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

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YALE'S POLICY SCIENCE AND INTERNATIONAL LAW: BETWEEN THE SCYLLA OF LEGAL FORMALISM AND THE CHARYBDIS OF POLICY CONCEPTUALISM

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1. Introduction

In 1943, an enduring collaboration between a political scientist and a legal scholar began to develop as the policy-oriented jurisprudence.[1] 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 the inertia of philosophical properties such as speculative, transcendental, metaphysical and theological absolutes, 'the ancient philosophical exercise of logical derivation', , and a 'quest for the ultimate and absolute meaning of law and justice.'[2] To remedy that, they centred 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 the pragmatism of interdisciplinary and social scientific insights. That pragmatism was well captured in two central ideas: contextualism and problem-solving orientation. In a synoptic description, New Haven's 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 authoritative decision-makers to weigh their claims and counterclaims and make prescriptions.[3] Legal decision-making requires a three-tier analysis of 'values', 'phase' and 'conditions'. These conceptual categories provide 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.[4] Conditions refer to the particular location of a context within the larger context of world power process,[5] whereas phase analysis considers specific factors that help dissect each individual context.[6]

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[1] MS McDougal and HD Lasswell 'Legal Education and Public Policy: Professional Training in the Public Interest' (1943) 52 *Yale Law Journal* 203–95 (introducing for the first time the policy-oriented thinking and education in law). It was Richard Falk who later described the methodology inspired by McDougal and Lasswell as the "New Haven Approach" and suggested that '[t]he coordination of inquiry around a common methodology, if significant, leads to the development of "a school," an approach to the study or treatment of a subject-matter that is a significant event in the history of the subject" with the aim to both "acknowledge" and "hasten" such a recognition for the McDougal-Lasswell approach.' R Falk 'On Treaty Interpretation and the New Haven Approach: Achievements and Prospects' (1967-1968) *Virginia Journal of International Law* 323-55 at 330 footnote 11. Others have refered to the same phenomenon as 'the Yale Approach' and 'the Yale School of International law'. See G Gottlieb 'The Conceptual World of the Yale School of International Law' (1968) 21 *WORLD POLITICS* 108-32. For ease of reference, I will use NHS, an acronym which was first used in 1985 by Michael Reisman, himself a close student of the NHS, WM Reisman, 'Remarks: McDougals Jurisprudence: Utility, Influence, Controversy' *(1985)* 79 *American Society of International Law Proceedings 266* at 277.

[2] HD Lasswell and MS McDougal *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (New Haven Press New Haven and Martinus Nijhoff Publishers Dordrecht, Boston and London 1992) vol 1 at 71, 178.

[3] MS McDougal 'The Impact of International Law upon National Law: A Policy-Oriented Perspective' in MS McDougal et al (eds) *Studies in World Public Order* (Yale University Press New Haven 1960) 157–236, at 168.

[4] For one such application to the question of coercion, for instance, see MS McDougal and FP Feliciano *The International Law of War: Transnational Coercion and World Public Order* (New Haven Press New Haven and Martinus Nijhoff Dordrecht, Boston and London 1994) at 16–20.

[5] See MS McDougal, HD Lasswell and JC Miller *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (Yale University Press New Haven and London 1967) at 34 (identifying some of the factors that affect the authoritative process of interpretation and application of international agreements as

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Contra traditional, rule-oriented adjudication or interpretation, a policy-oriented decision-maker or legal scholar treats each case as an individual 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, presented as indices of human dignity,[7] 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 fuelled endless disputes, the policy-oriented scholars of human dignity neither seek nor offer any normative justification for their preferred value commitments.[8] 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 US.

Despite its masterly design and broad scope, the NHS's policy science received its fair share of criticism at the time and persuaded only a handful of disciples. On the one hand, some scholars were sceptical about the plausibility of scientific objectivity and the impartial application of the NHS's methodology to international legal questions.[9] On this view, New Haven's pseudo-scientism was nothing more than a complex language with a simple objective: the maintenance and legitimization of the US national interest. On the other hand, some scholars reacted to McDougal's broad understanding of the social processes that defined law. These critiques were plainly aimed against the intrusion of power politics and policy into law either in a positivist spirit[10] or in line with the concerns of international relations scholars who opposed the

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 strategies of cooperation in shaping and sharing values that may affect expectations about future modalities of such cooperation).

[6] These are participants, perspectives, situations, base value, strategies, outcome, and effect. See MS McDougal, HD Lasswell and MW Reisman 'Theories about International Law: Prologue to a Configurative Jurisprudence' (1968) 8 *Virginia Journal of International Law* 188–299, at 198.

[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 MS McDougal 'International Law, Power, and Policy: A Contemporary Conception' (1953) 82 *Recueil des Cours* 133–259, at 168.

[8] MS McDougal 'Perspectives for an International Law of Human Dignity' in *Studies in World Public Order* (n 3) at 987–1019, at 993.

[9] See generally L Gross 'Editorial Comment: Hans Kelsen: October 11, 1886–April 15, 1973' (1973) 67 *American Journal of International Law* 491–511, at 499; OR Young 'International Law and Social Science: The Contributions of Myres S McDougal' (1972) 66 *American Journal of International Law* 60–76, at 74 ('McDougal has leaned toward a somewhat uncritical acceptance of the views of the American "establishment" on a number of specific issues in the field of international relations').

[10] See eg JL Kunz *The Changing Law of Nations: Essays on International Law* (Ohio State University Press Columbus OH 1968) at 169; A D'Amato '*Studies in World Public Order* by Myres S McDougal and Associates' (1961) 75 *Harvard Law Review* 458–61, at 460.

implications of realism.[11] Yet a third group simply targeted the convoluted style and complex presentation of New Haven's jurisprudence, which rendered it either incomprehensible or impractical.[12] Each strand of scepticism consists of nuanced and specific objections to various theoretical and application features of the McDougal–Lasswell project, but policy as legitimization, policy as invasion of power into law, and policy framework as conceptual 'grandiloquence'[13] in fact comprise the body of resistance against the methodological renewal of New Haven's 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.[14] 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 hard-headed discipline mostly concerned with formalist legal reasoning and wary of extra-legal 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 New Haven's 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 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 mode of formalism. I introduce this new mode of formalism as 'policy conceptualism' to suggest that the story of the NHS's career was not a simple rivalry between law and policy per

[11] S Hoffmann, L Henkin and R Falk 'Mild Reformist and Mild Revolutionary' (1970) 24 *Journal of International Affairs* 118–, at 118–20 (accusing the NHS of doing its best to undermine all the elements of law's distinctiveness).

[12] See eg H Briggs 'The Interpretation of Agreements and World Public Order—Principles of Content and Procedure' (1968) 53 *Cornell Law Review* 543–6, at 543 (calling the Lasswell–McDougal language 'dogmatic scientism'); G Fitzmaurice '*Vae Victis* or Woe to the Negotiators: Your Treaty or Our "Interpretation" of It?' (1971) 65 *American Journal of International Law* 358–73, at 360 ('[T]his book . . . is written in a highly esoteric private language,—we do not say jargon, but a kind of juridical code which renders large tracts 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': EN Griswold 'Intellect and Spirit' (1968) 81 *Harvard Law Review* 292–307, at 297.

[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.

1960 Curriculum Committee Report, Introduction, III, 1–6, *cited in* L Kalman *Legal Realism at Yale 1927–1960* (University of North Carolina Press Chapel Hill and London 1986) at 185.

se, but one between two understandings of an interpretive stance towards 'experience' and 'logic' of a (pseudo)scientific method. There was hope in determinative capacity of interpretative tools facilitated by law on one side, and faith in predictability of outcomes guaranteed by democratic policies of human dignity on the other. The real confrontation was between two conceptions of formalism: the formalism of law that the NHS attributed to the international law discipline and was committed to refute, and the formalism of policy—'policy conceptualism'—that the discipline found in the policy-oriented approach and did not countenance.

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.

The next two sections will locate policy conceptualism in the epistemic structure of New Haven's policy science (Part II) and show how that approach was inherited from Lasswell's behaviouralism (Part III). Part IV will then recount some of the debates between the NHS and its contemporaneous critics 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-based reasoning as such. The historical and jurisprudential significance of this counter-narrative will follow in a brief conclusion.

2. Conceptualism and Epistemic Structure of New Haven's 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 New Haven's jurisprudence embodies the pragmatist promises of policy-consciousness with a normative direction.[15] Yet 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 unrealised.[16] The unreflective adoption of eight postulates as indices of universal human dignity in principle[17] and subjecting the entire enterprise of contextual inquiry to the superiority of those postulates fatally blunts the true promises of pragmatism. New Haven's jurisprudence, as taught by McDougal and Lasswell and followed by their disciples, operates on epistemic incongruence between a general contextualist ambition which commands a rigorous examination of all 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

[15] See nn 3 and 4.

[16] See H Saberi 'Love it or Hate It, but for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity' (2012) 35 *Boston College International and Comparative Law Review* 59–144.

[17] See footnote 7 and accompanying text.

commitments in accordance with some parochial standards and misrepresenting them as universal values; and applying those normative commitments to overrule all other contextually-verified factors in a manner that legal outcomes are simply over-determined with the highest degree of predictability in any number of legal questions.

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 policy-oriented methodology. So when sceptics point to the partiality of the policy-oriented jurisprudence towards US foreign policy interests, they consider 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.

While the crucial difference between regarding the over-determining role of the NHS's normative commitments as a mere problem of application or inherent in its epistemic structure is nuanced, 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 New Haven's jurisprudence. These complex categories of contextual elements, besides the NHS's generally convoluted style, in fact explain why most of the mainstream international lawyers' engagement with McDougal was limited to the implementation of policy-oriented jurisprudence in the world public order writings. The conceptual categories of contextual elements, on a theoretical height before touching the ground of implementation and actual legal decision-making contestation, 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 jurisprudes on the nature of its theoretical teachings. But with very few exceptions, the lion's share of the debate between McDougal or his associates and their critics circled around the doctrinal bearings of a policy-oriented approach for questions of world public order and were recorded mostly in the genre of book reviews.[18] 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 behaviouralism 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 New Haven's jurisprudence: first, the over-determining role of human

[18] For a prominent exception, see WL Morison 'Myres S McDougal and Twentieth-Century Jurisprudence: A Comparative Essay' in WM Reisman and BH Weston (eds) *Toward World Order and Human Dignity: Essays in Honor of Myres S McDougal* (Free Press 1976) 1.

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 sceptical 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 scepticism 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 behaviouralism, 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 behaviouralists and triggered their criticism, but it did not substantively distinguish his policy conceptualism from behaviouralism's enthusiasm for categories of conceptions, analytical tools, levels of analysis, and precision of applied methods of scientific analysis.

3. Conceptualism and Behaviouralism

Political scientists view behaviouralism 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 potential as a revolutionary disciplinary change,[19] while its hostile critics accused it of a hegemonic scientific takeover.[20] As is the case with any transformative movement, sifting through the specious and the genuine in the stock of all that has been attributed to behaviouralism still fuels academic debates. Standing at the opposite end of the spectrum to the disciplinary reform proposals of some of the German émigrés such as Leo Strauss and Hans Morgenthau (who were equally dissatisfied with the state of the study of politics), behaviouralism proposed a systematic change that has received a fair

[19] See eg JC Wahlke '1978 APSA Presidential Address: Pre-Behavioralism in Political Science' (1979) 73 *American Political Science Review* 9–31, cited in R Adcock 'Interpreting Behavioralism' in R Adcock, M Bevir and SC Stimson (eds) *Modern Political Science: Anglo-American Exchanges since 1880* (Princeton University Press Princeton and Oxford 2007) 180–208, at 180–181.

[20] See eg SS Wolin 'Political Theory as a Vocation' (1969) 63 *American Political Science Review* 1062–82, cited in 'Interpreting Behavioralism' (n 19) 181. Some revisionists also call for moderation when assessing the reach and depth of behaviouralism's impact: see R Adcock and M Bevir 'The Remaking of Political Theory' in *Modern Political Science* (n 19) 209–33, at 209–10 (challenging specifically the idea that behaviouralism eliminated or took over political theory).

share of censure for propagating ahistorical research.[21] For all the critiques of ahistoricism, however, revisionists have furnished a defence 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 behaviouralism than it was afterwards.[22]

Whatever differences about the level of impact and (a)historical trait of behaviouralism, 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 behaviouralism. For behaviouralism, in fact, propagated a conception of theory that linked self-conscious abstraction in the interest of producing analytical frameworks with systematic empirical research.[23] In a neo-positivist search for universalism, behaviouralism started with macro-level assumptions about political systems or societies and worked with theories at a high level of conceptual abstraction 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 behaviouralism such as Harold Lasswell[24] and David Easton[25] 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.[26] 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 behaviouralists, could mean anything but the advancement of a substantive normative ideal. This is where Lasswell, quite dramatically, broke apart from the movement to whose nourishment he had devoted his widely-acknowledged prodigious intellectual energy.

Lasswell, it must be noted, took pains to qualify the limits of the universality of theory. Put more accurately, the genius of Lasswell did not neglect the potential risk of reverting to logical abstraction through a behaviouralist-advocated universalism of theory. Lasswell is thought to have taken to AN Whitehead, despite no explicit evidence, and accepted the philosophical idea of 'emergence' in his reference to 'emergent' and 'manifold of events'.[27] There is more supporting evidence in Lasswell's 'developmental' thinking and general

[21] See eg HJ Morgenthau *Scientific Man vs Power Politics* (University of Chicago Press Chicago and London 1946); B Crick 'The Science of Politics in the United States' (1954) 20 *Canadian Journal of Economics and Political Science* 308–20.

[22] 'Interpreting Behavioralism' (n 19) 192.

[23] ibid 207–8.

[24] See HD Lasswell and A Kaplan *Power and Society* (Yale University Press New Haven and London 1950).

[25] See D Easton *The Political System: An Inquiry into the State of Political Science* (Knopf New York 1953).

[26] 'The Remaking of Political Theory' (n 20) 215.

[27] H Eulau 'The Maddening Methods of HD Lasswell: Some Philosophical Underpinnings' in A Rogo (ed) *Politics, Personality, and Social Science in the Twentieth Century: Essays in Honor of Harold D Lasswell* (University of Chicago Press Chicago 1969) 15–40, at 21.

framework of contextual analysis for the presence of a multi-layered conception of 'emergence'.[28] 'Emergent evolution'—with its conceptions of existential and functional emergence—maintains that no single theory or explanation could equally apply to the phenomena coming into existence at different points or standing at different levels of organization. The result is pluralism of propositions and non-deducibility—both unpredictability and irreducibility—of phenomena.[29]

To reconcile 'emergence', which requires an inductive analysis of details, with a theory of the whole, Lasswell states that '[s]ound 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'.[30] Then, in case this does not just yet sufficiently stress theory and perception of the whole, a few pages later Lasswell writes '[t]he 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'.[31]

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 relationships 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 behaviouralist scientist to be alert to her 'observational standpoint' and level of analysis at every step in order 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-travelled 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?[32]

[28] ibid 22.

[29] ibid 23.

[30] HD Lasswell *World Politics and Personal Insecurity* (McGraw-Hill Book Co Inc New York 1935) 4.

[31] ibid 16.

[32] H Lasswell *The Future of Political Science* (Atherton Press New York 1963) 1–2.

This bold and sophisticated outline of the 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 authors would be innocuous, if policy science did not give so much credence to objectivity. As it stands now, however, maintaining an 'observational standpoint', is at worst a mirage, and at best a noble dream. Secondly, 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. Thirdly, developmental and alternative thinking are similarly influenced by conceptually determinative 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 behaviouralism 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 New Haven's 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.[33]

[33] For an illustration in international law, see 'Love it or Hate it' (n 16) 111–12 n 284. See also CM Chaumont '*Law and Public Order in Space* by McDougal, Lasswell & Vlasic' (1964) 3 *Columbia Journal of Transnational Law* 271–4 (suggesting at 271 that the policy-oriented 'distinctions constantly made between trends, claims, activities, policies, interactions, appraisals and recommendations, as much as those between participants, objectives, situations,

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In the second place, in addition to the categorical conceptualism often presented as a 'verbal juggling act' inspired by behaviouralism,[34] the predominant normative values and goals of policy science, both applied as one of the categories of contextual elements and as the defined 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 *a priori*, last determinative word, it is almost a redundancy to state that decisions are deduced from the categorical values of human dignity.[35]

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 all the categories of the recommended configurative method have been exhausted 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 (eg, postulated) values of human dignity. The net result of intellectual labour is simply determined by the original postulates. If empiricists' disguised assumptions foist meaning upon the facts (as behaviouralism claims), the clearly articulated normative assumptions of policy sciences equally determine the results of their 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 background in mind, let us now turn to the reaction of international lawyers to the translation of policy science methodology into international law.

4. 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 behaviouralist-inspired theories had less luck persuading lawyers compared to social scientists across various

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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 S Wiessner and AR Willard 'Policy-Oriented Jurisprudence' (2001) 44 *German Yearbook of International Law* 96–, at 112.

[34] B Moore *Political Power and Social Theory: Seven Studies* (Harper & Row New York 1962) 89–110, at 99.

[35] 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."': BH Weston '*The Interpretation of Agreements and World Public Order* by Myres S McDougal, Harold D Lasswell, and James C Miller' (1969) 117 *University of Pennsylvania Law Review* 647–64, at 650 (emphasis added).

disciplines because, in light of the practical nature of legal reasoning, the implications of deduction from policy, functionally similar to deduction from legal principles and different only in content, could more readily be detected and resisted in the process of legal decision-making.

More likely, however, US international lawyers were impatient with policy conceptualism because, coming from a tradition that had always countenanced policy considerations in handling problems of international relations, had a different expectation about the function of policy from what was on offer by the NHS. As it is generally a matter of first impression about the application of policy in legal reasoning, to these lawyers policy implied flexibility, avoiding binary oppositions and textual application of rules, and legal labour that does not aim to furnish highly predictable results. The policy-oriented approach, countering this expectation, starts with postulates of human dignity, which are diametrically contrasted with human indignity and both represented by a Cold War spirited pole, and establishes a conceptually complex contextual framework that pivots around those postulated normative commitments. In doing so, through a conceptually ingenious process of contextual analysis, the policy-oriented approach 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 defence 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 scepticism 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, 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 disciplinary reaction to rigidity and policy conceptualism embedded and inherent in the policy-oriented jurisprudence is best illustrated by 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.

4.1 The Analytical Function of Policy in New Haven’s 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 recall his

outstanding critiques of the rule-oriented conception of law to make sense of where policy comes into play. First, in McDougal's legal realist-inspired critical account, mainstream international law 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.[36] Secondly, the rule-oriented approach takes technical rules to adequately capture the entire intellectual process of decision-making from description of precedent, to prediction of outcomes, and prescription.[37] 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.[38]

Stated most economically, McDougal's diagnosis of what he calls rule-oriented jurisprudential theories of the past and his alternative policy-oriented approach take 'policy' to fulfil 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 associated with enlightenment and a guarantor of rationality 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.

Both in structure and application, teleological inference in New Haven's jurisprudence is substantiated by categories (conditions, phase and values) that constitute a contextual inquiry. In practice, however, the value category overrules other contextual categories in implications and in 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–or 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 NHS's normative commitments would bind the decision-maker to ensure is, in the last analysis, freestanding from the other context-specific circumstances and merely moves between the two poles of human dignity and human indignity.

Likewise, as a balancing tool, 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

[36] 'International Law, Power, and Policy' (n **Error! Bookmark not defined.**) 144.

[37] ibid.

[38] ibid 152, 156. See also MS McDougal and RN Gardner 'The Veto and the *Charter*: An Interpretation for Survival' in *Studies in World Public Order* (n 3) 718–60, at 723–6. For complementarity of rules, see MS McDougal and F Feliciano *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale University Press New Haven and London 1961) 56–7; MS McDougal 'The Ethics of Applying Systems of Authority: The Balanced Opposites of A Legal System' in HD Lasswell and H Cleveland (eds) *The Ethic of Power: The Interplay of Religion, Philosophy, and Politics* (Harper New York 1962) 221–40, at 221–6; MS McDougal 'Jurisprudence for a Free Society' (1966) 1 *Georgia Law Review* 1–19, at 2–4; MS McDougal 'Law as a Process of Decision: A Policy Oriented Approach to Legal Study' (1956) 1 *Natural Law Forum* 53–72, at 61–3.

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.

If one were to take the teleological capacity of policy seriously, one would have to wonder about the potential of other conceivable desiderata, such as security, distribution of resources, and the inclusion of voices from the periphery. Depending on different circumstantial factors in a genuinely contextual analysis, such values might give a different meaning to power, wealth, and enlightenment, not necessarily yielding to the direct interest of McDougal's assigned representative of human dignity.[39] To hold the value category as a whole in an unrivalled position in no need of epistemic justification, and then to read the 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'.[40] 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'.[41] 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.

4.2 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.

4.2.1 Interpretation of International Agreements

The predictable closure epistemically inherent to the NHS is what triggered some of the critiques of McDougal's reliance on 'shared expectations', among other contextual factors, in

[39] 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': R Higgins 'Policy and Impartiality: The Uneasy Relationship in International Law' (1969) 23 *International Organization* 914–31, at 924.

[40] D Kennedy 'Legal Formalism' in NJ Smelser and PB Baltes (ed) *The International Encyclopedia of the Social and Behavioral Sciences* (2001) 8634–8, at 8635, citing KE Klare 'Judicial Deradicalization of the *Wagner Act* and the Origins of Modern Legal Consciousness, 1937–1941' (1978) 62 *Minnesota Law Review* 265–339.

[41] ibid.

legal interpretation.[42] The irony was that the NHS set itself the task of jurisprudential renewal, of revolutionizing the history of rule-oriented approaches of the past and their endemic formalism. 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'.[43] In the former case, it would only be a distorting concept as it dominates 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.[44]

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'.[45] 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 McDougal in his unyielding conviction about their legalism had anticipated—they simply did not appreciate the radical interpretive fact about complementarity or any other linguistic shortcomings of legal rules.[46] Others reacted with more nuance, and used,

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[42] G Gottlieb 'The Conceptual World of the Yale School of International Law' (1968) 21 *World Politics* 108–32, at 126–7.

[43] ibid 126.

[44] In the context of the law of war, McDougal describes the problem with complementarity of rules as follows:

> the rules of the law of war, like other legal rules, are commonly formulated in pairs of complementary 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 innumerable 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.

MS McDougal, 'The Processes of Coercion and Decision: General Community Policies' in *Law and Minimum World Public Order* (n 38) 1–96, at 57 (citations omitted).

[45] 'The Conceptual World of the Yale School of International Law' (n 42) 127–8 (emphasis altered).

[46] See eg '*Vae Victis* or Woe to the Negotiators' (n 12) 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').

somewhat vaguely, 'plausible interpretation' as the yardstick to measure law's 'elasticity'.[47] 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'.[48] 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'.[49]

Yet some others, sympathetic to and raised in the NHS, essentially gave some deference to McDougal's indeterminacy thesis but were 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:

> [A]cceptance 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 the 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.[50]

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'.[51] 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 he attempts to draw attention to the promotion of one kind of determinacy over another at the expense of an exaggerated portrayal of the 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 manoeuvre and too little appreciation of the complexity of contextual interpretation.[52] The complexity and limitations of any interpretation

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[47] OJ Lissitzyn 'Western and Soviet Perspectives on International Law—A Comparison' (1959) 53 *Proceedings of the American Society of International Law* 21–30, at 23.

[48] ibid. See also R Fisher 'Law and Policy in International Decisions' (1962) 135 *Science* 658–60, at 659–60 ('[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').

[49] PH Rohn '*The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* by Myres S McDougal; Harold D Lasswell; James C Miller' (1969) 63 *American Political Science Review* 540–2, at 542.

[50] RA Falk 'The Adequacy of Contemporary Theories of International Law: Gaps in Legal Thinking' (1964) 50 *Virginia Journal of International Law* 231–65, at 240–1.

[51] RA Falk '*Law and Minimum World Public Order: The Legal Regulation of International Coercion* by Myres S McDougal and Florentino P Feliciano' (1963) 8 *Natural Law Forum* 171–84, at 179.

[52] Falk speaks of the limits of any method of interpretation resulting from

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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'.[53] 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.[54]

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 as beset by the same indeterminacies, unless harnessed by a directional normative framework such as human dignity, in the way that it was employed by New Haven's 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,[55] and the views of those who found original intent to be no more than a fiction and emphasized the judicial creativity of the decision-maker, on the other.[56] 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

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> 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.

RA Falk 'On Treaty Interpretation and the New Haven Approach: Achievements and Prospects' in RA Falk *The Status of Law in International Society* (Princeton University Press Princeton 1970) 342–77, at 369.

[53] ibid.

[54] ibid at 369–70 (emphasis added).

[55] 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 exclusive index of the parties' shared expectations. We join with those who condemn textualism of this kind as a violation of the human dignity to choose freely': MS McDougal, HD Lasswell and JC Miller *The Interpretation of International Agreements and World Public Order: Principles of Content and Procedure* (Yale University Press New Haven and London) at xvii.

[56] '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': ibid 117.

contextualist framework with a degree of predictability in which there was in fact little need for judicial creativity.

4.2.2 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'.[57] 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.[58]

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 behaviour 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 towards ensuring that the basic values of human dignity are disturbed as little as possible?'[59] 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 for balancing, in particular in a system where human dignity, in the final analysis, overrules all the circumstantial factors that could possibly impact the decision-making process.

4.2.3 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 defence of the rule of law to then abruptly dismiss. This rhetorical game characteristic to McDougal might be more visible in his reactions to some of the more implicit critiques of conceptualism. Those critiques were mostly buried in substantial arguments for what could justifiably be read as amounting to merely a concern for the rule of law. There were enough positivists still around after all, who had no reservations to expressing rage over what they saw as a disastrous consequence of policy arguments replacing the rule of law.[60] Some may have made a nuanced

[57] *Law and Minimum World Public Order* (n 38) 72.

[58] WV O'Brien, '*Law and Minimum World Public Order: The Legal Regulations of International Coercion* by Myres S McDougal and Florentino P Feliciano' (1962) 72 *Yale Law Journal* 413–20, at 419.

[59] ibid.

[60] For an example of a positivist-inspired debate with McDougal, see L Gross 'Voting in the Security Council: Abstention from Voting and Absence from Meetings' (1951) 60 *Yale Law Journal* 209–57. For McDougal's

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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 by nations in light of domestic policies.[61] That nuanced addition aside, many distrusted allowing policy greater importance 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 New Haven's 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,[62] and anticipated by Karl Llewellyn in 'the overall design of decision-making and authority-applying functions in the context of all social processes', the McDougal–Lasswell apparatus still stands alone for being 'highly abstract' and 'conceptual'.[63] In contradistinction to Llewellyn's—and in fact to legal realism's—idea of studying each 'cluster' of legal phenomena as a *sui generis* category, the McDougal–Lasswell 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'.[64]

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

> failed to support the development of any theory (or theories) in the formal sense. In fact, it tends to hinder the development of theory severely 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. . . .

rebuttal, see MS McDougal and RN Gardner 'The Veto and the *Charter*: An Interpretation for Survival' (1951) 60 *Yale Law Journal* 258–92.

[61] 'Law and Policy in International Decisions' (n 48) 659.

[62] R Pound 'Philosophy of Law and Comparative Law' (1951) 101 *University of Pennsylvania Law Review* 1–19, at 1–2, cited in AR Blackshield 'The Policy Science Approach to Jurisprudence: A Critique of the Legal and Sociological Concepts of Lasswell and McDougal' (1964) 23 Australian Society of Legal Philosophy, Working Paper No 5, 1964) 17.

[63] 'The Policy Science Approach to Jurisprudence' (n 62) 61.

[64] ibid 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': EM Jones '*Law and Minimum World Public Order: The Legal Regulation of International Coercion* by Myres S McDougal and Florentino P Feliciano' (1963) 15 *Journal of Legal Education* 341–9, at 345, 347; see also '*The Interpretation of Agreements and World Public Order* by Myres S McDougal, Harold D Lasswell, and James C Miller' (n 35) 117 (finding, as a close associate of the New Haven School, 'excessive theoretical abstraction' to be a problem plaguing *Interpretation of Agreements*). For a contrary view, see eg CH Peterson '*The Public Order of the Oceans* by Myres McDougal and William T Burke and *Law and Public Order in Space* by Myres McDougal, Harold D Lasswell and Ivan A Vlasic' (1965) 18 *Journal of Legal Education* 115–18, at 118 (1965) ('[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').

> Much of [the apparatus] is characterized by *a rigid formalism* that frequently makes it difficult to fit observations of the real world into the framework's categorizations 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.[65]

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'.[66]

Misgivings about the NHS's conceptual apparatus were not merely because of its complexity, but also because it was viewed largely as superfluous.[67] 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'.[68] The comprehensive modality is mostly nothing more than 'empty conceptualizing', introducing, for instance, a standard of 'reasonableness' that, while promising to resolve the question of occasional exclusive competence in outer space, is in fact just the beginning and not the end of legal analysis.[69]

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 about the 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

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[65] OR Young 'International Law and Social Science: The Contributions of Myres S McDougal' (1972) 66 *American Journal of International Law* 60–76, at 68–9 (emphasis added) (citations omitted).

[66] ibid 69. For a contrary view, see MN Schmitt 'New Haven Revisited: Law, Policy and the Pursuit of World Order' (1990) 1 *United States Air Force Academy Journal of Legal Studies* 185–204, at 193 ('the value of the New Haven approach is to be found, in great part, in its comprehensive nature').

[67] R Posner '*Law and Public Order in Space* by Myres S McDougal, Harold D Lasswell and Ivan A Vlasic' (1964) 77 *Harvard Law Review* 1370–4, at 1370.

[68] ibid 1371.

[69] ibid. 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.'

See also G Vernon Leopold '*Law and Public Order in Space* by Myer [sic] S McDougal, Hardol D Lasswell and Ivan A Vlasic' (1964) 42 *University of Detroit Law Journal* 238–41, at 238–9 (complaining about 'semantic gymnastics' of McDougal and associates that 'only serve to confuse and obscure their labors' and their use of 'pseudo mathematically' stated propositions that are in fact novel abstractions).

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'.[70] The NHS evades both natural law and positivism by giving a primary place of importance to 'community interests', '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"'.[71] 'Community interest', therefore, is an absolute in and of itself for 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.[72]

5. Conclusion

Contra the received wisdom, the NHS's success in antagonizing the discipline against its policy-oriented heresy was not due to the latter's principled hostility against policy reasoning, but rather to a clear (if not clearly articulated) opposition to New Haven's policy conceptualism. The NHS's apparent partiality for the 'particular' disguised as the 'universal' is not only a question of application, but also results from the very epistemic structure of New Haven's jurisprudence. Both these points have significant jurisprudential and historical implications.

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

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 the realisation of its promises in our own time. 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 undertheorised 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

[70] G Gilmore *The Ages of American Law* (Yale University Press New Haven and London 1977) at 90.

[71] E Ereli '*The Public Order of the Oceans* by Myres S McDougal and William T Burke' (1963) 16 *Vanderbilt Law Review* 1009–16, at 1016.

[72] ibid.

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'.[73] 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 NHS is an effort to do just that.

[73] RA Falk 'The Place of Policy in International Law' (1972) 2 *Georgia Journal of International and Comparative Law* 29–34, at 30.