

2012

Love it or Hate it, But for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity

Hengameh Saberi

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

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



Part of the [International Law Commons](#)

Recommended Citation

Saberi, Hengameh. "Love It or Hate It, But for the Right Reasons: Pragmatism and the New Haven School's International Law of Human Dignity." *Boston College International and Comparative Law Review*. 35.1 (2012).

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

LOVE IT OR HATE IT, BUT FOR THE RIGHT REASONS: PRAGMATISM AND THE NEW HAVEN SCHOOL'S INTERNATIONAL LAW OF HUMAN DIGNITY

HENGAMEH SABERI*

Abstract: This Article presents a novel understanding of pragmatism in the New Haven School of international law. The New Haven Jurisprudence is wrapped in layers of mystification and the scant accounts of its pragmatism in the literature are either entirely mistaken or only partially helpful, betray a vernacular or truncated understanding of pragmatism, and fail to engage with the internal, epistemic structure of the policy-oriented jurisprudence. In response, this Article uncovers a contradictory form of foundationalist pragmatism in the Yale Jurisprudence in a peculiar relationship between its contextualist and problem-solving promises and its unreflective normative commitments to a set of postulated values of human dignity. In doing so, it foregrounds a “foundationalist antifoundationalism” and its crippling impact on the pragmatist promises of policy-oriented jurisprudence. Against the worn-out accusations of the New Haven Jurisprudence of U.S. imperialism or disguised affinity with natural law, understanding its foundationalist pragmatism offers a new appreciation of both the genius of Yale’s policy-oriented approach and the promises of pragmatism for policy thinking in international law.

INTRODUCTION

In 1971, Richard Falk—himself an astute student of the New Haven School of international law (NHS)—predicted that if by 2010 the world would have overcome “the fundamental challenges of war, pov-

* Postdoctoral Fellow, Institute for Global Law and Policy, Harvard Law School; Director, Middle East & Near East Program, Harvard Law School Project on Disability. The author acknowledges with gratitude the unfailing support, advice, and mentorship of David Kennedy, the intellectual camaraderie of Paulo Barrozo, Lisa Kelly, Vlad Perju, and Mark Toufayan, and the invaluable comments of Catherine Elgin, Alejandro Lorite Escorihuela, Duncan Kennedy, and Martti Koskenniemi on various earlier drafts. This work has benefited from presentations at Harvard Law School’s Graduate Program Colloquium, Georgetown University Law Center’s Faculty Workshop: Critical Perspectives on Law, Boston University School of Law’s Faculty Workshop, Boston College Law School’s International Legal Studies Colloquium, and from the editorial help of the *Boston College International & Comparative Law Review*. All errors are solely the author’s.

erty, pollution, and oppression,” an historian seeking to “recreate the intellectual roots of such a positive outcome” could not hope to do better than to explicate the “clarity of vision, seriousness of commitment, and extent of impact . . .” of the life and work of Professor Myres McDougal.¹ With 2011 already behind us, the historian is hardly so lucky as to be asked for an account of the intellectual roots of a world without war, poverty, pollution, and oppression. Despite this, Professor Myres McDougal’s place in the history of American international law, as Falk aptly put it, “tower[s] so far above his contemporaries as to be virtually invisible.”²

Like most things in the altitudes of invisibility, however, the policy-oriented approach to international law that was born and flourished in New Haven³ remains, seven decades later, persistently enveloped in layers of mystification. In its own time, it lived a life of celebrity scholarship—attracting some and repelling many others—in which fiery rebuttals trumped meaningful engagements with critics. In its afterlife, it earned little more than either overwhelmingly negative or positive accounts of what it was not, or underwhelming appraisal and appreciation of what it was. Reactions to the NHS’s policy approach run the gamut from critiques that target its theoretical inadequacies or follies and the threat posed to the rule of law if policy and law were to be so closely integrated,⁴ to laudatory commendations of the NHS’s own assertive stance as a comprehensive jurisprudence for a new world public order of human dignity,⁵ to enchantment with the NHS’s methodo-

¹ Richard Falk, *Myres S. McDougal: Pioneer for the Year 2010*, 1 DENV. J. INT’L L. & POL’Y 13, 15–16 (1971).

² *Id.* at 16.

³ See generally Myres S. McDougal & Harold D. Lasswell, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943) [hereinafter McDougal & Lasswell, *Legal Education and Public Policy*]. *Legal Education and Public Policy* is the first collaborative work of Lasswell and McDougal, which in effect set the groundwork for a new policy-oriented jurisprudence.

⁴ See discussion *infra* Part I.

⁵ For examples of such accounts that address the NHS’s general jurisprudence, without discussing specific doctrinal debates, see, for example, John Morton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662, 688 (1968), who suggests that the jurisprudential canvass into the Lasswell-McDougal project is among the most rewarding endeavors in legal thought, and Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORD. 1, 46 (1974), who argues that the NHS “has aided contemporary scholars and decisionmakers alike to construct adequate tools for the study of the interrelations of law and the world social process.”

logical heresy of weaving policy into the fabric of law without actually adopting that methodology in any identifiable form or substance.⁶

This Article aims to break through the by-now solidified walls of misperception around Yale's policy-oriented jurisprudence, dispel some of the accepted wisdom about its foundations and nature, and present a more nuanced, dispassionate, and plausible understanding of its epistemological commitments and methodological claims. For all their differences, critics and admirers of the New Haven Jurisprudence agree about at least one fundamental assumption: that New Haven's policy-oriented approach and its avowed antifoundationalism are consistent with the teachings of American pragmatism. This Article challenges the accepted wisdom about pragmatism in the NHS and offers a more accurate reading of its antifoundationalism. It does so because the peculiar relationship between pragmatism and human dignity in the NHS not only defined the fate of its career during and after the Cold War, but continues to bear crucial implications for the life of international law in the United States. A fresh and accurate understanding of the pragmatist and policy-oriented jurisprudence of the international law of human dignity, therefore, through its historical significance, opens up new avenues for a realistic assessment of international law's vocation, limits, and potential in the twenty-first century.

As any cursory review of American legal thought confirms, Professor McDougal and Harold Lasswell's collaborative project transcends international law into the wider space of jurisprudence, introducing a configurative and sophisticated theoretical framework to advance human dignity in a free society.⁷ History, however, evidently had a different course plotted for the success and reception of Yale's policy science jurisprudence. The Lasswell-McDougal project is known as "the first American attempt to conceive of . . . lawyering—legal teaching, research, practice and decision-making—as an overtly political endeavor."⁸ Pedagogical reconstruction was, therefore, the first platform on which the NHS hoped to construct an image of the politically conscious lawyer

⁶ This view is best reflected in the general, but unenunciated, understanding of the NHS as an all-encompassing, oceanic movement that has altered the discipline such that it is simply no longer possible to think of international law in pre-McDougalian terms.

⁷ See generally MYRES S. McDOUGAL & HAROLD D. LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992) [hereinafter McDOUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY].

⁸ NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 164 (1995).

as a lawyer of human dignity.⁹ The American system of legal education, however, was not persuaded to train lawyers as policy scientists in order to advance the normative goals of human dignity or universal democracy.¹⁰ Nor was international law—the discipline the Lasswell-McDougal collaboration in effect spent its entire career to reform—enticed by the configurative methodology of policy science. In fact, as will be outlined in Part I below, contemporaneous reactions to the NHS's interdisciplinary project ranged from agnosticism to outright rejection, rendering the NHS the most visible, but ultimately the least influential, mid-twentieth century project of disciplinary renewal.¹¹

Later interdisciplinary proposals for an international law geared toward post-Cold War challenges and opportunities were also not aligned with Yale's policy-oriented methodology. One would have expected the post-Cold War reemergence of enthusiasm about the potential of political science to enrich international law to exhibit, beyond reverence for empirical research, a more meaningful methodological affinity with or understanding of the elaborate application of policy science in the New Haven Jurisprudence. Aside from an implicit regard for the pioneering work of McDougal, however, the international relations rescue mission lacked the sophistication of Yale's configurative and multidisciplinary approach, remaining content to set up international law with quantitative ambitions.¹² This was, after all, "a new generation of interdisciplinary scholarship."¹³ The other feasible suspect to

⁹ Hence, the first Lasswell-McDougal work was devoted to a comprehensive plan for legal education. See McDougal & Lasswell, *Legal Education and Public Policy*, *supra* note 3, at 206.

¹⁰ For the best account of the failure of the NHS's educational program, see LAURA KALMAN, *LEGAL REALISM AT YALE, 1927–1960*, at 184–85 (2001), which details the opposition to the Lasswell-McDougal proposal in the general perception of policy science as being too costly and academic, and just elitist. Interestingly, McDougal himself blamed the failure of educational institutions to adopt the policy-oriented approach on timing, rather than institutional constraints:

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.

Id. at 185 (quoting an interview with McDougal).

¹¹ See MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960*, at 475 (2002).

¹² See generally Anne-Marie Slaughter et al., *International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship*, 92 AM. J. INT'L L. 367 (1998) (exploring the intersection of international law and international relations and specifically the use of international relations theory to solve various international legal problems).

¹³ *Id.* at 393.

carry the NHS's torch would have been Critical Legal Studies (CLS) or its offspring, which share to an equal degree McDougal's skepticism about the law's autonomy.¹⁴ But this shared epistemological view about the law and its indeterminacy provides a very thin genealogical relation between CLS and the NHS, considering that CLS would cringe both at New Haven's commitment to a scientific approach to decision-making and at the significant, overdetermining role of its normative fidelity to human dignity for legal outcomes.¹⁵

Even through its brightest chance for resurrection or comprehension in the twenty-first century as "a 'new' New Haven School,"¹⁶ the NHS has been taken merely to inspire a pluralistic platform against the reductionism of rational choice theory,¹⁷ to delineate the complexity of diverse world public orders in a new age,¹⁸ or to question, in a way that does little to enhance our understanding of the NHS, the Lasswell-

¹⁴ See, e.g., ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 201–02 (1993) (suggesting that the seeds of CLS could be found in Lasswell and McDougal's first collaborative work).

¹⁵ See, e.g., James Boyle, *Ideals and Things: Legal Scholarship and the Prison-House of Language*, 26 HARV. INT'L L.J. 327, 343 (1985) ("To claim that one can inject a universal value ('human dignity') into an avowedly means-end technique is a contradiction in terms. For this to become one of the dominant approaches to international law is a travesty."). McDougal himself also spoke of the differences between the NHS and CLS:

We seek more emphasis upon deliberate creation and appreciation of policy than most prior framers of jurisprudence and we recognize the need for a comprehensive, integrated set of values to achieve this emphasis. It is here that we differ from the Critical Legal Studies people . . . [W]e try to be constructive as well as destructive.

Letter from Myres S. McDougal to Neil Duxbury (Feb. 14, 1990), *quoted in* DUXBURY, *supra* note 8, at 194–95 n.189.

¹⁶ Lauren E. Baer & Stephen M. Ruckman, *Foreward* to Symposium, *The "New" New Haven School: International Law—Past, Present & Future*, 32 YALE J. INT'L L. 299, 299 (2007).

¹⁷ See, e.g., Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 YALE J. INT'L L. 301, 305–11 (2007) (linking the Lasswell-McDougal emphasis on law as social process to Robert Cover's legal pluralism and finding its synthesis in Harold Koh's theory of transnational legal process); Janet Koven Levit, *Bottom-Up International Lawmaking: Reflections on the New Haven School of International Law*, 32 YALE J. INT'L L. 393, 396–98, 408–10 (2007) (comparing the old NHS's stance against the realists and positivists of its time to the New NHS's invocation of bottom-up rulemaking against contemporary neo-sovereignists); Dakota S. Rudesill, Note, *Precision War and Responsibility: Transformational Military Technology and the Duty of Care Under Laws of War*, 32 YALE J. INT'L L. 517, 543–44 (2007) (tangentially referring to the old NHS while tackling norm diffusion in the laws of war to fit into the New NHS symposium theme).

¹⁸ See Christopher J. Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 YALE J. INT'L L. 331, 359–61 (2007) (arguing for the conceptual complexity of world public order and suggesting ways the NHS can build on some of its original insights to capture the new realities of the time).

McDougal quest for scientific precision in legal decision-making as the specific product of its time and space.¹⁹ An amalgam of heterogeneous projects, the “new” New Haven School reaches out to different parts of the proverbial elephant in the dark, to pay respect to a shared geographical locale, rather than to find inspiration in the epistemological, methodological, or normative insights of the Lasswell-McDougal project.

If international law as a whole in the United States was not enlightened by the New Haven Jurisprudence, why, then, does McDougal’s policy-oriented approach warrant a new reading? Two reasons connected to the internal structure of policy-oriented jurisprudence not only justify, but demand, a new assessment of this mid-twentieth century genius of U.S. international legal thinking. First, the NHS’s policy approach to international law is symbolic of how Americans predominantly engage with (or disengage from) international law with a more flexible, policy-conscious, contextualist, and problem-solving attitude. In general, the association of American theories of international law with the Yale approach often has overestimating undertones that are both negative and positive. On the negative side, Yale—and thus any form of policy analysis, as opposed to purely legalistic arguments—is blamed for reflecting an ill disposition for easily breaking the law in the name of balancing conflicting policies.²⁰ On the positive side, even its detractors, who deny it the exalted status of “jurisprudence,” acknowledge that “[o]ne can hardly participate in modern international law scholarship without a background in ‘policy science.’”²¹ A more profound understanding of the internal structure, epistemological claims and function, and methodological and normative commitments of the NHS is required to reject the simplistic association of this policy-oriented approach with U.S. foreign policy interests to bring about the demise of international law. Likewise, given that even the “new” New

¹⁹ Rebecca M. Bratspies, *Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development*, 32 YALE J. INT’L L. 363, 366 (2007).

²⁰ See, e.g., Brad Roth, *Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force in the Post-Cold War Era*, in UNITED STATES HEGEMONY AND THE FOUNDATIONS OF INTERNATIONAL LAW 232, 249–50 (Michael Byers & Georg Nolte eds., 2003) (“At its worst, the policy-oriented approach equates law with justice as interpreted by the strong.”). Recognizing the policy-oriented approach as neither uniquely American nor merely a divisive apology to justify U.S. foreign policy interests, Roth still believes that it “remains a controversial mode of legal analysis, especially among those who seek to maintain a critical perspective on U.S. actions.” *Id.* at 250.

²¹ Brian Leiter, *Is There an ‘American’ Jurisprudence?*, 17 OXFORD J.L. STUD. 367, 369 (1997).

Haven School barely resembles McDougal's policy science except in geographic name, against the fantastic and overblown description of the NHS as a gateway to "modern international law scholarship," a more realistic account of McDougal's legacy for international law is long overdue.

Understanding that legacy is beyond the ambit of this Article.²² But to understand that invisible yet extraordinary and long-enduring impact, as opposed to the banal visibility often afforded the NHS, it is first crucial to cast the principal epistemic claims of the NHS—those suggesting the influence of pragmatism—in a new light. These two constitutive pragmatist claims are contextualism and problem-solving orientation. To grasp their origin, function, and implications for Yale's international law of human dignity, one must properly locate McDougal's intellectual pedigree.

Widely held and deeply ingrained in international lawyers' consciousness, but never methodically delineated,²³ is a belief that the NHS has deep roots in American Legal Realism.²⁴ Upon further examination, however, "McDougal's realist sentiments" irretrievably give way to the force of Lasswell's policy science.²⁵ Acknowledging the exceedingly strong and determinative influence of Lasswellian policy science on the New Haven Jurisprudence, compared to currently unexplored traces of Legal Realism, is the long neglected key that will open new avenues for a better understanding of the real place and disciplinary legacy of the NHS in international law.

How so? As I will argue, there is a peculiar interaction between the scientific and normative commitments in the New Haven Jurisprudence, in which the strenuous standards of empirical analysis it prescribes (or any other form of inquiry for that matter) do not apply to

²² See Hengameh Saberi, *The New Haven School's Soliloquy: Banal Visibility and Invisible Impact* (May 2010) (unpublished manuscript) (on file with the Harvard Law School Library). Here I suggest that in fact the NHS, through its interaction with its contemporaneous mainstream international law discipline, induced a new consciousness about "policy thinking" that still haunts international legal discourse in the United States.

²³ For a notable exception, see generally William Morison, *Myres S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY* 3 (W. Michael Reisman & Burns H. Weston eds., 1976). As the only extensive comparative jurisprudential study of the NHS, Morison's essay reads McDougal against a number of twentieth-century schools of thought and not merely Legal Realism. As such, his analysis of the NHS's realist roots is theme selective and, inevitably, limited in scope.

²⁴ *Cf.* DUXBURY, *supra* note 8, at 170 (stating that Lasswell and McDougal found legal realism to be inadequate and thus attempted to move American jurisprudence away from the traditional methods of legal realism).

²⁵ *Id.* at 167–68.

the normative values of human dignity. Human dignity, therefore, takes the form of an overarching and determinative element in legal decision-making, while its substance consists of a set of homegrown value postulates that reflect the parochial normative worldview of the New Haven masters. The form and substance of human dignity, defined as such, bear significant consequences for the fundamental epistemic claims of the policy-oriented approach—the claims that putatively make the NHS a genus of pragmatism. What remains of the pragmatist promises of contextualism and problem-solving orientation, in the face of what ultimately is a foundational faith in the essence and determining role of human dignity, is no more than a semblance of pragmatism, if one recognizes antifoundationalism as the cardinal epistemic building block of pragmatism. New Haven's antifoundationalism, in the final analysis, is not without foundations of its own. This foundationalist antifoundationalism becomes not only the hallmark of policy-oriented jurisprudence, aligning it with the foreign policy interests of the leader of the free world, but also the explanatory force behind international law's reaction to the role of policy versus law for many years to come.

To make sense of New Haven's foundationalist pragmatism—a contradiction by nature with grand consequences—one should flex the commonly held assumption about the force of realist jurisprudence on Yale's collaborative renewal project in international law. The Lasswell-McDougal project sought a new and receptive disciplinary home in international law for Lasswell's policy science and a counterpart for the policy scientist of democracy in the international lawyer of human dignity. Reading the foundationalist antifoundationalism of Yale under the shade of Lasswell's pedigree affords a breeze of sympathy toward McDougal's vision for a policy-oriented international law, vindicating it from the unsophisticated accusations of legitimization and hasty critiques that have failed to follow or engage with the internal logic of the New Haven Jurisprudence.

To offer a new understanding of New Haven's pragmatism for an international law of human dignity, this Article proceeds as follows. In Part I, I map the discipline's reactions to the Lasswell-McDougal project to illustrate that, regardless of the nature of objections, the literature has unanimously entertained an external critique of the Yale approach without a trace of attention to its epistemic claims and a critical assessment of their function and success in delivering what they promise. Part II reviews the sketchy accounts of New Haven's pragmatism in the literature and suggests that they lack a philosophical understanding of pragmatism, and thus adopt, at best a truncated, and at worst a vernacular, usage of the term. The centerpiece of the argument advanced here,

Parts III and IV, instead take contextualism and problem-solving orientation as the two core claims of the New Haven Jurisprudence that bear significant epistemological implications for policy-oriented approach and re-assess their success in light of the normative commitments of the New Haven masters. By dissecting the function of New Haven's contextualism and problem-solving orientation and their interaction with the central role of human dignity in legal decision-making, I aim to foreground and make sense of the NHS's foundationalist antifoundationalism or pragmatism. Part V concludes the argument.

Rather than intend to discover the "real" New Haven Jurisprudence, or propose an affirmative account of what a plausibly pragmatist international law of human dignity (or any other normative agenda) ought to look like,²⁶ this Article takes apart some of the fundamental, but misguided and misleading, understandings of Yale's policy approach, of pragmatism, and ultimately of policy thinking in international law. As the existing literature bears evidence, no account of the career of the Lasswell-McDougal project and its legacy for international law would take off successfully amid the fog that still surrounds the epistemic and methodological tenets of policy science. This is neither about saving Yale's policy-oriented approach nor about venerating the tradition of pragmatism, but rather a first attempt at taking stock of what really went on in the Lasswell-McDougal heresy in order to establish solid ground for a more accurate understanding of how this mid-twentieth century revolutionary project of disciplinary renewal speaks to us today.

I. NEW HAVEN'S POLICY-ORIENTED INTERNATIONAL LAW AND THE PANORAMA OF AGNOSTICISM

In its own time, the policy-oriented approach of the NHS faced general resistance. This resistance at first appears to derive from a commonly shared source of disciplinary anxiety among international lawyers of the time about the methodological novelty so passionately advocated by Lasswell and McDougal. Under the New Haven account, international law faced a choice between, on the one hand, a multidisciplinary project of renewal with a sophisticated scientific apparatus and clear normative commitments, and on the other hand, stagnation and a naïve hope in the autonomy of the rule of law.²⁷

²⁶ The latter project would be a worthwhile endeavor and certainly deserves its own space. That will not, however, be here.

²⁷ See, e.g., McDougal & Lasswell, *Legal Education and Public Policy*, *supra* note 3, at 237.

This picture, however, is too general and too vague to reflect the complete story of the discipline's reception of a policy-oriented international law of human dignity. The ill fate of the democratic science of international law envisioned by the NHS may be attributed, in varying degrees, to a wide variety of factors, such as: institutional constraints, unfavorable timing, McDougal's complex language and style, international lawyers' impatience with New Haven's scientific accuracy and technical vocabulary, agnosticism about the practical value of employing scientific language, resistance against a disciplinary renewal generally perceived as either unnecessary or incomprehensible, anxiety about the certainty of the law and the professional image of the lawyer giving in to the professional identity of the policy scientist of democracy, and a mutual sense of alienation between the old and the new.

An historiographical attempt to understand the career of the NHS must weigh all these explanations and possibly discover more. But the map of contemporaneous reactions to McDougal's policy-oriented heresy here has a different purpose. It presents a synopsis of what was in debate in order to illustrate what was not. Agnostic reactions to McDougal's proposal, in all their variations, focused on an external critique to target its ideological implications, its view of law and power, and its complex style and language.²⁸ As manifested by this map, none took any interest in the internal, epistemic structure of the New Haven Jurisprudence.

The map below sketching popular skepticism against the NHS is admittedly simplified to some degree. Any effort to thread various interpretations of the methodological renewal of the NHS inevitably disregards some nuances in the interest of making sense of a common disciplinary spirit. In fact, the prevalent strands of skepticism about the New Haven Jurisprudence never quite converged on what they found most problematic with the policy-oriented approach; nor did the New Haven masters take the various objections they faced seriously enough to engage in a dynamic and linear series of debates and methodically classify the arguments of their skeptics. This lack of genuine communication may explain why all the negative reactions to the policy-oriented approach remained external to the NHS's epistemic structure.

²⁸ See discussion *infra* Parts I.A.–C.

A. Policy-Orientation and Legitimization

The first set of critiques of the methodological renewal and normative commitment of the NHS derives from blanket skepticism about the political orientation and intellectual independence of the New Haven masters. By focusing on the American character of their policy approach to legal decision-making, these readings of Lasswell and McDougal begin with an assumption about New Haven's partiality for U.S. dominance during the Cold War. These assumptions are specifically illustrated in different aspects of the configurative jurisprudence in which policy considerations must determine legal outcomes. Though not always to an equal degree, the skepticism appears to be cast over the mere plausibility of the scientific claims and the possibility of consensus over the specific normative commitments of the New Haven Jurisprudence on the one hand, and the particular application of those scientific methods and the interpretation of the accompanying normative commitments on the other.

Some simply remain unconvinced by the Yale School's claims to scientific objectivity. It is difficult, however, to determine whether the plausibility of scientific objectivity or the failure of McDougal and his associates to apply those standards to actual legal problems is truly in question when, for instance, Leo Gross speaks of "the policy-science approach to international law which *disguises* policy in a *pseudoscientific apparatus of procedures* for determining what the law is."²⁹ At the center of the scientific teachings of policy sciences to promote objectivity lie the "maintenance of clarity in observational standpoint," "[t]he delimitation of an appropriate focus of inquiry," and the "performance of intellectual tasks."³⁰ These three principles aim to define precisely the relationship of the scholar to the legal problem at hand—the question of who is analyzing what and how.³¹ The identification of the scholar or policy scientist with a particular class, culture, and nation-state significantly impacts the way she formulates the question and seeks the answers. Even more important is the professional role the international

²⁹ Leo Gross, Editorial Comment, *Hans Kelsen*, 67 AM. J. INT'L L. 491, 499 (1973) (emphasis added).

³⁰ Myres S. McDougal, Harold D. Lasswell, & Michael W. Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188, 199–200 (1968) [hereinafter McDougal et al., *Theories About International Law*].

³¹ Frederick Samson Tipson, *Consolidating World Public Order: The American Study of International Law and the Work of Harold D. Lasswell and Myres S. McDougal, 1906–1976*, at 44 (May 1977) (unpublished Ph.D. dissertation, University of Virginia) (on file with Alderman Library, University of Virginia).

law scholar adopts, either consciously or unconsciously. McDougal, Lasswell, and Reisman contrast the “scholarly observer” with the “active decision-maker,”³² a distinction that, despite being oversimplified,³³ is nevertheless a testament to the importance of defining a precise observational standpoint in order to maintain objectivity.

The oversimplification of a divide between scholarly pondering and decision-making is even more evident when one considers that, within each category, the questions of contentment with status quo or a desire for change—and, for scholars, the task of accommodating an intellectual, social, and political orientation through a congenial jurisprudential approach—complicate the clarification of the observational standpoint far more than the policy sciences appear to recognize. To be sure, McDougal clearly recognizes that his own specific vocational, stylistic, community, national and international affiliations shape and constrain his vision, and that distinguishing between individual inclinations and common interests of mankind is a matter of exercise and persistence.³⁴ Such a clarification demands careful psychological self-analysis. Identifying the footprints of culture, class, and personality in Lasswell’s schema, and defining a particular professional role with respect to the analysis of the problem under investigation, requires a stronger faith in psychology than lawyers generally find persuasive.

Even if, in principle, psychology and observation of the self were granted the scrutinizing power that Lasswell recommends to the policy scientist and that McDougal borrows for the international lawyer, Lasswell and McDougal’s application of the test of rationality to their own work and their resistance to the impacts of class, personality and culture were less than successful. In fact, some sympathetic readers find that the alleged objectivity in observational standpoint falls short not in the usefulness of the concept itself, but in the New Haven masters’ overestimation of their own rationality in adhering to that first element of objectivity.³⁵ McDougal’s reliance on “reasonableness,” the “wider shaping and sharing” of values, and “minimum world public order” as working criteria to deduce specific desired results from general principles such as “community policy” and “human dignity” poses a difficult

³² McDougal et al., *Theories About International Law*, *supra* note 30, at 199.

³³ See, e.g., William Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275, 285–89 (1973).

³⁴ See Myres S. McDougal, *Remarks*, in *THE LAW OF THE SEA: A NEW GENEVA CONFERENCE* 179, 179–80 (L. Alexander ed., 1972), *cited in* Tipson, *supra* note 31, at 232.

³⁵ See, e.g., Tipson, *supra* note 31, at 235–37.

challenge to his claim of rationality and his extensive survey of trends and conditioning factors in different contexts.³⁶

Take, for instance, McDougal's justification of American hydrogen bomb tests based on "established community expectations."³⁷ The community expectations favoring the unrestricted right of the United States to conduct a series of hydrogen bomb tests derive from three factors: the absence of an absolute resolution between *mare liberum* and *mare clausum* claims; the universal right of defense against external security threats, which extends to nuclear testing in preparation for self-defense; and the vote of the Trusteeship Council of the 1947 Trusteeship Agreement governing the American control of the Marshall Islands, which recognized the right to nuclear testing as an extension of the Trustee's authority.³⁸ The quick path of reasoning from "community expectations" to the specific, undisputed right of the United States to nuclear testing runs afoul of contextual-orientation methodology with respect to the absence of empirical evidence regarding general community expectations and the opinions of world elites.³⁹ Considering that McDougal and his associates start from an anarchical assumption about international relations to make a case for the seriousness of security threats, an appeal to "community expectations"—including the opinion of those with no interest in the "wider shaping and sharing" of values and those who stand in opposition to the "minimum world public order"—would be meaningless.⁴⁰ One also must wonder about McDougal's reliance on the vote of the Trusteeship Council; elsewhere he is clear that "the presumed congruence of formal and actual authority of intergovernmental organizations may or may not be sustained by the concurrence of expectations necessary to justify a claim of actual constitutive authority."⁴¹ Here, an "effective decision" overrides an "authoritative decision."⁴² With that said, given the subjec-

³⁶ See *id.* at 235–36.

³⁷ Robert Wood, *Public Order and Political Integration in Contemporary International Theory*, 14 VA. J. INT'L L. 423, 437 (1974); see Myres S. McDougal & Norbert Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 679 (1955) [hereinafter McDougal & Schlei, *The Hydrogen Bomb Tests*].

³⁸ Wood, *supra* note 37, at 437–38; see McDougal & Schlei, *The Hydrogen Bomb Tests*, *supra* note 37, at 650, 678.

³⁹ Wood, *supra* note 37, at 437–38.

⁴⁰ See McDougal & Schlei, *The Hydrogen Bomb Tests*, *supra* note 37, at 650.

⁴¹ Myres S. McDougal et al., *The World Constitutive Process of Authoritative Decision*, in 1 THE FUTURE OF THE INTERNATIONAL LEGAL ORDER 73, 80 (Cyril E. Black & Richard A. Falk eds., 1969).

⁴² Wood, *supra* note 37, at 438. Similar challenges have been posed to other works of McDougal and his associates that apply general principles of "reasonableness," "commu-

tivity of independent states' determination of perceived threats, it is curious that McDougal expects such determinations to pass the test of "reasonableness" so smoothly.

It is, then, the speedy descent from the high ground of general principles to the valley of "self-evident" results that betrays sheer disregard for detailed contextual analysis and, understandably if not justifiably, gives rise to suspicion of McDougal's uncritical acceptance of the views of the policy elite.⁴³ To one commentator, "the impact of these implicit normative premises [of human dignity] on McDougal's thinking about substantive issues, despite his self-conscious concern with values in the formulation of his conceptual framework, constitutes a striking confirmation of the subtle impact of underlying values in all intellectual endeavor."⁴⁴ A more scathing review goes so far as to reduce the entire scientific and normative enterprise of the policy sciences to no more than the crude material interest of the United States: "Law is policy. Policy is human dignity. Human dignity is fostered in the long run by the success of American foreign policy. Therefore, law is the handmaiden of the national interest of the United States."⁴⁵

Stanley Hoffmann considers the problem to result from McDougal's definition of the values of human dignity in a manner overlapping with the American national interest in the face of Communism.⁴⁶ This critique is neither against the proposed (pseudo)scientific recommendations of policy sciences, nor against its normative commitment to human dignity per se, but rather against the precise way in which these

nity expectations," etc., to secure the interest of the U.S. foreign policy establishment. Tipson argues that this inconsistency is present in several of McDougal's works. See Tipson, *supra* note 31, at 235-36. For examples of these inconsistencies, see generally, Myres S. McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597, 603 (1963) [hereinafter McDougal, *The Soviet-Cuban Quarantine*]; Myres S. McDougal & Richard M. Goodman, *Chinese Participation in the United Nations: The Legal Imperatives of a Negotiated Solution*, 60 AM. J. INT'L L. 671 (1966); Myres S. McDougal & W. Michael Reisman, *Rhodesia and the United Nations: The Lawfulness of International Concern*, 62 AM. J. INT'L L. 1 (1968) [hereinafter McDougal & Reisman, *Rhodesia and the United Nations*].

⁴³ See Oran Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT'L L. 60, 74-75 (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.").

⁴⁴ *Id.* at 75.

⁴⁵ Stanley Anderson, *A Critique of Professor Myres S. McDougal's Doctrine of Interpretation by Major Purposes*, 57 AM. J. INT'L L. 378, 382 (1963).

⁴⁶ Stanley Hoffmann et al., *Mild Reformist and Mild Revolutionary*, 24 J. INT'L AFF. 118, 120 (1970).

goals are defined and applied to any number of particular cases to determine outcomes.⁴⁷

In what is perhaps sacrilegious treatment of policy sciences' democratic commitments, some consider the Yale School's application of contextual-orientation methodology and the Soviet doctrine of co-existence to be essentially two sides of the same coin.⁴⁸ Equally repugnant to the praxis-attentiveness of policy science is the haziness in McDougal's distinction between the professional roles of scholar and policy-maker, and a call for intellectual or theoretical purity. In Hoffmann's words:

[The scholar's] primary duty, in our discipline as in all others, is to seek knowledge and understanding for their own sake. This implies that the main purpose of research should not be "policy scientism." The fighting of crusades, the desire to advise policy-makers, or the scholar's dedication to national or international causes can and perhaps even should be the occasion, but they should not be the purpose, of theoretical research.⁴⁹

In essence, Hoffmann applauds the definition of observational standpoint in the interest of knowledge for the sake of knowledge.⁵⁰ Hankering after pure knowledge, however, only turns upside down the contribution of generations of American social thinkers—from pragmatists to the progressives of the early and mid-twentieth century, including policy scientists. McDougal's clarification of observational standpoint does not detach theory from praxis or knowledge from action. Rather, as unrealistic a demand as it is, it is meant to make the

⁴⁷ *Id.*

⁴⁸ *E.g.*, Leon Lipson, *International Law*, in 8 HANDBOOK OF POLITICAL SCIENCE: INTERNATIONAL POLITICS 415, 430–34 (Fred Greenstein & Nelson Polsby eds., 1975), *cited in* Tipson, *supra* note 31, at 233–34.

⁴⁹ STANLEY HOFFMANN, CONTEMPORARY THEORY IN INTERNATIONAL RELATIONS 10 (1960). Hoffmann continues: "[T]he distinction between 'what is worth knowing intellectually and what is useful for practice,' between understanding and doctoring, remains essential, both for practical and for ethical reasons." *Id.* Richard Falk, in the interest of developing a theory of international law, also suggests that the jurisdiction of the theorist and the adversary be separated:

[R]ecognizing the difficulty of making engineering applications of high-order legal abstractions, . . . the theorist [ought to] refrain from participation in adversary arenas (and, ideally, . . . an adversary [should] refrain from entering scholarly arenas), or at least that the nature of participation in legal debate [should] be clearly labeled.

RICHARD A. FALK, THE STATUS OF LAW IN INTERNATIONAL SOCIETY 17 (1970).

⁵⁰ *See* HOFFMAN, *supra* note 49, at 10.

scholar aware, vis-à-vis her inquiry, of her integrated identity and identification assumptions, and the particular professional position she takes. In fact, McDougal's clarification is intended to help achieve the ever-desired objectivity and scientific knowledge at the service of practical problems. It is one thing to point to the illusory nature of such a level of objectivity, but an entirely different thing to blame McDougal's partiality to U.S. national interests on this straddling of the scholarly and decision-making positions.⁵¹

The divergent characters and intellectual orientation of Lasswell and McDougal provide another basis for criticism of a credible standpoint in their collaboration.⁵² Behind the New Haven Jurisprudence, stands Lasswell—a scientific-minded, “insatiable” pioneer in “total comprehension” of social affairs, who is called “the ideal of the omniscient scientist”—and McDougal—“the ideal of the irrefutable advocate, the tireless persuader or persistent proselyte,” who never misses an opportunity to channel solutions for any problems to the cause of human dignity as he defines it.⁵³ The dual nature of policy sciences reflect the differences of two minds or two temperaments, that of a scientist and that of an advocate.⁵⁴ Under this reading, the advocacy side of Yale's configurative jurisprudence blunts its scientific edge because it either provides direction or manipulates results to fit the NHS's desired outcomes.⁵⁵ Thus, in plain disregard of the postulated normative values advocated by policy sciences, objectivity claims lose credibility in light of the policy-oriented approach's overestimation of its own objectivity.

In sum, whether it is the adulterated scientific objectivity of policy sciences, its masters' conflated observational standpoints (despite their

⁵¹ Richard Falk, in fact, finds McDougal's insistence on policy explication to have a necessarily radicalizing impact, which disqualifies international lawyers as mere professional technicians, particularly at the service of governments and corporations. See Richard Falk, *The Place of Policy in International Law*, 2 GA. J. INT'L & COMP. L. 29, 32 (1972).

⁵² See Tipson, *supra* note 31, at 236.

⁵³ See *id.* at 236–37. Lasswell himself refers to this difference:

Luckily our preferred frames of thought, though complementary, are not the same. McDougal loves verbal combat, especially in the frame of a prescriptive system and an appellate court. So far as I am concerned, most combat is boring and time-wasting. My preference is inquiry into factual causes and consequences. We are aware of these differences and deliberately exploit the intellectual tensions that result.

Harold Lasswell, *In Collaboration with McDougal*, 1 DENV. J. INT'L L. & POL. 17, 19 (1971).

⁵⁴ See Tipson, *supra* note 31, at 237.

⁵⁵ But see Anderson, *supra* note 45, at 382–83 (arguing that “Professor McDougal's approach is coherent, and is not simply the intrusion of advocacy into scholarship,” but nevertheless going on to reject it as an extra-juridic system).

recommendations for defining a credible standpoint), the centrality of human dignity in determining legal outcomes, the definition of human dignity in a way to converge with American foreign policy interests, or a disharmonious collaboration of two opposing personalities, the first group of critiques follows a straightforward explanation and views the policy-oriented international law as a project devised to maintain and legitimize the U.S. national interest.

B. *Policy-Orientation and the Reduction of Law to Power*

The second series of critiques concerns the project's broad definition of the social processes that define law. These objections run the gamut from direct opposition to debasing law with politics, to a significantly more sophisticated and widespread challenge to the actual application of the configurative methods of a policy-oriented international law. The blanket rejection of the intrusion of politics and policy into law came either from international lawyers avowedly associated with positivism or from commentators within the neighboring discipline of international relations who placed too much hope in a romanticized conception of law as taming the political realities of interstate relations.

To those associated with a positivist foundation of law, the NHS inherited "all the faults of American 'legal realism.'"⁵⁶ In McDougal's refutation of legal normativity, law, as they saw it, was no more than a "euphemism."⁵⁷ International law, in comparison to other fields of law, is more susceptible to politicization and yields more easily to arbitrary interpretations. Legal realism's strike, therefore, as reflected in the policy-oriented approach, was an existential threat that sacrificed law for propaganda: "Other more hardy areas of the law may have been able to withstand the idoloclastic onslaughts of legal realism. If international law is moribund, it would be better to bury it forthrightly than to have it cannibalized by the realistic school for digestion into propaganda."⁵⁸ Wolfgang Friedmann, however, questioned whether McDougal, by defining a set of policy goals and values that shaped the direction of international law, adopted a "value philosophy" that alienated a great majority of legal realists.⁵⁹ These goals and values of "an 'inclusive' order of human dignity" have the flaws of "natural law ideology" and "can, at

⁵⁶ See JOSEF L. KUNZ, *THE CHANGING LAW OF NATIONS* 169 (1968).

⁵⁷ See Anderson, *supra* note 45, at 382.

⁵⁸ *Id.* at 383.

⁵⁹ See generally Wolfgang Friedmann, *Law and Minimum World Public Order and the Public Order of the Oceans*, 64 COLUM. L. REV. 606 (1964) (book review).

best, outline the conditions of an international law of cooperation, not those of the international law of coexistence.”⁶⁰ The manner in which McDougal fuses law and policy, Friedmann argues, runs the risk of rendering international law merely a convenient instrument of national policy.⁶¹ Followed to its logical conclusion, McDougal’s doctrine, in which the standpoint of the policy-maker vis-à-vis human dignity determines legal outcomes, “is ultimately destructive of any ‘minimum world order.’”⁶² Although this might be affirmation of Dean Acheson’s remarks on the irrelevance of international law to national survival,⁶³ its gravity and risks to a minimum world order as the precondition to developing goals of human dignity should not be lost on McDougal, who genuinely believed in the relevance of international law to ensure the survival of mankind and to promote human dignity.⁶⁴

Taking the criticism to its limits, Anthony D’Amato challenges New Haven’s policy-oriented international law on two counts.⁶⁵ The first and most fundamental problem lies in McDougal’s equation of reasonableness with legality.⁶⁶ The broad test of reasonableness applied by McDougal, along with the breadth of contextual factors recommended for consideration and the significance of strict adherence to the specificities of context replaces the predictability of law with “psychological debility of ex post facto rationalization.”⁶⁷ If McDougal’s approach is to be accepted, there is a danger of changing legal thinking “from the propounding of broad beneficial conventions and improvement of existing rules to the detailed rationalizing of the factors of specific cases.”⁶⁸ The erosion of rigid rules would in turn lead to a clash of international claims that “otherwise would never arise.”⁶⁹ The second problem would be loss of respect for the rule of law if general applicability and precedent were sacrificed in the interest of the specific conditions of each new context.⁷⁰ On a practical level, decision-makers would

⁶⁰ *Id.* at 613.

⁶¹ *Id.* at 608.

⁶² *Id.*

⁶³ See Dean Acheson, Remarks, *Panel: Cuban Quarantine: Implications for the Future*, 57 AM. SOC’Y INT’L L. PROC. 13, 14 (1963).

⁶⁴ See Friedmann, *supra* note 59, at 608.

⁶⁵ See Anthony D’Amato, Book Review, 75 HARV. L. REV. 458, 460–61 (1961) (reviewing *STUDIES IN WORLD PUBLIC ORDER* (Myres S. McDougal ed., 1960)).

⁶⁶ *Id.* at 460.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 460–61.

always face a choice between equally reasonable claims.⁷¹ Absent at least a few rigid rules, power would inevitably write the rules of the game.⁷² To assume that the remedy is in reciprocity, as McDougal does, merely speaks of hankering after an image of utopia.⁷³

Starting from a practical orientation and moving within a different line of argument from the positivist concern with delimiting law, Richard Posner took issue with McDougal's reliance on customary international law in outer space.⁷⁴ In Posner's view, McDougal's elaboration on both the implications of uniform rules of access and competence in space and the significance of the Soviet Union's past practice was irrelevant and confused.⁷⁵ That McDougal put the onus on the Soviet Union to prove the lawfulness of its potential exercise of exclusive competence over the spacecraft of other states in light of its history of acquiescence to the freedom of space so far as peaceful vehicles were concerned betrayed a confusion between law, power politics, and mankind's ideals of a rational world order.⁷⁶ To speak of custom in the area of outer space—the vital national interest of the two superpowers “in the academic and even casuistic fashion” of McDougal and his associates—was to lose sight of the difference between law, power, and universal aspirations toward peace and justice.⁷⁷ “These areas may overlap and interpenetrate, but they are not the same.”⁷⁸ McDougal's use of custom in a field as exotic as outer space operates in a fantasy world wherein law and power are one and the same.⁷⁹

Longing for legal distinctiveness in terms no more compromising than the positivists, Stanley Hoffman pronounced that the NHS did its

⁷¹ See D'Amato, *supra* note 65, at 460.

⁷² See *id.* at 461.

⁷³ See *id.*

⁷⁴ Richard Posner, *Review of Law and Public Order in Space by Myres S. McDougal*, *Harold Lasswell & Ivan Vlasic*, 77 HARV. L. REV. 1370, 1372–73 (1964) (book review).

⁷⁵ *Id.* at 1372.

⁷⁶ *Id.* at 1372–73. Posner asks:

Is not all of this [talk of custom and burden of proof] rather beside the point? To whom would the Soviet Union have to prove the “lawfulness” of its conduct—of what practical significance would its “onus” be? Can the Soviet Union, in the space arena, be dismissed as “only one of many interested states”? Is it enough that the Soviet Union might be restrained by fear of retaliation by the United States—are we speaking of law or the balance of power?

Id. at 1372.

⁷⁷ *Id.* at 1372–73.

⁷⁸ *Id.* at 1373.

⁷⁹ See *id.* at 1373–74.

best to undermine all the constituents of law's distinctiveness.⁸⁰ To Hoffman:

Law is distinguished from other political instruments by certain formal features: there is a certain solemnity to its establishment; it has to be elaborated in a certain way. More significantly, the legal order, even in international affairs, has a life and logic of its own: there are courts and legal experts who apply standards of interpretation that are often divorced from underlying political and social factors.⁸¹

Oran Young was similarly concerned about law losing its discriminatory power in the hands of those who advocated for policy-oriented jurisprudence.⁸² The dispute was not over the existence of a "world constitutive process of authoritative decision," but rather how to designate this process "not simply in the interest of preserving certain verbal formulae but of maintaining sufficient distinctions between social categories."⁸³ In Young's view, the utility of maintaining what McDougal derisively and hyperbolically called an "Austinian" conception of law was to allow for "explor[ing] the connections between the law of a social system on the one hand and the changing distribution of power or the evolution of authority relations in the system on the other."⁸⁴ McDougal rejected any such division as obscurantism, mainly because he defined the political process in such a narrow way that in order to accommodate the fluidity of authoritative process, he had to expand the scope of legal process.⁸⁵ In McDougal's view, Young's demand for a distinction between the law of a social process and the dynamic distribution of power and evolution of authority is an example of "much too common a practice among social scientists, as well as among some unenlightened lawyers, to accept a limited, conventional, and parochial conception of law . . . and to conclude, hence, that naked power reigns supreme in 'international relations' or 'the international system.'"⁸⁶ In fact, as Robert Wood demonstrates, Young, "like most political scien-

⁸⁰ Hoffmann et al., *supra* note 46, at 118–20.

⁸¹ Stanley Hoffmann, *The Study of International Law and the Theory of International Relations*, 57 AM. SOC. INT'L. L. PROC. 26, 33 (1963).

⁸² Young, *supra* note 43, at 64.

⁸³ Wood, *supra* note 37, at 429–30.

⁸⁴ Young, *supra* note 43, at 64.

⁸⁵ Wood, *supra* note 37, at 430.

⁸⁶ Myres S. McDougal, *International Law and Social Science: A Mild Plea in Avoidance*, 66 AM. J. INT'L L. 77, 78 (1972) [hereinafter McDougal, *International Law and Social Science*].

tists, distinguishes in the first instance between 'naked power' and 'political power,' particularly in reference to a 'political community.'"⁸⁷

Like Lasswell and McDougal, integrationists consider "[i]nterdependence and consciousness of interdependence" to constitute the essence of a political system or a social community and, thus, identify a political community with the conscious pursuit of social transactions on the basis of "the authoritative distribution of values."⁸⁸ To them, legal systems, which embody a set of rules and principles, "are both aspects and outcomes of this authoritative process," and though they can be evaluated in light of the fluid process of the authoritative distribution of values, they cannot be mistaken for the whole process.⁸⁹ Thus, while many of the social scientists and lawyers who call on McDougal and Lasswell to distinguish between different social categories agree about the breadth of authoritative processes of decision-making, they distinguish between naked power, political power, and legal principles, rules, and standards.⁹⁰ What is disputed, then, is in effect the scope of the authoritative decision-making processes.⁹¹ Lasswell and McDougal assimilate politics in its entirety into the legal processes of authoritative decision-making, while political scientists, in a disciplinary rivalry, maintain the political nature of authoritative decision-making processes and limit jurisdiction to where legal principles, rules, and standards are at work in a specialized institutional setting.⁹² Expanding the scope of the legal process of authoritative decision-making in the New Haven Jurisprudence meant eclipsing politics for the political scientist, just as it portended the demise of law for the mainstream international law discipline. Introduced to the configurative jurisprudence of New Haven, both sets of professionals were distraught that they no longer recognized their uniquely held disciplinary identities in a system that cor-

⁸⁷ Wood, *supra* note 37, at 430. Wood draws on this distinction in the works of David Easton, who, in Wood's words, defines politics "in terms of the authoritative allocation of values in society," in *THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICAL SCIENCE* 129–34 (1960); Karl Deutsch who, in Wood's words, believes that a political community is "a community of social transaction supplemented by both enforcement and compliance," in *POLITICAL COMMUNITY AT THE INTERNATIONAL LEVEL: PROBLEMS OF MEASUREMENT AND DEFINITION* 40 (1954); and Leon Lindberg, who, according to Wood, "defines the essence of a political community as being the existence of a legitimate system for the resolution of conflict, for the making of authoritative decisions for the group as a whole," in *THE POLITICAL DYNAMICS OF EUROPEAN ECONOMIC INTEGRATION* 7 (1963).

⁸⁸ Wood, *supra* note 37, at 431.

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ *See id.*

⁹² *See id.*

roded each and every conceivable distinction between various social categories.

The international law discipline's skepticism about the absence of an adequate distinction between different categories of authoritative processes of decision-making in the New Haven Jurisprudence mirrors its frustration with McDougal's exaggerated and one-sided portrayal of his opponents' defense of potential flexibility in the application of rules, principles, and standards.⁹³ In the interest of replacing law with power, as the argument goes, McDougal castigates the "rule-oriented" approach as an illusory hope in "rules hav[ing] a meaning or 'normative character' largely independent of the purposes of the people who make use of them; and [in] these rules admit[ting], apparently without aid of criteria of interpretation, of practically automatic application in particular instances."⁹⁴ By attributing to his opponents a "model of automation in decision"⁹⁵ and utter disregard for the complementary nature of both rules and policies, and, further, by challenging their unawareness of what he calls the general normative ambiguity of rules, McDougal is understood to practically end any substantial dialogue about the actual interaction of rules and policies and irreversibly declare the rule-oriented approach futile.⁹⁶ His impatience with any consideration by his opponents of the flexibility of principles and standards, if not the openness of precise rules per se, along with his unwavering faith in the liberating force of policy applied in a manner consistent with the order of the masters of power, leads to suspicions that law in the hands of McDougal is "merely an increment to power."⁹⁷

⁹³ See Donald Charles Daniel, *Clarification and Appraisal of the Policy-Oriented Framework for International Legal Analysis: Inquiry into the Work of Myres S. McDougal* 156 (Apr. 16, 1971) (unpublished Ph.D. dissertation, Georgetown University) (on file with Edward Bennett Williams Law Library, Georgetown University).

⁹⁴ Myres S. McDougal, *A Footnote*, 57 AM. J. INT'L L. 383, 383 (1963).

⁹⁵ MYRES S. MCDUGAL & WILLIAM T. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* 48 n.124 (1962) [hereinafter MCDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS*] ("One can only wonder where Prof. Fisher is able to observe in flesh his model of automation in decision, and by what criteria he recommends that particular choices be made between inevitably complementary policies of the international law of the sea.").

⁹⁶ See Daniel, *supra* note 93, at 167.

⁹⁷ Anderson, *supra* note 45, at 382. Anderson finds ample evidence for his argument in some of McDougal's writings on power:

Among the instruments of power, when power is comprehensively conceived, there might be recognized, finally, not merely diplomacy, propaganda, armaments, and goods, but an international law which is an expression, not of an arbitrary political fiat, but of the fundamental policies of peoples and in

Distinguishing between policy-oriented jurisprudence and its application by McDougal and his associates to questions of world public order, one scholar locates the problem not in the comprehensive authoritative process of decision-making itself, but in the notion that McDougal conflates the descriptive with the prescriptive.⁹⁸ Using the NHS's own terminology, when "theory *about* law" is used as "theory *of* law, or at least of law-making," cynicism about rules is expected.⁹⁹ This is reminiscent of legal realism's relationship to rules, precedent, and *stare decisis*.¹⁰⁰ While it is true that the mere development of a theory that minimizes or questions the utility of rules does not change existing expectations about the role of rules, it is also true that propagating contextualism or empirical methods does not necessarily synchronize the standard, societal understanding of legal reasoning or diminish the generally expected central role of law in most legal contexts.¹⁰¹ In this reading, conflating theories about law and theories of law is not essential to the contextualist theory of Lasswell and McDougal, but rather it is incidental to the way they have implemented their policy-oriented jurisprudence in addressing practical questions of international law.¹⁰² "The very expectation that law *is* distinct and different from politics, or that it does or does not operate in international relations, is a matter for investigation in different settings."¹⁰³

Other scholars consider rules, merely for practical reasons, to have a relatively significant role.¹⁰⁴ Rules are "rational and indispensable" in many decision-making contexts simply because of "the possibility and desirability of promoting greater uniformity and hence predictability of decision by limiting the variety of contextual factors that a decision-maker . . . should be encouraged to take into account."¹⁰⁵ Rules, like

which decision-makers have a continuous creative role in formulating, applying, and re-formulating such policies.

Myres S. McDougal, *Dr. Schwartzberger's Power Politics*, 47 AM. J. INT'L L. 115, 119 (1953) (book review) [hereinafter McDougal, *Dr. Schwartzberger's Power Politics*], quoted in Anderson, *supra* note 45, at 382.

⁹⁸ Tipson, *supra* note 31, at 241.

⁹⁹ *Id.* at 241–42.

¹⁰⁰ See, e.g., WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES: A PRIMER OF INTERPRETATION* 48–72 (1976) (providing a foundation for rules in general); Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037, 1038–40 (1961).

¹⁰¹ Tipson, *supra* note 31, at 242.

¹⁰² See *id.*

¹⁰³ *Id.*

¹⁰⁴ See *id.* at 242–43.

¹⁰⁵ Tom J. Farer, *International Law and Political Behavior: Toward a Conceptual Liaison*, 25 WORLD POL. 430, 440–41 (1973), quoted in Tipson, *supra* note 31, at 242–43; see Ian Brown-

theories, are therefore essential to reduce the “overwhelming bulk” of social phenomena to a volume that is manageable in practical decision-making.¹⁰⁶ This is salient especially when interpreting international legal agreements because the text itself provides a strong basis for identifying and considering all relevant contextual factors.¹⁰⁷

C. Policy-Orientation as Conceptual Grandiloquence¹⁰⁸

The third series of critiques targets the style of presentation in the New Haven Jurisprudence.¹⁰⁹ Complex style and perplexing terminology are trademarks of Lasswell’s work that find their way into the New Haven Jurisprudence. During his tenure with the Wartime Communications Research Project, the main task of which was to apply content analysis to American fascist propaganda, Lasswell was presented with an opportunity to fulfill his dream of psychiatrist-as-king and activist.¹¹⁰ Lasswell’s high hopes for a positive role for social scientists, however, went awry in large part due to his abstruse expression.¹¹¹ The govern-

lie, *The Public Order of the Oceans*, 12 INT’L & COMP. L.Q. 1053, 1056 (1963) (book review). Brownlie seems to be concerned about the value and practical usage of *The Public Order of the Oceans*, compared to “a text, a set of clear prescriptions,” for decision-makers “who have to live by the law and custom of the sea.” *Id.*

¹⁰⁶ Farer, *supra* note 105, at 441–42.

¹⁰⁷ See Gerald Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our “Interpretation” of It?*, 65 AM. J. INT’L L. 358, 369 (1971) (reviewing MYRES S. McDOUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967)); Gidon Gottlieb, *The Conceptual World of the Yale School of International Law*, 21 WORLD POL. 108, 110 (1968) (reviewing MYRES S. McDOUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967)).

¹⁰⁸ The word is borrowed from Erwin Griswold who, recognizing the importance of Lasswell 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).

¹⁰⁹ See Fitzmaurice, *supra* note 107, at 360–61; Fred Rodell, *Legal Realists, Legal Fundamentalists, Lawyer Schools, and Policy Science—Or How Not to Teach Law*, 1 VAND. L. REV. 5, 6–7 (1947) (suggesting that McDougal’s style is plagued with verbosity and outlandishness). Fitzmaurice offers a spirited critique of McDougal and his co-authors’ style in *The Interpretation of Agreements and World Public Order*, noting,

[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.

Fitzmaurice, *supra* note 107, 360.

¹¹⁰ MARK SMITH, *SOCIAL SCIENCE IN THE CRUCIBLE: THE AMERICAN DEBATE OVER OBJECTIVITY AND PURPOSE, 1918–1941*, at 246, 247–48 (1994).

¹¹¹ See *id.* at 247–48.

ment, being wary of the dangers of emphasizing ideology, wished to keep the project entirely limited to research on facts and figures.¹¹² Lasswell tried to convince his superiors of the importance of a positive movement against fascism, proclaiming, “[i]f democracy is to endure, democracy must make propaganda in favor of itself and against propaganda hostile to itself.”¹¹³ His inability to make a convincing point about this normative view of propaganda and the positive role of social scientists was partly due to the general discomfort of his superiors with propaganda, and mostly due to his usage of technical vocabulary and putatively scientific methods that were incomprehensible to anyone outside his research group.¹¹⁴

This story resonates with many international lawyers who encounter Lasswell and McDougal’s work. Lasswell alone is said to “move heaven and earth to find the picayune meaningful,” if only for the fact that “he operates best with high abstractions and adores the game of multi-variable ping-pong.”¹¹⁵ When Erwin Griswold noted a tendency toward “grandiloquence” in the New Haven proposal, he specifically had the first Lasswell-McDougal collaboration on legal education in mind.¹¹⁶ Despite the intended limited application of the term, many in the field found the term grandiloquence to be applicable to the complex language and sophisticated conceptual framework used throughout New Haven’s jurisprudence.¹¹⁷

In terms of accessibility and comprehensibility, the pedagogical program of policy science at Yale did not fare any better than its volumi-

¹¹² *Id.* at 247.

¹¹³ *Id.* (quoting Memorandum from Harold D. Lasswell to Henry Morgenthau, Sec’y of the Treasury (Feb. 17, 1941)). Smith recounts that, disappointed with then-Secretary of the Treasury Henry Morgenthau’s lack of enthusiasm about Lasswell’s proposals for positive propaganda,

[Lasswell] descended on [Office of Facts and Figures] director [Archibald] MacLeish and bombarded him with an array of technical material and verbiage. MacLeish, an internationally recognized poet and cultural critic, certainly realized and respected the power of words and ideas. But he recollected that this meeting left him unconvinced and ignorant of Lasswell’s main points.

Id.

¹¹⁴ *Id.* at 248.

¹¹⁵ Leo Rosten, *Harold Lasswell: A Memoir, in POLITICS, PERSONALITY, AND SOCIAL SCIENCE IN THE TWENTIETH CENTURY: ESSAYS IN HONOR OF HAROLD D. LASSWELL* 1, 9 (Arnold A. Rogow ed., 1969).

¹¹⁶ See Griswold, *supra* note 108, at 297.

¹¹⁷ See Fitzmaurice, *supra* note 107, at 360.

nous scholarly texts.¹¹⁸ It faced agnosticism similar to the popular mid-twentieth century concerns about the return of natural law.¹¹⁹ Jerome Frank warned his classes about a new brand of natural law in policy sciences “far vaguer than many of the older brands.”¹²⁰ Reportedly, many students “call[ed] one of the Lasswell-McDougal courses ‘drifting and dreaming.’”¹²¹ Likewise, the Yale Law faculty found Lasswell to be “a queer guy,” and found his “jargon irritating.”¹²² “They couldn’t understand him,” and “[n]obody on the faculty had much use for [him], but he was McDougal’s protégé.”¹²³

Reacting to the application of policy sciences to coercion, Friedmann unwittingly paid tribute to McDougal by comparing his style to that of Hegel, only to charge both at once with the legitimization of hegemony.¹²⁴ “Just as [h]undreds of pages of rigorous conceptual dialectics in Hegel’s *Philosophy of Law and State* . . . disguise that Hegel really wanted to show that the reactionary Prussian monarchy under which he held his chair at the University of Berlin was the ultimate embodiment of the world spirit,” McDougal’s use of conceptual and indirect language was an attempt to embroider a simple and plain allowance for the use of nuclear armaments or preemptive self-defense against a Commu-

¹¹⁸ See Stewart Macatlay, *Law Schools and the World Outside Their Doors: Notes on the Margins of “Professional Training in the Public Interest,”* 54 VA. L. REV. 617, 635 (1968) (analyzing the shortcomings of the Lasswell-McDougal pedagogical approach). Macatlay emphasizes the contribution of social sciences to an understanding of “the formal and informal processes of government as they affect people and are affected by them . . . even prior to value analysis,” which the Lasswell-McDougal approach so forcefully advocates. *Id.*

¹¹⁹ See *id.*

¹²⁰ KALMAN, *supra* note 10, at 183.

¹²¹ *Id.* Fuller agreed that Lasswell and McDougal had developed a new type of natural law by listing values that aid the decision-maker in determining “what values are to be effectuated—in other words what he wants The rest is a mere matter of technical implementation with which Professors McDougal and Lasswell have no direct concern and for which they assume no responsibility.” Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEGAL EDUC. 457, 479 (1954). For another reading of the policy-oriented approach in line with natural law, see Crisolito Pascual, *The Policy Function of the Law: Value Creation, Clarification and Realization*, 29 PHIL. L.J. 431, 435–38 (1954) (“[T]he [New Haven] approach may be said to be a vigorous advocacy for a return to the natural law thinking, highlighting the apparent failure of the modern theories of law, . . . especially in the maintenance of the social interest in the infinite worth and value of human life, personality and dignity.”) For an approving comparison between McDougal’s advocacy of human dignity and natural law, see Dom David Granfield, *Towards A Goal-Oriented Consensus*, 19 J. LEGAL EDUC. 379, 380 (1966) (“Although McDougal’s writings stem apparently from a dissimilar philosophical position, they do exhibit remarkable conformity with the Catholic *philosophia perennis* . . .”).

¹²² KALMAN, *supra* note 10, at 184.

¹²³ *Id.*

¹²⁴ Friedmann, *supra* note 59, at 609–10.

nist state.¹²⁵ This complexity merely exacerbates the ambiguity and uncertainty in McDougal's approach toward the significant and determinative role of policy considerations in international law.¹²⁶ Thus, beyond a matter of random stylistic taste or preference, simplicity and clarity of prose were demanded of McDougal in order to deflect suspicions of a disguised, spurious agenda.¹²⁷

The critique of abstruseness comes not merely from skeptics, but also from those generally sympathetic to the complexity and conceptualism of the New Haven Jurisprudence.¹²⁸ "One can admire the intellectual resources brought to McDougal's *scholarly conceptualism of law* as an instrument of social and humanitarian will, without approving unqualifiedly the abstruse formulation of principles [therein] enunciated."¹²⁹ Note that the point of contention here is not McDougal's methodological conceptualism and its implications, but rather his conceptual framework, so far as it "cloaks the substance" of the ideas, and his "structural idiom" that detracts from the intelligibility of the conceptual formulation of law.¹³⁰

Yet others remained skeptical about the practical impact of the New Haven writings on world public order and questioned if the principal audience of these writings could in any way benefit from the complex style and thought process of the New Haven teachings in actual decision-making.¹³¹ Because McDougal's recommendations are recognized as theoretical and in part visionary, their comprehension is restricted to the initiated and the "scholar who needs to know the thought behind thought," and thus remain out of reach for those who look for guidance with no interest in digesting "a world maze."¹³² This is due in part to the fact that the recommendations of McDougal and his associates, particularly in areas less subjected to existing regulations,

¹²⁵ *Id.*

¹²⁶ *Id.* at 610.

¹²⁷ *See id.* at 609.

¹²⁸ *See* Alwyn V. Freeman, *Professor McDougal's Law and Minimum World Public Order*, 58 AM. J. INT'L L. 711, 715 (1964) (book review).

¹²⁹ *Id.* (emphasis added).

¹³⁰ *Id.*

¹³¹ *See, e.g.*, Claude Mickelwait, Book Review, 60 MICH. L. REV. 534, 537 (1962) (reviewing MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* (1961)) ("[T]he voluminous treatment may detract from its practicality unless an authoritative condensation, phrased in the customary terms of the varied contexts, is provided for the decision-makers who usually lack the time to absorb and appreciate fully the complex bases for action set forth in this volume.").

¹³² Cameron Wehringer, Book Review, 31 BROOK. L. REV. 197, 199 (1964) (reviewing MYRES S. MCDUGAL ET AL., *LAW AND PUBLIC ORDER IN SPACE* (1963)).

are prone to theoretical verbosity only loosely in touch with reality.¹³³ Even when the reader's mind finds new horizons in McDougal's work, it is doubtful that there is an acceptable balance between the intellectual reward and perseverance required to follow the work's masterly blend of astronomy, sociology, anthropology, and political science.¹³⁴

Another more sophisticated strand of critique of the cumbersome apparatus of policy-oriented jurisprudence shifts the attention away from mere comprehensibility to the substantive content of the scientific claims of policy sciences.¹³⁵ Under this reading, the problem with McDougal's cumbersome language is its machinations to shield the pseudo-scientific nature of the jargon used in order to give an illusion of mastery of scientific language.¹³⁶ McDougal and his associates offer postulates in the format of a conceptual formula using the language of symbols without creating equations or any other mathematical medium to make sense of those symbols.¹³⁷ Reducing propositions to symbols without mathematical models, however, is little more than a mockery of scientific work—it is in effect only creating symbols for the sake of symbols.¹³⁸ The “turgid style” of the New Haven School writings is a lamentable heritage of social scientists, which paradoxically, “while attempting to create order,” in fact “create[s] a form of chaos.”¹³⁹

¹³³ The reviewer refers to McDougal and his coauthors' elaboration on “inclusive enjoyment versus exclusive appropriation,” using the example of the Antarctica Treaty, and questions the authors' claim that it was in fact enlightenment that resolved difficulties in the Antarctica. “In Antarctica, if enlightenment means self-interest, it can be power based. The Antarctica Treaty did not resolve difficulties, but . . . it ‘froze’ the status of conflicting claims.” *Id.*

¹³⁴ See D.H.N. Johnson, Book Review, 13 INT'L & COMP. L.Q. 1121, 1122 (1964) (reviewing MYRES S. McDOUGAL ET AL., *LAW AND PUBLIC ORDER IN SPACE* (1963)). *But see* James Milton Brown, *Law and Public Order in Space*, 36 MISS. L.J. 116, 119 (1964) (book review) (“It is disappointing to find legally-trained critics, whose functional lives evolve around a special vocabulary, complain . . . over the need to devote a little effort to acquire the precision tools of the Public Order vocabulary.”); and Edward Hambro, *Law and Minimum World Public Order by Myres S. McDougal & Florentino P. Feliciano*, 50 CAL. L. REV. 745, 748 (1962) (book review) (“The reading of the book needs a certain amount of hard work, but once the reader masters the terminology of the book, he is richly rewarded. He will not always find the solution to all the problems, but he will find a penetrating analysis, a fresh approach, and original thought.”).

¹³⁵ See Allison Scafuri, Book Review, 18 VAND. L. REV. 863, 864–66 (1965) (reviewing MYRES S. McDOUGAL ET AL., *LAW AND PUBLIC ORDER IN SPACE* (1963)).

¹³⁶ See *id.* at 863.

¹³⁷ *Id.*

¹³⁸ See *id.* at 863, 865.

¹³⁹ *Id.* at 863 (finding analogy in H.L. Menken's review of THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* (1918)).

Despite the stylistic criticism, however, some scholars recognized the intellectual capital needed to engage with McDougal's language and found it to be rewarding through the heightened awareness it raised about the world legal order.¹⁴⁰ "A reader should be prepared . . . for an austere pilgrimage, unalleviated by witty asides or enhancing quotations."¹⁴¹ Falk attributes the general criticism of McDougal's obscure jargon and murky sentences to many who privately concede that they in fact have lacked the time or patience to navigate through the policy-oriented jurisprudence.¹⁴² In Falk's view, McDougal's style corresponds to his intellectual ambitions.¹⁴³ McDougal, borrowing from Lasswell, aims to present a comprehensive and systemic account of social realities that impact the process and structure of policy choices in legal decision-making.¹⁴⁴ Such a lofty endeavor needs a precise, though perhaps unconventional, linguistic device. The complexity of McDougal's writings "stems from an insistence upon nuance and accuracy, not from an infatuation with German metaphysics, or some inborn quality of verbal ineptitude."¹⁴⁵ "His sentences are almost always impossible to improve upon."¹⁴⁶ Stylistic criticisms of McDougal stem from an anti-intellectualism that expects accessible language in legal writings for the benefit of the uninitiated.¹⁴⁷ But McDougal's framework of analysis, which reflects a complicated image of social reality, is comparable to Einsteinian physics in its usage of a complex language to open a new path of inquiry into realities that habitually remain masked from lawyers' views.¹⁴⁸

To take stock, the three categories of critiques of policy-oriented jurisprudence—policy as legitimization, policy as invasion of power into law, and policy framework as conceptual grandiloquence—comprise the body of the critical reactions provoked by the methodological renewal of the New Haven Jurisprudence.¹⁴⁹ As is evident, McDougal's interlocutors, when they were able to see beyond problems with the accessibility of New Haven's approach, focused on either ideological

¹⁴⁰ *E.g.*, FALK, *supra* note 49, at 643.

¹⁴¹ *Id.*

¹⁴² *See id.* at 658.

¹⁴³ *See id.*

¹⁴⁴ *See id.* at 644, 658.

¹⁴⁵ *Id.* at 658.

¹⁴⁶ FALK, *supra* note 49, at 658.

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See* Anderson, *supra* note 45, at 382; Fitzmaurice, *supra* note 107, at 360–61; Friedmann, *supra* note 59, at 608; Rodell, *supra* note 109, at 6–7.

analyses or the ill consequences of New Haven's conception of power for the rule of law.¹⁵⁰

To be sure, there were sharper critical voices who found fault with McDougal's faith in an absolute concept of human dignity and its determining role for legal outcomes.¹⁵¹ Some took issue with the lack of adequate empirical inquiry in the New Haven Jurisprudence, despite "ambiguous hints to the contrary," to validate the postulated values of human dignity, which remain "rather *ab extra scientiam* (though perhaps *ab intra* McDougal)."¹⁵² Others challenged McDougal's confidence in a consensus about values and his Suarezian vision of "world community" with homogeneous values.¹⁵³ Still others highlighted the threat that McDougal's thought posed to the rule of law by prescribing human dignity as the favored value of the interpreter in the interpretation of rules or international agreements.¹⁵⁴ Further, some accused McDougal of Hegelian idealism because he considered conflicting interests to be capable of resolving themselves to the satisfaction of the parties involved and that of the "policy of the world community" through a priori values.¹⁵⁵ And still others believed that McDougal's invocation of postulated values of human dignity as the foundational criteria of legality masked the oppressive role of social structures, and thereby forestalled a more concrete criticism that would place in the foreground factors of class, gender, and race.¹⁵⁶

Like other external critiques, however, these more insightful reactions failed to engage with New Haven's internal, epistemic structure. Finding fault with the nature and place of the values representing human dignity in the NHS and identifying that as another form of foundationalism is one thing,¹⁵⁷ but delineating how exactly this founda-

¹⁵⁰ See Anderson, *supra* note 45, at 382; Friedmann, *supra* note 59, at 608.

¹⁵¹ See, e.g., B.S. CHIMNI, INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES 100 (1993); Julius Stone, *Problems Confronting Sociological Enquiries Concerning International Law*, 89 RECUEIL DES COURS 61, 73 n.1 (1956).

¹⁵² Stone, *supra* note 151, at 73 n.1.

¹⁵³ See *id.* at 113 n.1.

¹⁵⁴ See CHIMNI, *supra* note 151, at 100.

¹⁵⁵ E.g., Philip Allott, *Language, Method and the Nature of International Law*, 45 BRIT. Y.B. INT'L L. 79, 125 (1971).

¹⁵⁶ E.g., Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 1991, 2007 (1995) (reviewing MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7).

¹⁵⁷ 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 grounds irrelevant to capacity); enlightenment (access to knowledge, which is the basis of rational choice); wealth (control over economic goods and services); well-being (enjoyment of

tionalism affected New Haven's problem-oriented policy approach, and what this meant for decision-making in international law, is quite another. Interestingly, such an engagement—one that takes the claims, premises, and promises of McDougal's thought seriously enough to evaluate its function on its own terms—is absent from the scant accounts that find the policy-oriented and problem-solving characters of the New Haven Jurisprudence consistent with the insights of pragmatism. The result is that human dignity and pragmatism, the two identifying faces of the Lasswell-McDougal project, which correlate with its normative and scientific commitments, remain epistemologically disconnected. Even after taking into account all the strands of criticism, it remains unclear why the pragmatist promises of contextualism and problem-solving methodology were unfulfilled. Nor do we learn whether or how the relationship between human dignity and pragmatism in the New Haven Jurisprudence may be related to, or explain, the logical correspondence between the policy-oriented approach and American foreign policy dictates.

II. PRAGMATISM AND INTERNATIONAL LAW IN THE NEW HAVEN JURISPRUDENCE

Counting generously, there are only a handful of reflections on pragmatism and international legal theory. When considering a pragmatist representative in international law, however, these sparse accounts all turn their gaze toward the NHS's policy-oriented approach. One would expect to easily trace the intellectual footprint of pragmatism in Lasswell's work through his years in Chicago, where Dewey's thought traveled into various social scientific disciplines.¹⁵⁸ But Lasswell himself, the mind behind policy science, did not acknowledge an explicit intellectual debt to philosophical pragmatism, founded by Charles Sanders Peirce, William James, and John Dewey, except for a few cursory observations in his later writings.¹⁵⁹ The Lasswell-McDougal

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 McDougal, *International Law, Power, and Policy*].

¹⁵⁸ See HAROLD D. LASSWELL, *A PRE-VIEW OF POLICY SCIENCES*, at xiii–xiv (1971) [hereinafter LASSWELL, *A PRE-VIEW OF POLICY SCIENCES*].

¹⁵⁹ In 1971, Lasswell wrote: “The policy sciences are a contemporary adaptation of the general approach to public policy that was recommended by John Dewey and his colleagues in the development of American pragmatism.” *Id.* at xiv. Earlier on in his first exposition on policy sciences, Lasswell had a less direct reference to his affinity for pragma-

policy-oriented international law does not include any direct or indirect mention of pragmatism either. This is quite consistent with the history of pragmatism itself, which went out of philosophical fashion right around the birth of the NHS and reappeared as neopragmatism well after the maturity of McDougal's jurisprudence.¹⁶⁰

In fact, in McDougal's time, Philip Allott appears to have been the only commentator who directly took note of pragmatism, though only in the context of denying McDougal a place either in the American pragmatist tradition or in realism.¹⁶¹ There was, Allott said, "too much of a priori in McDougal . . . a certain Hegelian element . . . in the basic concept of McDougal's method, that of states with competing interests which must be resolved into something which satisfies both sides and also satisfies the policy of the world community (world-spirit)."¹⁶² Allott's brief but keen observation gets to the heart of the problem of a priori concepts, such as human dignity and its correlatives such as community policy, inherent in the NHS.¹⁶³ It does not, however, go far enough to explain what a pragmatist commitment to the normative values of human dignity would look like or to articulate the consequences of McDougal's accommodation of a priori values for his problem-solving and contextualist ambitions. Allott seems to be after the philosophical roots of McDougal's normative commitments¹⁶⁴ and his

tism. See THE POLICY SCIENCES: RECENT DEVELOPMENTS IN SCOPE AND METHOD 12 (Daniel Lerner & Harold D. Lasswell eds., 1951) [hereinafter THE POLICY SCIENCES]. On another occasion, Lasswell makes a curious comparison between pragmatism and mysticism: "Pragmatists assert that the quest for truth is a 'logic of inquiry.' It is, therefore, an experience in self-discipline in the course of which the knowledge and perhaps the order of preference of the inquirer is open to change." HAROLD D. LASSWELL, THE FUTURE OF POLITICAL SCIENCE 155 (1963).

¹⁶⁰ For a fine history of philosophy of pragmatism, see PRAGMATISM: FROM PROGRESSIVISM TO POSTMODERNISM (Robert Hollinger & David Depew eds., 1995). But see Robert Talisse, *Pragmatism and the Cold War*, in THE OXFORD HANDBOOK OF AMERICAN PHILOSOPHY 254 (Cheryl Misak ed., 2008) (arguing against the eclipse of pragmatism through the Cold War).

¹⁶¹ Allott, *supra* note 155, at 125.

¹⁶² *Id.*

¹⁶³ See *id.*

¹⁶⁴ Allott believes that no tradition of political and moral philosophy is relevant except for utilitarianism:

There is abundant evidence . . . that McDougal accepts the possibility of a "calculus of values", in the style of Bentham; . . . It seems clear that he feels able to weigh one interest against another, one value against another, one value-statement against another. The words "weigh" and "outweigh" are used on more than one occasion in such a context. It is highly speculative to suggest what the equivalents of "pleasure" and "pain" would be in McDougal's system; possibly "humanity" and "inhumanity".

mention of pragmatism is as cursory as a simple rejection of its connection with the NHS.¹⁶⁵

Only after its renaissance and reemergence on the legal theory scene¹⁶⁶ did pragmatism receive some attention—though scant—in international law.¹⁶⁷ In *Patterns of American Jurisprudence*, Neil Duxbury intriguingly suggests that the NHS, in spite of all that Lasswell and McDougal might have intended to the contrary, “represents a suppression rather than a continuation of the realist faith in pragmatism.”¹⁶⁸ Duxbury admits that this claim is “strange” because the purpose of policy-oriented jurisprudence seems to be the strengthening of the problem-solving and policy-making skills of the would-be-lawyer.¹⁶⁹ The path of the policy-oriented approach is linked to the history of Dewey’s thought after World War II.¹⁷⁰ Lasswell and McDougal adopted Dewey’s conception of democracy as a set of basic human ideals, the optimum realization of which calls for proper institutions throughout society.¹⁷¹ Furthermore, policy science, similar to Dewey’s attempt to reconstruct philosophy,¹⁷² expounded a set of intellectual tasks to reconstruct legal education and the legal profession.¹⁷³

An emphasis on democracy and the cultivation of a set of intellectual skills however, Duxbury writes, does not make policy science a pragmatic theory.¹⁷⁴ “For policy science is too preoccupied with the development of a methodology and too little concerned with the matter of how that methodology may prove in some way to be useful.”¹⁷⁵ Policy

Id.

¹⁶⁵ *See id.*

¹⁶⁶ *See, e.g.*, MICHAL ALBERSTEIN, PRAGMATISM AND LAW: FROM PHILOSOPHY TO DISPUTE RESOLUTION (2002); MICHAEL BRINT & WILLIAM WEAVER, PRAGMATISM IN LAW AND SOCIETY (1991); BRIAN Z. TAMANAHA, REALISTIC SOCIOLEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW (1997); RENASCENT PRAGMATISM: STUDIES IN LAW AND SOCIAL SCIENCE (Alfonso Morales ed., 2003); THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE (Morris Dickstein ed., 1998).

¹⁶⁷ *See* DUXBURY, *supra* note 8, at 191.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 200.

¹⁷⁰ *Id.*

¹⁷¹ *See, e.g.*, ALLAN RYAN, JOHN DEWEY AND THE HIGH TIDE OF AMERICAN LIBERALISM (1995); ROBERT WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY (1991).

¹⁷² *See generally* JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY (1948).

¹⁷³ *See* discussion *infra* Part IV (analyzing the role of each of the five intellectual tasks in the New Haven Jurisprudence: goal clarification, trend thinking, scientific thinking, developmental thinking, and alternative thinking). For further comparison of Lasswell-McDougal and Dewey, see Frederick Samson Tipson, Note, *The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity*, 14 VA. J. INT’L L. 535, 539–40 (1974).

¹⁷⁴ DUXBURY, *supra* note 8, at 201.

¹⁷⁵ *Id.*

science jurisprudence, thus, is “[a]t best groundwork; interpreted less charitably, it is the use of theory to encourage procrastination over matters practical.”¹⁷⁶

Duxbury’s reading seems to promise the right destination. Nevertheless, it neither takes the right direction, nor goes far enough on the road to that destination. His concern, in the last analysis, is similar to the earlier complaints regarding McDougal’s conceptual grandiloquence:¹⁷⁷ “The idea that [lawyers] might achieve as much by becoming versed in the language and methods of policy science demanded too great a leap of faith. It demanded also, certainly of academic lawyers, too radical a reorientation of perspective.”¹⁷⁸ This recognition certainly carries a great deal of explanatory power and historical significance for understanding the career of the New Haven Jurisprudence and its reception by the international legal discipline.¹⁷⁹ The overemphasis on the role of experts—policy scientists of democracy and international lawyers of human dignity—corresponds to the fate of pragmatism in the United States after Dewey and throughout most of the Cold War. As far as the contribution of philosophical pragmatism is concerned, however, Duxbury’s account reduces it to mere practicability. Equating pragmatism with practicability is little more than a vernacular reading of pragmatism and sets a very low threshold for the understanding of both pragmatism and New Haven’s policy-oriented international law.

In a constructivist proposal, Harry Gould and Nicholas Onuf suggest that pragmatism can provide constructivism with everything it needs epistemically to present an alternative view of rules as social constructs against ontological realism.¹⁸⁰ This pragmatist approach to the conditions of rule, however, is found neither in the early pragmatism of Peirce, James, and Dewey, nor in Legal Realism.¹⁸¹ Dewey delved into political theory but did not consider the conditions of rule in any of his writings. Likewise, Legal Realists paid great attention to methods of adjudication and the study of law, but were uninterested in broader politi-

¹⁷⁶ *Id.* at 202.

¹⁷⁷ See *supra* text accompanying note 108.

¹⁷⁸ DUXBURY, *supra* note 8, at 202.

¹⁷⁹ See Hengameh Saberi, *From Policy Science of Democracy to International Law of Human Dignity: A Translation Revisited* (May 2010) (unpublished manuscript) (on file with author).

¹⁸⁰ Harry Gould & Nicholas Onuf, *Pragmatism, Legal Realism and Constructivism*, in *PRAGMATISM IN INTERNATIONAL RELATIONS* 26, 31–32 (Harry Bauer & Elisabetta Brighi eds., 2009).

¹⁸¹ See *id.* at 38.

cal theory.¹⁸² To find a pragmatist view of the conditions of rule, Gould and Onuf suggest that one should turn to the New Haven Jurisprudence, which they introduce as pragmatism's representative in international law.¹⁸³

Starting with Legal Realism's position about "the instrumentality of the law and its reconceptualization as a locus of judgment," Lasswell and McDougal proceeded a step further, delineating the process of "authoritative decision" and its relation to "effective control,"¹⁸⁴ and asking oft-neglected questions such as: how to identify rules; who may prescribe rules (for whom and by what procedures); who may invoke rules; and how to apply and appraise the effectiveness of rules.¹⁸⁵ These are not merely questions about rules but also about rule—that is, rule as process.¹⁸⁶ That said, New Haven's pragmatist view of rule as process poses a conceptually binary opposition between two different world public orders—minimum and optimum¹⁸⁷—which may not be entirely consistent with pragmatism's rejection of absolute and binary distinctions.¹⁸⁸ Recognizing the NHS's pragmatist potentials, Gould and Onuf still believe that its "daunting conceptual vocabulary and latent rule-skepticism" obscure conditions of rule.¹⁸⁹ In their view, the NHS's emphasis on "the degree of centralization, or . . . respect for human dignity" in differentiating between minimum and optimum world public orders neglects more delicate and important differences in forms of rule.¹⁹⁰

Gould and Onuf's reference to the centrality of human dignity captures a significant issue at the heart of the NHS which has negative bearings for its claim to pragmatism. Their concern is to identify variations in rule depending on context and social process in which rules and rule perform different functions.¹⁹¹ Their quibble is with the liberal assumption about order as spontaneous, natural, and benign (or not always benign but nevertheless easily manageable and subject to quick adjust-

¹⁸² *Id.*

¹⁸³ *See id.*

¹⁸⁴ McDougal, *International Law, Power, and Policy*, *supra* note 157, at 173.

¹⁸⁵ *Id.* at 209–12.

¹⁸⁶ Gould & Onuf, *supra* note 180, at 38–39.

¹⁸⁷ For more on these two different world public orders, see generally Myres S. McDougal & Florentino P. Feliciano, *International Coercion and World Public Order: The General Principles of the Law of War*, 67 *YALE L.J.* 771 (1958) [hereinafter McDougal & Feliciano, *International Coercion and World Public Order*] (analyzing the legal framework of international coercion within these two contrasting attitudes).

¹⁸⁸ Gould & Onuf, *supra* note 180, at 40.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *See id.* at 41–43.

ments).¹⁹² They also take issue with the NHS's discount of rule and rules in a world of minimum public order where human dignity is not sufficiently respected, but, as they suggest, where some "functionally limited hierarchical arrangements" do exist.¹⁹³ Gould and Onuf do not, however, address the internal structure of policy-oriented jurisprudence and the consequences of the centrality of human dignity for its pragmatist and problem-solving promises. Further, beyond quick references to pragmatism's incompatibility with binary distinctions, they say little about the precise implementation of the NHS's pragmatist promises of contextualism in relation to the central role of human dignity.

The last and most recent account of international law and pragmatism belongs to an enthusiast for the potential of philosophical pragmatism to bring practice and action back to the center of international legal argument.¹⁹⁴ Siegfried Schieder, who in an earlier work presented a discursive reading of pragmatism in line with neopragmatism,¹⁹⁵ posits two reasons for the lack of attention in literature to the influence of pragmatism on the international legal system.¹⁹⁶ The first reason is that "perceptive boundaries between pragmatism and international law may generally impede philosophy from engaging with a practical science."¹⁹⁷ Alternatively, the second reason posits that since pragmatism is understood to relate to the entirety of legal decisions, and since there is limited adjudication in international relations, there has not been adequate interest in pragmatism's contribution to international law.¹⁹⁸ Why Schieder considers international law to be merely a "practical science" is quite curious. Pragmatism's connection to legal theory through the medium of adjudication and the low priority of adjudication in international politics, however, is not too farfetched as a possible reason for the dearth of attention to pragmatism in international law.

In Schieder's view, the policy-oriented approach of the NHS is closely related to "the specific American products of instrumentalism

¹⁹² See *id.* at 43.

¹⁹³ *Id.*

¹⁹⁴ Siegfried Schieder, *Pragmatism and International Law*, in PRAGMATISM AND INTERNATIONAL RELATIONS, *supra* note 180, at 127–28 [hereinafter Schieder, *Pragmatism and International Law*].

¹⁹⁵ See Siegfried Schieder, *Pragmatism as a Path Towards a Discursive and Open Theory of International Law*, 11 EUR. J. INT'L L. 663, 689 (2000) (taking a neopragmatist turn to present pragmatism merely as a theory of discourse for which justification of norms does not have much worth beyond the discourse itself).

¹⁹⁶ Schieder, *Pragmatism and International Law*, *supra* note 194, at 127.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 128.

and philosophical pragmatism.”¹⁹⁹ Adopting a secondary literature description,²⁰⁰ he lists five features of legal pragmatism—antifoundationalism, contextualism, instrumentalism, consequentialism, and perspectivism—in order to argue, in a schematic fashion, that the New Haven Jurisprudence does in fact live up to these pragmatist demands.²⁰¹

Antifoundationalism in international law, under this account, amounts to a rejection of positivism and natural law, both of which have traditionally supported deduction of legal decisions from a basic norm or a system of norms.²⁰² Against the traditional view of sources of international law, pragmatism stresses a relational and discursive path by virtue of which norms and legal cases come under the law of contingency and historicity.²⁰³ This view, Schieder says, is reflected in none other than McDougal himself, who questions a metaphysical view of rules as autonomous absolutes living in a vacuum.²⁰⁴

Schieder's understanding of (anti)foundationalism is too thin to take him beyond a superficial portrayal of McDougal's view of legal normativity. Consider foundationalism in epistemology to refer to (1) a set of theories of epistemic justification that rely on a distinction between basic and inferred beliefs, (2) an a priori conception of epistemology on which all claims to knowledge depend, or alternatively (3) the idea that our standards of weaker or stronger evidence, and of more or less justified beliefs, must be grounded in some relation to justification and truth.²⁰⁵ Today, foundationalism (as well as its genetically related terms of transcendentalism, essentialism, metaphysical, etc.) is no stranger in post-realist American jurisprudence.²⁰⁶ When there is a lucid account of the relationship between epistemic foundationalism and legal theory, however, only foundationalism understood in the third aforementioned category is accounted for with an analogue in

¹⁹⁹ *Id.* at 127. Schieder mistakenly notes that Lasswell and McDougal studied in Chicago in the 1920s under John Dewey and George H. Mead, and claims that was the channel through which pragmatist thinking entered into McDougal's approach to international law. It was in fact Lasswell alone who studied in Chicago, and whether he studied under Dewey directly would need historical proof—one that Schieder fails to provide. *Id.* at 140 n.3.

²⁰⁰ *See id.* at 128 (citing Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 *GEO. L.J.* 2071 (1996)).

²⁰¹ *Id.*

²⁰² *See id.* at 127–28.

²⁰³ *See id.* at 128–29.

²⁰⁴ *Id.* at 129.

²⁰⁵ Susan Haack, *On Legal Pragmatism: Where Does “The Path of the Law” Lead Us?*, 50 *AM. J. JURIS.* 71, 104 (2005).

²⁰⁶ *Id.*

legal theory: “[T]he idea that legal rules, to be (in a non-epistemic sense) justified, must be grounded in some relation to (presumably, moral) values.”²⁰⁷

Understood as Schieder intends, McDougal’s antifoundationalism stands beyond any doubt and a reference to it is almost redundant.²⁰⁸ This happy ending, however, ignores more than half of the story of normativity in policy-oriented jurisprudence. Schieder repeats, almost verbatim, McDougal’s claim to empirical verification of values of human dignity in the NHS as well as his dismissal of philosophical justification.²⁰⁹ He does not pause to find evidence for the NHS’s claim to empiricism or to ask whether the lack of justification for the normative commitments of human dignity may bear any consequences for New Haven’s contextualism and problem-solving promises.²¹⁰

Likewise, so far as contextualism is concerned, Schieder’s account is content with a worn-out juxtaposition between the American and European traditions of international law, in which the former is mindful of social and political circumstances and the latter is convinced of the objectivity and political neutrality of the rule of law.²¹¹ Schieder’s snapshot of New Haven’s pragmatism, however, does not address what context means in a policy-oriented approach, nor does it address how McDougal and his associates employ contextual variables in practice to answer legal questions.

The remaining three pragmatist features he attributed to the NHS are treated with no more diligence in Schieder’s hands.²¹² An appropriate response to Schieder’s list and his reading of New Haven’s pragmatism is a topic for another occasion. Here it is sufficient to state that instrumentalism and consequentialism—both philosophical concepts—are, in Schieder’s view, reduced to McDougal’s successful recon-

²⁰⁷ *See id.* This is only partly true, according to Geoffrey Samuel, whose work on legal epistemology takes knowledge of “facts,” rather than legal rules, as its central concern. *See* GEOFFREY SAMUEL, *EPISTEMOLOGY AND METHOD IN LAW* 173–80 (2003). Justification and the status of beliefs (definition 1 above) play a role when lawyers construct and reconstruct facts in legal cases. *See id.* at 173. Moreover, the epistemic (non-inferential) status of both facts and concepts at the heart of some putatively naturalist approaches to jurisprudence is the litmus test of the veracity of their claim to scientific naturalism. The point here simply is that the epistemic distinction between basic and inferred beliefs bears important implications for legal theory. *See id.*

²⁰⁸ *See* Schieder, *Pragmatism and International Law*, *supra* note 194, at 129–30.

²⁰⁹ *See id.*

²¹⁰ *See id.*

²¹¹ *See id.* at 130–31.

²¹² *See id.* at 131–34.

ciliation of law and power;²¹³ perspectivism, as against positivism, is reduced to the legal system's openness to newly emerging norms.²¹⁴

III. CONTEXTUALISM CONTEXTUALIZED: A RE-ASSESSMENT OF CONTEXTUAL-ORIENTATION OF POLICY SCIENCE AGAINST PRAGMATIC CONTEXTUALISM

As much as contextualism resonates with pragmatism in general, it is in fact more distinctively particular to neo-pragmatism's idea of thinking as situated and context-bound.²¹⁵ This is the belief that all thought is rooted in habits and patterns that human beings develop either individually or, more importantly, as a collective. The development of such patterns and habits is aided by the capacity for language and their transmission by culture, the two factors capitalized by the re-naissance pragmatism of the post-linguistic turn.²¹⁶

Surely it was pragmatism's understanding of knowing as situated in conventions, habits, and practice, as opposed to possessing an a priori status, that earned it a badge of victory over foundationalism. Not only did pragmatism's founding fathers debunk the assumption of a beginning point-zero for human knowledge,²¹⁷ but they also made clear that all our inquiries begin with and build upon opinions and beliefs that "we" have in stock.²¹⁸ Given the emphasis on the collective notion of

²¹³ See *id.* at 131–32.

²¹⁴ See Schieder, *Pragmatism and International Law*, *supra* note 194, at 132–34.

²¹⁵ See *id.* at 131.

²¹⁶ For an interesting attempt to project "contextualism" onto classical pragmatism and provide an account of Holmes as the embodiment of the jurisprudential tenets of American pragmatism, see generally Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 *STAN. L. REV.* 787 (1989).

²¹⁷ These grounds are rational indubitable intuitions for the rationalist, and uninterpreted, real data accessible to the mind by senses for the empiricist.

²¹⁸ Peirce emphasized the impossibility of universal doubt in the following way:

[T]here is but one state of mind from which you can "set out," namely, the very state of mind in which you actually find yourself at the time you do "set out"—a state in which you are laden with [an] immense mass of cognition already formed, of which you cannot divest yourself if you would; and who knows whether, if you could, you would not have made all knowledge impossible to yourself?

Charles Sanders Peirce, *What Pragmatism Is*, in 5 *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE* 272, 278 (C. Hartshorne & P. Weiss eds., 1934). James was equally clear as to the importance of opinions each individual has in stock when set out on the path of inquiry, and his resistance to give up on old beliefs when faced with the "inward trouble" of making any modifications to those opinions. WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* 59–60 (1907). Through this struggle, eventually, the individual "saves as much of it as he can, for in this matter of belief we are all extreme conserva-

inquiry and the social origins of beliefs and habits from which it proceeds, pragmatism's break from foundationalism parts ways with the methodological individualism of empiricism as well.²¹⁹ Still, contextualism is more often associated with neo-pragmatism because with the neo-Wittgensteinian centrality of language in all "truth" making endeavors already standing firm on the philosophical scene, contextualism needed only to take the ball and run with it to push contingency and historical irony all the way down.²²⁰ Nevertheless, unless it is clear what we mean by contextualism, a proprietary quibble over the roots of contextualism in classical pragmatism or in its postmodern reincarnation is futile.²²¹

The historical and practice-bound character of human thought and life, if that is meant by contextualism, is not unique to pragmatism, old or new. Philosophers as widely apart as Otto Neurath,²²² Martin Heidegger,²²³ and Ludwig Wittgenstein, in his later work,²²⁴ have all

tives. . . . The most violent revolutions in an individual's beliefs leave most of his old order standing." *Id.* at 60. Dewey only expanded on this idea by introducing creative intelligence as what supports inquiry when habit and practice become problematic. Inquiry does not aim to proceed from some pure, basic ground of truth, but always builds upon our existing knowledge in order to solve problems at hand. "We cannot lay hold of the new, we cannot even keep it before our minds, much less understand it, save by the use of ideas and knowledge we already possess." JOHN DEWEY, *EXPERIENCE AND NATURE*, at viii–ix (2d ed. 1929).

²¹⁹ See DEWEY, *supra* note 218, at 208–11; see also Peirce, *supra* note 218, at 281.

²²⁰ Rorty's account of our present situation is illustrative of this point:

Truth cannot be out there—cannot exist independently of the human mind—because sentences cannot so exist, or be out there. The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own—unaided by the describing activities of human beings—cannot.

RICHARD RORTY, *CONTINGENCY, IRONY, AND SOLIDARITY* 5 (1989). From the centrality of language in providing the sole medium to describe the world, and the contingency of all languages, he then moves to conclude that our "intellectual and moral progress [is] a history of increasingly useful metaphors rather than of increasing understanding of how things really are." *Id.* at 9.

²²¹ For a criticism of the employment of "context" and "contextualism" by non-traditional approaches to world politics, without an examination of their implications, and an analysis of context and its influence on methodology and normative theory by historicist and culturalist versions of contextualism, see STEPHANIE LAWSON, *CULTURE AND CONTEXT IN WORLD POLITICS* 36–57 (2007).

²²² Referring to Neurath's famous metaphoric boat on whose strongest planks inquirers have to hold a stable foot to continue the path of inquiry and reconstruct and change as they sail. See Otto Neurath, *Protocol Sentences*, in *LOGICAL POSITIVISM* 199, 201 (A.J. Ayer ed., 1959).

²²³ Heidegger was under no illusion that beliefs are free from presupposed prejudices that are mostly collective, historical, often unquestioned, and pre-reflective. See MARTIN HEIDEGGER, *BEING AND TIME* 190–203 (J. Macquarrie & E. Robinson trans., 1962).

accounted for the constituting role of praxis in human thought. Hegel, Marx, the historical school of jurisprudence, and Burkean version of conservative socio-political theory had already sung their “songs of experience”²²⁵ and each pondered on the practice-bound character of human inquiry before the emergence of pragmatism qua a distinctive philosophical tradition.²²⁶ It is true that, contrary to the conservative, Burkean treatment of history, pragmatism teaches to begin with old beliefs and builds upon them only so long as such beliefs and habits do not hinder the best usage of the tools of creative intelligence.²²⁷ But any philosophy that has broken away from foundationalism agrees on the situated state of knowing. What, then, pairs the “contextual” with “pragmatic” so ubiquitously? Beyond the vernacular, which tends to automatically equate one with the other, it is perhaps the fact that pragmatism ranks atop other antifoundational traditions in teasing out how exactly context-dependence of human inquiry epistemically defeats foundationalism.²²⁸ It does so by providing a context-dependent ground for our investigative affairs which, taken seriously, is liberated from both the illusion of foundational certainty and the chaos of radical indeterminacy. Regardless of whether pragmatism and epistemic contextualism as two existential paradigms of knowledge are merely isomorphic, their similar approaches to the role of practice and context standing against both foundationalism and skepticism validate their epistemological union.²²⁹ What remains is to explore the function of

²²⁴ Ludwig Wittgenstein often emphasized the habitual and social basis of all reasoning in his later work. See, e.g., LUDWIG WITTGENSTEIN, ON CERTAINTY ¶¶ 166, 189, 204 (G.E.M. Anscombe & D. Paul trans., 1969).

²²⁵ See generally MARTIN JAY, SONGS OF EXPERIENCE: MODERN AMERICAN AND EUROPEAN VARIATIONS ON A UNIVERSAL THEME 170–216 (2005) (discussing the aforementioned philosophers’ theories on the nature of human experience).

²²⁶ See *id.* at 211–15.

²²⁷ See *id.* at 177–83.

²²⁸ See *id.* at 302–04, 306–07.

²²⁹ In contrast to a general tendency to regard pragmatism and contextualism as one and the same, some have argued for a clear distinction between epistemic contextualism and epistemic pragmatism. See, e.g., Joseph W. Long, *Who Is a Pragmatist: Distinguishing Epistemic Pragmatism and Contextualism*, 16 J. SPECULATIVE PHIL. 39 (2003). Long applies a three-fold litmus test to differentiate pragmatism from epistemic contextualism, only the first of which is notable here. According to the first criterion, the difference between pragmatism and contextualism lies in responding to the regress problem of justification. The problem is as follows: every belief *C* must be inferentially justified by a belief *E*, which in turn needs to be justified by another belief *F*, which needs to be justified by yet another belief *G*, *ad infinitum*. Contrary to foundationalism, which would have the regress end with some empirically basic or non-inferentially justified beliefs in no need of further justification, the pragmatist holds that our beliefs are immediately justified or unjustified based on the practical difference their veracity would make. *Id.* at 41. Contextualists, on the other

context in the New Haven Jurisprudence with respect to its pragmatic war against foundationalism.

If jurisprudential approaches of the past failed the test of temporal relevance because of their scant regard for context and a false claim to context-transcendence through legal semantics, the configurative jurisprudence of Yale is wary of a direct relationship between its relevance and context sensitivity.²³⁰ The scholar of policy-orientation leaves the high field of semantics for a more cumbersome and rewarding labor of self-observation through proper techniques and elements that are sufficiently sensitive to the conditionality of time and space. She has the modesty of determining her own standpoint in search of objectivity, the vigilance of protecting her profession's collective identity against the distortive influence of power, and the diligence of returning to the field of semantics only once she is armed with a fair understanding of pragmatics.

While this summary is a fair description of what amounts to contextual-orientation in policy science, further elaboration is in order. The first part of the argument below details the various functions of context in the Lasswell-McDougal oeuvre. As will be shown, context-sensitivity, in the final analysis, is to serve two purposes: a procedure to ensure rationality and a conceptual tool against foundationalism. With this demonstrated, I will reexamine the real function of the conceptual tool of context in policy science against the backdrop of epistemic contextualism.

A. *Context, Rationality, Reflexivity, and Pragmatics*

Although contextualism is central to the policy-oriented approach, it is difficult to find an articulate account of how precisely context safeguards inquiry from leaning on any variation of foundationalism. On its face, the demand of such an account may seem superfluous because

hand, such as Wittgenstein in his later years, think that it is absurd to ask for any justification of our basic beliefs, because—similar to the rules of a game—such basic beliefs are beyond justification. *Id.* at 43. So while the pragmatic theory of knowledge argues that our basic beliefs are justified, contextualism holds that they are not. *Id.* at 45. In other words, contextualism is skeptical in an epistemic sense, but anti-skeptical in a pragmatic sense; whereas pragmatism is epistemically anti-skeptical. This distinction, though intriguing, is overshadowed by the simultaneously constraining and liberating role of context shared by epistemic pragmatism and contextualism. Contextualism, whether of epistemic or pragmatic genres, liberates justification from foundationalism and at the same time constrains radical indeterminacy. That is a sufficient ground for the argument developed here to disregard this distinction.

²³⁰ See I MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7, at 17.

the contribution of particularities of context in transcending the limitations of semantic foundationalism is self-evident. The NHS finds semantic foundationalism to be the foremost reason for the failed idealism of both its contemporaneous and past approaches to international law and boasts context-sensitivity as the remedy for that failure for any jurisprudence that hopes to be relevant.²³¹ Yet the obvious importance of considering the socio-political, historical, or economic particularities of each case in legal decision-making does not per se address how precisely such particularities respond to the insufficiency of the semantic. In a self-professedly value-oriented jurisprudence such as New Haven's, normative values also make up part of the body of the context and so add yet another layer to the question around the role of context in overcoming gaps, conflicts, and ambiguities in semantics.

Three understandings of contextual-orientation in policy science can be gleaned from the works of Lasswell and McDougal. The first two are specific to Lasswell's policy sciences, and the third one is contextualism as applied to the jurisprudence of international law.

1. Contextual-Orientation and Rational Observation

According to Lasswell, the path of inquiry for the policy analyst is not a journey with a specific end in view, but rather a means to enhance the potential for enlightened action.²³² Rational inquiry leading to enlightenment reads the meaning of details as part of a whole, the conception of which is in turn constructed, revised, and disciplined through concrete evidence in a dynamic manner.²³³ The whole in each situation under investigation is made up of the socio-historical context of that situation in addition to value judgments specific to the particular analyst. To ensure rationality, the complex web of social interactions based on shared meanings and values "recognized and sustained in the continuing interplay among participants in the social process" must be considered both as an objective universe to face and as a context to penetrate by the analyst.²³⁴ The analyst undertakes a psychoanalytical examination of herself and the unfamiliar territory of the social process and considers the wider context than that which is apparent.²³⁵ Yet the familiar is under constant reexamination as well: "The whole aim of the

²³¹ *Id.* at xxii.

²³² See HAROLD D. LASSWELL, *POWER AND PERSONALITY* 217 (1976).

²³³ See *id.* at 218.

²³⁴ Harold D. Lasswell, *Clarifying Value Judgment: Principles of Content and Procedure*, 1 *INQUIRY* 87, 96 (1958) [hereinafter Lasswell, *Clarifying Value Judgment*].

²³⁵ See HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 252–53 (1977).

scientific student of society is to make the obvious inescapable”²³⁶ as “[t]he world about us is much richer in meanings than we consciously see.”²³⁷

Thus, for Lasswell, the conception of the “self-in-context” necessarily links the analyst’s “insight” into one’s self with her knowledge of other people and a wider social context,²³⁸ as it is through an understanding of individual characteristics that are “ordinarily excluded from the focus of full waking attention by smooth working mechanisms of ‘resistance’ and ‘repression’” that the inhibiting shadow of anxieties is dispelled and the light of rationality appears.²³⁹ As much as psychoanalytic observation of the self and “insight” into individual characteristics is important to remove blinders and render an understanding of social context possible in order to make the individual aware of her total institutional context and provide for contextual “insight” into social reality at different levels, traditional psychoanalytic technique must be adapted to “reality critique.”²⁴⁰ Rational observation is thus ensured by the analyst’s deep “insight” into the particular context of individual specificities which provide the lens through which the institutional context is examined.²⁴¹

Rational inquiry is also contextual in the sense that it is necessarily directional, that is, of a temporal, developmental dimension. Contextual-orientation is to discern a totality which is not fixed in time, but involves both a stable configuration in a particular moment and a process of changing patterns in the form of historical development.²⁴² The “principle of temporality” requires that the policy analyst, as an actor within a changing context, adopt a “developmental construct” and draw an image of anticipated future developments based on past trends.²⁴³ Such a “developmental construct” is not bound to any laws of historical development, contrary to Marx to whom Lasswell acknowledges a debt for this concept,²⁴⁴ but rather it is tentative and subject to

²³⁶ *Id.* at 250.

²³⁷ *Id.* at 36.

²³⁸ LASSWELL, A PRE-VIEW OF POLICY SCIENCES, *supra* note 158, at 155–57.

²³⁹ See Lasswell, *Clarifying Value Judgment*, *supra* note 234, at 96–97.

²⁴⁰ LASSWELL, A PRE-VIEW OF POLICY SCIENCES, *supra* note 158, at 158.

²⁴¹ *See id.*

²⁴² HAROLD D. LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY 4–5 (1965) [hereinafter LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY].

²⁴³ HAROLD D. LASSWELL & ABRAHAM KAPLAN, POWER AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY, at xiv (1950) [hereinafter LASSWELL & KAPLAN, POWER AND SOCIETY].

²⁴⁴ LASSWELL, A PRE-VIEW OF POLICY SCIENCES, *supra* note 158, at 67–68.

revision. Future events are “partly probable and partly chance” and no amount of knowledge of past trends and present evidence can totally eliminate uncertainty.²⁴⁵

Context-sensitivity not only enables the individual observer to see through her own individual characteristics and background that have had a pivotal formative influence on her observation, but also empowers the analyst's professional identity to stand free from the internal peculiarities of the observer or the external pressure of power. It thereby becomes emancipatory by embedding itself in a professional outlook conscious of its limits and capabilities.

2. Context-Sensitivity and Professional Reflexivity

The enlightened observer is inescapably, but only implicitly, conscious of her past, present, and future assumptions and the influence of her natural and cultural environment. To uplift that consciousness to the level of “undogmatic access to inclusive versions of reality,” there ought to be professional “policy training operations” that employ appropriate procedures to make a full image of the total context available to the analyst.²⁴⁶ One example of such a procedure, according to Lasswell, is to hold continuing seminars composed of highly committed members who willingly engage in a collective psychoanalytic technique of free association in which “uttering of uncensored suggestions” is encouraged.²⁴⁷ He suggests the appointment of a “devil's advocate” in an adversarial model of seminars to challenge dominant predispositions and help unmask unrecognized demands, expectations, and identifications.²⁴⁸ Pursued seriously, a global network of such seminars to this end could be established.²⁴⁹

The reflexive labor of the analyst toward reducing constraints upon freedom and rationality of inquiry thus moves beyond “insight” into oneself, simultaneously demanding and reinforcing an institutional identity. The identity of rational policy science as such is defined by the analyst whose “insight” allows her to observe changes of social regularities alongside the changes of “current meaning,” which in turn lead to a transformation in the practical “context” of action.²⁵⁰ For rational

²⁴⁵ *Id.* at 11.

²⁴⁶ *Id.* at 155–56.

²⁴⁷ *Id.* at 150.

²⁴⁸ *Id.* at 152–53.

²⁴⁹ *See id.* at 154.

²⁵⁰ Harold D. Lasswell, *The World Revolution of Our Time: A Framework for Basic Policy Research*, in *WORLD REVOLUTIONARY ELITES: STUDIES IN COERCIVE IDEOLOGICAL MOVEMENTS*

policy science to be effective, the analyst must possess a creative orientation that allows her to at once detach from, and immerse into, the total context of social process with the mental flexibility to comprehend the process as one that both influences and is influenced by the actors.²⁵¹ The principal goal of the enlightened policy analyst in understanding the social process is “truth”; a goal that cannot be simply presumed but must be adopted as a demanding commitment.²⁵² This commitment is under constant threat by the distortive pressure of power and can be sustained only through individual efforts of the analyst as well as a cultivated professional identity for rational policy science that supports a network of rational inquirers.²⁵³

It is in the face of such circumstantial pressures and internal blind spots of personal and professional identity that Lasswell devises clear procedures to maintain contextual-orientation as a distinctive character of rational policy inquiry.²⁵⁴ Contextual-orientation is thus both an individual and a collective undertaking to enhance the rationality of policy analysis.

3. Inadequacy of Semantics and Pragmatics of Context

A comprehensive orientation in policy science toward context arms the analyst—whose principal goal of seeking truth sets her apart from the typical policy actor—with the intellectual means for undogmatic, rational policy analysis, free from the peculiarities of the personal identity and from the symbols or myths attached to professional identity. Translated to legal labor, the enlightening role of context is perhaps even more crucial, as the legal agent may act not just as the scholar to recommend sound decisions, but also as the actor entrusted with actual decision-making power. Contextual-orientation here ensures the rationality of such decisions in the sense of a closer approximation of community-approved value goals.

Legal semantics, devoid of determinate meaning, riddled with complementarity of propositions and conducive to normative-ambiguous prescriptions, falls short of the demands of a jurisprudence that is

33–34 (Harold D. Lasswell & Daniel Learner eds., 1965) [hereinafter Lasswell, *The World Revolution of Our Time*].

²⁵¹ See LASSWELL, A PRE-VIEW OF POLICY SCIENCES, *supra* note 158, at 155–56; LASSWELL, WORLD POLITICS AND PERSONAL INSECURITY, *supra* note 242, at 4–6.

²⁵² Harold D. Lasswell, *Some Perplexities of Policy Theory*, 14 Soc. Res. 176, 181 (1974).

²⁵³ *Id.* at 177.

²⁵⁴ See LASSWELL, A PRE-VIEW OF POLICY SCIENCES, *supra* note 158, at 63–64.

to remain relevant at any time.²⁵⁵ A policy-oriented jurisprudence of international law “[a]bjur[es] the metaphysical derivations and justifications” of normative prescriptions so characteristic of jurisprudential work and instead relies on an empirical study of the comprehensive context of the social process within which the prescription is to be made.²⁵⁶ Any syntactical derivation from past decisions and semantics of rules must be weighed against alternative derivations in terms of their practical consequences for the value goals most extensively shared by decision-makers and their constituencies.²⁵⁷ Exclusive focus on legal semologics or content (including semantics and syntactics) without a conscious appreciation of total context of their cause and effects (pragmatics) bears the blame for much of the normative ambiguity and irrelevance of international law jurisprudence.²⁵⁸

Cognizant of the comprehensive web of essential variables affecting decisions (causes) and rational appraisal of the aggregate value consequences of competing alternatives (effects), a policy-oriented international law locates authoritative decisions within the social process of the interaction of a larger global community and smaller communities. Because of interdependency or “interdetermination and interdependence²⁵⁹ of peoples across state lines” as they seek to maximize values by utilizing institutions and affect resources, says McDougal, one can well speak (as he does interchangeably) of “world community process” or “world social process.”²⁶⁰ The world social process is defined by the pro-

²⁵⁵ See McDougal, *International Law, Power, and Policy*, *supra* note 157, at 145–46.

²⁵⁶ See *id.* at 186.

²⁵⁷ See *id.* at 146.

²⁵⁸ Lasswell and McDougal, following the “behavioristic” analysis of semiotician Charles W. Morris in his discussion *Foundations of the Theory of Signs*, in 1 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE 77 (Otto Neurath et al. eds., 1938), present a distinction between different statements of law. In brief, the entire science of statement analysis (semiotics) is made up of statements about content (semologics) and statements about cause and effects (pragmatics). Semologics in turn consists of syntactics, which is the internal relationship of a body of (legal) propositions with one another (in terms of consistency, economy, and degree of generality), and semantics, which is the external reference of a proposition. See McDougal & Lasswell, *Legal Education and Public Policy*, *supra* note 3, at 267–69.

²⁵⁹ McDougal seems never to have defined the word “interdetermination” but used it interchangeably with “interdependence,” as in the following sentence: “[The world community process] exhibits the same kinds of interdeterminations, the same kinds of interdependences, as our national processes.” Myres S. McDougal, *International Law and the Law of the Sea*, in THE LAW OF THE SEA 3, 5 (Lewis M. Alexander ed., 1967).

²⁶⁰ 1 MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7, at 188; Myres S. McDougal, *The Impact of International Law upon National Law: A Policy-Oriented Perspective*, in STUDIES IN WORLD PUBLIC ORDER 157, 165 (Myres S. McDougal ed., 1960) [hereinafter McDougal, *The Impact of International Law upon National Law*].

cess of sharing and shaping eight basic values (power, enlightenment, respect, wealth, well-being, skill, affection, and rectitude),²⁶¹ the resolution of dispute over which may be accomplished within the world power process, that is, authoritative decisions with international effects that are enforced through severe deprivation or extreme indulgence.²⁶² The world power process is shaped by, and in turn shapes, the interactions of the world community with its encompassed sub-communities.²⁶³ As such, to be entirely contextual, it is essential to adopt proper procedures that identify the source of decisions within this reciprocal interaction and their effects on the distribution of community values.

Lasswell and McDougal introduce a quite sophisticated conceptual apparatus to structure inquiry into context.²⁶⁴ First, to avoid normative-ambiguity, policy-oriented jurisprudence recommends a clear distinction between what calls for an authoritative decision, that is, specific events or value changes in social process precipitating conflicting claims, and the decision itself.²⁶⁵ These decisions have both short-term and long-term consequences for values. When some participants in the world social process are threatened or deprived of certain values resulting from the actions of others which they call illegal, they call upon the authoritative community decision-makers to apply certain prescriptions of international law to restore any lost values.²⁶⁶ By weighing the claims and counterclaims of the deprived and the depriver and interpreting the prescriptions the parties have invoked to foster their claims, they “invariably seek to make reasoned decisions by reference to common policy and shared interests.”²⁶⁷

²⁶¹ See 1 MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7, at 188–90.

²⁶² See McDougal, *The Impact of International Law upon National Law*, *supra* note 260, at 166–67.

²⁶³ The world power process, McDougal writes,

may . . . be insightfully viewed as a complex hierarchy of power processes of varying degrees of comprehension (global, hemispheric, regional, national, local), with the more comprehensive affecting “inward” or “downward” the less comprehensive, and the latter in turn affecting “outward” or “upward” the former. The metaphor of “nesting” tables or cups might be apt if such tables and cups could be conceived as being in process of constant interaction and change.

Id. at 171.

²⁶⁴ See 1 MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7, at 21–38.

²⁶⁵ See *id.* at 30–31.

²⁶⁶ See McDougal, *The Impact of International Law upon National Law*, *supra* note 260, at 167–68.

²⁶⁷ *Id.* at 168.

Second, the legal scholar or decision-maker engages in a three-tier analysis of “values,” “phase,” and “conditions.”²⁶⁸ 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.²⁶⁹ Under the value category, McDougal holds that the observer or decision-maker ought to consider the events leading to claims, the actual claims made over values, and all decision alternatives in terms of their policy implications or value consequences.²⁷⁰ For instance, to distinguish between permissible and impermissible coercion, a context-sensitive approach should ask to what extent coercion was necessary to change the distribution of values and how comprehensive the parties’ objectives were (consequentiality), whether the coercion was to defend the established distribution of values or to change the existing setting (conservation or extension), and to what degree the contested values were inclusive or exclusive.²⁷¹

In the phase analysis, inquiry is made into “features,” “elements,” or “aspects” of the process of any interaction through which men shape and share values.²⁷² In addition to community or social processes as a whole, the value process, the process of legal or authoritative decisions, the analysis of events, and the claim and decision processes, there are seven categories that help dissect the specific features of each context. These are: 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?).²⁷³

In the “conditions” or “conditions of context” analysis, McDougal often refers to a number of additional factors relating to the location of a particular context within the larger context of world power proc-

²⁶⁸ See McDougal et al., *Theories About International Law*, *supra* note 30, at 198.

²⁶⁹ *See id.*

²⁷⁰ *See id.*

²⁷¹ See MYRES S. MCDUGAL & FLORENTINO P. FELICIANO, *THE INTERNATIONAL LAW OF WAR: TRANSNATIONAL COERCION AND WORLD PUBLIC ORDER* 16–20 (1994) [hereinafter MCDUGAL & FELICIANO, *THE INTERNATIONAL LAW OF WAR*].

²⁷² See McDougal et al., *Theories About International Law*, *supra* note 30, at 198.

²⁷³ *See id.*

ess.²⁷⁴ For example, some factors affecting the authoritative process of interpretation and application of international agreements include: 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.²⁷⁵

This sketch of the role of context in a configurative jurisprudence hardly does justice to the impressive precision with which a contextual-oriented inquiry is de-limited by Lasswell and McDougal. So much has already been said that it is unrealistic to expect a successful application of such a complicated conceptual framework in practice. Even with a masterfully crafted design of details of the indices affecting context, the limitations of investigative resources hamper any attempts to account for all variables that cause decisions and consider their respective consequences.²⁷⁶ A parsimonious selection of variables to account for, though perhaps far from the ideal image of a scholar, is more reasonable for the practitioner of international law.²⁷⁷ McDougal's proposal in

²⁷⁴ See MYRES S. MCDUGAL, HAROLD D. LASSWELL, & JAMES C. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER: PRINCIPLES OF CONTENT AND PROCEDURE* 34 (1967) [hereinafter MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*].

²⁷⁵ See *id.*

²⁷⁶ This criticism comes from writers of the "incrementalist" school, most prominently Charles Lindblom. He rejects the recommendation to examine all the variables that give rise to specific decisions, or consider alternatives by way of investigation into their consequences for aggregate values, as utterly unrealistic. He instead recommends that the goals in each decision-making process be limited to a few specific ones, and that a limited number of alternatives, which differ from one another only incrementally, be considered for the advancement of those goals. See, e.g., CHARLES LINDBLOM & DAVID BRAYBROOKE, *A STRATEGY OF DECISION: POLICY EVALUATION AS A SOCIAL PROCESS* (1963); Charles Lindblom, *The Science of "Muddling Through,"* 19 *PUB. ADMIN. REV.* 79 (1959); see also Nicholas Greenwood Onuf, *Do Books of Reading Contribute to Scholarship?*, 23 *INT'L ORG.* 98 (1969).

²⁷⁷ Oscar Schachter writes about this from his own standpoint as a practitioner:

This brings me to still another prejudice of the international official—one which he probably shares with others in practical affairs—that is, a bias in favor of deciding questions with reasonable dispatch and facility. This, we realize, is far from the ideal conception of a scholar. We have been told, for example, that one must consider all the conditioning factors that affect decisions in the field of international law. . . . We have also been told that we must take into account future developments and the impact of various alternatives on the whole range of basic values. But surely if we attempted to follow this counsel, even in small part, no decisions would ever be made on the

fact reaches the outer limits of empirical possibility by requiring investigators to deal with eight value categories and seven phase categories with attendant sub-categories, an open-ended list of conditions of context, and five dispositional factors specifically related to scientific thinking (culture, class, interest, personality, and crisis).

Valid as this critique may be, the impossibly demanding nature of the empirical task is not the focus of this Article. The more interesting point is to illustrate how the empirical potential of the conceptual apparatus of contextualism is indeed crippled under the shadow of a “postulated” value system of human dignity. McDougal’s recommended investigation into the pragmatics of cause and effect boils down to a determination by a decision-maker of the balance of value systems and an appraisal of alternatives to those decisions.²⁷⁸ The role of law in the world power process is to ensure the conservation and expansion of the preferred value system of human dignity, and the recommended phase analysis with all its scrupulously defined subcategories must be utilized to that end. No doubt legal semantics is unable to live up to this task. But nothing in that suggests that the meaning of rules, as McDougal is convinced, is radically indeterminate. Contextualism can afford to offer an epistemic view within which meaning is determinable, if not invariably determinate. Pragmatics of context, therefore, is epistemically illu-

complex issues of contemporary international life. From the point of view of a participant—if not of a scholar—we must have a reasonably manageable frame of reference; we must take account of the limits on our ability to obtain and organize information and to look into the future; we must, in consequence, restrict our focus to relatively few variables and pay attention to perhaps only one or two major values in any specific situation. In short, it is not wisdom (as Santayana observed) to be only wise, and it may not be rational to introduce all the questions that should rationally be considered. For most of them may be unanswerable.

Oscar Schachter, *The International Official in a Divided World*, 53 AM. SOC’Y INT’L L. PROC. 344, 348 (1959). McDougal seems to be aware of some of these problems, but never to have offered any practical suggestion as how to face them. See, e.g., McDougal et al., *Theories About International Law*, *supra* note 30, at 286 (admitting to the difficulty of accounting for all goal values and preferences, but also taking issue with the “incrementalist” thesis, which in its strict form is unable to estimate “what is worth knowing” and appraise “the net benefits of alternative benefits”); Myres S. McDougal, *The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System*, in *THE ETHIC OF POWER: THE INTERPLAY OF RELIGION, PHILOSOPHY, AND POLITICS* 221, 238 (Harold Lasswell & Harlan Cleveland eds., 1962) [hereinafter McDougal, *The Ethics of Applying Systems of Authority*] (conceding the fact that she who applies principles of content and procedure is ultimately responsible for using her creative discretion to choose which values to consider, and that such principles will aid in the process of selection).

²⁷⁸ See MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*, *supra* note 274, at 34.

minative of semantics. This is contrary to the policy-oriented approach of Lasswell and McDougal, under which legal semantics is irremediably indeterminate and indeterminable, and so disregarded and replaced with pragmatics.²⁷⁹ Ironically, the consequences of McDougal's recommended pragmatic context analysis in its most precise form are not contingent on context, but instead guided by a set of non-reflective values or "preferred events" which themselves are not context-dependent.²⁸⁰ They are thus no less unwarranted or rigid than what McDougal avoids in the foundationalism of semantics.

B. *A Re-Assessment of the Role of Context in Policy-Oriented Jurisprudence*

As noted earlier, Lasswell and McDougal's masterly detailed articulation of a conceptual framework for context-analysis triggered a good deal of skepticism, much of which related to the demanding empirical task involved.²⁸¹ A more interesting critique of Lasswell's original design of a framework for contextual-orientation, however, asks some difficult questions about the rationale behind devising the categories and sub-categories as introduced by policy science.²⁸² This is particularly crucial with regard to the value category and its eight subsumptive sets of values which I will take up in the next part. Here, I intend to illustrate how, in the New Haven Jurisprudence, pragmatics neither complements semantics nor in fact addresses occurring cases of semantic indeterminacy to provide interpretive remedy, but instead is substituted for semantics. Because, as will be shown, the value category in the last analysis outruns other categories in the McDougalian contextual apparatus to find answers to legal cases, contextual-orientation is in effect tantamount to the preservation of values of human dignity. This, however, is nothing more than a trite observation regarding policy-oriented international law, known to any dilettante with the most cursory ac-

²⁷⁹ See McDougal & Lasswell, *Legal Education and Public Policy*, *supra* note 3, at 268.

²⁸⁰ See 1 MCDUGAL & LASSWELL, *JURISPRUDENCE FOR A FREE SOCIETY*, *supra* note 7, at 335–36.

²⁸¹ See Tipson *supra*, note 31, at 537.

²⁸² A critic takes Lasswell's failure to give any explanation as to how he arrived at these categories, which he introduces as the conceptual tools for context analysis, to be "mere 'intellectuality' in science," arbitrary, and "the result of intellect 'culling' ideas from all other minds engaged in solving problems of substance without Professor Lasswell having the benefit of experiencing that process." Arthur J. Brodbeck, *Scientific Heroism from a Standpoint Within Social Psychology*, in *POLITICS, PERSONALITY, AND SOCIAL SCIENCE IN THE TWENTIETH CENTURY*, *supra* note 115, at 245. The result is a set of concepts received with no more than "cold empathy," leaving the reader desiring to know about Lasswell's own creativity in selecting some concepts rather than others. *Id.*

quaintance with its value-oriented configurative jurisprudence. Furthermore, the primacy of values of human dignity over all other contextual factors does not in and of itself negate the context-sensitivity of McDougal's approach, though it certainly affects its efficacy. The problem appears only when such justifying values remain unjustified in a context-transcendent manner, betraying epistemic irresponsibility on the part of advocates of values of human dignity. The upshot is not only universalizing the particular, but more importantly, presenting answers to cases, hard or not, that are as predictable as any diehard literal reading of semantics may produce. The examples below will demonstrate this point.

In a comprehensive series of four volumes on world public order, McDougal and his collaborators set a prime example of the level of sophistication involved in any contextual analysis.²⁸³ Applied to the general jurisprudence of a particular doctrinal field, the grand task is no impediment to a "systematic"²⁸⁴ effort to capture various constituents of

²⁸³ See MCDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS*, *supra* note 95; MCDUGAL & FELICIANO, *THE INTERNATIONAL LAW OF WAR*, *supra* note 271, at 71; MYRES S. MCDUGAL, HAROLD D. LASSWELL & IVAN A. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*, *supra* note 274. In order to recommend the method by which decision-makers should determine basic community values, and alternatives thereof to address each respective problem area, these volumes place values in their most comprehensive context as follows: They first offer a phase and value analysis to establish (1) the process by which the values of space and oceans are shaped and shared, coercion inflicted, or agreement reached; (2) the process of claims and counterclaims regarding each particular area and the problems faced by decision-makers having to choose between the conflicting claims; and (3) the process of decision, related to the area in question, by which contraposed claims are resolved. This is followed by an examination of the larger context of conditions in which each process occurs. McDougal and his associates then go on to recommend basic community policy or policies to guide decision-makers in balancing existing claims in the relevant area. The subsequent chapters take this analysis to a more specific level regarding particular problems in the area under examination, finally recommending the intellectual tasks designed to help the scholar scientifically understand the history of the problematique (trend) and alternative possibilities, given the already-clarified goals of the scholar and the desired direction of the future. Trend analysis itself requires a contextual analysis of the past, similar to what the decision-maker is advised to do for present decisions. This should attest to the level of sophistication in McDougal's recommended contextual analysis. For works by colleagues or followers of the NHS who have adopted this mode of inquiry, see, for example, DOUGLAS M. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES: A FRAMEWORK FOR POLICY-ORIENTED INQUIRIES* (1968); B.S. MURTY, *PROPAGANDA AND WORLD PUBLIC ORDER: THE LEGAL REGULATION OF THE IDEOLOGICAL INSTRUMENT OF COERCION* (1968); William T. Burke, *The Legal Regulation of Minor International Coercion: A Framework of Inquiry*, in *ESSAYS ON INTERVENTION* 37 (Roland Stanger ed., 1964).

²⁸⁴ However apt a description "systematic" is, it still must be qualified. Sometimes the subject matter does not lend itself to the application of conceptual categories, such as in MCDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS*, *supra* note 95, at 453-62, where

context by McDougal and his associates through the designated proper categories.²⁸⁵ This degree of comprehensive coverage of contextual categories, however, barely sustains when McDougal addresses specific cases in order to assess their legal status in practice.²⁸⁶ For instance, consider McDougal's recommended contextual analysis of the lawfulness of coercion, in which the decision-maker ought to consider the events, claims, and decision alternatives to assess the short-term, middle-range, and long-term proposed or actual consequences for community values.²⁸⁷ Together with this is a consideration of the particular event leading to the claim under investigation so far as the phase category and conditions of context are concerned.²⁸⁸ More concretely, when considering participants in an incident of coercion, their "fighting capabilities, composition of internal elites, concentration of power in internal structures of authority, [and] ideological affiliation" are at stake.²⁸⁹ The decision-maker must take into account the participants' objectives, the importance of the goals pursued (whether they bear major or minor changes to the existing order), the expansion or conservation of values, and the sharability of values.²⁹⁰ The conditions of context include some "more important factors of fairly obvious significance [for] . . . appraising lawfulness [of coercion] . . . expectations about the nature of the available technology of violence, and about the relative probabilities of effective community intervention, and the kind of public order demanded by the respective participants."²⁹¹ McDougal directs the decision-maker to inquire (1) not only into which participant fired the first shot, but also into whether such an act was justified under the circumstances; (2) into which participant accepted community intervention more readily; and (3) into the "degree of conformity" that

McDougal's discussion of the background "acts" relating to the width of territorial sea is not conducive to categorization. At other times, there is no analysis of the process of decision, and the claims are discussed merely insofar as what they entail.

²⁸⁵ See, e.g., MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*, *supra* note 274, at 14–21 (dividing the context of international agreements into the following categories: participants, objectives, situations, base values, strategies, outcomes, effects, and conditions).

²⁸⁶ See, e.g., McDougal, *The Soviet-Cuban Quarantine*, *supra* note 42, at 598–600 (discussing Article 51 in terms of customary rights instead of contextual analysis).

²⁸⁷ See McDougal & Feliciano, *International Coercion and World Public Order*, *supra* note 187, at 820–23.

²⁸⁸ See *id.* at 779–91.

²⁸⁹ See McDougal, *The Ethics of Applying Systems of Authority*, *supra* note 277, at 235 (emphasis added).

²⁹⁰ *Id.* at 235–36.

²⁹¹ MCDUGAL & FELICIANO, *THE INTERNATIONAL LAW OF WAR*, *supra* note 271, at 183.

the decision-maker expects to secure if “a characterization of impermissibility” is to be made.²⁹²

In response to Quincy Wright and other critics of the U.S. quarantine of Cuba,²⁹³ McDougal argued for the legality of the quarantine based on a new interpretation of Article 51 of the United Nations Charter (Charter).²⁹⁴ While Wright argued that the United States was not responding to an “armed attack” and thus was not entitled to a defensive use of armed force,²⁹⁵ McDougal scoffed at the strict interpretation of Article 51 by virtue of which the customary right of self-defense is limited to the actual cases of an armed attack.²⁹⁶ Invoking the “plain and natural” language of Article 51 quite curiously, McDougal accuses the proponents of a strict reading of Article 51 of “word-juggling” and “substitut[ing] for the words ‘if an armed attack occurs’ the very different words ‘if, and only if, an armed attack occurs.’”²⁹⁷ McDougal repeated his earlier arguments for the right to anticipatory self-defense in *Law and Minimum World Public Order* to offer a different reading of Article 51 reflecting the customary limitations of necessity and proportionality on the right to self-defense²⁹⁸ and concluded:

²⁹² See *id.* at 206.

²⁹³ See Quincy Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546 (1963). For more on Professor Wright's position, see also Quincy Wright, *Non-Military Intervention*, in *THE RELEVANCE OF INTERNATIONAL LAW* 5, 13 (Karl Deutsch & Stanley Hoffman eds., 1971).

²⁹⁴ McDougal, *The Soviet-Cuban Quarantine*, *supra* note 42, at 603.

²⁹⁵ See Wright, *supra* note 293, at 560–61.

²⁹⁶ See McDougal, *The Soviet-Cuban Quarantine*, *supra* note 42, at 599.

²⁹⁷ *Id.* at 600. Leo Gross turns this argument against McDougal, claiming that McDougal himself could also rightfully be accused of word-juggling, as his comments could be read as follows: “Nothing . . . shall impair the inherent right of . . . self-defence, if, but not only if, an armed attack occurs . . .” Leo Gross, *Problems of International Adjudication and Compliance with International Law: Some Simple Solutions*, 59 AM. J. INT'L L. 48, 53 (1965).

²⁹⁸ See McDougal, *The Soviet-Cuban Quarantine*, *supra* note 42, at 598. As McDougal puts it:

The more important limitations imposed by the general community upon this customary right of self-defense have been . . . those of necessity and proportionality. The conditions of necessity . . . have never . . . been restricted to “actual armed attack”; imminence of attack of such high degree as to preclude effective resort by the intended victim to nonviolent modalities of response have always been regarded as sufficient justification, and it is now generally recognized that a determination of imminence requires an appraisal of an initiating state's coercive activities upon the target state's expectations about the cost of preserving its territorial integrity and political independence. Even the highly restrictive language of Secretary of State Webster in the *Caroline* case, specifying a “necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation,” did not require “actual armed attack,” and the understanding is now widespread that a test formulated in the previous century . . . is hardly relevant to contempo-

Even this impressionistic recall of some of the more salient features of the larger context of threat and response should suffice to suggest that a third-party observer, genuinely concerned to clarify the common interests of all peoples, could reasonably conclude that the action taken by the United States was in accord with traditional general community expectations about the requirements of self-defense. The flow of pertinent comment and decision since the incident would indeed seem to confirm that this has been the overwhelming conclusion of world public opinion.²⁹⁹

The “impressionistic” examination of the larger context of the necessity and proportionality of the imposition of quarantine took into account the fact that the countermeasure was aimed against the U.S.S.R. and not against Cuba, and that, far from being egocentric, it was endorsed by the Organization of American States (participants).³⁰⁰ While the Soviet objectives were expansionist, the United States was responsible for securing the elimination of nuclear weapons from Cuba.³⁰¹ The general geographic area was of strategic concern to the United States and other countries in the hemisphere (situation), as historically expressed through the Monroe Doctrine. Furthermore, expectations of a crisis in the world arena were high and the estimates for an effective response from the organized community of states were low.³⁰² The outcome of the Soviet’s act, almost within its reach, was a new, more direct military threat to the whole of the Americas, while the quarantine was a reversible action causing no irremediable destruction.³⁰³ It is true that none of these contextual factors are considered in comparison to the counterclaims of the adversary as a genuine contextual-oriented analysis would require and that McDougal’s drawing on geographically harmonious foreign affairs interests in light of, *inter alia*, the Monroe Doctrine is simply ahistorical and, further, that the magnificence of the actual quarantine vis-à-vis the perceived threat is trivialized simply as “reversible.” What is more illuminating, however, is two-fold.

rary controversies, involving high expectations of violence, between nuclear-armed protagonists.

Id.

²⁹⁹ *Id.* at 603.

³⁰⁰ *See id.* at 601–02.

³⁰¹ *See id.*

³⁰² *Id.*

³⁰³ *Id.* at 602–03.

First, McDougal's reliance on the language of Article 51 to justify the legality of the quarantine is highly curious.³⁰⁴ It is perhaps one of the reasons a reviewer once accused him of legalism with a "conservative turn of mind," a characterization with which it is hard to quarrel.³⁰⁵ As far as the interpretation and application of Article 51 to the Cuban crisis are concerned, however, McDougal makes no effort to employ the roster of contextual indices, drawn up impressionistically or not, to determine the meaning of Article 51. Beyond word juggling or an otherwise unwarranted assumption about the embodiment of anticipatory self-defense in Article 51,³⁰⁶ McDougal makes no use of a contextual approach to establish that the Charter did not in fact supersede the right to preemptive self-defense allegedly derived from custom. The contextual analysis is merely limited to the question of facts—whether the initial event was sufficient to give rise to a justified right to anticipatory self-defense, given the participants, objectives and so on—and in no way extends to determine the meaning of Article 51.³⁰⁷ Notwithstanding the semantics and application of Article 51, McDougal does not even apply the conceptual framework of context analysis to empirically verify the customary status of anticipatory self-defense. In fact, only two years before the Cuban quarantine, McDougal wrote of a need

³⁰⁴ Ironically enough, not even the U.S. government made any attempt to use Article 51 to justify the Cuban quarantine. The State Department's then-Deputy Legal Adviser, Leonard Meeker, later summarized the Government's position as follows:

[I]t may be noted that the United States, in adopting the defensive quarantine of Cuba, did not seek to justify it as a measure required to meet an "armed attack" within the meaning of Article 51. Nor did the United States seek to sustain its action on the grounds that Article 51 is not an all-inclusive statement of the right of self-defense and that the quarantine was a measure of self-defense open to any country to take individually for its own defense in a case other than an "armed attack." Indeed, as shown by President Kennedy's television address of October 22[, 1962,] and by other statements of the Government, reliance was not placed on either contention, and the United States took no position on either of these issues.

Leonard C. Meeker, *Defensive Quarantine and the Law*, 57 AM. J. INT'L L. 515, 523 (1963).

³⁰⁵ See D.P. O'Connell, Book Review, 4 SYDNEY L. REV. 318, 318 (1964) (reviewing MYRES S. MCDUGAL & F.P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961) and MYRES S. MCDUGAL, *STUDIES IN WORLD PUBLIC ORDER* (1960)). Without elaborating further, O'Connell writes: "McDougal, despite all his social science language, and his dedication to relativism, is in fact excessively legalistic and of a fundamentally conservative turn of mind." *Id.*

³⁰⁶ See McDougal, *The Soviet-Cuban Quarantine*, *supra* note 42, at 600.

³⁰⁷ See *id.* at 602–03 (applying a contextual framework to the factual scenario of the Cuban crisis).

for “redefinition” or a less restrictive view of anticipatory self-defense,³⁰⁸ and it is not clear how mysteriously such a broad view would gain widespread recognition in the short term.³⁰⁹ It is worth noting that one may object to the distinction between questions of facts and law as contradicting the basic principles of viewing law as a process of authoritative and controlling decisions—perhaps disguised positivism. Such an objection is without force, however, because it is precisely the absence of factual grounds in interpreting the law that renders McDougal’s project of contextual-orientation meaningless for legal interpretation.³¹⁰

³⁰⁸ MCDUGAL & FELICIANO, *THE INTERNATIONAL LAW OF WAR*, *supra* note 271, at 67. According to the authors:

The traditional requirements imposed upon resort to self-defense—a realistic expectation of instant, imminent military attack . . . —may . . . require some redefinition to take into account the potentialities of the newer technology of violence. From this perspective, the emphasis in the United Nations Charter upon “armed attack” as the precipitating event for the legitimate recourse to self-defense may appear most unrealistic.

Id.

³⁰⁹ In fact, in her review of the U.N. debates about self-defense from its founding to 1963, Rosalyn Higgins concludes that:

In virtually all those instances where a right of anticipated self-defense has been specifically in issue . . . the United Nations has preferred not to give rein to the doctrine. This does not, however, warrant the assumption that Article 51 has restricted this right as laid down in *The Caroline*; there has merely been a reluctance on the part of the United Nations to encourage it, for fear it may be too fraught with danger for the basic policy of peace and stability.

ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 203 (1963).

³¹⁰ It is helpful here to compare, in some length, Richard Falk’s inquiry into the legality of the 1968 Israeli raid on the Beirut airport, during which Israeli soldiers destroyed all commercial aircraft belonging to Arab Airlines in retaliation for Arab commando actions against El Al Airline. *See generally* Richard Falk, *The Beirut Raid and the International Law of Retaliation*, 63 AM. J. INT’L L. 415 (1969). On the doctrinal level (the Charter and subsequent U.N. re-affirmations thereof), Falk asserts, “Israel is not entitled to exercise a right of [forcible] reprisal in modern international law.” *Id.* at 430. While the law “seems clear” on this point, he continues, “[s]uch clarity . . . serves mainly to discredit doctrinal approaches to legal analysis. International society is not sufficiently organized to eliminate forcible self-help in either its sanctioning or deterrent roles.” *Id.* This fact regarding the expectations of the “international society” ought to be considered when judging the legality of the Israeli actions. Falk thus draws on the precedent of February 1969, another Israeli attack against Arab commando bases in Syria:

Evidently, for instance, the attacks on the Syrian bases resulted in fairly large Arab casualties and yet failed to provoke any sense of international opposition to the Israeli action. An attack of this kind on bases seems well assimilated . . . into the structure of international expectations about tolerable levels of Arab-Israeli violence, given current levels and forms of conflict and hostility.

Second, though the value category occupies an independent framework alongside other categories in the McDougalian conceptual scheme for contextualism, it is hardly an overstatement to note that it in fact colonizes the implications of all the other categories in its normative grasp.³¹¹ The clearly articulated constituent elements of context, the identification of participants, the assessment of their objectives, perspectives, situations, base values, strategies employed, and outcome and effects, all take place on a bedrock of binary opposition between the universally sharable values of human dignity and the totalitarianizing values of human indignity. The identification of a participant with either of the two dominant visions of world public order, and the characterization of its objectives and perspectives and the effects of the claims and decisions simply leaves no room for a holistic understanding of context. No sooner is a participant identified on either side of the

Id. at 420. So given public expectations about a tolerable level of violence in the Arab-Israeli relationship, these expectations give rise to a valid second level of legal inquiry. As Falk puts it:

As a technical matter, Charter law is properly accorded priority over inconsistent rules of customary international law. . . . However, the inability of the United Nations to impose its views of legal limitation upon states leads to a kind of second-order level of legal inquiry that is guided by the more permissive attitudes toward the use of force to uphold national interests that is contained in customary international law. . . . Even second-order [level of] legal inquiry may be ill-adapted to the kind of retaliatory claim being made by Israel . . . and a third-order legal inquiry involving the specification of considerations bearing on the relative legal status of a particular retaliatory claim [may be necessary].

Id. at 430–31 n.39. On the third level of inquiry, Falk offers a set of indicators to assess the legality of Israeli claims, indicators (which are mainly specifications and adaptations of customary norms) that unlike customary norms, would “overcome[e] the dichotomy between war and peace, and would be more sensitive to the continuities of terroristic provocation and retaliatory response such as are evident in the Middle East.” *See id.* at 435. Based on these indicators, Falk notes the Israeli Beirut raid as unreasonable and thus illegal. *Id.* at 439–40.

The difference between McDougal’s and Falk’s applications of “general public expectations” as a contextual factor in assessing the legal status of an incident of coercion should be obvious. While Falk’s process-oriented approach has no difficulty severing the link between public expectations and the law of the Charter to suggest different orders of inquiry, McDougal’s invocation of the text of the Charter draws on facts on the ground not to determine the meaning of Article 51 but to decide the urgency of preemption and then provide a Charter-based rationalization. Absent from the former is a clear articulation of the legal basis for lower levels of inquiry, as well as any regard for contextual interpretation of the existing law. The latter, however, is in sheer disregard of contextualism at the core of a policy-oriented international law. Neither one takes the elements of context affecting the interpretation of the law of Charter seriously.

³¹¹ *See* McDougal, *International Law, Power, and Policy*, *supra* note 157, at 169.

value pole than the idea of holistic reasoning in context is nipped in the bud. None of this is to suggest that, in a sly rationalization of desideratum, McDougal manipulates the conceptual apparatus of context to reach his favored policy consequences.³¹² Rather, the claim is that, taken to its logical conclusion, the reign of value judgment over all other variables of context and the fixity of value demarcation in the policy-oriented approach neither can nor does leave any hope for a genuinely contextual-oriented jurisprudence.

The rigidification of context is by no means limited to the law of the use of force. While rejecting international law jurisprudence on the termination of treaties for either overemphasizing consent or unrealistically terminating agreements unilaterally, McDougal suggests an organization of “systemic inquiry into the prescription and practice by which the decision-makers of nation-states terminate . . . agreements” that “distinguishes between termination which is based on mutual consent and termination” based on the grounds of changed conditions.³¹³ An inquiry that is both cognizant of the past practice of the decision-makers of nation-states and amenable to securing policy preferences should seek an “appropriate balance between the honoring of the *reasonable expectations* of the parties to agreements . . . and the permitting or encouraging of a continual, progressive reformulation of policies to keep them in accord with the changing perspective and conditions of the parties.”³¹⁴ On its face, the recommended balancing work between the “reasonable expectations” of the parties and the dynamic interrelations of policy preferences could be best achieved in a comprehensive contextual framework of inquiry.³¹⁵ But understanding that “reasonable expectations” in international agreements are limited to those that are recognized as such by the interpreters in light of their compatibility with, and potential for, the advancement of values of human dignity,³¹⁶

³¹² This is the critique Louis Henkin makes specifically regarding McDougal’s invocation of Article 51 in the case of Cuban quarantine. See Louis Henkin, *Remarks*, 57 AM. INT’L L. PROC. 147, 165–69 (1963). For a similar critique, see also Dean Acheson, *The Arrogance of International Lawyers*, 2 INT’L L. 591, 593–99 (1968) (discussing McDougal & Reisman, *Rhodesia and the United Nations*, *supra* note 42). Chimni goes so far as to suggest that “McDougal’s jurisprudence appears to give the impression of working itself backwards from this point, putting together elements which in combination can provide some form of intellectual rationalisation and justification for every action that the United States undertakes.” CHIMNI, *supra* note 151, at 140.

³¹³ McDougal, *International Law, Power, and Policy*, *supra* note 157, at 211–12.

³¹⁴ *Id.* at 212 (emphasis added).

³¹⁵ See *id.* at 211–12.

³¹⁶ See MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*, *supra* note 274, at 44.

the application of *rebus sic stantibus* cannot rest on a myriad of contextual variables independent of the determinative consequences of the value bipolarity in the New Haven Jurisprudence.

Likewise, against the confusion surrounding the admission of newly-emerged, territorially-organized political bodies to the arenas of formal authority of existing nation-states, McDougal recommends a distinction between the facts to which decision-makers respond and the ensuing consequences of their response in order to rescue "recognition" from all the "normative-ambiguity" that surrounds it.³¹⁷ A comprehensive inquiry conducive to the clarification of the concept should first examine "what access official decision-makers . . . of newly emerged bodies politic have to established arenas of formal authority prior to ceremony of recognition and what new access to such arenas and other advantages they obtain after such ceremony."³¹⁸ An inquiry should also be made into "what policies in terms of legitimacy, constitutionalism, willingness to perform international obligations, and so on, the decision-makers in established nation-states have in fact sought and achieved in granting or withholding recognition in respect to newly emerged bodies politic."³¹⁹ Instead of focusing on the ceremony of recognition as the "outmoded survival of earlier power processes," it is rational to devise new collective modes of recognition based on "criteria compatible with an international law of human dignity."³²⁰ In the process of establishing a collective mode of recognition, so the argument goes, the history of granting or withdrawing recognition and their resulting consequences, as well as the effects resulting from each new act of recognition, must be evaluated in terms of their correspondence with the preferred values of human dignity.³²¹

At times, it may seem that McDougal favors the process of contextual interpretation not to respond to any semantic limitations of legal rules, but to ensure that the outcome of the process of legal decision-making is taken seriously.³²² What may seem to be a concern for fostering compliance, however, is no more than a reductive employment of contextual flexibilities and confinement of the great potentials of con-

³¹⁷ See McDougal, *International Law, Power, and Policy*, *supra* note 157, at 197.

³¹⁸ *Id.*

³¹⁹ *Id.* at 198.

³²⁰ *Id.*

³²¹ *Id.*

³²² See, e.g., McDougal, *The Soviet-Cuban Quarantine*, *supra* note 42, at 601 (juxtaposing concerns about acceptability of a strict reading of self-defense rights with concerns about minimizing coercion and violence).

text to the determinative demands of value judgment. McDougal's view on the width of the continental shelf is a fine case in point. The Convention on the Continental Shelf defined the shelf as the "seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres . . . or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas,"³²³ McDougal criticized the precise "200 metre" standard and argued for the vaguer standard of "exploitability:"

It is true that the outer limit placed upon the exploitability criterion is most imprecisely indicated by restricting application of the standard to "adjacent" submarine areas; we do not share the curious view that the additional provision of the 200-meter depth . . . remedies this imprecision The degree of vagueness in the exploitability criterion, deplored by all commentators, seems nevertheless much less likely to produce consequential tension than would a criterion which, while certain and precise, would also limit coastal authority to only part of an exploitable area.³²⁴

Contrary to the objections against McDougal for favoring open-ended standards, all of which focus on the threat that a McDougalian framework would pose to the rule of law,³²⁵ it must be noted that the "exploitability" criterion could indeed reduce the possibility of "consequential tension" by considering the changing exploitation capabilities of states. Such a standard is characteristically future-oriented and not captured in the past. This is in line with the objectives of a policy-oriented international law that views experience of the past as a guide to wisdom about the future and yet expects the decision-makers to project a distribution of values, in view of community goals, into the future.³²⁶ Yet as characteristic as the future-orientation of the exploitabil-

³²³ MCDUGAL & BURKE, *THE PUBLIC ORDER OF THE OCEANS*, *supra* note 95, at 685 n.376.

³²⁴ *Id.* at 687.

³²⁵ See, e.g., Richard A. Falk, *The Relevance of Political Context to the Nature and Functioning of International Law: An Intermediate View*, in *THE RELEVANCE OF INTERNATIONAL LAW*, *supra* note 293, at 133, 140; Brownlie, *supra* note 105, at 1055; Wolfgang G. Friedmann, *Law and Minimum World Public Order by Myres S. McDougal and Florentino P. Feliciano and Public World Order of the Oceans by Myres S. McDougal and W. T. Burke*, 64 COLUM. L. REV. 606, 614-15 (1964) (book review); Quincy Wright, *Studies in World Public Order by Myres S. McDougal and Associates*, 39 U. DET. L.J. 145, 148 (1961).

³²⁶ See McDougal, *International Law, Power, and Policy*, *supra* note 157, at 183-84.

ity standard is, it is over-determinative in application. A McDougalian decision-maker entrusted to project a distribution of values into the future consonant with community goals when interpreting and applying the exploitability standard in a particular case must take into account the participants, their objectives, perspectives, and situations, and the effects and outcomes of the distribution in question.³²⁷ With the bipolarity of value systems and the often *ex ante* assignment of participants and their objectives to either side of the pole, it is no longer a matter of contextual interpretation to predict how the exploitability standard would be used as a guide to determine cases in practice.

On other occasions, however, contextual interpretation addresses what McDougal identifies as normative-ambiguity surrounding the application of rules.³²⁸ The application of Article 27(3) of the Charter to the Security Council Resolutions of June 1950 (Resolutions) condemning the Korean attack and authorizing the members of the United Nations (U.N.) to furnish necessary assistance to the Republic of South Korea to repel the attack and restore international peace is an exemplary case in which McDougal criticized those who purported to find a “literal” “or “objective” meaning in Article 27(3).³²⁹ In a heated style, McDougal contends that commentators who find that the Soviet absence and lack of concurring vote renders the Resolutions invalid understand Article 27(3)’s provision that decisions of the Security Council on all matters other than procedural “shall be made by an affirmative vote of seven members including the concurring votes of the permanent members” to mean “the concurring votes of *all five* permanent members, who must be present and voting.”³³⁰ Such commentators are guilty of the “fallacy of univocalism” by thinking that Article 27(3) has unambiguous meaning in no need of interpretation, and of the “fallacy of detailism” in trying to project “a minutely detailed intent into the future” where subsequent interpreters will give priority to that intent over more general objectives.³³¹

In a characteristically inflated representation of the opponent, McDougal is here responding to an argument by Leo Gross, who, ra-

³²⁷ See *id.* at 182–83.

³²⁸ See McDougal, *International Law, Power, and Policy*, *supra* note 157, at 149–57 (discussing the limitations of “unambiguous meanings” in the context of North Korea’s attack on South Korea in 1950).

³²⁹ See Myres S. McDougal & Richard N. Gardner, *The Veto and the Charter: An Interpretation for Survival*, 60 *YALE L.J.* 258, 266–67 (1951) [hereinafter McDougal & Gardner, *The Veto and the Charter*].

³³⁰ See McDougal, *International Law, Power, and Policy*, *supra* note 157, at 149.

³³¹ *Id.* at 151–52.

ther than invoke a literal meaning for Article 27(3), in fact seeks to offer an interpretation thereof that is compatible with the policies and purposes of the drafters as well as the history of the subsequent practice of the U.N.³³² By making a distinction between abstention and absence and giving a privileged position to the principle of unanimity—which by virtue of established practice, and in fact contrary to a strict reading of the Charter, has been understood not to be tarnished by abstention—Gross is after a purposive interpretation of Article 27(3).³³³ He seems to give equal weight to the original intent³³⁴ and the evolution of the relevant practice of the U.N. members to conclude that the interpretation of Article 27(3), “like other such questions which have arisen in the past, . . . is believed to be susceptible of objective and judicial determination.”³³⁵ This, of course, is different from what McDougal considers to be the defect in the argument against the legality of the Resolutions, namely, the underlying “assumption that the words of Article 27(3) have an ‘unambiguous’ meaning which makes their interpretation unnecessary.”³³⁶ McDougal’s charge derives from his skepticism about “ordinary meaning,” a skepticism about whose implications he nevertheless remains inconsistent.³³⁷ It is fair to say that McDougal’s

³³² See Leo Gross, *Voting in the Security Council: Abstention from Voting and Absence from Meetings*, 60 *YALE L.J.* 209, 209–11 (1951).

³³³ See *id.* at 256. Gross argues:

This principle [of unanimity] is satisfied, of course, by an affirmative and concurring vote—that is by express consent to the proposed Security Council action. It is also satisfied by abstention—that is by tacit consent to the Council action. It is not satisfied when there is neither express nor tacit consent to the proposed Council action. . . . The same cannot be said of absences.

Id.

³³⁴ *Id.* (concluding that interpretations of Article 27(3) that equate absence with abstention find very little support in the Article’s text or history).

³³⁵ *Id.* at 257.

³³⁶ McDougal, *International Law, Power, and Policy*, *supra* note 157, at 151.

³³⁷ McDougal seems to accept the implications of “ordinary meaning” when he says:

Unless persuasive evidence is established to the contrary, assume that the terms of an agreement are intended to be understood as they are generally understood by the largest audience contemporary to the agreement to which both parties belong. The probabilities are that the more people who share a meaning, the more likely the particular parties are to have had that meaning.

MCDUGAL, ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*, *supra* note 274, at 59. Elsewhere, he notes:

Unless there are excellent grounds for the view that some idiosyncratic meaning was shared by the agreement-makers, the community decision-maker is justified in adopting, preliminarily, the ordinary usages that were current in

search for the purposes of the provision under controversy looks into the present and future of the U.N. and its survival, whereas Gross hankers after such purposes as established at the time of the drafting and evolution of the Charter.³³⁸ The divide is less a difference in their regard for context than it is a difference considering context both as it is already shaped and as it ought to be shaped by appropriate policy choices.

Neither this particular controversy nor the aptitude of McDougal's depiction of his opponent as oblivious to context need detain us any longer. Nor are we concerned with a consideration of McDougal's rejection of "ordinary language,"³³⁹ beyond noting that in this case, as in the Cuban quarantine, his censure of misreading the text is at best curious. One should ask, what if Article 51 of the Charter did in fact read "if, and only if, an armed attack occurs," or Article 27(3) in fact read, "the concurring votes of all five permanent members, who must be present and voting?" If semantics cannot afford to furnish any degree of closure under any circumstances, why does McDougal still take the trouble of word juggling at all? Whatever ambivalence there may be about dispensing with the text altogether, the crucial point is that the considerations of context are not supposed to bear any relevance to determining the semantics of the text.³⁴⁰ What McDougal hopes to make persuasive is:

[T]hat the language of Article 27(3) can dictate no particular interpretation and that any decision about the constitutionality of the Korean resolutions, whether for or against, must depend upon policy choices—and policy choices that may be made with varying degrees of consciousness and, hence, also with varying degrees of *rational consideration of relevant factors*.³⁴¹

the appropriate audiences. . . . When private parties enter into arrangements that they expect to make effective in case of dispute by involving the decision-makers of the community, it is reasonable to ask that they employ words with "public" rather than esoteric significations.

Id. at 69.

³³⁸ Compare McDougal, *International Law, Power, and Policy*, *supra* note 157, at 152 (concluding that "the words of an international agreement cannot be taken as timeless absolutes" but must be contextualized), with Gross, *supra* note 332, at 251–53 (examining the discussions surrounding Article 27(3) at the San Francisco Conference to draft the U.N. Charter).

³³⁹ For an interesting critique of McDougal's rejection of "ordinary meaning" and his behavioristic theory of semantics that views reality as non-verbal, see CHIMNI, *supra* note 151, at 83–99.

³⁴⁰ McDougal, *International Law, Power, and Policy*, *supra* note 157, at 155.

³⁴¹ *Id.* (emphasis added).

“*Rational consideration of relevant factors*” could indeed guide the interpreter to vistas of the future where relevance of the law survives the passage of time, but this could happen only if it is not pigeonholed in an unjustified bipolar evaluative framework. To McDougal, the legality of the Resolutions is a matter of “interpretation for survival,”³⁴² but at the time, one could just as well have put on the table other possibilities for consideration—whether unanimity would not be more germane to the survival of the U.N., for instance. The threshold of inquiry, however, was cut too short to give way to such questions, as the divide between the two poles of values painted a natural face to much of what was well in need of justification.

Overall, McDougal expects the contextualist framework to address three kinds of indeterminacy.³⁴³ The first relates to his rejection of “ordinary meaning”—rules come in words, and words possess no “ordinary meaning.”³⁴⁴ The second class, which is the most interesting of all but is not discussed here, derives from complementarity of norms or concepts—norms come in pairs of opposites.³⁴⁵ Finally, regardless of these two cases, a rule must be tested each time afresh for conformity to the expectations of parties through empirical methods of social science (such as content analysis, mass interviews, and participant observation).³⁴⁶ McDougal draws no distinction between different causes of indeterminacy when recommending a policy-oriented, contextualist framework.³⁴⁷ It must be assumed, therefore, that a policy-oriented scholar or decision-maker does not employ contextual factors to address indeterminacy understood as a matter of degree, but rather taken as an inclusively pervasive character of meaning. Nor is she to apply any sorts of discrimination in selecting the relevant contextual factors or their application based on the specific source of indeterminacy in a

³⁴² McDougal & Gardner, *The Veto and the Charter*, *supra* note 329, at 258.

³⁴³ *Id.* at 263–69.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 266–68.

³⁴⁶ See MCDUGAL ET AL., *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER*, *supra* note 274, at xviii. The authors note:

The approach which seeks genuine shared expectations does not neglect the words of a purportedly final text, if any exists. It does, however, regard any initial version of their relation to shared expectations as provisional, and requires that the interpreter engage in a course of sustained testing and revision of preliminary inferences about the pertinent subjectivities. And of course this calls for scrutiny of the whole context of communication.

Id.

³⁴⁷ *See id.*

particular case. What is certain is that in none of the cases, regardless of the specific source of indeterminacy, are contextual indices used by McDougal to help interpret the text (which may after all be considered as the original point in the process of interpretation).³⁴⁸ Instead, they are used to (re)construct a factual ground which will in turn serve to justify the desired, *ad hoc* application of a rule or standard.

To take stock, I am pursuing a two-fold argument with no parity of emphasis. The first, and less cardinal one to the overall thesis about the crippled contextualist claims of the NHS, is an argument about a complete disjunction between pragmatics and semantics in McDougal's scheme of contextual interpretation. The second, and central argument to the critique of the NHS's contextualism, seeks to expose the (over-)determinative role of the value category in McDougalian contextualism, and thereby, to reveal the futility of its sophisticated conceptual framework.

On the relationship between semantics and pragmatics in the contextual framework designed by policy-oriented jurisprudence, despite his self-avowed skepticism about the possibility of inferring any determinate meaning from the text, a great deal of ambivalence could be detected in McDougal's treatment of language of the law.³⁴⁹ Even in cases where he finds that the text is a good starting point, McDougal does not find it necessary, in theory or in practice, to employ contextual factors to determine a meaning for the text with any minimal consideration of the text itself.³⁵⁰ Instead, a series of contextual indices is used to construct a factual situation which is then considered to demand a particular (and consistently predictable) reading of the text.³⁵¹ Contextual factors are used to construct, rather than establish, a factual situation, as the value category is largely determinative of the overall

³⁴⁸ See *id.* at 97. The authors point out:

Although there is no reason to deny the usefulness of the common or public meanings of words as starting points in the process of interpretation, whenever a principle emphasizing such meanings threatens to become transformed into a final, exclusive procedure, it must be rejected. No acceptable justification can be given for precluding an interpreter, whose goal is to determine the shared expectations of the authors of a document, from proceeding to examine all of the relevant features of the context prior to final decision.

Id.

³⁴⁹ See CHIMNI, *supra* note 151, at 94–95.

³⁵⁰ Cf. McDougal, *The Soviet-Cuban Quarantine*, *supra* note 42, at 599–603 (analyzing Article 51 of U.N. Charter in light of customary self-defense rights and the factors of a single, contextualized situation).

³⁵¹ See, e.g., *id.* at 601–03.

structure of the facts as presented.³⁵² As soon as the events and claims under investigation are assessed against the bipolar value category, the factual situation is by and large constructed around the result of that assessment, leaving little room for any further significant interpretive labor.³⁵³

Pragmatics, however, need not be severed from semantics in a context-sensitive interpretive practice. Outside a foundationalist zone where one does not expect to find the comfort of semantic foundations to make meaning fully determinate, the work of interpretation makes use of pragmatics to find contingent, contextually determined semantics from within, rather than without, language.

On the (over-)determinative role of the values of human dignity in McDougal's design of contextual-orientation, a bipolar evaluative category permeates the whole enterprise of contextual analysis with consequences fatal to a project of contextual-orientation. The reasoning of a decision-maker or scholar in any number of particular cases follows a consistent pattern: first constructing the facts based on contextual categories, dominant among which is the value category, and then considering the optimum decision or recommendation as one that would best maintain and advance values of human dignity. In this process, before the investigative analysis of all the potentially relevant contextual factors begins, it is foreclosed by a predictable assignment of those elements to either side of the evaluative divide between human dignity and indignity. Consequently, the entire detailed design of contextual categories is certain to lead to inordinately predictable results.

This over-determination of legal analysis is more striking if one recalls the unjustified status of the values of human dignity and their association with Western liberal democracies against totalitarianism of the East. The preservation of the interests of the United States and its Western allies in the New Haven Jurisprudence does not presage the vanishing predictive power of law in the way it has occupied much of the critiques of Yale's policy-oriented jurisprudence.³⁵⁴ It is not a threat to the

³⁵² See, e.g., *id.* (contrasting the "totalitarian character" of the Soviet Union with the "democratic internal structures" of the United States to frame the discussion of the quarantine).

³⁵³ See, e.g., *id.* at 603 ("Even this impressionistic recall . . . of the larger context of threat and response should suffice to suggest . . . that the action taken by the United States was in accord with . . . the requirements of self-defense.")

³⁵⁴ See, e.g., Anderson, *supra* note 45, at 382. Anderson boldly objects:

The words of the law become mere wisps of sight or sound. Law is policy. Policy is human dignity. Human dignity is fostered in the long run by the success of American foreign policy. Therefore, law is the handmaiden of the national interest of the United States. . . . Law becomes merely an increment to power.

stability or predictability of international law in a world of competing interests. On the contrary, it makes policy-oriented decision-making as predictable as, if not more than, semantic foundationalism. The problem thus lies in the over-determinacy of policy analysis, rather than in the oft-deplored indeterminacy of law in the policy-oriented jurisprudence.

Against the claim that the over-determinacy of policy analysis is the logical conclusion of the unjustified epistemic status of values of human dignity and the centrality of those values in McDougal's contextual framework of inquiry, one could anticipate two valid questions. First, how could providing justification for normative values of human dignity precisely remedy the over-determinative implications of "rational considerations of relevant factors" in a policy-oriented jurisprudence of international law? Second, what modes of inquiry are available for a pragmatic, problem-oriented jurisprudence of international law to seek justification for normative values in a non-foundational yet cognitive state?

Epistemic justification of values of human dignity in a manner compatible with the overall contextualist framework of a policy-oriented international law would impact both the inventory of values represented as indices of human dignity and the modality in which various participants in the world arena are seen to respect and adhere to, or violate and deny, such values. Grounded in context, relevant values may vary according to the context in use. The list, for instance, may exceed an arbitrary set of the eight preferences of the NHS. It may include development as a value when economic and social rights are concerned, or the equality of access, rather than security, as a value when hydrogen bomb testing was questioned;³⁵⁵ or, it may include the equilibrium of military means on a large scale when the relationship between the legality of the use or threat of nuclear weapons and military necessity is in question. It may even include reproductive rights, contrary to McDougal's (or rather McNamara's) unfounded Neo-Malthusian thesis about the growth of population as the greatest threat to human rights.³⁵⁶ In

Id.

³⁵⁵ See generally McDougal & Schlei, *The Hydrogen Bomb Tests*, *supra* note 37, at 686. McDougal justified the legality of the hydrogen bomb test in the high seas with an argument for security given the threat posed by totalitarianism.

³⁵⁶ See MYRES S. McDOUGAL, HAROLD D. LASSWELL & LUNG-CHU CHEN, HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 40 (1980) [hereinafter McDOUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER]. The authors quote McNamara:

the same way that the values relevant to policy-making in a particular context may vary from those relevant in another context, a contextually-grounded normative framework of inquiry cannot capture the relationship between participants in the world arena and values of human dignity in a binary opposition without proper empirical investigation—an investigation which would perhaps establish fidelity to such values as a matter of degree.³⁵⁷ Contrary to McDougal's contextual framework of inquiry where a set of predetermined postulated values in practice defines the totality of the context in question, values grounded in context work holistically in relation to other contextual categories to render a meaningful configurative policy analysis possible.³⁵⁸

Having evaluated McDougal's promises of contextualism, I now turn to the second pragmatist claim of the NHS—problem-solving orientation—to see how it fares in relation to the normative commitments of Lasswell and McDougal.

IV. THE NEW HAVEN JURISPRUDENCE AND PROBLEM-ORIENTED INTERNATIONAL LAW

The previous Part attempted to link the central position of human dignity in policy science to its contextualist framework of inquiry. I suggested that the unjustified status of values at the center of the policy-oriented jurisprudence fatally blunts the contextualist edge of inquiry so much so that the considerations of those values over-determine the results of decision-making in a predictable manner unrivaled by semantic foundationalism. In this part, I address the question of the impact of the normative goals of the New Haven Jurisprudence on its pragmatist, problem-oriented method of inquiry. I will consider the relationship between goal or value clarification with other intellectual tasks recommended to the policy science analyst to demonstrate how the NHS's treatment of human dignity adversely affects the performance of those intellectual tasks.

The end desired by the Church and by all men of good will is the enhancement of human dignity. That is what development is all about. Human dignity is threatened by the population explosion—more severely, more completely, more certainly threatened than it has been by any catastrophe the world has yet endured.

ROBERT McNAMARA, ONE HUNDRED COUNTRIES, TWO BILLION PEOPLE: THE DIMENSIONS OF DEVELOPMENT 46 (1973), *quoted in* McDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra*.

³⁵⁷ See Young, *supra* note 43, at 69.

³⁵⁸ See *id.*

While the futility of contextual-orientation in policy science, as was argued, is the logical conclusion of the over-determinative role of the epistemically unjustified value category, it is in fact the performance rather than the nature of the recommended intellectual tasks, as evidenced by McDougal's work, which contradicts pragmatic methods required for a policy-oriented jurisprudence. If McDougal had properly employed any of his own recommended intellectual tasks to corroborate the factual or normative assumptions underlying the New Haven Jurisprudence, each of the tasks could potentially have aided a problem-solving approach to the world social process. Once the grip of the postulated value goals on the operation of the NHS's recommended intellectual tasks is exposed, the urge for a pragmatic method of inquiry into the justification of normative values presents itself as an alternative difficult to escape.

To avoid the confusion caused by the complementarity and ambiguity inherent in conventional legal rules, a policy-conscious scholar or decision-maker must take up a series of intellectual tasks to conduct a configurative inquiry into any problem under consideration.³⁵⁹ In a policy-oriented inquiry, the performance of these tasks need not follow a rigid order isolating the tasks from one another.³⁶⁰ When studying specific questions in context, the policy analyst must employ a configurative approach to synthesize the results compelled by the performance because each operation draws upon a particular set of skills.³⁶¹ The five intellectual tasks developed by Lasswell and adopted by McDougal define the method of inquiry in a directional fashion by postulating a normative vision for the social world, scientifically assessing the demands and conditions for its realization, investigating the historical trends relevant to its formation, and projecting a future in which either the envisioned worldview is realized, or barring that, a viable alternative vision takes over.³⁶² A vertical thread, however, seems in practice to run through these various modes of inquiry, shaping up the scientific, historical, and developmental thinking according to the demands of goal postulates. Liberal optimism, if not determinism, infused into the policy-oriented intellectual tasks, thus, leaves but a chimera of scientific and historical modes of investigation.

³⁵⁹ See 1 MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7, at 196.

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² See LASSWELL, A PRE-VIEW OF POLICY SCIENCES, *supra* note 158, at 39.

A. Goal Clarification

At a time when fundamentalism and localism present a real obstacle to intercultural value clarification, the scholar and decision-maker of international law ought to act differently from elites of smaller communities who have historically concealed their normative goals in the obscurity of natural law or “mysticism of historicism or scientism.”³⁶³ The policy-oriented jurisprudence, conscious of the fact that the artifact of law is used instrumentally for social change or stability, requires that the driving goals for the pursued social consequences be clarified in unequivocal terms.³⁶⁴ It requires that the observer or decision-maker use a secular technique to clarify the values they envision to be actualized in an ideal social structure in the future.³⁶⁵ Although goal clarification hardly dispenses with the wisdom of the past altogether, because veneration of the past could forestall a vision of change, the policy-oriented approach rules out “obsessive retrospectivity” in favor of a variety of methods such as disciplined imagination” and even “free fantasy techniques.”³⁶⁶ Whatever technique is in use, the overall goals must be clarified from a universal, as opposed to parochial, observational standpoint and in an empirical, rather than trans-empirical, fashion.³⁶⁷ When “instant Armageddon” is no longer a mere fancy, a policy-oriented approach to international law must adopt the goal of minimum order in order to minimize unauthorized coercion, even though minimum order is always pursued with a view of giving the best approximation to other, more ambitious, social goals.³⁶⁸ The goals of “optimum order” are the overriding goals of human dignity values, the shared desiderata in the global community.³⁶⁹

Minimum order is attainable when the overarching values of the worth and dignity of man are realized.³⁷⁰ How precisely the abundance of values of dignity are widely shared in a community reduces the happenstance of conflicts is what policy science takes to be self-evident. The presumed, rather than established, link between peace and security on the one hand, and the realization of the dignity of man on the other, is

³⁶³ 1 MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7, at 197.

³⁶⁴ *See id.* at 197–98.

³⁶⁵ *Id.* at 197.

³⁶⁶ *Id.*

³⁶⁷ *Id.* at 198.

³⁶⁸ *See id.*

³⁶⁹ 1 MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7, at 198.

³⁷⁰ *See id.*

nonetheless the outer layer of a deeper American creed—a pragmatic, liberal faith in necessary progress. It is this faith, rather than disguised natural law residua or merely some ad hoc arbitrary imposition of discretion, that ultimately explains the unreflective status of values in the New Haven Jurisprudence.

Not all readers of McDougal who are critical of the status of values of human dignity at the center of his jurisprudence, and certainly not McDougal himself, would agree. McDougal insists that the enlightened intellectual or decision-maker is one who consciously defines her observational standpoint and accordingly clarifies or postulates goal values not based on “faith” or “logical (syntactical) systems [which] are ambiguous in empirical reference unless they are explicitly related to observation,” but rather by empirical verification.³⁷¹ The epistemic implications of the inquirer’s standpoint will be most manifest and considered in scientific thinking. McDougal strives to maintain a comprehensive naturalism of discourse by an overbearing emphasis on the importance of eschewing logical or trans-empirical methods and adopting empiricism to establish value postulates.³⁷² The NHS, however, fails to offer any considerable exemplar of an empirical inquiry into its goal postulates.

To avoid an absolute or a priori system of value-variables, McDougal vehemently insists on an ever-increasing, common trend of rising demands for certain values worldwide, manifested in the national constitutions as well as the Charter and the Universal Declaration of Human Rights.³⁷³ Given that these demands are made in “different levels of abstraction and with little systematic ordering,” the intellectual task of goal clarification must use the highest level of systematization (eight value categories) which is comprehensive and applicable to any particular context by using appropriate “operational indices.”³⁷⁴ Yet the high level of systematization of the eight categories has not been supplemented with additional values throughout McDougal’s work such that

³⁷¹ See 2 *id.* at 759–63.

³⁷² See 1 *id.* at 315.

³⁷³ See McDougal, *International Law, Power, and Policy*, *supra* note 157, at 198; Myres S. McDougal, *Law as a Process of Decision: A Policy Oriented Approach to Legal Study*, 1 NAT. L.F. 72, 77 (1956); Myres S. McDougal & Gertrude C.K. Leighton, *The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action*, 59 YALE L.J. 60, 61 (1949) (“It is for values such as these [eight values] that men have always framed constitutions, established governments, and sought that delicate balancing of power and formulation of fundamental principle necessary to preserve human rights against all possible aggressors, governmental and other.”).

³⁷⁴ McDougal, *International Law, Power, and Policy*, *supra* note 157, at 189.

the list would no longer be exhaustive,³⁷⁵ in the same way that operational indices have done little more than apply the eight staple value categories to a particular discourse. So despite an empirical façade,³⁷⁶ systematization remains little more than the categorization of abstract preferences, indices little more than the translation of such preferences in context, and goal clarification tantamount to a declaration of fidelity to certain values. Read in this light, goal clarification is therefore more a psychoanalytical exercise for the inquirer than an epistemic obligation.

Lasswell and Kaplan make a stronger claim that these desired events are common to human nature, though different cultures afford them varying degrees of importance: “No generalizations can be made a priori concerning the scale of values of all groups and individuals. What the values are in a given situation must in principle be separately determined for each case [through specific empirical inquiry].”³⁷⁷ Except for citing a few domestic and international manifestos, hardly any empirical inquiry has been carried out to support the claim that there is a universal demand for the eight chosen values or to justify an assumption of parity in their desirability as constitutive of a democratic society.³⁷⁸ The

³⁷⁵ See *id.* McDougal notes:

The highest level systemization and description we have proposed is in terms of the eight values: power, respect, enlightenment, wealth, well-being, skill, affection, and rectitude, and we have offered brief, initial definitions. By the giving of further appropriate operational indices to these terms, they may be made both completely comprehensive and sufficiently detailed for any particular investigation.

Id.

³⁷⁶ As Arthur Brodbeck puts it when speaking of the absence of scientific warrant in policy science’s value system:

[T]he resulting set of abstract terms does not strike us as authoritatively binding for science. Since it is possible to smuggle in hidden postulates by the way one chooses Categories to form a set Many feel, for instance, that it is wrong to see legal institutions as more highly governed by “power” than by “rectitude,” or to see art as more highly governed by “skill” than by “enlightenment” (bypassing as this does the whole history of the idea of beauty in human affairs), or to see religion as more governed by “rectitude” than it is by a sense of love that clearly does not fit into any one of the categories, certainly not the category of “affection” as formulated.

Brodbeck, *supra* note 282, at 245.

³⁷⁷ LASSWELL & KAPLAN, *POWER AND SOCIETY*, *supra* note 243, at 56.

³⁷⁸ As Terry Nardin suggests:

The clarification of values is supposed to be a purely empirical activity uninfluenced by preconceived moral principles, but at the same time certain values are

NHS's claim to a natural view of ethics lacking a proper, warranting empirical inquiry, it must be noted, is not unique to policy science. Nor does it in and of itself confirm traces of natural law or arbitrary preferences of the masters of Yale's jurisprudence. To find marks of natural law in the New Haven Jurisprudence would demand a canvassing of the intellectual background and heritage of its founders—a task yet to be fulfilled by any critic of New Haven's jurisprudence. The accusation of arbitrary preferences, however, derives from a negation rather than an affirmation because most critics find themselves bound to conclude that absent any justification for values, they must be the result of some arbitrary preferences of Lasswell and McDougal.³⁷⁹

excluded from the empirical canvas because they are morally offensive. The contradiction is evident. Policy-oriented jurisprudence must be guided by values that are neither transcendently derived nor, McDougal's own evidence and arguments suggest, universally shared. In the end, therefore, the value of human dignity is simply, postulated.

TERRY NARDIN, *LAW, MORALITY, AND THE RELATIONS OF STATES* 204 (1983); see Julius Stone, *Approaches to the Notions of International Justice*, in *THE FUTURE OF THE LEGAL ORDER* 372, 450 (Richard Falk & Cyril Black eds., 1969) (arguing that the real difficult choice between values arises for the decision-maker just when the list has been offered, as not all the values could be equally secured either in general or in a particular context).

³⁷⁹ This is not to discount the valuable insights offered by some of the critical assessments of the NHS's value system. The most sophisticated of these accounts is presented by David Little in *Toward Clarifying the Grounds of Value-Clarification: A Reaction to the Policy-Oriented Jurisprudence of Lasswell and McDougal*, 14 VA. J. INT'L L. 451 (1974). Little begins with the reasons Lasswell and McDougal give for the essential importance of value clarification, that is, to facilitate the implementation of these values as constitutive of a democratic commitment, and to ensure rationality in decision-making—what McDougal calls “the quest for ‘rationality.’” McDougal, *International Law and Social Science*, *supra* note 86, at 80. Given that Lasswell and McDougal deliberately refrain from offering any justification for what they introduce as values of human dignity, Little believes these values could be taken either as mere postulates lying beyond rational justification, or as self-justifying or self-evident. In the former case, supplying rational justification for values is impossible and irrelevant; in the latter case, while further justification would be useful, it would only illuminate why such values are self-justifying and thus unavoidable. See Little, *supra*, at 453. Little finds evidence for fluctuating between these two positions in policy science, but he unequivocally adopts the latter view, arguing for a strong link in the New Haven Jurisprudence between self-evident values of human dignity and rationality, in the sense that since these values guarantee a space for decision-making free from frustration or coercion and provide the widest distribution of free choice and dignity, their adoption is considered to be necessary or unavoidable for any rational decision-maker. See *id.* at 454.

The ingenuity of Little's analysis is in linking the status of values to an important distinction that Lasswell, and thus McDougal, makes between principles of content and principles of procedure. Principles of content relate to the objects and states of affairs desired by individuals as a result of dispositional and environmental factors, and are not subject to rational justification. The content of values is a causal and not a rational matter; it would be a mistake to try to justify rationally what is empirically or accidentally determined. See *id.* at 455. Individuals can control these values first by distancing themselves from the val-

The NHS's evasion of the justification of values can best be understood when read against the flaws plaguing Dewey's pragmatic view of value and ethics.³⁸⁰ In an attempt to break away from a fact/value distinction and at the same time reject the "empirical theory of values" which takes what is enjoyed and a value to be one and the same, Dewey's concern is to distinguish between *de facto* and *de jure* statements, that is, between the desired and the desirable.³⁸¹ If "X is desirable" is to be taken as a *de jure* statement, it would have to mean "X ought to be desired", rather than merely "X is consistently desired."³⁸² Morton White believes that Dewey's naturalist view has not been successful in showing how "X is desirable" possesses any more *de jure* quality than "X is desired."³⁸³ White reads Dewey to suggest that the distinction between "a report of immediate sensation" and "an objective property of a thing" finds an analogue in value judgments as well.³⁸⁴ Therefore, as in the statements, "X looks red to me now," "X is (really) red," and "X is really red = for any normal person Y, if Y looks at X under normal conditions, X looks red to Y", in value judgments the analogue to such statements would be: "X is desired by me now," "X is really desirable," and "X is desirable = for any normal person Y, if Y looks at X under normal conditions, X is desired by Y."³⁸⁵ White convincingly questions if the third sentence in each pair has any more *de jure* quality than the second ones—that is, whether X being desirable to Y under normal conditions gives any sharper normative edge to X being really desired.³⁸⁶ If "X is desirable" is no more *de jure* than "X

ues and consciously clarifying them, and then manipulating them toward the realization of preferred events by a systematic operationalization of their content. This is performed by using principles of procedure that are entirely rational. *See id.* at 456. Little uncovers a confusion in Lasswell and McDougal's language and argues that the principles of rationality cannot intelligibly be said to be empirically grounded, because those principles should stand as the frame of mind that "is imposed on the empirical data in order to make sense of it." *Id.* at 457. Further, to the extent that value judgments are constituted based on principles and conditions of rationality, they also cannot be seen as empirically grounded. So rather than avoid the questions and problems that "speculative" or "trans-empirical" or "merely logical" philosophy has traditionally entertained, Lasswell and McDougal land precisely in the middle of the problematique. *See id.* Little goes on to find the Kantian solution to this conundrum more successful than the NHS's evasion of the question altogether. *See id.* at 458–60.

³⁸⁰ *See* MORTON WHITE, *ESSAYS AND REVIEWS IN PHILOSOPHY AND INTELLECTUAL HISTORY* 155 (1973) (critiquing the Deweyan naturalist view of value and ethics).

³⁸¹ *See id.* at 156.

³⁸² *See id.* at 157.

³⁸³ *Id.* at 160.

³⁸⁴ *See id.* at 160–61.

³⁸⁵ *Id.* at 159–60.

³⁸⁶ *See* WHITE, *supra* note 380, at 160.

is really red,” then it is hard to see how “X is desirable” is more than “X is desired.”³⁸⁷ Stated another way, “X is really red” if looked at under normal conditions does not mean “X ought to look red” in a moral sense, and nor does “X is desirable” if looked at under normal conditions.³⁸⁸ So if “X is desirable” is no more *de jure* than “X is desired,” Dewey has not succeeded in showing how “desirable” could mean “ought to be desired.”³⁸⁹

In *The Quest for Certainty*, Dewey seeks to establish the possibility of scientific verification not just for what is desirable, but also for what ought to be desired.³⁹⁰ Just as “normal conditions,” which Dewey sometimes calls “laboratory conditions,” are the testing platform for attributing any characteristics to objects, the desired can be equated with the desirable only under certain ascertainable conditions (whether of a sociological or circular character is unclear). Likewise, Lasswell, and by way of intellectual association, McDougal, considers the desired values of human dignity to be what ought to be the normative goal of a jurisprudence for any democratic society, with the addition of a further defect that, despite fervent claims to the contrary, policy science falls short of offering any evidence to ascertain the desired in the first place.³⁹¹ Some object to the universalizing claims of the NHS, arguing that the parochial nature of its democratic values of human dignity reflects American values,³⁹² but this concern should be secondary to the greater imperfection of assuming, rather than establishing, consensus, or the possibility thereof, about the desirable, whether domestically or on the international level.³⁹³

³⁸⁷ See *id.*

³⁸⁸ See *id.*

³⁸⁹ See *id.* at 161.

³⁹⁰ See *id.* at 155–56.

³⁹¹ Cf. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 356, at 91 (postulating human dignity as a desired value without regard to derivation or justification).

³⁹² See, e.g., A.R. Blackshield, The Policy Science Approach to Jurisprudence: A Critique of the Legal and Sociological Concepts of Lasswell and McDougal 8 (Australian Soc’y of Legal Philosophy, Working Paper No. 5, (1964)).

³⁹³ In this respect, compare Lasswell’s view of values with another behaviorist, Paul Kecskemeti. In contrast to Lasswell, Kecskemeti, attentive to the complexity of reaching consensus on “higher values” in any social setting, also seeks the possibility of rational consensus. So far as values are concerned, however, he rejects that such a consensus could be based on strictly scientific grounds. The alternative for Kecskemeti is not the rejection of a rational value discourse, but rather to suggest that those engaged in a discourse on “higher values” inevitably adopt certain postulates to serve as the framework for subsequent discourse. What is important, however, is that according to Kecskemeti, the rejection of such postulates does not involve a logical contradiction or a factual error. Nevertheless, it has

It is a faith in “human perfectibility” and in the propitious potential of the progressive age that draws policy science to the promotion of human dignity:

By taking human dignity as our central focus, we are in step with the ideal values of the American tradition, and with the progressive ideologies of our epoch. Liberalism and socialism are united in affirming the free man’s commonwealth as a goal of human society. That man’s dignity is not to be realized in this world is the principal forecast of whoever takes a dim view of human perfectibility.³⁹⁴

This view of human perfectibility, as Bernard Crick agrees, sets Lasswell apart from both the natural law tradition or “the self-evident propositions of 1776.”³⁹⁵ Those who possess “a dim view of human perfectibility” are considered “moral mavericks.”³⁹⁶ The problem is that Lasswell and McDougal do little to show that “moral mavericks” empirically may not outnumber the enlightened optimists.

It appears that while Dewey’s natural view of values and ethics suffers from a genuine flaw in moving from “desired” to “ought to be desired,” and is thus unable to provide a sufficient ground for values, Lasswell’s presentation of values as mere preferences tries to temporarily evade the problem of the justification of normativity.³⁹⁷ To shape preferences such that certain events are viewed as what ought to be desired is left to the field of individual and social psychology, as Lasswell’s attention to the role of propaganda manifests. The obligation of goal clarification incumbent on the scholar or decision-maker is a deep psychoanalytical exercise to clarify all dispositional and environmental ele-

the “stringent consequence” that the agnostic cannot meaningfully participate in the social setting that the standard defines. Neither the details of Kecskemeti’s argument, nor the flaws plaguing that argument are of importance here. What distinguishes Kecskemeti’s view of values from that of Lasswell’s, despite their shared behaviorism, is that Kecskemeti believes it is possible to achieve a consensus on “higher values,” even though the conditions of that discourse cannot be closely checked by scientific criteria. *See generally* PAUL KECSKEMETI, *MEANING, COMMUNICATION, AND VALUE* (1952).

³⁹⁴ Lasswell, *The World Revolution of Our Time*, *supra* note 250.

³⁹⁵ BERNARD CRICK, *THE AMERICAN SCIENCE OF POLITICS, ITS ORIGINS AND CONDITIONS* 196 (1959). Earlier in the same volume, Crick is hesitant to reject the possibility of a “continued implicit” adherence to the tradition of “natural rights” by Lasswell. *See id.* at 192.

³⁹⁶ *See* McDougal & Lasswell, *Legal Education and Public Policy*, *supra* note 3, at 212.

³⁹⁷ *See* WHITE, *supra* note 380, at 160; McDougal, *International Law, Power, and Policy*, *supra* note 157, at 189.

ments that make up the aggregate objectives that are pursued in decision-making.³⁹⁸

Lasswell's individualism and reliance on psychology aside, in the post-philosophical framework of policy science, the NHS's values in practice do not epistemically live up to the verification standards of empirical science, and thus remain non-cognitive. The other contemplative and manipulative methods of New Haven's problem-solving inquiry—presented as intellectual tasks for a policy-oriented jurisprudence—do little more to address the epistemic status of postulated goals. The NHS instead carries out these tasks in a manner that best reinforces the value postulates of human dignity.

B. *Trend Thinking*

The problem-solving approach here is a historical one. The study focuses on past trends towards or away from postulated goals to systematically understand how past practices have approximated those goals.³⁹⁹ The policy-oriented international lawyer bears a great responsibility to use “a comprehensive cognitive map”⁴⁰⁰ in order to avoid any impressionistic or anecdotal use of the past “in terms of isolated tidbits of doctrine and practice.”⁴⁰¹ This is in fact a methodological tool that, in a naturalistic view of values, could at least provide historical proof for “the desired.” It could also test the continuity of the “desired” events or preferences (and as such their desirability, albeit without establishing any *de jure* status more than the historical continuity of the demand): “Having postulated the overriding goal of human dignity on the most inclusive possible scale, the principal questions to be answered are whether values are becoming more abundant and more widely shared, and whether institutional practices are more or less well-adapted to the requirements of the fundamental objective.”⁴⁰²

The recommended historical approach seems in theory to avoid the two extremes of historical pitfalls: the objectivity mirage and the exile to the island of pure subjectivity. Lasswell and McDougal are clear that the policy relevance of trend thinking is that “trend knowledge discloses the degree of congruence or discrepancy between preference and

³⁹⁸ See McDougal, *International Law, Power, and Policy*, *supra* note 157, at 189.

³⁹⁹ See, e.g., LASSWELL, A PRE-VIEW OF POLICY SCIENCES, *supra* note 158, at 15.

⁴⁰⁰ See *id.*

⁴⁰¹ 1 MCDUGAL & LASSWELL, JURISPRUDENCE FOR A FREE SOCIETY, *supra* note 7, at 36–37.

⁴⁰² 2 *id.* at 787.

fact.”⁴⁰³ But the inquirer nevertheless consciously carries a myriad set of preferences into the reconstruction of facts depending on context.⁴⁰⁴

McDougal’s operationalization of trend thinking, which is largely presented in the context of human rights, however, leaves much to be desired in objectivity. A Marxist reading of McDougal’s description of the development of human rights in connection with the culture of cities, for instance, reveals the frailty of his historical claim.⁴⁰⁵ His progressive reading of the history of urban life and “the respect revolution” happily concludes with a hymn that “in the interdependent urbanizing globe, the continual recluster of conditioning factors has had the net effect of moving the world community towards articulating and attaining the principles of a respect revolution in the name of human dignity and an international public and civic order of human rights.”⁴⁰⁶ Chimni exposes McDougal’s simplistic portrayal of the “respect revolution” as the contribution of capitalism and its total disregard for the unequal distributive effect of colonialism and neo-colonialism.⁴⁰⁷

It is worth emphasizing that to concur with critiques of McDougal’s actual performance of trend thinking does not mean that a disciplined historical inquiry would respond to the need for a firm epistemic basis for the normative values at the center of a policy-oriented jurisprudence. It merely, and primarily, suggests that given the lack of empirical grounds for values in demand in Yale’s jurisprudence, proper

⁴⁰³ *Id.*

⁴⁰⁴ Some students of the NHS are at times clear on this point:

[O]bjectivity cannot be achieved by simply collecting facts and presuming that they speak for themselves. Facts are not events; they are often the conclusions the observer has drawn from observing events. How the *observer* collects the facts necessary for his inquiry and how he establishes the causal relationship among them cannot be answered without some preconceptions as to the events he is observing and the goals he seeks.

Suzuki, *supra* note 5, at 15.

⁴⁰⁵ See CHIMNI, *supra* note 151, at 127–28.

⁴⁰⁶ See MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 356, at 427–28.

⁴⁰⁷ CHIMNI, *supra* note 151, at 128. Chimni quotes a passage from Ronald Dworkin, that “the pragmatist will pay whatever attention to the past as is required by good strategy,” RONALD DWORKIN, LAW’S EMPIRE 162 (1986), to attribute the New Haven’s manipulative treatment of history to pragmatism. See CHIMNI, *supra* note 151, at 128. Such a view of pragmatism is merely as simplistic as McDougal’s performance of historical inquiry. It would take us too far afield to elaborate on pragmatism and historical inquiry. It suffices here to mention that Chimni’s reading of Dworkin is out of context, as Dworkin’s opposition to pragmatism is here limited to legal interpretation.

historical inquiry can only scrutinize to what degree those demands have been “approximated.”

C. *Scientific Thinking*

All of the contemplative and manipulative intellectual tasks of policy science facilitate the realization of the postulated goals. They are integrative, in that they are not marked by any order of priority or strict lines of division. The recommended scientific method of analyzing conditioning factors is to enrich the description of trends by eliminating the possibility of mere happenstance and establishing warranted causation between past decisions and preferences.⁴⁰⁸ It is incumbent on the inquirer here to define a clear “observational standpoint” with regards to any social process in context.⁴⁰⁹ Defining an observational standpoint does not mean for the intellectual to passively situate oneself in one’s surroundings, but rather, requires that she adopt a conscious social position with regard to those surrounding elements.⁴¹⁰ It is vital for the legal scholar to be able to travel between an external and an internal standpoint.⁴¹¹ When engaged with “theory about law,” it is essential for the scholar to take distance from participants in the legal process under investigation, and when studying “theories of law” to look with the view of a participant observer.⁴¹²

McDougal’s sharp demarcation between the external and internal positions sets him apart not only from positivists,⁴¹³ but also from Lon Fuller’s sympathizing observer with professional participants,⁴¹⁴ from Max Weber’s sociologist who should define an outside standing lest “the juristic precision of judicial opinions . . . be impaired” if sociological, ethical, or economic grounds were to replace “legal concepts,”⁴¹⁵ from Eugene Ehrlich’s Professor of Law who inevitably brings “norms

⁴⁰⁸ See McDougal et al., *Theories About International Law*, *supra* note 30, at 206.

⁴⁰⁹ See *id.* at 199.

⁴¹⁰ See *id.*

⁴¹¹ See *id.* at 200.

⁴¹² See, e.g., Myres S. McDougal & Harold D. Lasswell, *Trends in Theories About Law: Maintaining Observational Standpoint and Determining the Focus of Inquiry*, 8 U. Tol. L. Rev. 1; McDougal et al., *Theories About International Law*, *supra* note 30, at 199–200.

⁴¹³ Cf. McDougal et al., *HUMAN RIGHTS AND WORLD PUBLIC ORDER*, *supra* note 356, at 74 (describing exclusive focus on officials and state actors as “the fatal weakness of the positivist approach”).

⁴¹⁴ See LON L. FULLER, *THE MORALITY OF LAW* 106–07 (1964).

⁴¹⁵ MAX WEBER, *ON LAW IN ECONOMY AND SOCIETY* 11 (Max Rheinstein et al. eds., 1968).

that are being taught” into “the science of norms,”⁴¹⁶ from Karl Llewellyn’s jurisprudential work addressed to the “individual case” as opposed to the sociologist who addresses himself to the “comforting sweep of the decades,”⁴¹⁷ and from the later Llewellyn who attempts to “bridge between sociology and the legal.”⁴¹⁸ The difference lies in the fact that McDougal wishes to break the legal professional image by assigning an external observer role to the scholar of enlightenment as she draws on the trend of past decisions and employs the tools of social science to study empirically the causal relationship of those decisions and preferred events.⁴¹⁹ This is one step further from most realists,⁴²⁰ who in the latter life of legal realism were concerned with maintaining a balance within the professional outlook of the law—Llewellyn’s reckon-ability being one such attempt.⁴²¹

If McDougal targets the internal professional image of the law, however, he replaces it with another professional image—the professional image of the policy science scholar of enlightenment.⁴²² The modesty of objectivity that McDougal expects to infuse into the external observational standpoint is not only apparent in his own admission to the presence of identity attachments in any detached scholar,⁴²³ but

⁴¹⁶ EUGENE EHRLICH, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 364 (1936).

⁴¹⁷ KARL LLEWELLYN, *THE COMMON LAW TRADITION* 6 (1960).

⁴¹⁸ Karl Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *YALE L.J.* 1355, 1356 (1940).

⁴¹⁹ Myres S. McDougal & Harold D. Lasswell, *Criteria for a Theory About Law*, 44 *S. CAL. L. REV.* 362, 379–83 (1970) [hereinafter McDougal & Lasswell, *Criteria for a Theory About Law*].

⁴²⁰ An exception is Bingham, whose views in this regard parallel those of McDougal. See, e.g., Joseph W. Bingham, *What Is the Law?*, 11 *MICH. L. REV.* 1 (1912).

⁴²¹ See generally LLEWELLYN, *supra* note 417, at 178–208 (exploring the limits and laws of ideas that can be reckoned through reason). My analysis of the difference between McDougal’s approach and other jurisprudential approaches on the question of observational standpoint here closely follows that of William Morison. See Morison, *supra* note 23, at 5–13.

⁴²² Cf. MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER*, *supra* note 356, at 369 (defining role of scholar in terms of “professional responsibility”).

⁴²³ For example, McDougal addressed the Law of the Sea Institute as follows:

In these remarks, I shall be speaking as a professor, somewhat pedantically lecturing you; this is my vocation, it is my style. I assure you that I do this with no arrogance, but in all humility. Similarly, I cannot divorce myself from the fact that I am a United States national. I do not think any healthy man can escape identifying with his own national community, as well as with larger communities of which it is a member. I have deep roots in the communities of many of you here today. I have taught students from other countries, both at my home and abroad, for over thirty years. Insofar as I can, I intend to try to deal with these problems from the perspectives of citizens of the larger whole

also in the fact that the legal scholar as the policy scientist of democracy is first and foremost expected to define his standpoint with regards to value goals of human dignity before the scientific task begins.⁴²⁴ Maintaining a credible observational standpoint is as commendable as it is difficult, if there is an overbearing commitment to some postulated values that distinguish policy scientists of democracy from those of tyranny. The NHS sets up the scholar for the impossible task of maintaining an objective observational standpoint, while it simultaneously urges fidelity to some normative commitments in the form of postulates on the international lawyer of human dignity.

D. *Developmental Thinking*

Once the historical and scientific investigations clarify the past trend of events and the formation and distribution of values, the scholar performs a projective task to hypothesize the probable future trends.⁴²⁵ This is a detailed analytical exercise in which the policy scientist examines the change, continuity, or orderly fluctuation of factors to predict an identifiable trend and, accordingly, tailor policy decisions toward the realization of predicted future events and preferences.⁴²⁶ Lasswell develops an intellectual tool called “developmental construct” to address the projective task.⁴²⁷ Such a prediction of realistic possibilities is necessary for the performance of the policy scientists’ more creative responsibility to manipulate the course of events toward the preferred social vision.⁴²⁸

Developmental inquiry, Lasswell’s debt to Marx, nonetheless bears no deterministic implications. The policy scholar of enlightenment projects a future based on the empirically established trends of the

of mankind. If you prefer, let us adopt the perspectives of the anthropologist who tries to observe both common and special interests and to clarify a common interest. If I fail in this, I would suggest that this is an exercise which all of us should be continually trying.

Myres S. McDougal, *Commentary*, in *THE LAW OF THE SEA*, *supra* note 34, *cited in* Tipson, *supra* note 31, at 232.

⁴²⁴ See MCDUGAL ET AL., *HUMAN RIGHTS AND WORLD PUBLIC ORDER*, *supra* note 356, at 90–91.

⁴²⁵ See LASSWELL, *A PRE-VIEW OF POLICY SCIENCES*, *supra* note 158, at 68.

⁴²⁶ *Cf. id.* at 67–68 (utilizing the Marxist model of social progress to predict and influence future development).

⁴²⁷ *See id.* at 67.

⁴²⁸ *See id.* at 68–69.

past.⁴²⁹ On one extreme, there is the optimistic construct with increasing interdependence, advancement of science and technology, and clarification and promotion of human dignity by intellectuals, while on the other extreme there is the garrison state, increasing militarization, concentration of wealth, erosion of individual liberties, and the concentration and censoring of information.⁴³⁰ These extremes are consistent with the postulated normative vision of the NHS and are not warranted by the results of New Haven's deficient historical and scientific methods of inquiry.⁴³¹ Thus, the projective task is merely a blithely convenient affirmation of the envisioned worldview of policy science, albeit alluringly cloaked in scientific fallibilism.

E. *Alternative Thinking*

Because Lasswell, and thus McDougal, eschew a deterministic view of history, they equip the policy scientist with proper tools to manipulate events, should the projected future, despite all warranting evidence, appear unrealistic.⁴³² This is a manipulative and integrative task with a goal to maximize effectiveness with minimum dislocation.⁴³³ In "integrative" solutions, all participants gain, and thus conflicts among potential losers would be avoided.⁴³⁴ One of the techniques to foster realism together with creativity is to manipulate (shape or modify) the perspectives of the people of the world for an accelerated achievement of the objectives of the world public order of human dignity: "It is hardly a novel insight that the factors—culture, class, interest, personality, and crisis—which importantly condition peoples' perspectives can be modified to foster constructive rather than destructive perspectives."⁴³⁵

Aside from the naivety embedded in the assumption about a situation in which the distribution of the maximum would leave no losers,

⁴²⁹ MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 356, at 92–93.

⁴³⁰ *Id.* at 438–39.

⁴³¹ See CHIMNI, *supra* note 151, at 134–36 (providing more specific examples of McDougal's simplistic projection of the future); *cf.* MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 356, at 438–39 (assuming, in the optimistic construct, that scholars will continue to advance human dignity).

⁴³² See MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 356, at 92–93.

⁴³³ See *id.* at 93.

⁴³⁴ *Cf.* McDougal & Lasswell, *Criteria for a Theory About Law*, *supra* note 419, at 392 (advocating integrative solutions to maximize gains and minimize losses).

⁴³⁵ MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 356, at 443.

even judged from the standpoint of the underlying economic premises of Lasswell's maximization postulate,⁴³⁶ and the elitist implications of policing perspectives through the creative intelligence of intellectuals, the realistic view that may be gained as a result of the failure of the initial "developmental construct" does not alter the unrelenting reign of the unjustified values of human dignity.⁴³⁷ Failing the scholar's projected view of the future, she does not take a step back to reevaluate the desirability of the postulated values, but rather persists to homogenize the perspectives of the public (or rather those of the decision-making elites) in a therapeutic manner.⁴³⁸ Meanwhile, in practice, the postulated goals of the dignity of man curb any potential methodological significance that historical and scientific tasks might bear for a more realistic policy-oriented approach. The rigid application of human dignity consistent with the values of the New Haven masters fatally neutralizes any emancipatory opportunities that developmental and alternative thinking could provide to change the status quo.

CONCLUSION

This Article presents a new understanding of the New Haven Jurisprudence and a novel assessment of its pragmatist promises. The NHS, the most creative project of disciplinary renewal in the mid-twentieth century, is like the elephant under the touch of men in the dark. Yale's policy-oriented international law has been understood, *inter alia*, to legitimize U.S. imperialism and to cause the demise of law, to be no more than pseudo-scientific jargon, and to represent pragmatist thinking in international law. One commentator refuses to recognize the NHS as jurisprudence, but nevertheless states that an understanding of modern international law scholarship depends upon an understanding of Yale's policy science.⁴³⁹

Critical and admiring reactions to the NHS implicitly or explicitly identify Yale's policy thinking with American pragmatism. Explicit accounts of New Haven's pragmatism number only a handful and their analyses are both mistaken about pragmatism and unfair to Yale's sophisticated configurative jurisprudence. Instead of presenting a scheme

⁴³⁶ See, e.g., LASSWELL, A PRE-VIEW OF POLICY SCIENCES, *supra* note 158, at 18–20 (assuming that individuals seek to maximize their values by utilizing institutions that affect resources to achieve preferred outcomes).

⁴³⁷ Cf. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER, *supra* note 356, at 90–91 (basing explicitly their analysis in human dignity as a promoted goal).

⁴³⁸ See *id.* at 439–40; 443–44.

⁴³⁹ See Leiter, *supra* note 21, at 379.

of philosophical markers of pragmatism, this Article examines two central pragmatist claims of the NHS and assesses their pragmatist potential in light of the dominant, determinative role of postulates of human dignity in legal decision-making. The central argument is that the NHS's antifoundationalism reverts to a foundationalism of its own as it grants an over-determining role for legal outcomes to a set of values parochial to the New Haven masters. In doing so, Lasswell and McDougal's foundationalist antifoundationalism fatally blunts New Haven's promises of contextualism and problem-solving creativity.

Understanding New Haven's foundationalist pragmatism in light of the internal dynamic between values of human dignity and promises of contextualism and problem-solving orientation enables us to see beyond the fog of the accusations of the NHS's legitimization of power or affinity with natural law. It also opens the door for a more nuanced appreciation of philosophical pragmatism and its possible contribution to policy thinking in international law in the twenty-first century.

Whether the NHS adopted American pragmatism and impaired its antifoundationalism with a normative foundationalism of its own, or the tradition of pragmatism itself has never entirely escaped foundationalism is a historical question beyond the scope of this paper. Once we acknowledge the inherently contradictory nature of New Haven's foundationalist pragmatism, however, we are in a position to evaluate the career of the policy-oriented approach and its promises for policy creativity more accurately and with sympathy.