

"THE CHANGING STRUCTURE OF INTERNATIONAL LAW"†

UNCHANGING THEORY FOR INQUIRY

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*Plus ça change, plus c'est la même chose.*¹

In recent decades the demand has become increasingly insistent among scholars and others for development of a more comprehensive theory of inquiry about international law, drawing upon all relevant areas of knowledge and especially upon the social sciences.² Early in his very ambitious book Professor Friedmann states that:

The changes in the dimensions of international law require a corresponding reorientation in its study; neither the international lawyer trained in the classical methods of international law and diplomacy nor the corporation, tax, or constitutional lawyer are equipped to handle this subject without cooperation with each other, and with economists and political scientists. International law is becoming a more and more complex and many-sided subject.³

In bringing the book to a close, he reaffirms that basic changes in the "structure of international society" make necessary a "far-reaching reorientation in the science and study of contemporary international law."⁴

For any who are as yet unconvinced of the exigency of this demand, Professor Friedmann's able and wide-ranging survey of almost all of the more important and controversial areas of contemporary international law may serve as compelling proof. By intention and example, this book makes a conclusive case for the view that an inter-disciplinary approach and an inter-disciplinary jurisprudence offer the only effective means for delimiting

† By Wolfgang Friedmann. New York: Columbia University Press, 1964. Pp. xvi, 410. \$8.75.

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1. Ancient jurisprudential proverb.

2. A recent eloquent statement of this demand, with abundant references, is Falk, *The Adequacy of Contemporary Theories of International Law—Gaps in Legal Thinking*, 50 VA. L. REV. 231 (1964). See also CARLSTON, *LAW AND ORGANIZATION IN WORLD SOCIETY* (1962); FOREIGN POLICY DECISION-MAKING (Snyder, Bruck & Sapin eds. 1962); INTERNATIONAL POLITICS AND FOREIGN POLICY (Rosenau ed. 1961); KAPLAN & KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* (1961); ROSECRANCE, *ACTION AND REACTION IN WORLD POLITICS* (1963); THE INTERNATIONAL SYSTEM (Knorr & Verba eds. 1961); THE POLITICS OF THE DEVELOPING AREAS (Almond & Coleman eds. 1960); Lasswell, *The Interrelations of World Organization and Society*, 55 YALE L.J. 889 (1946).

3. P. 70.

4. Pp. 367-68.

and managing an area of inquiry which bristles with inter-disciplinary problems. The mere substantiation of this case, even without Professor Friedmann's excellent survey of, and penetrating comments upon, the main features of contemporary international law would make this book a significant contribution to a much neglected field and afford further evidence of the author's superior scholarship. Such evidence is, of course, superfluous for readers of the previous works of this distinguished and prolific publicist.

It must be regretfully noted, however, that the book reveals many gaps in thinking and many perplexing features. Despite the fact that Friedmann, in both title and text, manifests his awareness of the connection between international relations and international law, in no place in the book is this nexus clearly spelled out. An adequate theory describing the interrelations of community process and authoritative decision and indicating their implications for the study of international law is not presented. Even more puzzling is the fact that despite the author's *crie de coeur* cited above, his primary and secondary sources are almost exclusively "legal" and "doctrinal."⁵ The fruitful and provocative work in the social sciences that has enriched the international law field in the last two decades is neither mentioned nor, apparently, drawn upon.⁶

The principal thesis of Friedmann's book is that, during the formative period of international law, conflict was perceived as the main instrument for serving "national interest"; as a result, classical international law was almost exclusively concerned with the regulation of this conflict. Professor Friedmann calls this traditional law the international "law of coexistence,"⁷ since it aimed to do little more than maintain the existence of a small number of nation-states. In the contemporary period, the *motif* of conflict as the means of realizing national interest has been supplanted by cooperation in many areas of international endeavor. Thus Friedmann finds that alongside the continuing international "law of coexistence," an international "law of cooperation" is developing. Conflict and cooperation, he asserts, are both

5. See pp. 383-96.

6. See, in this regard, Professor Falk's criticism in his review. Book Review, 3 COLUM. J. OF TRANSNAT'L L. 256, 262 (1965).

7. Professor Friedmann apparently assumes that the term "coexistence" derives a stable reference from classical international law and that the U.S.S.R. proffers the term "coexistence" in good faith.

It is indeed only because the phrase is widely used by Communist leaders and forms an acknowledged objective of Soviet diplomacy that it has come to be suspect to important segments of western, and in particular United States', opinion. The international diplomacy of coexistence means nothing more or less than the continuation of the classical system of international law

P. 15. Subsequently, in discussing it in its Panch Shila formulation (p. 323), he notes that some of the tenets of coexistence are ambiguous, and he elsewhere suggests further qualifications. See pp. 335, 336. For a somewhat different analysis of Soviet strategy in the use of the term, see McWHINNEY, *PEACEFUL COEXISTENCE AND SOVIET-WESTERN INTERNATIONAL LAW* (1964); Lipson, *Peaceful Coexistence*, 29 LAW & CONTEMP. PROB. 871 (1964); McWhinney, *Peaceful Coexistence and Soviet-Western International Law*, 56 AM. J. INT'L L. 951 (1962). See also McDUGAL, LASSWELL & VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 131, 448-49 (1963), for discussion and further references.

instruments of national interest, but in the context of changing international society, there is a growing realization that national interest can be best served by cooperation.

If the author's major purpose is to provide a theory of inquiry about international law, adequate to locate it in the broader context of international relations and to promote its improvement for general community goals, then—unfortunately—his aspirations have exceeded his grasp. The two-tiered "co-existence-cooperation" description of international law, similar to Schwarzenberger's "international law of reciprocity and international law of coordination,"⁸ though responsive to certain contemporary features of the largest community process, is, in the final analysis, a rule-oriented jurisprudence with all the defects and limitations from which such a jurisprudence must suffer. It could scarcely be expected that a jurisprudence of this type could establish and maintain a consistent observational standpoint in inquiry or provide an adequate delimitation of the focus of attention for comprehensive and realistic study of the relevant features of the international social process, or facilitate performance of the various intellectual tasks that imperatively confront any serious inquirer—whether scholar, international decision-maker, national decision-maker, advocate, or community member. In the necessarily brief survey which follows it may be seen that Professor Friedmann does not overcome the difficulties inherent in his most general theory.⁹

I. CLARITY IN OBSERVATIONAL STANDPOINT

One prerequisite for an effective theory of inquiry about any kind of law is the establishment and maintenance of a consistent observational standpoint. Few will question that the perspectives from which one views a particular matter or flow of events affect perception and, as a result, evaluation. A comprehensive theory about international law must note different possible observational standpoints and then clarify and maintain its own.

8. For a recent statement, see SCHWARZENBERGER, *THE FRONTIERS OF INTERNATIONAL LAW* (1962). Similar formulations may be found in ARON, *PAIX ET GUERRE ENTRE LES NATIONS* (1962). CARR, *THE TWENTY YEARS' CRISIS 1919-1939* (2d ed. 1946) is probably the first formulation of the "split level" approach to international law.

9. The criteria which we apply in appraisal of Professor Friedmann's theory of inquiry are designed to test, from policy-oriented perspectives, the adequacy of any proffered jurisprudence. The principal point we would make in their application here is that Professor Friedmann's theory is not adequate to serve the goals which *he* explicitly sets for himself. (Note the references in the first paragraph of this review and his other statements of preference for a policy-oriented approach. *E.g.*, p. 68.) A more detailed statement of the criteria and principles employed here may be found in McDougal, *Some Basic Theoretical Concepts About International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RESOLUTION 327 (1960). See also McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, in *STUDIES IN WORLD PUBLIC ORDER* 3 (1960); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, in *id.* at 42.

It should not require emphasis that the measure of deference we accord Professor Friedmann's work is best indicated not by the number or sharpness of particular criticisms, but rather by the total amount of attention we accord to his book.

One aid to consistency in observational standpoint is recognition of the distinction between theories *about* law as contrasted with theories of law. When a jurisprudence fails to distinguish the theories required by a scholarly observer for the performance of his intellectual tasks from the theories employed by the participants in the social process in making and justifying decisions (theories which are in fact a part of the events being observed), serious distortions in perception and reporting may occur. One of the gravest distortions that is attendant upon failure to determine and to maintain a consistent observational standpoint is the inability to distinguish a comprehensive community perspective from that of particular participants. This is illustrated by the indiscriminate use of key terms as different participants would use them, without appreciating that these terms have different connotations for each participant. An examination of Friedmann's use of the term "national interest" will demonstrate that the author has fallen into this error.

The term "national interest" is a fundamental concept in Friedmann's thesis. Great pains are taken to distinguish "conflicts of interest" between participants from "conflicts of value" and "conflicts of ideology" in order to develop a notion of a "community of interests."¹⁰ If any of these terms are given consistent empirical references that might serve as a basis for distinction, Friedmann does not explicitly present them to the reader. By "national interest" does he mean such interest as determined by the officials of a particular state, by a decision-maker representing a larger community, or by a scholarly observer? The observational standpoint for "national interest" shifts constantly in the book. Indeed, the very adoption and employment of the terms "national" and "international" interest foredoom efforts to achieve clarification and to make important recommendations. The distinction between "national" and "international" interest posits a dichotomy between the two; but the dichotomy is unreal. The scholarly observer would note that the same interest may be both "national" and "international." Such a standpoint, if maintained, would allow for distinctions both (1) between general community interest as perceived by the observer and as perceived by the community members and (2) between general community interests, whoever does the perceiving, and the interests of particular participant states. The "national-international" distinction cuts across these standpoints and obscures the fact that in a given context the most important "national" interests of a particular state may be its inclusive ("international") interests with other states.

Professor Friedmann, in his function of supplying intelligence and recommendations to the general community decision-makers, could most

10. See pp. 45-59.

profitably take the position of the scholarly observer. From this vantage point he might distinguish—in terms of a comprehensive set of values and the conditions affecting the achievement of such values—first, between the common interests of all community members and the special interests that any particular member may assert against the whole community irrespective of consequences for the others, and second, as among the common interests of members, between those which are inclusive, in the sense that they may be enjoyed by all in the same modality (such as with respect to access to the oceans or the air-space over the oceans) and those which are exclusive in the sense that all may have comparable interests but not in precisely the same modality (such as with respect to the enjoyment of internal waters or of a territorial sea).¹¹ With these categories, or equivalents that make the same distinctions and avoid the simple dichotomy between “national” and “international,” Professor Friedmann might clarify the common interests of community members as he, the observer, perceives them; note the interests that are in fact asserted by particular community members; and, finally, appraise all asserted interests in terms of the degree of their compatibility with the clarified common interests for which he has assumed responsibility in recommendation. An analysis along these lines might, in appropriate performance of the tasks incumbent upon scholars, serve as a valuable guide both to established community decision-makers and to other responsible community members.

Reticence in clarifying the precise content of the term “national interest” in particular situations has detracted from the value of the book. “National interest,” as defined by Friedmann, means little more than that states in the international social process pursue objectives. This truism is of little descriptive value and, more serious, it incapacitates its author from making important recommendations to international decision-makers. Certainly, Professor Friedmann will not propose that all objectives are or should be treated by a decision-maker as equal. In some few instances, Friedmann attempts to strike a more comprehensive, evaluative stance, but these infrequent and hesitating steps in the right direction are unsuccessful due to the failure to maintain this observational stand throughout the book and from it to perform the requisite intellectual tasks.

One of Friedmann’s discussions of power will serve to demonstrate our point. Friedmann appears to state that pursuit of power per se is unlawful, but the pursuit of power as the means of achieving other values is lawful.¹²

11. It will be noted that we define interests in terms of demanded values plus attendant expectations about the conditions affecting the achievement of such values. The descriptive categories we recommend are discussed in more detail in McDougal, LASSWELL & VLASIC, *op. cit. supra* note 7, at 141-90.

12. See p. 50. Professor Friedmann’s precise words are:

Power, as a means of attaining a given objective, is a necessary and ethically neutral instrument of politics. But the pursuit of power, as a goal of national

Applying this, the author holds that certain objectives or "national interests" of Nazi Germany or Fascist Italy were unlawful.¹³ This formula is not, however, explicitly related to a comprehensive set of overriding values including conceptions of the appropriate sharing and management of power. Its ambiguity and plasticity become apparent in wider application. Thus, the Italian campaign in Africa prior to World War II could be said to have been manipulation of power with the aim of achieving wealth and respect. Professor Friedmann would undoubtedly be among the first to condemn such action. This finding could not, however, be based on his own ambiguous formula but rather on what he would be forced to describe as "extra-legal" factors.

II. DELIMITATION OF THE FOCUS OF INQUIRY

The pre-eminent contribution of Professor Friedmann's book is its recognition and description of the realities of the contemporary international social process. An initial assumption of "changing structures" permits Friedmann to remove traditional blinders and to note many significant phases of the world social process. Unfortunately, the lack of a comprehensive theory and an effective terminology has caused the author to overlook key facets. The result is an incomplete survey, not easily adapted to facilitating performance of the various necessary intellectual tasks.

The wide review of the participants in the contemporary international social process is one of the strongest parts of the book. Friedmann examines, often in impressive detail, the influx of a variety of new participants: new states,¹⁴ international organizations,¹⁵ nongovernmental organizations,¹⁶ international corporations and individuals.¹⁷ To be sure, the broadening spectrum of participants has been observed and commented upon by others,¹⁸ but a detailed study of the impact of this phenomenon on international decision and public order remains to be undertaken. It is regrettable that Dr. Friedmann has not pushed beyond the broad frontiers of the changes he depicts. The discussion of "conflicts between corporate loyalties and public national policies"¹⁹ is inconclusive. Friedmann fails to grasp that this is only one effect (and not the most important) of an increasing concentricity of identifications. Similarly, the discussion of internal democratization (which is subsequently

or personal politics, represents a specific ideal, antithetic to the ideals of international order, peace and cooperation.

13. See pp. 51, 254 n.1, 267-68.

14. See pp. 31-32.

15. See, *e.g.*, pp. 96-114, 153-59, 253-74.

16. See p. 38.

17. See pp. 40-44, 232-49.

18. See, *e.g.*, JESSUP, *A MODERN LAW OF NATIONS* 15-42 (1948); LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 12-47 (1950).

19. See pp. 29-30.

negated)²⁰ is vitiated by the fact that Friedmann, though paying lip service to a transnational social process, continually conceives separate arenas of international and municipal law that intersect only at fixed nodal points.²¹ Somewhat inconsistently and inexplicably, Friedmann, in a later part of the book, returns to the logomachous "subjectivity-objectivity" concepts of a different era.²²

The changing structures of international law include changing objectives. Elucidation of this phase of the social process remains wanting. "Cooperation" is sometimes used in this sense, but the precise denotation of the term remains unclear, for Friedmann presses it into double-duty as a strategy. His use of the term "common interest" lacks both the breath of life and detailed specification. When applied to the "law of coexistence," it means little more than a stalemate.²³ When applied to the "law of cooperation," it is a label (applied subsequently) to areas of interaction in which a noticeable degree of institutionalization has been achieved.²⁴ The split-level approach obfuscates "common interest" in a variety of value processes as it is perceived by both effective participants and objective observers. It is not surprising that Friedmann discerns it primarily in the economic sphere and remains skeptical about its existence in others.

There is little explicit discussion of the changing situations of interaction, geographic or temporal, or of the changing bases of power of the many different participants. The discussion of changing strategies deals only with the restrictions that the destructiveness of contemporary weapons places upon use of the military strategy, and even this observation suffers from overgenerality.²⁵ The delineation of the changing outcomes of the social process in the production and distribution of demanded values is too narrow. Friedmann dwells on resultant interdependence in the wealth process but fails to examine outcomes in a variety of other value processes. The author's manifesto on the defectiveness of a security regime based on regional organizations is presented dogmatically²⁶ with no analysis or reasons in support of the conviction.

Despite, therefore, Professor Friedmann's frequent mention of a world

20. Compare p. 7, with pp. 42-44.

21. Thus, at pp. 7-8, Friedmann regards treaty ratification as the area that is affected primarily by internal democratization. The argument is premised on the assumption that "the principal legal implementation of important international decisions is the Treaty."

22. See pp. 232-49.

23. It is significant that Friedmann adopts Morgenthau's definition of law as "the natural ideological ally of the *status quo*" to characterize the law of coexistence (at p. 58), but rejects it for his law of cooperation. The real implication of Friedmann's law of coexistence becomes clear from a variety of statements the author makes throughout the book. See, e.g., the "balance of power" statement at p. 85.

24. See text accompanying notes 109-10 *infra*.

25. See pp. 259-74.

26. See p. 258. This, again, would appear to be a particularization of Friedmann's general rejection of *dédoublement fonctionnel*.

social process, transnational in character, embracing many different participants and resulting in varying degrees of interdependence, it must be concluded that his delimitation of the broader focus of his inquiry is inadequate. His illumination of the larger community process is patchy, and a variety of half-conceptions and misconceptions lead to inaccurate conclusions. This will become more apparent as we examine his conceptions of authority and control and of the role they play in the different social and community processes.

A. *Balance of Emphasis Upon Perspectives and Operations*

In policy-relevant inquiry about international law, as indeed about any law, a writer must place balanced emphasis upon both perspectives and operations. Friedmann's criticisms of other schools for their failure to focus on both these factors are quite valid.²⁷ In unfolding his own jurisprudence, he attempts to strike this balance. Rejecting the *dédoulement fonctionnel* doctrine²⁸ (which will be analysed in more detail below), Friedmann is forced to admit that an effective sanctioning process does not prevail for the "law of coexistence."²⁹ Yet he convinces himself of the existence or "reality" of this stratum of international law through its "recognition and observance" by the major participants.³⁰ On a verbal level, this satisfies the balanced emphasis requirement. But Friedmann can neither substantiate his definition nor follow it in the rest of the book. Thus, for example, he states:

Overwhelmingly, however, international disputes are tested and judged by reference to international law, even though, depending on a variety of factors of power and opportunity, the contestants may distort the facts or the law in their own interest.³¹

Yet the reader will discover, to his surprise, that Friedmann's examples for this assertion are Berlin, Vietnam, Laos and the Congo.³² One can scarcely know whether he seeks to illustrate his major proposition or its qualification. Apparently even Professor Friedmann is somewhat uncomfortable with these examples, for elsewhere he discusses the theory that posits the existence of international law on the fact that its subjects "*feel a sense of obligation* in regard to the rules of international law."³³ This formulation would seem to represent Professor Friedmann's considered opinion, as he reverts to it in his summary and conclusions at the end of the book. There he bases the reality of international law on the "rule of recognition";³⁴ the "observance" component has been dropped. Emphasis has shifted exclusively to perspectives.

27. See pp. 82-84.

28. See p. 84. *But cf.* p. 92 n.18.

29. See p. 85.

30. P. 86.

31. P. 87.

32. See *ibid.*

33. P. 82. (Emphasis added.)

34. P. 369.

Though there is considerable reference to both rules *and* practices, the emphasis that dominates the author's discussion is upon "rules." The conception of law as a body of rules or norms appears explicitly in a number of places.³⁵ Even when Friedmann speaks more broadly of "process," it is a process for the articulation of rules.³⁶ The concept of *lacuna* or a *non liquet* judgment is a logical corollary of a rule-oriented jurisprudence; it cannot obtain in a jurisprudence based on a process of decision. Friedmann's vacillation between rules and decision is brought out clearly in his discussion of *non liquet*. On the basis of doctrinal authority, he denies it;³⁷ yet in his discussion of vital issues, he hearkens back to it.³⁸

B. *Clarity in Conception of Authority and Control*

The distinction between authority and control also suffers severely from the split-level approach to international law. Although Professor Friedmann distinguishes between authority and control in a number of places in his book, the distinction is thoroughly confused when it is applied to problems of the "law of coexistence." The reader's suspicion that the "law of coexistence" is no more than a synonym for the controlling situation receives early confirmation when the author adopts Morgenthau's definition of international law to characterize the stratum of coexistence.³⁹ The failure to grasp and apply the distinction recurs in the author's discussion of maintenance of peace among the Big Five:

Politically, the maintenance of peace in such conditions depends not on legal sanctions but on the balance of power between the major states. This is, in effect, the contemporary position.⁴⁰

The confusion recurs in one of the many disquisitions on sovereignty:

[A] national state has always the *power*, as distinct from the *right*, to violate international obligations. This is a hallmark of national sovereignty.⁴¹

It is worth noting that this use of the term sovereignty differs from the author's other uses of the term throughout the book. Some observations on the inaccuracy of the statement will be made below.

The distinction between authority and control languishes again in Friedmann's study of aggression and self-defense, in which he mentions, but does not adequately dispose of, the contrasting views of Professor Henkin on the

35. See, e.g., pp. 60, 81, 118, 140, 152-87.

36. See, e.g., pp. 140, 152. *But see* p. 299, where state practice is taken into account. For an indication of what is involved in taking seriously the conception of law as a process of authoritative decision, see Mayo & Jones, *Legal-Policy Decision Process: Alternative thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318 (1964).

37. See pp. 174, 189 n.3.

38. See pp. 146-48; text accompanying notes 62-63 *infra*.

39. See p. 58.

40. P. 85.

41. P. 110.

one hand and former Secretary Dean Acheson on the other.⁴² Similarly, in his attempt to establish the "reality" or "binding character" of international law, noted above, Professor Friedmann fails to extricate himself cleanly from certain inherited confusions about the relevance of consent.⁴³ The traditional argument against the relevance of consent, here illustrated by a quotation from Fitzmaurice who builds upon Brierly and others, is that consent cannot serve as an indication of "binding character" since its very invocation is to argue in a circle. This of course ignores the fact that "consent" may be employed at many different levels of generality. Professor Friedmann appears to dismiss the traditional confusions as "fragile constructions" and to offer instead tests in terms of "recognition and observance."⁴⁴ These terms do not, however, amount to a clear distinction between authority and control, and the difficulties Professor Friedmann has with them have already been indicated. When the mystical debate about the "reality," the "binding character," the "basis of obligation," and so on of international law is resolved into empirical questions about the distribution of authority and control, it is easy to frame a comprehensive set of questions whose answers might give appropriate guidance to decision-makers and community members.⁴⁵

C. *Comprehensiveness in Conception of Law as a Process of Authoritative Decision*

Professor Friedmann's conception of law as a response to events in the social process, a response which in turn conditions the social process,⁴⁶ has impelled him to a contextual examination. Logically, one would have expected him to progress to the notion of a comprehensive constitutive process of authoritative decision for the entire world arena. The visitors in flying saucers who observe our earth can undoubtedly see that for the earth community as a whole, as well as for each of its internal territorial communities, there is a comprehensive process of decision, sustained by dispositions of effective power, which identifies certain decision-makers as authoritative for the whole community, prescribes the criteria by which decisions are to be taken, establishes appropriate structures of authority for the interaction of claimants, allocates important bases of power among the established decision-makers, authorizes and regulates the employment of a variety of strategies or instruments of policy in aid of decision, and finally produces a continuous flow of particular decisions in resolution of controversies between claimants about the shaping and sharing of the different values sought in

42. See pp. 259-60 & n.12a.

43. See p. 85.

44. See p. 86.

45. A more detailed discussion of this problem appears in McDUGAL & FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 275-79 (1961).

46. See, e.g., *id.* at 1, 77, 117.

the world social process.⁴⁷ The decisions that establish this most comprehensive process are what we mean by "constitutive" decisions; the continuous flow of decisions about various value processes which come out of the most comprehensive process may conveniently be called "public order" decisions. Unfortunately, this concept of a comprehensive constitutive process of authoritative decision appears to elude Professor Friedmann. Certainly he makes no explicit use of such a concept: at one point he laments the "absence of international constitutional organs entrusted with the functions of legislation, administration, and adjudication";⁴⁸ when he employs the heading "International Constitutional Law," he refers to the internal processes of intergovernmental organizations;⁴⁹ and late in the book he makes a curious distinction between "constitutional" and "functional" approaches, in which "constitutional" appears to be the equivalent of "utopian."⁵⁰ Since Professor Friedmann does not achieve a conception of a comprehensive constitutive process, he is, of course, incapable of distinguishing between constitutive and public order decisions.

One source of Professor Friedmann's difficulty appears to stem from his reticence in applying the functional approach that he praises.⁵¹ He constantly voices a preference for international norms that emanate from centralized institutions.⁵² Friedmann's rejection of Scelle demonstrates a failure to understand an unorganized process of decision.⁵³ Without this notion, a comprehension of the international constitutive process is, of course, impossible. In addition, an understanding of the process of international prescription, to which Friedmann devotes a large part of his book, is disproportionately restricted to those processes manifesting a high degree of internal organization.

That part of the book which is devoted to the processes of change by authoritative decision⁵⁴ suffers from many grave defects. The term decision, when comprehensively considered, may be seen to comprise a variety of different authority functions.⁵⁵ Friedmann has treated only two of them—

47. For a detailed study, see McDUGAL, LASSWELL & VLASIC, *op. cit. supra* note 7, at 94-137.

48. P. 119.

49. See p. 153.

50. See pp. 275-77.

51. See *ibid.*

52. See, e.g., pp. 119, 153, 371, 373.

53. See p. 148. For a presentation of a different point of view, see KEETON & SCHWARZENBERGER, MAKING INTERNATIONAL LAW WORK 40-43 (2d ed. 1946); 1 SCELLE, PRÉCIS DE DROIT DES GENS 43, 56, 217 (1932); 2 *id.* at 10, 319-28 (1932); Lenhoff, *Reciprocity and the Law of Foreign Judgments: A Historical-Critical Analysis*, 16 LA. L. REV. 465 (1956); Lenhoff, *Reciprocity: The Legal Aspect of a Perennial Idea*, 49 N.W. U.L. REV. 619, 752 (1955); Lenhoff, *Reciprocity in Function: A Problem of Conflict of Laws, Constitutional Law, and International Law*, 15 U. PITT. L. REV. 44 (1953); cf. MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 23, 31-32 (1926). For additional discussion, see McDUGAL & FELICIANO, *op. cit. supra* note 45, at 296-301.

54. Pp. 117-51, 213-20.

55. For a detailed examination of seven different decision functions, see McDUGAL, LASSWELL & VLASIC, *op. cit. supra* note 7, at 113-27. An insightful description of the prescribing function as a process of communication appears in Schachter,

prescription and application. Too often, Article 38 of the Statute of the International Court is accepted as an homogenous and exhaustive description of "the sources" of international law. Professor Friedmann moves quickly beyond this, but unfortunately fails to develop an adequate theory of prescription in terms of a comprehensive process of communication. This and the orientation toward organized institutions, noted above, contribute to the inadequacies of his discussion of custom.⁵⁶ Chapter 10 indiscriminately mixes prescription (as the outcome of the process), prescribers, objectives, situations and strategies. But the prescribing roles of the International Law Commission and the Sixth Committee are given excellent treatment. Although Professor Friedmann shies away from authoritative unilateral decision made with promise of reciprocity and so accepted, in economic matters he stresses prescribing through a process of claim and counterclaim as a means of maximizing overall value position.⁵⁷

The discussion of the prescribing role of national courts is perplexing in itself and inconsistent with much that was stated earlier in the book. Though Friedmann is focusing on prescription, he enjoins national courts to prescribe only when there is pre-existing consensus.⁵⁸ (Is there then any need to prescribe?) Friedmann argues that national courts should not prescribe in controversial areas because they are prone to national prejudice and policies.⁵⁹ Apparently Professor Friedmann believes that Foreign Office staff and members of the International Law Commission and the Sixth Committee are less prone to these prejudices and are more objective. *Sabbatino*⁶⁰ is praised:

The Supreme Court by this reversal struck a powerful blow for a dispassionate approach by national courts to sensitive problems of international law, contrary to the claim of many groups and writers that non-recognition of the Cuban nationalisation legislation would strengthen international law. The purpose of these assertions is the judicial affirmation of a doctrine of expropriation which is deeply controversial in contemporary international law. As the Supreme Court pointed out, "it is difficult to imagine the Courts of this country embarking on adjudication in an area which touches more sensitively the practice and ideological goals of the various members of the community of nations."⁶¹

Friedmann quite realistically castigates the concept of *non liquet*, yet fails to note that *Sabbatino* is a *non liquet* judgment. Why a national court should take a "dispassionate approach" rather than seek to "strengthen international

The Relation of Law, Politics and Action in the United Nations, 109 RECUEIL DES COURS 165, 171-84 (1963).

56. See pp. 121-23.

57. See p. 56.

58. See pp. 146-48.

59. See p. 147.

60. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

61. P. 148 n.71.

law" is not explained. Praising an American court for "affirming a doctrine" that is antithetic to public order values shared by the United States with many other countries seems as perverse as would be praising the State Department for not extending diplomatic protection to American nationals abroad.⁶² If, as Friedmann states, the decisive agent of development of international rules is state practice,⁶³ it is difficult to understand why Friedmann, on the same page, insists that the authoritative judicial organs of a state should not participate in that development. Surely, judicial officials are no more biased or any less capable than executive officials of clarifying the common interests of the territorial community they represent and other such communities in controversies otherwise properly before them.

Friedmann's discussion of application is concerned primarily with sanctions. The author does not accept sanctions applied by nation-state officials acting as international decision makers—*dédoublement fonctionnel*—as lawful international sanctions.⁶⁴ Thus, in the international "law of coexistence," where there is little "vertical" development, there are no effective sanctions. In the international "law of cooperation," Professor Friedmann does find effective *international* sanctions in the exclusion from access to benefits of cooperative international organizations.⁶⁵ There are few international lawyers who do not view with enthusiasm the development of international welfare organizations in this generation. Their enthusiasm should not, however, lead to the optimistic belief that these organizations are currently capable of being effective in applying sanctions. In the first place, such action would probably jeopardize the sanctioning organization. Secondly, the benefits that most of these organizations dispense are only marginal. A recent study of elites within developing countries revealed that bilateral aid was often preferred to and often easier to obtain than international aid.⁶⁶

These criticisms of Professor Friedmann's thesis may, admittedly, be ephemeral; it is not unlikely that these international organizations will one day be capable of effective sanctioning. (How this change is to come about without some fundamental changes in the "law of coexistence" remains mys-

62. See in this regard, Jennings, *The Sabbatino Controversy*, 20 RECORD OF N.Y.C.B.A. 81 (1965).

63. See p. 147.

64. See pp. 84, 148. Here again, Friedmann is inconsistent; subsequently he states: "any sanction is an exercise of power by the stronger against the weaker and the decisive test is in whose name it is exercised." P. 92 n.18. (Emphasis added.)

65. Professor Friedmann has not defined sanctions. In the course of his discussion, he emphasizes the defects of sanction taken only as a deprivation and adopts Hart's formulation, which can be criticized for over-emphasizing indulgences. Had Friedmann taken a more comprehensive view of sanctions as techniques for supporting the primary norms of a society, he might have identified a greater variety of sanctions and sanction equivalents in the community's arsenal. See ARENS & LASSWELL, IN DEFENSE OF PUBLIC ORDER (1961); McDOUGAL & FELICIANO, *op. cit. supra* note 45, at 261-385. This approach would also have closed the conceptualistic gap between the laws of coexistence and cooperation.

66. See RUBINSTEIN, THE SOVIETS IN INTERNATIONAL ORGANIZATIONS 40-51 (1964).

terious.) Even within these international organizations, however, the *dédoublement fonctionnel* principle operates either directly or indirectly, until changes in participants' identification patterns occur within Dr. Friedmann's "law of coexistence." In certain organizations, such as the World Bank, elite groups composed of nation-state representatives must apply the sanction;⁶⁷ in others, like the International Civil Aviation Organization, the nation-states themselves must apply the sanction.⁶⁸ Dr. Friedmann accepts these functional double roles, because the sanctions are exercised in the name of a "genuine organ of the international community."⁶⁹ He is not willing to determine if this is being done functionally on the level of "coexistence."

One may note with satisfaction that although Professor Friedmann formally adopts a rule-oriented approach, his actual detailed studies move in more realistic and promising directions. His chapter on "general principles"⁷⁰ as a means of developing international law norms provides a good example. He starts by deploring a shortage of rules but quickly reveals that general principles are camouflage for creative prescription.⁷¹ His discussion of unjust enrichment exhibits more policy thinking than comparative rule study.⁷² One regrets that Professor Friedmann did not pursue this matter further and state concrete recommendations on a lower level of abstraction. The discussion of *contrat administratif*,⁷³ a more rigorous comparative approach in the traditional sense, is somewhat circular and its conclusion does little more than restate the problem. Professor Friedmann's note on the philosophical origin of the distinction between public and private law and its current anachronistic usage is excellent.

D. *Relation of Processes of Authoritative Decision to Social Process*

Although Professor Friedmann speaks of a comprehensive transnational social process, he offers no set of terms or categories for describing the social process events (those interactions transcending state lines) that give rise to the claims to authority. Thus, the new "fields" of international law described in chapter eleven are conceived largely in terms of bodies of rules, without clear focus upon "factual" problems. The absence of a systematic categorization, in social process terms, of the kinds of controversies that come before decision-makers makes it difficult for Professor Friedmann to make clear comparisons of decisions through time and across boundaries. Similarly,

67. Articles of Agreement of the International Bank for Reconstruction and Development, art. 6, § 2, Dec. 27, 1945, 60 Stat. 1454 (1946), T.I.A.S. No. 1502, at 17, 2 U.N.T.S. No. 20(b), at 172.

68. Convention on International Civil Aviation, art. 87, Dec. 7, 1944, 61 Stat. 1205 (1947), T.I.A.S. No. 1591, at 31, 15 U.N.T.S. No. 102, at 354.

69. P. 92 n.18.

70. Pp. 188-212.

71. See pp. 189-90.

72. See pp. 206-10.

73. Pp. 200-06.

in the absence of appropriate categorization there can be little suggestion of ways to make systematic appraisals in social process terms of the consequences of decision. It is, hence, this failure to devise an appropriate set of categories for describing the social process events to which decisions are response and in turn affect, which underlies Professor Friedmann's more basic failure to establish his sought nexus between changing international relations and international law.

When involved in detailed studies of the interrelation of the process of authoritative decision and the social process, Professor Friedmann often tends to narrow unduly the arenas of interaction. In his discussion of the impact of internal democratization, for example, he restricts the effect of this phenomenon to problems of treaty ratification.⁷⁴ Similarly, the discussion of the relations of international and national law is limited too often to treaties and to court application.⁷⁵ This narrow treatment belies the multiplicity of interactions.

E. *Relation of Authoritative Decision to Different Community Processes*

Professor Friedmann tends to describe the relationship between international and national law in terms of hierarchies of rules rather than of interpenetrating community processes.⁷⁶ (It may be added that his failure to clarify the multiplicity of interactions has led him to underestimate the intensity of the struggle between contending world public orders.) Brief reference has been made to the author's treatment of the impact of internal democratization as bearing primarily upon treaty ratification. It should be obvious that the impact of democratization on an internal decision process will have marked effect on *all* the interactions between that process and other processes. Friedmann's error appears to stem again from an excessive rule orientation. Take, for example, the following statement:

[T]he question of the relative priorities of [national and international law, a problem of the *hierarchy* of legal norms, has to be distinguished from that of the *content* of any legal order⁷⁷

The emphasis upon norms and their "hierarchies" rather than upon interpenetrating processes makes it difficult for Friedmann to account for the new European communities; hierarchical norm thinking forces him to treat them as quasi-federations.⁷⁸

As Professor Friedmann proceeds, however, some of his observations on this general problem demonstrate more insight. Thus he states:

74. See pp. 7-8.

75. See pp. 96-114.

76. See pp. 76, 77, 98, 299.

77. P. 77.

78. See pp. 98-99.

[T]here is no clear-cut alternative between national and international sovereignty, but a complex, evolving and checkered relationship.⁷⁹

This, it is believed, is a more sophisticated notion of the interrelationship under discussion, although it is still far from a comprehensive and realistic description.

Throughout his discussion, the problem of sovereignty presents especial difficulties for Professor Friedmann whose treatment of it reveals his failure to grasp the realities of interpenetrating processes and interdependences. The following statement may serve as an example:

[I]t remains generally true according to the present state of development of general international law, that a national state has always the *power*, as distinct from the *right*, to violate international obligations.⁸⁰

Formerly, Friedmann had used the term "sovereignty" to denote an entity that was not subordinate to any other authority.⁸¹ Here, however, the term is used to describe an entity or participant that is subordinate to authority but has sufficient effective control to repudiate that authority at will. In the classical sense of sovereignty, which Friedmann himself had used, the statement is incorrect. In the sense of effective control—the sense presented here—it is inaccurate. A state such as the United States, which one may presume to be a real and not "petty sovereign," certainly cannot do anything it wishes without courting global disaster.⁸² In regard to either control or authority, the term sovereignty is ambiguous and cannot be understood unless put in the context of interpenetrating communities and their interdependences.

III. PERFORMANCE OF RELEVANT INTELLECTUAL TASKS

A comprehensive theory about international law, capable of facilitating movement toward a public order of human dignity, must provide for the employment of a variety of interrelated, but different, intellectual tasks. These tasks may be usefully categorized as including the clarification of goals, the description of past trends in decision, the analysis of conditions affecting decision, the projection of future trends in decision, and the invention and evaluation of policy alternatives. There need, of course, be no dogmatic order in the performance, or inexorable routines for the fulfillment of these intellectual tasks. The modality of their use is dictated by the context of the particular problem, and effectiveness in the performance of any particular task

79. P. 113.

80. P. 110; see text accompanying note 41 *supra*.

81. See pp. 82-84.

82. See in this regard Singer's application of the difference between "fate control" and "behavior control" to the United States and Cuba. Singer, *Inter-Nation Influence: A Formal Model*, 57 AM. POL. SCI. REV. 420, 422 n.5 (1963). See generally THIBAUT & KELLEY, *THE SOCIAL PSYCHOLOGY OF GROUPS* (1959).

may depend upon effectiveness in the performance of the others. Professor Friedmann's conception of the goals of his inquiry are stated, early in the book, quite narrowly,⁸³ but as the book proceeds there is a marked effort to move beyond a mere contemplative study. Unfortunately, this endeavor is hampered by the failure to identify and distinguish the different tasks. Thus, though Professor Friedmann acquits himself quite notably in the performance of some of the intellectual tasks on some problems, there is no systematic and sustained examination of the whole range of important problems with which he is concerned.

A. *Clarification of Community Policies*

Professor Friedmann praises policy-oriented jurisprudence⁸⁴ and applies it in some cases.⁸⁵ Nevertheless, he offers no general directions about how policies are to be clarified and no procedures for the detailed clarification of specific goals. Furthermore, he has no set of categories (values) or procedures for relating most general value preferences to the choices that must be made or recommended in particular instances. In general, Professor Friedmann manifests a marked reluctance to undertake, explicitly, comprehensive goal postulation. For example, in regard to the general problem of human dignity, he states:

It may indeed be maintained that all law is a law made by human beings for human beings, and that the respect for the human being, as an individual rather than an object to be disposed of at will, is a foundation of all social, and therefore of legal, relations.⁸⁶

Yet Friedmann makes no effort to postulate a comprehensive set of goal values or to elaborate a set of procedures for relating basic values to specific instances of choice. Rather, returning to rule orientation, he claims that the same result (in the cited passage) could be reached "by stating that murder or torture are international crimes, since all civilized legal systems treat them as criminal offences of the gravest kind."⁸⁷ Friedmann then hastens to add that this method will not advance beyond the most elementary postulates.⁸⁸ If one is seriously concerned with human dignity, the critical question is how less abstract specifications can be achieved and related by appropriate prin-

83. P. 70. The emphasis is primarily contemplative:

The time has come to attempt at least a tentative ordering of this bewildering mass of new developments, not only for the sake of classification or as a guide to a reorientation of the teaching of modern international law in contemporary universities, but principally as an aid to our understanding of modern legal problems that have arisen outside the traditional scope and methods of international law.

84. See pp. 78, 142 n.55.

85. See, e.g., pp. 206-10.

86. P. 77.

87. P. 78.

88. See *ibid.*

principles of interpretation to choices about particular events. Friedmann gives no explicit answer to this question, nor does he explicitly state and defend criteria by means of which international behavior can be evaluated. Implicitly, of course, Friedmann is evaluating, and the reader will discern the operation of goals in regard to power, wealth, well-being and, generally, human rights.⁸⁹ The failure to postulate these goals in a comprehensive set and to indicate procedures for giving content to the higher level abstractions detracts seriously from the coherence and wider application of Friedmann's argument.

The greater shaping and sharing of the wealth value is cited by Professor Friedmann as an extant community goal. In applying this goal to the problem of expropriation, Friedmann presents one of the clearest case analyses of his book.⁹⁰ The discussions of the power value are considerably less coherent and, if nothing else, demonstrate the hazards of impressionistic rather than systematic goal clarification. Friedmann is uneasy about the shifting power center in the United Nations,⁹¹ which represents a wider participation in the power value, and similarly uneasy about the proliferation of petty sovereignties in the international arena.⁹² He vacillates on the use of power. Pursuit of power per se is, according to Friedmann, antithetic to international law, but pursuit of power as an instrument for achieving other ends is "ethically neutral."⁹³ This rather ambiguous formulation is supposedly buttressed by the author's rather grand statement that he "accepts" the bipolarity of politics, as resulting from a perpetual tension between "conscience and power," between "ethical and coercive factors."⁹⁴ This adds ambiguity to ambiguity. In the context of Friedmann's book the components of the bipolarity merge, for power is, according to the author, "ethically neutral"—an instrument for achieving a given objective in the national interest (national desired values) in any given situation. The abuses to which this formulation are susceptible have already been suggested.

Friedmann's goal clarification is further marred by an apparent misconception of what is involved in value analysis. The chapter that is devoted to this matter is less than pellucid.⁹⁵ He notes that there can be many types of values and that national interest is a "shorthand expression for the values being pursued in the name of a given nation state."⁹⁶ This truism brings one back to precisely the point from which value analysis should commence. It is because the term "national interest" is so ambiguous and changing that many contemporary social scientists and international lawyers reject it or insist

89. See, *e.g.*, p. 325.

90. See pp. 206-10.

91. See pp. 32-34.

92. See *ibid.*

93. P. 50; see note 12 *supra*.

94. *Ibid.*

95. Pp. 45-59 (ch. 5).

96. P. 47.

upon precise indices when it is used. One alternative would be an explicit adoption of the maximization postulate: whatever any participant in the social process does, he does because he believes, correctly or not, that it is in his own interest to do so. Some comprehensive set of value categories could then be employed to ascertain precisely what values are in fact being pursued in a particular context and how this affects general community interests and the long-term interests of particular participants, as clarified by the observer. It has been previously noted that Friedmann's "shorthand" use of national interest creates an artificial dichotomy between national and international interests and presents an unrealistic "either-or" choice; if in each situation national interest and general community interest are subjected to value analysis from the standpoint of an impartial observer, it will often be seen that "national" and "international interests" are the same.

In sum, Professor Friedmann has neither spelled out in comprehensive form nor offered techniques for the further specification of the public order goals for which he, as a scholarly observer, is willing to take responsibility in making recommendations to the decision-makers and members of the larger community of mankind. If Friedmann would state his overriding goals in some comprehensive and systematic form, specifying them in necessary detail for each value process, he might, thereafter, in assessing decision, test each choice by the degree of its approximation to his specified goals.

B. *Description of Past Trends*

Arguably, a book of this size cannot present comprehensive trend studies of each of the major areas that its author aspires to treat. Even allowing for this, however, the description of past trends is somewhat meager. In general, one questions the merit of merely citing by name current controversies such as Laos or Vietnam as substantiation for an assertion. It is also surprising to find a case as complicated as that of the *Certain Expenses of the United Nations*⁹⁷ disposed of without examination of some of the more important difficulties involved.⁹⁸ The technical unfeasibility of undertaking an intensive contextual examination of every case does not justify the other extreme.

The more particular difficulties that Professor Friedmann encounters in describing past trends are, of course, attributable to the absence, already noted, of a set of categories for the detailed description of the social process events to which decisions are a response. In default of categories that permit a stable reference through time and across boundaries for appraisal of the impact of decisions upon general community interests, description must perforce be largely anecdotal. Thus, despite all the emphasis which Professor Friedmann quite rightly gives to the roles of many new actors in the world social

97. [1962] I.C.J. Rep. 151.

98. See p. 15.

process—intergovernmental organizations, private associations, and individual human beings—he never achieves a systematic and detailed exposition of the broad participation that these new actors now have in the world arena's most comprehensive constitutive process of decision. Nor does he attempt comprehensively and systematically to describe the protection that the various new participants are able to secure from the larger constitutive process both in establishing themselves as legal entities, with a competence for making claims and being subjected to claims, and in the conduct of activities with other participants in the shaping and sharing of values.

Much of Professor Friedmann's discussion of past trends has been telescoped into the brief characterization of classical international law as a process of decision regulating conflict. Insofar as any process of decision regulates conflict, the characterization is not invalid. But the implication that national interest in the classical period was advanced only by instruments of conflict is an incomplete description of the decision process in question and an inaccurate rendering of the facts. In truth, participants in the international social process have always sought to secure certain value objectives by means at their disposal that were deemed effective. Decisions about value allocation have been taken in a variety of authoritative and/or controlling arenas by a variety of coercive and noncoercive means. Patterns of decision in certain areas of endeavor—for example, the law of the sea⁹⁹—have reflected in high degree a perceived common interest in cooperation. Patterns in other areas have manifested perceived common interest in a lower degree. Against this backdrop, "conflict" and "cooperation" as used by Professor Friedmann have a shifting meaning, referring variously to strategies as employed in the social process, the responding decision processes or, even, to the resultant patterns of decision.¹⁰⁰ Friedmann's shift in reference is subtle and confusing.

C. *Identification and Analysis of Conditioning Factors*

Much of Professor Friedmann's book is devoted to description of changes in the conditioning factors that affect decision. In the first part of the book, Friedmann describes and analyzes what he considers the major changes in interstate relations. The significant features of the traditional or formative era of international law, according to Friedmann, were: the almost exclusive participation of a limited number of western Christian states; the fact that these states, due to a broad political and cultural homogeneity, had no concern with each others' internal political or social systems; and the rise of the nation state with a strong doctrine of sovereignty that, among other things, made the nation state "diplomatically and legally" the only full

99. See McDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS* (1962).

100. A detailed analysis of the normative ambiguity of these terms is presented in text accompanying notes 109-10 *infra*.

subject of international law.¹⁰¹ These factors led classical international law to a preoccupation with acceptable rules of conduct in international diplomacy and relatively little concern with the economic or general welfare effects of such relations.¹⁰²

In contrast, Friedmann finds that the contemporary international scene has changed most of these factors. Participation has been opened to a large number of states of diverse political, religious and social cultures with the introduction of intense ideological divisions. That rival ideologies hold differing views about the state and the individual and almost all of their activities is not novel; what is new is that many formerly "domestic affairs" have now become matters of international concern. The combination of these two factors has led international law, according to Friedmann, into a new "vertical" dimension, which he calls the international law of "cooperation" as opposed to the traditional international law of "coexistence." As he views this process,

the attempts to regulate and promote, by positive cooperation, interests of common concern on a transitional [*sic*] level . . . add a new and "vertical" dimension to international relations, and thereby to international law.¹⁰³

The key to "cooperative law" is either internal similarity or common interest. Since these factors are not widely shared on a universal scale, the most effective and rapid development of cooperative arrangements has taken place between smaller groups of states on a "transnational scale."¹⁰⁴

Another change has been the internal democratization of many of the state participants. This, according to Professor Friedmann, has made foreign affairs a matter of domestic policies and has highlighted the close relation of international and internal law.¹⁰⁵ Both the rival ideologies and the increased participation of individuals in international relations has led to a concern with economic development. It remains a major instrument of policy of nation states, but has also become subject to public international control through the instruments of international economic organization. Contemporary welfare and economic development concerns, according to Friedmann, are part of the wider concern for survival, which he divides into a concern for avoidance of national destruction and the preservation of common resources. The former concern expresses itself in what Friedmann has characterized as the traditional law of coexistence; the creation of international organizations such as the League and the United Nations, according to Friedmann, is part

101. Pp. 4-5.

102. See *ibid.*

103. P. 9.

104. Pp. 10-11; see pp. 96-114.

105. See p. 7. As was noted above, the concentricity of national and international arenas is not always clearly expressed. At p. 7 and p. 102, the emphasis is on formal incorporation. Elsewhere it is on impact of decision in a variety of arenas.

of this concern in that they reflect a growing realization of the futility of war as an instrument of policy. The concern for the preservation of common resources, according to Friedmann, has led to a proliferation of international organizations since there is a growing realization that the enormity of the task defies the powers of particular nation states. The internationalization of economic interests, according to Friedmann, has led to a variety of group loyalties to the interdependence of the world economy and, as a result, to a variety of new legal forms in international law.

Despite a careful and detailed study of changes in environmental conditioning factors, Friedmann offers no theory for the identification and assessment of the impact of environmental and predispositional variables on decision. Environmental changes in the world arena are, of course, relevant to policy only insofar as they affect the perspectives of participants, and in turn, decision. Professor Friedmann tends to lose sight of this, and as a result his fine treatment of environmental changes goes largely to waste.

Friedmann's discussion of changes in perspectives is much less systematic than his illumination of environmental changes. This default in performance is apparently due partly to lack both of an adequate map of the environmental factors and of a clear delineation of the components of the perspectives of participants, and partly to lack of a distinction between the objectives of participants and the strategies that they employ in order to achieve their objectives. Thus, Friedmann documents the access of non-European cultural systems to participation in the international social process. He notes the divergencies between different cultural systems but concludes that, insofar as interstate relations are concerned, developing states and capital-importing states, communist and non-communist states, etc. will use the same law and substantially the same assertions.¹⁰⁶ Challenges to formerly accepted "rules," such as prompt and adequate compensation for expropriations, are not, according to Friedmann, due to cultural divergences but to immediate economic interests.¹⁰⁷ Despite this general statement, the reader will find that Friedmann takes careful note of the effect of cultural homogeneity or divergency in a variety of discussions.¹⁰⁸ Friedmann's general assumption (which even he cannot follow) that cultural factors do not affect interests, would not appear to have much support in history. His inconsistency here seems to stem from a confusion of objectives and strategies. Arguably, a democratic and a totalitarian state will conduct their formal interstate relations by means of the same strategies; but their objectives in terms of immediate and long-range value allocation will be affected by the more general perspectives that condition all of their actions, and may differ greatly in particular contexts. Though

106. See pp. 321-22.

107. See *ibid.*

108. See, *e.g.*, pp. 243, 279.

culture may in some instances appear to be a relatively unimportant factor, Professor Friedmann would be hard put to defend his sweeping rejection of it in its effects on decision.

D. *Projection of Future Trends*

The distinction between an international law of coexistence and an international law of cooperation is, according to Dr. Friedmann, the key to the prediction of future trends. When "conflicts of interest" are supplanted by a perceived common interest in cooperation in order to achieve maximum realization of common aims, then a new dimension of international law generates itself, a "law of cooperation" as distinguished from the traditional international law of "coexistence." Professor Friedmann notes that cooperation on a universal scale tends to be restricted to matters that are "neutral"—that is, matters treated similarly in diverse public order systems. In regional units with more homogeneity, there is, as a result, more transnational or supranational cooperation. Thus Friedmann distinguishes between a *universal* and a *regional* law of cooperation.¹⁰⁹ Apparently, these different international laws serve as an index of future trends of decision and development. In Professor Friedmann's words:

[T]he more predominantly technical and correspondingly devoid of political or social value conflicts a given activity, the more susceptible is it to universal organization, and also to a transfer of executive and regulatory functions from the national to the supranational level of an international authority. Conversely, the more sensitive a certain activity is to conflicting political and social ideologies, the more limited will be the scope of the transfer¹¹⁰

The elusive references in this quotation are immediately apparent. What is "technical" and "devoid of political or social value conflicts" and what is not? Nuclear energy should be "technical" enough to satisfy the requirement, but it is certainly politically and socially charged. Why is international organization developing in that area? What is less technical than basic human rights? Why so little organizational development? The reader who is so inclined can continue to play this game for many different areas of human endeavor, but the point is clear. All this prediction does is announce, after there is some international organizational development, that the subject of ecumenical regulation was "technical" and "devoid of political or social value conflicts." In short, Professor Friedmann's essays in prediction remain *post hoc* and anecdotal. This can be attributed to the failure systematically to perform the other intellectual tasks, as well as to inherent defects in the split-level approach.

109. See pp. 50-53.

110. Pp. 278-79.

E. Invention and Evaluation of Policy Alternatives

Even more distressing than the absence of responsible efforts toward the calculation of future probabilities is the fact that the split-level approach appears to inhibit creativity in the invention of alternatives to cope with the insistent problems of world public order. It would undoubtedly be simplistic to argue that conflict in the contemporary world is monolithic. In the interstices of conflict there is cooperation (or vice versa) and this may be expected to increase with the changing patterns of identifications of the participants in the international social process. In this regard, it is not unreasonable to observe that (1) nation-states of the world can and are cooperating on certain matters while doing no more than maintaining an uneasy truce on others and, hence, that (2) patterns of authoritative decision can be divided into one process which does no more than maintain the coexistence of states, and another process which regulates cooperative value production and distribution. But beneath the surface of this observation there could lurk a tendency to relieve scholarship of some of the exigency of its responsibility. It is tempting to assume that coexistence and cooperation are discrete phenomena, that the international lawyer or scholar can do little about "coexistence" and that he should concentrate upon developing "cooperation." One senses a touch of Hegelian mysticism: an increasing quantitative change on the level of "cooperation" will one day reach a "nodal point" and, magically, the world will change as the problems of coexistence miraculously disappear.

It might be that Professor Friedmann has fallen into this opiate self-deception. He discourses ably upon the many areas in which international cooperation has been achieved and develops his argument that comparative law can bring legal order to them. The air of optimism sometimes carries over to the problems of coexistence, but concrete suggestions do not.¹¹¹ In this area, Friedmann remarks, "principles of national policy and the assertion of what it [a state] rightly or wrongly regarded as the 'national interest' " generally determines national action.¹¹² Consider, for example, Friedmann's discussion of indirect aggression: a solution is "unlikely until the intensity of political and ideological warfare between the nations has abated."¹¹³ This comment borders on banality; when such warfare has abated, there will be no necessity for a solution, for there will be no problem. Without a solution, there may be no future. (More generally, one wonders what Friedmann's conception of the role of the international lawyer is, either in the present or in his millennial future?) The split-level approach to international law tends

111. It should be noted that Friedmann expands upon the importance of treating problems of coexistence early in the book (at p. 15) but thereafter, he does not carry through.

112. P. 272.

113. P. 273.

toward the same evasiveness as the "legal-political" question doctrine;¹¹⁴ it is open to the same criticisms.

The scholarly task of making recommendations for improvement thus suffers from the "coexistence-cooperation" distinction. Professor Friedmann fails to acquit himself of this intellectual task in measure proportional to his eloquent demands for change, on either of his levels of international law. Few alternative strategies are suggested for the basic problems of "coexistence." On the highest level of abstraction, Friedmann often vacillates. The author's discussions of power allocation can serve as an example. At times, Friedmann foresees a balance of power system,¹¹⁵ at times a bipolar or tripolar system of superstates on Orwellian lines;¹¹⁶ and though he quite validly criticizes the Sohn-Clark approach,¹¹⁷ he speaks at times of international federal government with a federal military or police force.¹¹⁸

The difficulty in stating Friedmann's precise views on the preferred structure and allocation of power in the international arena is not aided by the author's general jurisprudential views. Although Friedmann appears to challenge Austinian formulations and considerably later in his book praises a functional approach for describing international decision-making,¹¹⁹ his arguments that international sanctions must be imposed by international organizations (for example, the new international sanction of preclusion from participation) and his argument against *dédoublement fonctionnel* reveal an explicitly conscious hankering for an Austinian sovereign.¹²⁰

The suggestion of policy alternatives is meager even on the level of cooperation. Despite Friedmann's sanguine predictions of developments on the cooperative level, the author frequently indicates—on matters as basic as welfare agencies and human rights—a very pessimistic notion of the role of law in social change.¹²¹

The artificiality of the distinction between the laws of "coexistence" and of "cooperation" should by now be clearly apparent. All the actions of participants in the international social process are taken, it is assumed, for what is perceived to be self-interest in an attempt to maximize overall value positions. In certain value processes, it is widely perceived that self-interest can be achieved through cooperation; self-interest is supplanted by a perceived common interest. In these value processes, recurring patterns of decision

114. See DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 75-78 (1957). For a critique of the traditional doctrine, see LAUTERPACHT, *THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY* (1933).

115. See pp. 85, 260-61.

116. See p. 214.

117. P. 276; see CLARK & SOHN, *WORLD PEACE THROUGH WORLD LAW* (2d ed. 1960).

118. See pp. 13, 94.

119. See pp. 275-77.

120. Frequent references have already been made to Professor Friedmann's minimization of unorganized processes of decision. For explicit, sovereign-oriented statements, see pp. 119, 153, 370. "[T]he international legal order reflects a condition intermediate between national and international sovereignty." P. 294.

121. See p. 285.

give rise to institutions which can have positive effects as a conditioning factor in other value processes where self-interest clashes. Such other value processes, in which effective elites think (possibly correctly) that their objectives are better served by protracted conflict than by cooperation, are the primary problems for contemporary international law. Assuming that the interest in cooperation is strong enough, it may be possible to manipulate this interest so as to modify or regulate the areas of conflict. If the distinction between coexistence and cooperation is employed in this sense—that is, as a strategy for community decision-makers—then it is justified. If, on the other hand, it is used to circumvent the pressing problems in the so-called law of coexistence, it hinders rather than helps the cause of world order. Professor Friedmann's insistence on two kinds of law ignores that both are merely instruments in one comprehensive interdependent process in which security, in the sense of freedom from the fact and threat of unauthorized coercion, affects all other values and all other values in turn affect security. As a result, the dubious distinction which he has taken such trouble to draw hinders rather than helps his important enterprises.

CONCLUSION

The aspiration to create a new theory of inquiry about international law which infuses and inspires Professor Friedmann's book is indeed a magnificent one. Seldom has the need for such intellectual creation been more eloquently and cogently stated. All who cherish the values of a public order of human dignity must, similarly, both admire the honesty and courage demonstrated by Professor Friedmann in grappling with fundamental problems for which he can see no solution and applaud his more ultimate vision of a well-organized world arena in which men have security and the freedom effectively to cooperate in the abundant shaping and sharing of values. Every serious student of international law must, further, now be in his debt for a brilliant panoramic survey of important contemporary problems. Yet so long as Professor Friedmann is not able to establish and maintain an observational standpoint that clearly distinguishes between general community and participant member perspectives; or to delimit a conception of international law that focuses attention upon it as a comprehensive and continuing process of authoritative decision in which the peoples of the world, in unorganized as well as organized interactions, clarify and implement their common interests with respect to all values; or to identify and systematically to perform the various specific intellectual tasks indispensable to policy-oriented inquiry—so long also will he be unable to rise to his own challenge and create not "a mere classification of materials" but "a general legal theory" that will promote his long-term community goals.¹²²

122. The quoted words are taken from FRIEDMANN, *LEGAL THEORY* 129 (4th ed. 1960).