2014

Between the Scylla of Legal Formalism and the Charybdis of Policy Conceptualism: Yale's Policy Science and International Law

Hengameh Saberi

Osgoode Hall Law School of York University, hsaberi@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/olsrps

Recommended Citation

http://digitalcommons.osgoode.yorku.ca/olsrps/42

This Article is brought to you for free and open access by the Research Papers, Working Papers, Conference Papers at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Legal Studies Research Paper Series by an authorized administrator of Osgoode Digital Commons.
Between the Scylla of Legal Formalism and the Charybdis of Policy Conceptualism: Yale’s Policy Science and International Law

In F. Hoffmann, & A. Orford (Eds.). Oxford Handbook of International Legal Theory. (forthcoming)

Hengameh Saberi

Editors:
Editor-in-Chief: Carys J. Craig (Associate Dean of Research & Institutional Relations and Associate Professor, Osgoode Hall Law School, York University, Toronto)
Production Editor: James Singh (Osgoode Hall Law School, York University, Toronto)

This paper can be downloaded free of charge from: http://ssrn.com/abstract=2443360

Abstract:
An invisible but enduring legacy of the New Haven School, understood through this paper's counter-narrative, is a new vista through which to caution against the pitfalls of policy reasoning and to demand its promises. International legal theory has a relatively clear sense about abuse of deduction when found in legal interpretation, but it has little to say about similar defects in policy reasoning. Equally undertheorized are our ideas about the very concept of policy and its place in international legal argumentation. Pursued policy objectives might be principled or flexible and their application flexible or principled. So a combination of principled policies and flexible application of those policies or vice-versa might well permeate the words and practice of international lawyers, used simultaneously or selectively – depending on the context – to address international legal problems. And then there is percolation of these conflicting modalities – principled policies and unprincipled applications or the other way around – through different professional roles that international lawyers habitually adopt. We can begin to understand all that complexity only when we acknowledge the fallacy of an inherent association between law and formalism and between policy and anti-formalism. Re-telling the story of the Yale School is an effort to do just that.

Keywords:
New Haven School, policy conceptualism, legal formalism, international legal theory

Author(s):
Hengameh Saberi
Assistant Professor
Osgoode Hall Law School
York University, Toronto
E: hsaberi@osgoode.yorku.ca
I. Introduction

In 1943, an enduring collaboration between a political scientist and a legal scholar began to develop as the New Haven Jurisprudence. Harold Lasswell and Myres McDougal considered the past and contemporaneous record of international law jurisprudence to be inadequate to meet the needs of the post-WWII world. In their view, international law was historically riddled with inertia of philosophical properties such as speculative, transcendental, "the ancient philosophical exercise of logical derivation," metaphysical absolutes, theological, and a "quest for the ultimate and absolute meaning of law and justice." To remedy that, they centered the application of their comprehensive jurisprudence on international law and introduced the New Haven School’s (NHS’s) policy-oriented approach.

The policy-oriented international law aimed to replace the legalism of traditional thinking with pragmatism of interdisciplinary and social scientific insights. Its pragmatism was well captured in two central ideas: contextualism and problem-solving orientation. In a synoptic description, Yale’s configurative jurisprudence views law as a process of authoritative and controlling decisions that are located in various phases of contextual analysis. In any process of legal decision-making, there are parties with claims about values who pose demands on the authoritative decision-makers to weigh their claims and counterclaims and make prescriptions. Legal decision-making requires a three-tier analysis of “values”, “phase” and “conditions.” These categories provide a reasonably full access to the values contested, knowledge about participants with a claim over values, and the past, present, and future of value distribution in the world power process.

Conditions refer to the particular location of a context within the larger context of world power process. In the phase analysis, there are specific factors that help dissect the features of

---

1 Myres S. McDougal & Harold D. Lasswell, Legal Education and Public Policy: Professional Training in the Public Interest, 52 YALE L. J. 203 (1943) (introducing for the first time the New Haven School’s collaborative scholarship).


4 For one such application to the question of coercion, for instance, see Myres M. McDougal & Florentino Feliciano, The International Law of War: Transnational Coercion and World Public Order 16–20 (1994).

5 See Myres M. McDougal, Harold D. Lasswell & James C. Miller, The Interpretation of Agreements and World Public Order: Principles of Content and Procedure 34 (1967) (identifying some of the factors that affect the authoritative process of interpretation and application of international agreements as follows: changes in the relative strength of contending visions of world public order which commend persuasion or coercion as instruments of social change, changes in the composition of territorial communities affecting the modalities of communication and common perception of meaning, changes in the technology of communication, and changes in [continues on the next page]
each individual context: participants (who acted in varying roles that culminated in a particular outcome?), perspectives (what were the expectations and value demands of participants and who did they identify with?), situations (where and under what conditions were the participants interacting?), base value (what effective means were at the disposal of participants to achieve their objectives?), strategies (in what manner were this means manipulated?), outcome (what was the immediate result of this interaction for value allocation?), and finally, effect (what are the effects of different duration of the outcome of the interaction)?

Contrary to traditional, rule-oriented adjudication or interpretation, in a policy-oriented system, the decision-maker or legal scholar takes aid from all these contextual elements to treat each case as a unique context. Yet the guiding star of decision-making and what makes a policy-oriented international law relevant for the future of a democratic world order is the promotion of the universal values of human dignity. These values remain raw postulates rather than ripe fruits of reasoning. To avoid the metaphysical pitfalls of normative justification that, under the NHS’s account, have historically plagued jurisprudence and fueled endless disputes, the policy-oriented scholars of human dignity neither seek nor offer any normative justification for their preferred value commitments. Considering the Cold War understanding of the values of human dignity that belonged to the free world vis-à-vis totalitarianism, it is not particularly surprising that the application and interpretation of these values happened to correspond with the practice and desires of the leader of the free world, the U.S.

Despite its masterly design and broad scope, the NHS’s policy science received a fair share of criticism at its own time and persuaded only a handful of disciples in international law. On the one hand, scholars were skeptical about the plausibility of scientific objectivity and the impartial application of the NHS’s methodology to international legal questions. Under this view, New Haven’s pseudo-scientism was nothing more than a complex language with a simple objective: the maintenance and legitimization of the U.S. national interest. On the other hand, some scholars reacted to McDougal’s broad understanding of social processes that defined law. These critiques were plainly against the intrusion of power politics and policy into law either in a positivist fashion or in line with the concerns of international relations scholars who opposed

---


7 These values, which are in fact categories of desired events or preferences, are power (participation in making important decisions – those involving severe deprivations), respect (access to other values on the basis of merit without discrimination on the grounds irrelevant to capacity), enlightenment (access to the knowledge which is the basis of rational choice), wealth (control over economic goods and services), well-being (enjoyment of physical and psychic health), skill (proficiency in the exercise of latent talent), affection (enjoyment of sympathetic human relationships), and rectitude (sharing a sense of community responsibility). See Myres S. McDougal, International Law, Power, and Policy: A Contemporary Conception, 82 Recueil Des Cours 133, 168 (1953) [hereinafter International Law, Power, and Policy].

8 Myres S. McDougal, Perspectives for an International Law of Human Dignity, in McDougal et al., Studies in World Public Order, supra note …, at 987, 993.

9 See generally Leo Gross, Hans Kelsen, 67 Am. J. Int’l L. 491, 499 (1973); Oran Young, International Law and Social Science: The Contributions of Myres S. McDougal, 66 Am. J. Int’l L. 60, 74 (1972) (“McDougal has leaned towards a somewhat uncritical acceptance of the views of the American ‘establishment’ on a number of specific issues in the field of international relations.”).

the implications of realism. Yet a third group simply objected to the convoluted style and complex presentation in the New Haven Jurisprudence, which rendered it either incomprehensible or impractical. Each strand of skepticism consists of nuanced and specific objections to various theoretical and application features of the Lasswell-McDougal project, but policy as legitimization, policy as invasion of power into law, and policy framework as conceptual “grandiloquence” in fact comprise the body of resistance against the methodological renewal of the New Haven Jurisprudence.

As interpreted by the received wisdom and perpetuated by McDougal himself, this resistance has been attributed to international lawyers’ resolute aversion to policy thinking and their strict loyalty to traditional rule-oriented approaches. Under this tale, the cold reception of the NHS by the mainstream discipline reflects a conflict between law and policy – a rivalry between the comfort of law’s determinacy and autonomy versus the flexibility and uncertainty of policy, in which the policy-oriented heresy lost ground as it faced a hardheaded discipline mostly concerned with formalist legal reasoning and wary of extralegal social phenomena tainting the image of the rule of law.

This essay poses a challenge to the conventional narrative about the career of the NHS by arguing that the mainstream discipline’s rejection of the policy-oriented methodology was not a rejection of policy thinking as such, but rather an opposition to the conceptualism and formulaic determinism of the New Haven Jurisprudence resulting from a peculiar combination of a contextualist methodology and a non-cognitive view of normative values of human dignity. Rather than between law and policy, the tension was between two different perceptions of flexibility and rigidity. This tension, as suggested here, resulted from the NHS’s dogmatic and erroneous presentation of what they dubbed traditional and rule-oriented approaches as formalist and the mainstream discipline’s more accurate understanding of the policy-oriented international law as a new form of formalism. I introduce this new form of formalism as ‘policy conceptualism’ to suggest that the story of the NHS’s career was not a rivalry between law and policy per se, but one between two understandings of an interpretive stance towards 'experience' and 'logic' of a (pseudo)scientific method; between the determinative capacity of interpretative tools and predictability of outcomes, expected to be facilitated by law, or guaranteed by

---


12 *See*, e.g., Herbert Briggs, *The Interpretation of Agreements and World Public Order—Principles of Content and Procedure*, 53 CORNELL L. REV. 543, 543 (1968) (book review) (calling the Lasswell-McDougal language “dogmatic scientism”); Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiators: Your Treaty or Our “Interpretation” of It?*, 65 AM. J. INT’L L. 358, 360 (1971) (“[T]his book . . . is written in a highly esoteric private language—we do not say jargon, but a land of juridical code which renders large tracks of it virtually incomprehensible to the uninitiated (or at least to the unpracticed and unversed), short of a word by word ‘construe,’ such as we did in school with our Latin unseens.”).

13 The word is borrowed from Erwin Griswold who, recognizing the importance of Lasswell’s and McDougal’s approach to legal education, nevertheless found it to be “impaired by a certain tendency towards grandiloquence.” Erwin Griswold, *Intellect and Spirit*, 81 HARV. L. REV. 292, 297 (1968).

14 McDougal noted:

> We got much more attention than we wanted before we wanted it ... We thought we'd have several years to formulate the stuff and write it up before we got too much attention, but we got too much success too quickly to serve intellectual purposes, and then we got the reaction.

democratic policies of human dignity; or between two conceptions of formalism: 'legal formalism,' on the one hand, and 'policy conceptualism,' on the other.

To be sure, neither side would have admitted in the least to the slightest traces of 'formalism' in their prescribed way of arriving at legal outcomes. And, to be fair, the putative, old legal formalism against which policy science rose did not most accurately describe the spirit of the mainstream international law discipline of the day either. Yet the two opposing perceptions of formalism, one attributed to the law and one resulting from the policy conceptualism of the NHS, were so strong as to erect an insurmountable wall of conflict between the advocates of policy sciences and their interlocutors.

Understanding the fate of the NHS’s policy-oriented approach to international law through this counter-narrative is of both historical and jurisprudential significance. First, the attribution of the cold reception of policy science to international lawyers’ orthodox concern about guarding their disciplinary borders is inaccurate. The disciplinary aversion to scientific demands, the NHS’s convoluted style of expression of those demands, and the historical and institutional circumstances impacting the fate of the policy-oriented approach are all indubitable. But they all reinforce a conventional understanding about the clash of the orthodox with a work of renewal in which the content of the renewal project was outright rejected. Such a reading disregards the characteristics internal to the structure and application of the New Haven Jurisprudence that ultimately defeated its main promises of flexibility and context-sensitivity. What the discipline reacted against was the fact that the propagated contextual methodology of the policy-oriented approach pivoting around the central, but acontextual normative values of human dignity gave rise to highly predictable outcomes that were invariably over-determined by the policy implications of those normative values. Rather than between determinacy and indeterminacy, or predictability and unpredictability of outcomes, then, the conflict was between two different kinds of determinacy: one that was sought, with hope if not certainty, in the universality of legal rules, and the other that was indeed invariably guaranteed by the policy implications of values of human dignity. It was in reaction to this latter kind of determinacy that the international law profession became ever more persistent in safeguarding what it believed to be the jurisdiction of the law.

Second, this counter-narrative also refutes two simplistic but enduring associations: an inherent association of formalism with law and that of anti-formalism with policy. Following the legacy of the received wisdom about the NHS’s career, considerations of policy in international legal decision-making are often taken to evince anti-formalism in opposition to the formalism of legal rules. This distorted depiction simply reduces the opposition between formalism and anti-formalism to one between law and policy, and thereby, both overlooks the risks of rigidity or formalism equally borne by policy reasoning and closes the door long before it is opened to a better understanding of the place of policy in legal argumentation.

Rather than define the concept as such, the next two sections will locate policy conceptualism in the epistemic structure of New Haven’s policy science (II) inherited from Lasswell’s behavioralism (III). Section IV will then recount some of the debates between the NHS and its contemporaneous international lawyers to demonstrate that the discipline’s rejection of policy science was a rejection of policy conceptualism and its resulting dogmatism rather than hostility against policy reasoning as such.

**II. Conceptualism and Epistemic Structure of the New Haven Jurisprudence**

The principal alternative of the policy-oriented approach to the legal formalism against which it set itself up is contextualism. Context-sensitivity through a comprehensive examination
of elements of “values,” “phase,” and “conditions” in the New Haven Jurisprudence embodies the pragmatist promises of policy-consciousness with a normative direction.\textsuperscript{15} Yet I have elsewhere argued that due to the epistemic structure of New Haven's contextualism and problem-solving methodology, these two fundamental promises of the Yale approach in fact remained ineffectual.\textsuperscript{16} The unreflective adoption of eight postulates as indices of universal human dignity in principle and subjecting the entire enterprise of contextual inquiry to the superiority of those postulates fatally blunts the true promises of pragmatism. The New Haven Jurisprudence operates on epistemic incongruence between a general contextualist ambition which commands a rigorous examination of all the non-evaluative contextual elements on the one hand, and a peculiar exemption of the normative values of human dignity from all inquiry and doubt on the other. The result is two-fold: defining those normative commitments in accordance with some parochial standards and misrepresenting them as universal values; and adopting and applying those normative commitments to overrule all other contextually-verified factors in any number of legal questions in such a manner that legal outcomes are simply over-determined with the highest degree of predictability.

In addition to the inherent problems plaguing the contextualist methodology of the NHS that result from its non-cognitive view of the determinative values of human dignity, its very contextualist framework of analysis of the various aspects of social processes of interaction between agents has been presented in multi-layered sets of conceptual categories.

The over-determining role of the postulates of human dignity only becomes evident at the time of the application of the policy-oriented jurisprudence to particular cases. So when skeptics point to the partiality of the policy-oriented jurisprudence for U.S. foreign policy interests, they look at the rigid determination of legal outcomes in light of human dignity superseding all other contextual elements. They do not, therefore, go beyond the peculiar issues of application to consider the fundamental consequences of an epistemic discriminatory view of the normative and the non-normative. In other words, they focus exclusively on the consequences of the application of the policy-oriented approach and neglect its epistemic structural makeup, which is in fact the cause of the rigid application of the NHS’s contextualist framework to legal questions in practice.

Contrary to the crucial but nuanced difference between regarding the overdetermining role of the NHS’s normative commitments as a mere problem of application or inherent in its epistemic structure, the formulaic presentation of contextual categories and conceptual tools delineating what constitutes ‘context’ in the social processes of law is too bold to escape the first glance of any casual reader of the New Haven Jurisprudence. These complex categories of contextual elements, besides the NHS’s generally convoluted language, in fact explain why most of the mainstream international lawyers’ engagement with McDougal was over the implementation of the policy-oriented jurisprudence in the world public order writings. The conceptual categories of contextual elements, on a theoretical height before touching the ground of actual legal decision-making contest, seemed too abstract to be interpreted, critically assessed, adopted or rejected on their face. One would expect that a jurisprudential heresy as intelligent and ambitious as the NHS should have been met by copious critical consideration and theoretical reflection of jurisprudences on the nature of its theoretical teachings. But with very few exceptions, the lion’s share of debate between McDougal or his associates and their critics circled around the

\textsuperscript{15} See supra notes 3 and 4.

doctrinal bearings of a policy-oriented approach for questions of world public order and were recorded mostly in the genre of book reviews. This fact in itself attests to the complexity and abstractness of New Haven’s conceptual framework of contextualism, articulated in formula and categories that did not touch a chord in the minds of the mainstream lawyers who, like mainstream political scientists of their time, did not appreciate the method-driven conceptualism of behavioralism in which such categories had their roots.

So what is introduced here as policy conceptualism is in fact a combination of two essential features of the New Haven Jurisprudence: first, the over-determining role of human dignity leading to rigid and defining implications of those values for legal outcomes (manifested in application); and second the conceptual categorization of contextual elements – elements that are all to eventually be subordinated to human dignity (constituting the complex structure of the contextualist approach of the policy-oriented jurisprudence). It was this policy conceptualism that defined the essence of the mainstream discipline’s skeptical reaction against the policy-oriented approach. By re-listening to the echoes of the doctrinal dialogue between McDougal and his critics over some of the questions in fashion for international lawyers of the time, one can appreciate that the flame of skepticism was not fanned by a principled opposition to the employment of policy in legal thinking per se, but by the particular method of the application of policy that in structure, application and outcome was as rigid, if not more, than a positivism-inspired legal analysis or abuse of deduction.

To appreciate the roots of policy conceptualism, however, it is helpful to first revisit Lasswell’s configurative policy science which in essence defined the NHS’s configurative approach. Lasswell’s strong commitment to the method-driven, scientific approach of behavioralism, on the one hand, and what eventually came to be a non-reflective commitment to a set of norms signifying human dignity, on the other, betrays an oscillation between transcendentalism and pragmatism – between the eternal and the temporal, the absolute and the contingent, and the universal and the particular. His normative commitments already estranged him from behavioralists and triggered their criticism, but it did not substantively distinguish his policy conceptualism from behavioralism’s enthusiasm for categories of conceptions, analytical tools, levels of analysis, and precision of applied methods of scientific analysis.

III. Conceptualism and Behavioralism

Political scientists view behavioralism as a landmark movement of the 1950s and 1960s which divided the history of their field. Divided about the scope of its impact, many of its proponents, at least in retrospect, thought it fell short of its potentials of a revolutionary disciplinary change, while its hostile critics accused it of a hegemonic scientific takeover. As

17 For a prominent exception, see William Morison, in Myers S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay, in TOWARD WORLD ORDER AND HUMAN DIGNITY, ESSAYS IN HONOR OF MYERS S. MCDougAL 1 (W.M. Reisman & Burns H. Weston eds., 1976).
19 See, e.g., Sheldon S. Wolin, Political Theory as a Vocation, 63 AM. POL. SCI. REV. 1062 (1969), cited in ADCOCK, supra note ... Some revisionists also call for moderation when assessing the reach and depth of behavioralism’s impact. See Robert Adcock & Mark Bevir, The Remaking of Political Theory, in MODERN POLITICAL SCIENCE, supra note ..., at 209–10 (challenging specifically the idea that behavioralism eliminated or took over political theory).
it is the case with any transformative movement, sifting through the specious and the genuine in the stock of all that has been attributed to behavioralism still fuels academic debates. Standing at the opposite spectrum end of disciplinary reform proposals from some of the German émigrés, such as Leo Strauss and Hans Morgenthau, who were equally dissatisfied with the state of the study of politics, behavioralism proposed a systematic change that has received a fair share of censure for propagating ahistorical research.\textsuperscript{20} For all the critiques of ahistoricism, however, revisionists furnish defense by questioning what 'historical' research in fact means – if being historical for a discipline means conducting original research on the past, they contend, then American politics was no more historical before behavioralism than it was afterwards.\textsuperscript{21}

Whatever differences about the level of impact and (a)historical trait of behavioralism, there is little to dispute about advancement of techniques and importance of research skills promoted by the movement. Reliance on techniques, however, though often associated with quantitative work, should not discount the special place of theory in behavioralism. For behavioralism, in fact, propagated a conception of theory that linked self-conscious abstraction in the interest of producing analytical frameworks with systematic empirical research.\textsuperscript{22} In a neo-positivist search for universalism, behavioralism started with macro-level assumptions about political systems or societies and worked with a high level of conceptual abstract theories that could systematically be applied to the empirical results it attained through sophisticated quantitative techniques.

Aspiring to liberate theory from particular historical contexts and find a scientific universal language, some of the masterminds of behavioralism such as Harold Lasswell\textsuperscript{23} and David Easton\textsuperscript{24} laid the foundation for what the movement adopted as the standards for evaluating a theoretical framework: universality, deductive structure, and instrumental utility for empirical research.\textsuperscript{25} This instrumental utility was different from the instrumentalism championed by early twentieth-century American social and political thinkers sympathetic to pragmatism. Utility in short, for behavioralists, could mean anything but advancement of a substantive normative ideal. This is where Lasswell, quite dramatically, broke apart from the movement he had a fair share nourishing with his widely-acknowledged prodigious intellectual energy.

Lasswell, it must be noted, took pains to qualify the limits of universality of theory. Put more accurately, the genius of Lasswell did not neglect the potential risk of reverting to logical abstraction through a behavioralist-advocated universalism of theory. Lasswell is thought to have taken to A.N. Whitehead, despite no explicit evidence, and accepted the philosophical idea of "emergence" in his reference to "emergent" and "manifold of events."\textsuperscript{26} There is more supporting evidence, in Lasswell's 'developmental' thinking and general framework of contextual analysis, for the presence of a multi-layered conception of 'emergence' in his thinking.\textsuperscript{27}

\textsuperscript{21} ADCOCK, supra note …, at 192.
\textsuperscript{22} Id. at 207–08.
\textsuperscript{23} See HAROLD D. LASSWELL & ABRAHAM KAPLAN, POWER AND SOCIETY (1950).
\textsuperscript{24} See DAVID EASTON, THE POLITICAL SYSTEM (1953).
\textsuperscript{25} Adcock & Bevir, supra note …, at 215.
\textsuperscript{27} Id., at 22.
"Emergent evolution" – with its conceptions of existential and functional emergence – maintains that no single theory or explanation could equally apply to the phenomena coming to existence at different points or standing at different levels of organization. The result is pluralism of propositions and nondeducibility – both unpredictability and irreducibility – of phenomena.28

To reconcile 'emergence', which requires an inductive analysis of details, with a theory of the whole, Lasswell states: "Sound Political analysis is nothing less than correct orientation in the continuum which embraces the past, present, and future. Unless the salient feature of the all-inclusive whole are discerned, details will be incorrectly located . . ."29 Then, in case this does not just yet sufficiently stress theory and perception of the whole, a few pages later Lasswell writes: "The gradual creation of a sense of wholeness, and of assurance in the discovery of interdetail connections within the all-encompassing totality, also requires new methods of formal exposition."30

Despite a lifetime search for "new methods of formal exposition," for Lasswell, the choice of the level of analysis and one between an intensive or extensive configurative approach, at least so far as the modern analysis of human relationship is concerned, is a matter of expediency and not principle. It is the level of analysis that in fact determines the appropriate mode of analysis. What might be accurately generalizable on one level of analysis could well be limited in another. It is the responsibility of the behavioralist scientist to be alert about her 'observational standpoint' and level of analysis at every step to determine the scope of the total context and the generalizability limits in that context.

Perhaps the most developed articulation of the levels of analysis in Lasswell's work comes later and is introduced as the well-known idea of intellectual tasks well-traveled between different disciplines:

Any problem-solving approach to human affairs poses five intellectual tasks, . . . ---goal, trend, conditions, projection, and alternative. The first question, relating to goal, raises the traditional problem of clarifying the legitimate aims of a body politic. After goals are provisionally clarified, the historical question arises. In the broadest context, the principal issue is whether the trend of events in America or throughout the world community has been toward or away from the realization of preferred events. The next question goes beyond the simple inventories of change and asks which factors condition one another and determine history. When trend and factor knowledge is at hand, it is possible to project the course of future developments on the preliminary assumption that we do not ourselves influence the future. Finally, what policy alternatives promise to bring all preferred goals to optimal fulfillment?31

This bold and sophisticated outline of intellectual tasks of a policy scientist appears to leave no doubt about a masterfully crafted design of a problem-solving oriented approach to social science. Yet upon further probing, some legitimate questions overshadow the appearance of the facially unmistakable contextualism assumed in the structure of this approach. It bears emphasis that some of these questions are questions of application, but some others are not. They rather relate to the very design of the intellectual tasks with which policy scientists of democracy are entrusted. First, goal clarification in policy science remains an intuitive, rather than natural or scientific, task. That the clarified norms reflect the native properties of their

28 Id. at 23.
29 HAROLD D. LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY 4 (1935).
30 Id. at 12.
authors would be innocuous, if policy science did not give so much credence to objectivity. As it stands now, however, maintaining ‘observational standpoint,’ is at worst a mirage, and at best a noble dream.

Second, trend (historical) and conditions (scientific) thinking processes are either nothing more than fact-gathering, or as is more likely given the method-driven nature of policy science, they proceed on the basis of a formulated method of interpreting historical events and scientific interpretation. If they are the former, the value of their fact-gathering effort depends on the manner in which those facts will be used. If they are the latter, however, they are circumscribed by the restrictions of the projected goals – if there has been progress towards or decline away from the realization of those goals – and accompanying assumptions that not only impact but in fact shape their results.

Third, developmental and alternative thinking are similarly influenced by conceptually determining factors. Projecting the course of future events is true to its problem-solving promise only when it adopts a comprehensive probabilistic approach. Imbued with the optimism of the realization of initially projected goals, it is a jubilant self-fulfilled prophesy. Likewise, policy alternatives are meaningful when the pigeon holes of original normative assumptions and the results of prior historical and scientific tasks have not already so predictably conscribed the ambit of permissible and impermissible policies.

Lasswell’s contextualism and problem-solving oriented theory is a response to the limitations of both empiricism and rationalism. Yet both in structure and in application, it relies on a form of deductive reasoning of its own. This deductive scheme is not incidental to policy science, but rather inherent in its larger intellectual progenitor of behavioralism and the role and epistemic character of its normative commitments. In the first place, suspicious of the insidiously masked analytical categories and hypotheses of the empiricist investigator, Lasswell’s policy scientist forthrightly adopts the transparent, analytical categories that (allegedly) contextualize the frame of analysis. That different categories of intellectual tasks above, for instance, imbricate, instantiate, and substantiate one another is not disputed by policy science – there is an order of priority in which they are recommended to take place after all. But that the investigator is advised to checkmark all these categories in any particular context regardless of the subject matter suggests the importance of pursuing a strict method for analysis. This categorical conceptualism is equally true in other elements of context (values, phase, and conditions) so fundamental to the New Haven Jurisprudence. The legal scientist has to operate the comprehensive contextual analysis using the recommended categories regardless of whether and how the subject matter lends itself to such an examination.32

In the second place, in addition to the categorical conceptualism often presented as a "verbal juggling act" inspired by behavioralism,33 the predominant normative values and goals of policy science, both applied as one of the categories of contextual elements and as the defined

32 For an illustration in international law, see Saberi supra note 16 FN 284; see also Charles Chaumont, Book Reviews: Law and Public Order in Space: By McDougal, Lasswell & Vlasic, 3 COLUM. J. TRANSNAT’L L. 271 (1963) (suggesting that the policy-oriented "distinctions constantly made between trends, claims, activities, policies, interactions, appraisals and recommendations, as much as those between participants, objectives, situations, base values, strategies, outcomes and effects appear not only somewhat repetitious but also relatively artificial, or at the very least not altogether sound"). For an admiring description of New Haven’s categorical concepts of contextual analysis and a clear statement of its method-oriented approach, see Siegfried Wiessner & Andrew Willard, Policy-Oriented Jurisprudence, 44 German Y.B. INT’L L. 96, 112 (2001).

subject of the first intellectual tasks, in the last analysis, give the contextual and problem-oriented investigation a deductive effect. In a sensible contextualist frame, normative values find a place among all other considerations subject to a balancing act of decision-making to determine their practical implications. But in a system where human dignity, as defined by policy sciences, overrules all the other contextual factors and has the \textit{a priori}, last determinative word, it is almost a redundancy to state that decisions are deduced from the categorical values of human dignity.

In a like manner, the guiding star function of the goals clarified through the first intellectual task for the historical, scientific, developmental and alternative thinking merely satisfies the analyst that she has exhausted all the categories of the recommended configurative method to forestall the intrusion of unwarranted assumptions or untested hypotheses. But in fact, the cumulative effect of all the prescribed intellectual tasks is reinforcement of the avowedly clarified (\textit{e.g.}, postulated) values of human dignity. The net result of intellectual labor is simply determined by the original postulates. If for empiricists, their disguised assumptions, as claimed by behavioralism, foist meaning upon the facts, for policy sciences also, its clearly articulated normative assumptions determine the results of investigation. One would surely prefer disclosed assumptions over disguised hypotheses, but that does not substantially change the fact that unjustified assumptions finally determine the results, or the fact that policy science misrepresents a deduction from those assumptions for contextually-verified solutions.

With this brief background on policy conceptualism, it is now time to turn to the reaction of international lawyers to the translation of the policy science methodology into international law.

\textbf{IV. In the Shadow of Hyperbole: Two Images of Formalism}

That international law in particular took a strong position against policy conceptualism and a deductive method in a post-realist age, when the myth of conceptualism and certainty of legal outcomes had already been dispelled, should not be startling. Perhaps behavioralist-inspired theories had less luck persuading lawyers compared to social scientists across various disciplines because, in light of the practical nature of legal reasoning, the implications of deduction from policy, similar in function to deduction from legal principles but different from that only so far as the content of the conceptual principles was concerned, could more readily be recognized and resisted in the process of legal decision-making.

More likely, however, U.S. international lawyers were impatient with policy conceptualism because, having come from a tradition that had long opened its shores to policy considerations in finding answers to actual problems of international relations, had a different expectation about the function of policy from what was on offer by the NHS. To them, as it is generally a matter of first impression about the application of policy in legal reasoning, policy implied flexibility, avoiding binary oppositions and textual application of rules, and legal labor that does not aim to furnish highly predictable results. The policy-oriented approach, on the contrary, starts with postulates of human dignity, diametrically contrasted with human indignity,

\footnote{Though “deduce” is a word that the New Haven masters avoid and only use to scoff at what they refer to as formalism of the rule-oriented approach, Weston, an associate, uses the same word openly to describe the basic modality of policy-oriented interpretation of agreements. “The overriding ‘goals’ of interpretation which the authors [of the work under review] recommend and from which they deduce particular policies to fit exact issues are designed, consistent with the New Haven Approach generally, ‘to give effect to the goals of a public order of human dignity.’” Burns H. Weston, \textit{The Interpretation of Agreements and World Public Order By Myres S. McDougal, Harold D. Lasswell, and James C. Miller}, 117 U. PA. L. REV. 650 (1969) (book review) (emphasis added).}
both of which have their respective Cold-War spirited representative, and establishes a conceptually complex contextual framework that pivots around the postulated normative commitments. In doing so, through a conceptually ingenious process of contextual analysis, it in fact eventually deduces the outcomes that would best promote human dignity as defined by the friends of its representatives. This is certainly different from the flexibility that international lawyers have habitually associated with the application of policy in legal decision-making.

To be clear, the claim here is not that the mainstream discipline as a whole articulated a defense against deduction from policy, or defined what that meant, or connected the consequences of policy-oriented approach to its epistemic structure. The argument simply is that the disciplinary distrust of the policy-oriented approach was not a distrust of policy per se, but a consequence of justified skepticism about rigid outcomes dissonant with a deeply-rooted consciousness about policy in international law. This long-rooted consciousness was not systematic, but rather fluid, organic and natural. Correspondingly, the reactions to the world public order writings did not follow a systematic critique of policy deduction, or a theoretical elucidation to that effect, either. Nor was a discipline ingrained in an unsystematic and organic policy thinking consciousness eventually persuaded by systematic, configurative theory of the application of policy that in the last analysis robbed its subject—policy—of its natural and familiar function and turned it into its opposite.

The illustration of the disciplinary reaction to rigidity and policy conceptualism embedded and inherent in the policy-oriented jurisprudence is best found in the disagreements between McDougal and associates and the discipline they aimed to reform over a number of important practical questions of international law. Rather than attempting to cast a general theoretical net over the general misgivings of international lawyers about the rigidity of the policy-oriented approach—a theoretical explanation that was scarcely formulated as such by the discipline itself, it is more helpful to listen to the echoes of some of those disagreements to bring the point home. But before turning to that, one last note on the place and function of policy in the NHS’s policy-oriented approach to legal decision-making is in order.

### a. The Analytical Function of Policy in the New Haven Jurisprudence

Although anyone with some degree of allegiance to the NHS’s legacy would cringe at the thought of attempting to define law in McDougal’s view, it would be helpful to momentarily recall his outstanding critiques of the rule-oriented conception of law to make sense of where policy comes into play. In McDougal’s legal realist-inspired critical account, mainstream international law firstly, has perpetuated the descriptive/prescriptive or *de lege lata/de lege ferenda* dualism and thereby ignored, and consequently masked, the inevitable presence of policy in legal decision-making dressed in the language of law. Secondly, the rule-oriented approach takes technical rules to adequately contain the entire intellectual process of decisionmaking from description of precedent, to prediction of outcomes, and prescription. Thirdly and relatedly, it comfortably ignores the inherent ambiguity of legal language (and language in general) resulting in gaps and complementarity of rules which simultaneously drives each individual case to diametrically opposite directions.


36 Id.

37 Id. at 152, 156; see also Myers S. McDougal et al., *Studies in World Public Order* 723–26 (1964). For complementarity of rules, see Myers S. McDougal & Florentino Feliciano, *Law and Minimum World* [continues on the next page]
Stated most economically, McDougal’s diagnosis of what he calls rule-oriented jurisprudential thoughts of the past and his alternative policy-oriented approach take ‘policy’ to fulfill two tasks: to furnish teleological reasoning (substance) and to facilitate the performance of a balancing test (process). Policy provides content to fill in the gaps and interpret ambiguities in a manner consistent with the higher-ranked desiderata on the hierarchy of social needs and ideals. In its divisive function of balancing between various desiderata, policy is also a guarantor of rationality and associated with enlightenment as it distinguishes between the subjective and the objective, the past precedent and the future prediction, and the more immediately achievable policy goals and the aspirations that may have to be replaced with alternative objectives.

Now looking at the structure and application of the New Haven Jurisprudence, teleological inference is substantiated by a set of elements (conditions, phase and all its subcategories of participants, perspectives, situations, base values, strategies, outcomes, effects, and the other category of values) that constitute a contextual inquiry. In practice, however, the value category overrules other contextual categories in implications and in its function as a directive for determining outcomes. So the teleological value of the value category exceeds that of other contextual considerations. All the other contextual variables are subject to further inquiry, to empirical verification (be it historical – trend thinking - or scientific – scientific thinking), and to a cost-benefit act of balancing. But policy implications of the value category, irrespective of the other variable contextual conditions, remain unchanging and unchangeable in any number of particular cases. So what the promotion of power, wealth, respect, enlightenment, well-being, rectitude, affection, and skill would require and bind the decision-maker to ensure is, in the last analysis, freestanding from the other context-specific circumstances and merely moves between two poles of human dignity and human indignity.

As a balancing tool also, quite expectedly, the epistemically unjustified choice of the normative values of human dignity restrains the function of policy analysis. To weigh the varying measure of urgency or contribution of different policies in a context-sensitive investigation, not only should the value and significance of each value category in that particular context be assessed against all other contextual elements, but also the specific implications, fluid meaning and dynamic consequences of each value category must be determined in conjunction with, and in recognition of, all those other circumstantial factors. Power, wealth, enlightenment, rectitude or other values might well imply one thing in one case and another in the next one, depending on all the other interacting agents and elements present in the contextual game.

Besides, (and this might be more related to teleological capacity of policy than to balancing per se), one has to wonder about other conceivable desiderata, such as security, distribution of resources, and inclusion of the voices from the periphery for instance, that depending on different circumstantial factors in a genuinely contextual analysis, could give a different meaning to power, wealth, and enlightenment, not necessarily yielding to the direct interest of McDougal's assigned representative of human dignity. To hold the value category as a whole in an unrivaled position in no need of epistemic justification, and then to read the

38 McDougal is said to be concerned for human dignity in developing nations, like all nations, “but he does not see the developing countries as requiring the separate and urgent attention of the legal process.” Rosalyn Higgins, Policy and Impartiality: The Uneasy Relationship in International Law, 23 INT’L ORG. 914, 924 (1969).
implications of its subcategories categorically in line with the practice and interest of the designated representatives of human dignity eviscerates the notion of balancing from all its essential features but the name.

This rigidly determinative function of policy in legal decision-making resulting from what this essay has introduced as the NHS’s policy conceptualism in effect mirrors what Duncan Kennedy refers to as "policy formalism" or "social conceptualism." Symptomatic of this kind of formalism are "select[ing] policies arbitrarily, underestamat[ing] the conflicts among them, and offer[ing] no defense of balancing as a rationally determinate procedure." The NHS avowedly commits to a preference for a set of postulated values over others, consistently interprets them in a manner leading to most predictable consequences without considering the slightest possibility of disharmony in implications even among its randomly-selected values, and as suggested above, leaves much to be desired in the way of a meaningful process of balancing.

b. International Law and Policy Conceptualism

To understand the reactions of the international law discipline against Yale’s policy conceptualism, let us now look at some of the illustrative examples of significant debates dividing the NHS and their opponents.

I.—Interpretation of International Agreements

The predictable closure epistemically inherent to the NHS, ironic for a jurisprudential renewal that set itself the task of revolutionizing the history of rule-oriented approaches of the past and their endemic formalism, is what triggered some of the critiques of McDougal’s reliance on 'shared expectations,' among other contextual factors, in legal interpretation. Shared expectations could be taken to either refer to specific expectations in a particular agreement or to general expectations "attached to the whole pattern of relationships between parties, including procedures for the interpretation of agreements." In the former case, it would only be a distorting concept as it dominates over all other relevant functions of the process of interpretation, and in the latter, it is too general and vague to function as a useful guiding principle at all. Yet McDougal finds 'shared expectations' to successfully help fill the gaps and bring a kind of closure that in a rule-oriented approach, given the complementarity of rules, would be either an illusion or contrived through an arbitrary assignment of a specific meaning to a rule to justify the adjudicator’s preferred outcome.

40 *Id.*
42 *Id.* at 126.
43 In the context of the law of war, McDougal describes the problem with complementarity of rules as follows:

> [T]he rules of the law of war, like other legal rules, are commonly formulated in pairs of complementarity opposites and are composed of a relatively few basic terms of highly variable reference. The complementarity in form and comprehensiveness of reference of such rules are indispensable to the rational search for and application of policy to a world of acts and events which presents itself to the decision-maker, not in terms of neat symmetrical dichotomies or trichotomies, but in terms of enumerable gradations and alternations from one end of a continuum to the other; the spectrum makes available to a decision-maker not one inevitable doom but multiple alternative choices.

*McDOUGAL & FELICIANO, supra* note 37, at 57.
The outer limit of the subject of 'shared expectations' is, however, as undefined as coming to an agreement on whose 'expectations' to include or exclude is debatable. A solution, which is McDougal's use of policy, is to proceed on the basis of some postulated specific goals of interpretation, and policing the outer borders of shared expectations with the aim of fostering consensus over human dignity. But the "very postulation of fixed goals for interpretation is bound … to have a distorting and misleading effect, for what is at stake in interpretation is not a means-end form (type) of calculus to design means for reaching fairly stable ends." Postulating goals and values as final arbitrators between relevant but competing alternatives does not resolve the choice between those alternatives. It instead eliminates the choice altogether.

Against McDougal's over-emphasized accusation that lawyers neglect complementarity and ambiguity of rules, critics responded with various degrees of sophistication. Some, in fact did respond in the same way as the suspicious McDougal about the legalist discipline facing him had anticipated – they simply did not appreciate the radical interpretive fact about complementarity or any other linguistic shortcomings of legal rules. Some others reacted with more nuance, and used, somewhat vaguely, 'plausible interpretation' as the yardstick to measure law's elasticity. Policy in their view is broader than what McDougal grants – compliance with international law itself is a policy "by which government elites seek to attain certain goals." The main problem of McDougal's expectation of legal interpretation, according to another reviewer, is in its emphasis on predictability, secured through technical means and jargon. But in fact an acceptable combination of predictability and flexibility, from the viewpoint of states, is a political question and not technical. "States do not ask how to maximize one, but how to optimize the mixture of both." Yet some others, sympathetic to and raised in the NHS, have essentially given some deference to McDougal's indeterminacy thesis but are critical of the extent to which McDougal is willing to go to discredit the capacity of legal language to justifiably determine outcomes. Richard Falk is an example of this group when he writes:

Acceptance of McDougal's position virtually severs the link between language and meaning. For if complementary norms are equally plausible under most circumstances, then no predictable impact upon behavior derives from adoption of a new prohibitive rule. … Although legal rules, especially broad principles … such as self-defense, are not delineated precisely enough that violative behavior can be identified with confidence, something quite definite is communicated by the rule.

---

44 Gottlieb, supra note 41, at 128.
45 See, e.g., Fitzmaurice, supra note 12, at 373 (summing up the NHS's work on the treaty interpretation as a work that while "[a]iming at order and liberality, its concepts, by their very breadth, open the door to anarchy and abuse").
47 Id.; see also Roger Fisher, Law and Policy in International Decisions, 135 Sci. 658, 659 (1962) (book review) ("[I]n urging deciders to look away from rules to policy, [McDougal] overlooks the fundamental policy of having disputes, differences, and questions of right, professedly and in fact, decided according to rules. . . . To accept his policy-science is all but to ignore the policy of having law.").
Far from merely taking a familiar, intermediate path and repeating a rule versus standard solution, Falk in fact elsewhere turns his attention to the alternative sort of determinacy that McDougal seeks under the cover of flexibility of policy and the critique of indeterminacy of rules: "The extent of policy and normative flexibility represents less a jurisprudential 'fact' … than a policy chosen because it promotes other policies." Falk is not concerned with the law's objectivity or preserving some limit of linguistic determinacy – though both of these matter to him to a moderate degree, but rather attempts to draw attention to the promotion of one kind of determinacy over another at the expense of an exaggerated portrayal of indeterminacy of rules. What results from the policy-oriented approach to treaty interpretation is not too much flexibility and chaos but in fact too little room for maneuver and too little appreciation of the complexity of contextual interpretation. The complexity and limitations of any interpretation are swept away by the generality of method advocated by the NHS, which views the "tasks of treaty interpretation to be homogeneous regardless of the subject matter of agreement and of the arena wherein the interpretative event is located." Rather than accounting for changing circumstantial factors, there is a great expectation invested in "genuine shared expectations" of the parties as reinforced or altered in view of the "general community policies" in the policing process of interpretation to establish the meaning of international agreements. This is just as confining, if not more than, strict reference to rules for guidance:

Such an orienting formulation, preliminary to the application of "the method" for consulting context, is at once too abstract and too indefinite to give the interpreter guidance and too directive to allow the interpreter and those subject to his interpretation an awareness of "the openness" of the interpretative situation.

An elaborate discussion of a policy-oriented approach to legal interpretation demands more space. The intention here is merely to illustrate two points: that McDougal chose to underappreciate international lawyers' recognition – albeit a mostly implicit and unarticulated recognition – of the relative degree of determinacy of rules, principles and standards; and that his own alternative contextualist interpretation was regarded to be beset by the same indeterminacies, unless harnessed by a directional normative framework such as human dignity, in the way that it was employed by the New Haven Jurisprudence.

McDougal's directional method of interpretation in essence sought to provide a middle ground between the classic textualist approaches inherited from Vattel and comprehensively codified in the 1935 Harvard Research Draft Convention on the Law of Treaties, on the one hand, and the views of those who found original intent to be no more than a fiction and

51 Falk speaks of the limits of any method of interpretation resulting from

the nature of the agreement process, the imperfections of language as the medium by which agreements are communicated through time and across space, the dynamic character of international public policy that shifts directives to correspond with shifts in the structure and preferences of international society, and the inability of international institutions to induce compliance with their will in relation to certain kinds of disputes about treaty obligations.

52 Id.
53 Id. at 370 (emphasis added).
54 On the textualist approach, McDougal and associates write: “It is the grossest, least defensible exercise of arbitrary formalism to arrogate to one particular set of signs—the text of a document—the role of serving as the [continues on the next page]
emphasized the judicial creativity of the decision-maker, on the other. The result, however, was a method-driven system of interpretation that replaced the presumed constraints of rules with a formulated articulation of 'shared expectations' and 'community policies' and developed a contextualist framework with a degree of predictability in which there was in fact little need for judicial creativity.

ii.—Complementarity and Ambiguity of Rules

Another challenge to McDougal's alleged complementarity of legal norms, in the context of military necessity and principle of humanity, invites him to justify the polar interaction of these principles with regard to permissible coercion. Against the principle of military necessity which permits necessary and proportionate means and prohibits militarily unnecessary and disproportionate ones, there is the principle of humanity, which under the name of higher values of "a public order of human dignity" requires "that the least possible coercion be applied to human beings, and that all authorized control over human beings be oriented towards strategies of persuasion with the widest possible participation in decision, rather than towards strategies of coercion." The reviewer asks if, given the higher order of the normative system of human dignity, these two principles in fact ought not to be one and the same, that is, "economy of force" be already imbued and ordered by the higher normative framework.

In other words, if the normative commitments to human dignity were to supersede all other considerations, then military utility would already be defined by limits on human behavior in war and in peace. If this is so, the reviewer asks when "a military commander manages to limit his means to the minimal requirements of objective military utility will he not have gone a long way toward ensuring that the basic values of human dignity are disturbed as little as possible?"

Both the tone and the intent impelling this reaction give the impression that the focus here is not on a fundamental question about McDougal's position on complementarity in general, but specifically on the merging of humanitarianism into military assessment. At the cost of erring on the side of a close reading, however, the review could also be thought to cavil about McDougal's over-emphasis on complementarity, and cast doubt on the need to balancing, in particular in a system where human dignity, in the last analysis, overrules all the circumstantial factors that could possibly impact the decision-making process.

iii.—Implicit and Explicit Reactions to Policy Conceptualism

It is the discipline's implicit or explicit reference to what this essay presents as policy conceptualism that McDougal either entirely evades, or distortedly translates into a defense of the rule of law to then abruptly dismiss. This rhetorical game characteristic to McDougal might be more understandable when he reacts to some of the more implicit critiques of conceptualism, as they are mostly buried in substantial arguments for what one, in full sympathy with

55 "The view we recommend thus rejects the excessive emphases of recent years both upon hierarchy as in Beckett and Fitzmaurice, and upon freedom of decision as in Hyde, Stone, and others. The choice between an ordered hierarchy of rules and the rejection of all rules is one which unnecessarily restricts the available alternatives." Id. at 117.

56 McDougal & Feliciano, supra note 35, at 72.


58 Id.
McDougal, might in fact read as amounting to no more than a mere concern with the rule of law. There were enough of positivists still around after all, who had no reservations to express rage over what they saw as a disastrous consequence of policy arguments taking over the rule of law.\(^{59}\) Some may have made a nuanced distinction between national and international law to suggest that contrary to the former wherein "the national interests were being frustrated by a strong and entrenched legal system," the latter is already injuriously subject to conflicting interpretations of nations in light of domestic policies.\(^{60}\) That nuanced addition aside, there was a lot in the way of distrust of allowing for policy in the unstable international arena.

Yet, for all the implicit dissatisfaction with conceptualism in the application of the policy-oriented method, many expressed clear discontent with the rigidity inherently embedded in the New Haven Jurisprudence and its policy conceptualism. Foreshadowed by Roscoe Pound's idea of comparative study of systems of law as systems and starting from the study of the interactions of individuals in groups or societies and their "divergent drives, competing desires, conflicting ambitions," and the need for "social controls" to solve the conflicts thereof,\(^ {61}\) and anticipated by Karl Llewellyn in "the overall design of decision-making and authority-applying functions in the context of all social processes," the Lasswell-McDougal apparatus still stands alone for being "highly abstract" and "conceptual."\(^ {62}\) In contradistinction to Llewellyn's -- and in fact to legal realism's -- idea of studying each "cluster" of legal phenomena as a \textit{sui generis} category, the Lasswell-McDougal formula seeks to establish an analytical method that equally fits all social phenomena; "the result is that they automatically assume, without any genuine empirical inquiry, that the formula does fit whatever subject they take up."\(^ {63}\)

Focusing on the expected contribution of a ‘theory,’ Oran Young writes that the adopted conceptual apparatus from Lasswell,

\begin{quote}
failed to support the development of any theory (or theories) in the formal sense. In fact, it tends to hinder the development of theory by introducing excessive numbers of potentially relevant factors while the crucial problem in developing viable formal theories is to construct simple logical models by stripping away as many factors as possible without undermining the predictive accuracy of the resultant propositions. . . . Much (of the apparatus) is characterized by a \textit{rigid formalism} that frequently makes it difficult to fit
\end{quote}


\(^{60}\)Fisher, \textit{supra} note 47, at 659.


\(^{62}\)Blackshield, \textit{supra} note 61.

\(^{63}\)\textit{Id.} at 18. Even the admirers of the NHS, who believe McDougal's theories have “a remarkable capacity to stimulate thinking about law and legal processes,” “have a most comprehensive viewpoint,” and a conceptual structure which is “brilliantly successful in achieving comprehensiveness and synthesizing capability.” Cannot help but wish that he “had given equal treatment to the problem of identifying other components of the laws of war to that they gave to identifying policy goals.” Ernest Jones, \textit{Law and Minimum World Public Order; The Legal Regulation of International Coercion. By Myers S. McDougal and Florentino P. Feliciano}, 15 J. LEGAL EDUC. 341, 345, 347 (1963) (book review); see also Weston, \textit{supra} note 34, at 117 (finding, as a close associate of the New Haven School, "excessive theoretical abstraction" to be a problem plaguing \textit{Interpretation of Agreements}). For a contrary view, see, for example, Courtland Peterson, \textit{The Public Order of the Oceans}, 18 J. LEGAL EDUC. 115, 118 (1965) (book review) (“[I]n international law change from sterile conceptualism has been slow and sporadic. The Public Order books are the first truly major effort in this direction.”).
observations of the real world into the framework's categorization with any comfort. The scheme tends to encourage the proliferation of logically possible boxes or categories that sometimes have little substantive content and that often become difficult to manage in analytic terms.64

Oriented in a social science perspective, Young is wary of the formulaic structure of policy science and the way its method-driven approach stands apart from the most desirable aspect of a theory, parsimony. So he attributes any success the NHS has had to McDougal's brilliance rather than to Lasswell's framework of analysis, as the "employment of the conceptual apparatus alone is not a sufficient condition for the production of outstanding legal analysis."65

Misgivings about the NHS's conceptual apparatus were not merely because of its complexity, but also because it was viewed largely as superfluous.66 Richard Posner took an exemplary quote from Law and Public Order in Space to suggest that, as realistic and sophisticated as it was, the work was riddled with a set of formal characteristics: "an elaborate analytic machinery; an appearance of logical or scientific rigorousness and precision; a specialized vocabulary; and great length - for the authors are indefatigable in applying the 'various relevant intellectual techniques' to every facet of every problem they take up."67 The comprehensive modality is mostly nothing more than "empty conceptualizing," introducing, for instance, a standard of 'reasonableness' that, while promises to resolve the question of occasional exclusive competence in outer space, in fact is just the beginning and not the end in legal analysis.68

It was not only the complex conceptual apparatus of policy science, but also the centrality of a set of values representing human dignity in legal decision-making that raised dismissive eyebrows and a great deal of suspicion as to return of conceptualism. McDougal saw the novelty of policy sciences as a development of legal realism and its extension from critique to a positive proposal. A colleague at Yale, Grant Gilmore, disagreed and found some resemblance between the New Haven apparatus and Langdellian conceptualism: "Despite the novelty of its trappings, the work of McDougal and Lasswell, particularly in its insistence that everything can be reduced to a few general principles, can, not unfairly, be taken as a return toward older theories of law."69 The NHS's evasion of both natural law and positivism also, by

---

65 Id., at 69. For a contrary view, see Michael N. Schmitt, New Haven Revisited: Law, Policy, and the Pursuit of World Order, 1 U.S. A.F. ACAD. J. LEGAL STUD. 185, 193 (1990) (“[T]he value of the New Haven approach is to be found, in great part, in its comprehensive nature.”).
67 Id. at 1371.
68 Posner continues:

All the authors really have to say about the problem of national sovereignty in space is that the law of the sea, with its basic rule of freedom, offers a closer analogy than the law of the air, with its rule of sovereignty. While this is a sound observation, it should not require several hundred pages to make, and little is gained by garnishing it with a high-sounding, but on examination almost meaningless, ‘rule of reason.’

Id. at 1371; see also G. Vernon Leopold, Law and Public Order in Space, 42 U. DET. L.J. 238, 239 (1964) (book review) (complaining about “semantic gymnastics” of McDougal and associates that “only serve to confuse and obscure their laibors” and their use of “pseudo mathematically” stated propositions that are in fact novel abstractions).
giving a primary place of importance to 'community interest's,' "as the explanation of the 'is,' as the criteria for the 'ought,' and as an answer to the 'why' of the law is a substitution of a policy-oriented 'community interest' for a restatement 'rule.'"

'Community interest,' therefore, is an absolute in and of itself for the policy-oriented jurisprudence. "Whether following the policy-oriented absolute is in the interest of the community any more than following 'rules' or, indeed, any other absolute, depends on the evaluation of the community interest in view of the logical conclusion that may inevitably follow from the hypothesis of the policy-oriented jurisprudence.'

V. Conclusion

That contra the received wisdom, the NHS’s success in antagonizing the discipline against its policy-oriented heresy did not owe to the latter’s principled hostility against policy reasoning, but rather to a clear, if not clearly articulated, opposition to the New Haven’s policy conceptualism is not merely a historical counter-narrative. Nor is it only a matter of hair-splitting to argue that the NHS’s apparent partiality for the ‘particular’ disguised as the ‘universal’ is not only a question of application, as the literature believes, but also results from the very epistemic structure of the New Haven Jurisprudence. Both are of significant jurisprudential implications.

First, the conventional story of New Haven’s policy pragmatism versus a unifiedly defiant, formalist international law leaves the NHS with little more than banal academic visibility. The real, but invisible, impact of the New Haven jurisprudence is in presenting a form of policy – policy conceptualism – that triggered such an opposition amongst international lawyers who preferred the contextualist possibilities not entirely foreclosed in legal interpretive labor over the over-determinative and formulaic function of human dignity and other NHS’s conceptual categories.

Second, another invisible but enduring legacy of the NHS, understood through the present counter-narrative, is a new vista through which to caution against the pitfalls of policy reasoning and to demand its promises. International legal theory has a relatively clear sense about abuse of deduction when found in legal interpretation, but it has little to say about similar defects in policy reasoning. Equally undertheorized are our ideas about the very concept of policy and its place in international legal argumentation. Pursued policy objectives might be principled or flexible and their application flexible or principled. So a combination of principled policies and flexible application of those policies or vice-versa might well permeate the words and practice of international lawyers, used simultaneously or selectively – depending on the context – to address international legal problems. And then there is percolation of these conflicting modalities – principled policies and unprincipled applications or the other way around – through different professional roles that international lawyers habitually adopt – what Richard Falk calls "a kind of odd and unappreciated overlap between … 'careerist' or 'vocational' concerns of international lawyers and the moral imperatives of good citizenship on matters of world affairs." We can begin to understand all

---

71 Id.

Draft version – H. Saberi
that complexity only when we acknowledge the fallacy of an inherent association between law and formalism and between policy and anti-formalism. Re-telling the story of the NHS was an effort to do just that.