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# Theory About Law: The New Haven School of Jurisprudence

To many contemporary European scholars, the New Haven School of Jurisprudence appears to be quintessentially American in its candid goal-orientation, its social and political assumptions and, in particular, its conception of society as dynamic and conflictual and, of course, its pragmatism. But the "Americanist" appearance is misleading. Legal theory, like law itself, is much more of a shared international experience than is generally appreciated. Contemporary German jurisprudence owes much to work done originally in the English language, but the network of obligations is actually quite reciprocal and remarkably consistent through time. Consider just a few examples.

John Austin, a major influence on the formation of English jurisprudence and the father of Legal Positivism, had been selected by Jeremy Bentham to be the first chairholder for the new professorship of jurisprudence that Bentham and his associates established at the University of London. Austin promptly moved to Germany to study legal theory for two years and to prepare the inaugural lectures, which were published in 1832 as "The Province of Jurisprudence Determined."

In the United States, Justice Holmes and Justice Cardozo, both precursors of "American Legal Realism," from which the New Haven School emerged, regularly read contemporary German theorists.

Karl Llewellyn, the acknowledged founder of American Legal Realism, studied law in Germany and wrote his first legal theoretical work in German.

Dean Roscoe Pound, the founder of American Sociological Jurisprudence and a major influence on Legal Realism, drew heavily and openly from Rudolph von Jhering's jurisprudence of social conflict and interests. Jhering's theory had an explosive and liberating effect on American legal thinking.

At about the same time, Eugen Ehrlich was publishing important parts of his work in the *Harvard Law Review*.

As idiosyncratically American as the New Haven School of Jurisprudence may seem, some of its roots reach deeply into Germany.

All jurisprudential theory is essentially a way of solving a problem. But not all jurisprudence deals with the same problem. John Austin was concerned with the problem of a member of one of the Christian schismatic sects living in a system in which law and religion merged at many points. His solution, Positivism, involved the redefinition of law so that it could accommodate his own conflicting needs. For H. L. A. Hart, the problem was essentially an ethnographic question: "what do people mean when they use the word `law'?" His answer, which was not particularly startling, was that people mean a system of making and changing rules and not simply a body of primary rules themselves. Professor Dworkin's problem is the defense of one of the tenets of liberalism. His solution is the development of a theory of judicial application which allows courts to supplement gaps in law without, he believes, usurping the postulates of the liberal constitution. For Professor Wechsler and, to an extent, Professor Shklar, the problem is assuring that law will function as a mediating force between classes and groups and, in particular, will provide for the protection of permanent minorities. Wechsler's solution is the development of a theory of secular "neutral principles." For students of "law and economics," the problem is how to secure the application of theories of economic efficiency to community decision. For John Rawls and a large number of other contemporary jurisprudential writers, the problem is essentially the development of a theory justifying compliance with law for citizens of liberal democratic systems which aspire to accommodate the demand for personal autonomy and the need for personal subordinations necessary for life in large and complex social arrangements.

All of these jurisprudential responses to particular challenges were practical and urgent for the writers who designed them and they may be quite valuable for some contemporary jurists, but they are not the challenges which my colleagues and I have faced. It is impossible to explain (as opposed to describe) why our theory of law is what it is without first setting out the intellectual difficulties which many of us encountered and the solutions we expected a theory to help to provide.

If I may speak personally, from the time that I began to study law, I encountered a number of theoretical problems.

1. Though I always conceived of the jurist's role as that of someone making decisions or advising in the process of decision-making, most contemporary legal theory is constructed not from the perspective of the decision-maker, but from that of the consumer of law. Rather than providing conceptions and intellectual tools for making decisions, the focus

is most often on the conditions for receiving or accepting law, determining whether or not it is "legitimate," and complying with it.

2. When I was 11 years old, I began to study Jewish law. This was not a theoretical exercise. Jewish civil law in the Babylonian Talmud is still applied in rabbinical courts and was studied, accordingly, with great attention to practical detail. But the law about sacrifices in the Temple in Jerusalem was studied with the same passion and attention to detail, even though the Temple had been destroyed hundreds of years before the Talmud was redacted. I was puzzled by the tendency to treat equally law that could be and was being applied and law that would never be applied. The word "law" was being used in an inclusive sense but, plainly, some "law" was performing mythological social functions while other law was operational. There seemed to be no way of distinguishing between controlling and non-controlling law.

3. In legal instruction, it is common for a professor to stand before his students or a lawyer to stand before a court and to say "this is the law" and then to express some particular legal formula. From my first exposure to this formula, I was puzzled by the multiplicity and indiscriminancy of reference in the statement. Did the "this is the law" statement refer to a summary of what had happened in the past? Did it refer to the way decisions in these particular matters would predictably be taken in the future? Or was it a statement of personal preference of the speaker as to how decisions should be taken in the future? The answer to each of these questions can be and often is different. Failing to distinguish between them and referring to all of them in a simple statement leads to what Lasswell and McDougal called "normative ambiguity." This reduces the value of such statements for those who seek guidance in decision-making.

4. Another problem which I encountered and which available theories did not address was the relationship between law and power. When I was a first-year law student, the Israeli Parliament enacted a law reducing the value of "key-money." Shortly thereafter, a major demonstration in front of the Parliament by people who would be adversely affected led almost immediately to a change in the law. The Law of Return, which guarantees every Jew's access to Israel, was ignored by government authorities the following year when an American Jew, accused by the U.S. Government of spying against it, who had escaped to Israel, was summarily delivered to United States marshals on an American plane in Tel Aviv airport. It seemed obvious to a beginning student that the ambit and operation of law was influenced by the power process, much as the power process was influenced by law. But in legal theory power was often deemed to be a pathology, sometimes unmentionable, sometimes even an obscenity in legal discussion. No theory that required that legal deci-

sion be conceived as minimally effective dealt explicitly with power or was sufficiently clear about the operation of power to allow that variable to be incorporated into predictive statements about authoritative decision.

5. When I began to study international law, I was struck by the parochialism and irrelevance of domestic legal theory to international decision. Since Hobbes and Bodin, domestic theory has assumed, as a precondition of community organization, the centralization and monopolization of the use of force within a community. In international law, this is precisely the condition that does not obtain. Yet international law has many of the indicia of a legal system. Whether one wants to treat it as a legal system or not, it is plain that those who operate within it must still perform legal functions. No legal theory provided relevant guidance.

6. This was not the only problem that the study of international law presented. International law was, at least to this student, manifestly ineffective and in many of its parts morally offensive. It was impossible for me to study it without wanting to change it. But most jurisprudential theory is applicative rather than developmental, or, to use Bentham's useful terms, analytical rather than deontological. Insofar as applicative theories allow for change, such change is usually of the most incremental and disguised sort. I needed a theory which could be used for purposes of application as well as active but not capricious appraisal, development and change, hence a theory with a conception of a wider range of legal functions than that of conventional theories.

7. As a consequence of the applicative focus of jurisprudence, most jurisprudential theories did not incorporate criteria for the *appraisal* of law. Law, it was assumed, was good; the absence of law was bad. Like many beginning law students, I found much of what was officially described as law morally offensive. Some legal institutions were what anthropologists call "survivals" and incorporated values of another era that were inimical to, for example, women, or children, or aliens. But this was not limited to past legal arrangements. There were contemporary statutes which, to use Harry Truman's blunt phrase, were "class legislation," legal instruments designed to discriminate in favor of one class and against the common interests of the community. In international law, key struts of the system had been designed by former imperial powers to discriminate in their favor. Law *per se* did not always equal the common interest. I felt, as a law student, that one important function of jurisprudence in advanced industrial and science-based civilizations should be the provision of tools to the jurist and citizen for the ongoing clarification of social goals which could serve as targets of future law as well as criteria for independent appraisal of the quality of current law. The dominant legal theories in Europe and North America eschewed this function.

8. A community is generally characterized by certain fundamentally shared notions about past and future, political values, time and space, the relative efficacy of human agency, in short, by a minimum value consensus. In the international community, the setting for international law, such a value consensus is spotty and often low. In many sectors, it is nonexistent. While there are certainly trends toward a homogenized global culture, the community is still marked by many cross-cultural differences which make it harder for groups and elites to collaborate. But most legal theory ignores this datum.

9. Finally, I was confused from my first exposure to law with the way the word "problem" was used. A problem was frequently something which the speaker did not understand and which (often for that reason alone) was important enough to warrant a major investment of time and energy. It seemed to me that given the social interventionist objectives of law, a problem was best conceived of as a discrepancy between a preference about how decisions should be made in the future and a prediction of how they would be made and the social consequences that would ensue.

My colleagues in the New Haven School come from many different cultures, language systems and backgrounds but we have all experienced, in one form or another, many of the difficulties I have reviewed. Our common objective is in fashioning a jurisprudence that will enable the individual to perform decision functions with greater efficiency and responsibility, so that contemporary decision can better achieve the historic function of all law, the continuing clarification and implementation of the common interest. The legal theoretical instrument for achieving that objective is the development of a jurisprudence that can be applied domestically and transnationally, that facilitates understanding and operation in a multi-cultured world in which major value divergences exist, not simply *among* and *within* cultures and *between* classes but also *among* elites. We seek a jurisprudence for those charged with and those seeking to make decisions and not simply a theory from the perspective of those who receive decisions. A theory sufficient for our purposes should have contemplative, explanatory, evaluative, predictive and manipulative or interventionist applications. It is perforce a theory *about* rather than a theory *of* law in the sense that it examines the data and "mystery" of a system from a dispassionate, secular, agnostic and external standpoint rather than from the viewpoint of an internal participant.

A jurisprudential theory, as a whole, is an instrument for achieving the objectives I have set out above. Its components, themselves conceptual tools, are justified insofar as they contribute to the achievement of that

objective but not if their only claim for attention is that they have been concerns of traditional jurisprudence.

## Conceptual Components

### A. Clarification of Standpoint

Modern science is conscious of the need for sensitivity and clarity about the perspective from which phenomena are viewed. For any phenomenon, there are many possible standpoints, each of which affects and shapes what and how it is viewed. An indispensable intellectual tool concerns clarity with regard to what contemporary philosophy of science refers to as "observational standpoint." Both the reference and content of the term "law" will vary, depending on whether the standpoint is that of a member of the elite or the rank-and-file, whether the observer is a member of the system observed and has internalized its folklore, myth and miranda, is an outsider or is on the margin. Perception of the same phenomenon may vary depending on the culture, class, gender, age, or crisis-experience of the observer. Even within the legal establishment, reference and content will vary depending on whether the observer is a legislator, a judge, a prosecutor, a juryman, a defense attorney, an accused or a victim. No particular standpoint is more authentic than another, but the scholar must be sensitive to the variations in perception which attend each perspective, try to disengage himself and then carefully determine and consistently maintain his own.

Clarification of standpoint is not the end of the matter. It is clear that in all observation, the individual self-system is the ultimate instrument of perception, appraisal and choice. Because it is necessary to calibrate all instruments, a second preliminary intellectual task the New Haven School poses is one of "self-calibration" by various techniques of self-scrutiny: the person performing a decision function is expected to examine the self for neurotic tendencies, sub-group parochialisms and the distortions that may arise from professional conditioning or what the French call *déformation occupationelle.* Self-scrutiny is not a single act. It is not accomplished once and for all, but must be a continuing process of deep and searching self-examination. Each contemporary experience is, in part, a stimulus for self-examination in what will hopefully result in a cumulatively better understanding of the self.

## B. Focal Lenses

The self observes itself and its environment "through" a variety of conceptual categories. In the physical sciences, different lenses and dyes permit the observer to bring different features or properties of the same viewed object into sharper focus or greater prominence. A comparable function may be performed in the social sciences by carefully crafted conceptual categories which serve as "focal lenses." The New Haven School has developed a number of these.

### 1. Comprehensiveness and Contextuality

A useful theory about law must avoid the temptation, so common in conventional legal method, to drastically reduce the universe of variables to either a text or a few purportedly key social factors. The New Haven School incorporates Whitehead's conception of "reality" as a manifold. It eschews the idea of "modelling", for every model is built on the assumption that there is a particular key variable (or several of them) which may be relied upon for explanatory and predictive purposes. Our theory seeks to be as comprehensive as possible with regard to the various factors that influence decision.

### 2. Selectivity

It is a trite observation that one cannot study everything, especially for decisions that must be made quickly or decisions whose aggregate social value could be less than the costs of processing them. But it is important to recall that in advanced, industrial and science-based civilizations, some major decisions are ongoing and incorporate, in the collection of relevant information and the exploration of alternative possible arrangements, the efforts of many people, sometimes totalling thousands of hours, extended over long periods. With refinements in the electronic processing of data, such collaborations become more and more feasible. We recognize the demands of economy and try to develop various techniques of selectivity, especially for rapid decision-making.

### 3. Law as Authoritative and Controlling Decision

The notion of law as a body of rules, existing independently of decision-makers and unchanged by their actions, may serve certain intellectual purposes. But from the perspective of a jurisprudence which conceives of

law as a process that is generated by human beings, in which they try to influence the way social choices are continuously made about the production and distribution of the things that they want, including considerations about the ways that decisions should be made about those things, the notion of law as essentially a body of rules is insufficient. Hence we use, as a focal component, a conception of law as processes in which human beings make authoritative decisions. In applying this concept, we distinguish between decisions which are taken entirely on the basis of naked power without regard to the expectations of rightness of the people influenced by them and decisions which conform to those expectations, but lack all effectiveness. We think it appropriate to reserve the word "law" for those processes of decision which are both consistent with the expectations of rightness held by members of a community (authoritative decisions) and which are effective (controlling decisions). While the particular mix of authority and control may vary widely, a conception of law as authoritative and controlling decision avoids exercises in irrelevance, whether because of absence of authority or absence of control. One should note that the word "law" is only designative here. It does not imply approval or, for that matter, a commitment to comply or implement it.

### 4. Balanced Focus on Perspectives and Operations

If the concern is to identify expectations, it is obvious that what people say and what they do are both relevant. One need hardly give elaborate explanations of why a theory concerned with understanding and influencing the way people behave must be able to study and account for what people do as well as what they say and think. A commonly observed pathology of conventional legal research is its tendency to examine only words in documents, uncorrected by flows of behavior which may diverge from those words. Hence we recommend a focus on both perspectives and operations.

### 5. Constitutive Process

In any group process, some decisions will be concerned, not with ordinary activities, but with the way decisions henceforth are to be taken in that setting. This might be described as the "constitution" of the group, but that term implies a static and documentary character, while it is clear that these decisions are often quite fluid. We reserve the words "constitutive process" to focus attention on the component of decision concerned with establishing, maintaining or changing the fundamental institutions and procedures of decision-making.

### 6. Constitutive Process and Public Order

By establishing a term which permits the observer to distinguish constitutive decisions, attention is more sharply focussed on all other forms of decision that are concerned with creating and applying expectations about how the things people want are to be produced and distributed within a community. Whether the focus is on power, wealth, enlightenment, skill, affection, well-being, respect or rectitude, we find it convenient to refer to such decisions as comprising the public order and to distinguish it from the constitutive process.

### 7. Public Order and Civic Order

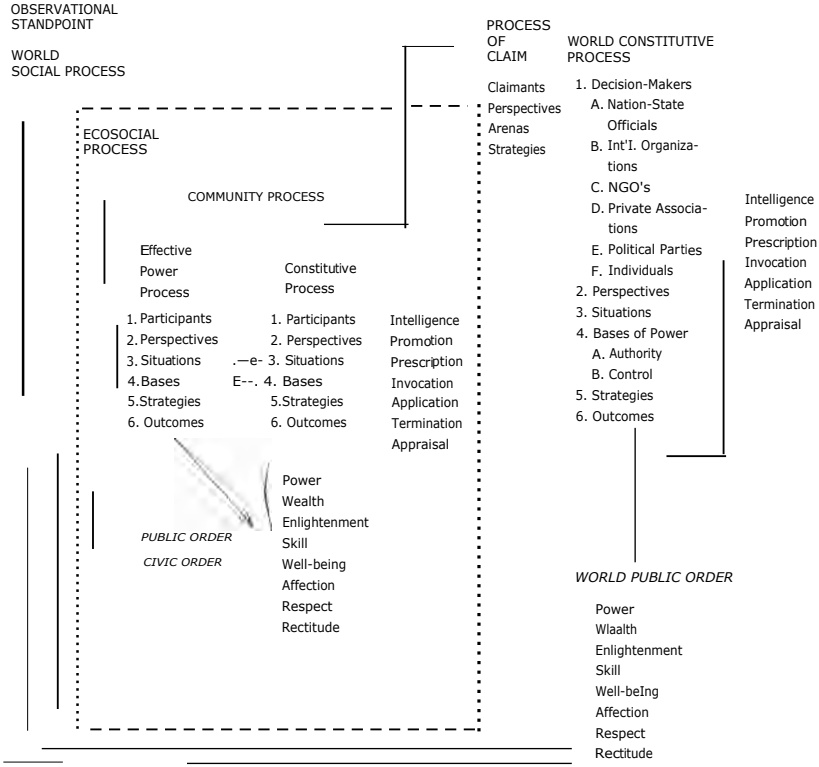
Many philosophers have distinguished between the public and the private sphere in a preferential sense. We propose that the distinction be one based upon severity of sanctions supporting the particular type of order. For descriptive and policy purposes, it is often useful to distinguish those parts of community life which are organized through norms supported by sanctions threatening intense deprivation for deviation, for which we reserve the term "public order", and those parts of community life which are supported by norms whose intensity of deprivation for deviation will be considerably lower, for which we reserve the term the "civic order". A continuing policy problem, especially in liberal and democratic systems, is the maintenance of a civic order. In contrast, totalitarian systems, whether they use secular or religious myth, reduce civic order to the vanishing point and try to regulate all aspects of life by norms supported by intense sanctions.

## C. A Map of Community Processes

Focal lenses address the question of *how* the observer looks at the data pertinent to his task. We have yet to consider *what* the observer looks at. Conventional legal analysis and schools of jurisprudence that conceive of law as a body of rules look only at a limited number of texts, characterized as legal, and those social events, "facts," to which the rules direct attention. Because our goal is influencing decision in ways that will precipitate desired social outcomes, the *what* of inquiry is necessarily broader than the *what* of conventional analysis. We take for granted that there is a wide range of variables and that each interacts with the others in many different ways. To ignore any of these variables could skew the results of

inquiry and render the exercise of little use, if not thoroughly counterproductive. The intellectual tasks of decision can be accomplished only if a map for the organization of all the relevant information is sufficiently comprehensive to account for and include all of it and, at the same time, is manageable.

We have adapted, with a number of adjustments, a scheme of cultural anthropology, in which any social process is described systematically in terms of those who engage in it (the participants), the subjective dimensions that animate them (their perspectives), the situations in which they interact, the resources upon which they draw, the ways they manipulate those resources and the aggregate outcomes of the process, which are conceived in terms of a comprehensive set of values.




The configurative map

The appended "map" sets out and relates these various concepts. It may be useful to comment on each of them briefly.

The participants in any decision process include those who may be formally endowed with decision competence, for example judges, and all those other actors who, though not endowed with formal competence, may nonetheless play important roles in influencing decision outcomes. In international decision, my special interest, the functional notion of participant forces the observer to examine, in addition to formal international organizations, state officials, non-governmental organizations, pressure groups, interest groups, gangs, and, of course, individuals, who act on behalf of all other participants and on their own.

The perspectives of these actors include their specific patterns of identification and disidentification, their matter-of-fact expectations of past and future and the value demands they project. It is plain that in a complex arena such as that found in international politics, the perspectives of the various participants actually playing a role in decision may diverge greatly in critical ways.

Situations refer generally to where decisions are made and to special properties of that "where." Conventional legal analysis generally looks to courts, secondarily examining the work of executive branches and legislatures. The New Haven School prefers a more functional approach in which it tries to focus on the range of centralized and decentralized settings in which decisions are actually taken, their varying degree of organization and formality, the extent to which they are specialized or not specialized and the extent to which they are continuous or episodic. We also consider it important to examine the extent to which participants in a particular situation perceive themselves in a state of crisis in which critical values are deemed to be at stake.

The resources on which participants draw, their bases of power, incorporate both effective power which permits control of the situation and symbols of authority. The New Haven School considers it appropriate for the jurist to correlate the extent to which power is available to support particular formulations. Power is considered in its relational sense and not in terms of some absolute inventory. The ways in which resources are manipulated, or the strategies used by different participants, involve the management of resources aimed at optimalizing preferred outcomes. Strategic modes include, in varying degree, use of military, economic, propagandistic and diplomatic techniques in varying ensembles.

In contrast to conventional legal analysis, which usually characterizes the outcome of a legal decision as a more specific statement of rule, the New Haven School seeks to conceive of outcomes, as do the people who are affected by them, in terms of the confirmation or redistribution of the

values at stake. Specifically, we examine the effects of a legal decision on the distribution of power, wealth, enlightenment, skill, well-being, affection, respect and rectitude.

## D. Decision Functions

Until now, I have spoken about decision in a general sense. For the scholar who seeks to understand decision and even more for the jurist whose function is to influence decision, it is clear that a number of distinct functions are engaged.

In most contemporary theories of jurisprudence, the term decision is generally used to refer to a judge applying rules to a particular dispute in an organized setting. Bentham, with his emphasis on deontological jurisprudence, tried to extend the conception of decision in jurisprudence to include *law-making.* From the standpoint of a jurisprudence concerned with understanding and making choices, however, it is clear that the operation of making choices involves many more component functions. Thus, if one were to systematically separate out the elements of a decision, one would identify

1) intelligence-gathering or the collection, processing, and dissemination of information relevant to making social choices;
2) promotion or the processes by which consciousness of a discrepancy between a desirable state and one that is or is about to take place gradually leads to a demand for some type of community intervention and regulation. In highly organized systems, specialists in this particular function are often called lobbyists or agitators. In informal processes, promotion may be accomplished by a wide range of actors, many of whom may be only dimly aware of what they are doing;
3) prescription or law-making occurs when actors, with varying degrees of authority, select and install certain preferences about policy as community law. This may be accomplished by a legislature or some other organized law-maker; but it is usually, and, especially in international law, largely accomplished in informal and non-institutionalized processes whose outcomes are generally referred to as "custom;"
4) invocation is the provisional characterization of a certain action as inconsistent with a prescription or law that has been established. Invocation is often accompanied by the demand that something be done about the action by an appropriate community institution;
5) application is the conventional conception of law: the organization of facts about a particular dispute, the specification of a norm or norms

that apply and the fashioning of a mandatory formulation, usually referred to as a judgment;

6) termination is the abrogation of existing norms and the social arrangements that have been based upon them, the development of transitional regimes and, where appropriate or necessary, the design of compensation programs for those who have made good faith value investments on the expectation that the old regime would continue;
7) appraisal is that part of decision which is concerned with evaluating the aggregate performance of all decision functions in terms of community requirements.

A jurisprudential theory that is only concerned with preparing lawyers to appear in court may be able to content itself with a conception of decision which includes no more than application. **But** a theory which wishes to understand the operation of law in its broader sense and to equip jurists to identify and influence decisions, in all the varied settings in which they are taken, must use a more detailed conception of decision functions.

## E. Intellectual Tasks of the Jurist

Until now, we have examined the way in which the New Haven School recommends that the jurist prepare himself for decision by clarification of observational standpoint and scrutiny of self, conscious selection of the focal lenses recommended for examining data pertinent to decision, deployment of the map of the manifold of social reality for the organization and inter-relation of that data with reference to the specific decision operations through which community policy is clarified and implemented in order to influence the production and distribution of values or desired events. It is that production and distribution which is the major concern of both politics and law in every community. Many of these conceptual tools are used, in varying fashion, by scholars in many other disciplines. The jurist is distinctive among them in that he alone undertakes, explicitly, to intervene in the social process that has been examined in order to secure changes in its pattern of authoritative decision so that it will henceforth discriminate in favor of a party retaining him or, hopefully, in favor of the common interest. We have found it useful to develop procedures for this distinctive juridical task. The procedures relate to each of five intellectual tasks performed by all who participate in the operations or functions of decision.

### 1. Goal Clarification

We cannot conceive of purposive behavior without a conception of what end that behavior seeks to secure. For the practicing lawyer, the question of goal clarification is frequently defined by the special interests of the client. We recommend that all who perform decision functions examine the demands of particular actors in terms of their congruence with the common interest of the community, expressed in terms of preferred patterns of production and distribution of every value within a system of stable minimum order.

### 2. Trend Analysis

Once a goal has been specified, it is necessary to examine the degree to which it has been achieved in past decision. This essentially historical function identifies and organizes trends in pertinent past decision in terms of the goal expressed.

### 3. Factor Analysis

Trends of past decision occurred within a context of conditions. The past is a potential predictor of future decision only if that context of conditions itself is stable in the future. Hence it is important to correlate past decisions with conditioning factors that influenced them and to note whether that context of conditions has changed in a material and pertinent way.

### 4. Predictions

Holmes remarked that law is nothing more pretentious than the prediction of what courts will in fact do. The New Haven School looks to a much wider range of institutions, but agrees that a critical intellectual task of the jurist is the estimation of future decisions. Predictions may be made by a variety of techniques. We emphasize that none of these techniques presupposes that there is a determined future, for there is none. We are concerned here with techniques for projecting different decision options and then examining the prospective aggregate value consequences of each in terms of the goals that have been clarified. This task then permits the jurist to select and, through time, to adjust particular recommendations so that they increase the probability of the eventuation of a preferred future and minimize the eventuation of a dystopic one.

### 5. Invention of Alternatives

When, as is often the case, predictions suggest a likely discrepancy between a goal preference and a probable future, the New Haven School recommends that the jurist explicitly explore alternative arrangements which will increase the probability of the eventuation of a desired future. This intellectual task is active and interventionist and engages the fundamental responsibility of the jurist and the citizen.

## Conclusion

The tasks which the New Haven School imposes on jurists are daunting in the extreme. But it is not the School which is responsible for this. As the world moves further into an industrial and science-based civilization in which human activity changes the physical and social environments to a degree and at a velocity hardly imaginable in the past, the role of law as a clarifier of common interest and a regulator of action becomes ever more complex even as it becomes more urgent. Conceptions of law which are premised on high veneration of the past and attempts to replicate it in current decision are hardly likely to be relevant. New theories are required. The jurisprudence of the New Haven School tries to address this new reality and to make law relevant to it. The School is not pessimistic nor is it committed to stifling change. It is Romantic, in the nineteenth century sense of the term, in its belief in the potential effectiveness of human agency and the possibility of the rational use of authority to secure a public order of human dignity. Its method of choice is akin to the traditional natural law approach, though, in contrast to traditional natural law, its techniques draw freely on contemporary physical and social sciences. In its commitment to using law to create a public order of human dignity, it identifies with the aspirations of the vast majority of the people of the world.