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TAI-HENG CHENG

Preface: Policy-Oriented Jurisprudence and Contemporary American Legal Education

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ABOUT THE AUTHOR: Partner, Quinn Emanuel Urquhart & Sullivan, LLP. The views expressed here are the author's own and do not necessarily reflect the views of his firm or its clients.

I have the pleasure of contributing this preface at the invitation of the *Law Review* of New York Law School, on whose tenured faculty I previously served. On April 12, 2013, the Institute for Global Law, Justice, and Policy, together with the *Law Review*, hosted a symposium titled *Solving Global Problems: Perspectives from International Law and Policy*.¹ This issue contains scholarship generated from the symposium.

The symposium theme, “Solving Global Problems,” expresses a normative goal of proposing better ways to tackle global issues. It also describes an approach to international law that is not static. Instead, international lawyers and scholars engaged with contemporary problems should always work to identify what is at stake, to understand the problem, and to propose alternatives that better secure common interests. This approach to international law, called policy-oriented jurisprudence, was applied and tested throughout the symposium.² The symposium comprised a keynote lecture, as well as four panels addressing global problems relating respectively to the environment, the use of armed force, international investment and trade, and human rights. Professor Molly Land’s closing remarks provide her summary and insightful analysis of the symposium’s sessions.³ Her comments are a particularly valuable addition to this issue because not all the papers presented or discussants’ remarks are published here. Rather than describe the substance of each session, I refer the reader to Professor Land’s remarks.

To my knowledge, the *Solving Global Problems* symposium is the first time that New York Law School has honored Professor Myres S. McDougal in its *Law Review*. Together with Professor Harold D. Lasswell, they founded policy-oriented jurisprudence at Yale University. After Professor McDougal retired from Yale Law School in 1974, he joined the faculty of New York Law School, where he continued his important scholarship and teaching for at least another decade.⁴ Professor Lung-chu Chen, who studied with Professor McDougal, joined him at New York Law School, where Professor Chen still teaches today. In light of Professor McDougal’s enormous contributions to international law and policy, and his affiliation with New York Law School, it is appropriate that the symposium celebrates one of the law school’s finest and most important scholars and professors, Myres S. McDougal, as well as the field of policy-oriented jurisprudence that he pioneered with Professor Lasswell.

The vast and lasting impact that policy-oriented jurisprudence has had on international legal scholarship is demonstrated by the myriad subjects covered by each paper presented at the symposium, whose authors all studied with Professor W.

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1. Video recordings of the symposium are available at <http://www.nylslawreview.com/global-problems-program/>.
 2. See also TAI-HENG CHENG, WHEN INTERNATIONAL LAW WORKS: REALISTIC IDEALISM AFTER 9/11 AND THE GLOBAL RECESSION 49 (2012) (“As policy-oriented jurisprudence developed, observers conferred upon it the appellation, ‘The New Haven School,’ in recognition of its geographical and intellectual locus and its worldwide epistemic community of New Haven associates.”).
 3. Molly Land, *Reflections on the New Haven School*, 58 N.Y.L. SCH. L. REV. 919 (2013–2014).
 4. Siegfried Wiessner, *Professor Myres Smith McDougal: A Tender Farewell*, 11 ST. THOMAS L. REV. 201, 201 (1999).

Michael Reisman, the Myres S. McDougal Professor of International Law at Yale Law School, who himself was a student of, and later collaborator with, Professor McDougal. The wide-ranging uses of policy-oriented jurisprudence are further emphasized by the diversity of the discussants, each one a leader in his or her respective field of international law and policy. Although there was on every panel at least one discussant who did not approach international law principally from the perspective of policy-oriented jurisprudence, the panel discussions showed that everyone, no matter his or her approach to international law, can engage with and be enriched by policy-oriented jurisprudence.

When I first began conceiving this symposium in 2011, New York Law School was in the midst of a bountiful period of international law scholarship. Professor Ruti Teitel, the Ernst C. Stiefel Professor of Comparative Law, had just published her second book, *Humanity's Law*, which subsequently received a commendation from the American Society of International Law.⁵ Although Professor Land is now a professor at the University of Connecticut School of Law, she was in 2011 pioneering at New York Law School her scholarship at the intersection of international law and the Internet.⁶ My first book, *State Succession and Commercial Obligations*,⁷ had been cited as authoritative by U.S. courts,⁸ and counsel appearing before the U.S. Supreme Court relied on articles that applied ideas from that book to ongoing international problems.⁹ My second book, *When International Law Works*, was on the brink of publication.¹⁰ As I have now become a member of Quinn Emanuel Urquhart & Sullivan, LLP, it seems appropriate that the *Solving Global Problems* symposium also serve as a celebration of this period of intellectual flourishing in international law at New York Law School.

This symposium issue is, however, not just a celebration of the past, because policy-oriented jurisprudence is always looking to the future. As shown by Professor Land's summary of the panels at the *Solving Global Problems* symposium, all the topics covered were forward looking. It is accordingly appropriate that this preface, too, address a contemporary problem. Policy-oriented jurisprudence has long been concerned about legal education and the legal profession. Just as Professors McDougal

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

6. Molly Land, *Towards an International Law of the Internet*, 54 HARV. INT'L L.J. 393 (2013).

7. TAI-HENG CHENG, *STATE SUCCESSION AND COMMERCIAL OBLIGATIONS* (2006).

8. *Mortimer Off Shore Servs., Ltd. v. Fed. Republic of Ger.*, No. 05 Civ. 10699, slip op. at 2 (S.D.N.Y. Apr. 9, 2008), *aff'd*, 615 F.3d 97 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1502 (2011).

9. See Brief for Respondents Robert Simon et al. at 54, *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009) (Nos. 07-1090, 08-539), 2009 WL 1615356 at *54 (citing and relying on Tai-Heng Cheng, *Renegotiating the Doctrine of Odious Debts*, 70 LAW & CONTEMP. PROBS. 7, 10-11 (2007)).

10. CHENG, *supra* note 2, reviewed in, *inter alia*, Chester Brown, Book Review, 61 INT'L & COMP. L.Q. 785 (2012); John F. Murphy, Book Review, 107 AM. J. INT'L L. 265 (2013); Robert Kolb, *Discussion of T.H. Cheng's Monograph When International Law Works, and in Particular a Defence of the Nicaragua Judgment of the ICJ*, 26 LEIDEN J. INT'L L. 751 (2013); Book Note, *Recent Publications*, 125 HARV. L. REV. 1184 (2012); Book Note, *Recent Publications*, 37 YALE J. INT'L L. 490 (2012).

and Lasswell addressed legal education in their Yale Law Journal article in 1943,¹¹ this *Law Review* preface will briefly apply policy-oriented jurisprudence to contemporary legal education.

One of the key intellectual tasks of policy-oriented jurisprudence is to observe trends. Here, the trend is clear: the legal education market has been contracting for several years and is projected to continue shrinking, albeit perhaps at a lower rate.¹² Given this trend, it is imperative to engage in another key intellectual task of policy-oriented jurisprudence: appraisal. Specifically, alternative models of legal education must be assessed.

One model is to focus on preparing students to provide legal services for localized and uncomplicated legal problems or transactions. This is a worthwhile model given that there are communities in the United States that are underserved by lawyers, and any legal problem, no matter how mundane, is serious for the client.¹³

Another model is to retain and grow a faculty that engages in serious scholarship and challenges students to think creatively and rigorously about complex global and national problems. Law firms that handle the most complex matters are often not engaged in “normal science,” to borrow Thomas Kuhn’s phrase.¹⁴ Their matters may involve, for example, helping the U.S. Supreme Court determine the limits of jurisdiction over corporations under the Alien Tort Claims Act.¹⁵ For such firms, “practice ready” first-year associates are not necessarily those who have drafted a brief, taken a deposition, or interviewed a witness in a law school class. Associates who are most valuable on matters not involving “normal science” are bright, creative, motivated, and articulate. They have been exposed by their professors to the most difficult legal and ethical conundrums and stretched to fashion innovative solutions. These associates often tell me that their perspectives were shaped by their law professors who are serious scholars and thought leaders.

From a policy-oriented perspective, it is equally important that law schools prepare lawyers not just to take responsibility for their technical legal tasks, but also to appreciate that their actions are invariably part of a larger legal process that can have wide ranging international outcomes. Exposing law students to complex international problems at law school can help them recognize that they, like all human beings, are the “ultimate agent[s] for securing and maintaining . . . a public order system,” as Professor Reisman emphasized in his General Course at the Hague

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

12. See N.Y.C. BAR ASS’N TASK FORCE ON NEW LAWYERS IN A CHANGING PROFESSION, DEVELOPING LEGAL CAREERS AND DELIVERING JUSTICE IN THE 21ST CENTURY 5 (2013) (“Law school applications for 2013 fell by more than 38% as compared to 2010 and by almost 50% as compared to 2004.”).

13. See *id.* at 88–101 (discussing how persons of “moderate means” have unmet legal needs and proposals to meet those needs).

14. See THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS passim* (3d ed. 1996).

15. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

Academy,¹⁶ and that lawyers must confront the moral dilemmas they may face as decisionmakers with courage and wisdom.

There are other models of legal education not discussed in this preface. A law school may pursue more than one model, and the models briefly noted here are not necessarily mutually exclusive. However, in a situation of declining resources and law school applicants, the choices a faculty must make about what sort of law school they wish to become are more stark. Tradeoffs must be made. Some law professors and deans are more suited to one model of legal education than the other. They may have vested interests in favoring a model of legal education that better promotes their careers, or they may press for a model that focuses on the types of legal education and academic writing about which they care. Policy-oriented jurisprudence teaches that the human being is the ultimate tool of observation and appraisal, and so those with decisionmaking authority in legal education must constantly recalibrate their focus and test their conclusions in order to avoid errors.

In his keynote address at the symposium, Professor Reisman concluded that “the essence of the New Haven School is to empower people, particularly those engaged in law or politics, to more efficiently identify common interests and the ways to implement them.”¹⁷ It will be up to the faculty of a law school, together with its administration and trustees, to decide what sort of law school it will be in the future. I hope these brief remarks, from the perspective of a practitioner and former law professor, will help those involved in legal education to consider the opportunities that lie ahead for law schools to better implement legal education for the benefit of the legal industry and society at large. Those of us in the legal profession today can work on contemporary global legal problems, such as the ones discussed at the symposium, but the legal problems of the future will have to be solved by the students who will attend law schools in years to come.

16. W. MICHAEL REISMAN, *THE QUEST FOR WORLD ORDER AND HUMAN DIGNITY IN THE TWENTY-FIRST CENTURY: CONSTITUTIVE PROCESS AND INDIVIDUAL COMMITMENT* 468 (Martinus Nijhoff ed., 2013).

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