

Commentary

Is There a “New” New Haven School of International Law?

Harold Hongju Koh[†]

This Conference issue asks: “Is there a ‘new’ New Haven School of International Law?” This would not be Yale Law School if we did not first frame that question with a meta-question: What does it mean to belong to a school of thought? Traditionally, a school of thought, belief, learning, or scholarship—often named after its place of origin—comprises a group of like-minded individuals who share common opinion, outlook, philosophy, or membership in the same intellectual, artistic, social, or cultural movement.¹

Like all schools, the New Haven School of International Law had its forebears, fellow travelers, and founders. In the early twentieth century, one of those forebears, Edwin M. Borchard, became the first great international law scholar in the history of the Yale Law School, serving under then-Dean Charles Clark and alongside such legendary faculty figures as Thurman Arnold, Wesley Sturges, future judge Jerome Frank, and future U.S. Supreme Court Justice William O. Douglas.² During the School’s early days, two

[†] Dean and Gerard C. & Bernice Latrobe Smith Professor of International Law, Yale Law School. This essay is based on introductory remarks delivered at *The Yale Journal of International Law* Fifth Annual Young Scholars Conference (Mar. 10, 2007). Let me congratulate the editors of *The Yale Journal of International Law*, one of the first journals to encourage full-length student scholarship in international law, for combining its Young Scholars Conference for law students with an informal national roundtable of Junior International Law Scholars from various American law schools.

As Michael Reisman has recalled, in its wisdom, the Yale Law School actually rejected the original student proposal to form *The Yale Journal of International Law* in 1974. Happily, the determined *Journal* organizers insisted upon founding and publishing the journal anyway, working “[i]n secrecy, in the bowels of the international law library . . . at night . . . [in] an underground bunker,” using half of the graduate stipend of the first Editor-in-Chief to print the *Journal* from 1974-1978. See W. Michael Reisman, *The Vision and Mission of The Yale Journal of International Law*, 25 YALE J. INT’L L. 263, 264 (2000). I am particularly grateful to my colleague Oona Hathaway for her insights, Kate Desormeau for excellent research assistance, and to the members of this year’s editorial board, especially Lauren Baer, Stephen Ruckman, Krissa Lanham, Elliott Mogul, and Phyllis Maloney, for their imagination and effort in bringing this Conference and Commentary to fruition.

1. Raphael’s famous Vatican painting, *The School of Athens*, for example, portrays not one, but two schools of thought: the ancient School of Athenian Philosophers, led by its two centrally depicted figures, Plato and Aristotle, and the Renaissance School of Painting to which Raphael belonged, along with Michelangelo, who painted the nearby Sistine Chapel and is also pictured in the painting.

2. A student of John Bassett Moore, from 1917, when he was first hired at Yale, until he passed away in 1951, Borchard wrote prolifically on international law, especially the law of neutrality and the diplomatic protection of citizens abroad. See, e.g., EDWIN BORCHARD, AMERICAN FOREIGN POLICY 1776-1946 (1946); Charles E. Clark, *Edwin Borchard*, 60 YALE L.J. 1071 (1951). Although hardly a member of the New Haven School, and frequently at odds with it, Borchard did evince considerable skepticism about the sweeping constitutional interpretation of executive power in foreign affairs given by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). See Justus D. Doenecke, *Edwin M. Borchard, John Bassett Moore, and Opposition to American Intervention in World War II*, 6 J. LIBERTARIAN STUD. 1 (1982).

“fellow travelers” of the School happened to work here in New Haven, even while often expressing sharp disagreement with it. Eugene V. Rostow, Yale Law School’s Dean from 1955 to 1965—and, later, Undersecretary of State—was in some ways a realist, although deeply committed to the rule of law in international affairs.³ And before coming to New Haven, Yale’s controversial President, Kingman Brewster, a product of the Harvard School of International Legal Process, co-authored with Milton Katz a pioneering casebook on international business transactions and relations, which became one of the founding texts of the modern Transnational Legal Process School.⁴

The founding fathers of the New Haven School themselves were, of course, two Yale professors: Myres McDougal, a lawyer, and Harold Lasswell, a political scientist. Along with a cohort of able collaborators, they elaborated the claims of policy science in an extraordinarily broad array of fields of public international law.⁵ Like most schools, the New Haven School did not include all international lawyers who lived in New Haven, nor did all of its members ever reside there. As one student of the School put it:

The New Haven school does not describe the world’s different community decision processes through a dichotomy of national and international law, in terms of the relative supremacy of one system of rules or other interrelations of rules. Instead, it describes them in terms of the interpenetration of multiple processes of authoritative decision of varying territorial compass. . . . [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.⁶

Today, McDougal and Lasswell’s insights continue to be developed through the work of a diverse array of senior scholars, who share the School’s process methodology, while adopting a variety of views regarding law’s social

3. See, e.g., EUGENE V. ROSTOW, *LAW, POWER AND THE PURSUIT OF PEACE* (1968).

4. See MILTON KATZ & KINGMAN BREWSTER, JR., *LAW OF INTERNATIONAL TRANSACTIONS AND RELATIONS* (1958), which has been succeeded in turn by HENRY J. STEINER & DETLEV F. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS* (1968), and now HENRY J. STEINER, DETLEV F. VAGTS & HAROLD HONGJU KOH, *TRANSNATIONAL LEGAL PROBLEMS* (4th ed. 1994). For histories of the evolution of Transnational Legal Process as a way of looking at international law, see generally Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996) [hereinafter Koh, *Transnational Legal Process*]; Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2617-27 (1997) (book review) [hereinafter Koh, *Why Do Nations Obey International Law?*]; OONA HATHAWAY & HAROLD HONGJU KOH, *FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS* 173-204 (2005) [hereinafter HATHAWAY & KOH]. Kingman Brewster’s own intellectual approach derived from his work with his future Harvard Law colleagues Milton Katz and Roger Fisher at the General Counsel’s Office at the Marshall Plan in Paris. As Brewster’s biographer notes, “The Marshall Plan demonstrated process-oriented thinking in action. Brewster, Fisher, and Katz were not planners. . . . Their work was process: how do you make this happen? How do you get this working?” GEOFFREY KABASERVICE, *THE GUARDIANS: KINGMAN BREWSTER, HIS CIRCLE, AND THE RISE OF THE LIBERAL ESTABLISHMENT* 115 (2004) (quotation marks omitted).

5. For representative works within this vast literature, see, for example, HAROLD D. LASSWELL & MYRES S. MCDOUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY* (1992) [hereinafter LASSWELL & MCDOUGAL, *JURISPRUDENCE FOR A FREE SOCIETY*]; MYRES S. MCDOUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980); MYRES S. MCDOUGAL & W. MICHAEL REISMAN, *INTERNATIONAL LAW ESSAYS* (1981). For jurisprudential histories of the New Haven School, see generally NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 191-203 (1995); Symposium, *McDougal’s Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC’Y INT’L L. PROC. 266 (1985) [hereinafter Symposium, *McDougal’s Jurisprudence*].

6. Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE J. WORLD PUB. ORD. 1, 30 (1974).

ends and policy values: their brilliant colleague and successor Michael Reisman;⁷ former Attorney General and Undersecretary of State Nicholas deB. Katzenbach;⁸ as well as scholars of such diverse political orientation as Richard Falk of Princeton University,⁹ President Rosalyn Higgins of the International Court of Justice (formerly Professor of International Law at the London School of Economics),¹⁰ John Norton Moore of the University of Virginia,¹¹ and Burns Weston of the University of Iowa.¹² Although he later broke from the New Haven School, Oscar Schachter, who would become famous at Columbia Law School, co-taught the course in World Public Order at Yale Law School with McDougal and Lasswell from 1955 to 1970.¹³

This essay asks three questions: First, what are the enduring themes of the New Haven School? Second, what are the emerging themes of the “new” New Haven School? And third, where should the “new” New Haven School turn its gaze in a twenty-first century era of law and globalization?

Guiding Themes of the New Haven School of International Law

What are the New Haven School’s enduring themes?

In answering this question, one must first remember that the New Haven School began life as a critical school. Yale Law School was the intellectual home of legal realism, and the New Haven School became, in effect, the school of international law for legal realists. As Richard Falk has noted, McDougal and Lasswell converted the core insight of legal realism, “its critical focus on the interplay between rules and social process in the enunciation of law in authoritative form . . . into a comprehensive framework of inquiry.”¹⁴ The New Haven School expressly intended to criticize both legal formalism and legal positivism in international law. In their stead, the School sought to develop “a functional critique of international law in terms

7. See, e.g., W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS (1971); W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC’Y INT’L L. PROC. 101, 107, 113 (1981) [hereinafter Reisman, *International Lawmaking*]; W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT’L L. 575 (2007).

8. See MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 356 (1961) (citing McDougal’s work as the view that “most clearly approximates the view taken in this book, and which has most influenced the authors’ approach”).

9. See, e.g., RICHARD A. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 642-59 (1970) (supporting McDougal’s position on a fundamental level).

10. As President Higgins put it in her Hague Lectures, echoing the views of the New Haven School: “[I]nternational law is a process, a system of authoritative decision-making. It is not just the neutral application of rules The role of international law is to assist in the choice between . . . various alternatives [arguably prescribed by existing rules] International law is a process for resolving problems.” ROSALYN HIGGINS, PROBLEMS AND PROCESS 267 (1994).

11. See John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968).

12. See, e.g., BURNS H. WESTON ET AL., INTERNATIONAL LAW AND WORLD ORDER (1980); Burns H. Weston, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L. SCH. J. INT’L & COMP. L. 227 (1983).

13. See Symposium, *McDougal’s Jurisprudence*, *supra* note 5, at 267 (remarks of Oscar Schachter); Oscar Schachter, *Towards a Theory of International Obligation*, 8 VA. J. INT’L L. 300, 307-08 (1968).

14. Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991, 1997 (1995).

of social ends . . . that shall conceive of the legal order as a process and not as a condition.”¹⁵

At the same time, however, the New Haven School employed its legal realist methods to critique Cold War *political* realism.¹⁶ As Paul Schiff Berman has put it, “the New Haven School offered a kind of socio-legal realism to combat the power-based realism that dominated the early Cold War period.”¹⁷ In McDougal’s view, the school of political realism both “underestimates the role of rules, and of legal processes in general, and over-emphasizes the importance of naked power.”¹⁸ Unlike the political realists, the New Haven School was based upon an abiding belief that law and rules do matter, even in international affairs.

In time, the New Haven School became critical of both legal realism and political realism.¹⁹ Looking back, the New Haven School seems most notable for five basic intellectual commitments. The first is a commitment to *interdisciplinarity*. As Oona Hathaway and I have noted, for many years, “international law and international politics have been two disciplines divided by a common subject matter. International law rarely found its way into the curriculum of political science departments. Law school courses only occasionally touched upon international relations. Scholarship in the two disciplines proceeded on separate tracks.”²⁰ In building the New Haven School, a lawyer (McDougal) and a political scientist (Lasswell) chose expressly and comprehensively to study international law by combining the insights of their two disciplines.

The School’s second commitment is to the study of *process*. The New Haven School consistently argued that international law is not just a body of rules, but a process of authoritative decisionmaking. Within that decisionmaking process, McDougal and Lasswell wrote, “our chief interest is in the legal process, by which we mean the making of authoritative and

15. Roscoe Pound, *Philosophical Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 73, 89 (1932), *quoted in* Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception* 137, 137 (1953).

16. *See generally* HATHAWAY & KOH, *supra* note 4 (reviewing tenets of political realism).

17. Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT’L L. 301, 305 (2007).

18. Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 157 (1953).

19. *See* W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935, 936-37 (1999) [hereinafter Reisman, *Theory About Law*] (“Returning to New Haven after the war, McDougal understood that the Realists were making six major mistakes. First, in their search for predicting how decisions would be made, they were still locked in the essential passivity of Positivism . . . Second, in their focus on courts or on the application of law, Realists were ignoring all the components of decisions—pre-law making, law-making, law-terminating, law appraisal—that preceded and followed courts and other institutions of application . . . Third, in their focus on law, Realists were overlooking what political and legal struggles were about: life opportunities or ‘values.’ . . . Fourth, in their focus on legal institutions, Realists were giving insufficient attention to the continuing impact of the rich dynamism of context and, in particular, to the role of power on decisions . . . Fifth, in their focus on legal institutions, Realists did not grasp that the maintenance or adjustment of the institutions themselves was part of every decision and that the ‘institutions and structures,’ as political scientists called them, were products of an ongoing constitutive process. Sixth, in their focus on the United States, Realists were ignoring the inevitable global dimension of influence and the impact of apparently local decisions.”).

20. HATHAWAY & KOH, *supra* note 4, at iii.

controlling decisions.”²¹ In 1981, Michael Reisman argued that the New Haven School viewed international law as a “process of communication,” which sees the legal process as comprising three communicative streams, “policy content, authority signal and control intention.”²² This communications model, he argued, “liberates the inquirer from the . . . distorting model of positivism, which holds that law is made by the legislature,” in favor of the notion that “any communication between elites and politically relevant groups which shapes wide expectations about appropriate future behavior must be considered as functional lawmaking.”²³

Third, the New Haven School committed itself to *normative values*. By treating international law as more than just a body of rules, the New Haven School committed itself not simply to a study of bare process, but more fundamentally, to an examination of a process of authoritative decision-making dedicated to promoting a set of normative values. As Michael Reisman notes, the New Haven School insisted “that the end of law and the criterion for appraisal of particular decisions was their degree of contribution to the achievement of a public order of human dignity.”²⁴ Accordingly, the School focused not just on process, but also on values: “[t]he division of things people want or ‘desired events’ into eight, empirically referential value categories.”²⁵

This led to the School’s fourth commitment: *connecting law and policy*. The School became known as a school of policy-oriented jurisprudence, because of its conviction that international law rules are intended to reflect the needs of international policy arguments and vice versa.²⁶ But it was precisely because of its effort to forge connections between law and policy arguments—sometimes in seeming tension with its own commitment to normative values—that the New Haven School lost key adherents during the Vietnam era. Columbia’s Oscar Schachter and Princeton’s Richard Falk, among others, broke away from the New Haven School during that period because of their concerns about “the tendency on the part of McDougal and others in the policy-oriented school to apply their theory in a highly selective manner to override the constraints of law in favor of the ‘higher ends’ sought by present U.S. policy.”²⁷

21. Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT’L L. 1, 9 (1959); see also *id.* (“Authority is the structure of expectation concerning who, with what qualifications and mode of selection, is competent to make which decisions by what criteria and what procedures. By control we refer to an effective voice in decision, whether authorized or not.”).

22. Reisman, *International Lawmaking*, *supra* note 7, at 113.

23. *Id.* at 107.

24. Reisman, *Theory About Law*, *supra* note 19, at 939. Those values are well-being, affection, respect, power, wealth, enlightenment, skill and rectitude.

25. *Id.* at 938. See 2 LASSWELL & MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY*, *supra* note 5, at 738-39.

26. See, e.g., Myres S. McDougal & W. Michael Reisman, *International Law in Policy-Oriented Perspective*, in *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY* (Ronald St. J. MacDonald & Douglas Johnston eds., 1983).

27. Symposium, *McDougal’s Jurisprudence*, *supra* note 5, at 272-73 (remarks of Oscar Schachter). As Schachter wrote, “If applied with a nationalist bias, [the New Haven approach] becomes an ideological instrument to override specific restraints of law[,] . . . a unilateralist vision of policy jurisprudence in which law plays a secondary role and policy is determined by the perception of self-

Fifth and finally, the New Haven School was among the first to recognize the emerging importance of *transnational law*. In the inaugural edition of the journal that became *The Yale Journal of International Law*, the editor-in-chief wrote, “The New Haven School does not [view legal processes] through a dichotomy of national and international law . . . [but rather] it describes them in terms of the interpenetration of multiple processes of authoritative decision of varying territorial compass.”²⁸ By so saying, he echoed the observation of Phillip Jessup in his 1956 Storrs Lectures at Yale Law School, which defined “transnational law” as “all law which regulates actions or events that transcend national frontiers” and including “[b]oth public and private international law . . . [plus] other rules which do not wholly fit into such standard categories.”²⁹ Over time, the extant doctrines of transnational law came to be summarized in the American Law Institute’s Restatement (Third) of Foreign Relations Law.³⁰

Obviously, schools of thought are products of different political times and different academic times. We now live in a different political era than when the New Haven School was founded: in a “post-post-Cold War” world, after the fall not just of the Berlin Wall, but also of the Twin Towers. We live in an emerging age of globalization: not a world of two blocs led by competing national superpowers locked in a debate over ideology and security, but an increasingly “flat” world populated by myriad transnational actors—intergovernmental organizations, nongovernmental organizations, and individuals armed with laptop computers or weapons of mass destruction.³¹ On the one hand, these non-state actors are capable of serving as transnational decision makers; on the other hand, they loom as potential transnational threats, now able to trigger massive computer failure, environmental injury, transnational disease, trafficking in human beings, and global terrorism.

Schools are also quintessentially products of their *academic* times. We live in a different academic era, where law is pervaded by interdisciplinary studies. In this era, the legal academy regularly combines theory with practice and the pursuit of scholarship with clinical activities. Our legal curriculum increasingly blends public and private law and focuses on transnational law and law and globalization.³² And we live in an age in which the legal academy does not see itself as just a ratifier of the status quo. In the same way as many in the legal academy devoted themselves during the era of *Brown v. Board of Education*³³ to the pursuit of civil rights, many scholars in this era conduct themselves according to normative commitments to upholding human rights,

interest of a particular state.” *Id.* at 273 (remarks of Oscar Schachter). Similarly, Princeton’s Richard Falk came to criticize harshly “the ‘miraculous element’ in the McDougal jurisprudence—that uncanny capacity he has to apply the eight [normative] values in a manner that consistently accords with U.S. foreign policy.” *Id.* at 281 (remarks of Richard A. Falk).

28. Suzuki, *supra* note 6, at 30.

29. PHILIP C. JESSUP, *TRANSNATIONAL LAW* 2 (1956).

30. See, e.g., *RESTATEMENT (THIRD) OF THE FOREIGN REL. L. OF THE U.S.* (1987).

31. See generally THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (2005).

32. See generally Harold Hongju Koh, *Why Transnational Law Matters*, 24 PENN ST. INT’L L. REV. 745 (2006) [hereinafter Koh, *Why Transnational Law Matters*].

33. 347 U.S. 483 (1954).

the rule of law, and what I called in these pages a few years ago “the globalization of freedom.”³⁴

Given these changed circumstances, the question becomes: How should the New Haven School’s core insights about interdisciplinarity, process, normative values, law and policy, and transnationalism be adapted for the age of globalization?

Guiding Themes of the “New” New Haven School of International Law

In an era of globalization, what can and should be the emerging themes of a “new” New Haven School?

Not surprisingly, I would suggest that the “new” New Haven School continue the five core commitments of the original New Haven School, but adapt them to the modern era: commitments to theory and interdisciplinarity, transnationalism, process, normativity, and connecting law and policy through practice and public service. Let me say a word about each.

The first commitment of the “new” New Haven School should be to continue investigation of theory and interdisciplinary work in international law. International law cannot and should not be studied in academic isolation. Interdisciplinarity stresses “international law *and*”—the obvious notion that how international law matters cannot, and should not, be studied purely through the lens of law itself. That suggests that scholars gain greater insights into international law by applying the insights of other scholarly fields. It is with this basic insight that members and fellow travelers of the “new” New Haven School have recently examined international law through the lens of international relations and political science,³⁵ anthropology,³⁶ sociology,³⁷ culture,³⁸ economics and rational choice,³⁹ political philosophy,⁴⁰ geography,⁴¹ empirical legal studies,⁴² and history.⁴³ In each of these fields,

34. Harold Hongju Koh, *The Globalization of Freedom*, 26 YALE J. INT’L L. 305 (2001).

35. HATHAWAY & KOH, *supra* note 4.

36. See, e.g., Berman, *supra* note 17 (2007); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the “Rule of Law,”* 101 MICH. L. REV. 2275 (2003).

37. See, e.g., Ryan Goodman & Derek Jinks, *How To Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621 (2004); Ryan Goodman & Derek Jinks, *Toward an Institutional Theory of Sovereignty*, 55 STAN. L. REV. 1749, 1750 (2003) (proposing “a sociological model of sovereignty” stemming from their “systematic reexamination” of the “questionable empirical assumptions about the nature of the state and its relation to the international order”).

38. See, e.g., PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* (2000); Eric W. Sievers, *The Caspian, Regional Seas, and the Case for a Cultural Study of Law*, 13 GEO. INT’L ENVTL. L. REV. 361 (2001).

39. See, e.g., Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

40. See, e.g., Michael Doyle, Tanner Lectures at the Princeton University Center for Human Values: Anticipatory Self Defense (Nov. 9, 2006) (forthcoming Princeton University Press 2007).

41. See, e.g., Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT’L L. 421 (2007).

42. See, e.g., Oona Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935 (2002); Oona Hathaway, *The International Law of Torture*, in *TORTURE: PHILOSOPHICAL, POLITICAL AND LEGAL PERSPECTIVES* (Sanford Levinson ed., 2004).

43. See, e.g., JOHN FABIAN WITT, *PATRIOTS AND COSMOPOLITANS: HIDDEN HISTORIES OF AMERICAN LAW* (2007); Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239 (2003).

interdisciplinary insights are being used to make the legal lens see farther and deeper.

The second commitment, as I have elaborated elsewhere, is a commitment to studying transnational law.⁴⁴ Instead of studying international law in isolation from domestic law, members of the “new” New Haven School should focus on transnational law, which I would divide into the studies of “transnational legal substance” and “transnational legal process.”

By transnational legal substance, I mean a hybrid body of law that transcends old dichotomies between international and domestic law and between public and private law. Consider, for example, the metric system or the Internet business concept of “dot.com.” Are these domestic or international concepts? Of course, the intuitive answer is neither. Both are hybrids, purely transnational ideas. And just as every nation recognizes these common global concepts, around the world, public law concepts are emerging, rooted in shared national norms and emerging international norms that have similar or identical meaning in every national system. These norms include, for example, “cruel, inhuman or degrading treatment” in human rights law; the concept of “civil society” in democracy law; the notion of “internally displaced” in refugee/immigration law; and the idea of “trans-border trafficking” in international criminal law.

Those of us who first studied law in the twentieth century labored within a strict two-by-two matrix that divided all law into domestic and international, public and private. What we all know now is that this matrix is a construct; these previously accepted dichotomies no longer fit modern legal realities. Today, the concept of transnational law embraces a range of law school courses thought to be neither purely domestic nor international, neither purely public nor private. Transnational law now embraces a range of legal subjects that are subject of regular teaching and writing by members of the “new” New Haven School: human rights,⁴⁵ humanitarian law,⁴⁶ immigration and refugee law,⁴⁷ foreign relations and national security law,⁴⁸ international criminal law,⁴⁹ international business and commercial law,⁵⁰ international

44. Koh, *Why Transnational Law Matters*, *supra* note 32.

45. See, e.g., Jenny S. Martinez, *Anti-Slavery Courts and the Dawn of International Human Rights Law*, 117 YALE L.J. (forthcoming 2007).

46. See, e.g., Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT'L L. 1 (2003).

47. See, e.g., Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U. PA. J. LAB. & EMP. L. 529 (2002).

48. See, e.g., Rosa Ehrenreich Brooks, *The Politics of the Geneva Conventions: Avoiding Formalist Traps*, 46 VA. J. INT'L L. 197 (2005); Rosa Ehrenreich Brooks, *War Everywhere: Rights, National Security Law, and the Law of Armed Conflict in the Age of Terror*, 153 U. PA. L. REV. 675 (2004); Sarah H. Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006); William S. Dodge, *Customary International Law and the Question of Legitimacy*, 120 HARV. L. REV. F. 19 (2007); Harold Hongju Koh, *Setting the World Right*, 115 YALE L.J. 2350 (2006).

49. See, e.g., BETH VAN SCHAACK & RONALD C. SLYE, *INTERNATIONAL CRIMINAL LAW AND ITS ENFORCEMENT* (2007); BRINGING THE KHMER ROUGE TO JUSTICE: PROSECUTING MASS VIOLENCE BEFORE THE CAMBODIAN COURTS (Jaya Ramji & Beth Van Schaack eds., 2005); Alison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75 (2005).

50. See, e.g., Janet Koven Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125 (2005) [hereinafter Levit, *A Bottom-Up Approach to International Lawmaking*]; Janet Koven Levit, *The Dynamics of International Trade Finance Regulation: The Arrangement on Officially Supported Export Credits*, 45 HARV. INT'L L.J. 65

environmental law,⁵¹ and conflict of laws.⁵² In each of these legal areas, global standards have become fully recognized, integrated, and internalized into domestic legal systems.

Perhaps the best operational definition of transnational law can be expressed using computer-age terminology. One may think of transnational law as law that has been “downloaded” from international to domestic law, for example, an international law concept that is domesticated or internalized into municipal law, such as the international human rights norm against disappearance, now recognized as domestic law in most municipal systems. Second, some rules of transnational law have been “uploaded, then downloaded,” for example, a rule that originates in a domestic legal system, such as the guarantee of a free trial under the concept of due process, which then becomes part of international law, as in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and from there becomes internalized into nearly every legal system in the world. Third, some rules of transnational law have been borrowed or “horizontally transplanted” from one national system to another, for example, the “unclean hands” doctrine, which migrated from the British law of equity to many other legal systems.

The “new” New Haven School makes a third commitment: to the study of “Transnational Legal Process,” the transsubstantive process whereby states and other transnational private actors use the blend of domestic and international legal process to internalize international legal norms into domestic law.⁵³ As I have argued elsewhere, key agents in promoting this process of internalization include transnational norm entrepreneurs, governmental norm sponsors, transnational issue networks, and interpretive communities.⁵⁴ In this story, one of these agents triggers an interaction at the international level, works together with other agents of internalization to force an interpretation of the international legal norm in an interpretive forum, and then continues to work with those agents to persuade a resisting nation-state to internalize that interpretation into domestic law. Through repeated cycles of

(2004); Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 YALE J. INT’L L. 211 (2005).

51. See, e.g., Rebecca M. Bratspies, *Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development*, 32 YALE J. INT’L L. 363 (2007); David M. Driesen, *Distributing the Costs of Environmental, Health, and Safety Protection: The Feasibility Principle, Cost-Benefit Analysis, and Regulatory Reform*, 32 B.C. ENVTL. AFF. L. REV. 1 (2005); Hari M. Osofsky, *The Geography of Climate Change Litigation: Implications for Transnational Regulatory Governance*, 83 WASH. U. L.Q. 1789 (2005).

52. See, e.g., Kermit W. Roosevelt III, *Guantanamo and the Conflict of Laws: Rasul and Beyond*, 153 U. PA. L. REV. 2017 (2005).

53. See generally Koh, *Transnational Legal Process*, *supra* note 4, at 75; Koh, *Why Do Nations Obey International Law?*, *supra* note 4, at 2599; HATHAWAY & KOH, *supra* note 4, at 173-204 (2005).

54. Transnational legal process highlights the interactions among both private citizens, whom I call “transnational norm entrepreneurs,” and governmental officials, whom I call “governmental norm sponsors.” The interactions among transnational norm entrepreneurs and governmental norm sponsors create transnational networks and law-declaring fora, which create new rules of international law that are construed by interpretive communities. Through the work of these “agents of internalization,” these international law rules trickle down from the international level and become domesticated into national law. See generally Harold Hongju Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623 (1998) [hereinafter Koh, *Bringing International Law Home*].

“interaction-interpretation-internalization,” particular readings of applicable global norms are eventually domesticated into states’ internal legal systems.

To illustrate, consider the ancient field of mercantile law (“*lex mercatoria*”). Originally developed as a form of business regulation among merchants in the Mediterranean, English merchants brought the customs, principles, and rules of *lex mercatoria* to England where they became incorporated into the English common law.⁵⁵ From there, this body of law migrated to the New World to become part of American common law.⁵⁶ Through the enactment of the Uniform Commercial Code, which sought to codify existing mercantile custom, in forty-nine states and the District of Columbia, *lex mercatoria* entered state statutory law. It then became treaty law as part of the United Nations Convention on Contracts for the International Sale of Goods, which entered into force for the United States on January 1, 1988.⁵⁷ Thus, the transnational legal process story of *lex mercatoria* shows that it was domesticated through an historical process whereby it began as transnational custom, mutated into domestic common law, was transplanted to another national system, was codified into domestic statutory law, and finally was uploaded into international treaty law, which also happens to be federal law in the United States.

Transnational legal process matters because it increasingly influences laws and policies that govern us, particularly through processes by which international law and policies become domesticated into U.S. law and policies. Take, for example, the recent, intense public debate over the domestication of the international norm against torture. The Bush Administration has battled over whether or not the norm against torture has in fact been internalized into executive practice, but President Bush has recently conceded that, as a matter of executive branch policy, the President cannot in fact order torture.⁵⁸ On the legislative side, the McCain Amendment to the most recent Department of Defense Authorization Act explicitly internalized the norm against torture.⁵⁹ Moreover, since 1980, the federal courts of the

55. See Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 HARV. INT’L L.J. 221, 224-29 (1978).

56. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842) (clarifying that the bill of exchange rules derived from *lex mercatoria* constituted part of the “common law” to be interpreted by federal courts sitting in diversity jurisdiction).

57. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 52 Fed. Reg. 6262, 6264, 1489 U.N.T.S. 3 [hereinafter CISG]. By operation of the Supremacy Clause, the CISG overrides the UCC with respect to contracts for the sale of goods between parties whose places of business are in different contracting states.

58. In January 2006, President Bush stated unambiguously: “I don’t think a president can . . . order torture, for example. . . . Yes, there are clear red lines” Interview by Bob Schieffer, CBS News, with President George W. Bush, in Washington, D.C. (Jan. 27, 2006), *transcript available at* http://www.cbsnews.com/stories/2006/01/27/eveningnews/main1248952_page3.shtml. For a review of the effort to internalize the norm against torture into U.S. law, see Harold Hongju Koh, *Can the President Be Torturer in Chief?*, 81 IND. L.J. 1145 (2005) [hereinafter Koh, *Can the President Be Torturer in Chief?*].

59. National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-148, Div. A, tit. X, § 1003, 119 Stat. 2680, 2739-40 (2005) (“No individual in the custody or under the physical control of the United States Government, regardless of nationality or physical location, shall be subject to cruel, inhuman, or degrading treatment or punishment.”). The previous Defense Authorization Act stated that “[i]t is the policy of the United States to—(1) ensure that no detainee shall be subject to torture or cruel, inhuman, or degrading treatment or punishment that is prohibited by the Constitution,

United States have held that torture constitutes a tort in violation of the law of nations.⁶⁰ Notwithstanding these varied efforts, at this writing, significant controversy still rages over whether and to what extent the United States government has genuinely foresworn the use of torture as an interrogation device in the war on terror.

A number of papers in this Conference illustrate five different facets of the “new” New Haven School’s continuing commitment to transnational legal process. First is the idea of *legal pluralism*, the notion that multiple communities for law development, interpretation and enforcement can make transnational law matter even in the absence of a single global “Leviathan.”⁶¹ A second is the recognition that international norms often infiltrate domestic law through *trickle-down lawmaking* implemented through processes of norm-internalization.⁶² A third, converse recognition is that sometimes lawmaking occurs through *bottom-up private/public processes*.⁶³ Fourth, some “new” New Haven School authors have focused on the growing reality that, as international activities are increasingly carried on by nonstate actors, there is an increasing need to attach *public law duties to ostensibly private actors*.⁶⁴ Fifth and finally, the “new” New Haven School’s commitment to process acknowledges the importance in transnational lawmaking of “*dialectical legal interactions*,”⁶⁵ especially those transnational interactions that transpire through the evolution of the institution of *transnational judicial dialogue*.⁶⁶

The fourth commitment of the “new” New Haven School is a renewed commitment to *normativity*: the recognition that positive theory should not be studied in isolation from normative ends.⁶⁷ Like the original New Haven School, the goals of the “new” New Haven school are not just analytic, but transformative. Scholars of the “new” New Haven School do not only care about how nations behave. They care more fundamentally about why nations do or do not obey legal rules. Understanding the complex interplay between law and policy requires not just asserting that international law matters, but understanding precisely *how* international law matters, in three key senses. First, how does transnational law function in a *dynamic* way to constrain state behavior over time, as it has done in the U.S. torture debate? A second, *normative* sense measures how law and legal process help to create norms and

laws, or treaties of the United States.” Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(b)(1), 118 Stat. 1811, 2069 (2004).

60. See, e.g., *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

61. Berman, *supra* note 17, at 302 (connecting the notion of interpretive communities in transnational legal process writings to the pioneering work of Yale’s Robert Cover).

62. Sarah H. Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT’L L. 1 (2001); see also Koh, *Bringing International Law Home*, *supra* note 54.

63. Levit, *A Bottom-Up Approach to International Lawmaking*, *supra* note 50; Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 393 (2007).

64. Danner & Martinez, *supra* note 49; Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE J. INT’L L. 383 (2006).

65. Berman, *supra* note 17, at 315 (emphasis added); see also Robert B. Ahdieh, *Between Dialogue and Decree: International Review of National Courts*, 79 N.Y.U. L. REV. 2029 (2004).

66. 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).

67. See *id.*

construct interests.⁶⁸ Transnational Legal Process scholars see international norms as filtering through legal process mechanisms to play a critical role in reformulating national interests and reconstituting national interests and identities. Thus, as Melissa Waters puts it, the third goal of transnational legal process is *constitutive*: “not simply to change behavior, but to change minds.”⁶⁹

The idea of normativity connects the Transnational Legal Process School to the “Constructivist” School of international relations. Unlike interest theorists, who tend to treat state interests as given, “constructivists” have long argued that states and their interests are socially constructed by “commonly held philosophic principles, identities, norms of behavior, or shared terms of discourse.”⁷⁰ Rather than arguing that state actors and interests create rules and norms, constructivists argue that “rules and norms constitute the international game by determining who the actors are, what rules they must follow if they wish to ensure that particular consequences follow from specific acts, and how titles to possessions can be established and transferred.”⁷¹

From this debate about how to link the issue of compliance to legal process comes the fifth and final commitment of the “new” New Haven School: connecting law to policy through an academic dedication to public service and legal practice. If theory should not be studied in isolation from practice, neither should practice be pursued purely for private ends, isolated from the public good. In this regard, the global war on terror has played much the same galvanizing role for the “new” New Haven School of International Law as the U.S. civil rights movement played for the old New Haven School of domestic public law, which was populated by such scholar-activists as Charles Black,⁷² Louis Pollak,⁷³ Thomas Emerson,⁷⁴ and Boris Bittker.⁷⁵ In arguing for the continuing relevance of transnational law even in a time of terror, members of the “new” New Haven School have sought to connect law

68. Abram Chayes, a father of the International Legal Process School, put it this way: “If we seek to strengthen the role of law in the relations among states, it follows that we should devote our energies to disclosing and articulating the common values and interests among them, of which the law is an expression.” Abram Chayes, *A Common Lawyer Looks at International Law*, 78 HARV. L. REV. 1396, 1413 (1965).

69. Waters, *supra* note 66, at 460.

70. MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 15 (1996). *See also* HATHAWAY & KOH, *supra* note 4, at 112-32 (describing constructivist school). Leading constructivists include Friedrich Kratochwil, John Ruggie, Nicholas Onuf, Hayward Alker, Richard Ashley, Ernst B. Haas, and Alexander Wendt. For samples of this work, see, for example, ALEXANDER WENDT, *SOCIAL THEORY OF INTERNATIONAL POLITICS* (1999); Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384 (1994); and Alexander Wendt, *Constructing International Politics*, 20 INT’L SECURITY, Summer 1995, at 71 (1995). For a systematic treatment of norms from a constructivist perspective, see *THE CULTURE OF NATIONAL SECURITY: NORMS AND IDENTITY IN WORLD POLITICS* (Peter J. Katzenstein ed., 1996).

71. NGAIRE WOODS, *The Uses of Theory in the Study of International Relations*, in *EXPLAINING INTERNATIONAL RELATIONS SINCE 1945*, at 9, 26 (1996).

72. Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

73. Louis H. Pollak, *Charles L. Black, Jr. and Civil Rights*, 111 YALE L.J. 1905 (2002).

74. THOMAS I. EMERSON & DAVID HABER, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* (1952).

75. BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

and policy not just through scholarly work, but also through public commentary in newspapers and in weblogs (“blogs”),⁷⁶ as well as through activist work by human rights clinicians, and law professors engaged in transnational public law litigation.⁷⁷

A transnational legal process perspective confirms both the continuing value and imperative of clinical work in international law.⁷⁸ As I suggested more than a decade ago, nongovernmental actors’ actions

influence the process and their inaction ratifies its outcomes. It is sometimes said that someone who, by acquiring medical training, comes to understand the human body acquires as well a moral duty not just to observe disease, but to try to cure it. In the same way, I would argue, a lawyer who acquires knowledge of the body politic acquires a duty not simply to observe transnational legal process, but to try to influence it.⁷⁹

The Challenges Facing the “New” New Haven School

In closing, let me say that the “new” New Haven School faces a twofold challenge. The first is to return into an affirmative vision of the role of international lawyers in the age of terrorism. My major objection to competing schools of international law—whether characterized by rational choice methodology⁸⁰ or a commitment to a “new sovereigntism,”⁸¹ is that they are so depressing. Their vision promotes a role of international lawyers as “yes men” or scribes, rather than as professionals seeking to hold their countries to their own highest standards.⁸² We need to return to a vision of international

76. Law professors who have commented regularly on the War on Terror in the popular and legal press include Georgetown’s David Cole (writing in the *New York Review of Books* and elsewhere) and Rosa Ehrenreich Brooks (writing regularly in the *Los Angeles Times*), and such professor-commentators as Jack Balkin, Marty Lederman, Sanford Levinson, and David Luban, on blogs such as Balkinization, <http://balkin.blogspot.com> (last visited Apr. 27, 2007).

77. See, e.g., Neal Kumar Katyal, *Comment: Hamdan v. Rumsfeld: The Legal Academy Goes to Practice*, 120 HARV. L. REV. 65 (2006). Clinical impact litigation in human rights has been a hallmark of the clinical arm of the “new” New Haven School, Yale’s Allard K. Lowenstein International Human Rights Clinic and National Litigation Project, which have spawned human rights clinics elsewhere and trained numerous human rights clinicians and public interest lawyers, many of whom have been actively involved in litigation surrounding civil liberties after September 11. See generally BRANDT GOLDSTEIN, *STORMING THE COURT: HOW A BAND OF YALE LAW STUDENTS SUED THE PRESIDENT—AND WON* (2005); Deena R. Hurwitz, *Lawyering for Justice and the Inevitability of International Human Rights Clinics*, 28 YALE J. INT’L L. 505 (2003).

78. Koh, *Transnational Legal Process*, *supra* note 4, at 206-07.

79. *Id.* at 207.

80. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005). But see Oona A. Hathaway & Ariel N. Lavinbuk, *Rationalism and Revisionism in International Law*, 119 HARV. L. REV. 1404 (2006) (book review).

81. As Hathaway and Lavinbuk put it, the “New Sovereigntists” “see international law . . . as threatening to push the balance of lawmaking authority toward those they believe are least deserving of it and are least able to handle it—to international bodies and federal courts—at the expense of the states, Congress, and the President.” *Id.* at 1414. For examples, see JOHN YOO, *THE POWERS OF WAR AND PEACE: THE CONSTITUTION AND FOREIGN AFFAIRS AFTER 9/11* (2005); Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557 (2003); Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004); Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 GEO. WASH. L. REV. 139 (2001).

82. Cf. Harold Hongju Koh, *An Uncommon Lawyer*, 42 HARV. INT’L L.J. 7, 8 (2001) [hereinafter Koh, *An Uncommon Lawyer*] (quoting Abram Chayes) (there is “nothing wrong” with an American lawyer “hold[ing] the United States to its own best standards and best principles”). For a particularly egregious example of lawyering that twisted the law to serve the client’s interests, see the Justice Department’s infamous, withdrawn 2002 Torture Memorandum, discussed in detail in Koh, *Can*

lawyers as architects and public servants, what Ben Heineman, Jr. recently called “lawyers as leaders.”⁸³

Some years ago, I argued:

[I]f international relations are to be about more than power politics, . . . international lawyers must be moral actors. Our job is not simply to do as we are told. We must fuse our training and skill with moral courage, and guide the evolution of legal process with the application of fundamental values. By having the courage to argue with our clients, to invoke illegality, to bring lawsuits, to negotiate treaties, international lawyers guide difficult policy choices into lawful channels, and thereby stand up for the rule of law.⁸⁴

Viewed in this light, the ultimate goal of the “new” New Haven School should be to revive our vision of international law not as an obstacle to, or as a straitjacket upon, state interests, nor as a “quaint” or antiquated threat to national security. Instead, we should return to the post-World War II image of international law as a creative medium devoted to building a humane world public order. In an age of globalization, this means using transnational law to help organize the activities and relations of myriad transnational players, not simply nation-states, with the goal not of reflecting parochial state interests, but of advancing an enlightened global system dedicated to the promotion of human dignity. That was the basic endeavor of the original New Haven School and it should remain the enterprise of the “new” New Haven School as well.

In an age of law and globalization, this leads to two challenges: an analytic challenge and a policy challenge. Our analytic challenge is to understand three relationships between law and globalization. We need to understand the law *of* globalization—globalization as a mixed international-domestic law subject. While sometimes derided as the proverbial “Law of the Horse,” is there in fact a distinctive, emerging law of globalization, of which topics like human rights and international business transaction are a part?⁸⁵ Second, we need to study law *as* globalization—how the global spread of the rule of law mirrors the globalization of other social and economic phenomena, such as culture and commerce. Third and most important, we need to analyze the role of law *in* globalization—the role that law plays in promoting the process of humane globalization. None of us want the process of globalization to “just happen.” We want that process to unfold in a way in which law can play a creative and positive role in building security, reducing disease,

the President Be Torturer in Chief?, *supra* note 58. At the same time, as a government lawyer, at least one of the New Sovereignist scholars, Jack Goldsmith, reportedly showed admirable backbone in resisting government excesses during the war on terror. See Daniel Klaidman, Stuart Taylor, Jr. & Evan Thomas, *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, available at <http://www.msnbc.msn.com/id/11079547/site/newsweek>.

83. Ben W. Heineman, Jr., *Lawyers as Leaders*, 116 YALE L.J. POCKET PART 266 (2007), <http://thepocketpart.org/2007/2/16/heineman.html>.

84. Koh, *An Uncommon Lawyer*, *supra* note 82, at 9.

85. When I first came to Yale Law School more than two decades ago to teach International Business Transactions, then-Dean Harry Wellington suggested that international business law is like that famous non-book, *The Law of the Horse*, which consists of Chapter I: “Contracting for a Horse”; Chapter II: “Owning a Horse”; Chapter III: “Torts by a Horse”; and Chapter IV: “Litigating over a Horse.” Cf. Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207 (leveling a similar charge against the course in “cyberlaw”).

poverty, and pollution, and promoting human rights, global governance, and self-governance.

And so we face a policy challenge: balancing three globalizations. The age of terror will tell a tale of three globalizations: the globalization of governance, the globalization of freedom, and the globalization of terror. Our challenge will be how to balance among them: how to use the globalization of governance and freedom—particularly global cooperation among global democracies—to combat the globalization of terror and other threats—whether poverty, climate change, disease, or the myriad other transborder ills—for which we are so desperately trying to find solutions.

So will the “new” New Haven School of International Law rise to these twin challenges that face us in the brave new world of law and globalization? At the end of day, whether the “new” New Haven School thrives and survives will depend on how well its members can answer that question.