

2013

Reflections on the New Haven School

Molly Land

University of Connecticut School of Law

Follow this and additional works at: https://opencommons.uconn.edu/law_papers

Recommended Citation

Land, Molly, "Reflections on the New Haven School" (2013). *Faculty Articles and Papers*. 272.
https://opencommons.uconn.edu/law_papers/272

HEINONLINE

Citation: 58 N.Y. L. Sch. L. Rev. 919 2013-2014



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Mon Aug 15 17:05:48 2016

-- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>

-- The search text of this PDF is generated from uncorrected OCR text.

-- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0145-448X](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0145-448X)

MOLLY LAND

Reflections on the New Haven School

58 N.Y.L. SCH. L. REV. 919 (2013–2014)

ABOUT THE AUTHOR: Professor of Law at the University of Connecticut School of Law and formerly an Associate Professor of Law at New York Law School. This essay is an edited version of Professor Land's concluding remarks at a symposium held at New York Law School on April 12, 2013 and sponsored by the *New York Law School Law Review*, the New York Law School Institute for Global Law, Justice, and Policy, and the American Society of International Law. See Symposium, *Solving Global Problems: Perspectives from International Law and Policy*, 58 N.Y.L. SCH. L. REV. 768 (2013–2014). Video recordings of the symposium are available at <http://www.nylslawreview.com/solving-global-problems/>.

REFLECTIONS ON THE NEW HAVEN SCHOOL

I. INTRODUCTION

New York Law School's symposium, *Solving Global Problems: Perspectives from International Law and Policy*, provided an important opportunity to consider the insights that the New Haven School of jurisprudence might yield with respect to some of the most important problems international law faces today. The purpose of the symposium—to consider possible solutions to pressing global problems—was ambitious, but this ambition both reflects and exemplifies the New Haven School.

The New Haven School is a methodological approach that views law as a process of authoritative and controlling decisionmaking designed to promote human dignity and world order.¹ Professor W. Michael Reisman's keynote address provided an overview of the foundational premises of the New Haven School.² In this essay, I would like to add some thoughts about what the New Haven School has meant to me as an international human rights scholar and advocate. I would also like to highlight principles of the New Haven School approach as reflected in the discussions that took place at the symposium.

II. THE NEW HAVEN SCHOOL

There are several aspects of the New Haven School of international law that have always struck me as particularly important. First, the policy-oriented approach of the New Haven School is a constant reminder of the purpose of international law. Too often, lawyers view law as something that exists in and of itself, for its own sake. The New Haven School, in contrast, reminds us that law is a tool, and not just any tool, but a tool designed to promote human dignity and world public order.³ The approach of the New Haven School demands that we ask not only what international law is and how to make it work more effectively, but also what values and goals the law does and should vindicate. In other words, the New Haven School “start[s] from the premise that law should serve human beings,”⁴ and not the other way around. Law is not law for law's sake, but rather law for the sake of all of us.

Second, the fact that the New Haven School understands “policy” as part and parcel of “law” provides it with powerful explanatory and predictive force. By “policy” I mean consideration of the outcomes that would result given particular choices in the process of making and applying law. Clearly, the idea that there are choices to be made in this process and that decisionmakers should consider the consequences of their choices is not a new idea, nor is it one unique to the New Haven School. Nonetheless, in both practice and legal education, we continually tend to misconceive

1. See, e.g., W. Michael Reisman et al., *The New Haven School: A Brief Introduction*, 32 *YALE J. INT'L L.* 575, 576 (2007).

2. W. Michael Reisman, Professor of Law, Yale Law Sch., Keynote Address at the New York Law School Law Review Symposium: *Solving Global Problems: Perspectives from International Law and Policy* (Apr. 12, 2013), available at <http://youtu.be/z1eFgbDm2ig?t=1m2s>.

3. See Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, in MYRES S. MCDUGAL & ASSOCS., *STUDIES IN WORLD PUBLIC ORDER* 3, 16 (1960).

4. Reisman et al., *supra* note 1, at 580.

the concept of “law.” We misconceive law when we understand it, and present it to our students, as a set of norms that inexorably lead to particular conclusions when properly applied. Arguments about what the outcome *should* be—what policy we should adopt—are often relegated to a secondary status. Policy becomes a tool to be used in limited contexts, such as when faced with two different interpretations of a rule, but is otherwise viewed as having little authority.

The New Haven School, in contrast, rejects distinctions between law and policy. As Professor Reisman has explained: “It is a truism that law is policy, but [the New Haven School] is an approach that is policy-oriented in a much broader sense. . . . It also undertakes to improve the performance of decision processes themselves and enhance their capacity to achieve outcomes more consonant with human dignity.”⁵ Although condemned for this early on,⁶ the policy orientation of the New Haven School is in fact one of its greatest strengths. As a methodology, the School orients our attention to policies to be achieved; rather than an additional argument to supplement law, consideration of policy is an integral part of lawmaking itself. From the perspective of the New Haven School, outcomes are not the necessary consequences of rules but rather the product of choices we make in realizing the shared values of the community.

Third, policy-oriented jurisprudence validates the importance of taking responsibility for one’s choices. Perhaps I focus on responsibility because I have two small children and am acutely conscious of trying to teach them to be responsible for their choices, but it is also the way I think about the law. In its understanding of law as a process of making choices that have consequences, the New Haven School requires us to take responsibility for the decisions we make as advisors and decisionmakers. In writing about the School, Professor Reisman has explained that “[f]rom the standpoint of the New Haven School, jurisprudence is a theory about making social choices.”⁷ Law is not something that happens to us, it is rather a product of our actions. Thus, one of the most innovative features of the New Haven School has been to flip the traditional inquiry of law, looking at law not as a body of rules that guide the individual but instead focusing on the decisionmaker and the tools he or she needs to address challenges of world public order.⁸ The New Haven School sees its role as explicitly assisting decisionmakers, not simply assessing and evaluating their actions.

5. *Id.* at 577.

6. Reisman, *supra* note 2.

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

8. Reisman, *supra* note 2; see also W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935, 937 (1999) [hereinafter Reisman, *Theory About Law*] (“The Copernican Revolution in McDougal’s jurisprudence was in unseating rules as the mechanism of decision and installing the human being—all human beings, to varying degrees—as deciders.”).

III. SOLVING GLOBAL PROBLEMS

The New Haven School's approach was the organizing theme connecting the symposium's panels and presentations. Each of the panels addressed a different aspect of the policy-oriented approach to lawmaking—actors, institutions, norms, and communication. Hari Osofsky's environmental law research⁹ and the commentaries by Rebecca Bratspies¹⁰ and William Ascher¹¹ focused on the actors involved in lawmaking. The international investment and trade law presentation by Diane Desierto,¹² with commentaries by Tai-Heng Cheng¹³ and Robert Howse,¹⁴ considered the institutions that shape the processes of decisionmaking. Craig Hammer's¹⁵ human rights law presentation, with commentaries by Ruti Teitel¹⁶ and Siegfried Wiessner,¹⁷ emphasized the importance of the role of legal norms and authority in the decisionmaking process. The use of force presentation by Jacob Katz Cogan and Monica Hakimi,¹⁸ with

-
9. Hari M. Osofsky, Professor of Law, Univ. of Minn. Law Sch., Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* <http://youtu.be/AmCj9FX0abc?t=1m58s>.
 10. Rebecca M. Bratspies, Professor of Law, City Univ. of N.Y. Sch. of Law, Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* <http://youtu.be/AmCj9FX0abc?t=28m40s>.
 11. William Ascher, Professor of Gov't & Econ., Claremont McKenna Coll., Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* <http://youtu.be/AmCj9FX0abc?t=53m36s>.
 12. Diane Desierto, Professor of Law, Peking Univ. Sch. of Transnat'l Law, Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* <http://youtu.be/Y1QH7iu5PCA?t=2m1s>.
 13. Tai-Heng Cheng, Partner, Quinn Emanuel Urquhart & Sullivan, LLP, Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* <http://youtu.be/Y1QH7iu5PCA?t=30m37s>.
 14. Robert Howse, Professor of Law, N.Y.U. Sch. of Law, Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* <http://youtu.be/Y1QH7iu5PCA?t=39m47s>.
 15. Craig Hammer, Consultant, The World Bank, Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* <http://youtu.be/IKFkLf8HiZg?t=49s>.
 16. Ruti Teitel, Professor of Law, N.Y. Law Sch., Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* <http://youtu.be/IKFkLf8HiZg?t=1h1s>.
 17. Siegfried Wiessner, Professor of Law, St. Thomas Univ. Sch. of Law, Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* <http://youtu.be/IKFkLf8HiZg?t=34m35s>.
 18. Jacob Katz Cogan, Professor of Law, Univ. of Cincinnati, & Monica Hakimi, Professor of Law, Univ. of Mich., Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), *available at* http://youtu.be/_-MaxkcMV08?t=2m46s.

commentaries by Mahnoush Arsanjani,¹⁹ William Burke-White,²⁰ and Nicholas Rostow,²¹ illustrated lawmaking as a process of communication and the distinction between myth and code in the context of the prohibition on the use of force.

A. Actors

One of the defining characteristics of the New Haven School is its pluralistic account of the actors and interests that drive decisionmaking on international issues. Understanding the participants involved and their interests and resources is a central part of the New Haven School's approach to the process of decisionmaking. Moreover, the New Haven School takes a broad view of the types of actors that should be factored into account, both those that have formal decisionmaking competence as well as those who influence decisions.²²

Building on these insights, Hari Osofsky's article highlights the roles of substate actors—not only cities but also *suburbs*—in the process of lawmaking on climate change. She urges a model for global problem solving that is de-centered, in which the nation-state is only one of many actors involved in responding to the “wicked problem”²³ of climate change. Professor Osofsky makes clear that we have to account for local actors not only in order to better understand what climate change responses look like, but also because these local actors can be an important source of learning. Her article encourages us to consider the characteristics of these suburban actors in order to understand what motivates actors to become involved in the process of responding to climate change.²⁴

Rebecca Bratspies takes up Professor Osofsky's challenge to consider substate actors in creating solutions to global problems. She uses the metaphor of the lionfish to illustrate the complexity of the factors that have resulted in an explosion of lionfish in the Atlantic Ocean, resulting in the decimation of coral reefs there. Although deeply skeptical of our ability to truly solve these difficult problems, she also finds some grounds for optimism

19. Mahnoush Arsanjani, Am. Soc'y of Int'l Law, Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), available at http://youtu.be/_MaxkcMVo8?t=31m56s.

20. William Burke-White, Professor of Law, Univ. of Penn. Law Sch., Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), available at http://youtu.be/_MaxkcMVo8?t=20m5s.

21. Nicholas Rostow, Professor, Nat'l Def. Univ., Remarks at the New York Law School Law Review Symposium: Solving Global Problems: Perspectives from International Law and Policy (Apr. 12, 2013), available at http://youtu.be/_MaxkcMVo8?t=43m10s.

22. This includes not only states but also “state officials, nongovernmental organizations, pressure groups, interest groups, gangs, and individuals, who act on behalf of all other participants and on their own.” Reisman, *supra* note 7, at 122; see also McDougal & Lasswell, *supra* note 3, at 12.

23. Hari M. Osofsky, *The Geography of Solving Global Environmental Problems: Reflections on Polycentric Efforts to Address Climate Change*, 58 N.Y.L. SCH. L. REV. 771, 778 n.4 (2013–2014) (citing Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153 (2009)).

24. See generally *id.*

REFLECTIONS ON THE NEW HAVEN SCHOOL

in the efforts of actors other than states and international organizations in tackling these issues—including certification schemes that leverage consumer buying power and localized responses such as “lionfish derbies.”²⁵ William Ascher also emphasizes the wide variety of authoritative actors involved in responding to climate change—ranging from counties in California to nongovernmental organizations.²⁶ Professor Ascher asks whether state and international actors could embrace the work of these other participants and foster both cooperation and competition.²⁷

B. Institutions

Diane Desierto’s presentation on international trade and investment law reflected several important features of the New Haven School of jurisprudence. First, in arguing against efforts to unify the fields of investment and trade law—and, in particular, to marry understandings of public interest in trade and investment—she brought an important focus on institutions not just as passive vessels or artifacts of an international system, but as “products of an ongoing constitutive process.”²⁸ Second, Professor Desierto applied the New Haven School’s phase analysis²⁹ to institutions and considered the way in which the particular features and design of the investment and trade regimes affect the opportunities and resources available to participants and the kinds of decisions they are able to make.³⁰ Consistent with the New Haven School’s orientation on outcomes, her presentation also reminds us that just because something is possible does not mean it is right. She argues that we should be skeptical about the desirability of incorporating trade law into the investment regime given the World Trade Organization’s less-than-stellar record in protecting human rights.³¹

-
25. Rebecca M. Bratspies, *Lionfish as a Metaphor for Governance in an Era of Climate Change*, 58 N.Y.L. SCH. L. REV. 829, 851–54 (2013–2014).
 26. William Ascher, *Expanding the “Geography” of Policy Options to Reduce Greenhouse Gas Emissions: A Commentary on Hari Osofsky’s The Geography of Solving Global Environmental Problems*, 58 N.Y.L. SCH. L. REV. 859, 864–67 (2013–2014).
 27. See generally *id.* at 872–73.
 28. Reisman, *Theory About Law*, *supra* note 8, at 937.
 29. W. Michael Reisman, *A New Haven Look at Sanctions*, 95 AM. SOC’Y INT’L L. PROC. 27, 27 (2001) (explaining that phase analysis “allows the observer to gather and organize data about the participants, their perspectives, the situations of interaction, the bases of power on which participants draw, the strategic modalities by which they manipulate those power bases, and the aggregate outcomes of decisions, examined in terms of power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude”); see also Myres S. McDougal & Harold D. Lasswell, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 387–88 (1971).
 30. The New Haven School’s approach considers the decisionmaking process “in terms of those who engage in it (the participants), the subjective dimensions that animate them (their perspectives), the situations in which they interact, the resources upon which they draw, the ways they manipulate those resources and the aggregate outcomes of the process of interaction, which are conceived in terms of a comprehensive set of values.” Reisman, *supra* note 7, at 121–22.
 31. Desierto, *supra* note 12.

Tai-Heng Cheng's and Robert Howse's comments oriented our thinking toward the importance of context.³² They emphasized differences in the policy goals of the trade versus the investment regimes. Dr. Cheng cautioned against using norms across these regimes because doing so would be contrary to the intentions of the parties.³³ In his comments, Professor Howse focused on the idea of law as a process of communication and ongoing interpretation. He rejected both the approach of unification and the approach of self-contained regimes, arguing in favor of dynamic integration involving dialogue, adjustment, and accommodation. For Professor Howse, legal interpretations that originate in other regimes could certainly be relevant elsewhere as long as there is an awareness of context in the process.³⁴

C. Norms

Craig Hammer and Winston Nagan's article is a fascinating case study of the role of legal norms in the process of authoritative decisionmaking.³⁵ Their article uses the problem of indigenous control over land—specifically the case of the Shuar in Ecuador—to consider the role that law has played in the relationship of indigenous peoples to their land. The article notes, for example, the way in which the Ecuadorian Constitution simultaneously threatened and provided an avenue for protecting that relationship. Law has been both empowering and disempowering for the Shuar, providing special protections but also rendering the protection of law more difficult. The Shuar have also used legal articulations as resources to further augment and strengthen their respective positions, creating, for example, their own legal norms by claiming their rights in a Bill of Fundamental Rights³⁶ that outlines their rights to their land, natural resources, and indigenous knowledge.

Siegfried Wiessner's comments emphasized the role of the authority signal in the lawmaking process. 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."³⁷ The "authority signal" is the "extent to which, empirically, the processes generating [a] norm and the symbols attached to it convey a sense of legitimacy or propriety to the normative communication's recipients."³⁸ Both

32. See generally Tai-Heng Cheng, *Preface: Policy-Oriented Jurisprudence and Contemporary American Legal Education*, 58 N.Y.L. SCH. L. REV. 771 (2013–2014); see also Howse, *supra* note 14.

33. Cheng, *supra* note 13.

34. Howse, *supra* note 14.

35. See generally Winston P. Nagan & Craig Hammer, *The Conceptual and Jurisprudential Aspects of Property in the Context of the Fundamental Rights of Indigenous People: The Case of the Shuar of Ecuador*, 58 N.Y.L. SCH. L. REV. 875 (2013–2014).

36. BILL OF FUNDAMENTAL RIGHTS (2002) (Shuar Fed'n, Ecuador) (on file with Winston P. Nagan, the drafter of the Bill). Nagan also coauthored an article that appears in this issue of the *New York Law School Law Review*. See Nagan & Hammer, *supra* note 35.

37. McDougal & Lasswell, *supra* note 3, at 13.

38. Robert D. Sloane, *More Than What Courts Do: Jurisprudence, Decision, and Dignity—In Brief Encounters and Global Affairs*, 34 YALE J. INT'L L. 517, 520–21 (2009).

authority signal and control intention are needed for a communication to constitute law,³⁹ but the level of each for prescription to be effective depends on the context.⁴⁰ Using the example of a recent resolution by the International Law Association's Committee on the Rights of Indigenous Peoples, which he chaired, Professor Wiessner emphasized that the considerable authority signal of this resolution was a function of both by whom and how the decision was made. Although formally a resolution by an international nongovernmental organization without binding effect, it was made by a highly respected body that reflected diverse legal traditions.⁴¹ Moreover, the resolution was passed without objection and with near consensus, with only one abstention on nonsubstantive grounds.⁴² The authority of this resolution⁴³ is particularly important given the advances it makes in articulating the content of the rights possessed by indigenous peoples.⁴⁴

Ruti Teitel's comments focused on the normative significance of collectivities organized along ethnic lines and the way in which claims by and on behalf of peoples can have constitutive effect. Tracing the tension between claims of belonging and the protection of borders, Professor Teitel argued that "humanity's law" requires vindication of the rights of both individuals and groups. Her comments and her larger work on "humanity's law"⁴⁵ share the New Haven School's deep and abiding concern with decisionmaking in the community's common interest⁴⁶ and the role of individuals as members of a global community.

39. See W. Michael Reisman, *International Lawmaking: A Process of Communication*, 75 AM. SOC'Y INT'L L. PROC. 101, 111–12 (1981).

40. See *id.* at 112.

41. See Siegfried Wiessner, *The State and Indigenous Peoples: The Historic Significance of ILA Resolution No. 5/2012*, in *DER STAAT IM RECHT, FESTSCHRIFT FÜR ECKART KLEIN ZUM 70. GEBURTSTAG 1368* (M. Breuer et al. eds., 2013) (observing that International Law Association resolutions have been recognized as reflecting customary law, and stating that "global resolutions of a body as qualified and diverse as the International Law Association are stating a rare consensus amongst, at times, radically different cultures and value traditions, and thus should be especially appreciated and valued").

42. See *id.* at 1364 (stating that the abstention was by a committee member who arrived late to the discussion and did not feel sufficiently well versed in the substance of the matter to take a position on the resolution).

43. Int'l Law Ass'n, *Rights of Indigenous Peoples*, Res. 5/2012 (Aug. 30, 2012).

44. See *id.* ¶¶ 1, 4–6, 10 (recognizing, *inter alia*, collective human rights and providing important elaboration on the rights of self-determination; autonomy; free, prior and informed consent; and reparation and redress).

45. RUTI G. TEITEL, *HUMANITY'S LAW* (2011).

46. The New Haven School views lawmaking as "a process of authoritative decision by which the members of a community clarify and secure their common interests." 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY*, at xxi (1992). The School evidences "a preference for inclusivity in the clarification of the common interest and the rejection of special interests redefining the community interests." Winston P. Nagan & Aitza M. Haddad, *Sovereignty in Theory and Practice*, 13 SAN DIEGO INT'L L.J. 429, 517 (2012).

D. Communication

Jacob Katz Cogan and Monica Hakimi's presentation on the norms governing the use of force exemplified the methodology of the New Haven School with its disregard for labels and its focus on the actions and signals of authoritative decisionmakers within the relevant community. Drawing on concepts of the "myth system" and "operational code,"⁴⁷ Professors Cogan and Hakimi observed that, with respect to norms governing the use of force, there are two sets of rules. The first is what they call a "formal code," the output of formal decisionmaking processes that regulate the use of force, while the second is an "informal code" that has developed through the practice of states. These two codes push in different directions: the formal code constrains the use of force, while the informal code deregulates and sanctions its use. Although they recognized that deviation from formal norms is not a unique occurrence, they argued that the informal code is no longer simply tolerated but indeed is increasingly recognized and defended as legal.⁴⁸

Professors Cogan and Hakimi's recognition of the informal code as authoritative and their identification of changes in state responses to conduct inconsistent with the formal code resonates with the New Haven School's approach to law, not as a set of formal institutions and rules, but as a process of communication. This process of communication is comprised of three streams—policy content, authority signal, and control intention—and the communication that fulfills these functions is law.⁴⁹ Policy content refers to communication of the substance of the norm—"the extent to which a norm communicates a directive or prohibition: 'thou shalt' or 'thou shalt not.'"⁵⁰ Authority signal is the extent to which that norm is communicated in a way that is perceived as legitimate or proper by the recipients.⁵¹ Finally, control intention refers to the recipient's perception of the likelihood of enforcement—"the extent to which those recipients expect that those with effective power will invest sufficient resources to make the norm effective."⁵² The examples Professors Cogan and Hakimi discuss all indicate communication reflecting particular content concerning the use of force (albeit with differing levels of clarity), generally with an authority signal, but often with weak control intention. The question this raises is whether a weakened control intention has, over time, undermined the norm

47. A "myth system" is a system of formal legal norms, while an "operational code" is "a set of norms that operate in a certain sector and that actors deem to be authoritative even though the norms may be inconsistent with formal legal codes." W. Michael Reisman, *War Powers: The Operational Code of Competence*, 83 AM. J. INT'L L. 777, 777 n.3 (1989). In other words, in a given area, the myth system is the normative system that "is supposed to apply and which continues to enjoy lip service among elites," while the operational code is the normative system "that is actually applied." W. Michael Reisman, *Myth System and Operational Code*, 3 YALE STUD. WORLD PUB. ORD. 229, 230 (1976–1977). Elsewhere, Professors Reisman, Wiessner, and Willard characterize the distinction as one between "the law-in-the-books" and "the law-in-action." See Reisman et al., *supra* note 1, at 577.

48. Cogan & Hakimi, *supra* note 18.

49. Reisman, *supra* note 39, at 108.

50. Sloane, *supra* note 38, at 520.

51. See *id.* at 520–21; see also *supra* text accompanying note 38.

52. Sloane, *supra* note 38, at 521.

such that in some contexts it has become more of an “expression of morality”—something that perhaps ought to be done, but which is not law.⁵³ Thus, their case study of changing state practice in the area of use of force provided an important example of the New Haven School’s understanding of law as a process of communication.

William Burke-White offered a very “New Haven” response to Professors Cogan and Hakimi’s presentation, deconstructing their deconstruction, pushing back on the formalism of the labels they chose to characterize these two sets of norms. He challenged both whether there are in fact two codes as well as the labels of “formal” and “informal,” suggesting instead that the “formal” category is really concerned with judicially constructed interpretation of formal code, while “informal” is comprised of state practice and *opinio juris*. His comments provided an important reorientation of the participants involved in the process of communication, and he suggested that the real divergence between the two categories of norms is the participants involved in each.

Mahnoush Arsanjani similarly turned our attention to the role of various actors in safeguarding and upholding the sanctity of the myth system, acknowledging that the formal code is based on premises that have since become obsolete, namely that states have a monopoly on the use of force. In light of new realities, with nonstate actors increasingly acting in this area and the International Court of Justice and the U.N. Security Council having fewer and fewer opportunities to manage lawmaking, it is important to consider new actors, such as the International Criminal Court, as possible custodians of the myth system.

Nicholas Rostow’s comments offered a pragmatic take on this discussion and a continued emphasis on the participants in the lawmaking process. He argued that the multiplicity of actors involved in lawmaking today presents both a challenge and a hope. Although the involvement of many participants makes it more difficult to reach agreement, it is only through a multiplicity of actors that we will find solutions to some of the most challenging problems we face today.

IV. CONCLUSION

The discussions at the symposium and the articles written in connection with it offer several insights about the New Haven School and its policy-oriented approach. First, complexity is good, at least with respect to the participants in the lawmaking process. We need everyone on board to even begin to solve these pressing global problems. Second, law is messy. The challenge for us as participants and advisors is to recognize the existence of multiple and often conflicting codes and to employ them in ways that further the common interest. Third, dialogue helps. One of the goals of a system featuring a multiplicity of actors and institutions should be to create a framework for continued conversation and dialogue. This symposium was an excellent contribution to that dialogue, and I thank the organizers and the participants for providing me with an opportunity to take part in this conversation.

53. Reisman, *supra* note 39, at 112 (explaining that it would be “improper to call [an expression of morality—content without control intention] . . . law unless, in the hypothetically possible but extremely rare case, the target audience is so enchanted or enthralled by the particular authority mystique that control intention is either unnecessary, or may be deemed to have ultimately been created”).

NEW YORK LAW SCHOOL LAW REVIEW