

FROM INTERNATIONAL LAW TO WORLD PUBLIC ORDER:  
WHO STUDIES WHAT, HOW, WHY\*

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I am not here with a system . . . of social or legal or political philosophy wherewith to regenerate International Law. Indeed, I doubt if we may expect one to spring into existence at once . . . . But it is something to recognize the task that is before us, to perceive the inadequacy of the theories and methods of the last century, and wherein and why they are inadequate, and to ask ourselves what are likely to be the elements of a new theory of International Law and whence a more adequate International Law is to derive its materials.

ROSCOE POUND<sup>1</sup>

The study of international law, like all jurisprudence, necessarily proceeds on the basis of a broad set of assumptions about purpose, scope, methods, and standards of performance. Yet these assumptions, and the difficult issues behind them, are seldom discussed by those concerned with international law. It is

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1. Pound, *The Part of Philosophy in International Law*, in PROC. SIXTH INT'L CONG. PHIL. 372, 378 (E. Brightman ed. 1927).

therefore useful to inquire whether the assumptions that govern international legal studies are adequate under present circumstances. Are we somehow condemned simply to repeat or rearrange the ideas of our predecessors, or is it possible to "progress" beyond them, to "distill" the best thinking of earlier periods and to adapt and improve upon it in confronting the problems of our own times? If so, by what process is such development accomplished? According to what standards should we proceed?

In a journal of international law founded in the Yale Law School it is appropriate to ask whether and how the work of Harold Lasswell, Myres McDougal, and their co-workers -- often referred to as the "Yale School of International Law" -- complements the ideas of their predecessors. Does their "policy-oriented approach" provide, as Pound put it, "the elements of a new theory of International Law"? Much of the criticism of the Lasswell-McDougal approach derives from misunderstanding of its purposes and of the way its distinctive form develops from and advances those purposes. The perspective of this article may help to clarify the nature of their contribution. This perspective has to do less with the substantive answers that their approach has given to basic issues of jurisprudence than with the way in which the issues themselves have been framed. To recognize the significance of this contribution, consideration should first be given to the legacy of theoretical and methodological confusion to which Lasswell and McDougal are responding.

## I. CONFUSION OVER FUNDAMENTALS: THE UNCERTAIN HERITAGE

### A. *Pre-World War I: A Flight from Theorizing*

Early American writers on international law were often outspoken in their criticism of the imprecision and lack of agreement in international legal studies about basic concepts and premises. Chancellor Kent, for example, in his lectures of 1823 on international law, complained that:

[T]he want of a clear and precise definition of its precepts, and a recognized authoritative classification of its various parts, are serious lets and hindrances to a proper appreciation of it as a science.... [The student of international law] finds ... to his surprise, that the very sphere and

scope, the foundation, the elements, and the evidence of the science are disputed points, and that in these preliminaries the highest authorities differ.<sup>2</sup>

Nearly a century later John Chipman Gray could still suggest that "on no subject of human interest, except theology, has there been so much loose writing and nebulous speculation as on international law."<sup>3</sup> While much attention was given in the literature to the substantive rules of international law, theoretical support for the idea that such rules "bound" nation-states was seldom offered by American writers.

Likewise, methodology--the study of various techniques of inquiry and of the reasons for choosing some methods over others--until recently has not been a major concern of international lawyers in this country. Interest in methodology was particularly lacking before World War I, the formative period of American international law. For example, during the early years of the American Society of International Law, from 1906 until after the War, its *Journal* and *Proceedings* were virtually devoid of general discussions about the scope and purpose of the discipline, the major functions to be performed by those writers associated with it, the procedures to be followed in research, or the theoretical basis for widely-used concepts and terminology.<sup>4</sup>

Even the First World War, despite its impact on the substance of certain branches of international law,<sup>5</sup> did little to change the basic methods by which they were studied. The general presumption continued to be that

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2. KENT'S COMMENTARY ON INTERNATIONAL LAW 3-4 (J. Abdy ed. 1866).

3. J. GRAY, THE NATURE AND SOURCES OF THE LAW 122 (1909).

4. One important exception to this generalization was an essay written by a European jurist. The essay, however, seems to have generated little subsequent comment. See Oppenheim, *The Science of International Law*, 2 AM. J. INT'L L. 310 (1908). See also L. OPPENHEIM, THE FUTURE OF INTERNATIONAL LAW ch. 4 (1921).

5. See 1 & 2 J. GARNER, INTERNATIONAL LAW AND THE WORLD WAR (1920).

international legal studies were primarily for determining and expounding "the body of rules accepted by the general community of nations as defining their rights and the means of procedure by which those rights may be protected or violations of them redressed."<sup>6</sup> These were the words of Professor Charles G. Fenwick in a widely-used text on the subject. Fenwick acknowledged a separate study of "the underlying conceptions of international law" which he called "international jurisprudence," but he did not suggest how that study should be organized or how it was related to the "science of international law"--the explicit focus of his own treatise.<sup>7</sup>

It was customary in this early period to point to Hugo Grotius as the founder of a modern "science" of international law.<sup>8</sup> While there was truth in that notion, since Grotius and his successors had established a jurisprudential standard that strongly influenced most subsequent writing, it is also likely that few international lawyers in this country carefully assessed the adequacy and relevance of Grotius' approach. An exception was John Bassett Moore, who noted that the prestige of Grotius was often exaggerated:

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6. C. FENWICK, INTERNATIONAL LAW 34 (1924).

7. *Id.*

8. Deference to Grotius was common among international lawyers on both sides of the Atlantic. *See, e.g.*, T. WALKER, THE SCIENCE OF INTERNATIONAL LAW 91 (1893):

A Science of International Law of today must be a science of Territorial Sovereignty . . . .

It was this science which the Peace of Westphalia made realisable; and it was this science that Grotius expounded.

Grotius' major work was of course his DE JURE BELLI ET PACIS (1625). The significance of the work of Grotius has been assessed in A. NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS (1947); W. SCHIFFER, THE LEGAL COMMUNITY OF MANKIND (1954); C. VAN VOLLENHOVEN, THE THREE STAGES IN THE EVOLUTION OF THE LAW OF NATIONS (1919). *See also* notes 60-95 *infra*.

The popular supposition that international law, as we now have it, originated with Grotius...is due to the circumstances that his treatise was exceptionally clear, comprehensive and systematic, and for that reason formed a landmark in the development of the science; but if one will take the trouble, as few now do, to examine the pages of Grotius, it will be found not only that he drew his inspiration and his opinions largely from earlier times and writers, but also that some of his fundamental doctrines are now obsolete.<sup>9</sup>

Rather than engage in such reexamination, however, most American students of international law accepted their inheritance largely at face value, even where it departed drastically from Grotius. They preferred instead the exercise of identifying, classifying, interpreting, and applying the rules themselves. In this they shared the inclinations of their British counterparts, but diverged sharply from the jurists of Continental Europe.<sup>10</sup> Unlike the latter, who retained close academic ties to philosophy, Anglo-American legal study had become

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9. Moore, *Law and Organization*, 9 AM. POL. SCI. REV. 1 (1915) (presidential address to the American Political Science Association).

As Grotius himself wrote,

The undertaking seemed to me all the more worth while because, as I have said, no one has dealt with the subject-matter as a whole, and those who have treated portions of it have done so in a way to leave much to the labors of others.... [M]ost of them have done their work without system...

H. GROTIUS, ON THE LAW OF WAR AND PEACE (F. Kelsey trans. 1925), in the *Prolegomena*, at 22.

10. According to Nussbaum,

The divergence between the Anglo-American and the continental school of international law did not vanish during the period [1900-1937]; in its first decades it was perhaps more accentuated than in the nineteenth century.

A. NUSSBAUM, *supra* note 8, at 276.

"professionalized" in a way that discouraged theoretical speculation and methodology.<sup>11</sup> By the early twentieth century, legal study in the United States was dominated by the law schools, in whose hands the emphasis on professional practice institutionalized a conception of legal education that had little place for broader theorizing.<sup>12</sup>

B. *Competing Calls to Consensus: Kelsen vs. Pound*

During the interwar period two major approaches to revising the theoretical foundations of international law emerged. One was based upon the "Vienna School" of jurisprudence associated with the great

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11. The natural law philosophy of Grotius retained a much stronger hold upon Continental scholarship. As Roscoe Pound observed,

A just feeling that international law could not rest securely upon such a basis was behind English and American distrust of Continental speculative international law. English and Americans were right in demanding a better theory of international legal obligation. But they were wrong in believing that they could find it without the aid of philosophy. On the whole the Continental speculative writers were nearer the truth. Their error was in relying upon a philosophical system, the philosophy of the seventeenth and eighteenth centuries, rather than upon philosophy.

Pound, *Philosophical Theory and International Law*, 1 BIBLIOTHECA VISSERIANA 73, 83-84 (1923).

12. See Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968), reprinted in *NEW DIRECTIONS IN LEGAL EDUCATION* 331, 352 (H. Packer & T. Ehrlich eds. 1972).

A certain degree of theoretical attention was directed towards the concepts of sovereignty and equality in the aftermath of the First World War. But this speculation was largely of an abstract and traditional sort. See, e.g., E. DICKINSON, *THE EQUALITY OF STATES IN INTERNATIONAL LAW* (1920); Borchard, *Political Theory and International Law*, in *A HISTORY OF POLITICAL THEORIES: RECENT TIMES* 120 (C. Merriam & H. Barnes eds. 1924).

Austrian scholar, Hans Kelsen.<sup>13</sup> Kelsen's "pure theory of law" presented international law as a formal system of norms rigorously distinguished from social and political influences. He sought a "science" of law which would preserve the "essential," juristic qualities of international law, and criticized those who imported "political" considerations into assessments of legality.<sup>14</sup> As one commentator has written of Kelsen: "[O]ne of his main objectives has consistently been to defend the 'purity' of the Pure Theory of Law against two areas of methodological syncretism into which legal analysis has often been drawn: psychology and sociology on the one hand and ethics and politics on the other."<sup>15</sup> Kelsen's influence was originally less significant in this country than in Europe, but his own immigration to the United States, and that of several of his best students, eventually led to an important following here.<sup>16</sup> Even the leader of the other major stream of jurisprudential revision, Dean Roscoe Pound of Harvard,

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13. See Kunz, *The Vienna School and International Law*, 11 N.Y.U.L.Q. REV. 370 (1934).

14. It is called a "pure" theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law. Its aim is to free the science of law from alien elements. This is the methodological basis of the theory.

H. Kelsen, *THE PURE THEORY OF LAW* 1 (M. Knight trans. 1967). See also H. Kelsen, *PRINCIPLES OF INTERNATIONAL LAW* (1966).

15. Ebenstein, *The Pure Theory of Law: Demythologizing Legal Thought*, 59 CALIF. L. REV. 617, 650 (1971). Professor Leo Gross emphasized the difference between Kelsen and the policy-oriented approach:

Nothing could have been more abhorrent to him than the policy-science approach to international law which disguises policy in a pseudoscientific apparatus of procedures for determining what the law is.

Gross, *Hans Kelsen*, 67 AM. J. INT'L L. 491, 499 (1973).

16. Gross, *supra* note 15, *passim*.

called Kelsen "unquestionably the leading jurist of the time."<sup>17</sup>

Nevertheless, Pound's efforts were precisely in the direction opposed so vigorously by Kelsen and the positivists of the Vienna School. In a lecture at the University of Leyden in 1922, Pound called for

a legal philosophy that shall take account of the social psychology, the economics, the sociology as well as the law and politics of today, that shall enable international law to take in what it requires from without, that shall give us a functional critique of international law in terms of social ends, not an analytical critique in terms of itself, and above all that shall conceive of the legal order as a process and not as a condition.<sup>18</sup>

The "instrumentalist thinking" then popular in social science suggested to him a theory of international law that recognized the "great task of social engineering . . . whereby the conflicting or overlapping interests and claims and demands of the peoples of this crowded world may be secured or satisfied so far as may be with a minimum of friction and a minimum of waste."<sup>19</sup>

Drawing upon the example of Grotius' jurisprudential breakthrough in the seventeenth century, Pound challenged international lawyers to develop a creative, philosophical juristic thought, analogous to that of Grotius and his school in that it would apply creative philosophical ideas to set up a picture of what we may do and should do and would invite creative

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17. Pound, *Law and the Science of Law in Recent Theories*, 43 YALE L.J. 525, 532 (1934).

18. Pound, *supra* note 11, at 89. Pound's conception of a "sociological" jurisprudence had previously been set forth in American journals.

19. Pound, *supra* note 11, at 89.



juristic effort to shape existing legal institutions and to make new ones in that image.<sup>20</sup>

He was hardly alone in perceiving the gap between political needs and theoretical clarity. At the 1925 Conference of Teachers of International Law and Related Subjects, sponsored by the Carnegie Foundation,<sup>21</sup> Manley O. Hudson echoed Pound's assessment of the problem: "Isn't it obvious that we are in need of a re-statement of the basic conceptions of our international law...? We need to have done for the twentieth century the kind of job which Grotius did for the seventeenth century."<sup>22</sup>

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20. *Id.* at 75. See also Pound, *Grotius in the Science of Law*, 19 AM. J. INT'L L. 685 (1925); Pound, *The Part of Philosophy in International Law*, in PROC. SIXTH INT'L CONG. PHIL. 372 (E. Brightman ed. 1927); Pound, *Toward a New Jus Gentium*, in IDEOLOGICAL DIFFERENCES AND WORLD ORDER 1 (F. Northrop ed. 1949).

21. The Carnegie Endowment for International Peace sponsored seven conferences of this kind, usually in conjunction with the annual meeting of the American Society of International Law, in 1914, 1925, 1928, 1929, 1933, 1938, and 1941. The proceedings are a valuable source of information on the changing nature of the discipline in the United States.

22. Hudson, *Contemporary Development of International Law*, in SECOND CONFERENCE OF INTERNATIONAL LAW TEACHERS 83, 88 (1925), See also Hudson, *The Prospect for International Law in the Twentieth Century*, 10 CORNELL L. Q. 419 (1924). At the same conference Professor Charles G. Fenwick offered a similar diagnosis:

So our theories of international law are a most unsatisfactory combination of ideas borrowed from the natural law, which certainly had a place in their day, and, on the other hand, ideas representing the hard facts of international practice divorced from any critical attitude toward the justice or injustice of the facts.

Now, how shall we meet this situation? It seems to me highly desirable that we who are interested in the science of the subject should undertake a very careful study of the underlying principles of international law.

Fenwick, *The Reexamination and Restatement of the Fundamental Theories of International Law as a Means to More Effective Exposition as well as to Improvements in System and Content*, in *id.* at 65, 67.

But no such Grotius was soon to appear. In the same forum three years later, a panel examining the feasibility of a "functional approach" to international law saw little indication that a methodological revolution was imminent.<sup>23</sup> Philip C. Jessup offered some valuable observations on the resistance among his colleagues to such innovations:

Perhaps in international law the employment of the functional method faces obstacles greater than those which confront its utilization in private law. Against a scoffing and cynical lay world, the international lawyer has been intent upon emphasizing that rules of international law exist and are observed. If he succeeds in demonstrating that the international society is not lawless and that breaches of the law have not rendered it non-existent, he may be inclined to rest triumphant. The analysis of the rules against the actual background of the international society in all its phases may seem to offer a task of staggering proportions.<sup>24</sup>

In 1930, Quincy Wright found some indications that international lawyers were increasingly making use of the social sciences in their work.<sup>25</sup> He credited Pound with creating a renewed sensitivity in the profession to the importance of "juristic analyses built on the findings of most of the social sciences," but suggested that the greater part of this research was in the nature of reference rather than integration.<sup>26</sup> Wright insisted that international law should "relate itself [to the social sciences] not merely by using their data, but also

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23. THIRD CONFERENCE OF INTERNATIONAL LAW TEACHERS 125 (1928).

24. Jessup, *The Functional Approach As Applied to International Law*, in *id.* at 134, 136-37.

25. Q. WRIGHT, RESEARCH IN INTERNATIONAL LAW SINCE THE WAR 29 (1930).

26. *Id.* at 29-31.

by employing their methods and philosophy,"<sup>27</sup> and he concluded his survey with a strong plea for deeper inquiry into the theoretical foundations of the discipline.<sup>28</sup>

In the 1930's Pound's "sociological jurisprudence" was taken a step further by a group of law professors associated with the "legal realist" movement.<sup>29</sup> While this term was used to encompass a

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27. *Id.* at 30.

28. *Id.* at 36. The jurist, he wrote,  
 . . . should seek constantly to formulate the concepts and conclusions based on concrete evidence into larger concepts and systems. The law cannot live on philosophy alone, but it cannot live without philosophy. By envisaging the broadest tendencies of the times and moulding his systems toward them, the jurist may gradually shape the course of society itself.

Wright's sentiments were echoed by other American international lawyers from time to time, for example, by Edwin Dickinson:

The student or practitioner whose interest is primarily in the interpretation and application of the law of nations is often prone to dismiss fundamental concepts as a matter of mere theoretical importance. This is a serious mistake.... Concepts, in truth, are as much a part of the fabric of international jurisprudence as the intricate and confused records of international conduct. If they are no longer its warp and woof, they provide at least the necessary patterns.

Dickinson, *Changing Concepts and the Doctrine of Incorporation*, 26 AM. J. INT'L L. 239 (1932).

29. Excellent studies of the legal realist movement include W. RUMBLE, *AMERICAN LEGAL REALISM* (1968); K. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); Currie, *The Materials of Law Study*, 3 J. LEG. ED. 331, 341 (1951). For a discussion of the differences between realism and Pound's sociological jurisprudence, see White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America*, 58 VA. L. REV. 999 (1972).

large variety of viewpoints, the legal realists generally had in common a critical view of the American legal system, emphasizing the irrationality, inefficiency, or injustice of its operation. Most of them followed Pound's lead in looking to the social sciences for the methods and theories to reform legal education and the legal system.<sup>30</sup> Pound's own criticism of these realists was largely the result of what he perceived to be their excessive cynicism and misguided criticism of legal rules.<sup>31</sup>

In spite of all the furor created by legal realists in the discussion of domestic legal issues, the realists made little impression upon international law.<sup>32</sup> The one important exception was

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30. See, e.g., Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931); Arnold, *Institute Priests and Yale Observers--A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811 (1936).

31. Compare Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931), with Llewellyn, *Some Realism About Realism*, 44 HARV. L. REV. 1222 (1931) (reply to article by Pound).

32. McDougal assessed the contribution of the legal realists in his 1975 address to the American Branch of the International Law Association:

At one time I thought that the American realists had not contributed very much. There's only one book written from this guise published in St. Louis called *The Lawless Law of Nations*, by a man named Edmunds. It seemed to be very bad. Frederick Dunn's book on *The Protection of Nationals* comes a little closer and of course is a great book.

But as I reflected this morning I think American legal realism has had much greater impact on international law than is represented in any book. This is the notion of decision and of decision-making--the notion that completely dominates the thinking by political scientists today and is gradually seeping into law schools and international law writing and discussion.

McDougal, *Reflections on American Perspectives on International Law*, in CONDYNE LAW TAPES INL-1005 (1976).

a lawyer-turned-political scientist named Frederick Sherwood Dunn. Dunn's classic study in 1932 criticized traditional assumptions about international law in the general mold of Pound and the legal realists.<sup>33</sup> Having begun his career as a legal officer in the Department of State, and later coming in contact with several of the principal legal realists at Johns Hopkins University, Dunn was skeptical of the rules of international law and their manipulation by government officials.<sup>34</sup> He

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33. F. DUNN, *THE PROTECTION OF NATIONALS: A STUDY IN THE APPLICATION OF INTERNATIONAL LAW* (1932). *But see* the review by Borchard in 28 AM. J. INT'L L. 188 (1934). *See also* Dunn, *International Legislation*, 42 POL. SCI. Q. 571 (1927); Dunn, *International Law and Private Property Rights*, 28 COLUM. L. REV. 175 (1928).

Much of what is here said will not be new to those who are familiar with current trends of thought in the field of municipal law and its related social sciences. The author is fully sensible of the great debt he owes to the stimulating and adventurous thinkers who are remaking those fields, especially to such writers and jurists as Cook, Holmes, Stone, Cardozo, Pound, Oliphant, Yntema, Llewellyn, John Dickinson, Green, Underhill Moore, Michael, Arnold, Frankfurter and Powell; and to such philosophers as Dewey, Morris Cohen, Felix Cohen, Cassius Keyser, C.I. Lewis, Whitehead and Adler. What is new, perhaps, is the effort to apply to international problems some of the ideas germinating in other fields. Such an enterprise obviously cannot be accomplished in one work or by one person; it requires the help of many minds and many viewpoints.

F. DUNN, *supra*, at 10-11.

34. For an account of Dunn's career, see Fox, *Frederick Sherwood Dunn and the American Study of International Relations*, 15 WORLD POL. 1 (1962), reprinted in W. FOX, *THE AMERICAN STUDY OF INTERNATIONAL RELATIONS* 36 (1967).

Dunn was influenced at Johns Hopkins especially by Walter Wheeler Cook, a "legal realist," who had left Yale in 1928 to set up the short-lived Institute of Law. *See* Cook, *The Legal Method*, in FIFTH CONF. INT'L L. TEACHERS 50 (1933).

sought to restructure the study of international law to suggest the wide range of considerations that entered into decisions ostensibly "legal" in nature.<sup>35</sup>

Dunn's work reflected the same impatience with outdated philosophical assumptions that had motivated Pound's earlier critique of international legal studies. "[B]oth the political scientist and the jurist," wrote Dunn in 1927, "tend to endow the established postulates of their sciences with a rigidity and longevity that does not accord with the changing character of human institutions."<sup>36</sup> Like Pound, Dunn looked for a transformation of the discipline based upon the newest inter-disciplinary developments:  
[T]he present range of our experience seems no longer capable of being satisfactorily explained within the framework of conventional ways of thinking about the subject. When this happens there is only one thing to do, and that is to

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35. See F. DUNN, *supra* note 33, at 196. Dunn's ideas bear great resemblance to some of the later arguments of McDougal. McDougal knew Dunn well during the latter's tenure as Director of the Yale Institute of International Studies from 1943 to 1948.

36. Dunn, *supra* note 35, at 571.

This tendency is particularly apparent in such an abstract branch of the juristic science as that of international jurisprudence, where the vastness of the field of action and the novelty of the subject matter make the construction of a scientific system so enormously difficult a task. Most of the doctrines we possess in this field have come down to us from the infancy of the science, and their tenacity in the face of the rapidly changing character of the international community in the last century has brought about an extraordinary divergence between accepted theory and current practice.

push our inquiry back to the implicit assumptions underlying the established system of thought underlying the established system of thought on the subject, to bring these out into the light, to question their validity however "self-evident" they may seem, and to see if we cannot find alternative hypotheses which more adequately account for the whole range of our present knowledge or experience.<sup>37</sup>

But Dunn, like Pound before him, never carried through this effort.<sup>38</sup>

### C. *Post-World War II: More of the Same?*

In the wake of World War II, international lawyers turned once again to the task of rebuilding their discipline; but the emphasis was still on substantive principles of law rather than fundamental reform of legal theory. Philip Jessup, for example, in 1946 called for revisions of international law to give increased recognition to individuals and less to absolute state sovereignty.<sup>39</sup> Though he endorsed in passing Dunn's arguments regarding the need for a "challenge of underlying assumptions in international law and relations," Jessup was more

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37. F. DUNN, *supra* note 33, at 8.

38. Dunn did begin a brief, but largely unfruitful effort to explore the central problems of international relations in terms of the basic dilemma of "peaceful change"-- an attempt which faded with the outbreak of World War II. F. DUNN, *PEACEFUL CHANGE: A STUDY OF INTERNATIONAL PROCEDURES* (1937); Dunn, *Law and Peaceful Change*, 1944 *PROC. AM. SOC'Y INT'L L.* 60. See also E. CARR, *THE TWENTY YEARS' CRISIS, 1919-1939* ch. 13 (1939); Lauterpacht, *The Legal Aspect*, in *PEACEFUL CHANGE: AN INTERNATIONAL PROBLEM* 135 (C. Manning ed. 1937). Dunn's later writings were even less "policy-oriented". Dunn, *The Scope of International Relations*, 1 *WORLD POL.* 144 (1948); Dunn, *The Present Course of International Relations Research*, 2 *WORLD POL.* 81 (1949).

In 1939, Pound was still repeating his original call for a "thorough study of fundamentals" and for renewed attention to the philosophy of international law. Pound, *The Idea of Law in International Relations*, 1939 *PROCS. AM. SOC'Y INT'L L.* 10, 21-22

39. P. JESSUP, *A MODERN LAW OF NATIONS* (1946).

concerned with political than with jurisprudential assumptions.<sup>40</sup> He endorsed a change in the international legal system, but failed to relate that change to the ways in which the system itself was conceived.

Writing in the same year, another international lawyer criticized what he saw as

mechanistic adherence to traditional ill-digested generalities and slogans devised by theoreticians of an unscientific age of subsidized piracy, matchlocks, woodfires and candlelight, wide-open spaces, and glorification of cruel aggressive forces for selfish profit--theoreticians who could have foreseen little of the technology, industries, social pressures, and dominant impulses of our crowded, complex, modern civilization.<sup>41</sup>

And six years later, Covey T. Oliver called it "regrettable"

that those with professional competence in international law and in philosophy of law generally, continue (a) seemingly at loggerheads about basic concepts, (b) quixotically optimistic or just plain arrogant about law's place in the whole picture, and (c) wedded to media ill-adapted for any effective communication with the main bodies of citizenry or...with other professional groups working in the same fields.<sup>42</sup>

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40. *Id.*, at 4.

41. Bingham, *The Continental Shelf and the Marginal Belt*, 40 AM. J. INT'L L. 173 (1946).

42. Oliver, *Reflections on Two Recent Developments Affecting the Function of Law in the International Community*, 30 TEXAS L. REV. 815, 841 (1952). Charles de Visscher referred to international law in the early 1950's as "a field which methodological prejudices have been largely responsible for leaving fallow." C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 171 (P. Corbett trans. 1968).



In 1953 Myres S. McDougal once again revived Roscoe Pound's challenge to international lawyers to look to the social sciences for a new strategy of inquiry.<sup>43</sup> In collaboration with Harold D. Lasswell, McDougal argued for the reconstruction of international law as a "policy science":

[L]egal scholars will require a comprehensive guiding theory and intellectual techniques adequate to perform certain specific functions . . . [that form] the elements of a "policy-oriented" approach to the study of law.<sup>44</sup>

The Lasswell-McDougal "policy orientation" was firmly within the tradition of sociological jurisprudence and its legal-realist variant.<sup>45</sup> It is no coincidence that McDougal led off his 1953 lectures at the Hague Academy of International Law with a key quotation from Pound's famous lecture at a neighboring Dutch university a generation earlier,<sup>46</sup> McDougal

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43. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECEUIL DES COURS 137 (1954) [hereinafter cited as McDougal, *International Law, Power and Policy*]. This was the first and still one of the best descriptions of the policy-oriented approach to international law. It summarized several years of postwar collaboration with Lasswell. For earlier indications of his position, see McDougal, *The Law School of the Future: From Legal Realism to Policy Science in the World Community*, 56 YALE L.J. 1345, 1349 (1947); McDougal, *The Role of Law in World Politics*, 20 MISS. L.J. 253 (1948); McDougal, *Remarks*, in 1947 PROC. AM. SOC'Y INT'L L. 47.

44. McDougal, *International Law, Power and Policy*, *supra* note 43, at 140.

45. See Note, *The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity*, 14 VA. J. INT'L L. 535 (1974).

46. That quotation was from Pound's concluding paragraphs:

We shall not ask . . . [the jurist of the immediate future] for a juristic romance built upon the cosmological romance of some closed metaphysical system. But we may demand of him a legal philosophy that shall take account of the social psychology, the

proceeded to elaborate a functional approach to international law directly responsive to Pound's challenge.<sup>47</sup> At the same time, the approach had even deeper roots in the philosophical tradition of American pragmatism which made the work of Lasswell and McDougal more than a simple translation of legal realism to the international sphere.<sup>48</sup>

However, the initial response of others to McDougal's challenge was the same ambiguous reaction that had greeted Pound's similar prescriptions of 1922. Occasionally endorsed in principle, McDougal's proposal apparently continued to represent to most international lawyers what Jessup had called in 1928 "a task of staggering proportions."<sup>49</sup> The scope of McDougal's proposed reforms and the extensive effort obviously required to perform each of the intellectual operations he deemed "indispensable" were so imposing that many easily evaded them.

Other factors certainly reinforced this procrastination. On the one hand, despite a general

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economics, the sociology as well as the law and politics of today, that shall enable international law to take in what it requires from without, that shall give us a functional critique of international law in terms of social ends, not an analytical critique in terms of itself, and above all that shall conceive of the legal order as a process and not as a condition.

Pound, *supra* note 11, at 89.

47. Our principal concern in these lectures has been ... with adapting the sound core of traditional international jurisprudence to the systematic assessment of findings and guidance of appropriate inquiries in other contributory fields.

McDougal, *The Role of Law in World Politics*, *supra* note 43, at 257-58. C. Wilfred Jenks has noted the important influence of Pound on McDougal. W. JENKS, *A NEW WORLD OF LAW? A STUDY OF THE CREATIVE IMAGINATION IN INTERNATIONAL LAW* 126 (1969).

48. See Note, *supra* note 45.

49. Jessup, p. 48 *supra*.

receptiveness to the use of social science as a source of information, or even as a thought-provoking professional device, international lawyers would not easily surrender to the idea that their subject should be studied in the manner of a social science. They were understandably suspicious of the jargon and strange style of presentation that challenged their own as a language of professional communication.<sup>50</sup>

On the other hand, political scientists were becoming increasingly uncomfortable with the entire notion of international "law". In the 1950's, political science was dominated by "realists" like Hans Morgenthau who argued that international relations was fundamentally a struggle for power and that international law was of marginal significance, if not a complete illusion.<sup>51</sup> Concurrently, the ranks of an older generation of political scientists who had specialized in international law were not reinforced by younger scholars of comparable interests and stature. Thus Quincy Wright in 1955 concluded that: "The discipline of international law is in a state of crisis. As understood by traditionalists it appears to be obsolete, and as understood by modernists it appears to be premature."<sup>52</sup>

The 1960's did not witness a meaningful resolution of this "crisis". The decade began with a promising variety of new approaches, including systems theory, historical sociology, organization theory,

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50. Many practitioners, however, had grown impatient with traditional formulations:

[D]iscussion of International Law, unaffected by the trend of recent legal writing in other fields, has persisted in its preoccupation with high level abstractions. It is time that attempts were made to bridge the gap between the realities of practice and the arid legalisms of the literature.

Coudert & Lans, *Direct Foreign Investment in Undeveloped Countries: Some Practical Problems*, 11 LAW & CONTEMP. PROBS. 741, 742 (1946), quoted in P. JESSUP, *THE USE OF INTERNATIONAL LAW* 3-4 (1959).

51. See K. THOMPSON, *POLITICAL REALISM AND THE CRISIS OF WORLD POLITICS: AN AMERICAN APPROACH TO FOREIGN POLICY* (1960).

52. Q. WRIGHT, *THE STUDY OF INTERNATIONAL RELATIONS* 233 (1955).

functionalism, and policy science,<sup>53</sup> But it closed with the same general eclecticism and atomization, International lawyers continued to differ widely in their attitudes toward the essential nature and basic methods of their discipline, as evidenced by the confused debates on such issues as Vietnam, treaty interpretation, and national expropriation.

Political science, on the other hand, had become the province of a new breed of self-consciously scientific "behavioralists" for whom international law was something of an embarrassment.<sup>54</sup> To political scientists, international law seemed to lack the precision and the concreteness of other areas of inquiry.

In short, the study of international law has continued without a broad consensus on fundamental theoretical and methodological issues, save that inherited from the traditional but increasingly discredited nineteenth century viewpoint. Despite greater attention shown to these issues in recent years,<sup>55</sup> the possibility for consolidation of an approach along the lines of Pound's original suggestion seems remote. As one recent study concluded: "[W]e are faced with the paradox that the more necessary general theory seems to be and the more intense the striving for it, the more difficult it is to

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53. See, e.g., K. CARLSTON, LAW AND ORGANIZATION IN WORLD SOCIETY (1962); W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW (1965); R. HIGGINS, THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS (1963); M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW (1961); Hoffmann, *The Study of International Law and the Theory of International Relations*, 1963 PROC. AM. SOC'Y INT'L L. 26.

54. See CONTENDING APPROACHES TO INTERNATIONAL POLITICS (K. Knorr & J. Rosenau eds. 1969); CONTENDING THEORIES OF INTERNATIONAL RELATIONS ch. 13 (J. Dougherty & R. Pfaltzgraff eds. 1971). But see M. BARKUN, LAW WITHOUT SANCTIONS: ORDER IN PRIMITIVE SOCIETIES AND THE WORLD COMMUNITY (1968); W. COPLIN, THE FUNCTIONS OF INTERNATIONAL LAW (1966).

55. See, for example, the writings of Richard A. Falk, Tom J. Farer, W. Michael Reisman, Rosalyn Higgins, John Norton Moore, Richard B. Lillich, Burns Weston, and Anthony D'Amato, See also Piscatori, *The Contribution of International Law to International Relations*, 53 INT'L AFF. 217 (1977).

attain."<sup>56</sup>

## II. IN SEARCH OF CONSENSUS: BACK TO THE BASICS

### A. Falk's "Scientific Revolution"

Perhaps the most ambitious recent effort to deal with issues of consensus in international law was Richard A. Falk's Sherrill Lectures at the Yale Law School in 1974. Falk drew interesting parallels between the history of natural science, as interpreted by Thomas S. Kuhn, and the history of international legal studies.<sup>57</sup> He argued that international lawyers, and indeed students of international relations in general, share the same kind of "paradigm," or set of "shared assumptions, traditions, and procedures," as those which guide inquiry in the natural sciences.<sup>58</sup> Furthermore, the impact of this common intellectual perspective on all thinking in international law was similar to that of the basic sciences:

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56. W. GOULD & M. BARKUN, INTERNATIONAL LAW AND THE SOCIAL SCIENCES 18 (1970).

The search or, at least, the felt need for general theory with categories into which to deposit new information, to store it, and from which to retrieve it...remains. Discomfiture induced by confrontation with the mass of data observed and now generated as well neither completely drives out the patterns of thought acquired from what once passed for general theory nor prevents search at a less ambitious level of analysis for partial theory as a step, taken in hope, toward eventual general theory.

*Id.* at 17.

57. See T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (1970); Falk, *A New Paradigm for International Legal Studies: Prospects and Proposals*, 84 YALE L.J. 969 (1975).

58. Falk, *supra* note 57, at 977.

Such a paradigm sets boundaries on research and creates a set of intellectual taboos that prevail until challenged by new discoveries, so-called anomalies, that are not explainable within the reigning paradigm and yet appear too significant to ignore or disavow. It is at such a point that a scientific revolution occurs and a new paradigm is crystallized, in order to allow the work of the profession to proceed with maximum efficiency because a large fundamental area of agreement can again be taken for granted.<sup>59</sup>

Though Falk acknowledged that Kuhn himself "has been properly critical of facile extrapolations of his ideas about paradigms in the natural sciences to the discipline of social science,"<sup>60</sup> Falk remained interested in developing a dominant paradigm "that confines inquiry and embodies a consensus as to the political terrain upon which international law can fruitfully operate".<sup>61</sup> Falk's recent work is based upon the assumption that, at the present time, international lawyers need to fashion "a new juridical expression which corresponds to the political realities that are moving the world system from one of relatively decentralized, if hierarchically arranged,

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59. *Id.* at 976.

60. *Id.* Indeed, it was a perception of the differences between "natural" and "social" sciences that originally led Kuhn to his thesis about the nature and function of paradigms in the former. T. KUHN, *supra* note 57, at viii. Kuhn writes that, "[t]hough scientific development may resemble that in other fields more closely than has often been supposed, it is also strikingly different." *Id.* at 209. Kuhn does, however, "underscor[e] the need for similar and, above all, for comparative study of the corresponding communities in other fields." *Id.* For extensive commentary and criticism of Kuhn's original essay, see 4 CRITICISM AND THE GROWTH OF KNOWLEDGE (I. Lakatos & A. Musgrave eds. 1970).

61. Falk, *supra* note 57, at 977.

statism to relatively centralized, but *not yet pre-determined*, rearrangements of managerial control and value priorities."<sup>62</sup> He finds this necessary effort inhibited by the prevailing assumption that international law is a system of rules operating exclusively upon nation-states:

The statist paradigm has been used by the profession to discipline deviant practitioners, mainly by labelling them as "utopian," "legalist," or "idealist," that is, unworthy of serious attention because they worked outside the paradigm, or more likely, challenged the prevailing paradigm of geopolitically conditioned interstate relations.<sup>63</sup>

Thus Falk sees the need for what he calls a "paradigm shift" or "paradigm redesign" (Kuhn's "scientific revolution") in the study of international law.<sup>64</sup> It is in this context that he interprets the significance of Lasswell, McDougal, "and their numerous co-workers." Falk suggests that their writings amount to the kind of "dangerous knowledge" that threatens the prevailing "statist paradigm" by providing "a radical [world order] vision of prime magnitude."<sup>65</sup> It is radical because it implies a complete "redefinition of what constitutes knowledge for lawyers":<sup>66</sup>

It is universal in scope: that is, the conception is nonhierarchical, and does not necessarily depend on the persistence of the state system. It is process-oriented in relation to the future: that is, it suggests we create the future by promoting preferred values in all critical arenas,

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62. *Id.* at 976. See also R. FALK, A STUDY OF FUTURE WORLDS (1975).

63. Falk, *supra* note 57, at 977.

64. *Id.* at 992, 994.

65. *Id.* at 1009.

66. *Id.* at 1011 n.106.

starting now. It is oriented toward the well-being of the species as a whole, and is thus naturally receptive to both an ecological perspective and a futurist concern with assuring the life-chances of subsequent generations.<sup>67</sup>

Falk's praise of the Lasswell-McDougal approach is qualified only by his belief that their work is "not yet related directly enough to the transitional historical situation that is already underway."<sup>68</sup> He suggests that it needs to be "developed in several directions"<sup>69</sup> and "refocus[ed] . . . on the specific challenges posed by a transitional context."<sup>70</sup> Thus Falk is not certain "whether the McDougal jurisprudence will underlie the paradigm which will eventually prevail in the emergent era of nonterritorial central guidance."<sup>71</sup> His reservations, however, do not prevent his general endorsement of the New Haven School's basic direction.<sup>72</sup>

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67. *Id.* at 1009. For his earlier assessments of McDougal, see R. FALK, *THE STATUS OF LAW IN INTERNATIONAL SOCIETY* (1970).

68. Falk, *supra* note 57, at 1020.

69. *Id.* at 1011.

70. *Id.* at 993.

71. *Id.* at 1010. Falk's conception of the necessary improvements in McDougal's work are grouped under the headings of "values," "governments," "central guidance," and "transition strategy." *Id.* at 1012-1013. Falk interprets the World Order Models Project in which he is active as an "unwitting attempt to develop the New Haven approach so that it better satisfie[s] the needs for a global reform movement." *Id.* at 1013.

72. *Id.* at 1010. Falk also writes that "[i]t is as yet unclear whether to regard McDougal (and collaborators) as the immediate precursor of a new world order system, in the way that we view Grotius today, or whether the role is a more antecedent one, comparable to that of say, Vitoria or Suarez. Such a comparison will be more credible when made from the vantage point of the 21st century." *Id.* at 1009.



Yet it is difficult to understand from Falk's accounting just what the Yale School's contribution has been and why it might be said to offer "paradigmatic" improvements over earlier conceptions of international law. Falk's argument may please those already persuaded of the importance of the policy-oriented approach, but it does not fully explain what that approach is about and where exactly it departs from its predecessors.

#### B. *The Problems with Paradigms*

In fairness to Professor Falk, it must be noted that his valuable Sherrill Lectures were only marginally concerned with explaining the nature and significance of the Lasswell-McDougal contribution--a task he has undertaken elsewhere.<sup>73</sup> But his larger argument about the need for further development of their work is weakened by a forced adaptation of Kuhn's "scientific revolution" argument to international law,

A preliminary question concerns the appropriateness of fitting a model of intellectual development derived from the history of natural science to a field of study as dissimilar to physics and chemistry as international law. It is highly problematic whether the latter is a comparable "discipline" and whether it can be viewed in any sense as a "scientific" domain.<sup>74</sup>

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73. See R. FALK, *supra* note 67.

74. For a discussion of problems with the "cognitive style" of social sciences generally, see Almond & Genco, *Clouds, Clocks, and the Study of Politics*, 29 WORLD POL. 489 (1977); Hirschman, *The Search for Paradigms as a Hindrance to Understanding*, 22 WORLD POL. 329 (1970). But see Rogowski, *International Politics: The Past as Science*, 12 INT'L STUD. A. 394 (1968).

McDougal himself has commented:

[F]rom the accounts of some of the contemporary historians of science, such as that by Thomas S. Kuhn . . . it may be doubted whether even the natural scientists have ever enjoyed other than in myth a conception of science so exclusive and rigid as that sometimes propounded.

*Subcomm. on Government Research of the Senate Comm. on Government Operations, United States Senate, 90th Cong., 1st Sess. 508, 514 (1967) (testimony of Myres McDougal).*

Even more serious questions can be raised concerning Falk's failure to develop more thoroughly the implications of his perspective for international law. The progression of thought in law and social science may be comparable in general structure to intellectual developments in the natural sciences, but the nature and substance of accepted knowledge is not similar. Furthermore, the process by which "paradigmatic" understandings become generally shared, the degree of their acceptance, and the precision with which they are articulated are different in the "non-physical" sciences. These differences are important to anyone making judgments as to the adequacy of one paradigm or another. Thus if we are to take a "Kuhnian" perspective on international legal studies, such differences must be more carefully considered.

In politics and jurisprudence, a paradigm or "set of assumptions, traditions, and procedures" as Falk means it, may function on two different levels. It not only constitutes a common point of view about the world, as in other fields, but may also affect that world itself by inducing or enforcing changed behavior on the part of the people it purports to describe.<sup>75</sup> In other words, political or legal paradigms can become self-fulfilling prophesies. Certain widely-held assumptions become not merely descriptive of the world of politics and law, but *constitutive* of that world because they orient or reorient our response to it.<sup>76</sup>

Thus when a Hobbes or Machiavelli (or Hans Morgenthau) describes politics as fundamentally a struggle for power, he leads all those who find that description credible to respond as though it *were* such

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75. See Wolin, *Paradigms and Political Theories*, in *POLITICS AND EXPERIENCE: ESSAYS FOR MICHAEL OAKESHOTT* 125 (P. King & B. Parekh eds. 1968).

76. This might be called the equivalent of the "Heisenberg principle" in physics whereby the act of measurement affects the phenomena being measured. See also A. KAPLAN, *THE CONDUCT OF INQUIRY* 32 (1964) (discussion of related "double process of interpretation"); Allott, *Language, Method and the Nature of International Law*, [1971] *BRIT. Y.B. INT'L L.* 79, 117-18.

a principle of human behavior. Unlike the natural sciences, political theory and social science deal with a subject matter (human behavior) which can be expected to adjust in some degree to the generalizations made about it. As a consequence, the competition between different legal/political paradigms can become a clash of values and symbols as much as a debate about fact and perception.<sup>77</sup> In such cases, salesmanship and propaganda will play a large role in the acceptance of one interpretation over another.

The work of Hugo Grotius illustrates this dual character of legal "paradigms." By combining certain generalizations about state practice with his own normative interpretations, justified as "natural law," Grotius wrote a treatise about international relations that exhorted and inspired as much as it described, and thereby helped to bring the reality of international behavior somewhat closer to his own conceptions of how it should be. It became a *standard* as well as a statement of international law which had important influence upon succeeding generations.<sup>78</sup>

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77. For Harold D. Lasswell's original discussion of his "world revolution of our time" hypothesis, see Lasswell, *The World Revolution of Our Time: A Framework for Basic Policy Research*, [1951], reprinted in *WORLD REVOLUTIONARY ELITES* 29 (H. Lasswell & D. Lerner eds. 1965). See also H. LASSWELL & A. KAPLAN, *POLITICS AND SOCIETY: A FRAMEWORK FOR POLITICAL INQUIRY* 282-284 (1950).

Kuhn himself draws the analogy between political and scientific revolutions in T. KUHN, *supra* note 57, at 92-94.

78. See H. MAINE, *INTERNATIONAL LAW* 23 (1887); W. SCHIFFER, *THE LEGAL COMMUNITY OF MANKIND* (1954); C. VON VOLLENHOVEN, *THE THREE STAGES IN THE EVOLUTION OF THE LAW OF NATIONS* (1919); Bull, *The Grotian Conception of International Society*, in *DIPLOMATIC INVESTIGATIONS* 51 (H. Butterfield & M. Wight eds. 1966); Lauterpacht, *The Grotian Tradition in International Law*, [1946] *BRIT. Y.B. INT'L L.* 1.

Of course, as far as Grotius and other natural law adherents are concerned, the distinction between "is" and "ought" is faulty. To persons of this persuasion, moral principles are derivable from "the nature of things." Professor Kuhn suggests that even in the natural sciences "'[i]s' and 'ought' are by no means always so separate as they have seemed." T. KUHN, *supra* note 57, at 207. For discussions of the "Is-Ought" distinction

This difference between law and the "hard" sciences does not completely negate the value of looking at international law in terms of paradigms. However, to say that Grotius' *De Jure Belli et Pacis* and Newton's *Mathematical Principles* were both dominant paradigms in their respective fields of thought is to say something about intellectual paradigms in general, but very little about either international law or physics. If the notion is to be made useful for international legal studies in anything but historical discussion, we must break it down much further into its particulars as they apply in this context. It may be accurate to say, as does Professor Falk, that international legal studies are at a "crisis" point and in need of a "scientific revolution" in Kuhn's sense, but to benefit from that insight we require a better understanding than he provides of what such a "revolution" might involve in *this* discipline at *this* time. What does it mean to say that international lawyers share a paradigm--"statist" or otherwise--and what kinds of changes are involved in choosing one paradigm over another?

### C. Kuhn's Alternatives

Looking first to Professor Kuhn himself for clarification, it becomes evident that his concept of paradigms was not one of rigidly fixed content.<sup>79</sup> In acknowledging a certain variability in his original usage, Kuhn subsequently suggested two basic meanings of the term:

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in modern political theory and the rise of "scientific value relativism," see A. BRECHT, *POLITICAL THEORY* (1960); J. Hobbs, *The Rise of Scientific Value Relativism in American Political Science* (1961) (unpublished dissertation in Princeton University Library).

79. Masterman did a "content analysis" of Kuhn's use of the term paradigm in his original essay and found three distinct uses. See D. CRANE, *INVISIBLE COLLEGES* 29 (1972) (citing Masterman). He suggests that Kuhn generally uses it to mean "a problem-solving device."

On the one hand, it stands for the entire constellation of beliefs, values, techniques, and so on, shared by the members of a given community. On the other, it denotes one sort of element in that constellation, the concrete puzzle solutions which, employed as models or exemplars, can replace explicit rules as a basis for the solution of the remaining puzzles of normal science.<sup>80</sup>

Both usages pose problems for researchers.

### 1. "Exemplars" of International Law

International law provides very few, if any, instances of paradigms in the sense of "concrete puzzle solutions," "models," or "exemplars" as Kuhn uses them in reference to natural science. Despite what scholars may have said about the achievements of Grotius, Vattel, Kelsen or, for that matter, Myres McDougal, one can hardly refer to individual works of international law as solving the "puzzles" of international relations in the same way that a Newton or an Einstein solved the puzzles of physics.<sup>81</sup> There are, of course, certain works whose acceptance and emulation are for a time so pervasive that they become classic illustrations of "how to do" international law. Vattel's *Law of Nations* was apparently one such work.<sup>82</sup> But these amount really to "approaches" or "standpoints" of a general and open-ended variety rather than "jealous" paradigms purporting to replace their predecessors completely.<sup>83</sup>

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80. T. KUHN, *supra* note 57, at 175.

81. On the successive breakthroughs in physics and their radical implications for the discipline, see A. EINSTEIN & L. INFELD, *THE EVOLUTION OF PHYSICS* (1938).

82. See F. RUDDY, *INTERNATIONAL LAW IN THE ENLIGHTENMENT* ch. 9 (1975).

83. The sociologist Daniel Bell, for example, refers to paradigms as "conceptual schemes, which themselves are neither models nor theories but standpoints from which models can be generated and theories developed." Bell, *The Post-Industrial Society: The Evolution of an Idea*, in *SURVEY* 102, 158 (1971).

Indeed, the notion of exclusivity is crucial to Kuhn's scheme of paradigms and scientific revolutions. A paradigm in physics, for example, is not merely an approach to a subject matter or a problem, but an "intolerant approach."<sup>84</sup> It admits of no competitors. Differences in paradigms are irreconcilable differences in perception and interpretation of reality. In fact, so drastic is the transition from one such paradigm to another that Kuhn likens the change to a "conversion experience" or "gestalt switch."<sup>85</sup>

It is precisely this aura of exclusivity and intolerance that has prompted other scholars to dissent from Falk's conclusion about the need for "a new paradigm of international law." Professor James P. Sewell, for one, compares the current situation in international law to the post-World War II period in political science generally, when many scholars became committed to the so-called "behavioral revolution."<sup>86</sup> Sewell warns against preoccupation with the search for a single "best" paradigm and asserts "the necessity of serial contributions and joint cultivation rather than the sufficiency of a single apocalyptic leap."<sup>87</sup> Others will surely fear the imposition of some new orthodoxy in the name of a "scientific revolution."<sup>88</sup> Indeed,

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On the difference between "approaches" and theory, see O. YOUNG, *SYSTEMS OF POLITICAL SCIENCE* Ch. 1 (1968).

84. Rogowski, *supra* note 74, at 397. See also T. KUHN, *supra* note 57, at 109-110.

85. T. KUHN, *supra* note 57, at 204.

86. See Sewell, *World Order Studies: A Critical Examination* (July, 1974) (Research Monograph No. 43, Center of International Studies, Princeton University) [hereinafter cited as Sewell, *World Order Studies*]. See also Sewell, *Shapes of a World to Come*, 26 *WORLD POL.* 592 (1974).

87. Sewell, *World Order Studies*, *supra* note 86, at 33.

88. Philip Jessup warned against a similar tendency:

Perhaps it is some innate instinct for orderliness which leads the human mind endlessly to establish and to discuss classifications and definitions and to evolve theories to justify them. . . . The intellectual process is essential but it involves dangers. The more wedded we become to a particular classification or definition, the more our thinking tends to become frozen and thus to have a rigidity which

such suspicions of rigidity and intolerance may be largely responsible for the resistance to Lasswell's and McDougal's jurisprudence in some quarters.<sup>89</sup>

Once again, this problem arises in part because of the double-sided quality of a paradigm-candidate in law and politics. While in the natural sciences the only value common to all endeavors is ostensibly the search for truth, in jurisprudence the choice of one paradigm or another often involves a choice of certain other values as well: democracy, egalitarianism, order, and so forth. To impose one paradigm or world view is often to encourage an orthodoxy of certain preferred outcomes, not just a framework for scientific problem-solving. Thus, the notion of a single paradigm of international law in the sense of "exemplars" that set out the limits of the discipline may seem to many people politically as well as intellectually unacceptable.

However, even critics such as Professor Sewell acknowledge the need for a certain minimal agreement among international lawyers as to what they are

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hampers progress toward the ever needed new solutions of problems whether old or new.

P. JESSUP, *TRANSNATIONAL LAW* 7 (1956).

Similarly, Abraham Kaplan has warned of the "myth of methodology":

. . . the notion that the most serious difficulties which confront behavioral science are "methodological," and that if only we hit upon the right methodology, progress will be rapid and sure.

A. KAPLAN, *supra* note 76, at 24. See also Hirschman, note 74 *supra* Singer, *Cumulativeness in the Social Sciences; Some Counter-Prescriptions*, P.S. 19 (Winter 1973); Wolin, note 75 *supra*.

89. See, e.g., Farer, *International Law and Political Behavior: Toward a Conceptual Liaison*, 25 *WORLD POL.* 430 (1973); Fitzmaurice, *Vae Victis or Woe to the Negotiators! Your Treaty or Our "Interpretation" of It?*, 65 *AM. J. INT'L L.* 358 (1971); Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 *AM. J. INT'L L.* 60 (1972).

about.<sup>90</sup> What is needed is something less rigid and less exclusive than the "paradigm as exemplar" model, but something which nonetheless affords a degree of intellectual consensus sufficient to promote common effort.

## 2. A "Sociology" of International Law

Kuhn's first or "sociological" meaning of the term "paradigm," defined as "the entire constellation of beliefs, values, techniques, and so on, shared by the members of a given community,"<sup>91</sup> is more helpful in seeking such a perspective. Although this is a residual, all-inclusive concept, it nevertheless suggests the range of shared assumptions that provide a necessary common foundation for an intellectual discipline. Falk's "statist paradigm" more easily fits this loose definition, although the image of a world of power-balancing nation-states is in fact only one dimension of "the entire constellation" of assumptions involved.<sup>92</sup>

The sociological definition is preferable in this context for several reasons. First, it is more inclusive and forgoes the need to decide whether an approach is a full-blown, jealous "paradigm" according to some standard of rigor or originality. Second, it does not presuppose that changes in basic approach involve relatively abrupt, "revolutionary" transitions in which the old is rejected wholesale for the new. Finally, the "community" of persons involved in the sociological approach is broad and inchoate, and encompasses practicing lawyers and decision-makers as well as scholars in various fields.

The attempt to give empirical precision to the sociological conception of paradigms, however, presents a serious problem of circularity. Analysis can begin by identifying a particular "community" of international jurists and then proceeding to examine the "constellation" of ideas that they share in order to elaborate the common paradigm; or, in the alternative, analysis can begin by specifying a particular paradigmatic constellation and then

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90. Sewell, *World Order Studies*, *supra* note 86, at 35. Sewell refers to the problem of "scholarly disability because of inadequately shared concepts and underdeveloped explanatory theory," *Id.*

91. T. KUHN, *supra* note 57, at 175.

92. *See* p. 76 *infra*.



proceeding to identify those who share that paradigm. The problems in gathering adequate evidence for either approach are formidable.

Professor Kuhn himself now emphasizes study of the shared assumptions and dynamics of particular scientific communities--or "invisible colleges," as one historian of science has called them.<sup>93</sup> Kuhn is optimistic that precise techniques for identifying such communities can be developed;<sup>94</sup> but in lieu of such techniques he relies on an "intuitive notion of community" to resolve the problem of circularity.<sup>95</sup> Such a community includes all "the practitioners of a scientific specialty."<sup>96</sup> Clearly Falk's notion of a community of "international legal studies" is intuitive in this sense and would presumably include *all* those persons, for example jurists, political scientists, and government officials, who share the "statist" paradigm. This inclusivity is an indication of the looseness with which Falk understands the concept of paradigms as applied to international law.

Attempts might be made to delimit more precisely particular schools or sub-schools within this all-inclusive grouping. Surveys and correlations of "who reads whom" and "who cites whom" have been used to establish rough indices or rankings of influence and thus to identify various intradisciplinary groupings.<sup>97</sup>

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93. D. CRANE, *supra* note 79 (building upon the work of Derek de Solla Price). See also Schachter, *The Invisible College of International Lawyers*, 72 NW. L. REV. 217 (1977).

94. T. KUHN, *supra* note 57, at 175.

95. *Id.* at 176.

96. *Id.* at 177.

97. See, e.g., Outland, *The Decision-Maker and the Scholar: Who Reads Whom*, 4 INT'L LAW. 859 (1970); Russett, *Methodological and Theoretical Schools in International Relations*, in A DESIGN FOR INTERNATIONAL RELATIONS RESEARCH 87 (N. Palmer ed. 1970). See also Finnegan & Giles, *A Citation Analysis of Patterns of Influence in International Relations Research*, 2 INT'L STUD. NOTES 11 (Winter 1975).

But neither index has been useful for satisfactory articulation of the intellectual differences between competing approaches or the reasons for their appeal to some people and not to others.<sup>98</sup> Nor do such studies suggest standards for choosing among the available approaches. Finally, such analyses can be made only of the comparatively small academic portion of the community.

Given this problem, an alternative approach is to begin with a generalized notion of certain "communities" of international lawyers--for example, along national lines--and then proceed to compare the significant assumptions made by each group about the discipline. An especially enlightening study of this sort was done by Professor Rosalyn Higgins.<sup>99</sup> She identified a very basic difference between the pervasive "rule-orientation" of English international lawyers and the dominant "process-orientation" of American international lawyers.<sup>100</sup> This distinction suggests an important

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98. For a comprehensive survey of various approaches and techniques in international law, see W. GOULD & M. BARKUN, *INTERNATIONAL LAW AND THE SOCIAL SCIENCES* (1970). Of the McDougal-Lasswell approach, Gould and Barkun write:

The best known and certainly the most productive incorporation of a nonlegal approach with the substance of international law has been Myres S. McDougal's application of Harold D. Lasswell's analytical framework. Indeed, the Lasswell-McDougal collaboration, joining political scientist and lawyer, represents the teamwork over an extended time span that Julius Stone held to be essential to bring about marked advances in international law.

*Id.* at 11.

99. Higgins, *Policy Considerations and the International Judicial Process*, 17 *INT'L & COMP. L. Q.* 58 (1968).

100. *Id.* at 60:

Our purpose is to draw attention to the fact that the differences inherent in what we may for convenience term the "American" and the "British" views, now permeate the entire fabric of international law. . . .

difference in perspective among international lawyers which is influenced by differences in educational background. However, some commentators have cast doubts on the accuracy or adequacy of this particular differentiation.<sup>101</sup>

Efforts to distinguish other national perspectives have appeared from time to time.<sup>102</sup> What is still needed in such efforts, however, is a basic accounting of the full range of assumptions involved. These assumptions would be described by Professor Falk as a "paradigm" of international law, but may be more accurately described as an "approach" or "orientation." The dimensions of the problem are considerably more varied than he seems to suggest, and the degree of consensus on all of them considerably less complete. Nonetheless, the possibilities for clarification and improvement of international legal studies at this level remain substantial. More useful than Kuhn, in this context, are studies of the social sciences and, in particular, sociology.

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. . . [T]here is all too little analysis in terms of the underlying perceptions of the nature of international law.

The distinction between "rule-oriented" and "process-oriented" approaches is illustrated as follows:

The great majority of British international lawyers regard international law as a set of neutral rules, which it is the task of the judge to apply objectively to the facts before him. . . . It is, however, possible to perceive international law in a fundamentally different way--as a particular, specialized decision-making process.

*Id.* at 58.

101. See 2 GA. J. INT'L & COMP. L., Supp. II, at 111 (1972) (remarks of Eli Lauterpacht).

102. See, e.g., CANADIAN PERSPECTIVES ON INTERNATIONAL LAW AND ORGANIZATION (R. MACDONALD, G. MORRIS & D. JOHNSTON eds. 1974); W. HOLDER & G. BRENNAN, THE INTERNATIONAL LEGAL SYSTEM: CASES AND MATERIALS, WITH EMPHASIS ON THE AUSTRALIAN PERSPECTIVE (1972); J. HSIUNG, LAW AND POLICY IN CHINA'S FOREIGN RELATIONS (1972); S. JAYAKUMAR, PUBLIC INTERNATIONAL LAW CASES FROM MALAYSIA AND SINGAPORE (1974); G. TUNKIN, THEORY OF INTERNATIONAL LAW (Butler trans. 1974); McDougal, note 32 *supra*.

D. *Gouldner's "Domain Assumptions"*

Alvin Gouldner begins his study<sup>103</sup> of Western (and largely American) sociology by emphasizing that the crucial assumptions of any sociologist are those underlying generalities about the world which seldom, if ever, receive conscious examination. In addition to the set of "explicitly formulated assumptions" or "postulations" which form the outline of any carefully-developed social theory, there is "a second set of assumptions that are unpostulated and unlabeled" that he calls "background assumptions."<sup>104</sup> These background assumptions range in generality from metaphysical beliefs ("world hypotheses") that are applicable to every dimension of life, to more specific assumptions that relate to knowledge within a given field of inquiry, such as sociology or international law. Within these more specific "domains" of knowledge, "domain assumptions" determine the general orientation of an observer, that is, how he performs all other theoretical and empirical tasks.<sup>105</sup>

Gouldner offers the following example of the kinds of assumptions that might or might not be made about sociology: "that men are rational or irrational; that society is precarious or fundamentally stable; that social problems will correct themselves without planned intervention; that human behavior is unpredictable; that man's true humanity resides in his feelings and sentiments."<sup>106</sup>

Maintenance of such presuppositions is seldom an entirely rational process. These assumptions grow out of one's lifelong experience and, as Gouldner puts it, "are often internalized in us long before the intellectual age of consent."<sup>107</sup>

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103. A. GOULDNER, *THE COMING CRISIS OF WESTERN SOCIOLOGY* (1970).

104. *Id.* at 29.

105. *Id.* at 31.

106. *Id.*

107. *Id.* at 32.

Gouldner also suggests that the explicit theories that are acceptable to practitioners in a given discipline during any period depend on the "fit" of those theories with the domain assumptions of the period.<sup>108</sup> The appeal of a theory or interpretation is determined as much by its compatibility with these frequently unexamined generalities as it is by its "validity" or "utility" in relation to the facts or problems under scrutiny.<sup>109</sup> In short, Gouldner sets the stage for an extensive "sociology of sociology" that considers the fate of certain theoretical approaches in American sociology according to the changing intellectual and cultural setting of American society.<sup>110</sup>

This general perspective provides a valuable approach to the understanding of international law as an intellectual discipline. Professor Falk's efforts to develop a single dominant "paradigm of international legal studies" may be translated into an effort to reexamine the various "domain assumptions" that underlie our understanding of international law and to consider alternatives in light of the political circumstances and requirements of our time. The basic objective of intellectual reform remains the same, but the nature of the task and the expectation of "revolutionary breakthrough" to a fundamentally different paradigm need revision.<sup>111</sup>

The difficulty in such an approach is in identifying those fundamental issues of international legal studies about which the crucial "domain assumptions" are made. Here the work of Lasswell and Mc-

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108. For speculation on the master ideas of an historical era, see M. FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (1970).

109. See A. KAPLAN, *supra* note 76, at 86.

110. A. GOULDNER, *supra* note 103, at 25.

111. These intellectual differences may also reflect an analogous difference in our respective *political* expectations about the prospects for change. A notion of "revolutionary breakthroughs" has been contrasted with more gradualist approaches to the theory of political "modernization" in K. JOWITT, *REVOLUTIONARY BREAKTHROUGHS AND NATIONAL DEVELOPMENT: THE CASE OF ROMANIA, 1945-1965* (1971).

Dougal has made a considerable contribution. More than any other school of thought, it has directed attention to underlying assumptions about law. Unless such issues themselves are recognized, therefore, the justification for their approach will probably be found lacking.

E. *Criteria for a Theory About International Law:*

*The Who, What, How, and Why Issues*

In numerous writings on jurisprudence during the past decade, Lasswell and McDougal have organized their analysis around four basic "emphases" or "criteria" for an adequate "theory about law", as distinguished from particular theories of law.<sup>112</sup> Especially relevant here is a 1968 article with Michael Reisman<sup>113</sup>. Anyone familiar with their work will recognize the following headings from that article:

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112. See, e.g., Lasswell & McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362 (1971); Lasswell & McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 486 (1967).

The distinction between theories of law and theories about law is drawn by McDougal in *Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry*, 4 J. CONFLICT RES. 337 (1960). McDougal takes it from Thurman Arnold (who attributed the distinction to his colleague, Edward S. Robinson):

This spiritual trouble would be avoided if the scholar realized that there is a need for both a science of law and a science about law--the one for ceremonial use inside the institution and the other for observation from above.

Arnold, *Institute Priests and Yale Observers--A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811, 813 (1936). See also Robinson, *Psychology and the Law*, 1 J. SOC. PHIL. 197 (1936).

113. McDougal, Lasswell & Reisman, *Theories About International Law: Prologue to a Configurative Jurisprudence*, 8 VA. J. INT'L L. 188 (1968).

1. Establishment of observational standpoint;
2. Delimitation of the focus of inquiry;
3. Performance of intellectual tasks;
4. Postulation of basic goals.

These four categories amount to a breakdown of the kinds of basic issues involved in discussing the "domain assumptions" of international legal studies and their current inadequacies. Though never referred to as such, they can be called the *who*, *what*, *how* and *why* assumptions of the international legal domain.<sup>114</sup>

1. *WHO? Assumptions about Observational Standpoint*

The most general domain assumptions of international lawyers relate to matters of personal identification, expectation, and aspiration -- all of which may be characterized as issues of "standpoint" or "point-of-view."<sup>115</sup> Despite their primacy in determining *what* it is that international lawyers and jurists do and *how* and *why* they do it, these assumptions are probably the least subject to scrutiny.

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114. William L. Morison characterizes the observational standpoint issue as "The 'Where Am I?' Question," and the focus of inquiry issue as "The 'What Fields Shall I Conquer?' Question". See Morison, *Myres S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 3 (M. Reisman & B. Weston eds. 1976).

The classic usage, of course, was in H. LASSWELL, *POLITICS: WHO GETS WHAT, WHEN, HOW* (1936).

115. I am grateful to Professor William Twining for suggestions on the standpoint issue, though our approaches remain somewhat different. See Twining, *The Bad Man Revisited*, 58 CORNELL L. REV. 275 (1973); Twining, *Some Jobs for Jurisprudence*, 1 BRIT. J. L. & SOC. 149 (1974). See also W. TWINING & D. MIERS, *HOW TO DO THINGS WITH RULES* 24-33 (1976); Moline, *On Points of View*, 5 AMER. PHIL. Q. 191 (1968). For a general outline of the range of assumptions see the discussion in Lasswell, *supra* note 77, at 64-77.

The importance of such assumptions in influencing the thinking and performance of international lawyers should be evident. Cultural and national identifications affect decisions about the nature and scope of international society, the kinds of sources and information that should be consulted, and the interests that are served by an international legal system.<sup>116</sup> Restrictive identifications with a single culture, class, or nation-state may have significant impact on one's interpretation and performance.<sup>117</sup>

Similarly, assumptions about the appropriate role of an international legal scholar become crucial determinants. McDougal, Lasswell and Reisman have emphasized the basic distinction between "scholarly observer" and "active decision-maker,"<sup>118</sup> but the full range of important standpoints is much broader.<sup>119</sup> *Officials* may be motivated principally by a desire to maintain the social and political status quo against all challenges, or they may have aspirations as radical innovators. *Advocates* may place all other considerations behind the interests of their clients, or they may be reformers at heart whose overriding objective is to change the system as a whole. Even "*scholarly observers*" exhibit a wide range of standpoints, from principal concern with developing a "science" of international law for

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116. Lasswell, *Future Systems of Identity in the World Community*, in THE FUTURE OF THE INTERNATIONAL LEGAL ORDER (C. Black & R. Falk eds. 1972). See also A. BOZEMAN, THE FUTURE OF LAW IN A MULTICULTURAL WORLD (1971); H. Hernes, Concepts of Community in Modern Theories of International Law (unpublished Ph.D. dissertation, Johns Hopkins University, 1970).

117. One of the few examples of such an accusation in print was Tom J. Farer's dig at John Norton Moore as "a white scholar, reared in the cocky middle classes of an affluent and relatively open society," in LAW AND CIVIL WAR IN THE MODERN WORLD 554 (J. Moore ed. 1974).

118. McDougal, Lasswell & Reisman, *supra* note 113, at 199.

119. See Twining, *The Bad Man Revisited*, *supra* note 115, at 285-289. Twining's reference to "criteria of relevance" is especially enlightening. I agree with Professor Twining that Lasswell and McDougal have tended to oversimplify this issue.



its own sake to an assumed inadequacy of the present international system and a search for a successor. Attitudes toward the subject and receptivity to different approaches will necessarily grow out of an individual's presuppositions. However, one's choice of personal standpoint is not determined independently of other assumptions about international studies, i.e., *what*, *how*, and *why*. In fact, only by confronting these other choices do the implications of one standpoint or another become clear.

A classic example of a dichotomy in standpoint among international lawyers is that between the "Grotian" (or "universalist," "monist," "solidarist") conception of international law, and one that is variously labeled "Vattelien," "pluralist," or "positivist."<sup>120</sup> While a considerable amount of oversimplification accompanies these designations, the issues that distinguish one from the other illustrate important differences in standpoint.

Grotius and his juridical heirs emphasized the broadest identifications for international lawyers. Their influence has been in the direction of universalizing the application of legal considerations to cultures, nations, and substantive issues. Thus, Grotius rejected the exclusion of non-Christians from the international legal system, resisted the double standard of *raison d'état* as an excuse for international delinquency, and rejected the notion that legal considerations should not apply to matters of "vital" state interest.<sup>121</sup>

"Grotians" generally base such views on the perceived implications of interdependence within the world community and the solidarity or common interest that necessarily results. They tend to analogize readily between municipal law and the law of nations. Ultimately, such perspectives derive from a faith in the power of reason to manage inter-

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120. Bull, *supra* note 78, at 52; Falk, *supra* note 57, at 977 n.17; W. SCHIFFER, *supra* note 78.

121. Lauterpacht, *supra* note 78.

national problems and gradually to improve the entire system according to self-evident conceptions of morality and justice.<sup>122</sup>

In contrast to the Grotians, the "pluralists" see universalism as so much wishful thinking. They deemphasize solidarity, limit applicability of law, and emphasize the disparities and differences that divide nations and restrain their common interests.<sup>123</sup> Predictably, "pluralists" emphasize the differences between national and international law and the consequent differences in standards applicable to each. Unlike the Grotians, the "pluralists" have a more pessimistic attitude toward the prospects for substantial international reform of the state system and hold lower expectations for the beneficent intervention of reason and morality in world politics. They therefore minimize the role of international lawyers as agents of progress.<sup>124</sup>

Assumptions of this sort are among the most susceptible to changes in intellectual attitudes. Grotius' seventeenth century optimism could not withstand the far more restrained positivism of Vattel which largely dominated the succeeding three centuries.<sup>125</sup> The return to the Grotian conception, as Hedley Bull suggests, came only with the impact of two World Wars.<sup>126</sup>

Since complete consensus on matters so closely related to personal intuition as the "who" questions of jurisprudence is difficult to reach, rational resolution of the issues suggested by the universalist/pluralist dichotomy is not fully possible. This fact suggests the enormous variety of possible perspectives or dimensions of "observational standpoint" from which international law is approached.<sup>127</sup> But this variety also indicates the critical choices that are involved in establishing one's orientation

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122. *Id.*

123. Bull, *supra* note 78.

124. *Id.* at 69-73.

125. See F. RUDDY, *supra* note 82.

126. Bull, *supra* note 78.

127. See, e.g., W. GOULD & M. BARKUN, *supra* note 98,

to the subject. These choices are often made inconsistently, without deliberation or without a clear conception of what one is trying to accomplish. In the face of the enormous changes occurring in the international system, the current "crisis" of international legal studies is in large measure an "identity crisis" of international lawyers who are not sure of "who" they are. Not knowing the *who*, it becomes difficult to decide rationally the remaining issues: *what* to study, *how* to do it, and *why*.

## 2. WHAT? Assumptions about the Focus of Inquiry

The most familiar issues in international legal studies are those related to the nature and scope of the subject matter. What is law? Where do we look for evidence of it? What are the major features of the system in which it operates? With what kinds of problems does it deal?<sup>128</sup> In spite of the familiarity of these matters, they are not easily treated or resolved. The "what" questions of jurisprudence are nonetheless routine, and almost every text or treatise on international law begins with a designation of the primary focus, for example, that "[i]nternational law is a body of rules and principles of action which are binding upon civilized states in their relations with one another."<sup>129</sup>

Traditionally, as the definition implies, international lawyers have focused upon institutions deemed to be inherently "legal" in nature, for example, courts, treaty documents, and official pronouncements, with some effort to generalize about state practice on matters not otherwise expressed in formal legal terms. For

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128. See Coplin, *International Law and Assumptions About the State System*, in *INTERNATIONAL POLITICS AND FOREIGN POLICY* 142 (J. Rosenau ed. 1969).

129. J. BRIERLY, *THE LAW OF NATIONS* 1 (6th ed. 1963).

the most part, the products of these institutions and activities were assumed to be embodied in, or translatable to, rules of law that provided the basis for future guidance on legal issues. The test of what actually could be called "law" in these settings was sometimes so narrow as virtually to define away the subject altogether.<sup>130</sup>

During the last century, more expansive points of view have developed, including those often referred to as "sociological" theories of international law. To jurists in this frame of mind, international law is seen as a working part of the larger system of international relations. The rules themselves are but one component of larger processes that must be considered. The focus is thereby explicitly extended to various "non-legal" dimensions of the international milieu.<sup>131</sup>

In either case, the range of phenomena that could be subsumed within an international lawyer's focus of inquiry is vast. Yet the criteria of selection are rarely fully explained. Among the elements<sup>132</sup> that a lawyer may take into account are "participants" (for example, states, individuals, corporations and organizations, economic and regional blocs, and international organizations); the various claims of participants, relating to nationality, resources, and institutions; the context in which these claims arise, including geographic areas and historical periods;<sup>133</sup> and numerous other factors.

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130. K. THOMPSON, *POLITICAL REALISM AND THE CRISIS OF WORLD POLITICS* (1960); McDougal, *Law and Power*, 46 AM. J. INT'L L. 102 (1952); Williams, *International Law and the Controversy Concerning the Word "Law"*, 1945 BRIT. Y.B. INT'L L. 146.

131. See Coplin, *Current Studies of the Functions of International Law: Assessments and Suggestions*, [1971] POL. SCI. ANN. 149, 157-161; Hernes, *supra* note 116.

132. This breakdown is based on the "phase analysis" categories developed by the "Yale School", with certain modifications of terminology. See Lasswell & McDougal, *Jurisprudence in Policy-Oriented Perspective*, *supra* note 112.

133. See Higgins, *Integrations of Authority and Control: Trends in the Literature of International Law and International Relations*, in *TOWARD WORLD ORDER AND HUMAN DIGNITY*, *supra* note 114, at 79.

Conventional treatments of international law give special consideration only to certain features of this vast context. For example, states are not only the primary actors in the international legal system, but they have also traditionally been the only participants whose claims are acknowledged under international law. Claims made by individuals are recognized only through official adoption by a state.<sup>134</sup> Similarly, vast areas of the globe and entire eras of history have generally been ignored in presenting evidence of state practice or precedent. Even in the modern era of elaborate "case reporter" systems, the selection of relevant precedents and the reporting of significant facts is far from comprehensive.

In both cases, justifications might be given for the choice of focus; the point is that each implies a certain frame of attention which may or may not be related to rational criteria of selection.<sup>135</sup> What international lawyers study is often taken for granted rather than related to conscious objectives or based on a comprehensive map of the terrain.

### 3. HOW? Assumptions about Intellectual Tasks

International lawyers have long insisted on the distinction between the law as it is (*lex lata*) and the law as it ought to be (*de lege ferenda*).<sup>136</sup> Studies or assertions about either have been considered legitimate exercises as long as the two are rigorously distinguished. In practice, of course, the distinction is a difficult one to preserve.<sup>137</sup> Furthermore, this dichotomy hardly does justice to the range of operations which are performed by international lawyers, whether identified individually or not.

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134. For Philip Jessup's famous critique, see P. JESSUP, *A MODERN LAW OF NATIONS: AN INTRODUCTION* (1948). See also Manner, *The Object Theory of the Individual in International Law*, 46 AM. J. INT'L L. 428 (1952).

135. McDougal, Lasswell & Reisman, *supra* note 113, at 202-204.

136. For a typical formulation, see H. Kelsen, *THE PURE THEORY OF LAW* 5-6 (Knight trans. 1967).

137. Writers of treatises or restatements invariably must make judgments about which is "the better rule" even if only to maintain consistency in generalizations where disagreement is otherwise evident. Efforts to maintain the distinction between the "codification" and "progressive development" of international law face similar problems. See McDougal, *International Law, Power, and Policy*, *supra* note 43, at 156.

The duties of lawyers have been usefully analyzed by McDougal, Lasswell, and Reisman.<sup>138</sup> Lawyers perform a normative task (goal clarification) that includes specification, elaboration, and justification of goals and the suggestion of priorities. Another task is the historical description of past trends, including the formulation of criteria for their evaluation, identification, and generalization of their important features, and organization and presentation of the information thus obtained. The scientific task includes the identification of recurring factors, hypotheses about causal or influential relationships, and a melding of these into explanations of past behavior. The suggestion of probable future developments is yet another function performed by international lawyers: projecting likely conditions and identifying contingencies and their probable effects. Finally, their creative contribution is to develop alternative policies, including the identification of departures from goals in light of the projections made, the formulation of general strategies for achievement of those goals, and a recommendation of specific policies for achievement of those goals. Taking the roles of advocacy, scholarship, or prophecy seriously amounts to engaging in a range of intellectual operations directed at the past and future behavior of decisionmakers. Merely purporting to say "what the law is" involves several distinct steps in research and reasoning: historical, analytical, and speculative. The exhaustiveness with which each step is undertaken should depend upon the importance to the observer of being correct about the outcomes; but the steps are theoretically present in any case.<sup>139</sup>

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138. See McDougal, Lasswell & Reisman, *supra* note 113, at 204-206.

139. McDougal and Lasswell refer in this regard to the need for a "principle of economy":

We are calling attention here to the obvious necessity of recognizing limits on deliberation, and proposing that the decision-maker face these choices candidly as he goes along. The various specific operations by which new information is made available vary greatly in money cost; hence one of the ever-present features of judgment is whether relatively high costs will add much to the context that will legitimately affect one's final judgment.

M. McDUGAL, H. LASSWELL & J. MILLER, *THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER* 66 (1967).

Similarly, lawyers acting in an official capacity, as well as those who wish to influence official decisions, necessarily pass through the normative and creative stages as well as the others, even if these are not always rationally confronted. Avoidance of rational consideration or personal responsibility does not suspend the act of choosing goals or policies, but merely foregoes the opportunity for rational choice and influence.

#### 4. WHY? Assumptions about Basic Goals

The final set of domain assumptions relates to the ends of the entire exercise. Once again, the nature of prior standpoint is the crucial determinant. The aspirations and expectations of international lawyers as individuals normally lead to certain general assumptions about the concrete results that international legal studies are supposed to promote. These in turn will condition other assumptions.

In general, impacts might be sought in one or a combination of three realms: the intellectual/academic community, the political/decision process, and the larger world society. In each case, the basic goals may also be distinguished according to *when* they are expected to be realized.<sup>140</sup>

With respect to the first of these realms, concrete objectives may include an improved theory of international law, better communication among scholars, or better communication between teachers and students. In the "power process," results could include a better theory of international law with respect to particular issues, increased communication between scholars, practitioners, and decisionmakers, or improved decisionmaking. Finally, from the standpoint of political, economic, and social factors (World Public Order), one might seek to promote greater stability in international relations (minimum order), greater efficiency in international

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140. On the matter of academic impacts, see Young, *The Perils of Odysseus: On Constructing Theories of International Relations*, in *THEORY AND POLICY IN INTERNATIONAL RELATIONS* (R. Tanter & R. Ullmann eds. 1972).

relations, a strengthening of the political status quo, c improved popular understanding of international relations,

The distinction between the short and long term may be decisive with respect to the approaches taken. For example, if the basic objective is to influence decisionmakers on current problems, the demands of long-term theory-building, such as conceptual clarification and standardization,<sup>141</sup> may seem prohibitively cumbersome and ineffectual. On the other hand, if one is concerned with radical changes in the structure of world politics, conventional studies of "what the law is" on various issues may seem pointless.<sup>142</sup>

#### F. *Reconstructing International Law*

The previous enumeration of basic issues is obviously only a tentative effort to raise the underlying "domain assumptions" of international legal studies to the level of rational consideration. The purpose of such an exercise is not to suggest that there are any inherently correct assumptions upon which to build a jurisprudence of international law adequate to the times. On the contrary, the criteria of selection will vary considerably depending upon the point-of-view of individual observers.

But it should also be evident at this point that the choices made about *what*, *how* and *why* may not always be rationally related to the standpoint and objectives of the observer, even where that standpoint is deliberately chosen. There is a widespread tendency to leave these issues unexplored and to accept uncritically the intellectual inheritance of previous eras. Not only is it questionable whether those earlier assumptions remain adequate for the world at present, but they have often been imprecise, inconsistent, and incomplete in themselves.

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141. Lasswell has suggested that the significant impacts of theory-building efforts can be expected only several decades later.

142. See R. FALK, *A STUDY OF FUTURE WORLDS* (1975); S. MENDLOVITZ, *ON THE CREATION OF A JUST WORLD ORDER: PREFERRED WORLDS FOR THE 1990'S* (1975).



Professor Falk writes of a crisis in international legal studies and calls for a collective effort to refashion a new "juridical paradigm."<sup>143</sup> It is doubtful that such a paradigm will ever emerge or even that it is desirable to think in terms of such wholesale substitutions of one grand approach for another.<sup>144</sup> But there is some value in Falk's evaluation of traditional approaches in light of the problem of managing and changing the world as we find it today. It seems imperative that those concerned with international law begin to reexamine their basic assumptions in light of both the intellectual and political changes of recent times, and to debate their way to some limited form of consensus or common understanding.

McDougal, Lasswell and Reisman have set down in general terms their "criteria for an adequate theory about law."<sup>145</sup> This is a fundamental contribution. They have also recommended their own general approach to each one of the issues frequently hidden within the underlying assumptions about the international legal domain. I have tried to explore these recommendations in greater detail elsewhere.<sup>146</sup> On the basis of such an examination, I would not suggest that the work of the "Yale School" in any way "solves" the problems of international legal studies,

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143. Falk, *supra* note 57.

144. I am not as pessimistic, however, as Young, *supra* note 89, nor do I agree with Leon Lipson's admonition to international lawyers that "in a world of ideological confrontation and nuclear suspense international lawyers might do well to curb their zeal, contract their horizons, and Think Small." Lipson, *International Law*, in 8 HANDBOOK OF POLITICAL SCIENCE: INTERNATIONAL POLITICS 415, 434 (1975).

145. McDougal, Lasswell & Reisman, *supra* note 113.

146. F. Tipson, Consolidating World Public Order: The American Study of International Law and the Work of Harold D. Lasswell and Myres S. McDougal, 1906-1976 (May, 1977) (unpublished Ph.D. dissertation, University of Virginia).

or even that it entirely lives up to its own standards of adequacy; but I do believe that the Lasswell-McDougal-Reisman formulation of the issues is immensely valuable in itself, and that its recommendations for improvement are generally in the right direction. In seeking changes in international legal studies, however, the purpose must not be to enthrone some new orthodox approach to the subject, whether "policy-oriented" or some other, but to "ask ourselves," with Dean Pound, "what are likely to be the elements of a new theory of International Law and whence a more adequate International Law is to derive its materials." I would suggest with Lasswell and McDougal that we do well to begin with the basics and to reexamine our intellectual assumptions about international law with great care.