Michael Reisman

Testing a Theory about Law

Born 1939 in the United States. B. A. Johns Hopkins University, LL. B. Hebrew University, LL. M., J. S. D. Yale University, Faculty of Yale since 1965, Hohfeld Professor of Jurisprudence, Yale University School of Law. Books published in legal theory, international law and sociology of law.

The jurist studying international law is compelled to address theory, for the matrix of most basic assumptions within which the study and practice of domestic legal subjects is pursued cannot be transposed to the international sphere. Since Hobbes and Bodin, western legal and political theory has assumed that a centralization of coercive power is the prerequisite of any civil society. That assumption has permitted domestic political and legal theory to ignore the power variable. But centralization of coercion is precisely the condition that does not obtain internationally. The domestic pathology is the international norm. Some legal theorists who have simply transposed the domestic model (for example, Austin and, more cautiously, Hart), have concluded that international law is not law. Others, such as Schwarzenberger, have gone to the other extreme and developed theories based on the postulate that international law is nothing but power, while still others, such as Niemeyer, have assumed that a legal system does not require any power for its effectiveness. Others have sidestepped the issue, concluding that the field is not susceptible to a theoretical analysis. T. E. Holland called international law "the vanishing point of jurisprudence".

Law schools are perforce practical academies. From their perspective, the question of whether international law is really law is marginal. It is plain that "events" are occurring that require the performance of a variety of legal tasks or, if you prefer, tasks performed by legal specialists, that people trained in these academies will be called upon to perform them, and that understanding, predicting and influencing those events — key elements in the practice of law — require a

theory. As Kurt Lewin put it, "there is nothing more practical than good theory".

My own work has oscillated between the development of a theory about law and its testing and application in particular studies. Each theoretical effort has been tested in applications and each application has occasioned reconsiderations and sometimes changes in theory. I have always been working on two fronts and, as a result, on more than a single project.

As a member of the New Haven School of Jurisprudence, my theory is framed not in terms of the receiver or "consumer" of law, for whom jurisprudence is essentially an ideology of the conditions for compliance, but in terms of the decision-specialist and decision-maker for whom jurisprudence is a theory about making decisions (which includes the making of law or legislation as well as its application, through courts or other institutions) at the constitutive (or structural) level and in all the various value processes of a community (wealth, enlightenment, skill, well-being, affection, respect and rectitude).

Theoretical Work

At the *Wissenschaftskolleg,* I continued to work on a manuscript tentatively entitled *How to Make a Choice,* and completed drafts of chapters on methods for clarifying goals and on the function of rules in decision. I view law as part of the community's political process of making authorized social choices. Hence I see the determination and appraisal of social goals as a key legal function. There is a good deal of legal writing on how one applies other's goals, but not on how one establishes community goals or evaluates (or reevaluates) them, especially when the setting is that of an advanced industrial and science-based civilization. The chapter on rules rejects both the crude rendition of American Legal Realism, according to which rules are meaningless, and the Positivist notion that rules decide. I argue that rules are authoritative communications of relevant policy information which the decision maker must take account of and use in creatively fashioning each decision.

I also worked on a manuscript on designing and implementing human rights. It views the proper function of the human rights lawyer and, more generally, the human rights movement not as the creation of rules but as an ongoing process of social engineering, the fashioning and refashioning in changing contexts of institutions that promise to secure a wide production and distribution of the values of a public order of human dignity.

Viewed in this fashion, a set of conceptions and operations different from those of conventional legal practice are required. Of the three parts that will comprise this study, I completed a draft of one and outlined the other two.

On an experimental basis, I have been trying to apply the New Haven theory to evanescent social arrangements (e. g. looking at others; standing in lines, talking in coarchical and hierarchical settings) in order to determine the micro-legal system that operates there. I benefitted from a number of discussions with anthropologists at the Kolleg and used some of the time to write a methodological chapter and an applications chapter as well as an introduction to a collection of micro-legal studies I had done occasionally and which I would like to republish together.

International Legal Work

I completed three studies on more specific international legal subjects.

With my student James Baker, I completed a manuscript on the lawfulness of covert actions in international law. Given the key feature of international law which I mentioned above, most of its decisions are made by actors acting unilaterally. Many of them are lawful. Some are accomplished "secretly." The quality or property of secrecy is hard to define, but it is clear that some phases of all the major instruments of policy in international politics, the military, the economic, diplomacy and propaganda, have been effected covertly and that in many of them secrecy *per se* is not unlawful. We examined what has been done and considered lawful in the past, why it happened, and what we think will or should be done in the future under different projected conditions.

With my colleague Gayl Westermann, I completed a study on baselines in maritime boundaries. Some five-sevenths of the planet are covered by water. Historically, ocean areas have not been susceptible to appropriation. They remained a *res communis.* But the development of extractive technology and the accessibility of petroleum and other resources in off-shore areas has led to an expansion of national claims and, as a consequence, a proliferation of maritime boundary disputes. After 30 years of dispute resolution, the basic legal principles in this area have been established. The one issue that remains unresolved is where one starts measuring. Our book examines policies, trends and projections with regard to these baselines.

Finally, I completed a manuscript on the ways that international judicial and arbitral decisionmaking are controlled. Domestically, institu-

tional controls over decision are provided by a hierarchy of appeal courts and, ultimately, a legislature; informal controls derive from a variety of social dynamics. None of these exist internationally, hence the continuing need to invent international control systems. I examined alternative control arrangements in three distinct systems of international decision, each of which is breaking down and recommended steps to improve them.

I also completed a number of smaller projects: an article on the allocation of competence between the executive and legislative branches to interpret treaties in the United States; an essay on international law after the Cold War, in which I explored which parts of traditional international law will revive and which will likely prove obsolete; an essay on changing conceptions of sovereignty in light of reactions to events in Central America, Eastern and Central Europe, Africa and China; a book review of two new volumes in the Heidelberg *Encyclopedia of Public International Law*, and a draft study in comparative law of the international effect of fraudulent evidence in securing decisions.

Conclusion

I found the environment at the Kolleg very conducive to research and reflection. For me, the opportunity for reflection was especially important now, as much of the framework of assumptions in my field has crumbled in the past year. The Kolleg's library staff was consistently attentive and helpful and the administrative staff succeeded in protecting me from many mundane distractions. It is clear to me that much of what I did here is quite different from the way I would have done it in New Haven. I attribute that to the environment at the Kolleg and in Berlin. It has been a rewarding six months.