

***Positivism, New Haven Jurisprudence,  
and the Fragmentation of International Law***

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*Abstract:* This Article addresses the fragmentation of international law and international legal theory. This problem has become increasingly acute. As international interactions have increased exponentially among a broad range of domestic and international actors, the need to coordinate and regulate international actions has correspondingly intensified. Because actors cannot seem to agree on what international law is, consensus on applicable international laws and legal behavior often remains elusive. Using positivism and policy-oriented jurisprudence – two major theories of international law – as foci of inquiry, this Article demonstrates that the gulf between the two international legal theories are not really meaningful conceptual disagreements. Instead, they are differences about ontological and normative commitments that are anterior to conceptualizing about law, which this Article terms preconcept commitments. After identifying the nature of fragmentation between Positivism and policy-oriented jurisprudence, the Article suggests that these differences of preconcept commitments can be bridged, or at least revealed, if jurists and policy-makers clarify semantically what they mean when they use the term law. This theoretical move may enable jurists and policy-makers to engage each other more meaningfully. By addressing the fragmentation of international legal theory in this manner, jurists and policy-makers may be able to understand each other better and work together more effectively to devise international laws and

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processes to prevent, address and rectify  
international problems.

## I. Introduction

The fragmentation of international law and legal theory is an age old issue that has vexed jurists, philosophers and decision-makers in international problems. Although this problem is not new, it is today magnified because of broader and deeper international interactions that all require regulation, and which are not fully coordinated in part because international law remains fragmented. For centuries, there have been diverse viewpoints on what international law is and how it works (and, relatedly, whether international law even law and whether it works at all).<sup>2</sup> However, the problem of fragmentation has now become acute as different conceptions of international law have proliferated and some have become more entrenched.<sup>3</sup> Without agreement on what international law is, who it binds, and how it may control actions, governments may identify and follow contradictory purported international legal rules, national courts and international tribunals may prescribe conflicting legal principles that lead to inconsistent outcomes with potentially destructive consequences for world order, and corporations and individuals may be left uncertain about their legal protections in their international activities.

This Article proposes that fragmentation can begin to be addressed by going behind each concept of international law

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<sup>2</sup> See HAROLD LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* (1992); MARY ELLEN O'CONNELL, *THE POWER AND PURPOSE OF INTERNATIONAL LAW* (2008); ANNE MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); JACK GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* 3 (2005); JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* (2007); MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENTS* (2006); HANS KELSEN, *PRINCIPLES OF INTERNATIONAL LAW* (Robert W. Tucker ed., 2d. rev. ed. 1966); ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, *INTERNATIONAL LEGAL PROCESS* (1968); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). For a good discussion of the major theories of international law, see generally *METHODS IN INTERNATIONAL LAW* (S. Ratner & A. Slaughter eds., 2004).

<sup>3</sup> See Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 64–65 (2006) (discussing fragmentation of international law theory).

to examine their respective preconcept commitments that may divide international legal theories. It examines two leading and apparently diametrically opposed theories: positivism, which views law as a corpus of rules created largely by states and identified in accord with sources of law, and policy-oriented jurisprudence, which views law as a dynamic process of decision-making in which rules might play only one part in determining the outcomes in international problems. The Article suggests that although the two theories are conceptually different and, in some senses, incompatible, their differences are not meaningful conceptual differences.<sup>4</sup> Instead, the differences are actually disagreements about preconcept commitments of a normative and ontological nature that are anterior to conceptualizing about law. By identifying pre-concept commitments, and adjusting semantics to clarify what jurists respectively mean when they use the term “law,” jurists may better engage each other – meaningfully agreeing and disagreeing – to address international problems more effectively, or at the very least, with less confusion. The Article concludes by hypothesizing that differences among other international legal theories may similarly be clarified by examining their preconcept commitments, a process that could help international actors understand and bridge their respective perspectives on international law.

An entry point into the fragmentation of international law vis-à-vis positivism and policy-oriented jurisprudence is the criticism that proponents of the former have made of the latter. Ever since the policy-oriented jurisprudence was developed in the 1930s, positivists have criticized it for apparently “conflating law, political science and politics plain and simple.”<sup>5</sup> Yet, policy-oriented lawyers have long participated in

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<sup>4</sup> There are of course many other important theories of international law. *See supra* n. 2. Due to constraints of space, the theoretical moves proposed in this Article will have to be tested against the other theories in future scholarship. *See generally* TAI-HENG CHENG, INTERNATIONAL LAW AS COMMITMENT (forthcoming, Oxford University Press, 2010).

<sup>5</sup> Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT’L L. 302, 305 (1999); *see* Oscar Schachter, Panel Remarks, McDougal’s Jurisprudence: Utility, Influence, Controversy, (April 26, 1985) in 79 AM. SOC’Y INT’L L. PROC. 266, 267 (1985) [Hereinafter McDougal’s Jurisprudence: Utility, Influence, Controversy] (“Above all, the complaint charges that by subordinating law to policy, the McDougal approach virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law.”).

decision-making in international legal problems alongside positivists,<sup>6</sup> confounding attempts at unifying international law behind one theoretical orientation.

Before positivism and policy-oriented jurisprudence can be reconciled to reduce the fragmentation of international law, the positivist critique needs to be carefully examined and addressed. This Article will unpack what key positivist criticisms could be, how they might be justified, as well as addressed, and, importantly, whether it is possible to find ways for positivists and New Haven jurists to understand and engage each other even more effectively.

There are at least three different but related versions of the general critique that policy-oriented jurisprudence conflates law, policy and politics.<sup>7</sup> The first version is that policy-oriented jurisprudence conflates law with politics. This essay will argue that this claim is conceptually inaccurate because the policy oriented concept of law explicitly excludes purely political considerations. It is impossible to examine every past application of policy oriented jurisprudence to determine conclusively whether

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Law and Economics scholars tend also to adopt the positivist concept of law as a system of rules, *see generally* JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* parts I & II (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS* CHS. 4 & 5 (2007), and have leveled similar criticisms of the New Haven School. *See* Jeffrey Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394, 408 (1999) (criticizing the “school’s failure to distinguish clearly between law and politics,” and observing that “many leading New Haven theorists have tended to merge law into policy.”).

<sup>6</sup> *See Methanex v. United States* (NAFTA/UNCITRAL, Aug. 3, 2005), slip op. (Arbitrators: V.V. Veeder; W. Michael Reisman, William Rowley). Dame Rosalyn Higgins, the Former President of International Court of Justice, and Judge Florentino Feliciano, the Chairman of the Appellate Body of the World Trade Organization and President of the Philippines Supreme Court, were both schooled in policy-oriented jurisprudence. Policy-oriented jurisprudence has also been applied in national courts. *See, e.g., De Los Santos Mora v. N.Y.*, 524 F.3d 183, 190 n. 9 (2d Cir. 2008), *cert. denied* 2008 U.S. Dist. LEXIS 7724 (Oct. 14, 2008); *United States v. Corey*, 232 F.3d 1166, 1177 (9th Cir. 2000); *Mortimer v. Fed. Rep. Germany*, 1:05-cv-10669, Order Denying Amendment (S.D.N.Y. Apr. 9, 2008), slip op. at 2.

<sup>7</sup> *Supra* note 5.

politics was injected into the mix. But even if it were possible, that would not conclusively establish that policy oriented jurisprudence as a conceptual matter conflates law with politics. Just as positivists may apply politics to law in error without inserting politics into the positivist concept of law, policy oriented jurists could apply politics to law in error without injecting politics into the policy oriented concept of law.

The second version of the critique is that the policy oriented concept of law wrongly incorporates policy into law. This criticism cannot be made by soft positivists, whose concept of law accepts that criteria for legal validity could, but need not, include policy or normative heuristics. The incorporation of policy as a criterion for legal validity under the policy oriented concept of law is therefore consistent with the soft positivist concept of law.

Hard positivists, whose concept of law excludes normative considerations from the criteria for legal validity, can make the second version of the critique described above. I will argue that hard positivism does not accord with the semantic usage of the term international law, or, in the alternative, does not accord with a functional usage of the term.

The third version of the critique is that the extent to which the policy oriented concept of law incorporates policy is wrong, or at least different from the soft positivist concept of law. Although soft positivists might agree with policy oriented jurists that the concept of law could refer to normative criteria for legality, soft positivists might charge that the policy oriented concept gives excessive weight to policy, or is insufficiently determinate in its application of policy.

A key intellectual task in policy oriented jurisprudence is the clarification of standpoints. Undertaking this task brings into focus points of agreement and disagreement about whether the policy oriented concept of law excessively or indeterminately incorporates policy into law. When the policy oriented jurist serves as a judge, arbitrator, or counsel, in the normal case, his references to policy in identifying and applying the applicable laws tend to go only as far as permitted by the same secondary legal rules that positivists apply.

When the policy oriented jurist steps into the role of a legal scholar recommending alternative visions of what the law could be, he is less constrained in imagining the law. The scholarly application of the policy oriented concept of law appears

incompatible with the positivist concept of law. Policy oriented jurisprudence conceives of law as an authoritative and controlling process of decision-making to maximize human dignity. Legal rules do not matter solely because of their formal legal pedigree. It also matters whether they are accompanied by expectations of compliance, the extent to which they are in fact controlling, and whether their prescriptions promote world values. Conversely, practices without formal legal pedigree are relevant if they institutionalize expectations of compliance and accord with human dignity. In contrast, positivism conceives of law very differently. At the risk of being overly reductive, at least for the moment, it conceives of law as a body of rules derived from secondary rules identifying formal legal sources.

I will argue that although the policy oriented and positivist concepts of law are incompatible in this regard, this is not a meaningful conceptual disagreement because the disagreement arises from commitments that are anterior to conceptualizing law. These commitments, which I call pre-concept commitments, in my view, are not of a conceptual nature. They are instead commitments that are ontological, political, normative,<sup>8</sup> and/or semantic. Because of their different respective pre-concept commitments, positivists and policy-oriented jurists have undertaken different intellectual tasks concerning different systems under their respective inquiries. Without agreement on pre-concept commitments, it is difficult to have meaningful conceptual disagreements.

The disagreements as to pre-concept commitments are meaningful normative or political disagreements. From a pragmatic point of view, however, it is mostly unnecessary to resolve these disagreements. With an adjustment of semantics, positivists and policy oriented jurists should be able to choose either concept of law without causing confusion. They may even subsequently accept *renvoi* to the other concept if the situation requires.

I hope that this attempt to deepen our understanding of the nature of the philosophical differences between positivists and policy-oriented jurists may be a useful contribution to

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<sup>8</sup> “Normative” is used here in contrast to “descriptive” or “conceptual.” See Jeremy Waldron, *Normative (or Ethical) Positivism*, in HART’S POSTSCRIPT 411, 411 (J. Coleman ed., 2001) [hereinafter HART’S POSTSCRIPT] (discussing meanings of normativity and using normative in the same sense as it is used here).

scholarship because it begins to fill the interstices between international legal theory and conceptual jurisprudence. International law scholars are familiar with different concepts of international law,<sup>9</sup> but only a few international law scholars have appraised international law theory through the lens of conceptual jurisprudence.<sup>10</sup> Legal philosophers have discussed the concept of law, but many have not fully considered international law.<sup>11</sup> There is much work to be done in the philosophy of international law.<sup>12</sup>

Each version of the positivist critique is examined below in turn.

## **II. Does The New Haven Concept of Law Conflate Law and Politics?**

Myres S. McDougal and Harold D. Lasswell began working on the policy-oriented approach to law at Yale University over sixty years ago.<sup>13</sup> As the policy-oriented approach developed, observers conferred upon it the alternate appellation, “the New Haven School,” in recognition of its geographical and intellectual locus and its worldwide epistemic community of adherents.

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<sup>9</sup> See MARY ELLEN O’CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW 17-151 (2008); Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT’L L. 64 (2006).

<sup>10</sup> See DOUGLAS M. JOHNSTON, THE HISTORICAL FOUNDATIONS OF WORLD ORDER 120 (2008); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT’L L. 345 (1998) [hereinafter Kingsbury, *The Concept of Compliance*].

<sup>11</sup> See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 238-45 (2d ed. 1986); RONALD DWORKIN, LAW’S EMPIRE 71 (1986) (not discussing international law); *cf.*, H.L.A. HART, THE CONCEPT OF LAW 213-37 (2d ed. 1997) [hereinafter HART, THE CONCEPT OF LAW]. Although Hart considers international law at length, international law has continued to evolve since THE CONCEPT OF LAW was published.

<sup>12</sup> *Cf.*, Kingsbury, *The Concept of Compliance*, *supra* note 10, at 368 (suggesting a research agenda on the philosophy of compliance in international law).

<sup>13</sup> See generally Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203 (1943).

From its inception, the New Haven School has provoked strong responses from positivists.<sup>14</sup> This may have been due in part to McDougal's iconoclastic persona.<sup>15</sup> But it was also possibly due to perceptions that the New Haven concept of law was diametrically opposed to the positivist concept of law.<sup>16</sup>

Generally speaking, positivists conceive of law as a system of rules that regulate the conduct of those to whom the rules address.<sup>17</sup> Ulrich Fastenrath has explained that legal validity in positivism is determined by "a law-creating process, without affecting normative content."<sup>18</sup>

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<sup>14</sup> See David J. Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 AM. J. INT'L L. 20, 41 (2006) ("So powerful was this new approach -- and generally unprecedented and subversive -- that it naturally started to draw sharp critiques.").

<sup>15</sup> See W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L. J. 935, 939 (1999) [hereinafter Reisman, *Theory About Law*] ("McDougal's image . . . in the collective mind of the academy and the profession [was that of an] enfant terrible and destroyer of the law.").

<sup>16</sup> See Harold Hongju Koh, *Is there a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 561 (2007) ("The New Haven School expressly intended to criticize both legal formalism and legal positivism in international law."); Rosalyn Higgins, *Diverging Anglo-American Attitudes to International Law: Introductory Statement*, 2 GA. J. INT'L & COMP. L. 1 (1972) (recording Rosalyn Higgin's observations about skepticism of British scholars towards mixing policy with legal rules); Julien Cantegreil, *Legal Formalism Meets Policy-Oriented Jurisprudence: A More European Approach to Frame the War on Terror*, 60 ME. L. REV. 97, 99 (2008) (noting that the policy-oriented approach is "diametrically opposed to the Kelsenian spirit").

<sup>17</sup> See Simma & Paulus, *supra* note 5, at 304 ("Law is regarded as a unified system of rules[.]"); Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUR. J. INT'L L. 305, 307 (1993) ("Legal positivism identifies law with legal propositions (Rechtssätze), *i.e.*, the wording of positive rules[.]").

<sup>18</sup> Fastenrath, *supra* note 17, at 307. Fastenrath's exposition seems a little simplistic, because it does not account for the soft positivist conception of law; see *infra*, Part II; see also generally, Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401 (2002) (explaining normative positivism).



In contrast, the New Haven School conceives of law as a global process of authoritative and controlling decision-making to address international problems and to maximize human dignity.<sup>19</sup> Normative concerns are explicitly considered and included in the criteria for legal validity.

Consequently, the New Haven concept of law has appeared to be incompatible with positivism. Some critics have charged that the New Haven concept of law distorts law with politics.<sup>20</sup> Others have even gone so far as to charge that the New Haven School served U.S. foreign policy interests.<sup>21</sup>

In the author's view, the charge that the New Haven concept of law confuses politics with law is conceptually inaccurate, because the School explicitly distinguishes policy from politics. To explain this point, a somewhat lengthy exposition of the New Haven concept of law is necessary.

It is a Herculean task to summarize the New Haven approach. In 1992, McDougal and Lasswell, working with Andrew Willard, took over 1,500 pages to set out the New Haven approach after decades of developing it.<sup>22</sup> Professor W. Michael Reisman, the leading contemporary scholar from the New Haven School, and his associates have continued to apply and refine the

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<sup>19</sup> See Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence & Human Rights Abuse in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 319 (1999) ("First, law is conceived of as an ongoing process of authoritative and controlling decision.").

<sup>20</sup> See *supra* note 5.

<sup>21</sup> Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT'L L. 421, 424 (2007) ("The School has been accused of . . . serving as apologists for U.S. foreign policy."); O'CONNELL, *supra* note 9, at 70 ("The harsher criticism of the New Haven School was aimed at McDougal's evident promotion of United States policy."); Reisman, *Theory About Law*, *supra* note 15, at 939 (noting that critics have accused policy-oriented jurisprudence of promoting American values).

<sup>22</sup> MYRES S. MCDUGAL & HAROLD LASSWELL, *JURISPRUDENCE FOR A FREE SOCIETY* (1992).

approach.<sup>23</sup> Nonetheless, bearing in mind Reisman's admonition that the scholar is the "ultimate instrument of perception and appraisal,"<sup>24</sup> an attempt will be made here to describe the features of the New Haven concept of law salient to the present discussion.<sup>25</sup>

The New Haven School is principally interested in guiding decision-makers about how to act in an international problem or situation. It is less interested in only identifying and applying rules that the world community might ordinarily term "laws."<sup>26</sup> Thus, the New Haven School conceives of law not just as a body of laws identified by reference to past decisions (whether judicial, legislative, executive) that have been designated by a secondary rule of identification as a law. Law is instead conceived of as an authoritative and controlling process of decision-making to address problems and secure maximum human dignity. This formulation might seem inaccessible to lawyers unfamiliar with New Haven syntax and vocabulary,<sup>27</sup> so each element is explained in turn below.

In its ordinary semantic usage, "laws" often refer to rules, commands or prescriptions that have been designated as

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<sup>23</sup> See, e.g., W. Michael Reisman, *Testing a Theory About Law*, WISSENSCHAFTSKOLLEG 104, 104 (Jahrbuch, 1989/90) [hereinafter *Testing a Theory About Law*]; Wiessner & Willard, *supra* note 19, at 316; Cantegreil, *supra* note 16, at 99; Osofsky, *supra* note 21, at 422-26.

<sup>24</sup> W. Michael Reisman, *Preface in* DOUGLAS M. JOHNSTON, *THE HISTORICAL FOUNDATIONS OF WORLD ORDER* vii, vii (2008) [hereinafter *JOHNSTON Preface*].

<sup>25</sup> For other expositions of the New Haven concept of law, see JOHNSTON, *supra* note 10, at 115-18; Cantegreil, *supra* note 16, at 99.

<sup>26</sup> Eisuke Suzuki, *The New Haven School of International Law: An Invitation to Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORD. 1, 30 (1974) ("[I]nternational law is most realistically observed, not as a mere rigid set of rules, but as the whole process of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined.").

<sup>27</sup> See Burns H. Weston, *McDougal's Jurisprudence: Utility, Influence, Controversy*, *supra* note 5, at 266 (noting that some audiences find New Haven vocabulary inaccessible). The author intentionally describes the New Haven conceptualization prosaically in an effort to address this criticism.

“legal” because they have been identified in the past in a court or legislature or executive decision. In the international context, a past decision includes accepted sources and secondary rules of identification, such as treaties.<sup>28</sup>

To the New Haven scholar, however, the identification of a law according to predetermined secondary rules fails to provide adequate guidance to relevant actors about appropriate conduct. The actor will want to know how the rule is communicated, to whom, and with what effect. The actor will also want to know whether the rule reflects his interests and, whether it is good policy. To the extent that the actor’s interests deviate from good policies for the community at large, the New Haven scholar may take an external perspective and try to persuade the actor to set aside its parochial interests in favor of shared world values.<sup>29</sup> Because identifying a rule as a law through past decisions could obscure the intellectual tasks described here, the New Haven School resists characterizing rules, standing alone, as law.

An example might make this point clearer. The New Haven scholar would accept that the Genocide Convention contains rules prohibiting genocide,<sup>30</sup> as defined under the convention.<sup>31</sup> But the New Haven scholar would not stop there in studying the international legal system. He would want to know how the Genocide Convention is communicated to potential and actual genocidal regimes and with what effect. He would want to know when and why genocide occurs and when it does not. He would study prior incidents in which genocide took place, genocide was prevented, or genocide was stopped. Based on the information he collects, the New Haven scholar would make recommendations to relevant actors, including state officials, courts, and non-governmental organizations. These

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<sup>28</sup> See Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055; *cf.*, ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 3 (1994) (“[R]ules are just accumulated past decisions.”).

<sup>29</sup> For an excellent discussion of how legal advisors should, and in fact do, balance the interests of their government with broader ethical and policy concerns, see JOHNSTON, *supra* note 10, at 66-70.

<sup>30</sup> See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

<sup>31</sup> *Id.* at art. 2.

recommendations are intended to coordinate their strategies in an authoritative and controlling fashion to prevent genocide from occurring, to stop it when it occurs, and to take remedial actions to ameliorate its consequences. The New Haven scholar is concerned with the entire process in which relevant actors, such as states, officials, courts, non-governmental organizations, international organizations, and corporations communicate past decisions to each other about the issue at hand; how they interact and address problems; and how good outcomes may be secured in the present and future.

To count as law, as opposed to random or unlawful processes, the process of interaction must be authoritative and controlling. By “authority,” the New Haven School means “expectations of appropriate conduct” at each stage of the process in which problems are addressed.<sup>32</sup> These expectations come from a combination of factors. Each of these factors can be explained and illustrated with a hypothetical arbitration between two states concerning sovereignty over a disputed territory.<sup>33</sup>

The first factor is whether the decision-maker has been properly endowed with decision-making power, such as an arbitrator selected by two states to resolve their dispute over whether a disputed territory should be restored to one or the other state.<sup>34</sup>

The second factor is whether the decision-maker is pursuing proper objectives, such as the reduction of conflict, rather than unacceptable personal goals, such as the pursuit of bribes.<sup>35</sup>

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<sup>32</sup> Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 256 (1966).

<sup>33</sup> Although this example is constructed hypothetically, Professor Reisman has served as arbitrator and as counsel in at least two actual territorial disputes. See *Eritrea-Ethiopia Boundary Commission Decision (Eri. v. Eth.)* (Apr. 13, 2000), slip op.; *Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.)*, Request for Provisional Measures, ITLOS/PV.03/05 (Int’l Trib. For the Law of the Sea, Sept. 27, 2003) Hearing Tr. 28:16-33:27.

<sup>34</sup> See W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 745 (1989).

<sup>35</sup> See generally, Jason N. Summerfield, *The Corruption Defense in Investment Disputes*, 6:1 TRANSNAT’L DISP. MGMT. (Mar. 2009) (appraising corruption in arbitration from a New Haven perspective).

The third factor is whether the decision supports relevant world values. So, an arbitral award that purports to authorize a state to recapture the invaded territory through any means, including genocide, would be unlawful. This is because permitting genocide is bad policy, and strong international decisions have been made, in the form of the Genocide Convention and analogous *jus cogens*, to reject this policy.

The fourth factor is whether the decision was made in a proper physical, temporal and institutional context. Continuing our arbitration example, this includes requirements that the arbitral award should be rendered after a hearing, while the dispute is still alive and of a legal nature, and in accord with the rules of the arbitration center designed by the arbitration agreement.<sup>36</sup>

By “controlling,” the New Haven School means decisions and processes that actually direct outcomes. Whereas “authority” has normative and factual elements, “control” is purely a question of fact. So, an arbitral award is controlling if it causes the disputing states to follow the decision, or to oppose it in ways that were contemplated in advance as acceptable and appropriate, such as by challenging enforcement in a national court, seeking annulment before a review committee, or settling the dispute.

If law is a process of authoritative and controlling decisions, is a decision that is authoritative but not controlling still law? In the arbitration example, if the award is effectively ignored by the losing party, is it still law? The New Haven School would resist designating the award as not law simply because it is not controlling for a period of time. Few international processes are fully authoritative and fully controlling. Law is not a binary concept in which the process is most usefully designated as either lawful or not lawful.<sup>37</sup> There can be shades of grey in an international process that addresses problems. Depending on how authoritative and controlling it is, it may be more or less like law. Because law is seen as the entire process of decision-making, the New Haven School would not necessarily characterize the ignored award as not law in the first instance. Instead, it would focus on

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<sup>36</sup> See McDougal, Lasswell & Reisman, *supra* note 32, at 266 (making the same points).

<sup>37</sup> Cf. Tai-Heng Cheng, *The Central Case Approach to Human Rights*, 13 PAC. RIM L. & POL’Y J. 257 (2004) (rejecting binary approach to human rights in favor of a central case approach).

whether and how the award could be implemented in the face of a losing party that seems, at least for the moment, intent on and able to ignore the award.

If, however, the award were never complied with, and indeed a majority of the awards rendered under the arbitral institution are effectively ignored over a significant time period, the New Haven School might explain that although the arbitral institution and awards had the formal appearance of law, in substance they had ceased to function as law because of the utter lack of control. Over time, the awards may not even be authoritative in the sense that parties in arbitration may not have any expectation that the appropriate conduct is to comply with the award. If it became the situation that most arbitrations under the arbitral institution were reduced to *kabuki*, New Haven scholars might characterize the arbitration proceedings as a “myth system” in which awards were rendered and supposedly “lawful” in the ordinary semantic usage of that word. This myth system would exist alongside an “operational code” in which the world community understands that the award would be effectively ignored. From the functional New Haven perspective, an ignored award from an arbitral institution that is broken could not be considered law even if it is designated as such by formal sources.<sup>38</sup>

An international decision that is controlling but not authoritative may also seem less like law. At the extreme, if a decision is made with such power that it controls outcomes, but is otherwise not authoritative, that decision may not be lawful. So a rogue state, or a powerful state (take your pick), that uses conventional weapons or weapons of mass destruction unprovoked, or under an artificial fig leaf of self-defense, may well control at least one outcome – the destruction of the state attacked. But the act of aggression would not be lawful. From the New Haven perspective, the designation of the act as unlawful is insufficient. The New Haven scholar is interested in also making recommendations to relevant actors in the global community to respond in an appropriate process to restore world order.

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<sup>38</sup> See generally W. Michael Reisman, *Myth System and Operational Code*, 3 YALE J. WORLD PUB. ORD. 229 (1976-1977). Reisman’s separation of law into a myth system and operational code may be conceptually incompatible with some forms of positivism, because it can be accommodated within a sophisticated rendering of the rule of recognition that allows the community to distinguish between rhetorical claims and actual prescriptions that are followed.

There is one more element of the New Haven concept of law that needs explanation. The ideas of authority and law are intrinsically entwined with the goal to which the process of law is directed. The New Haven School has designated the promotion of human dignity to be the preeminent goal. The normativity of law comes in part from the values it promotes. These values are designated in short hand form by the phrase, “human dignity.” This capacious term includes values such as affection, respect and well-being.<sup>39</sup> At its margins, scholars may debate whether a value is intrinsic to human dignity, such as an overly expansive or idiosyncratic notion of democracy. But there are clear instances in which an otherwise authoritative and controlling decision would not be law because the decision is abhorrent to human dignity. If an award purported to authorize a state to commit genocide as a self-help measure to reclaim its territory, the award would not be regarded as lawful. Its lawless nature would not be due only to the Genocide Convention and *jus cogens* prohibiting genocide. It would also be due to the self-evident policy against genocide.

In summary, the New Haven School conceives of law not just as a static body of rules, but as an authoritative and controlling process through which social ends are constantly negotiated, adjusted and secured.<sup>40</sup> The New Haven concept is part descriptive, for it describes the international process involved in preventing and resolving international problems. It is in part normative, for it identifies social goals to not only direct the process but also to serve as a heuristic for the legality of the process. It is also in part prescriptive, because it makes recommendations to a wide range of decision-makers about appropriate actions and responses. But, perhaps ironically to some observers, it is not dogmatic. As an instrumentalist conception of law, it is open to making recommendations to decision-makers to use whatever tools are necessary or legitimate to achieve the social goals. These tools include, but are not necessarily limited to, legal rules.

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<sup>39</sup> MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 22, at 375-590.

<sup>40</sup> See Harold Hongju Koh, *A World Transformed*, 20 YALE J. INT’L L. ix, xii-xiii (1995) (explaining that the New Haven School seeks to “Develop a functional critique of international law in terms of social ends . . . that shall conceive of the legal order as process and not as a condition.” (quoting Roscoe Pound, *Philosophical Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 73, 89 (1932))).

Nothing in the foregoing exposition of the New Haven concept of law incorporates politics into the criteria for law. Yet, critics have contended that “policy” functions as a code word for “politics.”<sup>41</sup> Perceptions that McDougal used the New Haven concept of law to advance American interests may have fueled this suspicion.<sup>42</sup>

Space constraints here make it impossible to determine whether each of McDougal’s interventions injected politics into law, or whether they simply reflected the promotion of universal human values.<sup>43</sup> In any event, such an exercise would not get us very far in determining whether the New Haven concept of law conflates law with policy. Just as positivists may legitimately disagree with each other about the correct application of a rule to facts without necessarily indicating that the positivist concept of law conflates interests with rules, New Haven jurists may take controversial positions in an international problem without necessarily indicating that the New Haven concept of law folds law into politics. Even if in a particular problem a New Haven jurist incorporated law into politics, that may simply be a misapplication of the New Haven concept of law, just as positivists may apply a wrong rule of law without undermining the concept of law itself.

Any appraisal of the New Haven concept of law should not be transfixed on its applications to problems that occurred decades ago. In historical and contemporary applications, New Haven jurists have taken positions contrary to prevailing U.S. national policies or interests.<sup>44</sup> Following the U.S. invasion of Iraq

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<sup>41</sup> See JOHNSTON, *supra* note 10, at 121 (attributing this view to Richard Falk).

<sup>42</sup> *Id.* at 119 (“McDougal himself was seen as an unabashed advocate of US foreign policy.”); Edward McWhinney, *Book Review*, 87 AM. J. INT’L L. 335, 338-9 (1993) (reviewing HAROLD D. LASWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* (1992)).

<sup>43</sup> Reisman, *Theory About Law*, *supra* note 15, at 939 (noting Eisuke Suzuki’s argument that the commitment to human dignity, which is core to New Haven jurisprudence, was a universal value, not an American value).

<sup>44</sup> See Rosalyn Higgins, *The Benign First Mate*, in *LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO* 11 (S. Charnovitz et al. eds. 2005) [hereinafter FELICIANO FESTSCHRIFT]



in 2003, Reisman devoted his speech accepting the American Society of International Law's Manley O. Hudson medal – its highest honor – to a careful critique of regime change. He concluded:

[L]et the strongest and best-intentioned government contemplating or being pressed to undertake regime change remember that not everything noble is lawful; not everything noble and lawful is feasible; and not everything noble, lawful, and feasible is wise.<sup>45</sup>

In response to the Bush doctrine of preemptive force, Reisman wrote a Centennial Essay in the American Journal of International Law warning that the Bush doctrine could pose a threat to world order, because it encouraged other states to claim similar preemptive rights.<sup>46</sup> These appraisals contradict the claim that New Haven jurisprudence blindly promotes U.S. foreign policies.

Further, Reisman's scholarship explicitly disavows not just biases towards U.S. interests, but the injection of politics into the New Haven concept of law. In JURISPRUDENCE, he wrote:

A . . . point of importance is the need to observe yourself as the instrument of observation and

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("Feliciano's life in the law is a silent rebuttal to those who contend that a policy-oriented approach to law is but a façade for politics, . . ."); Tai-Heng Cheng, *Power and Authority in International Investment Law*, 20 AM. U. INT'L L. REV. 465, 508-512 (2005) (criticizing the *Loewen* award for refusing to find jurisdiction over NAFTA dispute arising from lack of due process in Mississippi courts); Julien Cantegreil, *The Final Award in Mondev International v. United States of America*, in THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION 33, 50-57 (M. Reisman & G.A. Alvarez eds. 2008) [hereinafter THE REASONS REQUIREMENT] (criticizing the *Mondev* Award for finding in favor of the United States based on inadequate reasoning).

<sup>45</sup> W. Michael Reisman, *The Manley O. Hudson Lecture: Why Regime Change Is (Almost Always) A Bad Idea*, 98 AM. J. INT'L L. 516, 525 (2004).

<sup>46</sup> See generally W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Pre-emptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006).

choice. . . . [T]he responsible decisionmaker or appraiser should develop methods of scrutinizing the self-system and determining the extent to which emotional tendencies, sub-group parochialisms or institutional biases are distorting or skewing observation and choice.<sup>47</sup>

Thus, whatever the truth or falsity of the factual claim that some appliers of the New Haven jurisprudence might have injected politics into their appraisals (just as scholars and advocates using any concept of law may do so intentionally or inadvertently), the New Haven concept of law does not incorporate partisan politics as a criteria for policy choices and legal validity.

### **III. Does the New Haven Concept of Law Wrongly Conflate Law and Policy?**

The second version of the positivist critique of the New Haven concept of law is that it wrongly conflates law and policy. Soft positivists, who accept that legal validity can have normative or policy criteria, cannot make this criticism. Hard positivists, however, can make this criticism. They contend that the concept of law cannot admit normative criteria for legal validity, which must be confined to social facts. Yet, if this is true, this hard positivist critique of the New Haven concept of law applies with equal force to their critique of soft positivists. The incorporation of policy content into law would not be a unique failing of New Haven jurisprudence. In any event, the hard positivist concept of law does not accord with the ordinary understanding of the term international law and how it functions.

An excursion into positivism will help explain these points. It is perhaps an impossible task to adequately convey the sophistication of positivism here, but nonetheless an attempt will be made.

Positivism as a legal philosophy provides the conceptual framework for positivism in international law. The key intellectual goal of positivism, according to its preeminent philosophers, H.L.A. Hart and Hans Kelsen, is to describe the

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<sup>47</sup> W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 13 (1987) [hereinafter REISMAN & SCHREIBER, JURISPRUDENCE].

concept of law by reference to a central case or ideal type legal system.<sup>48</sup> This descriptive enterprise is “morally neutral and has no justifiatory aims.”<sup>49</sup> Hart’s ideal type was domestic legal orders, in particular England. Kelsen’s ideal types were positive laws from domestic legal orders, such as the United States or France, or, importantly for international law positivists, international law. Regardless of the legal system, Kelsen included within his field of inquiry only “positive law.”<sup>50</sup>

At its core, positivism conceives of law as a body of rules identified as laws by reference to past decisions acknowledged as providing the rules with legal pedigree. Law is therefore a social fact.<sup>51</sup> Kelsen conceptualized his “pure theory of law” as a body of rules ultimately emanating from a *grundnorm*, or basic validating norm, such as the very first constitution in a legal order.<sup>52</sup>

For many Anglo-American legal philosophers, Hart developed an enduring version of positivism. According to Hart, a legal system exists if two social facts exist. First, officials accept

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<sup>48</sup> See HART, *THE CONCEPT OF LAW*, *supra* note 11, at 239 (stating that *THE CONCEPT OF LAW* “seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense “normative”) aspect”); *id.* at 100 (focusing on “the salient features of a modern municipal legal system”).

<sup>49</sup> See HART, *THE CONCEPT OF LAW*, *supra* note 11, at 240 (“My account is descriptive in that it is morally neutral and has no justifiatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law[.]”); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* xiii (A. Wedberg trans., 1945), *reprinted in* REISMAN & SCHREIBER, *JURISPRUDENCE*, *supra* note 47 at 381 (1987) (“the aim of this general theory of law is to enable the jurist concerned with a particular legal order . . . to understand and describe as exactly as possible his own positive law.”).

<sup>50</sup> KELSEN, *supra* note 49, at xiii-xviii (“[T]he pure theory of law seeks to attain its results exclusively from an analysis of positive law.”).

<sup>51</sup> In an earlier version of positivism, Austin stated: “Laws proper, or properly so called, are commands; laws which are not commands, are laws improper or improperly so called.” JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 1-3 (1832). *But see* HART, *THE CONCEPT OF LAW*, *supra* note 11, at 79 (criticizing Austin’s concept of law for failing to distinguish law from orders issued at gunpoint).

<sup>52</sup> KELSEN, *supra* note 49, at xiii-xviii, 110-36, 175.

secondary rules, the most important of which is a second rule of recognition, prescribing the validity of primary rules. Second, there is a general acceptance by the community, to whom rules are addressed, of primary rules identified as valid by secondary rules and the rule of recognition.<sup>53</sup> The rule of recognition is a social rule or custom constituted by a regular pattern of conduct and by a “distinctive normative attitude” accepting the rule of recognition. This normative attitude is the rule of recognition’s “internal aspect.”<sup>54</sup>

After Ronald Dworkin launched a stinging attack on Hart’s concept of law,<sup>55</sup> Hart clarified in his postscript to *THE CONCEPT OF LAW* that he did not exclude from his conceptualization of law the possibility that a rule of recognition could, although it need not, prescribe moral or normative criteria (or, in New Haven speak, policy criteria) for the validity of primary rules. This version of positivism has become known as soft, or inclusive, positivism.<sup>56</sup> Soft positivism contrasts against hard, or exclusive, positivism. Joseph Raz, perhaps the leading hard positivist, argues that a conceptualization of law cannot include policy or moral criteria for the validity of law, because that would undermine law’s unique claim to authority and render it contingent upon morality.<sup>57</sup>

Positivists in international law share some key postulates with their cousins in legal philosophy. The function of their conceptualization of law is to identify laws. Unlike New Haven jurists, positivists see their conceptual function as “not to

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<sup>53</sup> HART, *THE CONCEPT OF LAW*, *supra* note 11, at 100-23; *see also* Stephen Perry, *Hart’s Methodological Positivism*, in HART’S POSTSCRIPT, *supra* note 8, at 319.

<sup>54</sup> HART, *THE CONCEPT OF LAW*, *supra* note 11, at 56.

<sup>55</sup> *See* DWORKIN, *supra* note 11 at 45-46.

<sup>56</sup> HART, *THE CONCEPT OF LAW*, *supra* note 11, at 250-54; *see* Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

<sup>57</sup> *See generally* JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); *see also* Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in HART’S POSTSCRIPT 99, 102, Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in HART’S POSTSCRIPT 355, 355 (both discussing hard and soft positivism).

facilitate the decision-makers dilemma between law and politics (and, occasionally, law and morals), but to clarify the legal side of things.”<sup>58</sup> Their ideal type of international law is the rules or norms governing international relations. Prosper Weil has asserted that “the aggregate of the legal norms governing international relations” is “as an uncontroversial starting point.”<sup>59</sup>

Arising from their observation of this ideal type, Bruno Simma and Andreas L. Paulus have stated that all international law positivists are committed to the conceptualization of law in the following terms:

Law is regarded as a unified system of rules that, according to most variants, emanate from state will. This system of rules is an “objective” reality and needs to be distinguished from law “as it should be.”<sup>60</sup>

In the language of legal philosophy, international law positivists accept, as do their jurisprudence counterparts, what Brian Leiter has termed the Separation Thesis (what law is and what law ought to be are separate questions), and the Social Thesis (what counts as law is fundamentally a question of social fact).<sup>61</sup>

Where “classical” and “modern” positivists part company is in their criteria for validity of international laws. Simma and Paulus explain that

classical positivism demands rigorous tests for legal validity. Extralegal arguments, e.g., arguments that have no textual, systemic or historical basis, are deemed irrelevant to legal analysis; there is only hard law, no soft law.<sup>62</sup>

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<sup>58</sup> Simma & Paulus, *supra* note 5, at 307.

<sup>59</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 413 (1983).

<sup>60</sup> Simma & Paulus, *supra* note 5, at 304.

<sup>61</sup> Leiter, *supra* note 57, at 358.

<sup>62</sup> Simma & Paulus, *supra* note 5, at 304.

Their insistence on a precise rule of recognition could necessitate, or at least explain, classical international law positivists' rejection of normative or policy criteria for legal validity. Ambiguities in normative criteria would render the rule of recognition uncertain and undermine the concept of law as social fact. In general jurisprudence, this is Dworkin's Conventionality Thesis.<sup>63</sup> Brigitte Stern additionally echoes Raz's argument that law's distinctive authority or normativity must be internally defined without reference to external values and policies.<sup>64</sup>

In comparison, modern international law positivists seem more like soft positivists. They acknowledge that "soft law" may be a sort of law even though their criteria for validity is more open textured.<sup>65</sup> They also appear to accept the introduction of policy as long as it is prescribed as a relevant consideration by a law. Simma and Paulus state that in circumstances where there does not appear to be only one correct legal answer, the positivist may derive a legal answer by injecting his "ethical standpoint," for instance through the application of "general principles of law," or in so far as "global values . . . find sufficient expression in legal form."<sup>66</sup>

The critique that the New Haven concept of law improperly incorporates policy as a criterion for legal validity is not one that can be made by positivists of all stripes. Because soft positivists and "modern" international law positivists accept that legal validity could turn on more than just social facts, the

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<sup>63</sup> DWORKIN, *supra* note 11, at 114-150; *see also* Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *supra* note 57, at 99, 102 (noting that Dworkin's reason for excluding moral criteria is that such criteria are uncertain and undermine law's conventionality).

<sup>64</sup> Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 93-94 (2001) (refusing to "refer to an extra-legal element justifying the passage from fact into law in the customary phenomenon as an approach which is foreign to a veritable legal science" and concluding "law is nothing but a particular factual modality, a legal order that can define itself as a factual order considered as law, without anything needing to be added to this definition.").

<sup>65</sup> Simma & Paulus, *supra* note 5, at 306.

<sup>66</sup> *Id.* at 316. *See Wiessner & Willard*, *supra* note 19; *see also*, HART, THE CONCEPT OF LAW, *supra* note 11, at 304; JOHNSTON, *supra* note 10 (citing the soft positivist Hart in support of their conception of classical positivism).

references of the New Haven School to policy in determining appropriate laws is compatible with the soft positivist's concept of law.

Hard positivists and "classical" international law positivists could, and indeed must, criticize the New Haven concept of law as wrongly incorporating policy into the criteria for legal validity. Raz is thoroughly rigorous in arguing that law which is contingent on morality or – in the closely-related New Haven vernacular, policy – does not have unique legal authority. Nonetheless, there may be some doubt as to whether law that turns on policy could be both normatively and legally authoritative. But that is a longer debate for another essay.

My response here is narrower. Hard positivism may not sit comfortably with international law for at least two other reasons.

The first reason turns on the semantic usage of the term. The author is not committed to this argument for reasons that will become apparent in Part IV of this essay. Nonetheless, he will make it for those who are committed to the value of semantics. The term "international law" in its ordinary semantic usage among international law professionals is often applied to determine the legality of conduct at least in part by normative, moral or policy criteria. For example, customary international law and countless bilateral investment treaties often require host states to accord foreign investments "fair and equitable treatment." Numerous arbitral awards have confirmed that this standard includes normative criteria such as "legitimate expectations," and policy criteria, such as whether, in fact-specific contexts, the conduct of the host state promotes business stability and foreign investments.<sup>67</sup> An UNCTAD report states that "meaning of [the fair and equitable standard] has not been precisely defined."<sup>68</sup> Under the hard positivist concept of law, the fair and equitable treatment standard could not be law, because the reference to policy is inherently controversial, so it undermines clarity in the law and Dworkin's Conventionality Thesis. Yet, international

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<sup>67</sup> See Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 *FORDHAM J. INT'L L.* 1014, 1031-37 (2007) (discussing the fair and equitable treatment standard).

<sup>68</sup> See U.N. Conference on Trade and Development ("UNCTAD"), *Bilateral Investment Treaties in the Mid-1990s*, at 53, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998).

lawyers, scholars and arbitrators all regard the fair and equitable treatment standard as law. Put another way, the term “international law” includes, as a matter of common usage, imprecise legal rules and standards that contain policy and normative content as essential components. To the extent that conceptual jurisprudence is meant to explain international law as the term is ordinarily used, the inclusion of laws with ambiguous normative and policy criteria within the term international law poses difficulties for the hard positivist’ account of international law.

There is a second related, but distinct reason, for doubting the hard positivist concept of law as applied to international law. If a purpose of conceptual jurisprudence is to explain the phenomenon of law and how it makes a practical difference “in the structure and content of deliberation and action,”<sup>69</sup> then a concept of law must account for laws that can and do affect how relevant actors think and behave. Returning to the example of the fair and equitable treatment standard, it is beyond doubt that host states and investors regard the fair and equitable treatment standard as functioning as law. They have spent millions of dollars in legal fees disputing whether the standard was breached in investment disputes, and host states have honored awards finding breaches of the standard. Because inherently ambiguous and normative international legal rules have affected behavior and decision-making in profound ways, it behooves jurists to conceive of law in a way that accounts for such rules.

#### **IV. Does the New Haven Concept of Law Meaningfully Differ from Soft Positivism About How and to What Extent Policy is Incorporated into Law?**

Although soft positivists cannot object to the incorporation of policy *per se* into the New Haven concept of law, they can object to the manner and extent that policy is incorporated. While it is conceptually possible for the rule of recognition to refer to normative or policy criteria for validity, soft positivists may charge that the rule of recognition under the New Haven concept of law contains wrong policy criteria or excessively favors policy criteria.

Two contrasting examples clarify this point. A modern international law positivist might accept *renvoi* to policy

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<sup>69</sup> Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *supra* note 57, at 101 (describing this as the practical difference thesis).



considerations where a legal rule explicitly contains policy considerations, such as the rule requiring host states to accord foreign investors fair and equitable treatment. If a New Haven jurist referred to the policy of promoting foreign investments in determining if a host state was fair and equitable, the soft positivist would not quarrel with this application of the New Haven concept of law.

In contrast, the modern international law positivist would not accept *renvoi* to policy considerations without reference to a legal rule that incorporates normative or policy criteria for legality. Consider Articles 2(4) and 51 of the U.N. Charter, which prohibit the use of military force except against an armed attack. In addressing the question of whether these articles prohibit preemptive military force against a putative enemy, which may acquire the capability to launch a devastating attack in the future, a soft positivist would be constrained by the plain and ordinary language of the Articles in light of the object and purpose of the UN Charter, as required by Article 31(1) of the Vienna Convention on the Law of Treaties of 1969. The soft positivist may also consider subsequent state practices on the use of force to interpret Articles 2(4) and 51 of the U.N. Charter, as mandated by Article 31(3) of the Vienna Convention. But the soft positivist would not countenance determining the meaning of Articles 2(4) and 51, or more broadly, the legality of preemptive force, by appraising policy concerns thoroughly divorced from canons of treaty interpretation.

Imagine if a New Haven jurist interpreted Articles 2(4) and 51 without referring to formal rules of treaty interpretation, but instead turned to relevant world policies, such as the protection of human lives, the maintenance of world order, and the potential for abuse in unilateral assessments of future risk. A soft positivist may well charge that the New Haven concept of law incorporated policy in a mistaken manner because it did not identify any secondary rule permitting such references to policy.

The charge that the New Haven concept of law incorporates policy into law differently than soft positivism is only partially correct. An intellectual task of the New Haven School is the clarification of standpoint. The manner in which one discerns international law is guided by one's role and standpoint. From several of these standpoints, the application of New Haven concept of law is practically similar in some ways similar to positivism.

As a judge or arbitrator, the New Haven jurist is concerned about reaching a normatively desirable outcome, but, he is also constrained by formal secondary rules guiding the interpretation of laws and their application to facts to reach judicial decisions.<sup>70</sup> There are strong policy reasons for this practice. It is good policy to generally follow a method of legal reasoning accepted as legitimate by the community, and the applicable primary and secondary rules often secure relevant community values.<sup>71</sup> Thus, Reisman has written that when deciding arbitral disputes, “identification of the major principle and a pellucid logical exercise would appear to be a minimum requirement.”<sup>72</sup> This reliance on secondary rules to derive applicable laws and their logical application to relevant facts is aligned with positivism,<sup>73</sup> even if the New Haven School and positivists discharge their respective judging duties in this manner for different reasons.

However, in other circumstances where applying prior judicial decisions to novel circumstances would lead to manifestly absurd results, “an adaptation or even an innovation in policy” is required. Here, “a purported exercise in logical derivation, far from explaining what is being done, can only conceal what is being done.”<sup>74</sup> This rejection of the apparently

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<sup>70</sup> For a detailed discussion of judging from the New Haven perspective, see W. Michael Reisman, *A Judge's Judge: Florentino P. Feliciano's Philosophy of the Judicial Function*, in *LAW IN THE SERVICE OF HUMANITY DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO* 3, 3-10 (S. Charnovitz ed. 2005).

<sup>71</sup> See *id.* at 7. Reisman has explained his decisions in accord with these two policies. See, e.g., Dispute Concerning ACCESS TO INFORMATION UNDER ARTICLE 9 OF THE OSPAR CONVENTION (Ir. v. UK), Final Award (OSPAR Arb. Trib. July 2, 2003) slip op. at 61, Decl. of W. Michael Reisman, available at <http://www.pca-cpa.org>. (proposing “plain reading of [a treaty provision because it] appears to both reflect its objects and purposes and to produce a reasonable economic means for implementing [the obligations in the provision].”) (emphasis added).

<sup>72</sup> W. Michael Reisman & Guillermo Aguilar Alvarez, *How Well are Investment Awards Reasoned*, in *THE REASONS REQUIREMENT*, *supra* note 44, at 1, 31.

<sup>73</sup> See, e.g., Dispute Concerning ACCESS TO INFORMATION UNDER ARTICLE 9 OF THE OSPAR CONVENTION (Ir. v. UK), Final Award (OSPAR Arb. Trib. July 2, 2003), Decl. of W. Michael Reisman, available at <http://www.pca-cpa.org>.

<sup>74</sup> *Id.*

applicable secondary rules to determine laws and legal outcomes may seem to depart from positivism, and may provoke claims that the New Haven concept of law overly infuses law with policy.

It may come as a surprise that Dworkin takes roughly the same position as the New Haven School on this issue. Dworkin explains that Conventionalism does permit a court to depart from binding precedent where the prior decision was “especially immoral,” such as where the U.S. Supreme Court in *Brown v. Board of Education* departed from *Plessy v. Ferguson*, which had held that racial segregation did not violate the Equal Protection clause of the U.S. Constitution. Conventionalists would insist that in such a case, “the Court should have made plain to the public the exceptional nature of its decision, that it should have admitted it was changing the law for non-legal reasons.”<sup>75</sup> This is similar to Reisman’s suggestion that where prior decisions would lead to grossly suboptimal outcomes in contemporary contexts, a judicial decision to reach a different outcome is permissible but should be explained in policy terms rather than in seemingly logical extensions of prior decisions.

From a scholarly standpoint, the New Haven School and positivism do part ways. As a scholar, the New Haven jurist is unfettered by judicial constraints. The scholar may imagine alternative visions of law that better promote relevant policies and social goals, and recommend to decision-makers methods to achieve those visions.<sup>76</sup>

In order to imagine alternate configurations of world order that better promote community values, the New Haven School conceives of law as an authoritative and controlling process of decision-making to address problems and to secure maximum human dignity. So conceived, laws that do not secure compliance, or which are not accompanied by expectations of compliance by the world community to which they are addressed, do not adequately describe the relevant legal system. Conversely, norms, customs, or practices that lack formal legal pedigree but which are either accompanied by expectations of compliance by the world community or which in fact secure compliance may be studied as part of the legal system.

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<sup>75</sup> See DWORKIN, *supra* note 11, at 119.

<sup>76</sup> See MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 22, at 38.

In contrast, positivism conceives of law as a system of rules, in which their legality turns on their formal legal pedigree even if – as is the case in international law – this pedigree is often unaccompanied by expectations of compliance. From the scholar's standpoint, these two concepts of law appear to be conceptually incompatible.

Yet, the claim that the New Haven and positivist concepts of law are conceptually incompatible is not really a meaningful conceptual disagreement because the two concepts are respectively predicated upon different pre-concept commitments. Pre-concept commitments are ontological, normative, political or social choices that must be made to develop or describe a concept. These commitments or choices include: the function of inquiry; the ideal type to observe; and the value of semantics. If two parties disagree on any one of these pre-concept commitments, their disagreements about conceptualizations of their respective objects under inquiry may be meaningless.

Let me illustrate these points. Suppose that the concept of a table is the subject of philosophical inquiry. Philosopher A is interested in putting forth the best interpretation of a table to enable carpenters to build dining tables, whereas Philosopher B is interested in describing criteria for a table as it exists in its various forms. A's concept of a table may well specify that tables must be large enough to seat at least two persons and strong enough to bear the weight of china and silverware. B's concept of a table may specify that a table simply needs to be a piece of furniture in which a flat surface is elevated about four feet from the ground by one or more vertical legs. It is not possible for A and B to meaningfully disagree on their concepts of a table because their function of inquiries are different. They may certainly debate their preferred purposes of philosophizing, but this is not a conceptual debate.

Philosopher C enters into a debate with B. B's ideal type of a table is extrapolated from the salient characteristics common among tables in his home. C, however, comes from a different culture in which people sit cross legged on the floor and designate as a table what we might ordinarily call a tray. C's concept of a table will be radically different than B's concept because their ideal types, or the representative data they observed to conceptualize, are different. Again, to assert then that B and C disagree about the concept of a table is not meaningful, because they are simply speaking about different things.

C leaves in a huff, and in comes D. D is a scientist with aesthetic pretensions. He has invented a stable platform that is suspended in the air by magnetic fields created by a machine installed beneath floorboards. B, who is committed to the semantic usage of the word “table” insists that the concept of a table cannot be extrapolated from the floating platform because no one in the community would use the word “table” in that way. D, however, does not share the same commitment to semantic usage of words. In his view, what matters more is whether the platform serves the same function as a table. Because it is a stable flat surface parallel to the ground on which a person could eat, read and write, the concept of a table must include his platform.

The point here about disagreements over commitments to the value of semantics is different from Dworkin’s semantic sting argument. Dworkin argued that philosophers must agree on roughly the same criteria for a concept denoted by a word before they can have a meaningful disagreement on that concept. So, according to Dworkin, if you do not count his copy of *MOBY DICK* as a book because in your view novels are not books, “any agreement is bound to be senseless” because you and Dworkin are using the word “book” in completely different ways.<sup>77</sup> Raz disagrees with Dworkin. In Raz’s view, in the ordinary course of human interaction, you would not insist that *MOBY DICK* is not a book and you would apologize for your mistake.<sup>78</sup> According to Raz, “criterial explanations of concepts are consistent with the fact that people who use the rules setting out these criteria may make mistakes about which criteria are set by the rules.”<sup>79</sup>

Although Raz is correct that people can make mistakes about semantic criteria without invalidating criterial explanations, he seems to miss Dworkin’s point. If a person is committed to different semantic criteria, then it is impossible to engage in a meaningful disagreement with him about the concept denoted by the word being used. Take for example, the word “consideration.” A person committed to the semantics of its ordinary usage may say the concept of consideration entails deliberately thinking about an idea. A lawyer, who does not share those semantics, but is committed to the specialized semantics of

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<sup>77</sup> See DWORKIN, *supra* note 11, at 45.

<sup>78</sup> Joseph Raz, *Two Views on the Nature of the Theory of Law*, in HART’S POSTSCRIPT, *supra* note 8, at 1, 17 (making the point with reference to a disagreement about tables and sideboards).

<sup>79</sup> *Id.* at 1, 18-19.

his profession, asserts that the concept of consideration is a bargained for exchange of something of legal value. The lay person and the lawyer may disagree about their concepts of consideration, but they are speaking past each other.

In any event, the author's point about the value of semantics does not stand or fall on whether Dworkin or Raz is correct, because it makes a slightly different point. My point is that for there to be meaningful conceptual disagreement, the disagreeing parties must share roughly the same pre-concept commitment to the value of semantics in conceptualizing. Without this commitment, a philosopher may determine a concept by the functions ascribed to it by the community, rather than by its ordinary semantic meaning of the word representing the concept. This concept could be quite different from the concept shackled to the semantic usage of the word representing the concept. So, Philosopher D is not committed to semantics about how an object appears, but instead focuses on how an object functions, so he designates his platform as a table. B, who is committed to semantics, does not believe the word table and its associated concept includes platforms. Yet D and B cannot have a meaningful conceptual disagreement. They could certainly have a meaningful disagreement about semantic commitments, but this would be anterior to conceptual debate.

We can now apply our discussion about pre-concept commitments to the apparent conceptual incompatibility between the New Haven School and positivists. I submit it is difficult for New Haven jurists and positivists to engage each other about conceptual differences because they disagree about all three pre-concept commitments.

As regards the function of jurisprudence, the New Haven School seeks to provide guidance to decision-makers about what to do to authoritatively secure maximum human dignity. International law positivists see the function of jurisprudence as describing rules they designate as legal by reference to secondary rules about the pedigree of prior decisions and sources of law. Modern international law positivists explicitly eschew providing guidance on policy, except in so far as the rule of recognition incorporates policy into the criteria for legal validity. Not surprisingly, the New Haven School conceptualizes law as the process of decision-making, whereas positivists conceptualize law as a body of rules.

As regards the ideal type of law, because the New Haven School is committed to offering practical guidance to decision-makers, it selects as its ideal type the entire global decision-making process in which power and authority are diffused rather than concentrated in elite law-makers, in which claims and norms may be, to varying degrees authoritatively controlling, and in which formal legal rules may not tell the whole story about the actions and deliberations of relevant actors.<sup>80</sup> In contrast, international law positivists designate as their ideal type the international legal norms concerning international relations that are legally validated by reference to limited sources specified in an international rule of recognition. With such different ideal types, it is unavoidable that the New Haven School and positivists will identify different salient characteristics of their respective concepts of law.

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As regards the value of semantics, it follows from the New Haven School's commitment to offering functional guidance that it draws into its scope of inquiry factors that affect international conduct, even if those factors would not in ordinary usage be termed as law. Reisman has explained that

“[a]rrangements and processes which may not have been assigned the sobriquet, “international law,” by the people who fashioned them; yet from the perspective of the disengaged observer, it will be apparent that these processes and arrangements functioned as the struts of world or regional order in specific contexts.”<sup>81</sup>

This rejection of descriptive semantics in favor of functional criteria is an anathema to positivists, who are committed to describing those phenomena that ordinarily would fall within the normal usage of the word “law.”

These normative disagreements as to the purpose of jurisprudence, the ideal type of international law, and the relevance of semantics cannot be properly addressed at the conceptual level.

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<sup>80</sup> See Reisman, McDougal's Jurisprudence: Utility, Influence, Controversy, *supra* note 5, at 274.

<sup>81</sup> Reisman, JOHNSTON *Preface*, *supra* note 24, at vii; see also generally W. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS (1999).

The resultant differences between the New Haven School and positivists respective concepts of law are accordingly not really conceptual disagreements. They are, more fundamentally, normative disagreements about pre-concept commitments.

## V. The Choice of Law

This Article has argued that although New Haven and positivist concepts of law are different, this difference is not a very meaningful conceptual dispute. The meaningful disagreement is over pre-concept commitments that are not of a conceptual nature, but of an ontological and normative nature.

It may be possible to bridge the apparent normative gulf by recognizing the respective pre-concept commitments of the New Haven School and positivists. It might even be possible to have a meaningful conversation about law once jurists and scholars accept that the word law can denote two often non-mutually exclusive concepts, which I shall call Law1 and Law2.<sup>82</sup> Law1 refers to the positivist concept of law, a body of legal rules derived from secondary rules governing legal pedigree. Some scholars have variously referred to this as a “legal regime,”<sup>83</sup> or a “theory of law.”<sup>84</sup> Law2 refers to the New Haven concept of law, the process of authoritative and controlling decisionmaking. Some scholars have variously referred to this as a “legal order,”<sup>85</sup> a “theory about law,”<sup>86</sup> or, “World Order.”<sup>87</sup>

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<sup>82</sup> Janet Halley made a similar semantic move in explaining various feminist theories. JANET HALLEY, *SPLIT DECISIONS* 23-25 (2006).

<sup>83</sup> Symposium, *Comparative Visions of Global Public Order*, 46 HARV. INT’L L. J. 387, 387 (2005) (distinguishing between legal regime and legal order).

<sup>84</sup> JOHNSTON, *supra* note 10, at 113.

<sup>85</sup> See Symposium, *Comparative Visions of Global Public Order*, *supra* note 83, at 387.

<sup>86</sup> See Reisman, *Testing a Theory About Law*, *supra* note 23, at 104; JOHNSTON, *supra* note 10, at 113; see also 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).

<sup>87</sup> W. Michael Reisman’s international law course at Yale Law School is titled “Public Order of the World Community.” Douglas Johnston’s final opus is titled “THE HISTORICAL FOUNDATIONS OF WORLD ORDER,”



With this distinction, it is possible for a positivist to assert that there is a Law1 rule against preemptive military force without claiming that this rule is also Law2, if the Law1 rule slavishly applied to every situation may lead to a suboptimal policy outcome for the world community. Conversely, a New Haven jurist may assert that Law2 permits preemptive military force in certain contexts in which such force would promote world order and maximize human well-being, broadly speaking, while accepting that a Law1 rule against preemptive force exists on the books and entails a strong, albeit not necessarily overwhelming, expectation of compliance.

The distinction between Law1 and Law2 can be useful to legal advisors in foreign ministries as well. A legal advisor with a policy bent may counsel her foreign minister that Law1 prohibits preemptive force, but because the threat of destruction from a particular putative enemy seeking nuclear weapons is so great, her government should consider military preemption from a Law2 perspective, even at the cost of flouting the Law1 rule. Alternatively, a legal advisor with a strict positivist orientation may decide to advise his foreign minister of the Law1 rule against preemptive force, and explicitly leave considerations of Law2 to other policy advisors.

Differentiating between Law1 and Law2 also helps to explain how a New Haven jurist performing a judicial function can appraise a dispute before him under Law2, but nonetheless recognize that he is bound in his role to decide the dispute in accordance with Law1 and ultimately follow Law1. It is also possible for a positivist sitting as a judge to recognize that the applicable Law1 rules would lead to such a terrible outcome in Law2 terms that it would unacceptably shock the conscience, and as a result to issue a decision that departs from Law1 and explains its reasons using Law2, as Dworkin and Reisman both recommend.<sup>88</sup>

The problems of fragmentation of international law and international legal theory are wider and deeper than the disagreements between positivists and policy-oriented jurists. This Article has demonstrated that apparent conceptual differences between positivism and policy-oriented jurisprudence are more

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rather than “THE HISTORICAL FOUNDATIONS OF INTERNATIONAL LAW.”  
Johnston, *supra* note 10.

<sup>88</sup> *Supra*, Part III.

meaningfully understood as differences about normative and ontological preconcept commitments. However, work remains to be done to test whether disagreements among other concepts of international law could also be understood and ameliorated by studying their respective preconcept commitments. Then, a new vocabulary— beyond Law1 and Law2 – could be constructed to enable proponents of various theories to fully engage each other. Difficult questions will also need to be addressed, such as how to resolve conflicts about when jurists disagree about whether Law1, Law2, Law3, Law4, ... should prevail in an international problem.

These issues will need to be addressed in future scholarly works. For now, the theoretical innovation of this Article concerning preconcept commitments suggests that there may be a fertile field of research in international legal philosophy that may ultimately help develop international law and achieve its goals of promoting human dignity and world order. If a concept of law is contingent upon its pre-concept commitments, proponents of different concepts of law may eventually find better ways to work together – meaningfully agreeing and disagreeing with each other – by being aware of their respective pre-concept commitments and the extent to which they are not always mutually exclusive.