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Abstracts

Articles

A Pluralist Approach to International Law

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The New Haven School of International Law offered a significant, process-based rejoinder to the realism and positivism that had dominated international relations theory in the United States since the close of World War II. Whereas international relations realists viewed international law as merely a product of state power relations, and positivists dismissed international law entirely because it lacked both sovereign commands and a rule of recognition, scholars of the New Haven School studied law as a social process of authoritative decisionmaking. Such a study necessarily expanded the state-focused perspective of both the realists and positivists by drawing attention to ongoing interactions among variously situated bureaucratic and institutional actors.

Now, in the first decade of the twenty-first century, the gaze has widened still further, as international law scholars (and those studying law and globalization more generally) increasingly recognize that we inhabit a world of multiple normative communities, some of which impose their norms through officially sanctioned coercive force and formal legal processes, but many of which do not. These norms have varying degrees of impact, of course, but it has become clear that ignoring such normative assertions altogether as somehow not "law" is not a useful strategy. Accordingly, what we see emerging is an approach to international law drawn from legal pluralism.

As such, this new international law scholarship owes a debt not only to Myres McDougal, Harold Lasswell, Michael Reisman, and the other practitioners of the New Haven School, but to another Yale Law School professor whose name is rarely associated with international law: Robert Cover. This Article discusses Cover's work and its relationship to the New Haven School of International Law, while arguing that Cover's emphasis on norm-generating communities—rather than nation-states—along with his celebration of "jurisdictional redundancy" provide a useful analytical framework for understanding the plural normative centers that are the focus of much current international law scholarship. Moreover, a pluralist perspective on international law provides a powerful critique to the latest incarnation of realism, now newly dressed up in the trappings of rational choice theory.

**Whose Public, Whose Order?
Imperium, Region, and Normative Friction**

Christopher J. Borgen 331

This Article, part of an ongoing project by the author on law and hegemony in Eurasia, considers the strengths and weaknesses of the New Haven School's policy-oriented jurisprudence in light of the competition among multiple conceptions of "world public order" that exist today. Taking as its starting point the concept of the world being divided into "diverse systems of public order," as defined by Harold Lasswell and Myres McDougal, the Article assesses how this idea of diversity applies to post-Cold War geopolitics. As a test case, it focuses on Eurasia as a geographic space where multiple conceptions of public order, including those of the United States, the European Union, Russia, and Islamic fundamentalism, overlap, interact, and at times compete, especially in the unstable arc of states bordering Russia.

Part II introduces the idea of "diverse systems of public order" described in policy-oriented jurisprudence. It also situates the New Haven School as part of the liberal modernist tradition that attempts to find universal norms and/or techniques to address questions of political or normative conflict. Part III examines the different public orders in

today's multipolar, multinormative world. Part IV proposes the concepts of systemic borderlands (states that are the geopolitical crossroads between two or more normative realms) and of normative friction (the process by which competing conceptions of public order interact in these borderland states) as means of describing normative interactions in a multipolar world. Part V considers examples of systemic borderlands and normative friction in Eurasia and, in particular, the recent disputes over the accession of East European states to the EU and to NATO and to the ongoing conflicts over the states of the Black Sea and Caspian Sea regions. Finally, Part VI considers ways in which the New Haven School can build on some of its own original insights on the existence of diverse systems of public order in light of changes in international politics and sets out questions for further investigation.

Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development

Rebecca M. Bratspies 363

Drawing on insights from the social and behavioral sciences, the New Haven School of International Law, championed by Harold Lasswell and Myres McDougal, proposed a worldwide jurisprudence of human dignity. Their process-oriented jurisprudence attempted to flesh out the core values of human dignity and the processes necessary to translate those values into universal theories of authoritative decisionmaking. Of particular interest is the role they proposed for science in legal analysis. This Article explores the relationship between New Haven School ideas of authoritative decision and the environmental challenges posed by sustainable development.

In examining the tensions between the malleability of sustainable development as an international principle on the one hand, and the precision of the multilateral environmental agreements that shape international environmental law on the other, this Article identifies how the very idea of an "authoritative decision" is being reshaped in the context of globalization. In particular, the Article emphasizes how New Haven School ideas might help make sense of the new multiplicity of decisionmakers in the globalized arena, and how they might help international environmental law confront the duties owed to future generations. Using the international debate over cost-benefit versus precautionary approaches to regulation, this Article tests both the strengths and weaknesses of New Haven School thinking about science, and draws the conclusion that the lessons offered for environmental problem-solving are cautionary as well as salutary. While science can provide useful data for decisionmakers, their process of weighing and acting on those data is necessarily political and contextual. Ultimately, this Article concludes that, although the specific scientific matrices and analyses proposed by New Haven School writings are a product of their times, many of the School's basic insights about the need for contextual, problem-oriented, and multi-disciplinary analysis still ring true.

Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law

Janet Koven Levit 393

Many contemporary international legal scholars find themselves besieged by intellectual and geopolitical currents highly reminiscent of those that influenced the New Haven School of International Law. Just as the New Haven School answered Cold War, power-based realism, a new generation of scholars is called upon to answer a neo-conservative, nationalist ideology that likewise challenges the normative value of international law. The response—a response indelibly marked by New Haven School jurisprudence—is to question the naysayers' foundational assumptions by turning from the detached, game-theoretic heights of power-based realism to the on-the-ground nuance and gradation of sociolegal realism.

This Article first isolates three artificial assumptions about the nature of international law which are at the core of the "nationalist" critique: 1) "states" as lawmakers; 2) the treaty as the preeminent form of international law; and 3) international law as a choice—a deliberate process that state elites can orchestrate and control.

The Article then offers three "bottom-up lawmaking" vignettes—export subsidies, climate change regulation, and corporate social responsibility initiatives—to cast light on the self-serving simplicity of the nationalists' assumptions. In each instance, a bottom-up

lawmaking process unfolds, featuring private parties, NGOs, sub-state actors, and/or mid-level technocrats, who coalesce around shared, on-the-ground experiences and perceived self-interests to solidify norms, which are often intended as a form of self-regulation. Over time, these informal rules embed in a more formal legal system and harden as law. Whereas top-down lawmaking—the type of lawmaking at the heart of the nationalist critique of international law—is a process of law internalized as practice, bottom-up lawmaking is a subterranean, unchoreographed process of practice externalized as law.

Thus, bottom-up lawmaking empirically exposes the mythical quality of many international law stories, particularly those flowing from archaic descendants of Cold War realism. States—and within states, the “political leadership”—are no longer the universe of international lawmakers; a diverse cast of transnational actors also join the ranks. These transnational actors parade multiple normative forms in addition to the treaty, including understandings, informal “gentlemen’s agreements,” pacts, codes, and court decisions. Finally, international law is not always a matter of deliberate, reflective choice; international law happens, whether the President or political elites will it or not. Thus, international lawmaking emerges as a complex, decentralized, and diverse process, a loosely stitched patchwork of multiple norm-generating communities rather than a predictably centralized process with the President as the steward. All of these insights grow from New Haven School seeds, which seem to have taken root and blossomed.

A Law and Geography Perspective on the New Haven School

Hari M. Osofsky 421

This Article explores the value of—and barriers to—law and geography approaches to international legal analysis through the example of the New Haven School of International Law. It argues that the expulsion of geography from elite U.S. universities has limited the exposure of current and future generations of international law professors to the discipline. As a result, despite the centrality of geographic concepts to international legal problems, scholarly analysis of those ideas tends to be quite thin. The Article calls for the New Haven School and international legal scholarship more broadly to draw from geography’s interrogation of place, space, and scale.

In making this case, the Article engages in historical and conceptual analysis. First, the Article looks to the past, providing two different spatio-temporal approaches to an intellectual history of the barriers to the New Havens School’s incorporation of the discipline of geography. Part II considers the assault on U.S. academic geography in the mid-to-late twentieth century in the context of developments in legal academia at that time. It then turns to the evolution of law and geography at Yale more specifically, from the university’s inception through geography’s final elimination in 1967. In the process, it examines possible explanations for the New Haven School’s lack of explicit engagement with the discipline.

Second, the Article focuses on the present and future, analyzing how the current geography literature might enhance the New Haven School’s approach to its geographic ideas. Part III begins by discussing the geographic ideas consistently articulated in New Haven School scholarship, with a focus on world community, territorial units, and authoritative decisionmaking. It then explores how recent geography literature on space, place, and scale might influence the questions that the New Haven School asks. Finally, it demonstrates the ways in which the New Haven School’s internal and external analyses might evolve through deeper interrogation of its geographic concepts.

Although the Article primarily advocates for future New Haven School scholarship to engage the discipline of geography more directly, it also introduces a broader project of integrating law and geography approaches into international legal analysis. The attack on geography in tone-setting U.S. universities—and the influence of those eliminations on law—represents a cautionary tale of the way in which thought develops. Until these elite institutions embrace geography more fully, the danger of incomplete international problem-solving will persist.

Normativity in the “New” Schools: Assessing the Legitimacy of International Legal Norms Created by Domestic Courts

Melissa A. Waters 455

From the building blocks of the New Haven School of International Law, scholars have developed rich descriptive accounts of the way international law is formed—schools

of thought that can be loosely grouped into those focusing on transgovernmentalism and those focusing on transnational legal process. To date, however, proponents of those concepts have shown less interest in exploring the normative implications of their theories. Most importantly, those theories have not addressed the legitimacy questions that arise when relevant actors are not necessarily representatives of the state, and when the emerging legal rules are “softer” and more difficult to identify and apply.

This Article explores the potential of transnational legal process and transgovernmentalism as normative concepts. It takes as its narrow focus transnational judicial dialogue among domestic courts, which both transgovernmentalism and transnational legal process identify as a key vector of transnational lawmaking. However, that dialogue also presents difficulties from a normative perspective. At worst, its critics argue, it can create an international countermajoritarian difficulty, in which domestic courts impose foreign norms on unwilling domestic audiences.

*Testing that criticism, this Article returns to John Hart Ely’s seminal work on the domestic countermajoritarian difficulty, *Democracy and Distrust*. Ely suggests that the courts’ task of removing issues from the political process through constitutional judicial review can be legitimate, even democracy-enhancing, if it serves to protect discrete and insular minorities. This Article argues that transnational judicial dialogue may serve an analogous role: Domestic courts can mediate between the promulgation of international norms and their internalization to domestic law. As examples, this Article examines two topical transnational judicial conversations. In the first, both U.S. and foreign courts construe immigration statutes so as to remain consistent with international human rights law. In the second, the world’s courts shape emerging human rights norms surrounding the imposition of the death penalty.*

Notes

From “See You in Court!” to “See You in Geneva!”: An Empirical Study of the Role of Social Norms in International Trade Dispute Resolution

Ji Li 485

Are countries with litigious domestic environments more willing to resolve their disputes with other countries through formal international dispute resolution mechanisms? Do vague and intangible social norms have any significant impact on a government’s behavior in the international community? If they do, can we distinguish the influence of social norms from the influence of other factors, such as the level of economic development, state capacity, and political structure? This Note attempts to answer these questions by exploring the relationship between domestic levels of litigiousness and a government’s use of the WTO Dispute Settlement Mechanism (DSM). In evaluating the relationship, I use both quantitative and qualitative methods. Conversations with trade officials and systemic data analysis reveal a significant positive relationship between domestic litigiousness and government propensity to file a request for consultation with the WTO DSM. The findings have several implications. First, the current trend of judicialization of international affairs may impose disproportionate costs on countries with non-litigious domestic norms. Second, incorporating normative differences into institutional design may make transnational dispute resolution mechanisms more effective. Third, scholars with different disciplinary backgrounds and methodological preferences will benefit enormously by engaging in the debate of other disciplines and by applying a diverse set of analytical tools.

Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under the Laws of War

Dakota S. Rudesill 517

Recent decades have witnessed the American Revolution in Military Affairs (RMA)—the “Transformation” of the American way of war through synergistic advances in sensor, communication, precision-strike technology, and related organizational and operational changes. This Note asks whether technological transformation also transforms responsibilities under the law of armed conflict (LOAC) and, in particular, whether greater

technological capacity for precision in the use of force dictates greater legal responsibility for effects, especially unintended harm to protected persons and property.

In answering in the affirmative, this Note begins in Part II by describing LOAC as including proscriptive and prescriptive zones, in the latter of which a duty of care is evident. The legal academic literature generally does not conceptualize responsibility to obey the law of war in these terms, but Parts III and IV of the Note explain that a duty of care is evident in LOAC, originating in its jurisprudential, treaty, and customary law sources. It is also evident in state practice: the ways in which militaries explain LOAC to their own soldiers. In this respect, this Note seeks to bring the legal academic literature up to speed with how LOAC is coming to be understood and applied by those in the profession of arms in the United States and other advanced nations. Combatants are strictly required to apply this duty of care, while its performance carries what lawyers will recognize as a negligence standard. Part V explains that responsibility for effects—intended or not—varies with capacity for control. On a prima facie level, advanced military technology increases the potential ability of commanders to control the application of force. In theory, therefore, a particular harm caused by a technologically advanced military could be the result of negligence while the same harm caused by a less advanced nation might not.

However, the legal obligation to exert as much control as is reasonably possible over effects, together with the capabilities of precision technology, cannot add up to a duty of perfect effects, nor dictate a change to a standard akin to strict liability, due to the circumstances of war (its timeless nature, implications of the RMA itself, and adversary adaptation) that can significantly offset Transformation's advantages. Instead, this Note suggests that, despite their apparent incongruity, fiduciary notions may be a more appropriate and insightful way to understand the duty of care. The Note concludes by predicting that duty of care analysis is more likely to inform prosecutions at the state level rather than in international fora, and by noting that the implicit notion of a duty of care has migrated internationally in a manner consistent with the transnational norm diffusion pattern identified by the New Haven School of International Law.

