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## PROLEGOMENON TO THE JURISPRUDENCE OF MYRES McDOUGAL AND HAROLD LASSWELL

*John Norton Moore\**

**I**F a Benjamin Cardozo or a Jerome Frank were to spend a few weeks browsing in Dean Dillard's law school, he would be enthusiastic about the rising tide of "social consciousness." The trend in legal education and student interest is toward involvement with such major social problems as the inequality of treatment accorded the black man, poverty, war and revolution, urban blight, crime and reform of the criminal process, and the challenges to human dignity presented by an exploding technology. Legal education has begun unmistakably, even if erratically, a fundamental transition from the study of law as a self-contained and sometimes irrelevant discipline to the study of law as a socially conscious discipline which has the potential to play a leading role in the amelioration of major social concerns. Though our observers might be justifiably exasperated at the slowness of the transition, which was also underway in their day, they would find the recent acceleration of the trend encouraging. But in another respect they would almost certainly be disappointed, for legal education today largely lacks the jurisprudential spark and excitement that prevailed at the height of the legal realist movement during the 1920's and 1930's. Today there is little disagreement that judges are men, that legal rules don't automatically decide cases, and that law is a tool for achieving social goals rather than a brooding omnipresence in the sky. All of this has become commonplace in the classroom and by the second year no longer holds any excitement for the law student. In fact, this "legal realism in the air," without explicit study of the lessons of legal realism, has sometimes contributed to an overly cynical attitude toward learning the mass of background information necessary for effective functioning as an informed legal specialist in today's world.<sup>1</sup> And, from the perspective of the law

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\* Associate Professor of Law, The University of Virginia. A.B., 1959, Drew University; LL.B., 1962, Duke University; LL.M., 1965, University of Illinois. Thanks are due to Professor Thomas F. Bergin of the University of Virginia Law School, Professor Mary Ellen Caldwell of the Ohio State College of Law, and W. Michael Reisman of the Yale Law School, all of whom read the manuscript and offered helpful suggestions.

<sup>1</sup> Legal realism in the air is a phrase which seems to describe a pervasive atmosphere in American legal education characterized by faculty and student skepticism of "rules"

teacher, the teaching of "black letter law" has become a sign of academic inferiority, except (as myth has it) for a few Harvard holdouts. But most of this realism, no matter how necessary, has been nihilistic or destructive. And the very success of an essentially negative legal realism has led to a puzzlement about where we go from here that has infected most of the law school world. All too often the answer seems to be that a diffuse and ill-defined policy approach replaces a rigorous but frequently irrelevant analytic approach.

There are a few legal scholars today, however, whose creative work offers positive direction and an exciting jurisprudential challenge.<sup>2</sup> Per-

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without ability to articulate why. The principal cause of the malaise seems to be the continuing impact of the legal realist movement without contemporary study of what the legal realists said. Though law faculties increasingly agree, and rightly so, that methodology may be the most important part of a student's legal education, the truth of the matter is that most law schools are doing a poor job of teaching basic methodology. The student probably learns to read a case through sheer repetition, but rarely does he learn anything very concrete about stare decisis, statutory and constitutional interpretation, normative ambiguity, the function of rules in judicial decision making, the meaning of a functional approach, methods of legal reasoning, and other basic skills for operating the judicial process. One way in which legal education could be substantially improved is by encouraging *explicit* study of these and other basic skills. The change might also return to legal education some of the intellectual excitement which marked the legal realist period.

A symptom of the malaise in methodology is the prevalence of super-edited, easily digestible cases in the casebooks. Frequently cases seem to be selected more with an eye to illustrating majority and minority rules than to contributing to the students' understanding of the judicial process. It remains a mystery what advantages such casebooks have over a good text.

<sup>2</sup> As the principal sources of jurisprudential excitement today, I would list the McDougal-Lasswell policy-oriented jurisprudence, the "new analytical school" and the "new natural law school." And, though not a school of jurisprudence, certainly the related "neutral principles" and "political question" debates concerned with the justification and limits of judicial review should be included in this list. Of the "schools," it seems to me that all offer significant insights. For that reason it does not seem that a choice need be made among them. The principal problem common to all "schools" may be how to increase the interaction among them.

With respect to the "new analytical school" see, e.g., *Symposium, The Philosophy of H. L. A. Hart*, 35 U. CH. L. REV. 1 (1967); R. Summers, *The New Analytical Jurists*, 41 N.Y.U.L. REV. 861 (1966); R. Dworkin, *Does Law Have a Function? A Comment on The Two-Level Theory of Decision*, 74 YALE L.J. 640 (1965).

With respect to the "new natural law school" see, e.g., L. FULLER, *THE MORALITY OF LAW* (1964); H. DILLARD, *SOME ASPECTS OF LAW AND DIPLOMACY* (1957), reprinted from 91 HAGUE ACADEMY RECUEIL DES COURS 447 (1957); Dillard, *Law and Conflict: Some Current Dilemmas*, 24 WASH. & LEE L. REV. 177 (1967); *Symposium, The Morality of Law*, 10 VILL. L. REV. 624 (1965).

With respect to the "neutral principles" debate see, e.g., Wechsler, *The Myth of Neutrality in Constitutional Adjudication*, 73 HARV. L. REV. 1 (1959); Pollak, *Racial Dis-*

haps the most influential of these scholars are Myres S. McDougal and Harold D. Lasswell, who, in a distinguished series of major books with a number of talented colleagues, have put together a comprehensive jurisprudence which has had a profound impact on post-legal realist thinking.<sup>3</sup>

The philosophical underpinnings of the McDougal-Lasswell jurisprudence are broadly eclectic. Among the principal influences, however, would certainly be listed the entire legal realist movement and the work being carried on in a host of social-science disciplines, particularly work in description of social process, decision theory and communication theory. The McDougal-Lasswell jurisprudence is broader than

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*crimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661 (1960). With respect to the "political question" discussions see, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L.J. 517 (1966).

There are, of course, as always individual scholars who do not fit neatly into any of these "schools" but whose creative work offers exceptional insight and stirs considerable excitement. Brainerd Currie's "governmental interest analysis" theory in conflict of laws is a prime example. And to mention a few recent articles in this category from one area with which I am familiar see Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967); Reich, *The New Property*, 73 YALE L.J. 733 (1964).

<sup>3</sup> Myres S. McDougal is Sterling Professor of Law at Yale Law School and is a former president of the Association of American Law Schools and the American Society of International Law. Harold D. Lasswell is Phelps Professor of Law and Political Science at Yale Law School and is a former president of the American Political Science Association. The principal books using the McDougal-Lasswell system are: M. McDOUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* (1967); L. CHEN & H. LASSWELL, *FORMOSA, CHINA, AND THE UNITED NATIONS* (1967); B. MURTY, *THE IDEOLOGICAL INSTRUMENT OF COERCION AND WORLD PUBLIC ORDER* (1967); D. JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* (1965); M. McDOUGAL, H. LASSWELL, & I. VLASIC, *LAW AND PUBLIC ORDER IN SPACE* (1963); M. McDOUGAL & W. BURKE, *THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA* (1962); R. ARENS & H. LASSWELL, *IN DEFENSE OF PUBLIC ORDER* (1961); M. McDOUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (1961); M. McDOUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* (1960); H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950).

Other books are in the works now, notably a book on the world constitutive process of authoritative decision with Harold Lasswell and Michael Reisman. For an introduction see McDougal, Lasswell & Reisman, *The World Constitutive Process of Authoritative Decision*, 19 J. LEGAL ED. 253, 403 (1967).

See also M. McDOUGAL & D. HABER, *PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT* (1948). The McDougal and Haber book is to my knowledge the only casebook explicitly using the system although many casebooks have been influenced by the system. Though the book has never been widely adopted it is still in many ways ahead of its day twenty years after it was written.

the traditional schools of jurisprudence and encompasses not only a theory about law, but also a means of describing social process and the role of law within it, techniques for systematic research into legal problems, and a framework for analysis of theories about law. It is made up of a variety of different insights and analytic tools which together are usually termed the McDougal-Lasswell "system," but which individually often have a life of their own.<sup>4</sup>

An overriding characteristic of the system is the use of a meta-linguistic terminology for assistance in carrying out the sophisticated tasks performed by the system. This use of a precise meta-language for analysis is both one of the greatest strengths of the system and one of the greatest causes of popular misunderstanding of the system.<sup>5</sup> A meta-language in its classic sense is a linguistic system for precise definition of another language. Though the lawyer has had little occasion to become familiar with the concept, in other disciplines it has become an indispensable tool. For example the computer programmer relies heavily on a meta-language called Backus Normal Form to achieve precise syntactic description of the programming language by which he instructs the computer. The use of this BNF language has become indispensable for achieving the precision required in his task. The McDougal-Lasswell

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<sup>4</sup> Probably the best introductory treatments of the McDougal-Lasswell jurisprudence are: McDougal, *Jurisprudence for a Free Society*, 1 GA. L. REV. 1 (1966); Lasswell & McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486 (1967); McDougal, Lasswell & Reisman, *supra* note 3; Feliciano, *Book Review*, 68 YALE L.J. 1039 (1959).

Other basic writings about the system are McDougal & Reisman, "The Changing Structure of International Law" *Unchanging Theory for Inquiry*, 65 COL. L. REV. 810 (1965); McDougal, *The Ethics of Applying Systems of Authority: The Balanced Opposites of a Legal System* in H. LASSWELL & H. CLEVELAND, *THE ETHICS OF POWER* (1962); McDougal, *Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry*, 4 JOURNAL OF CONFLICT RESOLUTION 337 (1960); McDougal & Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959); Lasswell, *The Public Interest: Proposing Principles of Content & Procedure*, NOMOS V: THE PUBLIC INTEREST 54 (1962); McDougal, *Law as a Process of Decision—A Policy-Oriented Approach to Legal Study*, 1 NATURAL LAW FORUM 53 (1956); Lasswell, *The Interrelations of World Organization and Society*, 55 YALE L.J. 870 (1946); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943); McDougal, *Fuller v. The American Realists*, 50 YALE L. REV. 827 (1940-41).

<sup>5</sup> The best introduction to the meta-language of the McDougal-Lasswell system is an unpublished learning program in the Yale Law Library called "The Scharpf Learning Program." The introductory treatments of the system cited in note 4 *supra* also provide an introduction to the meta-language. For greater detail see also H. LASSWELL & A. KAPLAN, *POWER AND SOCIETY* (1950).

system utilizes a specialized vocabulary for theorizing about law and for exploring and analyzing the role of law in social process, a vocabulary which is closely analogous to a meta-language. In fact, one of the insights of the system is to insist on clarity of distinction between theories about law and theories of law, which is another way of expressing this distinction between a language or theory used for analysis and the language or system being analyzed.

An example of this meta-linguistic usage is the breakdown of "law" into patterns of "authority" and patterns of "control." "Authority" is used to signify community expectations about how decisions should be made and about which established community decision-makers should make them. Decisions made in conformance with community expectations about proper decision and proper decision-makers, as distinguished from decisions based on mere naked power, are said to be authoritative.<sup>6</sup> "Control" is used to signify that a decision is backed by effective sanction. Using these terms some of the classic jurisprudential debates about the nature of "law" can be recast as whether there can be law without authority (*i.e.*, was Nazi law really law in the absence of widespread expectations about proper decision?) or whether there can be law without control (*i.e.*, is the international norm prohibiting the use of force as an instrument of national policy really law in the absence of a controlling sanction?). The analytic concepts "authority" and "control," which are key decision concepts of the McDougal-Lasswell system, expose these dimensions of the traditional debate as largely sterile. Whether or not one postulates any particular combination of authority and control as the most useful definition of law for a particular purpose, the observer of the legal system must be concerned both with patterns of authority and patterns of control. The traditional debate obscured this distinction. Explicit focus on the distinction has already had a substantial liberating influence on legal scholars concerned with international law.

Similarly, the meta-linguistic concepts "perspectives" and "operations" provide a valuable tool for evaluation of theories about law. "Perspectives" are defined to include the rules or norms of the legal system. "Operations" are the actual practices of that system. Armed with these concepts, the legal realist-positivist debates about the meaning of law are sharpened. Were the legal realists so concerned with "what courts do in fact" *i.e.*, "operations," that they downgraded too much the effect

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<sup>6</sup> For a somewhat related analysis of the meaning of authority see Friedrich, *Authority, Reason, and Discretion* in AUTHORITY (Friedrich ed. 1958).

of rules in influencing decision? Or were the positivists too concerned with rules and wordplay, *i.e.*, "*perspectives*," to understand the law as applied by judges who were always faced with the necessity of choice not dictated by any logical system?

Another important tenet of the system is that law is a process. That is, law is not merely rules, it is not merely judges or courts, or, as Holmes suggested, what courts do in fact. Instead, if our concern is understanding and accurately describing the role of law in society, the most useful conception of law is a broad one encompassing the entire process by which judges, legislators, litigants and many others pursue particular values through the whole panoply of authoritative community decision-making. This tenet is used with the key decision concepts of authority and control and perspectives and operations, to provide a basis for appraisal of theories about law (schools of jurisprudence).

McDougal and Lasswell also emphasize that law as an on-going process is located in a larger social context. Law as a normative and social science is concerned with social interaction, and legal problems are generally attributable to the broader social setting in which they always occur. Yet traditional legal parlance and modes of legal analysis provide no tools for systematically describing social process and the role of law within it. As a result, McDougal and Lasswell have constructed a framework consisting of inter-penetrating processes to facilitate more accurate description and analysis of the role of law in society. Their starting point for description of social process is "the world community process" or the total "big blooming ongoing confusion" which is the reality of global interaction. For convenience in study, this global process, which may be thought of as the total pie of social interaction, may be sliced by value processes such as the "wealth" or "power" processes and further subdivided politically as, for example, by the "national power process." Each process is marked off for convenience in study, and it is recognized that in other ways such division may be arbitrary.

It is further recognized that other ways of slicing the pie may also be useful depending on what one intends to study. Since legal scholars and political scientists are concerned particularly with the application of community power, the most useful slice for their study is "the effective power process," or that part of the on-going social process concerned with making and enforcing decisions of community wide effect. And since legal scholars are also particularly concerned with patterns of "authority" as this term is used in its meta-linguistic sense, the system

marks off for special study within "the effective power process," a process termed the process of authoritative decision. The authoritative decision process is the on-going authoritative application of power we call law. And within this process, the system marks off the process by which this authoritative decision process is created, maintained, modified and terminated. This last process is termed the "constitutive process of authoritative decision."<sup>7</sup> The concept of "constitutive process" is a fundamental insight which permits more sophisticated analysis of such problems as the classic problem of the sources of international law. Instead of focusing only on the incomplete generalities of Article 38 of the Statute of the International Court of Justice for an understanding of the sources of international law, the scholar is offered a map of the world constitutive process detailing the range of participants in the making of international law and their characteristics.

Decisions which establish or otherwise affect the authoritative decision process are "constitutive decisions." Decisions without constitutive impact which flow from the constitutive process and which affect other value allocations in the community, *i.e.*, which affect other slices of the pie, are termed "public order decisions." Hence the "public order" designation in the title of many of the books using the system. Though delineation of these inter-penetrating processes tends to look artificial, in fact it provides an invaluable tool for understanding law by locating legal process in its broadest social context.

In addition to the schematization of inter-penetrating social processes, McDougal and Lasswell have also developed techniques for describing any inter-personal interaction. These techniques result from the same need for an adequate description of social process which can most usefully be adapted to legal problems. Though as individuals we talk about particular interactions every day (for example the seizure of the Pueblo by North Korea), we are sadly lacking in adequate language in everyday speech for systematically describing them. As a result, systematic inquiry into social interaction requires that an appropriate language be formulated to call attention to the range of relevant variables evident in any such interaction. The principal workhorses of the system for meeting this need are "value analysis" and "phase analysis," each of which may be more or less useful for analysis of a particular interaction. Like the schematization of the inter-penetrating processes, each looks

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<sup>7</sup> For a detailed description of the "constitutive process" see M. McDougal, H. Lasswell & M. Reisman, *supra* note 3.



artificial and arbitrary unless one is aware of its function as a checklist for the systematic analysis of context. Value analysis breaks down a process of interaction by reference to the principal values sought, of which eight are currently employed: power, enlightenment, wealth, well-being, skill, affection, respect and rectitude. The eight categories have no magical quality and are chosen for their convenience in analysis of social process. Phase analysis breaks down a process of interaction by component elements and sequence. The phases in current use are eight: The *participants* in the process, the *perspectives* of the participants, the *situations*, geographical and temporal, in which the participants are interacting, the means or *base values* which the participants have available for achieving their objectives, the manner or *strategies* by which these means are employed by the participants, the immediate *outcomes* of the process of interaction, the longer range *effects* of the interaction, and the broader context of *conditions* in which the process of interaction takes place. Again, there is nothing magical about these categories. They are selected for their broad utility in describing any process of interaction.<sup>8</sup>

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<sup>8</sup>The concept of phase analysis is particularly flexible and has substantial utility even apart from other features of the system. Legal rules may be said to be a relationship between context (some feature of the real-world) and consequence. As such they may be cast in "if-then" form. That is, "if X then Y," where X represents some feature of the real-world and Y represents the consequence flowing from its presence or absence. When in "if X then Y" form, legal rules are good or bad depending at least on whether or not the feature of the context chosen to represent X is a feature whose presence or absence is important or decisive for policy realization. But all too frequently complex legal problems are approached with a kind of single factor analysis which implicitly assumes that only one feature is important for policy realization. Such analysis may lead to over-simplified legal rules such as the classic rule of international law that it is always lawful to render military assistance to a widely recognized government or the current response advocated by some contemporary scholars, who are rightly concerned with the abuses of the traditional rule, that neither side engaged in civil strife can lawfully be aided. "X" in the traditional norm represents the single contextual feature of recognition. The resulting rule neglects the great range of other contextual variables which are important for policy realization with respect to community "intervention" norms, and it is not surprising that the rule is under assault. Similarly the newer neutral non-intervention norm does not escape the undue emphasis on the widely recognized government-insurgents distinction of the traditional rule and is also suspect.

Systematic application of phase analysis to the process of intervention reveals the great range of variables which may be important in formulating a more responsive normative framework. For example, who the participants are is certainly important for determination of legitimacy. Is the intervention under the auspices of the United Nations, collective intervention pursuant to a regional arrangement, or unilateral? Certainly the objectives of the intervening parties are important. Is assistance rendered for territorial conquest, protection of nationals, or humanitarian concern with the

Though some of the terminological difficulty of the McDougal-Lasswell system stems from the techniques for slicing social process and for evaluating theories about law, probably the greatest source of confusion for the uninitiated is this use of "phase analysis" and "value analysis." This may be because much of the rest of the meta-language of the system can easily be misunderstood as simply a pedantic use of language with which the reader is familiar. But since "phase" and "value analysis" are often used in outline form as headings, no such false comfort is available, and the terms are frequently rejected out of hand as arbitrary, repetitive, and proof positive of a Benthamite language difficulty. "Phase" and "value analysis," however, are intended as analytic tools for exploration of context, and their utility is substantial.

In addition to phase and value analysis, a third method of slicing a process of interaction used by McDougal and Lasswell is the slicing of the decision process by "authority functions." This breakdown is a refined and much more useful counterpart of Montesquieu's famous institutional division of legislative, executive and judicial. One of the difficulties of the Montesquieu division always has been that there is a substantial overlap in functions performed by each branch. No branch of government has performed solely a making or an applying or an enforcing function. When the emergence of new governmental institutions in the early part of this century threatened to blur the traditional institutional distinction, a fourth category, "administrative," was added in frank recognition of this fact. But more fundamentally, the Montesquieu division, even as modified by the administrative category, did not achieve any real focus either on the range of functions being performed in the legal process or on the diversity of the institutions performing those functions. This failure was far more than a failure to focus on the justification and limits of judicial review which in recent years has stimulated such useful debate and which certainly has transcended the

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slaughter of minorities? What are the strategies employed in the intervention? Are they economic aid or military advisers or regular combat troops? And similarly, the arenas, base values, outcomes, effects and conditions of the process may suggest other features important for policy realization. Recognition of the government assisted turns out on close analysis to be only one such feature (it would be picked up under the heading base values) in a systematic phase analysis of the process of intervention.

Because legal rules depend on their relationship to context, a tool such as phase analysis which expedites systematic exploration of context is a particularly useful tool for the legal scholar. Again, we tend to dismiss such techniques as what we have been doing all along, but there is a vast difference between episodic awareness of context and the deliberate, systematic exploration of context in search of features important for policy realization.

Montesquieu framework. Rather it was a failure to locate the major institutional branches of government in their broader social context and a failure to focus on decision functions other than making, applying and enforcing.

To meet the failure the McDougal-Lasswell system breaks down the decision process into seven "authority functions" which also correspond sequentially with the functioning of the legal process. The seven "authority functions" are: *intelligence-gathering*, the obtaining and supplying of information to the decision maker; *promotion*, the recommendation of policy; *prescription*, the promulgation of norms—as in legislation; *invocation*, the provisional application of a prescription—as by a grand jury indictment; *application*, the final application of a prescription—as by an appellate decision; *termination*, the ending of a prescription; and *appraisal*, the evaluation of the degree of policy realization achieved. Like phase analysis, this functional breakdown may have many uses. One of the immediate insights from functional analysis when it is applied to the traditional range of concerns of legal education is that legal education has been concerned almost exclusively with the "application" and "prescriptive" functions. Interestingly, in the recent concern with police and prosecutorial discretion, however, legal educators are showing signs of interest in the "invocation" function. And in the increasing awareness of the value of law revision commissions the legal profession is showing signs of a long overdue awakening of the need for a continuing "appraisal" function.<sup>9</sup> Since the process of making, applying and enforcing law is more complex than the traditional focus has enabled us to see, it is probable that this trend toward greater interest in the whole range of authority functions will continue. In any event, explicit recognition of these authority functions is a useful insight for increasing awareness of the greater range of decisions with which the legal scholar must be concerned.

The McDougal-Lasswell system is also characterized by a concern with law in terms of value production and allocation and by its insistence that all law be investigated in these terms. The system is pragmatic and value-oriented; its concern with law is a normative concern. As with the legal realists, law is seen as an instrument for effectuating community policies and is good or bad according to its effectiveness in realization of

<sup>9</sup> See the recent article by Harold Lasswell calling for continuing exercise of the appraisal function. Lasswell, *Toward Continuing Appraisal of the Impact of Law on Society*, 21 *RUTGERS L. REV.* 645 (1967). The American Law Institute has sometimes performed an appraising function.

those policies. Though realization of community policy is seen as the ultimate justification for legal norms, the system carefully avoids intellectual confusion between the is and the ought; the most rational clarification of policies requires the systematic performance of all intellectual tasks. Clarification of the classic debate in legal philosophy over the separation of is and ought is achieved by careful description of the intellectual tasks necessary for decision. The crucial distinction is that between the intellectual task of accurate description of the law (*i.e.*, community expectations about authority and control which may include community expectations about ought) and clarification of an observer's policy preferences, which, though they build upon past experience may express new goals.<sup>10</sup> The emphasis on the intellectual tasks necessary for decision also provides a pragmatic outline for systematic analysis of legal problems.

In simplest form the McDougal-Lasswell decision theory postulates that rational decision requires the performance of five intellectual tasks: clarification of goals, description of past trends, analysis of conditions affecting past trends, projection of future trends, and invention and evaluation of policy alternatives.<sup>11</sup> These tasks are performed by all of us, implicitly or explicitly, when we make any decision. We perform them, for example, when we decide whether to buy a house or rent. Though we tend to dismiss such clarification about decision making as something we have been doing all along, explicit reflection on how decisions are made can have and is having great impact in improving performance in government, business, and other aspects of our daily lives. In fact, similar systematic applications of decision theory have given rise to the discipline of "systems analysis" which is an effort to apply decision theory to solution of concrete problems.<sup>12</sup> A dramatic example of the

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<sup>10</sup> A related insight of the system which is a substantial aid to intellectual clarification is the insistence on clarification of observational standpoint. Is the observational standpoint that of observer, authoritative decision-maker, advocate, or some other?

<sup>11</sup> For an introduction to decision theory see I. BROSS, *DESIGN FOR DECISION* (1959); Mayo & Jones, *Legal-Policy Decision Process: Alternative Thinking and the Predictive Function*, 33 GEO. WASH. L. REV. 318 (1964).

<sup>12</sup> For an introduction to systems analysis see C. Hitch, *An Appreciation of Systems Analysis*, The RAND Corp., P-699 (Aug. 1955). Also of general interest are: R. McKEAN, *EFFICIENCY IN GOVERNMENT THROUGH SYSTEMS ANALYSIS* (1958); P. Don Vito, *Annotated Bibliography on Systems Cost Analysis*, The RAND Corp., RM-4848-PR (Feb. 1966); E. Quade, *Systems Analysis Techniques for Planning-Programming-Budgeting*, The RAND Corp., P-3322 (March 1966); THE PRESIDENT'S COMMIS-

impact of systems analysis is the McNamara revolution in the Pentagon following the adoption of a planning-programming-budgeting system.

Since policy-oriented jurisprudence has a pragmatic concern for problem solving, the basic outline of each of the recent McDougal-Lasswell studies is designed to facilitate systematic performance of each of these five intellectual tasks. Characteristically the first chapter of books using the system defines the problem in its broadest context, including the relevant features of the processes of claim and decision by which the problem is presented to the decision-maker and decided. The second chapter then clarifies the goals and policies at stake in deciding the problem, a number of intermediate chapters systematically and exhaustively explore each major type of dispute by analysis of past trends and conditions affecting past trends, and the final chapter evaluates the possible alternatives. This overall outline is a thorough-going aid to problem solving and is particularly helpful in presenting an overview of a problem, in focusing attention on the goals at stake, and in enabling comparison of trends through time and across national boundaries. It encourages research which is pragmatic, contextual, systematic and policy oriented.

Though the McDougal-Lasswell system is a substantial help in avoiding intellectual confusion and in problem solving, as with any methodology no matter how elaborate or perceptive it cannot automatically solve problems. Variations in value input and difficulties in accurately predicting the impact of varying alternatives see to that. But just as one

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SION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK-FORCE REPORT: SCIENCE AND TECHNOLOGY (prepared by the Institute for Defense Analysis 1967).

One should not overestimate the ability of systems analysis, PPBS, or decision theory to solve all problems. As Robert Millward points out about PPBS:

One must conclude that PPBS has many shortcomings, although its attempts at normative decision-making may be desirable. There is no disagreement about the need for new decision-making tools, only a caution that the PPBS framework alone will not solve the immense problems facing us. It is hoped that working with PPBS will result in a greater awareness of ends, means, consequences, needs, and resources, all of which will facilitate decision-making within agencies. Its attempt at quantification of costs and benefits may lead to more sophisticated comparative efforts, particularly the use of mathematical models. Perhaps the basic advantage of PPBS is in the forced examination of ongoing activities in problem terms, in direct contrast to the present approach of incrementalism, where we do not evaluate what has already been approved and is operational. Such an examination is bound to reveal problems heretofore unrecognized.

Millward, *PPBS: Problems of Implementation*, 34 J. AM. INSTITUTE OF PLANNERS 88, 93 (1968). Also see Kaplan, *Some Limitations on Rationality*, NOMOS VII: RATIONAL DECISION 55 (1964).

should not imbue a methodology with the ability to solve problems, one also should not underestimate the effect which a methodology can have on problem solving. The great strength of the McDougal-Lasswell system is its ability to clarify what are otherwise real intellectual difficulties in thinking about law and legal problems, to stimulate creativity by getting outside traditional modes of thought about law, to successfully utilize inter-disciplinary techniques, and to assist legal research by arming it with a variety of analytic techniques.

It may assist in understanding the McDougal-Lasswell system to briefly identify the three most commonly articulated criticisms of their approach.

The first, and perhaps most common criticism, and one sometimes taken to naive extreme<sup>13</sup> runs: "their writing is filled with insight but why don't they write in English?" This criticism stems from a genuine difficulty in understanding the specialized terminology of their policy-oriented jurisprudence. Perhaps also it stems from a natural suspicion, nurtured by a jargon-filled world, of that which is not understood. But the terminological suspicion of policy-oriented jurisprudence is not well-founded. The terminology which causes the greatest difficulty for the uninitiated is a necessary part of the approach and is itself responsible for many of the insights. Though policy-oriented jurisprudence is characterized by a diversity of techniques, central to the approach is a

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<sup>13</sup> A recent book review of McDougal, Lasswell & Vlasic's *LAW AND PUBLIC ORDER IN SPACE* contains this attempt to translate a condensed and precise passage from the book into the reviewers own language:

In order to know what the authors attempt in *Law and Public Order in Space* we need only wrestle with their own statement:

The basic design of our book is the modality of policy-oriented jurisprudence: we first seek to identify the major recurring types of problems—that is, types of controposed claims to authoritative decision which raise common issues in policy and which are affected by common conditioning factors—and to locate these problems in their most comprehensive context of community process; we then proceed to explore each major type of problem by employing the various relevant intellectual techniques of policy-oriented inquiry, including the detailed clarification and recommendation of general community policies, the description of past trends in decision on comparable problems, appraisal of the factors which appear to have affected past decision, the projection of probable future conditioning factors and decisions, and the recommendation of alternatives in policy content and procedures more appropriately designed to secure overriding community goals.

What the authors are trying to tell us is that: (1) they will define jurisprudence as a policy regime; (2) they will characterize problems accordingly; and (3) they will analyze these problems with a view to ascertaining whether or not policy should override precedent.

Scafuri, Book Review, 18 *VAND. L. REV.* 863, 864-65 (1965). The attempt, which does not remotely restate anything the authors were talking about, stands as a monument to the danger of believing that what one doesn't understand doesn't say anything.

focus on the intellectual tasks necessary for problem solving and a method of systematically exploring social context in aid of decision. Both of these objectives require a meta-language for maximum success. Phase analysis, value analysis, concepts for evaluating theories about law and the role of legal process in society, and the decision theory outlined above are some of the responses to this need. Moreover, this terminology is not an isolated phenomenon springing full-blown from the heads of McDougal and Lasswell but is a synthesis of specialized linguistic systems developed in a host of component social science disciplines. Much of their terminology is the daily grist of the political scientist, statistician, economist, systems analyst, or sociologist. As Professor Falk points out:

I would argue that the stylistic criticism is unfounded. McDougal strives to achieve clear and precise expression. His sentences are almost always impossible to improve upon. Their complexity stems from an insistence upon nuance and accuracy, not from an infatuation with German metaphysics, or some inborn quality of verbal ineptitude. McDougal, with the substantial help of Harold D. Lasswell, is engaged in the formidable task of developing and applying a jurisprudence that takes *systemic account* of all aspects of social reality relevant to the processes and structures of making *rational* decisions about legal policy alternatives. This is a complicated endeavor and requires an elaborate intellectual apparatus. It would not occur to anyone to complain about Einsteinian theories of physical reality on the ground that they were abstruse and not readily susceptible to lay understanding. Well, it is time that we appreciate that theories about social reality are also likely to be comparably complicated if they are to render service. Our expectations seem quite wrong. Why should a reader be entitled to grasp McDougal's ideas on international law without special effort and training? We confront an insidious form of anti-intellectualism whenever we meet the argument that legal analysis must be carried on in a fashion that requires its meaning to be evident to the uninitiated or hurried reader. All that it is proper to demand is that legal analysis bring added knowledge and understanding to the adept. McDougal and Feliciano overfulfill this demand.<sup>14</sup>

To Falk's eloquence should be added the observation that those who doubt that the scope of a medium sets limits on its usefulness should try

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<sup>14</sup>Falk, *International Legal Order: Alwyn V. Freeman vs. Myres S. McDougal*, 59 AM. J. INT'L L. 66, 70-71 (1965).

A quick reading of most of the reviews of the books using the system indicates that few recognized scholars familiar with the objectives of the McDougal-Lasswell system make the terminological criticism.

to multiply 867 by 493 using Roman numerals.<sup>15</sup> Without most of the specialized terminology of the system it would be awkward if not impossible to achieve its objectives.

A second criticism is that the system somehow depends on a particular value orientation which may or may not be shared by others and that it is not useful if one has a different value orientation or is concerned with reconciling competing values (between, for example, communist and non-communist states). This criticism seems to be triggered principally by a misunderstanding of two features of the system: "value analysis" and the insistence on policy clarification as a necessary task in decision.<sup>16</sup> Perhaps also it reflects the disagreement of some critics with McDougal's position on such major public order issues as the lawfulness of the hydrogen bomb tests.

This second criticism is also unwarranted. "Value analysis" is an analytic tool for exploration of context. The eight current value headings have proven useful for systematic research. They do not carry any "value" overtones for decision. The emphasis on policy clarification as a necessary task in decision does of course result in policy choice. But the policy choices are explicitly and candidly revealed as distinguished from the inevitable policy choices which may go unrevealed under other methodologies. Moreover the policy plugged into the system is largely independent of the system. The analytic tools of the system will, like a computer, function equally well should someone postulate a public order of human indignity rather than the public order of human dignity espoused by McDougal and Lasswell. Policy choices are inevitable in any decision process; the great advantage of the system is precisely its ability to focus attention on the necessity of goal definition and to make final choices explicit for appraisal by others. Its use does not guarantee that equally talented and sincere scholars would not disagree, for ex-

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<sup>15</sup> See generally M. McLuhan, *UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN* (1964).

<sup>16</sup> Perhaps the value criticism also stems from the illusion that policy-oriented or even analytic systems can be tools for automatic decision. Arthur Corbin points out that the same criticism plagued Wesley Hohfeld's analytic system of "fundamental legal conceptions."

Hohfeld's articles disturbed the mental complacency of professors of law as well as of students. This was due not only to the fact that mastery of his work is a severe disciplinary process, but also to the fact that they got the erroneous impression that his analysis of concepts and terms was offered as a method of determining social and legal policy . . . .

A. Corbin, *Foreword to W. HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS* xi (1964).



ample, on such issues as the "admission" of Communist China to the United Nations.<sup>17</sup>

McDougal and Lasswell, however, are no mere technicians fashioning a series of neutral tools for legal analysis. On the contrary, they insist that all law be investigated in terms of value production and allocation. Their "policy-oriented jurisprudence" has perhaps gone further than any other in recommending values and in developing techniques for dealing with values. As a starting point they insist that goal values be systematically clarified whatever their derivation. This emphasis on explicit value clarification is poles apart from the haphazard "balancing" or "absolutist" position which is the usual extent of the law student's exposure to value problems. And since McDougal and Lasswell go further in explicit clarification of their own values they are much more vulnerable to criticism than those who obscure their own value choices in the "phonograph" theory of the law. The inevitability of value choice in decision and the desirability of decision makers and scholars making their value choices explicit is a major theme of the Swedish political economist Gunnar Myrdal and many other of the best thinkers of our age.<sup>18</sup>

In dealing with policy clarification McDougal and Lasswell also recommend that the more reliable technique is for reference to proceed from highest level generalization to more concrete statement, and not *vice versa*. For example, their own highest level abstraction "human dignity" is given more specific policy content at lower levels of abstraction when dealing with particular problems in context. Reasonable men can, of course, still disagree at lower levels of abstraction about, for example, whether the interdiction attacks on facilities in North Viet Nam may ultimately minimize or increase coercive use of the military instrument, but whatever one's persuasion the policy justification for or

<sup>17</sup> Compare L. CHEN & H. LASSWELL, FORMOSA, CHINA, AND THE UNITED NATIONS (1967), with McDougal & Goodman, *Chinese Participation in the United Nations*, 60 AM. J. INT'L L. 671 (1966).

<sup>18</sup> Gunnar Myrdal, the Swedish political economist, places great importance on the idea that social scientists should work from explicit value premises; that is to say, a person should set out his personal preferences and predilections as clearly as possible when dealing with social data. By so doing, he will enable one who reads his exposition to evaluate what he says in the light of those preferences. It is only in this way, according to Myrdal, that any manageability and real intelligibility may be attained in handling social phenomena.

Miller & Howell, *The Myth of Neutrality In Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 669 (1960).

against particular action is not most usefully made in terms of the highest level abstractions "human dignity" or "morality."

At a time when some social scientists are disclaiming any ability to deal with values it seems particularly important for legal scholars, operating in an essentially normative discipline, to sharpen their skills for dealing with values. Value technique, meaning a technique for clarification and justification of value choice, is an area of jurisprudence which is barely embryonic today but which seems destined to become an area of major concern.

A variation of the criticism that the system somehow depends on a particular value orientation is the criticism that the system facilitates chauvinistic manipulation of the law. This criticism has sometimes been hinted at by international law scholars who disagree with the conclusions of McDougal or other writers using the system on major public order issues such as Viet Nam or the Dominican Republic.<sup>19</sup> The fatal flaw in the criticism is its concealed premise that rules automatically decide cases and that a positivist or analytic approach somehow mystically avoids the necessity of choice. Anyone with experience with the kinds of legal norms involved in controversies such as Viet Nam, or the Cuban missile crisis, or the Arab-Israeli war, however, realizes that rules often provide only minimal guidance. Among other problems, they may be at a high level of abstraction, or normatively ambiguous, or travel in complementary opposites.<sup>20</sup> For example, aggression is imper-

<sup>19</sup> See, e.g., Anderson, *A Critique of Professor Myres S. McDougal's Doctrine of Interpretation By Major Purposes*, 57 AM. J. INT'L L. 378, 382 (1963); Wright, *Review of Studies In World Public Order*, 39 U. DET. L. J. 145, 149 (1961). For a recent exchange raising this charge see Friedmann, *Law and Politics in the Vietnamese War: A Comment*, 61 AM. J. INT'L L. 776 (1967); Moore, *Law and Politics in the Vietnamese War: A Response to Professor Friedmann*, 61 AM. J. INT'L L. 1039, 1050-52 (1967).

<sup>20</sup> The notions of "complementarity" and "normative ambiguity" in legal rules are other insights of the McDougal-Lasswell approach. "Complementarity" is a refined version of the legal realists' observation that frequently legal norms travel in pairs of complementary opposites such as self-defense-aggression or the famous Karl Llewellyn arrangement of the canons of construction in opposing columns labeled "thrust" and "parry." For example, "THRUST: Statutes in derogation of the common law will not be extended by construction; PARRY: Such acts will be liberally construed if their nature is remedial." K. LLEWELLYN, *THE COMMON LAW TRADITION* 522 (1960). "Normative ambiguity" refers to the observation that many key legal terms are used ambiguously to refer both to operative facts and to purported legal consequences. One example is the term "delivery" in the law of gifts which is sometimes used to refer to some operative feature of the real-world such as manual transfer of an object and sometimes is used as a conclusory legal term to indicate that a gift will be upheld despite lack of manual transfer. Another form of normative ambiguity is the use of a

missible under article 2(4) of the Charter; collective defense is permissible under article 51 of the Charter. But these complimentary standards contain no external referent as to how a particular use of force is to be characterized.

Moreover, international law, perhaps more than most law, is limited by gaps and tears in the legal fabric and even by controversies concerning identification of "controlling" legal norms. In a system with these characteristics an approach which relies on "black letter rules," without consideration of context or function, itself carries the greater risk of manipulation. Such reliance on asserted positive law carries with it even greater chance of obfuscation in that no hint of the necessity of choice among rules or policies need be revealed. That is, the footwork of the positivist approach is largely covert rather than overt. This is particularly dangerous for the lay observer who tends to be more legalistic than the most black letter of lawyers. The so-called "Lawyers Committee Memorandum" condemning United States assistance in Viet Nam as illegal by invocation of a series of asserted "rules of international law" (an example of one of these "rules" is the assertion that it is illegal to assist South Viet Nam under article 51 of the Charter because Viet Nam is not a member of the United Nations) is a prime example of the dangers of manipulation present in a black letter approach.<sup>21</sup> Policy-oriented jurisprudence, on the other hand, provides the intellectual tools to focus attention on the competing norms, reveal the choice characteristics of the system, separate expectations about law from personal policy preference, and explicitly reveal the preference of the writer. Both positivist and policy-oriented systems can be used to accomplish chauvinistic aims, as can any system of jurisprudence. It is naive to believe that the use of any particular system will inevitably result in

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term such as "intervention" to refer simultaneously to what is, what will be and what ought to be. Much of the trouble the international lawyer experiences in trying to define "intervention" arises from this ambiguity. The antidote is careful separation of the intellectual tasks necessary for decision. Public international law issues suffer from an abundance of both complementarity and normative ambiguity. Much of the trouble the international lawyer experiences in trying to define "intervention" arises from the same difficulty. Public international law issues suffer from an abundance of both complementarity and normative ambiguity.

For a somewhat related and extremely useful insight into the choice points in judicial decision making see Allen & Caldwell, *Modern Logic and Judicial Decision Making: A Sketch of One View*, 28 LAW & CONTEMP. PROB. 213 (1963).

<sup>21</sup> *Memorandum of Law of the Lawyers Committee on American Policy Toward Vietnam*, 112 CONG. REC. 2552 (daily ed., Feb. 9, 1966).

the one true result. And it is equally naive to believe that all approaches offer the same possibilities of intellectual clarification.<sup>22</sup>

A third criticism sometimes leveled at the system is that it is uneconomic to apply these admittedly sophisticated techniques to practical decisions that must be made by lawyers and judges in the everyday operation of the legal system. The answer is that the system provides a series of precise, analytical tools for analysis of legal and jurisprudential problems. Just as it may be uneconomic to use a computer to make out one's weekly grocery list and highly efficient to use it to make out a large payroll, so too the nature of the task will dictate when the system or sub-skills of policy-oriented jurisprudence may be efficiently used. No one, however, would downgrade the computer because it is not a useful device for the task of making the weekly grocery list.

With respect to some legal tasks, of course it will not be economic to use the Lasswell-McDougal system. One of the common errors of the neophyte is that he is tempted to apply the system in ways and on tasks to which it is uneconomic. Another more annoying error is the use of the meta-language in attempting to communicate with audiences who have had no exposure to it. The system and its meta-language are rigorous; their use requires a systematic analysis which may entail some repetition in the final product and which is always achieved at a cost in time and a sacrifice in wide communication. Sensitivity to function is the only guide to profitable use. The system itself subsumes this answer to the third criticism in what McDougal and Lasswell term the principle of economy.<sup>23</sup>

A variation of the third criticism asks whether the meta-linguistic structure and the elaborate systematic method of inquiry is really worth it in any context. Or sometimes it is said that interdisciplinary work is fine in theory, but in practice it just does not work. The answer from one who has spent his share of confused hours becoming familiar with

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<sup>22</sup> Professor Lissitzyn hit the nail on the head when he wrote:

Professor McDougal frequently stresses the fact that norms usually come in pairs of "complementary opposites." Decision-makers who desire to make rational and lawful decisions will be helped rather than hindered in their task by the clarification of the nature and function of law. There is always, of course, some danger of "flexible" interpretations of the law being misused as ostensible justification for socially undesirable conduct, but this danger is diminished rather than increased by a wider understanding of the factors and processes involved."

Lissitzyn, *Review of Law and Minimum World Public Order*, 76 HARV. L. REV. 668, 670 (1963). See also Dillard, *Combined Review of Four Books in the System*, 40 VA. Q. REV. 629 (1964), reprinted in 19 VA. READING GUIDE 56 (1964); Falk, *Review of Law and Minimum World Public Order*, 8 NATURAL L.F. 171, 175-77 (1963).

<sup>23</sup> See note 33 *infra*.

the system is that there is simply no question of its *great* utility in legal problem solving and in clarifying jurisprudential issues. It is no accident that the books utilizing the system such as *Law and Minimum World Public Order*, *The Public Order of the Oceans*, *Law and Public Order in Space*, and *The Interpretation of Agreements*<sup>24</sup> provide substantially greater insight into the range of problems within their compass than the usual treatises. One has but to search the literature on use of force or treaty interpretation or the admission of Communist China to the United Nations to realize how great the contribution of the works using the system really is. The comment heard so often, that the books are great but they would be better if they did not use an abstruse language, is understandable but naive. For it is in large measure the use of the language which enables the thorough analysis of problems and the outstanding issue and policy clarification achieved.

As examples of the utility of the system for clarifying major areas of concern, it may be useful to examine the application of the system to two major problems of international law: first, by a brief sketch of the McDougal-Feliciano approach to the determination of "aggression," and second, by an analysis of the recent McDougal, Lasswell, Miller book dealing with the interpretation of international agreements. Both problems are of fundamental and longstanding concern to international law theorists, and their clarification has been significantly aided by use of the McDougal-Lasswell system. In fact, the impact of the McDougal-Lasswell jurisprudence has been particularly heavy in international law, an area in which McDougal and his associates have done most of their recent writings. As an aid in understanding the system, the reader is urged to refer to the *Interpretation Of Agreements* book in conjunction with the analysis of the research techniques employed.

Major use of force is prohibited as an instrument of national policy by the United Nations Charter.<sup>25</sup> On the other hand, defense against aggression (or in the language of Article 51 "armed attack") is permissible at least until the Security Council takes action. The problem of appraising lawfulness of the use of force, then, is largely one of separating aggression from defense. Traditional approaches to this problem have either attempted to define a list of hostile acts, any one of which would constitute aggression, or have declared that little could be said in the absence of the ad hoc circumstances of a particular case. Both approaches

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<sup>24</sup> See the books listed in note 3 *supra*.

<sup>25</sup> To what extent does this statement refer to both patterns of "authority" and patterns of "control" in the McDougal meta-language?

have proven either illusory or of little help in making concrete determinations. In their book *Law and Minimum World Public Order*,<sup>26</sup> McDougal and Feliciano offer a more meaningful method of analysis: first, clarification of the community goals at stake, principally avoidance of intense coercion as an instrument of international change—that is, avoidance of intense coercion for purposes of value extension rather than value conservation; and second, the orderly examination of context with reference to the characteristics of the participants, the nature of the objectives (extension or conservation of values and the degree of consequentiality of the values protected), the modalities of response, the conditions of use of force (reasonable expectations of necessity), and the effects of the use of force (the degree of intensity and scope of the responding coercion and the necessity of its use to achieve permissible objectives). This approach provides a means of operationalizing the community policy against aggression by reference to more specific community policies relevant to each feature of the process of coercion. Though the McDougal-Feliciano method of analysis does not guarantee instant agreement about aggression-defense characterizations, it does offer both greater realism than the definitional approach and greater guidance than the ad hoc approach. To test the potentiality of the various methods of analysis, try analyzing the recent Arab-Israeli war in the “who did what to whom first” format of the 1954 Draft Resolution on the Definition of Aggression<sup>27</sup> and then in the McDougal-Feliciano policy-oriented contextual framework.

The *Interpretation of Agreements and World Public Order*, written by McDougal, Lasswell and James Miller, is aimed primarily at another major problem in international law. The book sets forth a viable theory of interpretation which surpasses the sensitivity of the legal realists both in describing the system as it operates and in making sound positive recommendations for practical guidelines to interpretation. It also graphically demonstrates the benefits from real interdisciplinary collaboration, for an eminent legal scholar, an outstanding political scientist, and a talented young psychologist were capable of integrating their specialized skills in search of a solution to a particularly

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<sup>26</sup> “Minimum public order” is a meta-linguistic term of art used to denote absence of high order coercion. The concern is with at least a minimum stability of expectations of freedom from non-authoritative use of force as a prerequisite to maximum shaping and sharing of all public order values.

<sup>27</sup> Reprinted in L. SOHN, BASIC DOCUMENTS OF THE UNITED NATIONS 106-08 (2d ed. 1968).

prickly legal problem. But the *Interpretation of Agreements* is not only a practical book with practical suggestions about an important problem of international law and a practical demonstration of interdisciplinary work; it also is a book with enormous jurisprudential significance that far transcends the interpretation of international agreements. The basic approach conceives the task of interpreting international agreements and prescriptions as a problem in communication, and lends itself with some adaptation to the interpretation of prescriptive communications at all levels of social organization, including constitutions, statutes, case holdings, contracts, wills and even something as elusive as custom.

Traditional debate about interpretation of agreements has tended to polarize around the textualists, who would substantially restrict the decision-maker as to the sources he might legitimately look to in the process of interpretation, and the extreme realists, who deny that very much useful can be said about the process of interpretation.<sup>28</sup> Typically the extreme textualists emphasize the "plain and natural meaning rule," argue that interpretation is largely automatic, and deny the legitimacy of reliance on *travaux préparatoires* as an aid in interpretation. Typically the extreme realists denigrate the canons of construction by arguing that they travel in pairs of complementary opposites which serve only a rationalizing function. The McDougal, Lasswell, Miller approach effectively transcends the limited frames of reference of both schools by approaching the problem of interpretation primarily as a problem in communication and by using the analytic tools and interdisciplinary findings which are the hallmark of the McDougal-Lasswell jurisprudence.

The *Interpretation of Agreements* follows the general outline of decision tasks used by the authors in other studies, except that in the interest of economy the past trends in decision chapters are organized around the features of the process of agreement and decision rather than by types of disputes (claims). Extended use of phase analysis is made both to analyze the processes of agreement and decision, and to recommend principles of content appropriate to each of the phases of the process of agreement.

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<sup>28</sup> Though the generalization about these polar camps is useful, as Ronald Dworkin points out with respect to the much maligned "mechanical jurisprude," it would probably be difficult "to cage and exhibit" a pure representative of either camp. See Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 16 (1967).

For an excellent discussion on the merits see P. Liacouras, *The International Court of Justice and Development of Useful "Rules of Interpretation" in the Process of Treaty Interpretation*, 1965 PROCEEDINGS AM. SOC. INT'L L. 161.

In the first chapter the authors make a systematic contextual analysis of the process of agreement, claim and decision which encompasses all phases of the processes by which parties reach agreement, and by which their claims about agreements are presented to and decided by authorized community decision makers. The purpose of this chapter is to demonstrate the great range of features which are relevant to policy realization in the process of interpretation and application. In locating the problem of interpretation in its broadest context the authors effectively debunk the automatic interpretation school and demonstrate that some interpretation is always necessary.

Chapter two makes explicit the goals and strategies of interpretation. The primary or initial goal is postulated as the ascertainment of the shared expectations of the parties in order to give effect to genuine agreement. Where the search for genuine shared expectation fails because of gaps, contradictions or ambiguities in the agreement, the authors recommend as a secondary goal that the agreement be "supplemented" by reference to basic policies of the community and basic objectives of the parties. And as a tertiary goal, in those few cases in which the genuine shared expectations of the parties are subversive of basic community policies, the authors recommend that the decision-maker "police" the agreement by application of overriding community policies. An example of policing, by analogy to domestic contract law, would be the refusal to enforce contracts for prostitution, no matter how clearly spelled out, in deference to an overriding community policy against prostitution.

This tripartite goal, consisting of first a disciplined search for genuine shared expectations using the findings of modern communications theory, then the "supplementing" of gaps or contradictions by reference to the parties' purposes and community policies, and finally "policing" the agreement if necessary by application of any overriding community policies, is a simple but profound insight into legal process. Because the starting point in many legal problems is ascertainment of intent or relied-upon expectation, this tripartite division is useful in a number of contexts. For example, most of the material taught in the course in trusts and estates, to use a "private law" course with which I am particularly familiar, could profitably be located within a related framework. Much of the content of the course is concerned with effectuating the expectations of a donor with regard to the transmission of wealth at his death. The wills acts, the statute of frauds, and to a substantial degree even the intestate succession laws are intended to give effect to genuine expect-



tations. On the other hand, such problems as "death without issue," the problem of implied survivorship, and the doctrine of worthier title are, to the extent that they perform any real function, largely intended to serve the secondary goal of "supplementing" gaps and contradictions. And finally, such rules as the statutory forced share, the Rule in Shelley's case, and the rule against perpetuities are invoked as "policing" rules which override intent presumably because of some more or less pressing community policy. The use of such a tripartite goal structure impels attention to the function, or lack thereof, of these and related rules and can materially assist in appraisal of the efficacy of the process for transmission of property on death. Using such a framework to organize our thoughts on the goals being served by all these rules would produce greater insight into the causes of the popular dissatisfaction with the administration of estates that enables a form book to become a best seller.<sup>29</sup>

McDougal, Lasswell and Miller also recommend a detailed and comprehensive strategy of interpretation for implementation of their goals. Their recommendation includes principles of both content and procedure. Principles of content are defined as recommendations concerning the subject matter which the decision maker should take into account in interpreting an agreement. Principles of procedure are defined as recommendations as to how the decision-maker should go about taking them into account. The most basic of these principles of content and procedure is the contextual principle that the decision-maker utilize the context as a whole as a basis for ascertaining shared expectations and "that he use procedures calculated to bring all relevant content to the focus of his attention in the order best adapted to exhibiting relevance."<sup>30</sup> This principle stems from the diffuseness of the process of communication itself which makes it dangerous arbitrarily to weight any one feature of the context prior to examination of the context as a whole. More detailed principles of content are then formulated for each of the phases of the processes of agreement and decision. For example,

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<sup>29</sup> See N. DACEY, *HOW TO AVOID PROBATE* (1965), reviewed in 46 BOST. L. REV. 417 (1966). The significance of this book for the legal profession is that if a rather dull form book can become a best seller it would seem to be proof positive that there is widespread dissatisfaction with the legal processes for transmission of wealth on death. The causes of this dissatisfaction rather than Dacey's book might profitably be studied. The success of the book also suggests the need for institutions to provide continuing appraisal of the efficacy of legal systems. See Lasswell, *supra* note 9.

<sup>30</sup> M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 65 (1967).

"the principle of the distinctive phase of agreement" is postulated as: "When sources of equal credibility give contradictory results concerning the expectations that prevailed at the preoutcome and outcome phases of the agreement process, assign priority to the expectations shared at the outcome phase."<sup>31</sup> This principle of content is based on the relevance of the outcome phase of the process of agreement for achieving the goals of interpretation. And similarly "the principle of explicit rationality" is postulated as: "For the guidance of future agreement-makers and interpreters, as well as for their own guidance and self-knowledge, decision-makers should make as explicit as possible the principles of interpretation and application which influence their decision."<sup>32</sup> This principle of content is based on the relevance of the strategies of the process of decision concerned with interpreting and applying agreements. An example of a principle of procedure is the "historical operation." Decision makers undertaking "the historical operation" are urged to "consider the focal agreement in the light of the context by moving attention back to the period of negotiating the agreement and forward to date."<sup>33</sup>

Interpretation buffs will be familiar with Karl Llewellyn's famous arrangement of the traditional canons of construction in pairs of opposites labeled "thrust and parry."<sup>34</sup> The McDougal, Lasswell, Miller principles of content and procedure are no mere canons of construction in this traditional sense. They offer instead a series of recommendations about what is important for the interpreter to look at, based on every phase of the process of agreement, the negotiation (preoutcome), the agreement (outcome), and subsequent conduct (postoutcome), and based on every phase of the process of decision. They also offer a series of recommendations about how the decision-maker should most efficiently go about serving community goals in the interpretation and application of the agreement. These recommendations are soundly rooted in communication theory, semantics, propositional calculus, and

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<sup>31</sup> *Id.* at 58.

<sup>32</sup> *Id.* at 64.

<sup>33</sup> *Id.* at 67. One of the principles of procedure which is particularly worth noting is "the operation of adjusting effort to importance." This is described by the authors as: "Adjust the time and facilities devoted to the act of interpretation according to the importance of the values at stake in the controversy and to community policies." *Id.* at 65. This principle carries its own answer to those who argue that the systematic methods of interpretation set out require the decision-maker to make an uneconomic exertion.

<sup>34</sup> K. LLEWELLYN, *THE COMMON LAW TRADITION, DECIDING APPEALS* 521-35 (1960). See note 20 *supra*.

other relevant information from the social sciences. As guidelines for interpretation they offer a whole new world to the episodic insights of the traditional canons of construction or to the nihilistic "realism" which despaired of any interpretative guides.

Chapters one and two, defining the problem of interpretation and clarifying the basic goals and strategies of interpretation, contain the basic conceptual framework and recommendations of the authors. Chapters three through five contain what would traditionally be the "meat" of the subject. These chapters offer a panorama of the past practices and trends in interpretation, pinpoint each of the existing rules and canons on a larger canvas, and discuss the relevance (or lack of relevance) of each. They also present an exhaustive and scholarly analysis of the existing case law and the writings of publicists and contain a timely and forceful critique of the recent International Law Commission Draft Articles on Treaty Interpretation which they criticize for retrogressing to textuality rather than taking a more balanced approach emphasizing all relevant features of the process of agreement in a search for genuine shared expectations of the parties.<sup>35</sup> A final chapter completes the intellectual tasks for decision with a comprehensive summation of the recommendations of the authors.

The tripartite goal structure postulated for the interpretation and application of agreements<sup>36</sup> and the materials dealing with the lexical and logical operations bear close scrutiny.<sup>37</sup> This latter material relies on modern social science findings in semantics and syntactics which demonstrate an impressive utility for interpretation, again with a great promise of carry-over value to many other aspects of legal process. Much of this discussion of syntactics builds on the contributions of Laymen Allen in the application of modern logic to legal problems.<sup>38</sup>

The *Interpretation of International Agreements* is the most recent major application of the McDougal-Lasswell system of jurisprudence. It is an excellent example of the results such a system can achieve<sup>39</sup> and

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<sup>35</sup> M. McDUGAL, H. LASSWELL & J. MILLER, *supra* note 30, at 88-90. See also McDougal, *The International Law Commission's Draft Articles Upon Interpretation: Textuality Redivivus*, 61 AM. J. INT'L L. 992 (1967).

<sup>36</sup> M. McDUGAL, H. LASSWELL & J. MILLER, *supra* note 30, at 39-45.

<sup>37</sup> *Id.* at 67-73, 319-43.

<sup>38</sup> See, e.g., Allen, *Some Uses of Symbolic Logic in Law Practice*, 1962 M.U.L.L. 119.

<sup>39</sup> For an almost immediate practical application of the INTERPRETATION OF INTERNATIONAL AGREEMENTS framework to a problem of great contemporary concern, see Hannon, *A Political Settlement For Vietnam: The 1954 Geneva Conference and Its Current Implications*, 8 VA. J. INT'L L. 4 (1967).

demonstrates again the system's extraordinary capacity for intellectual clarification. It should be clear by now, however, that before one can obtain maximum benefit from the system, he must dig in and obtain the necessary background. The purpose of this necessarily over-simplified introduction is to stimulate more digging and to suggest that the jurisprudential yield from such digging is among the highest in legal education today.