

## Commentary

### Toward a “New” New Haven School of International Law?

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It is always difficult, of course, to try to group a diverse collection of scholars together and suggest that they might subscribe to a single “school” of thought. Indeed, the practice of founding schools of legal analysis seems to have gone somewhat out of fashion. There is law and economics, of course (and in particular, the “Chicago School”), critical legal studies, law and feminism, critical race theory, legal history, law and society, as well as the original New Haven School of International Law (described by its founders as the school of law, science, and policy), but most of these are at least a generation old by now, and they are perhaps better thought of as broad movements or clusters of scholars working on a set of topics with a shared interest in certain methodologies, than as schools of thought. Moreover, we might question the need for any new school of international legal thought, given that the original New Haven School, the Transnational Legal Process School, and a variety of other schools are still alive and kicking.<sup>1</sup> Finally, we might wonder what difference it makes whether or not we can identify and classify a “new” New Haven School, or a school by any other name, given that all of the scholars involved are likely to continue to do the work they have been doing, regardless of the label.

To me, it is important to consider whether such a school exists, in part, because we are currently in an era when both the divergent methodologies of international law scholarship and the very idea that international norms might play a useful role are hotly contested. To be sure, the study of international law has long been a fraught one, and international relations and international law scholars have been methodologically divided since at least World War II. But the debate about international law’s impact, relevance, and role in the world has become increasingly intense as a particular version of rational

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1. See, e.g., Steven G. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT’L L. 291 (1999) (introducing symposium to discuss approaches of major schools of international law, including: legal positivism, the New Haven School, international legal process, critical legal studies, international law and international relations, feminist jurisprudence, and law and economics); W. Michael Reisman, *The Democratization of Contemporary International Law-Making Processes and the Differentiation of Their Application*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 26 (Herausgegeben von Rüdiger & Volker Rüben eds., 2005).

choice theory, dressed up as non-normative empirical political science, has sought both to advance a crabbed view of international law and to limit its influence.<sup>2</sup> One might characterize this approach as the new (or re-emergent) international law skepticism. Scholars adhering to this view have argued that nation-state self-interest both is and should be the primary reason for forming and enforcing international law; that executive branches within states are the most legitimate agents for making and interpreting this law; and that international law, in any event, has limited impact in the world.<sup>3</sup> Moreover, these scholarly positions have gone hand in hand with concrete policy outcomes in Washington, as executive branch officials of the Bush Administration have undermined treaty regimes and international institutions such as the International Criminal Court, the Kyoto Protocol, the Geneva Conventions, and the Convention Against Torture. While commentators often describe this approach as held by those on the right, the new international law skepticism (if not the rational choice methodology) has a home on the left as well, as critics have argued that international law, and in particular international human rights discourse, may shut out more productive frameworks for addressing global problems such as poverty and underdevelopment.<sup>4</sup>

Against this backdrop, the need to define an alternative approach and call it a school becomes more urgent, because ideas advanced as part of a broader collective framework may wield more power and have greater impact. Of course, many scholars seek to defend international law and have used a variety of methodological approaches to do so. Yet it is striking, I think, that a younger generation of international law scholars educated at Yale Law School or deeply engaged with ideas developed in New Haven have been at the forefront of these efforts. As the papers in this Conference demonstrate, the ongoing work of the original New Haven School, carried forward by Michael Reisman and many others, has profoundly shaped the ideas of many of these scholars, even if they do not necessarily define themselves in that way. Similarly, the work of Harold Hongju Koh and the transnational legal process movement,<sup>5</sup> as well as that of Paul Kahn<sup>6</sup> and Amy Chua,<sup>7</sup> have also been important. Whether there are enough commonalities in this new work to

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2. Of course, rational choice approaches need not result in such a dismissive view of international law's efficacy. See, e.g., Andrew T. Guzman, *Reputation and International Law*, 34 GA. J. INT'L & COMP. L. 379 (2006) (adopting a rational choice framework, but arguing that concerns about reputation encourage compliance with international law).

3. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). Indeed, scholars have gone so far as to dismiss *any* non-instrumental reasons states might comply with international law. See, e.g., Jack Goldsmith & Eric A. Posner, *The New International Law Scholarship*, 34 GA. J. INT'L & COMP. L. 463, 464 (2006) (describing such non-instrumental theories as the "primary intellectual target" of their book).

4. DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004).

5. See Harold Hongju Koh, *Why Do Nations Obey International Law?* 106 YALE L.J. 2599 (1997) (book review).

6. See Paul W. Kahn, *From Nuremberg to the Hague: The United States Position in Nicaragua v. United States and the Development of International Law*, 12 YALE J. INT'L L. 1, 30-32 (1987).

7. See AMY CHUA, *WORLD ON FIRE: HOW EXPORTING FREE MARKET DEMOCRACY BREEDS ETHNIC HATRED AND GLOBAL INSTABILITY* (2003).

constitute a school is, of course, an open question. However, I would like to suggest, in this brief Commentary, that the work of this younger generation of scholars within the orbit of New Haven does, at least, share a number of important features that might qualify it as a new school of thought about international law—and interestingly, these features echo aspects of the original New Haven School.

First, as in the case of the original New Haven School, this scholarship often takes a normative stand. While the original New Haven School is oriented toward world public order and human dignity, the work of many in this new group of scholars is committed to the rule of law, accountability, and human rights. Rosa Brooks, for example, has argued for a re-formulation of international humanitarian law and human rights law to better protect human rights in an age of terror.<sup>8</sup> Sarah Cleveland has contended that economic sanctions can contribute to internalization of international human rights norms, resulting in important benefits.<sup>9</sup> Bill Dodge has maintained that courts should break the “public law taboo” and enforce international public law just as they do international private law.<sup>10</sup> Beth Van Schaack has argued that civil human rights litigation is an important tool for improved human rights protection.<sup>11</sup> And while some of Oona Hathaway’s work assessing the impact of international human rights law might be considered more empirical and less normative,<sup>12</sup> she also has argued for the importance of international law.<sup>13</sup> These normative commitments stand in stark contrast to those of the international law skeptics.

Second, the work often takes a flexible approach to the actors of international law. For example, Catherine Powell challenges the idea of the nation-state as a unitary entity by focusing on dialogic processes between federal and local governmental actors in applying international human rights.<sup>14</sup> Analogously, Robert Ahdieh has investigated the complex, dialectical relationships among domestic courts, international tribunals, and non-state entities.<sup>15</sup> Melissa Waters has explored how transnational networks of judges influence the use of international and comparative law in legal decision-making.<sup>16</sup> Meanwhile, Janet Koven Levit opens up the inquiry still further, looking at the ways in which bankers and others establish norms that migrate

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8. Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004).

9. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L. 1 (2001).

10. William S. Dodge, *Breaking the Public Law Taboo*, 43 HARV. INT’L L. J. 161 (2002).

11. Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change* 57 VAND. L. REV. 2305 (2004).

12. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L. J. 1935 (2002).

13. OONA A. HATHAWAY, *STRONG STATES, STRONG WORLD* (forthcoming 2009).

14. Catherine Powell, *Dialogic Federalism: Constitutional Possibilities for Incorporation of Human Rights Law in the United States*, 150 U. PA. L. REV. 245 (2001).

15. Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004).

16. Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005).

into treaties and other agreements, in a process of “bottom-up” law making.<sup>17</sup> Tai-Heng Cheng, using international intellectual property law as a case study, has argued that international law emerges from a global process of interactions among state and non-state participants.<sup>18</sup> More broadly, Paul Schiff Berman has suggested that a framework of “global legal pluralism,” which recognizes non-state actors as well as governmental actors as the agents of international and transnational law formation, can help us manage legal challenges in a globalized world.<sup>19</sup> And in my own work, I have examined the increasing role that private contractors have played in states’ foreign policy bureaucracies.<sup>20</sup> This turn to specific groups within the state apparatus and to non-state actors has roots in the work of core New Haven School scholars, but is in sharp contrast to the view of many international law skeptics that the state is essentially a black box with unitary interests acting in the international realm.

Third, the scholarship adopts a practice-oriented study of the norms and processes of international law in action on the ground. Instead of abstract models of impact and influence, typical of international law skeptics, we see attention to micro-analyses and the conduct of international law advocacy work in local settings throughout the world (through, for example, the Bernstein program<sup>21</sup>). Thus, Noah Novogrodsky, a clinician, and Susan Benesch, a former Bernstein Human Rights Fellow, have maintained that international law properly takes a different approach to regulating incitement to genocide than domestic constitutional law approaches to other forms of incitement.<sup>22</sup> Likewise, Jaya Ramji-Nogales, also a former Bernstein Human Rights Fellow, has interviewed Cambodians to understand their views of truth, justice and accountability for atrocities.<sup>23</sup> And I think it is no surprise that many of the scholars in what one might call the “new” New Haven School have spent time in international law practice, either as litigators or in government.

Finally, scholars who might be said to belong to a “new” New Haven School adopt empirical and interdisciplinary approaches to the study of international law not only from political science but also other social science disciplines. Empirical political scientists are right that many international law scholars have traditionally been overly sanguine in simply assuming the

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17. Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT’L L. 125 (2005).

18. Tai-Heng Cheng, *International Law, Intellectual Property, and Power* (SSRN Working Paper, Aug. 2006), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=917583#PaperDownload](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=917583#PaperDownload).

19. Paul Schiff Berman, *Global Legal Pluralism*, 80 S. CAL. L. REV. (forthcoming 2007).

20. Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383 (2006).

21. The Robert L. Bernstein Fellowships in International Human Rights enable two Yale Law School graduating students or recent graduates to devote a year to full-time human rights work. See Yale Law School, Bernstein Fellowship, <http://www.law.yale.edu/intellectuallife/bernsteinfellowship.htm> (last visited Apr. 27, 2007).

22. Susan Benesch & Noah Novogrodsky, *Incitement to Genocide*, Remarks Delivered at Yale Law School (Mar. 12, 2007).

23. Jaya Ramji, *A Collective Response to Mass Violence: Reparations and Healing in Cambodia*, in BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS (Jaya Ramji & Beth Van Schaack eds., 2005).

efficacy of international law and then busying themselves with textual analyses of the international law instruments themselves. Thus, I would agree that empirical approaches to international law are necessary. And, while Oona Hathaway's quantitative studies of international human rights treaty compliance have been significant, so too are Ryan Goodman and Derek Jinks's turn to sociology and social psychology to understand state behavior.<sup>24</sup> Likewise, Hari Osofsky's use of geography has added a new dimension to international law analysis.<sup>25</sup> And Elena Baylis has drawn from the methodology of anthropology to conduct insightful case studies, based in part on interview data, such as her discussion of "parallel" justice systems in Kosovo, one run by the United Nations and one run by Serbia.<sup>26</sup> Thus, while the original New Haven School used social science methodologies to resist an earlier generation of international relations realism, a new school, I would argue, should likewise welcome empiricism, but insist on an even broader definition of what counts as valuable, empirically-grounded international law scholarship.

Indeed, in my view international law, generally—and international human rights law, in particular—needs to embrace more sociolegal and anthropological methodologies. Law and society scholars have for decades now been developing insights about how laws on paper translate themselves into the behavior, assumptions, and practices of officials, social movements, and people on the ground. International law would greatly benefit from the kind of rich multifaceted studies that characterize sociolegal scholarship. Such studies would help us develop a more complete understanding of the complex and multivariate processes through which states and the various actors within states—governmental and intergovernmental bureaucrats, as well as members of nongovernmental organizations, corporations, social movements, and individuals—internalize, ignore, or resist the norms and values encoded in international law.

A "new" New Haven School might be a home for such qualitative empirical studies. After all, Koh's transnational legal process idea was interested in the practice of human rights compliance and norm internalization in day-to-day bureaucratic settings. Thus, a "new" New Haven School approach might be said to delve into the process part of transnational legal process in order to tease out *whether* it is happening, *how* it is happening, and *under what circumstances* it is happening.<sup>27</sup>

To be sure, the scholars who might plausibly fit within a new school are so diverse that suggesting that they form a school may be far-fetched. Ironically, as Rosa Brooks has suggested,<sup>28</sup> one of the features that unites many of these scholars is precisely their embrace of "messiness" and

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24. Ryan Goodman & Derek Jinks, *International Law and State Socialization: Conceptual, Empirical, and Normative Challenges*, 54 DUKE L.J. 983 (2005).

25. Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH U. L.Q. 1789 (2005).

26. Elena A. Baylis, *Parallel Courts in Post-Conflict Kosovo*, 32 YALE J. INT'L L. 1 (2007).

27. Janet Koven Levit, for example, has engaged in precisely this type of analysis. See, e.g., Levit, *supra* note 17.

28. Rosa Ehrenreich Brooks, Remarks at *The Yale Journal of International Law Fifth Annual Young Scholars Conference* (Mar. 10, 2007).

resistance to orthodoxy, at the same time that they are committed to pragmatic solutions on the ground. And in this perspective we may see more of the legacy of Paul Kahn<sup>29</sup> than Harold Koh or Michael Reisman. Yet, this embrace of on-the-ground specificity and recognition of plural legal and quasi-legal orders as sites of international law may itself be part of what makes this group of scholars distinctive.

To summarize, the collection of approaches that might fit here, while differing in some respects from one another, are alike in (1) their willingness to bet, contra the skeptics, that the processes, norms, and modalities of international and human rights law are both real factors or forces in social life, and that pragmatically employed, they can and do make a real difference in the world; (2) their embrace of multiple and eclectic points of view, disciplinary traditions, and concrete descriptions, in contrast to the tendencies toward the behavior reductionism of some rational choice approaches; and (3) their inclination to challenge the reification of the "state" and to see state action as the product of the interaction of many conflicting political and social subgroups, ideals, and motivations, rather than as a single actor directed by a single purpose. Above all, these scholars seem to share a common commitment not to adhere too strictly to any particular method or model, but to try to understand the complexity and plurality of the forces at work in the world. Indeed, in deploying such a wide variety of methodologies to address concrete problems, the work of these scholars perhaps echoes the approach of neopragmatism.<sup>30</sup>

This is, I think, a crucial crossroads for international law scholarship, because skepticism of the whole project of international law within the American academy is rising (ironically even as globalization multiplies the places where international and transnational processes are relevant). Identifying and elaborating a collectivity of scholars influenced by New Haven therefore strikes me as part of the project of organizing a counter-narrative. Such a counter-narrative seeks to understand international law as a series of micro-processes that must be studied in all of their complexity, recognizing that assumptions about state interest and abstract models of state behavior will never be sufficient to understand the role of international law or its efficacy.

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29. See Paul W. Kahn, Paper Presented at the University of Virginia Law School Conference: The Future of the State in International Law (Oct. 8, 2005) (on file with author).

30. See Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473 (2003); DON HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* (1985) (arguing that grand theories are best read as overstated partial responses to more limited situations).