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

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"A point has been reached in history when we must shape our actions throughout the world with a more prudent care for their environmental consequences. Through ignorance or indifference we can do massive and irreversible harm to the earthly environment . . . ."1

I. INTRODUCTION

Almost forty years ago, the United Nations began recognizing a "rising [environmental] crisis of worldwide proportions."2 Around the same time, the New Haven School was building worldwide "a jurisprudence of human dignity." That jurisprudence, a combined effort of sociologist Harold D. Lasswell and law professors Myres S. McDougal and W. Michael Reisman, described itself as "a contextual, policy-oriented jurisprudence, postulating as its overriding goal the dignity of man in an increasingly universal public order." 3 Drawing on insights from the social and behavioral sciences, Lasswell and McDougal developed an elaborate system of legal analysis intended to flesh out the core values of human dignity, and the processes necessary to translate those values into universal theories of legal decisionmaking. 4 Their process-oriented jurisprudence produced an impressive body of scholarship.5 It remains one of the major theories of law
and one of the few that attempts to account for law in both domestic and international arenas.

The relationship between human dignity and the human environment in their jurisprudence raises a host of interesting questions. For example, what should this relationship look like in the realm of sustainable development, an area that has now become central to international environmental law, and yet has taken on a variety of meanings? Numerous treaties, proclamations, and declarations have adopted sustainable development as a goal, expressing it in terms of a global consensus.6 However, attempts to implement sustainable development rapidly run into a Wittgensteinian dilemma where the same term means very different things to different thinkers acting in a variety of contexts.7 Thus, widespread agreement on a principle does not translate into agreement on the principle's normative content. This Article suggests that a re-engagement with the New Haven School's process-oriented jurisprudence might cast light on this dilemma that
international environmental law faces: how to reconcile the competing visions of sustainable development offered by decisionmakers from widely different claims, and cultures. To that end, this Article heeds the New Haven School's call for a clearly defined methodology for identifying problems, goals, conflicting imbedded policy choices. 8 To account for the complex interdependencies that pervade environmental interactions, 9 this Article explores several important New Haven School tenets: its recognition that every decisionmaker brings to the task of "authoritative decision" 10 perspectives embedded in her particular circumstance; its insistence that legal decisions are inherently about policy; and its embrace of interdisciplinary investigation. Ultimately, this Article suggests that environmental law, domestic and international, must recognize the inescapable interdependence of people and places, and therefore must embrace one of the most striking attributes of the New Haven School line of reasoning, namely its "natural[] receptive[ness] to both an ecological perspective and a futurist concern with assuring the life-chances of subsequent generations." 11

Indeed, the New Haven School's insistence that law and policy must begin from a global concept of community, "premised on the interdependence of the entire earthspace arena in which people interact,"12 ought to become a guiding insight for modern international environmental law.

While some New Haven School ideas resonate powerfully in this context, exploring this question also highlights some of their weaknesses. In particular, New Haven School writings invoke scientific methods in a fashion both instructive and cautionary. Their engagement with science is twopronged—sometimes offering their methods as a means for developing scientific information, and sometimes as a means for rendering legal decisions scientific. Exploration of these two strands of thought in the context of sustainable development highlights some problematic questions about the relationship between law, science and policy. (pp. 369-371)

… As precautionary decisionmaking has gathered steam, a backlash led by scholars and officials in the United States has emerged.93 Critics characterize the precautionary principle as too indeterminate and no more meaningful than saying "take care" 94 or "better safe than sorry," 95 and they emphasize confusion about the core meaning of the term.96 Indeed, at least one U.S. official has characterized the precautionary principle as "a mythical concept, perhaps like a unicorn." 97 The ensuing ambiguity, it is claimed, permits political concerns rather than science to drive regulatory decisions.98 While from a New Haven School perspective this attempt to separate law from policy makes no sense, Frank Garcia points out that this issue of allowing political concerns too much sway over substantive decisions has a particular resonance in a trade context because opposition to politicization (in the form of disguised protectionism) is a core value of the trade system.99

Critics also decry the precautionary principle as imposing unnecessary costs to address remote and improbable harms. The basis for this critique is obvious. Precautionary regulation restricts human actions and imposes costs that cannot be grounded in unambiguous scientific evidence. As such, critics compare it unfavorably with quantitative risk assessment which rarely permits regulation without scientific evidence of a "significant risk[]."100 **Typically motivated by the assumption that economic expansion and technological innovation increase overall social welfare, these critics perceive the precautionary principle as an unwelcome and technically unsound deviation from science-based regulation, and often perceive it to be little more than a non-tariff trade barrier in disguise.101**

Applying New Haven School jurisprudential theories to assess the balance that should be struck between demands for cost-benefit or precautionary analyses in the international arena means walking an uneasy line. On the one hand, American liberal democratic values are the ideological backdrop for Lasswell and McDougal's jurisprudence. Their universalization of the American perspective finds its echo in a parallel aspect of the push to force adoption of cost-benefit analysis through the WTO. Yet that process's embrace of scientific neutrality102 divorced from normative values seems to contradict a central New Haven School tenet—that law and policy are deeply interrelated—and flies in the face of the unabashedly value-laden form of inquiry they advanced…

101. *See* Lawrence A. Kogan, *Exporting Precaution: How Europe's Risk-Free Regulatory Agenda Threatens American Free Enterprise* (2005), *available at*

http://www.wlf.org/upload/110405MONOKogan.pdf . The European Union, by contrast, has embraced the precautionary principle. *See Communication from the Commission on the Precautionary Principle*, COM (2000) 1 (Feb. 2, 2000), *available at* http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub07_en.pdf ; Treaty Establishing Constitution for Europe art. III-233, Oct. 29, 2004, 2004 O.J. (C 310) 1, *available at* http://europa.eu.int/constitution/en/ptoc46_en.htm (enshrining precaution as a constitutional principle).

(pp. 388-390)