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MAKING INTERNATIONAL LAW WITHOUT AGREEING WHAT IT IS

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ABSTRACT

This Article explores how international law works in spite of its fragmentation into radically different conceptions of law. Using the United States' invasion of Iraq and Israel's construction of a wall around Palestine, the Article shows how outcomes of a legal nature can be reached in spite of decision-makers' different conceptions of international law. The Article uses two major conceptions of international law—positivism and policy-oriented jurisprudence—to explain and address fragmentation. It demonstrates that the gap between the two conceptions of international law does not actually reflect meaningful conceptual disagreements. Instead, they are differences of normative commitments that are anterior to conceptualizing law. These pre-concept commitments relate to the purpose of law, the ideal type of law, and the importance of semantics. The Article makes three interlocking proposals to address the fragmentation of international legal theory. First, decision-makers should clarify what they designate by the word "law" so that they may engage each other meaningfully. Second, certain international institutions, such as tribunals, may partially

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address pre-commitment conflicts because they have established hierarchies of conceptions of law. Third, outcomes will be reached through a process of claims and counterclaims about which conception should prevail. This Article concludes by testing its proposals against the United States' invasion of Iraq and Israel's construction of the wall.

I. LAW IN TWO VIGNETTES

One of the enduring puzzles in international law is how international outcomes are reached even though different decision-makers, such as judges on tribunals or foreign policy advisors, have varied conceptions of international law that require them to reach different decisions. This Article addresses the puzzle by examining two major conceptions of international law: positivism and policy-oriented jurisprudence.[1] It makes a number of contributions to solving fragmentation. First, the Article corrects the misunderstanding that positivism and policy-oriented jurisprudence are in conflict over whether law is distinct from politics. In fact, both conceptualize law as separate from politics. Second, it explains that the conflict between the two conceptions of international law is more nuanced than some realize. Policy-oriented jurisprudence requires its adherents to account for policy considerations in their appraisals of legality. Hard positivism is in conflict because it excludes policy from law, albeit hard positivism may have limited explanatory power in international law. Soft positivism is less in conflict because it accommodates policy as a criterion for legality when a legal rule commands *renvoi* to policy. It only parts ways with policy-oriented jurisprudence when policy-oriented jurisprudence considers policy beyond what legal rules appear to mandate. Yet, this is not a meaningful conceptual disagreement. The disagreement instead arises from differing normative commitments anterior to conceptualizing, which this Article terms "pre-concept commitments." These pre-concept commitments relate to the purpose of law, the ideal type of law, and the value of semantics. Third, the Article suggests that

1. This Article uses the term "conception" to refer to an iteration of the concept of law. *See* RONALD DWORKIN, LAW'S EMPIRE 70–72 (1986) (distinguishing between concepts and conceptions). It is worth noting that "[w]hat conceptual analysis is, however, is not altogether clear." Nicos Stavropoulos, *Hart's Semantics, in* HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE *CONCEPT OF LAW* 59, 69 (Jules Coleman ed., 2001) [hereinafter HART'S POSTSCRIPT]. For legal philosophers who disagree that the international legal theories discussed here are conceptions of law, "conception" can be substituted with "approach" without materially affecting this article's theses.

problems arising from the fragmentation of legal theory can be minimized when decision-makers clarify what they mean by "law" and when international institutions apply hierarchies of conceptions. Ultimately, however, in problems where hierarchies are absent or not fully controlling, outcomes will tend to reflect a mix of conceptions of international law, the normative attractiveness of their respective prescriptions, and the power of decision-makers backing each conception of international law.

The fragmentation of international legal theory is an age-old issue that has vexed jurists, philosophers, and decision-makers in international problems. Although this problem is not new, it is today magnified by broader and deeper international interactions that all require regulation, and which are not fully coordinated, in part because international law remains fragmented. For centuries, there have been diverse viewpoints on what international law is and how it works (and, relatedly, whether international law is even law and whether it works at all).[2] However, the problem of fragmentation has now become acute, as different conceptions of international law have proliferated and some have become more entrenched.[3] Without agreement on what international law is, who it binds, and how it controls actions, governments may reach different decisions about what is lawful. National courts and international tribunals may prescribe conflicting legal principles and inconsistent outcomes with potentially destructive consequences for world order. Corporations and individuals may be left uncertain about their legal protections in their international activities.

Consider the invasion of Iraq. On November 8, 2002, the United Nations Security Council adopted Resolution 1441.[4] The operative

2. *See* HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992); MARY ELLEN O'CONNELL, THE POWER AND PURPOSE OF INTERNATIONAL LAW: INSIGHTS FROM THE THEORY AND PRACTICE OF ENFORCEMENT (2008); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005); JAMES R. CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW (2d ed. 2006); MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (rev. ed. 2005); HANS KELSEN, PRINCIPLES OF INTERNATIONAL LAW (Robert W. Tucker ed., 2d rev. ed. 1966); ABRAM CHAYES, THOMAS EHRLICH & ANDREAS F. LOWENFELD, INTERNATIONAL LEGAL PROCESS: MATERIALS FOR AN INTRODUCTORY COURSE (1969); Hilary Charlesworth, Christine Chinkin & Shelley Wright, *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991). For thorough discussions and comparisons of major theories of international law, see generally THE METHODS OF INTERNATIONAL LAW (Steven R. Ratner & Anne-Marie Slaughter eds., 2004).

3. *See* Richard H. Steinberg & Jonathan M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 64, 64–65 and passim (2006) (discussing fragmentation of international law theory).

4. S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002), *available at* http://www.un.org/Depts/unmovic/new/documents/resolutions/s-res-1441.pdf. The United States provided other justifications as well, but an extended debate on preemptive force is beyond the scope of this article.

provision stated that the Security Council "[d]ecides to convene immediately upon receipt of a [disarmament and inspection] report [on Iraq] . . . in order to consider the situation and the need for full compliance with all of the relevant Council resolutions in order to secure international peace and security . . . ."[5] As it became clear that Saddam Hussein would breach Resolution 1441, the United States considered whether to preemptively invade Iraq. It had to decide if preemptive force was lawful. The Legal Adviser of the United States Department of State, William H. Taft IV, stated that his conception of international law was based "not on abstract concepts, but on the particular events that gave rise to [state action]."[6] In the case of Iraq, the legality of preemption was partly contingent upon geopolitical factors that had grave policy implications, which included: "the naked aggression by Iraq against its neighbors, its efforts to obtain weapons of mass destruction, its record of having used such weapons, Security Council action under Chapter VII of the United Nations Charter, and continuing Iraqi defiance of the Council's requirements."[7] He concluded that "preemptive force is certainly lawful" and is "consistent with the resolutions of the Security Council."[8]

Three permanent members of the Security Council, France, China, and Russia, embraced a different conception of international law that was more rule driven. In their view, the Security Council had issued an authoritative rule that only the Security Council could decide whether to invade Iraq. They issued the following statement:

> Resolution 1441 (2002) adopted today by the Security Council excludes any automaticity in the use of force . . . . In case of failure by Iraq to comply with its obligations, . . . [s]uch failure will be reported to the Security Council . . . . It will then be for the Security Council to take a position on the basis of that report.[9]

The United Kingdom took a third position, which could be interpreted as a conception of law in which the content of rules are indeterminate and outcomes turn more on politics. On November 12, 2002, four days after

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For a discussion on preemptive force, *see* Tai-Heng Cheng and Eduardas Valaitis, *Shaping an Obama Doctrine of Preemptive Force*, 82 TEMP. L. REV. 737 (2009).

5. S.C. Res. 1441, *supra* note 4, ¶ 12.

6. William H. Taft IV & Todd F. Buchwald, *Preemption, Iraq, and International Law*, 97 AM. J. INT'L L. 557, 557 (2003).

7. *Id*. at 557–58.

8. *Id*. at 563.

9. *Joint statement by the People's Republic of China, France and the Russian Federation* (Aug. 11, 2002), *available at* http://www.ambafrance-uk.org/Iraq-UNSCR-1441-Joint-statement-by.html.

Resolution 1441 was adopted, the UK Attorney General, Lord Peter Goldsmith, advised the UK Foreign Secretary:

> [I]t was very clear from Resolution 1441 that, in the event of Iraq's non-compliance, there would have to be a further discussion in the Security Council. . . . [O]nly the Security Council could decide on . . . whether all necessary means were authorised.[10]

On March 17, 2003, Lord Goldsmith changed his mind. In response to a parliamentary question, he stated:

> Resolution 1441 would in terms have provided that a further decision of the Security Council to sanction force was required if that had been intended. Thus, all that resolution 1441 requires is reporting to and discussion by the Security Council of Iraq's failures, but not an express further decision to authorise force.[11]

A confidential statement by the UK Foreign Secretary to Lord Goldsmith might partly explain the UK Attorney General's inconsistent interpretation of Resolution 1441. The Foreign Secretary asserted that "if Iraq were to be found in breach of Resolution 1441, it was essential that we act pretty swiftly to take military action. . . . [T]his was of course primarily a military/political judgment."[12]

On March 20, 2003, the United States commenced Operation Iraqi Freedom. It invaded Iraq. Key members of the Iraqi government, including Saddam Hussein, were arrested or killed.

Divining conceptions of law from statements and events carries interpretative risk. Be that as it may, it appears that the permanent members of the Security Council may have adopted, or at least deployed rhetoric flowing from, different conceptions of international law. The chief lawyer for the State Department seemed to conceive of international law as a system in which the legality of preemptive force is determined in part by geopolitical context, and the ordinary meaning of words from a positive source alone (i.e., Resolution 1441) may not be dispositive. France, Russia, and China seemed to conceive of international law as a system of rules in which the express words of a positive source of law command

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10. David Brummell, Iraq: Note of Telephone Conversation between the Foreign Secretary and the Attorney General on Tuesday, 12 November 2002 3 (declassified UK government document) (on file with author), *available at* http://www.iraqinquiry.org.uk/media/43505/doc_2010_01_26_11_03_33_493.pdf.

11. Lord Peter Goldsmith, *Legal Basis for Use of Force Against Iraq* (Mar. 17, 2003), *available at* http://www.number10.gov.uk/Page3287 (responding to parliamentary questions).

12. Brummell, *supra* note 10, at 2.

obedience from international actors. The contradictory statements of the UK Attorney General, as well as the view of the UK Foreign Secretary, suggest a more critical conception of international law: a positive source may have indeterminate content, and politics controls outcomes. If these characterizations are reasonable, they present a theoretical puzzle of immense import. How were conflicts among different conceptions of international law resolved, and how was an outcome reached?

Conflicts among international legal theories also play out in international tribunals. Consider the wall that Israel built around occupied Palestinian territory. On December 8, 2003, the U. N. General Assembly at a Tenth Emergency Special Session requested an advisory opinion from the International Court of Justice on the legal consequences of Israel's construction of the wall.[13] The ICJ rendered its advisory opinion (hereinafter "Wall Opinion") on July 9, 2004. Fourteen out of fifteen judges found that Israel had violated international law.[14] Judge Buergenthal from the United States was the exception. The majority's opinion is rich in analysis and controversial at parts. For present purposes, it is sufficient to focus on the question of whether article 51 of the UN Charter, permitting a state to act in self-defense against armed attack, applied to Israel's construction of the wall. Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[15] The majority held that article 51 did not make Israel's actions lawful. It reasoned:

> Article 51 of the Charter thus recognizes the existence of an inherent right of self-defence in the case of armed attack by one State against another State. However, Israel does not claim that the attacks against it are imputable to a foreign State.
>
> The Court also notes that Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory. . . .

13. G.A. Res. ES-10/14, U.N. Doc. A/RES/ES-10/14 (Dec. 8, 2003).

14. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 201–03, ¶ 163 (July 9), *available at* http://www.icj-cij.org/docket/index.php?p1=3&p2=4&k=5a&case=131&code=mwp&p3=4 [hereinafter *Wall Opinion*].

15. U.N. Charter art. 51.

> Consequently, the Court concludes that article 51 of the Charter has no relevance in this case.[16]

Judge Rosalyn Higgins voted with the majority, but wrote a separate opinion disagreeing on this point:

> While accepting, as I must, that this is to be regarded as a statement of the law as it now stands, I maintain all the reservations as to this proposition that I have expressed elsewhere (R. Higgins, *Problems and Process: International Law and How We Use It*, pp. 250–251).
>
> . . . Palestine cannot be sufficiently an international entity to be invited to these proceedings, and to benefit from humanitarian law, but not sufficiently an international entity for the prohibition of armed attack on others to be applicable. This is formalism of an unevenhanded sort.[17]

She stated her criticism in *Problems and Process* in the following terms:

> [T]he Court appears to have selected criteria that are operationally unworkable. When a state has to decide whether it can repel incessant low-level irregular military activity, does it really have to decide whether that activity is the equivalent of an armed attack by a foreign army—and, anyway, is not *any* use of force by a foreign army entitled to be met by sufficient force to require it to withdraw?[18]

In the decision, the majority of the judges of the International Court of Justice and Judge Higgins appear to adopt different conceptions of international law that led to different decisions. The court could be seen as adopting a positivist conception of international law, in which it mechanically interpreted article 51 of the United Nations Charter. It also follows, as Judge Higgins pointed out, the *Nicaragua* case, which limited article 51 to armed attacks by a foreign state.[19] Judge Higgins, in contrast, has a policy-oriented conception of international law. She conceptualized international law as "the whole process of competent persons making authoritative decisions in response to claims which various parties are pressing upon them, in respect of various views and interests."[20]

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16. Wall Opinion, *supra* note 14, at 194, ¶ 139.
17. *Id*. at 215, ¶¶ 33–34 (separate opinion of Judge Higgins).
18. ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 251 (1994).
19. Wall Opinion, *supra* note 14, at 215, ¶ 33 (separate opinion of Judge Higgins).
20. 1 ROSALYN HIGGINS, THEMES AND THEORIES 20 (2009).

Accordingly, "it is the task of the judge to decide the distribution as between them of values at stake, but taking into account not only the interests of the parties, but the interests of the world community as a whole."[21] Her view of law as a process to distribute values may explain her rejection of the majority's decision on this point as unevenhanded formalism.

This Article examines the fragmentation of international legal theory that manifests itself in grave international problems like the ones discussed above, and which may obscure the appropriate outcome mandated by law. This attempt to deepen our understanding of the nature of the philosophical differences between conceptions of international law is a useful contribution to scholarship because it begins to fill the interstices between international legal theory and conceptual jurisprudence. International law scholars are familiar with different conceptions of international law,[22] but only a few international law scholars have appraised international law theory through the lens of jurisprudence.[23] There has been significant attention given to the fragmentation of international laws and of legal regimes (such as specialized tribunals).[24] However, the fragmentation of international legal theory, its practical implications, and the possibility of harmonization have been under-theorized. Legal philosophers have discussed the concept of law, but many have not fully considered international law.[25] There is much work to be done in the philosophy of international law.[26]

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21. *Id*.

22. *See* O'CONNELL, *supra* note 2, at 17–149; Steinberg & Zasloff, *supra* note 3, at 64.

23. *See, e.g.*, DOUGLAS M. JOHNSTON, THE HISTORICAL FOUNDATIONS OF WORLD ORDER: THE TOWER AND THE ARENA 120 (2008); Benedict Kingsbury, *The Concept of Compliance as a Function of Competing Conceptions of International Law*, 19 MICH. J. INT'L L. 345 (1998) [hereinafter Kingsbury, *The Concept of Compliance*].

24. *See, e.g.*, Steven Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM. J. INT'L L. 475 (2008); Ernst-Ulrich Petersmann, *Justice as Conflict Resolution: Proliferation, Fragmentation, and Decentralization of Dispute Settlement in International Trade*, 27 U. PA. J. INT'L ECON. L. 273, 314–20 (2006); Rep. of the Study Grp. of the Int'l Law Comm'n, *Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law*, 58th sess., May 1–June 9, July 3–Aug. 11, 2006, ¶ 12, U.N. Doc. A/CN.4/L.682 (July 18, 2006); Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL. 959 (2009).

25. *See* JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 238–45 (1980); DWORKIN, *supra* note 1, at 71 (not discussing international law); *cf.* H.L.A. HART, THE CONCEPT OF LAW 213–37 (2d ed. 1994). Although Hart considers international law at length, international law has continued to evolve since *The Concept of Law* was published.

26. *Cf.* Kingsbury, *The Concept of Compliance*, *supra* note 23, at 368 (suggesting that further research should be done on the philosophy of compliance in international law).

This Article examines two leading and apparently diametrically opposed theories: positivism and policy-oriented jurisprudence. Positivism views law as a corpus of rules created largely by states and identified in accord with sources of law. Policy-oriented jurisprudence views law as a process of decision-making in which rules might play only one part in determining the outcomes in international problems. Normative legitimacy, measured against relevant global policies, also matters. An entry point into the fragmentation of international law vis-à-vis positivism and policy-oriented jurisprudence is the criticism that proponents of the former have made of the latter. Ever since policy-oriented jurisprudence was developed in the 1930s, positivists have criticized it for apparently "conflating law, political science and politics plain and simple . . . ."[27] Yet, policy-oriented lawyers have long participated in decision-making in international legal problems alongside positivists,[28] confounding attempts at unifying international law behind one theoretical orientation. To reduce the fragmentation of international law, the positivist critique needs to be carefully examined and addressed. This Article unpacks what key positivist criticisms could be, whether they actually point to true conflicts between positivism and policy-oriented jurisprudence, and whether there may be solutions to these conflicts.

Part II addresses a major false conflict between positivism and policy-oriented jurisprudence about whether politics is a criterion for legality. Some scholars believe that positivism excludes politics, and policy-oriented jurisprudence conflates law with politics. Part II demonstrates

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27. Bruno Simma & Andreas L. Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, 93 AM. J. INT'L L. 302, 305 (1999); *see* Oscar Schachter, Panel Remarks, *McDougal's Jurisprudence: Utility, Influence, Controversy* (Apr. 26, 1985), *in* 79 AM. SOC'Y INT'L L. PROC. 266, 267 (1985) [hereinafter McDougal's Jurisprudence: Utility, Influence, Controversy] ("Above all, the complaint charges that by subordinating law to policy, the McDougal approach virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law."). Law and economics scholars tend also to adopt the positivist conception of law as a system of rules. *See generally* GOLDSMITH & POSNER, *supra* note 2, pts. I & II; ANDREW T. GUZMAN, HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY 119–209 (2008) (leveling similar criticisms of the New Haven School). *See* Jeffrey L. Dunoff & Joel P. Trachtman, *The Law and Economics of Humanitarian Law Violations in Internal Conflict*, 93 AM. J. INT'L L. 394, 408 (1999) (criticizing the "school's failure to distinguish clearly between law and politics," and observing that "many leading New Haven theorists have tended to merge law into policy.").

28. *See* Methanex Corp. v. United States (NAFTA/UNCITRAL Arb. Trib. 2005), http://www.state.gov/documents/organization/51052.pdf. Dame Rosalyn Higgins, the Former President of International Court of Justice, and Judge Florentino Feliciano, the Chairman of the Appellate Body of the World Trade Organization and President of the Philippines Supreme Court, were both schooled in policy-oriented jurisprudence. Policy-oriented jurisprudence has also been applied in national courts. *See, e.g.*, United States v. Corey, 232 F.3d 1166, 1177–79 (9th Cir. 2000); Mortimer Off Shore Servs., Ltd. v. Germany, No. 05 Civ. 10669(GEL), 2007 WL 2822214, at *5–6 (S.D.N.Y. Sept. 27, 2007).

that both conceptions exclude politics as a criterion for legality. It also addresses the claim that policy-oriented jurists have used their jurisprudence as a fig leaf for the political agendas of their states. It is impossible to examine every past application of policy-oriented jurisprudence to determine conclusively whether politics were injected into the mix. But even if it were possible, that would not conclusively establish that policy-oriented jurisprudence as a conceptual matter conflates law with politics. Just as positivists may apply politics to law in error without inserting politics into the positivist conception of law, policy-oriented jurists could apply politics to law in error without injecting politics into the policy-oriented conception of law.

Part III addresses the conflict between positivism and policy-oriented jurisprudence about policy as a criterion for legality. This issue is more complex than some jurists think. There are some true conflicts and some false conflicts. Hard positivism excludes policy entirely from law, and is in conflict with policy-oriented jurisprudence. This Article explains why hard positivism does not accord with the semantic usage of the term international law, or, in the alternative, does not accord with a functional usage of the term.

Soft positivism accepts that policy can be part of law. At this general level, it is not in conflict with policy-oriented jurisprudence. However, the two conceptions of international law are in conflict over the manner and extent that policy is incorporated into law. Soft positivists might charge that the policy-oriented conception gives excessive weight to policy, or is insufficiently determinate in its application of policy.

A key intellectual task in policy-oriented jurisprudence is the clarification of standpoints. Undertaking this task brings into focus points of agreement and disagreement about whether the policy-oriented conception of law excessively or indeterminately incorporates policy into law. When the policy-oriented jurist serves as a judge, arbitrator, or counsel, in the normal case, his references to policy in identifying and applying the applicable laws go only as far as permitted by the same secondary legal rules that positivists apply, except in situations where the putative laws would lead to repugnant outcomes.

When the policy-oriented jurist steps into the role of a legal scholar recommending alternative visions of what the law could be, he is less constrained in imagining the law. The scholarly application of the policy-oriented conception of law appears incompatible with the positivist conception of law. Policy-oriented jurisprudence conceives of law as an authoritative and controlling process of decision-making to maximize human dignity. Legal rules do not matter solely because of their formal

legal pedigree. It also matters whether they are accompanied by expectations of compliance, the extent to which they are in fact controlling, and whether their prescriptions promote world values. Conversely, practices without formal legal pedigree are relevant if they institutionalize expectations of compliance and accord with human dignity. In contrast, positivism conceives of law very differently. At the risk of being overly reductive, it conceives of law as a body of rules derived from secondary rules identifying formal legal sources.

Part III suggests that although the policy-oriented and positivist conceptions of law are incompatible in this regard, this is not a meaningful conceptual disagreement because the disagreement arises from commitments that are anterior to conceptualizing law. These commitments, which this Article terms pre-concept commitments, are not of a conceptual nature. They are instead commitments that are normative in nature,[29] and concern the purpose of law and the value of semantics. Because of their different pre-concept commitments, positivists and policy-oriented jurists have undertaken different intellectual tasks concerning different systems under their respective inquiries. Without agreement on pre-concept commitments, it is difficult to have meaningful conceptual disagreements.

Part IV makes several interlocking recommendations to address this conflict of pre-concept commitments and tests its proposals against the International Court of Justice's Wall Opinion and the United States' invasion of Iraq. The first proposal is that decision-makers should clarify what they mean by the term "law," so they can, at a minimum, meaningfully agree and disagree with each other. With an adjustment of semantics, positivists and policy-oriented jurists should be able to choose either conception of law without causing confusion. They may even subsequently accept *renvoi* to the other conception if a situation requires. The second proposal is to resolve the conflict through institutional settings that have hierarchies of conceptions of law. The third proposal is to address the conflict through an international decision-making process in which claims and counterclaims about conceptions of law are exchanged until an equilibrium is achieved.

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29. "Normative" is used here in contrast to "descriptive" or "conceptual." *See* Jeremy Waldron, *Normative (or Ethical) Positivism*, *in* HART'S POSTSCRIPT 411, 411, *supra* note 1 (discussing meanings of "normativity" and using normative in the same sense as it is used here).

II. LAW AND POLITICS

Myres S. McDougal and Harold D. Lasswell began working on the policy-oriented approach to law at Yale University over sixty years ago.[30] As the policy-oriented approach developed, observers conferred upon it the alternate appellation, "the New Haven School," in recognition of its geographical and intellectual locus and its worldwide epistemic community of adherents. The New Haven School conceives of law as a global process of authoritative and controlling decision-making to address international problems and to maximize human dignity.[31] Normative concerns are explicitly considered and included in the criteria for legal validity.

From its inception, the New Haven School has provoked strong responses from positivists.[32] This may have been due in part to McDougal's iconoclastic persona.[33] But it was also possibly due to perceptions that the New Haven conception of law was diametrically opposed to the positivist conception of law.[34] Generally speaking, positivists conceive of law as a system of rules that regulate the conduct of those to whom the rules address.[35] Ulrich Fastenrath has explained that

30. *See generally* Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

31. *See* Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence & Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316, 319 (1999) ("First, law is conceived of as an ongoing process of authoritative and controlling decision.").

32. *See* David J. Bederman, *Appraising a Century of Scholarship in the American Journal of International Law*, 100 AM. J. INT'L L. 20, 41 (2006) ("So powerful was this new approach—and generally unprecedented and subversive—that it naturally started to draw sharp critiques.").

33. *See* W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935, 939 (1999) [hereinafter Reisman, *Theory About Law*] ("McDougal's image . . . in the collective mind of the academy and the profession [was that of an] *enfant terrible* and destroyer of the law . . . .").

34. *See* Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 561 (2007) ("The New Haven School expressly intended to criticize both legal formalism and legal positivism in international law."); Rosalyn Higgins, *Diverging Anglo-American Attitudes to International Law: Introductory Statement*, 2 GA. J. INT'L & COMP. L. (SUPP. 2) 1 (1972) (recording Rosalyn Higgin's observations about skepticism of British scholars towards mixing policy with legal rules); Julien Cantegreil, *Legal Formalism Meets Policy-Oriented Jurisprudence: A More European Approach to Frame the War on Terror*, 60 ME. L. REV. 97, 99 (2008) (noting that the policy-oriented approach is "diametrically opposed to the Kelsenian spirit").

35. *See* Simma & Paulus, *supra* note 27, at 304 ("Law is regarded as a unified system of rules . . . ."); Ulrich Fastenrath, *Relative Normativity in International Law*, 4 EUR. J. INT'L L. 305, 307 (1993) ("Legal positivism identifies law with legal propositions (*Rechtssätze*), i.e. the wording of positive rules . . . .").

legal validity in positivism is determined by "a law-creating process, without affecting normative content."[36]

Because these two articulations of international law are radically different, some jurists believe that never the twain shall meet. Whereas positivists in general exclude politics as a criterion of legality, some jurists believe that New Haven jurisprudence conflates law with politics.[37] Others have even gone so far as to charge that the New Haven School served United States foreign policy interests.[38]

In the author's view, this is a false conflict because the charge that the New Haven conception of law confuses politics with law is conceptually inaccurate. The school does incorporate policy in the legal process, but explicitly distinguishes policy from politics. To explain this point, a somewhat lengthy exposition of the New Haven conception of law is necessary.[39]

The New Haven School is principally interested in guiding decision-makers about how to act in an international problem or situation. It is less interested in only identifying and applying rules that the world community might ordinarily term "laws."[40] Thus, the New Haven School conceives of law not just as a body of laws identified by reference to past decisions (whether judicial, legislative, or executive) that have been designated by a secondary rule of identification as a law. Law is instead conceived of as an authoritative and controlling process of decision-making to address problems and secure maximum human dignity. This formulation might seem inaccessible to lawyers unfamiliar with New Haven syntax and vocabulary,[41] so each element is explained in turn below.

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36. *Id.* at 307. Fastenrath's exposition seems a little simplistic, because it does not account for the soft positivist conception of law. *See infra* Part III. *See generally*, Benedict Kingsbury, *Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law*, 13 EUR. J. INT'L L. 401 (2002) (explaining normative positivism).

37. *See* Simma & Paulus, *supra* note 27.

38. *See* Hari M. Osofsky, *A Law and Geography Perspective on the New Haven School*, 32 YALE J. INT'L L. 421, 424 (2007) ("The School has been accused of . . . serving as apologists for U.S. foreign policy."); O'CONNELL, *supra* note 2, at 70 ("The harsher criticism of the New Haven School was aimed at McDougal's evident promotion of United States policy."); Reisman, *Theory About Law*, *supra* note 33, at 939 (noting that critics have accused policy-oriented jurisprudence of promoting American values).

39. For other expositions of the New Haven conception of law, *see* JOHNSTON, *supra* note 23, at 115–22; Cantegreil, *supra* note 34, at 99.

40. 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) ("[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.").

41. *See* Burns H. Weston, *McDougal's Jurisprudence: Utility, Influence, Controversy*, *supra* note 27, at 266 (noting that some audiences find New Haven vocabulary inaccessible). The author

In its ordinary semantic usage, "laws" often refers to rules, commands, or prescriptions that have been designated as "legal" because they have been identified in the past in a court or legislature or executive decision. In the international context, a past decision includes accepted sources and secondary rules of identification, such as treaties.[42]

To the New Haven scholar, however, the identification of a law according to predetermined secondary rules fails to provide adequate guidance to relevant actors about appropriate conduct. The actor will want to know how the rule is communicated, to whom, and with what effect. The actor will also want to know whether the rule reflects his interests and whether it is good policy. To the extent that the actor's interests deviate from good policies for the community at large, the New Haven scholar may take an external perspective and try to persuade the actor to set aside his parochial interests in favor of shared world values.[43] Because identifying a rule as a law through past formal decisions alone could obscure the intellectual tasks described here, the New Haven School resists characterizing rules, standing alone, as law.

An example might make this point clearer. The New Haven scholar would accept that the Genocide Convention contains rules prohibiting genocide,[44] as defined under the Convention.[45] But the New Haven scholar would not stop there in studying the international legal system. He would want to know how the Genocide Convention is communicated to potential and actual genocidal regimes and with what effect. He would want to know when and why genocide occurs and when it does not. He would study prior incidents in which genocide took place, genocide was prevented, or genocide was stopped. Based on the information he collects, the New Haven scholar would make recommendations to relevant actors, including state officials, courts, and non-governmental organizations. These recommendations are intended to coordinate their strategies in an authoritative and controlling fashion to prevent genocide from occurring, to stop it when it occurs, and to take remedial actions to ameliorate its consequences. The New Haven scholar is concerned with the entire

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intentionally describes the New Haven conceptualization prosaically in an effort to address this criticism.

42. *See* Statute of the International Court of Justice, art. 38(1), June 26, 1945, 59 Stat. 1055, 1060; *cf.* ROSALYN HIGGINS, *supra* note 18, at 3 ("'[R]ules' are just accumulated past decisions.").

43. For an excellent discussion of how legal advisors should, and in fact do, balance the interests of their government with broader ethical and policy concerns, see JOHNSTON, *supra* note 23, at 66–70.

44. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

45. *Id.* art. II.

process in which relevant actors, such as states, officials, courts, non-governmental organizations, international organizations, and corporations communicate past decisions to each other about the issue at hand; how they interact and address problems; and how good outcomes may be secured in the present and future.

To count as law, as opposed to random or unlawful processes, the process of interaction must be authoritative and controlling. By "authority," the New Haven School means "expectations of appropriateness" at each stage of the process in which problems are addressed.[46] These expectations come from a combination of factors. Each of these factors can be explained and illustrated with a hypothetical arbitration between two states concerning sovereignty over a disputed territory.[47]

A first factor is whether the decision-maker has been properly endowed with decision-making power, such as an arbitrator selected by two states to resolve their dispute over whether a disputed territory should be restored to one or the other state.[48]

A second factor is whether the decision-maker is pursuing proper objectives, such as the reduction of conflict, rather than unacceptable personal goals, such as the pursuit of bribes.[49]

A third factor is whether the decision supports relevant world values. So, an arbitral award that purports to authorize a state to recapture the invaded territory through any means, including genocide, would be unlawful. This is because permitting genocide is bad policy, and strong international decisions have been made, in the form of the Genocide Convention and analogous *jus cogens*, to reject this policy.

A fourth factor is whether the decision was made in a proper physical, temporal, and institutional context. [50] Continuing our arbitration example, this includes requirements that the arbitral award should be rendered after

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46. Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL EDUC. 253, 256 (1967).

47. Although this example is constructed hypothetically, Reisman has served as arbitrator and as counsel in at least two actual territorial disputes. *See* Eritrea-Ethiopia Boundary Commission Decision, http://www.un.org/NewLinks/eebcarbitration/EEBC-Decision.pdf; Case Concerning Land Reclamation by Singapore in and Around the Straits of Johor (Malay. v. Sing.), Request for Provisional Measures, ITLOS/PV.03/05 (Int'l Trib. For the Law of the Sea, Sept. 27, 2003) Hearing Tr. 28:16–33:27.

48. *See* W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, 1989 DUKE L.J. 739, 745 (1989).

49. *See generally* Jason N. Summerfield, *The Corruption Defense in Investment Disputes: A Discussion of the Imbalance Between International Discourse and Arbitral Decisions*, 6 TRANSNAT'L DISP. MGMT. 1 (2009) (appraising corruption in arbitration from a New Haven perspective).

50. *See* McDougal, Lasswell & Reisman, *supra* note 46, at 266.

a hearing, while the dispute is still alive and of a legal nature, and in accord with the rules of the arbitration center designed by the arbitration agreement.

By "controlling," the New Haven School means decisions and processes that actually direct outcomes. Whereas "authority" has normative and factual elements, "control" is purely a question of fact. So, an arbitral award is controlling if it causes the disputing states to follow the decision, or to oppose it in ways that were contemplated in advance as acceptable and appropriate, such as by challenging enforcement in a national court, seeking annulment before a review committee, or settling the dispute.

If law is a process of authoritative and controlling decisions, is a decision that is authoritative but not controlling still law? In the arbitration example, if the award is effectively ignored by the losing party, is it still law? The New Haven School would resist designating the award as not law simply because it is not controlling for a period of time. Few international processes are fully authoritative and fully controlling. Law is not a binary conception in which the process is most usefully designated as either lawful or not lawful.[51] There can be shades of grey in an international process that addresses problems. Depending on how authoritative and controlling it is, it may be more or less like law. Because law is seen as the entire process of decision-making, the New Haven School would not necessarily characterize the ignored award as not law in the first instance. Instead, it would focus on whether and how the award could be implemented in the face of a losing party that seems, at least for the moment, intent on and able to ignore the award.

If, however, the award were never complied with, and indeed a majority of the awards rendered under the arbitral institution are effectively ignored over a significant time period, the New Haven School might explain that although the arbitral institution and awards had the formal appearance of law, in substance they had ceased to function as law because of the utter lack of control. Over time, the awards may not even be authoritative in the sense that parties in arbitration may not have any expectation that the appropriate conduct is to comply with the award. If it became the situation that most arbitrations under the arbitral institution were reduced to *kabuki*, New Haven scholars might characterize the arbitration proceedings as a "myth system" in which awards were rendered

51. *Cf.* Tai-Heng Cheng, *The Central Case Approach to Human Rights: Its Universal Application and the Singapore Example*, 13 PAC. RIM L. & POL'Y J. 257 (2004) (rejecting binary approach to human rights in favor of a central case approach).

and supposedly "lawful" in the ordinary semantic usage of that word. This myth system would exist alongside an "operational code" in which the world community understands that the award would be effectively ignored. From the functional New Haven perspective, an ignored award from an arbitral institution that is broken could not be considered law even if it is designated as such by formal sources.[52]

An international decision that is controlling but not authoritative may also seem less like law. At the extreme, if a decision is made with such power that it controls outcomes, but is otherwise not authoritative, that decision may not be lawful. So a rogue state (or a powerful state—take your pick) that uses conventional weapons or weapons of mass destruction unprovoked, or under an artificial fig leaf of self-defense, may well control at least one outcome: the destruction of the state attacked. But the act of aggression would not be lawful. From the New Haven perspective, the designation of the act as unlawful is insufficient. The New Haven scholar is interested in also making recommendations to relevant actors in the global community to respond in an appropriate process to restore world order.

There is one more element of the New Haven conception of law that needs explanation. The ideas of authority and law are entwined with the goal to which the process of law is directed. The New Haven School has designated the promotion of human dignity to be the preeminent goal. The normative quality of law comes in part from the values it promotes. These values are designated in shorthand form by the phrase "human dignity." This capacious term includes values such as affection, respect, and well-being.[53] At its margins, scholars may debate whether a value is intrinsic to human dignity, such as an overly expansive or idiosyncratic notion of democracy. But there are clear instances in which an otherwise authoritative and controlling decision would not be law because the decision is abhorrent to human dignity. If an award purported to authorize a state to commit genocide as a self-help measure to reclaim its territory, the award would not be regarded as lawful. Its lawless nature would not be due only to the Genocide Convention and *jus cogens* prohibiting genocide. It would also be due to the self-evident policy against genocide.

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52. *See generally* Michael Reisman, *Myth System and Operational Code*, 3 YALE STUD. WORLD PUB. ORD. 229 (1977). Reisman's separation of law into a myth system and operational code may be conceptually compatible with some forms of positivism, because it can be accommodated within a sophisticated rendering of the rule of recognition that allows the community to distinguish between rhetorical claims and actual prescriptions that are followed.

53. LASSWELL & MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 2, at 375–590.

In summary, the New Haven School conceives of law not just as a static body of rules, but as an authoritative and controlling process through which social ends are constantly negotiated, adjusted, and secured.[54] The New Haven conception is part descriptive, for it describes the international process involved in preventing and resolving international problems. It is part normative, for it identifies social goals to not only direct the process but also to serve as a heuristic for the legality of the process. It is also part prescriptive, because it makes recommendations to a wide range of decision-makers about appropriate actions and responses. But, perhaps ironically to some observers, it is not dogmatic. As an instrumentalist conception of law, it is open to making recommendations to decision-makers to use whatever tools are necessary or legitimate to achieve the social goals. These tools include, but are not necessarily limited to, legal rules.

Nothing in the foregoing exposition of the New Haven conception of law incorporates politics into the criteria for law. Yet, critics have contended that "policy" functions as a code word for "politics."[55] Perceptions that McDougal used the New Haven conception of law to advance American interests may have fueled this suspicion.[56]

Space constraints here make it impossible to determine whether each of McDougal's interventions injected politics into law, or whether they simply reflected the promotion of universal human values.[57] In any event, such an exercise would not get us very far in determining whether the New Haven conception of law conflates law with policy. Just as positivists may legitimately disagree with each other about the correct application of a rule to facts without necessarily indicating that the positivist conception of law conflates interests with rules, New Haven jurists may take controversial positions in an international problem without necessarily indicating that the New Haven conception of law folds law into politics. Even if in a particular problem a New Haven jurist incorporated law into politics, that

54. *See* Harold Hongju Koh, *A World Transformed*, 20 YALE J. INT'L L. ix, xii–xiii (1995) (explaining that the New Haven School seeks to develop "a functional critique of international law in terms of social ends . . . that shall conceive of the legal order as a process and not as a condition." (quoting Roscoe Pound, *Philosophical Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 73, 89 (1932))).

55. *See* JOHNSTON, *supra* note 23, at 121 (attributing this view to Richard Falk).

56. *See id.* at 119 ("McDougal himself was seen as an unabashed advocate for US foreign policy . . . ."); Edward McWhinney, Book Review, 87 AM. J. INT'L L. 335, 338–39 (1993) (reviewing HAROLD D. LASSWELL & MYRES S. MCDOUGAL, JURISPRUDENCE FOR A FREE SOCIETY (1992)).

57. *See* Reisman, *Theory About Law*, *supra* note 33, at 939 (noting Eisuke Suzuki's argument that the commitment to human dignity, which is core to New Haven jurisprudence, was a universal value, not an American value).

may simply be a misapplication of the New Haven conception of law, just as positivists may apply a wrong rule of law without undermining the conception of law itself.

Any appraisal of the New Haven conception of law should not be transfixed on its applications to problems that occurred decades ago. In historical and contemporary applications, New Haven jurists have taken positions contrary to prevailing United States national policies or interests.[58] Following the United States' invasion of Iraq in 2003, Reisman made the following critique of regime change: "Let the strongest and best-intentioned government contemplating or being pressed to undertake regime change remember that not everything noble is lawful; not everything noble and lawful is feasible; and not everything noble, lawful, and feasible is wise."[59] In response to the Bush doctrine of preemptive force, Reisman warned that the Bush doctrine could pose a threat to world order, because it encouraged other states to claim similar preemptive rights.[60] These appraisals contradict the claim that New Haven jurisprudence blindly promotes United States foreign policies.

Further, the policy-oriented conception of law disavows not just biases towards United States interests, but the injection of politics into the New Haven conception of law. Consider the following passage written from the New Haven perspective:

> A . . . point of importance is the need to observe *yourself* as the instrument of observation and choice. . . . . [T]he responsible decisionmaker or appraiser should develop methods for scrutinizing the self-system and determining the extent to which emotional

58. *See* Rosalyn Higgins, *The Benign First Mate*, *in* LAW IN THE SERVICE OF HUMAN DIGNITY: ESSAYS IN HONOUR OF FLORENTINO FELICIANO 11 (Steve Charnovitz et al. eds., 2005) [hereinafter FELICIANO] ("Feliciano's life in the law is a silent rebuttal to those who contend that a policy-oriented approach to law is but a façade for politics . . . ."); Tai-Heng Cheng, *Power, Authority and International Investment Law*, 20 AM. U. INT'L L. REV. 465, 508–12 (2005) (criticizing the *Loewen* award for refusing to find jurisdiction over NAFTA dispute arising from lack of due process in Mississippi courts); Julien Cantegreil, *The Final Award in* Mondev International v. United States of America, *in* THE REASONS REQUIREMENT IN INTERNATIONAL INVESTMENT ARBITRATION: CRITICAL CASE STUDIES 33, 50–57 (W. Michael Reisman & Guillermo Aguilar Alverez eds., 2008) [hereinafter THE REASONS REQUIREMENT] (criticizing the *Mondev* Award for finding in favor of the United States based on inadequate reasoning).

59. W. Michael Reisman, *Why Regime Change Is (Almost Always) A Bad Idea*, 98 AM. J. INT'L L. 516, 525 (2004).

60. *See generally* W. Michael Reisman & Andrea Armstrong, *The Past and Future of the Claim of Preemptive Self-Defense*, 100 AM. J. INT'L L. 525 (2006).

> tendencies, sub-group parochialisms or institutional biases are distorting or skewing observation and choice.[61]

Thus, regardless of the allegation that some appliers of the New Haven jurisprudence might have injected politics into their appraisals (just as scholars and advocates using any conception of law may do so intentionally or inadvertently), the New Haven conception of law does not incorporate partisan politics as a criteria for legal validity.[62] The perception that policy-oriented jurisprudence and positivism disagree about the incorporation of politics as a criterion for legality is thus a false conflict.

III. LAW AND POLICY

Another perceived conflict between positivism and New Haven jurisprudence is the apparent rejection of policy by the former and the explicit consideration of policy by the latter. This conflict is more complex than some observers understand. Whether or not there is a conflict depends on whether one adopts a hard or soft positivist conception of international law. This is at least partially a false conflict because soft positivists accept that legal validity can have normative or policy criteria. Hard positivists, however, contend that the conception of law cannot admit normative criteria for legal validity, which must be confined to social facts. Yet, if this is true, hard positivists are also in conflict with soft positivists on this point. In any event, the hard positivist conception of law does not accord with the ordinary understanding of the term international law and how it functions.

A. Hard and Soft Positivism

An excursus into positivism will help explain these points made above. It is perhaps an impossible task to adequately convey the sophistication of positivism here, but nonetheless an attempt will be made.

Positivism as a legal philosophy provides the conceptual framework for positivism in international law. The key intellectual goal of positivism,

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61. W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW 13 (1987) [hereinafter REISMAN & SCHREIBER, JURISPRUDENCE].

62. This does not mean, however, that New Haven jurisprudence ignores the geopolitical limitations when making proposals. *See* 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, 524 (2009); Tai-Heng Cheng, *Why New States Accept Old Obligations*, 2011 U. ILL. L. REV. 1, 41 (describing and applying "realistic normativity" of the New Haven school).

according to its preeminent philosophers, H.L.A. Hart and Hans Kelsen, is to describe the conception of law by reference to a central case or ideal type of legal system.[63] This descriptive enterprise is "morally neutral and has no justificatory aims."[64] Hart's ideal type was domestic legal orders, in particular England. Kelsen's ideal types were positive laws from domestic legal orders, such as the United States or France, or, importantly for international law positivists, international law. Regardless of the legal system, Kelsen included within his field of inquiry only "positive law."[65]

At its core, positivism conceives of law as a body of rules identified as laws by reference to past decisions acknowledged as providing the rules with legal pedigree. Law is therefore a social fact.[66] Kelsen conceptualized his "pure theory of law" as a body of rules ultimately emanating from a *Grundnorm*, or basic validating norm, such as the very first constitution in a legal order.[67]

For many Anglo-American legal philosophers, Hart developed an enduring version of positivism. According to Hart, a legal system exists if two social facts exist. First, officials accept secondary rules, the most important of which is a second rule of recognition, prescribing the validity of primary rules. Second, there is a general acceptance by the community, to whom rules are addressed, of primary rules identified as valid by secondary rules and the rule of recognition.[68] The rule of recognition is a

63. *See* HART, THE CONCEPT OF LAW, *supra* note 25, at 239 (stating that *The Concept of Law* "seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule-governed (and in that sense 'normative' aspect.)"); *id.* at 100 (focusing on "the salient features of a modern municipal legal system").

64. *See id.* at 240 ("My account is *descriptive* in that it is morally neutral and has no justificatory aims: it does not seek to justify or commend on moral or other grounds the forms and structures which appear in my general account of law . . . ."); HANS KELSEN, GENERAL THEORY OF LAW AND STATE (A. Wedberg trans., 1945), *reprinted in* REISMAN & SCHREIBER, JURISPRUDENCE, *supra* note 61, at 381 (1987) ("[T]he aim of this general theory of law is to enable the jurist concerned with a particular legal order . . . to understand and describe as exactly as possible his own positive law . . . ."). Other positivists have since argued that positivism is not entirely free from normativity. *See* Waldron, *supra* note 29, at 411–12; John Finnis, *H.L.A. Hart: A Twentieth-Century Oxford Political Philosopher: Reflections by a Former Student and Colleague*, 54 AM. J. JURIS 161, 171 (2009) ("Hart's late-period work also shows the extent to which he was willing to admit, at least by implication, that the asserted autonomy of political from moral philosophy was unsustainable.").

65. KELSEN, *supra* note 64, at 382 ("[T]he pure theory of law seeks to attain its results exclusively by an analysis of positive law.").

66. In an earlier version of positivism, Austin stated: "Laws proper or properly so called, are commands: laws which are not commands, are laws improper or improperly so called." JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 1–3, at vii (1832); *but see* HART, THE CONCEPT OF LAW, *supra* note 25, at 79 (criticizing Austin's conception of law for failing to distinguish law from orders issued at gunpoint).

67. *See generally* KELSEN, *supra* note 64.

68. HART, THE CONCEPT OF LAW, *supra* note 25, at 100–23; *see also* Stephen Perry, *Hart's Methodological Positivism*, *in* HART'S POSTSCRIPT, *supra* note 29, at 319.

social rule or custom constituted by a regular pattern of conduct and by a "distinctive normative attitude" accepting the rule of recognition. This normative attitude is the rule of recognition's "internal aspect."[69]

After Ronald Dworkin launched a stinging attack on Hart's concept of law,[70] Hart clarified in his postscript to *The Concept of Law* that he did not exclude from his conceptualization of law the possibility that a rule of recognition could, although it need not, prescribe moral or normative criteria (or, in New Haven speak, policy criteria) for the validity of primary rules.[71] This version of positivism has become know as soft, or inclusive, positivism. Soft positivism contrasts against hard, or exclusive, positivism. Joseph Raz, perhaps the leading hard positivist, argues that a conceptualization of law cannot include policy or moral criteria for the validity of law, because that would undermine law's unique claim to authority and render it contingent upon morality.[72]

Positivists in international law share some key postulates with their cousins in legal philosophy. The function of their conceptualization of law is to identify laws. Unlike New Haven jurists, positivists see their conceptual function as "not to facilitate the decision maker's dilemma between law and politics (and, occasionally, between law and morals), but to clarify the legal side of things."[73] Their ideal type of international law is the rules or norms governing international relations. Prosper Weil has asserted that "the aggregate of the legal norms governing international relations" is "an uncontroversial starting point."[74]

Arising from their observation of this ideal type, Bruno Simma and Andreas L. Paulus have stated that all international law positivists are committed to the conceptualization of law in the following terms: "Law is regarded as a unified system of rules that, according to most variants, emanate from state will. This system of rules is an 'objective' reality and needs to be distinguished from law 'as it should be.'"[75] In the language of

69. HART, THE CONCEPT OF LAW, *supra* note 25, at 56.

70. *See* DWORKIN, *supra* note 1, at 45–46.

71. HART, THE CONCEPT OF LAW, *supra* note 25, at 250–54; *see* Jules Coleman, *Negative and Positive Positivism*, 11 J. LEGAL STUD. 139 (1982).

72. *See generally* JOSEPH RAZ, THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY (1979); *see also* Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, *in* HART'S POSTSCRIPT 99, *supra* note 29, 102; Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, *in* HART'S POSTSCRIPT 355, *supra* note 29, 355 (both discussing hard and soft positivism).

73. Simma & Paulus, *supra* note 27, at 307.

74. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413, 413 (1983) (quoting P. GUGGENHEIM, TRAITE DE DROIT INTERNATIONAL PUBLIC (2d ed. 1967)).

75. Simma & Paulus, *supra* note 27, at 304.

legal philosophy, international law positivists accept, as do their jurisprudence counterparts, what Brian Leiter has termed the Separation Thesis (what law is and what law ought to be are separate questions), and the Social Thesis (what counts as law is fundamentally a question of social fact).[76]

Where "classical" and "modern" positivists part company is in their criteria for validity of international laws. Simma and Paulus explain that "[c]lassic positivism demands rigorous tests for legal validity. Extralegal arguments, e.g., arguments that have no textual, systemic, or historical basis, are deemed irrelevant to legal analysis; there is only hard law, no soft law."[77] Their insistence on a precise rule of recognition could necessitate, or at least explain, classical international law positivists' rejection of normative or policy criteria for legal validity. Ambiguities in normative criteria would render the rule of recognition uncertain and undermine the concept of law as social fact. In general jurisprudence, this is Dworkin's Conventionality Thesis.[78] Brigitte Stern additionally echoes Raz's argument that law's distinctive authority normatively must be internally defined without reference to external values and policies.[79]

In comparison, modern international law positivists seem more like soft positivists. They acknowledge that "soft law" may be a sort of law even though their criteria for validity is more open-textured.[80] They also appear to accept the introduction of policy as long as it is prescribed as a relevant consideration by a law. Simma and Paulus state that in circumstances where there does not appear to be only one correct legal answer, the positivist may derive a legal answer by injecting his "ethical standpoint," for instance, through the application of "general principles of law," or insofar as "global values . . . find sufficient expression in legal form."[81]

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76. Leiter, *supra* note 72, at 356–59.

77. Simma & Paulus, *supra* note 27, at 304.

78. DWORKIN, *supra* note 1, at 114–50; *see also* Coleman, *supra* note 72, at 99, 102 (noting that Dworkin's reason for excluding moral criteria is that such criteria are uncertain and undermine law's conventionality and that Dworkin "takes exclusive positivism to be the best and, indeed, only coherent version of legal positivism: a coherent but mistaken jurisprudence.").

79. Brigitte Stern, *Custom at the Heart of International Law*, 11 DUKE J. COMP. & INT'L L. 89, 93–94 (2001) (refusing to "refer to an extra-legal element justifying the passage from fact into law in the customary phenomenon as an approach which is foreign to a veritable legal science" and concluding that "law is nothing but a particular factual modality, a legal order that can define itself as a factual order considered as law, without anything needing to be added to this definition.").

80. Simma & Paulus, *supra* note 27, at 306.

81. *Id.* at 316; *see* Wiessner & Willard, *supra* note 31; *see also* HART, THE CONCEPT OF LAW, *supra* note 25, at 304; JOHNSTON, *supra* note 23 (citing the soft positivist Hart in support of their conception of classical positivism).

The perceived conflict between the New Haven conception of law and positivists regarding whether policy is a criterion for legal validity is not always a true conflict. Because soft positivists and "modern" international law positivists accept that legal validity could turn on more than just social facts, the references of the New Haven School to policy in determining appropriate laws is often compatible with their conception of law.

Hard positivists and "classical" international law positivists could, and indeed must, criticize the New Haven conception of law as wrongly incorporating policy into the criteria for legal validity. Raz is thoroughly rigorous in arguing that law which is contingent on morality (or, in the related New Haven vernacular, policy) does not have unique legal authority. Nonetheless, there may be some doubt as to whether law that turns on policy could be both normatively and legally authoritative. But that is a longer debate for another essay.

My response here is narrower. Hard positivism may not sit comfortably with international law for at least two other reasons.

The first reason turns on the semantic usage of the term. The author is not committed to this argument for reasons that will become apparent in Part IV of this Article. Nonetheless, he will make it for those who are committed to the value of semantics. The term "international law" in its ordinary semantic usage among international law professionals is often applied to determine the legality of conduct at least in part by normative, moral, or policy criteria. For example, customary international law and countless bilateral investment treaties often require host states to accord foreign investments "fair and equitable treatment." Numerous arbitral awards have confirmed that this standard includes normative criteria such as "legitimate investor expectations," and policy criteria, such as whether, in fact-specific contexts, the conduct of the host state promotes business stability and foreign investments.[82] A U.N. Conference on Trade and Development report states that the "meaning [of the fair and equitable standard] has not been precisely defined."[83] Under the hard positivist conception of law, the fair and equitable treatment standard could not be law, because the reference to policy is inherently controversial, so it undermines clarity in the law and the Conventionality Thesis. Yet, international lawyers, scholars, and arbitrators all regard the fair and

82. *See* Tai-Heng Cheng, *Precedent and Control in Investment Treaty Arbitration*, 30 FORDHAM INT'L L.J. 1014, 1031–37 (2007) (discussing the fair and equitable treatment standard).

83. *See* U.N. CONFERENCE ON TRADE AND DEV. (UNCTAD), BILATERAL INVESTMENT TREATIES IN THE MID-1990S, at 53, U.N. Doc. UNCTAD/ITE/IIT/7, U.N. Sales No. E.98.II.D.8 (1998).

equitable treatment standard as law. Put another way, the term "international law" includes, as a matter of common usage, imprecise legal rules and standards that contain policy and normative content as essential components. To the extent that conceptual jurisprudence is meant to explain international law as the term is ordinarily used, the inclusion of laws with ambiguous normative and policy criteria within the term "international law" poses difficulties for the hard positivist's account of international law.

There is a second related, but distinct, reason for doubting the hard positivist conception of law as applied to international law. If a purpose of conceptual jurisprudence is to explain the phenomenon of law and how it makes a practical difference "in the structure and content of deliberation and action,"[84] then a conception of law must account for laws that can and do affect how relevant actors think and behave. Returning to the example of the fair and equitable treatment standard, it is beyond doubt that host states and investors regard the fair and equitable treatment standard as functioning as law. They have spent millions of dollars in legal fees disputing whether the standard was breached in investment disputes, and host states have honored awards finding breaches of the standard. Because inherently ambiguous and normative international legal rules have affected behavior and decision-making in profound ways, it behooves jurists to conceive of law in a way that accounts for such rules.

The soft positivist and New Haven conceptions of law are both amenable to policy as a constitutive element of law. However, they may part ways over the manner in and extent to which policy is incorporated. While it is conceptually possible for the rule of recognition to refer to normative or policy criteria for validity, soft positivists may charge that the New Haven conception of law wrongly contains policy criteria or excessively favors policy criteria.

Two contrasting examples clarify this point. A modern international law positivist might accept *renvoi* to policy considerations where a legal rule explicitly contains policy considerations, such as the rule requiring host states to accord foreign investors fair and equitable treatment. If a New Haven jurist referred to the policy of promoting foreign investments in determining if a host state was fair and equitable, the soft positivist would not quarrel with this application of the New Haven conception of law.

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84. Coleman, *supra* note 72, at 101 (describing this as the practical difference thesis).

In contrast, the modern international law positivist would not accept *renvoi* to policy considerations without reference to a legal rule that incorporates normative or policy criteria for legality. Consider articles 2(4) and 51 of the U.N. Charter, which prohibit the use of military force except against an armed attack. In addressing the question of whether these articles prohibit preemptive military force against a putative enemy—which may acquire the capability to launch a devastating attack in the future—a soft positivist would be constrained by the plain and ordinary language of the articles in light of the object and purpose of the Charter, as required by article 31(1) of the Vienna Convention on the Law of Treaties of 1969.[85] The soft positivist may also consider subsequent state practices on the use of force to interpret articles 2(4) and 51 of the Charter, as mandated by article 31(3) of the Convention.[86] But the soft positivist would not countenance determining the meaning of articles 2(4) and 51, or more broadly, the legality of preemptive force, by appraising policy concerns thoroughly divorced from canons of treaty interpretation.

In contrast, a New Haven jurist would not interpret articles 2(4) and 51 solely by reference to formal rules of treaty interpretation. She would also turn to relevant world policies, such as the protection of human lives, the maintenance of world order, and the potential for abuse in unilateral assessments of future risk. A soft positivist may well charge that the New Haven conception of law incorporates policy in a mistaken manner because it did not identify any secondary rule permitting such references to policy.

But even this conflict about the manner and extent to which soft positivism and New Haven jurisprudence incorporate policy is a false conflict in many international disputes. An intellectual task of the New Haven School is the clarification of standpoint. The manner in which one discerns international law is guided by one's role and standpoint. From several of these standpoints, the application of New Haven conception of law is practically similar to soft positivism.

As a judge or arbitrator, the New Haven jurist is concerned about reaching a normatively desirable outcome, but, he is also constrained by formal secondary rules guiding the interpretation of laws and their application to facts to reach judicial decisions.[87] There are strong policy

85. *See* Vienna Convention on the Law of Treaties art. 31, Jan. 27, 1980, 1155 U.N.T.S. 331, *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

86. *Id.* art. 31(3).

87. For a detailed discussion of judging from the New Haven perspective, see W. Michael Reisman, *A Judge's Judge: Justice Florentino P. Feliciano's Philosophy of the Judicial Function*, *in*

reasons for this practice. It is good policy to generally follow a method of legal reasoning accepted as legitimate by the community, and the applicable primary and secondary rules often secure relevant community values.[88] Thus, Reisman has written that when deciding arbitral disputes, "identification of the major principle and a pellucid logical exercise would appear to be a minimum requirement."[89] This reliance on secondary rules to derive applicable laws and their logical application to relevant facts is aligned with positivism,[90] even if the New Haven School and positivists discharge their respective judging duties in this manner for different reasons.

However, in other circumstances where applying prior judicial decisions to novel circumstances would lead to manifestly absurd results, "an adaptation or even an innovation in policy" is required. Here, "a purported exercise in logical derivation, far from explaining what is being done, can only conceal what is being done."[91] This rejection of the apparently applicable secondary rules to determine laws and legal outcomes may seem to depart from positivism, and may provoke claims that the New Haven conception of law overly infuses law with policy.

Dworkin takes roughly the same position as the New Haven School on this issue. Dworkin explains that Conventionalism does permit a court to depart from binding precedent where the prior decision was "especially immoral," such as where the United States Supreme Court in *Brown v. Board of Education* departed from *Plessy v. Ferguson*, which had held that racial segregation did not violate the Equal Protection Clause of the United States Constitution.[92] Conventionalists would insist that in such a case, "the Court should have made plain to the public the exceptional nature of its decision, that it should have admitted it was changing the law for nonlegal reasons."[93] This is similar to Reisman's suggestion that where

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FELICIANO, *supra* note 58, at 3–10.

88. *See id*. at 7–10. Reisman has explained his decisions in accord with these two policies. *See, e.g.*, Dispute Concerning Access to Information under Article 9 of the OSPAR Convention (Ir. v. U.K.), Final Award (Perm. Ct. of Arb. 2003) at 61, http://www.pca-cpa.org/upload/files/OSPAR%20 Award.pdf (Decl. of W. Michael Reisman) (proposing "plain reading of [a treaty provision because it] appears to both reflect its objects and purposes *and* to produce a reasonable and economic means for implementing [the obligations in the provision].").

89. W. Michael Reisman & Guillermo Aguilar Alvarez, *How Well Are Investment Awards Reasoned?*, *in* THE REASONS REQUIREMENT 1, *supra* note 58, at 30.

90. *See, e.g.*, Dispute Concerning Access to Information under Article 9 of the OSPAR Convention, *supra* note 88.

91. W. Michael Reisman & Guillermo Aguilar Alvarez, *How Well Are Investment Awards Reasoned?*, *in* THE REASONS REQUIREMENT 1, *supra* note 58, at 30.

92. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Plessy v. Ferguson, 163 U.S. 537 (1896).

93. *See* DWORKIN, *supra* note 1, at 119.

prior decisions would lead to grossly suboptimal outcomes in contemporary contexts, a judicial decision to reach a different outcome is permissible but should be explained in policy terms rather than in seemingly logical extensions of prior decisions.

From a scholarly standpoint, the New Haven School and positivism may part ways. As a scholar, the New Haven jurist is relatively unfettered by judicial constraints. The scholar may imagine alternative visions of law that better promote relevant policies and social goals, and recommend to decision-makers methods to achieve those visions.[94]

In order to imagine alternate configurations of world order that better promote community values, the New Haven School conceives of law as an authoritative and controlling process of decision-making to address problems and to secure maximum human dignity. So conceived, laws that do not secure compliance, or which are not accompanied by expectations of compliance by the world community to which they are addressed, do not adequately describe the relevant legal system. Conversely, norms, customs, or practices that lack formal legal pedigree, but which are either accompanied by expectations of compliance by the world community or which in fact secure compliance, may be studied as part of the legal system.

In contrast, positivism conceives of law as a system of rules, in which their legality turns on their formal legal pedigree even if—as is the case in international law—this pedigree is often unaccompanied by expectations of compliance. From the scholar's standpoint, these two conceptions of law appear to be conceptually incompatible.

B. Pre-concept Commitments

Even though soft positivism and New Haven jurisprudence may be in conflict as regards the manner and extent that policy is incorporated into law, this conflict is not really a meaningful conceptual disagreement. This is because the two concepts are respectively predicated upon different pre-concept commitments. Pre-concept commitments are normative choices that must be made to develop or describe a conception. These commitments or choices include the function of inquiry, the ideal type to observe, and the value of semantics. If two parties disagree on any one of these pre-concept commitments, their disagreements about

94. *See* LASSWELL & MCDOUGAL, *supra* note 2, at 38.

conceptualizations of their respective objects under inquiry may be meaningless.

A thought experiment illustrates these points. Suppose that the conception of a table is the subject of philosophical inquiry. Philosopher A is interested in putting forth the best interpretation of a table to enable carpenters to build dining tables, whereas Philosopher B is interested in describing criteria for a table as it exists in its various forms. A's conception of a table may well specify that tables must be large enough to seat at least two persons and strong enough to bear the weight of china and silverware. B's conception of a table may specify that a table simply needs to be a piece of furniture in which a flat surface is elevated about four feet from the ground by one or more vertical legs. It is not possible for A and B to meaningfully disagree on their concepts of a table because their function of inquiries are different. They may certainly debate their preferred purposes of philosophizing, but this is not a conceptual debate.

Philosopher C enters into a debate with B. B's ideal type of a table is extrapolated from the salient characteristics common among tables in his home. C, however, comes from a different culture in which people sit cross-legged on the floor and designate as a table what others might ordinarily call a tray. C's conception of a table will be radically different than B's conception because their ideal types, or the representative data they observed to conceptualize, are different. Again, to assert that B and C disagree about the conception of a table is not meaningful, because they are simply speaking about different things.

C leaves in a huff, and in comes D. D is a scientist with aesthetic pretensions. He has invented a stable platform that is suspended in the air by magnetic fields created by a machine installed beneath floorboards. B, who is committed to the semantic usage of the word "table" insists that the conception of a table cannot be extrapolated from the floating platform because no one in the community would use the word "table" in that way. D, however, does not share the same commitment to semantic usage of words. In his view, what matters more is whether the platform serves the same function as a table. Because it is a stable flat surface parallel to the ground on which a person could eat, read, and write, the conception of a table must include his platform.

The point here about disagreements over commitments to the value of semantics is different from Dworkin's semantic sting argument. Dworkin argued that philosophers must agree on roughly the same criteria for a conception denoted by a word before they can have a meaningful disagreement on that conception. So, according to Dworkin, if you do not count his copy of *Moby Dick* as a book because, in your view, novels are

not books, "any agreement is bound to be senseless" because you and Dworkin are using the word "book" in completely different ways.[95] Raz disagrees with Dworkin. In Raz's view, in the ordinary course of human interaction, you would not insist that *Moby Dick* is not a book and you would apologize for your mistake.[96] According to Raz, "[c]riterial explanations of concepts are consistent with the fact that people who use the rules setting out these criteria may make mistakes about which criteria are set by the rules."[97]

Although Raz is correct that people can make mistakes about semantic criteria without invalidating criterial explanations, he seems to miss Dworkin's point. If a person is committed to different semantic criteria, then it is impossible to engage in a meaningful disagreement with him about the conception denoted by the word being used. Take for example, the word "consideration." A person committed to the semantics of its ordinary usage may say the conception of consideration entails deliberately thinking about an idea. A lawyer, who does not share those semantics, but is committed to the specialized semantics of his profession, asserts that the concept of consideration is a bargained-for exchange of something of legal value. The lay person and the lawyer may disagree about their concepts of consideration, but they are speaking past each other.

In any event, the author's point about the value of semantics does not stand or fall on whether Dworkin or Raz is correct, because he makes a slightly different point. The author's point is that for there to be meaningful conceptual disagreement, the disagreeing parties must share roughly the same pre-concept commitment to the value of semantics in conceptualizing. Without this commitment, a philosopher may determine a conception by the functions ascribed to it by the community, rather than by its ordinary semantic meaning of the word representing the conception. This conception could be quite different from the conception shackled to the semantic usage of the word representing the conception. So, Scientist D is not committed to semantics about how an object appears, but instead focuses on how an object functions, so he designates his platform as a table. B, who is committed to semantics, does not believe the word table and its associated conception includes platforms. Yet D and B cannot have

95. *See* DWORKIN, *supra* note 1, at 45.

96. Joseph Raz, *Two Views on the Nature of the Theory of Law: A Partial Comparison*, *in* HART'S POSTSCRIPT 1, *supra* note 29, at 17 (making the point with reference to a disagreement about tables and sideboards).

97. *Id.* at 19.

a meaningful conceptual disagreement. They could certainly have a meaningful disagreement about semantic commitments, but this would be anterior to conceptual debate.

We can now apply our discussion about pre-concept commitments to the apparent conceptual incompatibility between the New Haven School and positivists. In the author's view, it is difficult for New Haven jurists and positivists to engage each other about conceptual differences because they disagree about all three pre-concept commitments.[98]

As regards the function of jurisprudence, the New Haven conception of law seeks to provide guidance to decision-makers about what to do to authoritatively secure maximum human dignity. International law positivists adopt as key functions of jurisprudence describing law as distinct from policy, ethics, or morality, and providing the best explanatory or descriptive account of law as a system of legal rules.[99] Not surprisingly, the New Haven School takes as its starting point law as the process of decision-making, whereas positivists take as their starting point law as a body of rules.[100]

As regards the ideal type of law, because the New Haven School is committed to offering practical guidance to decision-makers, it selects as its ideal type the entire global decision-making process in which power and authority are diffused rather than concentrated in elite law-makers; in which claims and norms may be, to varying degrees, authoritatively controlling; and in which formal legal rules may not tell the whole story about the actions and deliberations of relevant actors.[101] In contrast, international law positivists designate as their ideal type the body of international legal rules concerning international relations that are legally validated by reference to limited sources specified through an international rule of recognition. With such different ideal types, it is almost

98. *See* Coleman, *supra* note 72, at 106 ("A theory of law is a contestable conception of law, reflecting, as it must, an account of law's function or purpose. Disputes between or among conflicting legal theories are ultimately normative disputes, resolvable by substantive moral and political argument.").

99. In the extreme, methodological positivism "maintain[s] that legal theory is a purely descriptive, non-normative enterprise that sets out, in the manner of ordinary science, to tell us what one particular corner of the whole we inhabit looks like." Stephen R. Perry, *The Varieties of Legal Positivism*, 9 CAN. J.L. & JURIS. 361, 361 (1996).

100. *See* Liam Murphy, *The Political Question of the Concept of Law*, *in* HART'S POSTSCRIPT 371, *supra* note 29, at 373 (noting that Hart "takes for granted that law should be conceived of in a positivist manner, and then proceeds to describe the complex structure of law, so understood.").

101. *See* W. Michael Reisman, *McDougal's Jurisprudence: Utility, Influence, Controversy*, *supra* note 27, at 274.

unavoidable that the New Haven School and positivists will identify different salient characteristics of their respective conceptions of law.[102]

As regards the value of semantics, it follows from the New Haven School's commitment to offering functional guidance that it draws into its scope of inquiry factors that affect international conduct, even if those factors would not in ordinary usage be termed as law. Reisman has explained that "arrangements and processes . . . may not have been assigned the sobriquet, 'international law,' by the people who fashioned them; yet from the perspective of the disengaged observer, it will be apparent that these processes and arrangements functioned as the struts of world or regional order in specific contexts."[103] This rejection of descriptive semantics in favor of functional criteria is an anathema to positivists, who are committed to describing those phenomena that ordinarily would fall within the normal usage of the word "law."[104]

These normative disagreements as to the purpose of jurisprudence, the ideal type of international law, and the relevance of semantics cannot be properly addressed at the conceptual level. The resulting differences between the New Haven School and positivists' respective concepts of law are accordingly not really conceptual disagreements. They are, more fundamentally, normative disagreements about pre-concept commitments.[105]

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102. *Cf.* Murphy, *supra* note 100, at 409 (noting that underlying Dworkin's and Hart's accounts of law "is a fundamental disagreement about the politically most desirable way to conceive of law's domain.").

103. W. Michael Reisman, *Preface to* JOHNSTON, *supra* note 23, at vii. *See generally* W. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS (1999).

104. Stavropoulos, *in* HART'S POSTSCRIPT 59, *supra* note 1, at 70 ("It seems natural to suppose that conceptual analysis aims at articulating the existing, *common* understanding of the terms whose extension constitutes the field of inquiry.") (emphasis in original).

105. *See* Leiter, *in* HART'S POSTSCRIPT 355, *supra* note 29, at 367 (noting the view that "[c]onceptual analysis, by itself, gives us no reason to prefer one concept to the other; only a further, normative argument can do that . . . ."). Leiter disagrees with this view, arguing that hard positivism provides a concept of law that "figures in the most fruitful a posteriori research programmes, i.e. the ones that give us the best going account of how the world works." *Id.* at 369. For the reasons set forth in Part IV, *infra*, Leiter's view does not apply to international law, where policy-oriented jurisprudence offers a stronger explanatory account of how contestations among conceptions of law are resolved in international conflicts. In subsequent work, the author will test this descriptive claim further and also examine whether policy-oriented jurisprudence additionally offers the normatively most attractive account of how the world ought to work even in problems with competing conceptions of international law. *See* TAI-HENG CHENG, INTERNATIONAL LAW AS COMMITMENT (forthcoming 2011).

IV. ADDRESSING CONFLICTS

This Article has discussed why differences between the policy-oriented and positivist conceptions of international law are not meaningful conceptual disputes. The meaningful disagreements are over pre-concept commitments that are not of a conceptual nature, but of a normative nature.

It may be possible to go some way to bridge the apparent normative gulf by recognizing the respective pre-concept commitments of the New Haven School and positivists. It might even be possible to have a meaningful conversation about law once jurists and scholars accept that the word "law" can denote two often non-mutually exclusive conceptions, which I shall call Law1 and Law2.[106] Law1 refers to the positivist conception of law, a body of legal rules derived from secondary rules governing legal pedigree. Some scholars have referred to this as a "legal regime,"[107] or a "theory *of* law."[108] Law2 refers to the New Haven conception of law, the process of authoritative and controlling decision-making. Some scholars have variously referred to this as a "legal order,"[109] a "theory *about* law,"[110] or "world order."[111]

With this distinction, it is possible for a positivist to assert that there is a Law1 rule against preemptive military force without claiming that this rule is also Law2, if the Law1 rule—slavishly applied to every situation—may lead to a suboptimal policy outcome for the world community. Conversely, a New Haven jurist may assert that Law2 permits preemptive military force in certain contexts in which such force would promote world order and maximize human well-being, broadly speaking, while accepting that a Law1 rule against preemptive force exists on the books and entails a strong, albeit not necessarily overwhelming, expectation of compliance.

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106. Janet Halley made a similar semantic move in explaining various feminist theories. JANET HALLEY, SPLIT DECISIONS 23–25 (2006).

107. Symposium, *Comparative Visions of Global Public Order*, 46 HARV. INT'L L.J. 387, 387–88 (2005) (distinguishing between legal regimes and legal orders).

108. JOHNSTON, *supra* note 23, at 113.

109. *See* Symposium, *supra* note 107, at 387.

110. *See* Reisman, *Theory About Law*, *supra* note 33, at 935; JOHNSTON, *supra* note 23, at 113; *see also* Myres S. McDougal, Harold D. Lasswell & W. Michael Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

111. W. Michael Reisman's international law course at Yale Law School is titled "Public Order of the World Community: A Contemporary International Law," http://www.law.yale.edu/news/WReisman.htm. Douglas Johnston's final opus is titled *The Historical Foundations of World Order*, rather than *The Historical Foundations of International Law*. JOHNSTON, *supra* note 23.

The distinction between Law1 and Law2 can be useful to legal advisors in foreign ministries as well. A legal advisor with a policy bent may counsel her foreign minister that Law1 prohibits preemptive force, but because the threat of destruction from a particular putative enemy seeking nuclear weapons is so great, her government should consider military preemption from a Law2 perspective, even at the cost of flouting the Law1 rule. Alternatively, a legal advisor with a strict positivist orientation may decide to advise his foreign minister of the Law1 rule against preemptive force, and explicitly leave considerations of Law2 to other policy advisors.

Differentiating between Law1 and Law2 also helps to explain how a New Haven jurist performing a judicial function can appraise a dispute before him under Law2, but nonetheless recognize that he is bound in his role to decide the dispute in accordance with Law1 and ultimately follow Law1. It is also possible for a positivist sitting as a judge to recognize that the applicable Law1 rules would lead to such a terrible outcome in Law2 terms that it would unacceptably shock the conscience, and as a result to issue a decision that departs from Law1 and explains its reasons using Law2, as Dworkin and Reisman both recommend.[112]

The two incidents that provided factual launching pads for this Article illustrate the utility and limits of the semantic move described above. The question of whether article 51 of the United Nations Charter provided a legal basis for Israel's construction of a wall enclosing the occupied Palestinian territory is, in some senses, an easier case.[113] There was a normative gap between the majority's Law1 positivist interpretation and of article 51 and the *Nicaragua* case and Judge Higgin's Law2 policy-oriented conception of the law of self-defense. Under Law1, article 51 does not apply to Israel because the occupied territories are not a state, and the *Nicaragua* case held that article 51 only applies to self-defense against a state. Under Law2, law of self-defense might permit Israel's action to avoid the imbalance that would result if the occupied territories were treated as a state to be invited to the International Court of Justice proceedings and benefit from humanitarian law but were insufficiently an international entity subject to the regulation of armed attacks under article 51.

This normative conflict between Law1 and Law2 was partly avoided because Judge Higgins found other Law1 reasons to reject the application of article 51. In her view, article 51 would not apply to Israel's actions

112. *See supra* Part III.
113. *See supra* Part I.

even if article 51 extended to armed attacks by non-state actors because the construction of a wall was not self-defense within the meaning of the provision.[114] She also questioned whether Israel's actions met the thresholds of necessity and proportionality required for any legitimate exercise of self-defense.[115] In this fashion, Judge Higgins was also able to avoid a formal conflict between Law1 and Law2 by locating other independent Law1 grounds for rejecting the argument that article 51 applied to Israel.[116]

The conflict between Law1 and Law2 was also, at least formally, resolved by the hierarchy of conceptions of law institutionalized within the International Court of Justice. In the adjudicative context, tribunals often have a strong institutional norm to favor Law1 over Law2. This preference might, in extreme cases of injustice that would result from Law1, be overcome. However, the Wall Opinion was not an extreme case in which Law1 produced an abhorrent outcome. Accordingly, although Judge Higgins expressed a preference for Law2, she accepted Law1 as it stands.[117]

At another level, which is both normative and practical in nature, there remained a true conflict. In many international law settings, including at the International Court of Justice, and especially when it gives non-binding advisory opinions, the institution involved lacks controlling authority to prescribe effective forcible sanctions or remedies for illegal acts. The formal authority of the institution is limited to stating its view. Yet it would be naïve to think that when a legitimate institution states its view on law, this exercise does not exert any authority or control on international actors. By expressing a view on the applicable law, the institution imposes reputational and other informal costs on actors whose conduct deviates from that view.[118] The institution's view may also carry normative heft that may, to varying degrees, be constitutive of international law in future disputes.[119] In an advisory opinion, when a judge and highly qualified publicist proposes a Law2 alternative and states her objections to Law1 in Law2 terms, she reduces the normative force

114. Wall Opinion, *supra* note 14, at 215–16, ¶ 35 (separate opinion of Judge Higgins).

115. *Id.*

116. *Id*. (finding that building a wall was not a non-forcible measure within article 51 and that it may not have been necessary and proportionate).

117. *Id*. at 215, ¶ 33.

118. *See generally* GUZMAN, *supra* note 27.

119. *See* HIGGINS, *supra* note 18, at 1 ("International law . . . is a normative system."); *see also* Ruti Teitel & Robert Howse, *Beyond Compliance: Why International Law Really Matters*, 1 GLOBAL POLICY 127 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551923.

and authority of the majority opinion and moderates the reputational cost of the opinion on the deviating actor, which in the Wall Opinion was Israel. From this perspective, it would be simplistic to conclude that the International Court of Justice has a fully controlling and effective institutional hierarchy that favors Law1 over Law2.

More accurately, Law1 may formally prevail over Law2, but in normative terms the hierarchy between the two conceptions of law could be contested. Ultimately, resolution of the normative conflict between Law1 and Law2 may turn on the persuasiveness of judges favoring each respective conception of law, and the attractiveness of outcomes prescribed by each conception of law in specific disputes. In many instances, legal prescriptions will emerge over time and will likely reflect some balance between the competing conceptions as they are applied to specific international disputes.

The disagreement about whether the United States acted lawfully in invading Iraq illustrates this process of resolving conflicting conceptions of law in the absence of an authoritative hierarchy.[120] The Law1 approach of France, China, and Russia—a strict reading of Resolution 1441—would characterize the invasion as illegal. The Law2 approach of the United States—determining legality in light of the applicable policies, such as the control of weapons of mass destruction, and the threat that Iraq posed, along with a more liberal reading of Resolution 1441—would permit the invasion. Unlike judicial decision-making, in which judges would generally defer to Law1 in making dispositive decisions unless Law1 was wholly egregious (and even then it is not certain if some judges would depart from Law1), in foreign policy decisions there is often no clear legal hierarchy between Law1 and Law2.

It may be tempting to conclude therefore that foreign policy decisions are thus driven by sheer power—akin to the critical Law3 approach of the United Kingdom in which Law1 is often regarded as indeterminate and amenable to being deployed rhetorically to support political goals. Such a grim conclusion might be an oversimplification of the interface between law and power. Every permanent member of the Security Council felt the need to justify their position by reference to legality. Even though the appropriate conception of law in the invasion of Iraq may have been an open question, and even though Law1 was open to different interpretations, the pursuit of legality exerted some controlling authority over the actors because it was not open to them to countenance acts that

120. *See supra* Part I.

fell beyond the outer reaches of believable claims to legality. So, for instance, even in its fluid state, international law could be said to have restrained the United States from invading Iraq prior to its breach of Resolution 1441. International law could be said to have been a large factor in bringing the permanent members to the negotiating arena of the Security Council, which may thereby have limited the range of unilateral actions countenanced. At the same time, however, any appraisal of events must be realistic. While law slowed the United States down, and probably modified its behavior, no conception of law could stop the United States once it made its mind up to invade Iraq.

Whatever the power of the United States to invade Iraq, it was not necessarily powerful enough to establish the dominance of Law2 over Law1 and Law3. At the present time, whether the world community will accept the United State's Law2 analysis, and whether the United State's actions may come to be regarded as lawful under international law, remains unclear. The lawful scope of preemptive force in future disputes also remains uncertain. Eventually, after international decision-makers exchange more claims and counterclaims about which conception of law applies and what each of those conceptions prescribe, the international community may reach a decision, or at least a temporary equilibrium, about the scope of preemptive force. The decision will probably reflect some mix of Law1, Law2, and Law3 (and potentially, yet other conceptions of international law not considered in this Article).[121] It will also probably reflect the relative normative value of each of the different conceptions of law as applied to preemptive force, along with the relative power of decision-makers supporting the different conceptions. Further investigation will need to be carried out to test and specify in greater detail the international process of resolving contests among conceptions of law in particular international disputes.

If this analysis proves correct, then it might demonstrate the ultimate utility of policy-oriented jurisprudence. At one level, the policy-oriented conception of international law is just one of several important conceptions. Formally speaking, no conception is hierarchically superior to any other. Whether or not a conception of international law applies to an international problem may turn on its normative appeal, its predictive power, and its explanatory value. At another level, in the absence of an authoritative hierarchy of conceptions, the process through which

121. *See* TAI-HENG CHENG, WHEN INTERNATIONAL LAW WORKS (forthcoming 2011) (on file with author) (surveying conceptions of international law in chapter two).

decision-makers promote their different conceptions of law and reach outcomes is exactly the process described and appraised by policy-oriented jurisprudence. Ironically, although policy-oriented jurisprudence may not be the only conception of law applicable to international problems, it may be the best conception of law to address conflicts among conceptions when they occur.