

Commentary

The New Haven School: A Brief Introduction

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With due respect to the Agoras and Peripatetics, a “school of thought” imports more than a venue. It means a community of scholars who identify as such, share common ideas about social process, a common sense of mission about that social process, and a common methodology. At the recently concluded Fifth Annual Young Scholars Conference of *The Yale Journal of International Law*,¹ it became clear that some of the presenters and others in attendance were open to the idea that their work might benefit from greater familiarity with—and even study of—what has come to be known as the New Haven School.

The New Haven School was developed by Professors Myres S. McDougal and Harold D. Lasswell.² McDougal had been trained in classics and later at Oxford in legal history. Lasswell, at the time that he met McDougal, was already recognized as one of the most creative political and social scientists of the twentieth century.³ The jurisprudential school that they

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1. *The Yale Journal of International Law* Fifth Annual Young Scholars Conference (Mar. 10, 2007).

2. The *locus classicus* of the New Haven School is Lasswell and McDougal’s two-volume treatise, HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992) [hereinafter LASSWELL & MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY]. For earlier statements, see HAROLD D. LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY (1935); Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); HAROLD D. LASSWELL & ABRAHAM KAPLAN, POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY (1950); Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137 (1953); Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT’L L. 188 (1968); and Myres S. McDougal, W. Michael Reisman & Andrew R. Willard, *The World Community: A Planetary Social Process*, 21 U.C. DAVIS L. REV. 807 (1988) [hereinafter McDougal, Reisman, and Willard, *The World Community: A Planetary Social Process*]. Other examples of the approach include W. Michael Reisman, *Theory About Law: The New Haven School of Jurisprudence*, in 1989/90 WISSENSCHAFTSKOLLEG JAHRBUCH 228 (F.R.G.); and Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence*, 44 GERMAN Y.B. INT’L L. 96 (2001). Interchangeably, the main protagonists have also used the terms “policy-oriented jurisprudence” or “law, science and policy” to designate the School.

3. In 1960, the American Council of Learned Societies awarded Lasswell a \$10,000 prize, whose citation read: “Harold Dwight Lasswell, master of all the social sciences and pioneer in each; rambunctiously devoted to breaking down the man-made barriers between the social studies, an so acquainting each with the rest; filler-in of the interdisciplinary spaces between political science, psychology, philosophy, and sociology; prophetic in foreseeing the Garrison State and courageously intelligent in trying to curb its powers; sojourner in Vienna and selective transmitter of the Freudian

created at Yale adapts the analytical methods of the social sciences to the prescriptive purposes of the law. Deploying multiple methods, it seeks to develop tools to bring about changes in public and civic order that will make them more closely approximate the goals of human dignity which it postulates.

The New Haven School defines law as a process of decision that is both authoritative and controlling; it places past such decisions in the illuminating light of their conditioning factors, both environmental and predispositional, and appraises decision trends for their compatibility with clarified goals; it forecasts, to the extent possible, alternative future decisions and their consequences; and it provides conceptual tools for those using it to invent and appraise alternative decisions, constitutive arrangements, and courses of action using the guiding light of a preferred future world public order of human dignity. To achieve these goals, the New Haven School adapts focal lenses from the social sciences, a mode of organizing data about various social processes though cultural anthropology's modality of phase analysis and an analytical break-down of the actual components of a decision. To facilitate actual decisionmaking, it proposes a praxis of five intellectual tasks: goal formulation, trend description, factor analysis, projection of future decisions, and the invention of alternatives. A public order of human dignity is defined as one which approximates the optimum access by all human beings to all things they cherish: power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude. This, in a nutshell, characterizes the contribution the New Haven School has made to the law's academic and policy enterprise.

It should be evident that the intellectual tools of the New Haven School can assist anyone in any context who is grappling with and trying to solve a problem. This point is worth emphasizing because many people associate the School only with international law and politics.⁴ The association is understandable in light of the School's conception of the earth-space arena as, in Whitehead's words, "a vast manifold"⁵ and of the vast literature that has applied New Haven School jurisprudence to international problems. In fact, this jurisprudence is designed and has been used to understand and shape law in all contexts, from the local to the planetary.

That said, the New Haven School can be especially empowering for individuals not associated with the state, a class that classical international law all but disenfranchised. In the past, the international lawyer's client was, for the most part, the Prince or, put in more prosaic terms, governments, however they were organized. That is no longer the case. Equipped with an appropriate jurisprudential frame, each and every person can now participate, whether directly or through the mediation of groups, in the processes of decision that

vision to his American colleagues; disciplined in wide-ranging inquiry; working against resistance to create a modern quadrivium of the social sciences that will make them truly liberal arts."

4. Curiously, it was a European scholar in a study of the New Haven School who concluded that its methods were most effective for domestic legal problems. See BENT ROSENTHAL, *ETUDE DE L'OEUVRE DE MYRES SMITH MCDUGAL EN MATIÈRE DE DROIT INTERNATIONAL PUBLIC* [STUDY OF THE WORK OF MYRES SMITH MCDUGAL IN TERMS OF INTERNATIONAL PUBLIC LAW] (1970).

5. ALFRED NORTH WHITEHEAD, *SCIENCE AND THE MODERN WORLD* (1941). See also ALFRED NORTH WHITEHEAD, *PROCESS AND REALITY: AN ESSAY IN COSMOLOGY* (David Ray Griffin & Donald W. Sherburne eds., 1978).

affect their lives. To that extent, we all have the potential to function as the Prince or as Austin's "political superior."⁶ The constant formation and reformation of interest groups on a planet in which economical, electronic simultaneity permits effective coordination without face-to-face contact means that the possibility of meaningful participation in key functions of international decision is within the reach of more and more people who are not affiliated with governments. But only if they know how.

For all these actors, the New Haven School assembles a set of tools for enhancing the understanding and more effective influencing of these international processes. It is a truism that law is policy, but this is an approach that is policy-oriented in a much broader sense. With respect to particular problems, the School seeks not only to map decision processes, assess the often contradictory trends and the factors conditioning them, predict the range of probable outcomes, and enhance the skills necessary for influencing the decision processes of concern so that preferred outcomes ensue. It also undertakes to improve the performance of decision processes themselves and enhance their capacity to achieve outcomes more consonant with human dignity. This necessarily involves a careful assessment and critique of current processes, institutions and practices.

Now it is clear that, given the characteristics of the international political process, a way of mapping the processes that lawyers try to influence, and which are influencing lawyers, requires a different set of analytical tools. A "conventional" analysis in terms of government organs and of the technical doctrines employed by officials, an effective technique for certain problems, is inappropriate for the study of international decision. Conventional usage must here yield to "functional" analysis, because no dependable relationship exists between formal structures and the facts of authority and control on the global scale. It is far from unusual to discover, for example, that the authority formally provided in a written constitution may be ignored or totally redefined by unwritten practice; there, too, myth system must be distinguished from operational code,⁷ the law-in-the-books from the law-in-action. When the international arena is examined, the presumed congruence of formal and actual authority may or may not be sustained by the concurrence of expectations necessary to justify a claim of actual constitutive authority.

The comprehensive, analytic framework required must, accordingly, include a conceptual technique for mapping the relevant processes. The New Haven School has adapted, with a number of adjustments, a scheme of cultural anthropology, in which any social process is described systematically in terms of those who engage in it (the participants); the subjective dimensions that animate them (their perspectives); the situations in which they interact; the resources upon which they draw (bases of power); the ways they manipulate those resources (strategies); and the aggregate outcomes of the process of interaction, which are conceived in terms of a comprehensive set of values.

6. Michael Reisman, *A Jurisprudence from the Perspective of the "Political Superior,"* 23 N. KY. L. REV. 605 (1996).

7. W. MICHAEL REISMAN, *FOLDED LIES: BRIBERY, CRUSADES AND REFORMS* (1979).

The *participants* in any decision process include those formally endowed with decision competence, such as executives, legislators and judges, and all those other actors who, though not endowed with formal competence, may nonetheless play important roles in influencing decision outcomes. In international decision, this means examining, in addition to formal international organizations, state officials,⁸ non-governmental organizations,⁹ pressure groups, interest groups, gangs, and individuals, who act on behalf of other participants and on their own.¹⁰

By the same token, the inventory will not be of much use if it does not take account of the *perspectives* of these actors. These perspectives include their specific patterns of identification and disidentification, their matter-of-fact expectations of past and future, and the value demands they project. It is clear that in a complex arena, such as international politics, the perspectives of the various participants actually playing a role in decision often diverge greatly in critical ways.

Situations, as the New Haven School uses the term, refers generally to where decisions are made and the distinctive properties of that “where.” Conventional legal analysis generally looks to courts, secondarily examining the work of executive branches and legislatures. The New Haven School adopts a more functional approach in which it focuses on the range of centralized and decentralized settings¹¹ in which decisions are actually taken, their varying degree of organization and formality, the extent to which they are specialized or not specialized, and the extent to which they are continuous or episodic. We also consider it important to examine the extent to which participants in a particular situation perceive themselves to be in a state of crisis in which critical values are deemed to be at stake.

The resources on which participants draw—their “*bases of power*”—incorporate both effective power and symbols of authority. The New Haven School considers it appropriate for the jurist to correlate the extent to which control of power is available to support particular formulations that are presented as law.

The ways in which resources (material and symbolic) are manipulated, or the *strategies* used by different participants, involve the management of resources aimed at optimizing preferred outcomes. Strategic modes are considered along a persuasive-coercive continuum. They include diplomatic, propagandistic, economic, and military techniques in varying ensembles.

8. While states continue as the primary organizations and value providers, private entities, with their effectiveness enhanced by technological innovations relatively insusceptible to control by established territorial elites (such as the Internet) exert an ever-increasing influence on the global process of authoritative and controlling decision. Michael Reisman, *Designing and Managing the Future of the State*, 8 EUR. J. INT'L L. 409, 416 (1997).

9. Siegfried Wiessner, *Legitimacy and Accountability of NGOs: A Policy-Oriented Perspective*, in W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 305, 305-311 (2004).

10. McDougal, Reisman & Willard, *The World Community: A Planetary Social Process*, *supra* note 2, at 822-26.

11. As to the choice of methodological frameworks depending on institutional determinants, see Siegfried Wiessner, *International Law in the 21st Century: Decision-making in Institutionalized and Non-Institutionalized Settings*, 26 THESAURUS ACROASIMUM 129 (1997).

The *outcomes* of interaction are tracked on a continuing basis and in terms of the five previously identified phases or features of a context.

The mapping of social and decisional contexts permits the observer or the person trying to influence decision to orient himself or herself contextually in the relevant processes. It is clear that there can be no single one-size-fits-all map for every problem. Contexts vary enormously. Thus the participants who will be relevant for a problem involving international security will include the major powers, those who can support or work against them, including major antagonists, international organizations or other institutions which may be relevant for some of the decision functions. For example, for a problem involving international investment law in a particular context, the critical participants are likely to be the states concerned, the multinational enterprises involved in a particular investment, civil society, and institutions specialized in the transnational wealth process. The point of emphasis is that a functional approach, using a mapping procedure that is designed to minimize the chances of overlooking pertinent factors and relationships, enables the lawyer and policy-scientist to operate with a realistic sense of the relevant processes.

Modern science has been acutely conscious of the need for sensitivity and clarity about the perspective from which phenomena are viewed. For any phenomenon, there are many possible standpoints, each of which affects and shapes what is viewed and how it is viewed. An indispensable intellectual tool concerns clarity with regard to what the New Haven School has referred to as “observational standpoint.”¹² Both the reference and content of the term “law” or “choice” will vary depending on whether the standpoint is that of a member of the elite or the rank-and-file, whether the observer is a member of the system observed and has internalized its folklore, myth and *miranda*, or is an outsider. Perception of the same phenomenon may vary depending on the culture, class, gender, age, or, in particular, by the profound influence of crisis-experience or trauma on the observer. Even within the formal institutions of the legal establishment, reference and content will vary depending on whether the observer is a legislator, a judge, a prosecutor, a jurymen, a defense attorney, an accused, or a victim.

The delimitation of an appropriate focus of inquiry is important because it affects the comprehensiveness and realism (or contextuality) of inquiry, the manageability with which problems are formulated, and the effectiveness with which the different intellectual tasks can be performed. In this perspective, all law is conceived not simply as traditional rules,¹³ but in more comprehensive terms, as *decision*, composed of both perspectives and operations; as

12. W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118, 120 (1992) [hereinafter Reisman, *View from the New Haven School*].

13. “The jurisprudence of positivism provides the counterimage to this empirical, dynamic conception of law. Its common focus on ‘existing’ rules, emanating solely from entities deemed equally ‘sovereign,’ does not properly reflect the reality of how law is made, applied and changed. Positivism remains fixated on the past, trying to reap from words laid down, irrespective of the context in which they were written, the solution to a problem that arises today or tomorrow in very different circumstances.” Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 320 (1999) [hereinafter Wiessner & Willard, *Policy-Oriented Jurisprudence*]. For an engagement of other jurisprudential approaches, see *id.* at 320 n.7.

authoritative decision, combining elements of authority and control; and not as occasional choices, but as a *continuous process* of authoritative decision, both maintaining the constitutive features by which it is established and projecting a flow of public order decisions for the shaping and sharing of community values.¹⁴ Each of these distinctive emphases may be briefly elaborated.

One component of the most comprehensive process, as of all the lesser community processes, is a process of *effective power* in the sense that decisions are in fact taken and enforced, by severe deprivations or high indulgences, which are inclusive in their effects. The experience of those who use the jurisprudence of the New Haven School shows that full and realistic description of such effective power processes—in terms that include all important participants, perspectives, arenas, bases of power, strategies, and outcomes—is necessary, both for understanding and influencing.

The New Haven School also provides a way of organizing thought and action with respect to any decision process. The School identifies seven decision functions, each of which is engaged in every decision process. The functions that compose decision processes include *intelligence, promotion, prescription, invocation, application, termination, and appraisal*.¹⁵ The fact that each function is always in operation does not mean that it is being performed well. Accordingly, the New Haven School offers criteria for appraising the performance of each function, and by bringing each function into clear view, the School provides a nuanced and realistic way to improve decision.

Starting from the premise that law should serve human beings, the New Haven School anchors its policy-oriented search for a world public order of human dignity¹⁶ in the universe of human aspirations, which are expressed empirically in its characterization of eight values,¹⁷ i.e., power, enlightenment, wealth, well-being, skill, affection, respect, and rectitude. The jurisprudence of the School allows for goal-setting beyond what has been achieved in the past, and for intellectual preparation for leadership in the face of ever-new problems in an ever-changing world.

Two papers presented at the Conference, on which we were invited to comment, demonstrated the need for and the utility of the New Haven School's methods. Paul Schiff Berman's *A Pluralist Approach to*

14. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253 (1967), reprinted in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73 (Cyril E. Black & Richard A. Falk eds., 1969), also reprinted in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS: A SUPPLEMENT TO INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE 191 (1981).

15. *Id.*; see also Reisman, *View from the New Haven School*, *supra* note 12, at 122-123.

16. Cf. MYRES S. MCDUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY (1980). See also Wiessner & Willard, *Policy-Oriented Jurisprudence*, *supra* note 13.

17. The term "values" is used to designate the broad categories of events that gratify desire. In empirical terms, they signify the things humans "value." Analytically, they characterize the assets humans draw on in their efforts to achieve their goals (*base values*); preferentially, they relate to "preferred events" (*scope values*). 1 LASSWELL & MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 2, at 336.

*International Law*¹⁸ is a plea for recognition of the variety of legal systems existing on this planet. He found it useful to turn to the work of Robert Cover, lamentably cut short by his untimely passing, on the *nomos*, the narratives and precepts of communities other than the state.¹⁹ Cover provided valuable insights into the life and decisionmaking processes of such communities, as exemplified by religious groups such as the Amish and the Mennonites.²⁰ Cover's work can be read as a plea for a larger range of self-government for groups challenged to defend their "inner worlds,"²¹ their religion and their culture, against unremitting attacks by the "modern" world. Today's indigenous peoples' claims to self-determination,²² alluded to by Cover in one footnote,²³ come to mind. But the policy and intellectual problem in both national and international law is to determine when and how the legal arrangements of one system should trump another. For all his interest in validating the claims to recognizing distinct legal systems of such "insular" communities, Cover was blunt and uninflected as to which legal system, in case of conflicting prescriptions, should prevail. It was the nation-state, if it was articulating its demand on the normative level of the constitution.²⁴ The New Haven School, in distinguishing between the "public order" and the "civic order," and in expressing a preference for maximizing the civic order, but intervening in it when its practices violate goals of public order, provides a far more refined decision tool.²⁵

Unlike Cover's opus, Berman's article does not answer the question of which legal system will or should prevail in cases of conflict, and who should make such a decision. Berman, in opening the concept of law to non-state communities, would include not only religious communities, but also racial and ethnic groups, corporations, universities, gangs, terrorist cells, etc. To weed out the poisonous ones, Berman suggests delegitimizing "illiberal" communities, but he never explains what he means by the term "illiberal." Nor does he explain who should determine which communities and their legal systems are to be delegitimized in this fashion.²⁶ Ultimately, since his pluralist theory limits itself to mere description of the various contending legal orders, a task well performed historically by anthropologists of law and, more broadly, social scientists, he stops far short of the thorough problem- and policy-, i.e. solution-oriented inquiry the New Haven School suggests. His

18. Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301 (2007).

19. Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 40 (1983).

20. *Id.* at 26-35.

21. W. Michael Reisman, *International Law and the Inner Worlds of Others*, 9 ST. THOMAS L. REV. 25, 25 (1996).

22. For details, see Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Perspective*, 12 HARV. HUM. RTS. J. 57, 116-120 (1999); and Siegfried Wiessner, *Joining Control to Authority: The Hardened "Indigenous Norm,"* 25 YALE J. INT'L L. 301 (2000).

23. Cover, *supra* note 19, at 32 n.94.

24. *Id.* at 66 (referring to the "counterclaim of constitutional redemption," which, in his view, would "pose no general threat to the insular community").

25. See W. Michael Reisman, *Autonomy, Interdependence, and Responsibility*, 103 YALE L.J. 401 (1993); W. MICHAEL REISMAN, *LAW IN BRIEF ENCOUNTERS* (1999).

26. See Berman, *supra* note 18, at 321.

focus on process alone expressly disavows a desire to influence decision; refusing to provide any substantive guiding light for resolving conflicts between competing legal orders, he leaves the content of decisionmaking to the unbridled processes of effective power.

Christopher Borgen's plea for the diversity of legal orders bases itself on a purportedly realistic analysis of geopolitical groupings holding "different, deeply-held beliefs."²⁷ From the New Haven School's perspective, and with respect, we found neither novelty nor useful inference in this data. There is undeniably "normative friction" between those groupings, as he sees them. There has always been. There is also an undeniable process of communication and interaction between those groupings that results in identifying certain values as common and certain behavior as lawful or unlawful. That identification is, of course, one of the central enterprises of law. Borgen does, indeed, speak of "unjust orders,"²⁸ but he never explains the limits to the development of diverse legal orders, as implied in this concept. His antipathy toward "cosmopolitanism"²⁹ is palpable and possibly at variance with an order of law built on universal standards of respect for human dignity. Sadly, he decides to ignore the approach of the New Haven School, because he assumes it was an outgrowth of and intellectual weapon for the Cold War. The School existed long before the Cold War and thrives long after it.

If we may be permitted a "cosmopolitanism," we would conclude with the Chinese proverb which Chairman Deng Xiao Ping made famous: It does not matter whether a cat is black or white but whether it catches mice. Our loyalty is to the values of human dignity and our goal is a world order producing and distributing those values. The New Haven School was established to refine and apply tools to achieve that goal. If there is a better cat around, we would be the first to use it. As far as we have been able to tell, there is not.

27. Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 YALE J. INT'L L. 329, 361 (2007).

28. *Id.*

29. *Id.* at 362.