of a state in return for the obligation to obey, the citizen would be vulnerable to this hostility from other states.⁵³ This assumption shapes Kennan's skeptical view of international codes of conduct and his suspicion about the use of vague and high-sounding declarations, presumably including various human rights declarations and covenants, which have no means of success in a hostile world except through the state. Third, law is the command of Leviathan to a political inferior backed by threats to maintain internal peace.⁵⁴

Given his acceptance of the social contract, Kennan believes that if one is to have the security and well-being of a system of government under law, one is bound by tacit if not actual consent or estoppel to obey the law as a

50. For a coherent explanation for this position in the views of a historian closely allied to Kennan's realism, see Coll, note 8 above, 5.

51. David Hume, *Treatise of Human Nature*, ed. L. A. Selby-Bigge, 2nd ed. (Oxford: Clarendon Press, 1978), 567-569.

52. Kennan, note 9 above, 169-170.

53. *Ibid.*, 169-170. "No one has a moral right to deny on principle his contribution to [the national defense] . . . unless he is willing to condemn not just the war his government is at the moment conducting, but every one that it has conducted in the past, including that which established its political independence; and unless he is really prepared to commit its destinies to the good graces of an extremely jealous and largely hostile outside world. If all were to do this, there would of course then be nothing to prevent the seizure of the reins of government in this country, entirely or in part, by any foreign political entity that wished to seize them and could accommodate its action to the interests of other foreign governments." *Ibid.*

54. Developed later by Bentham and Austin, this notion describes the realistic allocation or assumption of power within a state. Constitutive in character through yielding freedom for security and partly informal, this concept seems to form the basis for Kennan's fierce support of the power allocated to the American judiciary. Shaped in the McCarthy era when the political branches brought enormous power to bear on Kennan's associates in the State Department and elsewhere, his preferences favor the principled reason of the independent judiciary under the Constitution as a safeguard. In that sense, the judiciary is a political superior. He distrusts the mob-instinct fueled by popular fear of the communist threat brought on by naive and dangerous mistakes in foreign policy. Kennan, *Memoirs 1950-1963*, note 1 above; Kennan, note 9 above, 203: "It is better, as I see it, to live under bad laws fairly and impartially administered than to live under good ones for the proper application of which no adequate judicial sanction exists, just as it is better to have nar-

moral premise.⁵⁵ It is unclear whether he would agree with Hume's devastation of the social contract basis for the duty to obey government and ultimately agree with Hume that self-interest and advantage form the moral basis to obey, a utilitarian judgment.⁵⁶ It is also a fair question whether this moral stance itself conceals a conflict between a pure power theory of law as command of political superior to political inferior backed by coercion and that of a natural law, or religiously derived, theory of the justification for the obligation to obey law.⁵⁷ In calling for an American outlook that accepts "obligations of maturity" in a world of relative and changing values, Kennan admonishes Americans to be grown up, to "put away childish things" that are so dangerous in such a world.⁵⁸

In the arenas of foreign policy, where sovereign states still control the effective monopoly of coercive power over individuals, Kennan's view of law is clearly positivist and relativist, based upon mutually enforceable specific "obligations" derived from consent, presuming common interests.⁵⁹ In the

rower rights guaranteed by independent courts than wider ones against the arbitrary denial or curtailment of which there is no judicial recourse." For Kennan, these are distinctly realistic and legitimate claims, with order and security the predominate values, whose purpose is aimed at protecting human beings in return for allegiance to the state through law and the courts.

55. We find this internal premise stated explicitly and defended most vigorously in Kennan's dialogue with the student left in the late 1960s over the issues of civil disobedience in the face of the war in Viet Nam, with which he profoundly disagreed. Kennan, note 9 above. Other statements in his memoirs, books, and articles confirm this moral premise underlying his political theory of government. But see Michael Reisman, "The Tormented Conscience: Applying and Appraising Unauthorized Coercion," *Emory Law Journal* 32 (1983): 499 for a psychological consideration of the use of unauthorized violence from Plato's Crito to modern civil disobedience. For a contemporary critique of the obligation to obey the law, see Jonathan Raz, "The Obligation to Obey the Law," in *The Authority of Law* (Oxford, Clarendon Press, 1979), 233.
56. Harrison, note 5 above, 190–191, referring to Hume's *A Treatise of Human Nature* and concluding that government is a useful human institution which can retain its usefulness only if it is usually obeyed and not because the people gave promise a long time ago or, by acquiescence, made a tacit bargain today. The obligation to obey more accurately means that one is obliged to obey from the advantage of having order and security. Kennan's rhetoric refers to the duty to obey almost as a moral imperative, not as a utilitarian calculation of advantage, but his reasoning and analysis address the interests of advantage in having a useful institution.
57. See John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1979).
58. G. Kennan, *Russia and the West under Lenin and Stalin* (Boston: Little Brown, 1961), 397–398. These things include "self-idealization and the search for absolutes in world affairs." A strong nation wielding great power must share in the guilt of exercising that power when it affects others. "There is no greater American error than the belief that liberal institutions and the rule of law relieve a nation of the moral dilemma involved in the exercise of power. Power, like sex, may be concealed and outwardly ignored, and in our society it often is; but neither in the one case nor in the other does this concealment save us from the destruction of our innocence or from the confrontation with the dilemmas these necessities imply. When the ambivalence of one's virtue is recognized, the total iniquity of one's opponent is also irreparably impaired." *Ibid.*
59. Kennan does not treat seriously the claim that human rights law is a part of international law that is enforced in external relations by reciprocal sanctions by states, as D'Amato

human rights provisions of the Helsinki Accords, the moral question for Kennan is not whether the treatment of human beings inside the Soviet Union sometimes is odious, but why the United States pressed for principles its statesmen knew could not be met without a complete transformation of power within the Soviet Union.⁶⁰ In this comment, Kennan reveals another structural basis for his own morality, auto-limitation. Again and again in his own foreign policy recommendations, Kennan counsels self-limitation and sacrifice as principles guiding conduct of the United States. Negative imperatives restrain the tendency for moral histrionics at the expense of substance and limit the instinct for covert operations.⁶¹ Positive imperatives are urgent to gain control over the efficient and effective use of all our resources (the deficits, for example) and to concentrate these in averting the twin perils, major war and abuse of the natural habitat of the environment.⁶²

While surely strategic, control over and concentration of resources and policy have structural implications, for the perils are so formidable that the cooperation of states is imperative. The structural modifications are not comprehensive, as in supranationalism or world federalism. They are, nonetheless, at least functional. These structural imperatives are not only founded on the rational calculation of advantage, but they also entail "moral obligation," to pursue the functions of survival, a common enterprise. A subjective or religious bias may form an inward duty to a higher purpose.

In the calculation of external advantage in foreign policy, on the other hand, Kennan seems to discount morality, even though actions taken to identify and further those interests may reflect internal moral opinion as realistic parts of the calculus. He resembles the empiricists and utilitarians following Hume and Bentham, in that sentiments of people merely form part of a realistic assessment. We choose action to reflect national interest in particular ways without accepting the Kantian moral imperative to act such that the basis for action is a principle of universal legislation. Yet Kennan himself accepts a very disciplined set of inner standards: "Morality," he writes, "if not principled, is not really morality."⁶³ The inward moral obligation arises in the prudent use of power and resources limited to carefully determined national interests, reasonably conceived, within our own traditions, not in interventions in the vague name of human rights, fidelity to treaties, the United Na-

cogently argues. Anthony D'Amato, "The Concept of Human Rights in International Law," *Columbia Law Review* 82 (1982): 1110. However, Kennan's position does not preclude an inner incorporation, the possibility that "[h]uman rights law may be used to express the larger community's expectations even between a country and its own nationals, that relationship being a juridical construct of international law that may be reflected in domestic constitutional law." Gordon Christenson, "Using Human Rights Law to Inform Due Process and Equal Protection Analyses," *University of Cincinnati Law Review* 52 (1983): 5-6.

60. Kennan, "Morality and Foreign Policy," note 1 above, 207-208.

61. *Ibid.*, 212-215.

62. *Ibid.*, 215-217.

63. *Ibid.*, 211.

tions Charter, or democracy based on some moral duty to detect and correct abuse.

Kennan's structure of concepts separates government from individuals. A structure of governance relationships, both domestic and international, must be distinguished from the morality of codes of behavior for other governments' treatment of their citizens. Even the treatment of one's own citizens rests on a relative morality, the moral and cultural traditions informing the particular internal political structures of that state. Julius Stone associates this difference of treatment with diverse "human justice constituencies."⁶⁴ Kennan accepts the nation-state system with this explicit dualism, a constitutive structure resting on worldly presuppositions ultimately normative. Since states are diverse enclaves of justice, the nation-state system which protects that variety while serving the needs of human justice might be said to rest on a moral foundation.⁶⁵

IV. A CRITIQUE OF THE CONCEPTUAL STRUCTURE FOR HUMAN RIGHTS

Kennan's postulates allow us to construct an approximation of his conceptual position that might undergird the use of human rights norms in foreign policy. His conservative theories about the state and government, his association of law and morality, his critical political realism for statecraft in exercising the power of government, and his view of duty, are all derived from these postulates. He is explicit in the importance he attaches to his personal religious values which influence his thinking, but he tries to keep personal preference separate from his calculation of the requirements of national interests, accepting cultural relativism as a basis for deference to other political systems. He attempts no "deep-structure" critique of the foundation of the nation-state system, but accepts the reality of what exists and seeks to further the national and common interests as he sees them, using the traditional power of governments. Yet he is highly critical of universal structures, especially the American penchant for detecting and correcting aberrant behavior of foreign governments using high-sounding principles most closely associated in recent years with human rights conventions.

Law as a coercive order made applicable to individuals is best developed under a domestic system that might vary according to the political history and unique conditions of a people. Until the monopoly of coercive force shifts from the nation-state to a supranational or global authority (a transformation of power not likely to happen soon if ever), we should accept

64. Julius Stone, *Visions of World Order: Between State Power and Human Justice* (Baltimore: Johns Hopkins University Press, 1984), 91-101.

65. See Butterfield, note 7 above, 50.

the reality of keeping world public order through national systems.⁶⁶ As a matter of foreign policy, international agreements that are not enforceable by reciprocal arrangements ought not be invoked to affect the behavior of another country toward its own citizens.

If this summary fairly represents Kennan's conclusions as I have interpreted their application to human rights in foreign policy, are those conclusions valid? Is Kennan at last to be heard? Are his views adequate in taking account of the transformations in power relationships that appear to make human rights concerns as strategic and important as nuclear weapons and global ecology? Is Kennan's argument for a moral obligation for removing the threat of nuclear or ecological disaster more cogent than one for ameliorating gross abuse of human dignity?

Prudence may indeed place high priority on the intractable problems of major war and the environment, but what makes them any more of a moral or political obligation upon governments than the protection of fundamental human rights? The answer seems to lie in the construct Kennan brings to his realistic understanding of the nation-state system. He writes frequently of the relationship between responsibility or obligation and power.

Despite frequent assertions to the contrary, not everyone in this world is responsible, after all, for the actions of everyone else, everywhere. Without the power to compel change, there is no responsibility for its absence. In the case of governments it is important for purely practical reasons that the lines of responsibility be kept straight, and that there be, in particular, a clear association of the power to act with the consequences of action or inaction.⁶⁷

Power resides in the nation-states and the special power to control nuclear weapons and environmental harm lies predominately with the great powers. The power to control the behavior of individuals resides in the internal domestic systems of coercive order traditionally exercised by sovereign states. One state cannot easily intervene in another state's internal relationship of government to citizen (with or without justification in law or morality) without a major claim to displace, weaken, or subordinate the authority structure of that government.⁶⁸ states have no claim to authority or control over the internal political independence or integrity of other states.⁶⁹ They may have sufficient power to intervene or to control, but in the calculus of

66. Kennan, "Morality and Foreign Policy," note 1 above, 206.

67. *Ibid.*, 212.

68. See Richard Lillich ed., *Humanitarian Intervention and the United Nations* (Charlottesville, Va.: University Press of Virginia, 1973) for a detailed exploration of the problem of the legality of major power interferences in the international affairs of other states committing human rights offenses against their own populations even when such repressive actions shock the conscience or threaten the peace.

69. The principle of illegality for threats to a nation's territorial integrity or political independence is reflected in Article 2(4) of the U.N. Charter. Despite the purposes of the Charter to promote human rights of all peoples, the Soviet-bloc have invoked consistently

cost and benefit, the costs are high and the claims to control may be quite inefficient. The principle of political independence and nonintervention encapsulate experience from the Peloponnesian wars to the Napoleonic wars and the twentieth century wars. The costs may be high indeed when a foreign power seeks to intervene to control the internal affairs of another country, even when conquered or even when the intervention is by a major power. Costs may be less when the local population is being repressed or brutalized and the intervention is to counter the repression of a democratic insurgency.⁷⁰

In the cases of nuclear weapons and global ecology, however, (and perhaps also in the global economy and communications) the planetary interests transcend those of the nations and demand that state power be used to eliminate the threats to all. States themselves have power to stop gross abuses of human rights and improve conditions within their own borders, but without the cooperation of other states they have no power to eliminate the threats to all from major war and ecological destruction. As nuclear proliferation and widespread ecological destruction threaten to escape the control of even the great powers, the interest of all in yielding to international control heightens. The Hobbesian world of Leviathans coexisting in a natural state of hostility is a precondition for yielding autonomy for survival and order. Hume's notion that it is in a nation's interest for all other nations to cooperate in keeping order, while it does not, describes the dilemma. If a state has power, the capacity to defect from a cooperative standard of international order increases.⁷¹ This dilemma in contemporary theory of public choice is well-known.⁷² A nation has no narrow self-interested incentive to cooperate when it has power, only when it needs the power of others.

Or is it rather that Kennan's structure, with circular logic, answers itself? Governments ought not threaten each other's internal order in human rights matters because it would be incompatible with the existing power of the state and destabilizing of the equilibrium of existing power if an outside force claimed a basic part of the allegiance and protection of local citizens. The fear of internal changes and revolutions, allegedly encouraged by human

a narrow interpretation of Article 2(7), the domestic jurisdiction reservation, that any international accountability for internal human rights compliance is an unwarranted interference with their domestic affairs. See Jhabvala, note 48 above, 461, 490.

70. See Cutler, note 38 above, 96 (the principle of counter-intervention in support of democratic movements or governments does not emasculate Article 2(4) of the U.N. Charter).

71. Hume, note 51 above.

72. Russell Hardin summarizes and extends this dilemma, beginning with the well-used "prisoner's dilemma" by using game theory in dynamic collective action. The incentive for a participant to defect and not cooperate in collective action while presuming a free ride, is the basis for the dilemma in the theoretical model. A major power's responsibility is not to get trapped in the dilemma when survival is the issue. Russell Hardin, *Collective Action* (Baltimore: Johns Hopkins University Press, 1982), 16-37.

rights pressures by a major power (as some claim happened in Iran and Nicaragua) loosens internal bonds of control, especially when the control was maintained by repressive measures, and is likely to yield even more repressive successor regimes.

One answer is to work within the power structure of nation-states, a moral justification by *raison d'état*.⁷³ Indeed, various external human rights policies toward the Philippines tapped a nascent democratic revolution whose strength toppled the Marcos regime. Something more powerful, then, might be at work than can be attended exclusively within the internal order system of each country without international meddling. The new Reagan foreign policy, which uses human rights to justify support for democratic insurgencies against repressive regimes from the right as well as the left, revises earlier formulations. Recent experience in the Philippines, Haiti, Chile, and South Africa presumably justifies the new revision and thus supports aid to the *contras* in Nicaragua and insurgencies elsewhere.⁷⁴ From Kennan's premises, he would not formulate such a human rights policy, for it may or may not serve the national interest, although it is clear that in any given situation when required, Kennan would not hesitate to allow moral sensibilities to coincide with national interest. Even though any intervention required in the national interest, as in the Indian intervention in Bangladesh, the American intervention in Grenada or the African countries' intervention in Uganda, might be technically illegal (although all unilateral interventions are wrapped in some form of legality such as self-defense), it might also be considered moral.

It is not altogether clear that the same reasoning will not apply to nuclear power and global ecology, too. Kennan's acceptance of a moral obligation for a foreign policy of one category of dangers but not the other seems rooted less in the capacity to use power than in the calculation of will to use it effectively. Any moral obligation for Kennan derives from the duty of the national government to use its resources for limited but vital objectives to avert a threat to the whole, including its own people, and not to interfere with other governments' internal relations with their own citizens. The calculation seems one of cost-benefit, a utilitarian one, not a Kantian view of a government's universal moral obligation to human beings at large, grounded in an inner imperative applied to its own actions. It is entirely possible, how-

73. Butterfield's study of *raison d'état* is similar to Kennan's and does not deserve the pejorative connotation given to the term "statist." See Coll, note 8 above, 87-96.

74. *New York Times*, 15 March 1986, p. 4: "In this global revolution, there can be no doubt where America stands. The American people believe in human rights and oppose tyranny in whatever form, whether of the left or the right. We use our influence to encourage democratic change, in careful ways that respect other countries' traditions and political realities as well as the security threats that many of them face from external or internal forces of totalitarianism." See a recent appraisal of the Reagan doctrine, in Rosenfeld, note 23 above.

ever, for a political calculus to show that it is indeed in the national interests of the United States to use human rights abuses to justify influencing events within another country even though there is neither a moral nor a legal obligation to act. The danger, of course, is that such a policy can lead to coercive intervention when authority structures weaken or change and the national policy objectives widen to become counter-government.⁷⁵

If there is no basis for a moral obligation for one government to hold other governments accountable for their internal human rights practices, even if the power is available, might there be a duty to act on the basis of legal obligation? It is at this point in understanding Kennan that his association of the moral with the legal deserves critical analysis. If Kennan, as he has written, respects the sovereign equality of the nation-state tradition and institutions of international law, as well as specific, contractual obligations in treaties, he must not also take the purely Austinian view that international law is nothing but positive morality. Legal obligations may and do arise, by consent, between governments. The institutions of international law he

75. The reality is that countries intervene for purely national or ideological reasons, as happened in the Spanish Civil War. Carr explains: "[T]he notion had grown up since the first world war that a country whose internal organization was based on a certain political theory was expected to encourage and assist the triumph of that theory in other countries. This policy was pursued by the Soviet Union prior to 1927, and was adopted later by other countries. . . . In nearly all such cases, it seems difficult to distinguish between the supposed interests of a political theory and the national interests of the intervening country." Edward Carr, *International Relations Between the Two World Wars 1919–1939* (New York: St. Martin's Press, 1967), 270.

The United Nations Charter sought to prevent just such major power interventions through outlawing force by one state against another except for collective action and self-defense. Various interventions initially have rested on humanitarian or protection of nationals grounds but subsequently have changed rapidly to reflect broader, counter-authority objectives, as in the United States intervention in the Dominican Republic in 1965, the Soviet intervention in Czechoslovakia, the Congo intervention, the Indian intervention in Bangladesh, and others. These trends formed the backdrop for the Charlottesville conference of experts on the subject leading to skepticism about the doctrine of humanitarian intervention, but a concern for human rights deprivations in the face of United Nations impotence. Lillich, note 68 above, containing essays by Professors Brownlie, Farer, and Reisman.

The late Wolfgang Friedmann pointed out the difficulty in formulating any kind of principles of international law on the subject of humanitarian intervention without authority from the United Nations under collective security provisions. That inquiry inevitably raised "fundamental questions of the structure of international law." *Ibid.*, 36. He asked: "Are we not then coming—openly or in disguise—to our own preferences? In other words, we accept intervention for purposes that we regard as desirable because we dislike the structure of the government in question?" *Ibid.* He postulated the possibility of a morally valid but legally invalid intervention for humanitarian purposes exclusively, a grey and developing area of international law, as in the Indian intervention in Bangladesh. Humanitarian interventions by the United States in Grenada, Central America, and in terrorist situations pose even more difficult questions of morality and law than addressed in the conference in 1972. For a full treatment of the major instances of humanitarian intervention before World War I, see Louis Sohn and Thomas Buergenthal, *International Protection of Human Rights* (Indianapolis: Bobbs-Merrill, 1973), 137–194.

respects are those of a structural or constitutive character, not those of a set of norms in a cosmopolitan sense where the individual has a direct relation with the international community bypassing the social contract of nations with citizens for allegiance and protection.⁷⁶ But they are international law norms nonetheless.

For Kennan, I believe, legal obligation among governments would arise from customs, traditions, and agreements reciprocally followed by states in their mutual relations. This international law is referred to by Hart as the set of primary rules of obligation among nations. But there is no unifying power by which they are changed, invalidated, or recognized as legitimate, as there is in advanced municipal systems. Secondary rules of recognition, often spelled out in constitutions, provide this unifying and validating function. The validating rules in various countries recognize the legitimacy of particular primary rules that develop from within. In the international system, we have only the most rudimentary worldwide process for validating or changing customs and traditions among nations. Hart thinks we may be working also toward a more unified international system by similar secondary norms of recognition as yet undeveloped. My guess is that Kennan would not think this development realistic, but that he would accept as workable the few important rules of reciprocal custom and agreement that are effective. He would not think it necessary to have a super-system for changing the rules about jurisdiction, territory, international agreements, or respect for the political independence of other states. He might characterize such attempts as avoiding complex substantive problems.

Others believe Hart's analytic structure is not realistic enough.⁷⁷ Either way, primary rules among nations are community expectations we label obligations. They do not require for their effectiveness a formal process to tell us which rules are valid.⁷⁸ When a structural (or functional) unity is required by cooperation to solve certain intractable problems, however, a second set of constitutive norms or principles may become necessary.

Kennan would accept a primary imperative to refrain from intervention or coercion against the territorial integrity or political independence of

76. See Hoffmann, note 35 above, 36–37, for a thesis employing the cosmopolitan approach to a limited transformation of the structure of international relations.

77. McDougal, Lasswell, and Reisman view this concept as inadequate. "The analytical approach has been too much obsessed by a sterile notion of law as a body of rules emanating from some internal 'sovereign' source to observe any wider context of social processes, much less a world constitutive process; its more recent assumption of certain ill-defined 'secondary' rules which mysteriously bestow 'validity' upon 'primary' rules offers but a modest expansion of view." "The World Constitutive Process of Authoritative Decision," revised and reprinted in Myres S. McDougal and W. Michael Reisman, *International Law Essays* (Mineola, N.Y.: Foundation Press, 1981), 191, 199.

78. Hart, note 15 above, 97, 228–231. "[A] society may live by rules imposing obligations on its members as 'binding,' even though they are regarded simply as a set of separate rules, not unified by or deriving their validity from any more basic rule. It is plain that the mere existence of rules does not involve the existence of such a basic rule." *Ibid.*, 228.

another country, subject to traditional self-defense. The purpose of this obligation would be to preserve the constitution of the power of the nation-state system for recognizing and enforcing rules within the municipal system. If the character of the international legal obligation changes to affect primary or secondary norms of national systems, as in the specification of the civil, political, social, and economic rights and duties of human beings and their governments, then Kennan becomes skeptical, for it may be necessary for a nation to act for its own interests at variance from such claims in specific cases. But these matters are best left to the culturally diverse, internal processes of governments, in the absence of a stronger international system.

Kennan accepts the statist position, not as an absolutist, but rather for the largely practical reason of the need to exercise power to provide order in a decentralized, relativist world. Moreover, even the present rules of international law are far too vague and have far too little agreement about their meaning to allow the interpretations of one government to be given preference through its foreign policy insistence on accountability by another for detection and correction of internal abuse.⁷⁹

Now suppose, as consensus suggests, that certain of the various human rights are considered fundamental and have compelling importance in state practice by universal agreement. Not only are they obligatory on all governments under positive international law, *erga omnes*,⁸⁰ but also they may have the character of *jus cogens*.⁸¹ These kinds of norms have a peremptory quality under customary international law that permits no derogation by any state.⁸² Should not these "intensities in demand" amount to legal obligations of such an overriding affirmative character that national governments acting on behalf of the entire international community must enforce these norms for the benefit of individuals even if not in the immediate political interest of the nation through its foreign policy?⁸³ As in the Draft Restatement of

79. Even if we accept the validating procedure entailed by the emergence of secondary rules of recognition, as D'Amato points out, an adequate concept of law requires the justification of content in addition to the test of pedigree to deal with the inability of the positivists to handle the moral questions once morality and law are separated. See Anthony D'Amato, "The Moral Dilemma of Positivism," *Valparaiso University Law Review* 21 (1985): 43.

80. Flowing to all.

81. Compelling law.

82. Brownlie, note 15 above, 512-515.

83. *Ibid.* at 224-225. See *Restatement of Foreign Relations Law of the United States (Revised)* (Tent. Draft No. 6, Vol. 1, 12 April 1985) Sec. 702 and comment 1 and m; Myres S. McDougal, Harold Lasswell, and Lung Chu Chen, *Human Rights and World Public Order* (New Haven: Yale University Press, 1980), 338-350 (insisting on *jus cogens* in a comprehensive global constitution, based on the social facts of intensities of demand). But how does this latter view of the peremptory norms differ conceptually from Hart's secondary rules of recognition?

Foreign Relations Law of the United States⁸⁴ or in recent recommendations for inclusion as part of foreign policy, the most basic general obligation would be "to halt the suffering caused by torture, detentions, extra-judicial executions and starvation."⁸⁵

I think it is possible for Kennan to accept a legal obligation, narrowly constructed from positive international law, without associating it necessarily with a moral obligation of governments. He could be consistent by viewing such a legal obligation conceptually not as a claim to change the structure of the international order through unilateral enforcement by one government acting as international agent in the internal affairs of another, but as an affirmative duty to cooperate with all other states to ensure that their governments implement these general obligations internally. But that obligation is precisely what most governments have already agreed to and what Kennan finds meaningless. Putting aside the regional and international institutions for enforcing the human rights conventions, and even distinguishing between intervention and interference, might nations act as agents to enforce human rights of other countries' nationals on behalf of the international community? Is it possible to go beyond the legal obligation affecting primary norms among governments without directly challenging the structure of the present system of nation-states which Kennan has accepted by his initial realistic premises?

Kennan does challenge the present structure by his affirmative imperatives to eliminate the threats of major war and of ecological destruction even if his narrowest change has a strategic or functional focus. Moreover, as in the Nuremberg Principles, individuals acting under state orders preventing the performance of a specific obligation against nuclear proliferation or use or against ecological degradation may have direct duties running to international law which may not be excused by superior orders. Unless Kennan admits the defeat of the dilemma that a nation's own self-interest permits it to defect from such norms, but not to permit any other nation to defect, then he must find some way to enforce directly the important obligations of international law between the nation and its officials in conduct toward its citizens and toward other nations. A functional international regime may be the only feasible alternative, a structural change anticipated by Kennan himself years ago, in the Baruch and other plans. Transition to such a regime would require yielding a piece of the statist assumptions Kennan makes.

While I have no doubt that Kennan reached his conclusions about the twin perils for practical and prudent reasons of policy, the structure that im-

84. Restatement, note 83 above. Section 702 lists genocide, slavery or slave trade, state murder or disappearance of individuals, torture, prolonged arbitrary detention, systematic racial discrimination, and consistent patterns of gross violations of internationally recognized human rights, as violations of customary international law if a state by its policy practices, encourages, or condones any of them.

85. Matthews and Pratt, note 33 above.

plicitly undergirds his thinking is not capable, without modification, of achieving his main moral concerns. His thinking about human rights, based as it is on a rejection of his own projections of the evils of a "legalistic-moralistic" approach to foreign policy, explains why his own realism may be trapped in structural contradiction. Kennan's own assumptions about the nation-state system also rest on certain conceptions of law and morality, but he seems to avoid the demystification of these assumptions. Moreover, these assumptions may not describe actual patterns of authority and effective control from within the international community. For example, judicial power is one of the little-noticed parts of Austin's definition of law that gives meaning to Kennan's realism when applied to international human rights. I refer to the meaning of political superiority, when human rights demands take political form from within a state and are given recognition by courts. In addition, claims made powerful by people, compelling interests and, today, international movements from multinational corporations, international organizations, and covert or terrorist organizations have to enter any realistic appraisal of interests and power, as McDougal, Lasswell, and Reisman explain in their comprehensive jurisprudence and as Julius Stone summarizes in his last work.⁸⁶

Kennan's near statist view of the legitimacy of the power of the sovereign state does not square with his own political realism when one observes the power of the demands for human rights against abuses by brutal governments. In the subordination of human rights theory to that of the old social contract basis of the nation-state, traditional political realism itself may shun facing the political power claims from within the state. In the same way that Kennan recognized the advanced power of the American judiciary under an updated Hobbesian version of protection, so also political reality of unmet demands of people ready to be organized into formal power claims cannot be ignored.⁸⁷ These claims are as real, although the political

86. Lasswell, McDougal, and Reisman, note 77 above; Stone, note 64 above.

87. Note the political use of human rights from a purely national interest perspective in tapping the demands from within a nation such as Chile. Career diplomat Harry G. Barnes, Jr., Ambassador to Chile from the United States, uses the human rights organizations and moderate opposition to President Pinochet's government to support a transition to democracy. The General has publicly stated, in opposition, that the "function of some diplomats" was not to act as "correctors," for that would mean leaving behind "the minimum norms of good relations." Yet, the apparent reality is one of capturing the political spirit of the people for the foreign policy objective of preventing more radical factions to benefit from the government's intransigence. *New York Times*, 27 January 1986, p. 6. A *New York Times* editorial was quick to discern this kind of shift in the human rights policy of the United States in Haiti and the Philippines, noting "the Administration's roundabout return to an even-handed human rights policy. After an initial coddling of 'friendly authoritarians' and South Africa's racist regime, it now champions American values on a wide front. The effect, if not the motive, is also to enhance respect for America's hostility to leftist tyrannies." Editorial, "Mr. Reagan Scores for Democracy," *New York Times*, 8 February 1986, p. 18.

This editorial rhetoric is indeed the object of Mr. Kennan's criticism. It illustrates the

channels are not as well-defined, as those protected in Western democracies through the courts or parliament.

I have reached my critical conclusion about Kennan's association of morality and human rights law most cautiously and gingerly, for the lucidity and integrity of Kennan's voice heard over the decades so vastly outclasses that of his detractors or of those he aptly calls the moral meddlers, that to risk this conclusion may weaken his own critique. Kennan should be applauded for revealing the concealed avoidance of substantive conflict in thinking that moral or legal codes can determine outcomes. This kind of critique, however, is now more than ever needed to show that even the structural assumptions Kennan relies upon in this contemporary era—the fictional social compact based on natural law duties between citizens and governments,⁸⁸ the presumed exclusivity of the nation-state in the international power structure, the predilection for preserving that structure⁸⁹ and the implications of his statist realism—all require a more thoughtful and penetrating inquiry. The human rights side of the obligations of foreign policy places restraints and affirmative duties on governments in relation to their citizens. Challenges to the legitimacy of the state from unauthorized minor coercion (we call it the *international terrorist phenomenon*), the other side of the problem, represent coercive claims to power. The one structurally may be related to the other, for a weakened state cannot protect its citizens' rights. Ultimately strengthening the power of the state in repressing unauthorized coercion by potentially equally repressive measures of state violence may also lead to human rights deprivations and a denial that things might be transformed into a more civilized world. The paradox may simply reinforce Kennan's own sense of the human condition as tragic.

confusion that easily leads to realists to resist a human rights policy, for the purpose of human rights in foreign policy is not necessarily to champion American values, an egocentric idea of detection and correction, but to act as an agent of the international community using a few well-established principles of international law as well as the national self-interest. Whether the Reagan administration's revision of foreign policy in regional security adequately enfolded human rights concerns when repressive regimes of both the right and the left are involved is not clear, nor does it necessarily address Kennan's main points. While even-handed and high-toned, it does contain language of realism and national interests based on appraisal of another country's own traditions; but it seems to rest on a Wilsonian vision of democratic revolutions encouraged by a politicized human rights foreign policy. See "Presidential Message to Congress," note 34 above.

88. In his "Yencken hypothesis" Falk stated that a contractual relationship between a people and its government at the level of nation-state cannot be sustained without the use of repressive force so long as the territorial nation-state system continues. For consensual rule under social contract at that level, it is necessary at the same time to have a social contract on a global level, as a prelude to a transition to nonterritorial central guidance functions and redistribution of power, wealth, and influence. Richard Falk, *A Study of Future Worlds* (New York: Free Press, 1975). For a critique, see Stone, note 64 above, 13, 33–40.

89. Kennan, "Morality and Foreign Policy," note 1 above, 206. Kennan once told the student left that he was far more radical than they, for he wanted structural changes to be made in government. Kennan, note 9 above, 204, 228.

Myres McDougal and Harold Lasswell were the first to propose a comprehensive jurisprudence of human dignity attempting to accommodate power, authority, values, and decisions and looking toward a different future world process. Conceptions of many other thoughtful international lawyers struggling within a contemporary society not burdened by the impediments of "legalistic-moralistic" assumptions have come to share many of Kennan's conclusions. Yet, without fail, these distinguished international lawyers, disagreeing as they might with each other and on their assumptions, have placed the problem of human dignity and fundamental human rights near the top of their concerns, along with the control of violence and nuclear weapons, the problems of economic development, and the concern about environmental degradation.

It is the task for jurisprudence to try to explain where we are headed or ought to be. It is clear that change is rapidly affecting how we see, conceptualize, and act. The structures of international order are inadequate for the present and have not yet yielded a future, and we are skeptical of throwing them out. Yet we need these institutions, without illusion, without the concealed assumptions that Kennan's realism so long ago revealed and that his own structure now employs with great conceptual difficulty.