

## Commentary

# The Continuing Influence of the New Haven School

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This Conference has explored the deep and abiding influence of what has been called the “New Haven School” of International Law. It offers an occasion to reflect on the connection between the ideas at the heart of the School and the place at which they were first formulated—that is, between New Haven and the school of thought that bears its name. And it is an opportunity to consider the connection between the past and the present—the ideas first formulated by Myres S. McDougal and Harold D. Lasswell more than a half-century ago, and those, both near and far, whose work they have influenced.

What is the relationship between the city of New Haven and the New Haven School? At the surface level, it is simply an accident of place: New Haven is the city in which the ideas that stand at the heart of the School formed and took root. During the years before and following World War II, McDougal and Lasswell were both members of the faculty at Yale Law School (though Lasswell was a political scientist and did not have a law degree).<sup>1</sup> Indeed, Lasswell was not a specialist in international law.<sup>2</sup> The two came together, in part, because Lasswell was, as he later put it, “on the lookout for a colleague learned in the law and highly motivated to execute the much-touted but little-realized aspiration toward a valid integration of ‘law and the social sciences.’”<sup>3</sup> The decades-long collaboration that ensued brought the policy science approach to international law, in the process transforming

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1. Notably, Lasswell’s first appointment at Yale was at the Law School (he visited in 1937 and joined the faculty as a permanent member in the mid-1940s). He accepted a joint appointment in the political science department in 1952. E-mail from Andrew Willard, Experiential Learning Coordinator, Univ. of Iowa, to Oona Hathaway, Associate Professor of Law, Yale Law School (Apr. 19, 2007) (on file with author).

2. He was no stranger to international issues, however. For example, he wrote *World Politics and Personal Insecurity* before his collaboration with McDougal began. See HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935). He remains best known outside law schools for his work on the relevance of psychology to political science and on policy science more generally. See generally James Farr, Jacob S. Hacker & Nicole Kazee, *The Policy Scientist of Democracy: The Discipline of Harold D. Lasswell*, 100 AM. POL. SCI. REV. 579 (2006).

3. Harold D. Lasswell, *Introduction* to TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL xiii, xvi (W. Michael Reisman & Burns H. Weston eds., 1976).

the study of international law not just in New Haven but, eventually, around the country, and even the globe.

Reflecting the substantive themes of their work, McDougal and Lasswell called their new creation "Policy-Oriented Jurisprudence."<sup>4</sup> It was not until almost three decades after it was born that the school of legal analysis that is the subject of this Conference received the title today most often associated with it: The New Haven School. Perhaps fittingly, the title was bestowed not by the original progenitors of the School, but by one who would later distance himself from it, both in body and spirit.<sup>5</sup> Richard Falk is generally credited with inventing the term in the mid-1960s, after he himself had left New Haven and joined the Princeton faculty.<sup>6</sup>

New Haven is, then, the place where the School's ideas were first formed. And it is where it grew and flourished. For many years, McDougal and Lasswell taught a seminar entitled "Law, Science, and Policy," in which they traded and shaped the ideas that became the New Haven School. It has also been the intellectual home of some of the most prominent current proponents of the School—Michael Reisman foremost among them. They, too, continued to form and shape the School both through their writing and teaching. Indeed, in 1983, a seminar called "The Incident as a Decision Unit of International Law" resulted in multiple published papers that were later collected in a book.<sup>7</sup>

And yet, as this Conference and its inclusion of participants from throughout the country makes clear, the School's influence is far from limited to New Haven and the halls of the Yale Law School. New Haven has served as the School's incubator and its testing ground, and it remains a center of both what I would call the core New Haven School and its radiating spheres of influence. Yet, like any successful school, the ideas of the New Haven School have spread far afield. Those educated here have brought the ideas with them, helping them to grow and flourish around the country and, indeed, the world.

The New Haven School's ongoing influence, like that of any great school of thought, is felt in two distinct but related ways. It is felt through those who consider themselves a part of the School. These are the many scholars and practitioners who continue to be engaged directly and self-consciously in adapting, addressing, and promulgating the ideas of Lasswell and McDougal.<sup>8</sup> This is what I mean by the core of the modern New Haven School. Yet, the influence of the school is also felt through its impact on those would not ordinarily identify themselves as direct intellectual descendants of its original promulgators. Understanding this broader influence requires drawing out three central features of the New Haven School that are deeply

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4. It has also been variously referred to as "Law, Science, and Policy," "Policy-Oriented Jurisprudence," and "Jurisprudence for a Free Society."

5. See Richard A. Falk,  *Casting the Spell: The New Haven School of International Law*, 104 *YALE L.J.* 1991 (1995).

6. Lung-chu Chen, *Perspectives from the New Haven School*, 87 *AM. SOC'Y INT'L L. PROC.* 398 (1993).

7. *INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS* (W. Michael Reisman & Andrew Willard eds., 1988)

8. This includes three of the participants in this Conference—Michael Reisman, Andrew Willard, and Siegfried Wiessner—as well as many others.

embedded in the contemporary field of international law: a resistance to the realism that once gripped the study of world politics, an interdisciplinary approach to international law, and attention to policy and policymaking.

### *A Response to the Realist Challenge*

From the start, the New Haven School offered a response to the bare-knuckled realism that came to dominate the study of international law and politics in the immediate wake of World War II. Writing as the world descended into a global war for the second time in three decades, E.H. Carr derided the League of Nations as “an attempt ‘to apply the principles of Lockean liberalism to the building of a machinery of international order’”<sup>9</sup> and counseled extricating “ourselves from the blind alley of arbitration and judicial procedure.”<sup>10</sup>

The turn to political realism that had begun during the interwar period<sup>11</sup> gained momentum as the world descended into the Cold War. The chief proponent of realism, Hans Morgenthau, led a devastating attack on international law. These scholars defined themselves in opposition to what they considered the unjustified and dangerous utopianism of “idealists” like Charles Evans Hughes and Elihu Root. Arguing that such idealists ignored the relationship between power and state behavior, Morgenthau noted that “[i]nternational law owes its existence to identical or complementary interests of states, backed by power as a last resort, or, where such identical interests do not exist, to a mere balance of power which prevents a state from breaking these rules of international law.”<sup>12</sup> States do not act in accordance with the law, but rather simply pursue their own power relative to others. Indeed, law that does not enjoy compliance—which Morgenthau claimed was true of much of international law—could not be said to really be law at all.<sup>13</sup>

The New Haven School stepped into the breach left by this broadside attack. Working from a *legal* realist perspective, McDougal and Lasswell developed a process-oriented conception for fostering legal order. They counseled decisionmakers to fashion “a more usable conception of international law” not simply by consulting rules, but by balancing emphasis on “authority and control” and on “perspectives” and “operations.”<sup>14</sup> Like the political realists, then, they turned a critical eye on international law and rejected any assumption that international law has the independent power to shape state behavior. And like political realists, they argued that understanding state power is essential to understanding state behavior.

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9. E.H. CARR, *THE TWENTY YEARS' CRISIS, 1919–1939: AN INTRODUCTION TO THE STUDY OF INTERNATIONAL RELATIONS* 28 (Palgrave 2001) (1939) (citation omitted).

10. *Id.* at 207.

11. Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 *AM. J. INT'L L.* 260 (1940); CARR, *supra* note 9.

12. Morgenthau, *supra* note 11, at 275.

13. *Id.* at 276 (“A rule, be it legal, moral, or conventional, is valid when its violation is likely to be followed by an unfavorable reaction, that is, a sanction against its violator. An alleged rule, the violation of which is not followed by such a sanction, is a mere idea, a wish, a suggestion, but not a valid rule.”)

14. MYRES S. MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER* 169 (1960).

And yet they disagreed profoundly with the dismissive view of international law held by political realism. International law may not always be effective, but it does have immense power to shape the world. Power matters, they argued, but so too does authority. Moreover, contrary to the early political realists—especially Morgenthau—they argued that power was far from the only value that actors maximized. Actors also sought and used enlightenment, wealth, well-being, skill, affection, respect, and rectitude.<sup>15</sup>

This position is profoundly influential today. Despite something of a realist resurgence in the study of international law,<sup>16</sup> much of the discipline still shares the New Haven School's view that authority matters and that actors in the system pursue much more than simply power. The New Haven School of McDougal and Lasswell thus set the stage for a clear-eyed response to the realist challenge—one that does not see law as all-powerful but views it as a tool capable of bringing about change.

This is evidenced in the work of those in attendance at this Conference: Harold Hongju Koh has put forward the transnational legal process theory that emphasizes the role of norms in guiding behavior;<sup>17</sup> Janet Levit shows how international law is made from the “bottom-up”;<sup>18</sup> Christopher Borgen argues that norms and normative outlooks matter in the formation of world public order;<sup>19</sup> Paul Schiff Berman offers a pluralist approach to law that sees law not simply as a command backed by a threat of force but as an entity bearing normative force as well;<sup>20</sup> Melissa Waters reflects on the role of normativity and legitimacy in transnational legal process;<sup>21</sup> and Nicole Hallett considers the role of national human rights institutions in bringing human rights home.<sup>22</sup> Indeed, nearly every contribution to this Conference, I think it is fair to say, bears this stamp of the New Haven School.

### *The Connection of the Study of International Law to Other Disciplines*

The New Haven School was driven in no small part by McDougal and Lasswell's dissatisfaction with their own separate disciplines—law in McDougal's case, political science in Lasswell's—and a belief that drawing upon the strengths of each they could build a new and stronger approach to

15. 2 HAROLD D. LASSWELL & MYRES MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY 803-33 (1992).

16. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005).

17. See Harold Hongju Koh, *Is There a “New” New Haven School of International Law?*, 32 YALE J. INT'L L. 559 (2007); Harold Hongju Koh, *How is International Human Rights Law Enforced?*, 74 IND. L.J. 1397 (1999); Harold Hongju Koh, *Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599 (1997) (book review).

18. Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393 (2007).

19. Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 YALE J. INT'L L. 331 (2007).

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

21. Melissa A. Waters, *Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts*, 32 YALE J. INT'L L. 455 (2007).

22. Nicole Hallett, *National Human Rights Institutions: Bringing Human Rights Home* (Mar. 10, 2007) (unpublished manuscript, on file with The Yale Journal of International Law).

international law. As McDougal later put it in an homage to Lasswell that could have as easily been said of himself, "A distinctive emphasis in Lasswell's orientation to problem-solving is grounded in the wisdom that every discipline can provide methods and insights which may be of use to those who can use and/or understand them. Hence his injunction to become multidisciplinary, and no one heeded this advice better than Lasswell himself."<sup>23</sup> This was no simple hyperbole by an old friend and collaborator: Lasswell in fact served as president of both the American Political Science Association and the American Society of International Law.<sup>24</sup>

This advice resonates powerfully today. Writing less than a decade ago, Anne-Marie Slaughter documented the ways in which "political scientists and international lawyers have been reading and drawing on one another's work with increasing frequency and for a wide range of purposes."<sup>25</sup> Her essay went on to examine the numerous ways that international law scholars had used international relations theory and empirical research over the previous decade, and laid out yet more promising new avenues for joint research.

Sophisticated cross-disciplinary analyses of international law of the sort encouraged by McDougal and Lasswell are now increasingly common in both legal and political science scholarship. Under the banner of "legalization," leading scholars of both fields have begun a joint effort to understand international law by reference to its functional value and the preferences of domestic political actors.<sup>26</sup> Once again, this trend is exemplified by the work of participants in this Conference: from Hari Osofsky's work at the intersection of law and geography,<sup>27</sup> to Ryan Goodman and Derek Jinks's work at the intersection of law and sociology,<sup>28</sup> to the work of Michael Gottesman,<sup>29</sup> Ji Li,<sup>30</sup> myself,<sup>31</sup> and many others at the intersection of law and political science.

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23. Myres S. McDougal, *McDougal on Collaboration with Lasswell*, in 1 LASSWELL & MCDUGAL, *supra* note 15, at xxxii.

24. *Id.*

25. Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367, 367 (1998).

26. See, e.g., LEGALIZATION AND WORLD POLITICS (Judith L. Goldstein et al. eds., 2001).

27. Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT'L L. 421 (2007).

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

29. Michael Gottesman, *Revising the Golden Rule: Reciprocity and the Geneva Conventions in Modern Conflicts* (Mar. 10, 2007) (unpublished manuscript, on file with The Yale Journal of International Law).

30. Ji Li, *From "See You in Court!" to "See You in Geneva!": An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution*, 32 YALE J. INT'L L. 485 (2007).

31. See, e.g., OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS (2004); Oona A. Hathaway, *International Delegation and Domestic Sovereignty*, LAW & CONTEMP. PROBS. (forthcoming 2007); Oona A. Hathaway, *Why Do Countries Commit to Human Rights Treaties?*, 51 J. CONFLICT RESOL. (forthcoming 2007); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821 (2003); Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002).

*The Policy-Centered Focus*

The New Haven School—or as McDougal and Lasswell called it, “Policy-Oriented Perspective”—aimed from the beginning not simply to understand the way the world worked, but to shape it. McDougal and Lasswell offered a scientific method for studying world public order that would allow those using it to understand in depth the challenges posed by a particular situation, and to identify the steps that would lead toward the best policy alternatives. “The formidable challenge to legal scholars today,” they wrote, “is to create a jurisprudence which is relevant to establishing demanded public order.”<sup>32</sup> That is precisely the challenge that they took up.

McDougal and Lasswell’s message to their readers was a profoundly hopeful one: The School is centered on the belief that those who study and practice international law can make a difference in the world. World public order is not simply a function of state power, as political realists would have it, but of human agency as well. If one takes the time to understand the problems and to consider them carefully, one can “enhance the quality of both law and public order.”<sup>33</sup>

This conviction is a central feature of the modern New Haven School, both at its core and within its broader sphere of influence. Law school clinics focusing on issues of international law have proliferated during the last several decades. Such programs are premised on the conviction that international law is not just a subject to be studied from afar, but knee-deep in the gritty details of law in the real world. Current legal scholarship, too, reflects the impulse to “understand and affect”<sup>34</sup> real-world problems. One need only look at Rebecca Bratspies’s article on sustainable development,<sup>35</sup> or Dakota Rudesill’s examination of technology and the duty of care under laws of war<sup>36</sup>, to see that the tradition of a jurisprudence engaged in the world is alive and well.

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32. 1 LASSWELL & MCDUGAL, *supra* note 15, at 16.

33. *Id.* at 21.

34. *Id.* at 17.

35. Rebecca M. Bratspies, *Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development*, 32 YALE J. INT’L L. 363 (2007).

36. Dakota S. Rudesill, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War*, 32 YALE J. INT’L L. 517 (2007).