

## Casting the Spell:

### The New Haven School of International Law

*Jurisprudence for a Free Society: Studies in Law, Science, and Policy.* By Harold D. Lasswell\* and Myres S. McDougal.\*\* New Haven, Conn.: New Haven Press/Martinus Nijhoff Publishers, 1992. Pp. xl, 1588. \$594.00.

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In what must be a virtually unsurpassed record of forbearance, Professors Myres McDougal and Harold Lasswell polished and perfected the huge manuscript that was to become *Jurisprudence for a Free Society* for several decades after it was ready for publication in virtually its present form. Such perfectionism exhibited and confirmed a deep commitment by the authors to the most precise possible formulation of their jurisprudential position. It also represented great confidence that their influence would be exerted in a literal and comprehensive fashion, that readers would be guided quite specifically in their thinking about law through a study of this text. Only time will tell whether this preoccupation with precision that delayed publication more than thirty years was warranted.

McDougal and Lasswell locate their endeavor in an evolutionary process of thinking about law, repudiating naturalism because of its supraempirical claims of validation, and positivism because of its formalistic reliance on logical derivations of legal decisions from abstract doctrines.<sup>1</sup> They perceive American legal realism as an antecedent to their work, admirable for its critical focus on the interplay between rules and social process in the enunciation of law in authoritative form, especially through the operations of appellate courts.<sup>2</sup> Indeed, the McDougal and Lasswell undertaking can be regarded as converting the core insight of legal realism into a comprehensive framework of inquiry, including the provision of a normative rudder—the eight constituent values of a free society dedicated to the promotion of human dignity—by

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1. See 1 HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY* 212–17, 220–23, 231–35, 236–42 (1992) [hereinafter *JURISPRUDENCE*].

2. 1 *id.* at 249–67.

which to assess the relative merits of opposing lines of argument and analyses of factual circumstances.<sup>3</sup>

McDougal and Lasswell thus offer a jurisprudence that breaks radically from the positivism of John Austin and Hans Kelsen, viewing law not as the command of the sovereign<sup>4</sup> or—in the more contemporary formulation of H.L.A. Hart—as the product of some rational “rule of recognition,”<sup>5</sup> but rather as the end result of an authoritative decision-making process.<sup>6</sup> For scholars and policymakers, McDougal and Lasswell’s configurative jurisprudence offers the promise of a rigorous approach to decision, as well as one embedded in social context. By following the steps set forth, McDougal and Lasswell argue that a scientifically grounded answer to any given policy problem may be reached that is likely to promote the common interest in achieving a world order founded on fundamental principles of human dignity.<sup>7</sup>

As part of this endeavor, McDougal and Lasswell emphasize the distinction between “the observational standpoints of the scholar and decision maker,” with respect to “enlightenment, as well as . . . decision.”<sup>8</sup> The stress on this distinction is explained primarily by a presumed difference in orientation. The scholar is thought to be preoccupied with aggregating the knowledge relevant to reaching the most informed decision, while the decision maker is conditioned by the dimension of power. As McDougal and Lasswell put it, the decision maker—unlike the scholar—is constrained by “the making of effective choices in conformity with demanded public order.”<sup>9</sup> Without such a distinction, it becomes impossible for the scholar to do that part of her job that involves “appraising the rationality” of legal events “in terms of community interest of either claims or decision.”<sup>10</sup>

The other side of this search for a better jurisprudence is to ground it in policy science properly conceived: in essence, empirical knowledge analyzed by reference to purposive outcome. McDougal and Lasswell express their outlook as follows: “Science is sometimes said to be ‘value free’; and yet the most obvious fact about policy is that it is value oriented, since policy is only intelligible when it is seen as a deliberate search for the maximization of valued goals.”<sup>11</sup>

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3. This framework is the work of the entire two volumes, but its nature is usefully summarized at several points. *See, e.g.*, 1 *id.* at xxi–xxvii; 2 *id.* at 725–58.

4. *See* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 11 (Weidenfeld & Nicolson 1954) (1832); HANS KELSEN, *GENERAL THEORY OF LAW AND STATE* 30–31 (Anders Wedberg trans., Legal Classics Library 1990) (1945).

5. H.L.A. HART, *THE CONCEPT OF LAW* 97 (1961).

6. 1 *JURISPRUDENCE*, *supra* note 1, at 24–25.

7. 1 *id.* at 34–36.

8. 1 *id.* at 17, 18–24.

9. 1 *id.* at 18.

10. *Id.*

11. 1 *id.* at 16.

Another take on the McDougal and Lasswell enterprise is that its aims are primarily pedagogical rather than policy-oriented. Their preoccupation with legal education is expressed by both their dedication "To Our Students," and their first published effort *Legal Education and Public Policy: Professional Training in the Public Interest*, reprinted as an Appendix to their jurisprudence.<sup>12</sup> There is no question that the approach they advocate is more contextual, interdisciplinary, processive, systematic, and visionary than the standard emphases on legal reasoning and fact/law analysis characteristic of the way law mainly was (and is) being taught in American law schools. In some sense, McDougal and Lasswell conceive of legal education less in terms of vocational training and more as a means of producing enlightened citizens capable of understanding the issues of the day as a struggle to realize the values of human dignity. Thus, they seek through their jurisprudence a dynamic of political engagement needed to achieve and sustain a free society.

Despite the huge delay in publication, this mammoth work remains "unfinished." Harold Lasswell, who died in 1978, had evidently planned to expand and document substantially the chapters for which he took primary responsibility.<sup>13</sup> These constitute the bulk of the second volume. And more surprisingly, despite a long prepublication process that included numerous reconsiderations of how to formulate this or that dimension of the overall orientation, the work as published has a dated quality arising partly from the authors' failure to refer in the text or footnotes to the major scholarly work or historical developments of the last twenty-five years. It poses a question for reader and reviewer. Why was this mystifying preoccupation with exactitude, which was responsible for the long deferral of publication, coupled with an unwillingness to look up from the manuscript to take account of what others were writing during these years and of what was going on in the world?

My own explanation would be that the core of this remarkable jurisprudential enterprise was conceptual, pedagogical, professional, and scientific, with reference being made to other scholarly work either for polemical purposes (to orient critical arguments)<sup>14</sup> or as a matter of academic decorum (to exhibit a reassuring and professionally proper awareness of other, related work).<sup>15</sup> The documentation, aside from cross-referencing other work

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12. Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943), reprinted in 2 JURISPRUDENCE, *supra* note 1, at 1265.

13. See 1 JURISPRUDENCE, *supra* note 1, at xxiii.

14. This comment applies generally to the reliance on academic sources throughout this work, and indeed in most of the vast corpus of McDougal's scholarly output. McDougal and Lasswell use some antecedent writing critically to situate their own enterprise, see 1 *id.* at 3-9 nn.1-17, but in the remainder of the text other scholarly work plays virtually no role in the exposition of their theory and its application.

15. For an example of their reference to an assortment of scholarly work without any serious treatment of the positions taken, see 1 *id.* at 177-81. In many footnotes, diverse, even antagonistic, works by a range of authors are simply listed. See, e.g., 1 *id.* at 181 nn.49-52.

proceeding from a kindred, and generally collaborative, viewpoint,<sup>16</sup> adds very little to the essentials of the approach. Updating would have added, at most, little more than an aura of contemporaneity. Similarly with the evolving global setting. Aside from the crucial, and historically (and ethically) appropriate, distinction between democratic and totalitarian public order systems,<sup>17</sup> the authors were not really concerned about depicting empirical levels of reality at a given historical juncture.

Theirs was a remarkable collaboration, noteworthy for its coherence of vision and pedagogical impact. But I shall argue that the jurisprudence is conceptually troubled, and unlikely to survive once the charismatic spell cast by its progenitors has passed.

### I. COLLABORATIVE SCHOLARSHIP

It is highly unusual to find distinguished scholars with independent reputations collaborating on works of conceptual magnitude.<sup>18</sup> It is unique to find a work of this sort prefaced by short essays by each author on his sense of his partner in collaboration, a self-consciousness that acknowledges just how special this jointness of endeavor really is. Lasswell begins his essay, entitled "Lasswell on Collaboration with McDougal," with a characteristically engaging remark: "Professor McDougal and I have been able to work together for over thirty years in what must establish a record of sorts for an interdisciplinary team whose members are not shackled together by the love, hate, and duty bonds of matrimony."<sup>19</sup> My own experience with collaborative scholarship has been somewhat opposite, creating some of the bonds, for better and worse, of a mini-marriage. But Lasswell is all business: "The essential point in our collaboration is common purpose and shared expectation about what is to be

16. See, e.g., 2 *id.* at 725-45 nn.1-10.

17. This distinction is powerfully developed and relied upon in Myres S. McDougal & Harold D. Lasswell, *The Identification and Appraisal of Diverse Systems of Public Order*, 53 AM. J. INT'L L. 1 (1959), reprinted in MYRES S. MCDUGAL ET AL., *STUDIES IN WORLD PUBLIC ORDER* 3 (1960) [hereinafter MCDUGAL ET AL., *STUDIES*].

18. The only important exception in international legal studies is the treatise on international law of Lassa Oppenheim and Hersch Lauterpacht, but even here the collaboration was less a joint scholarly undertaking than Lauterpacht taking over the work of editing later editions of Oppenheim's original treatise. See LASSA OPPENHEIM, *INTERNATIONAL LAW: A TREATISE* (H. Lauterpacht ed., 8th ed. 1955); see also W. Michael Reisman, *Lassa Oppenheim's Nine Lives*, 19 YALE J. INT'L L. 255, 268-70 (1994) (describing evolution of treatise). Although prodigious, the effort was essentially doctrinal and informational, given that the treatise's positivist jurisprudential frame was taken as fixed. For another major collaboration, see MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* (1961).

19. 1 JURISPRUDENCE, *supra* note 1, at xxxv. He concludes his comments in the same vein:

In some collaboration the partners keep together by multiplying side-activities. They cultivate big game fishing, yachting, karate, or opera. McDougal and I have been so absorbed in the central tasks the re-enforcements have been superfluous. Our collaboration has required no care and feeding after hours. How long will our collaboration last? As long as we do.

1 *id.* at xxxvii. And so it did! But, perhaps, a little more care and feeding would have made the process even more satisfying, or at least so it seems to me.

done. . . . The aim is to show how a comprehensive approach to the role of knowledge in society generates a jurisprudence that furthers self-appraisal and innovation in systems of public and civic order."<sup>20</sup>

Lasswell also tells us about the interplay of the collaborators' interests and orientations, including his preference for working papers in contrast to McDougal's inclination to rely on exhaustive outlines and critiques of preliminary drafts as a way of producing by stages a manuscript. Lasswell also takes note of McDougal's "furious tenacity" and his deployment of an "intellectual bulldozer" to remove from the path of inquiry "traditional modes of thought."<sup>21</sup> And Lasswell celebrates difference, perhaps most tellingly in terms of intellectual style: "McDougal loves verbal combat, especially in the frame of a prescriptive system and an appellate court. So far as I am concerned, most combat is boring and time-wasting. My preference is for inquiry into factual causes and consequences."<sup>22</sup>

Lasswell's inquiring mind was always pushing back the frontiers of knowledge in relation to the social sciences. He recognized early in his career the implications for knowledge of psychoanalysis and psychological self-scrutiny,<sup>23</sup> of modern communications and the manipulation of information as a dimension of power,<sup>24</sup> and of the relevance of polling and sampling techniques to politics in large, contemporary democracies.<sup>25</sup> Such social science perspectives, when filtered through McDougal's more focused preoccupation with law (conceived as the processes of authoritative decision making), give credence to McDougal and Lasswell's joint claim to provide a comprehensive framework for inquiry into the interface between law and policy.

McDougal's assessment of Lasswell is more sober, and extravagantly celebratory. McDougal praises Lasswell's achievement as the founder of what "is now widely known, as 'the policy sciences,'"<sup>26</sup> and his specification in empirical terms of the values decision makers should rely upon to identify preferred policies in all arenas in which they must act authoritatively. By

20. 1 *id.* at xxxv.

21. 1 *id.* at xxxvi.

22. *Id.*

23. See the path-breaking books HAROLD D. LASSWELL, *POWER AND PERSONALITY* (1948); HAROLD D. LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* (1930); see also HAROLD D. LASSWELL, *WORLD POLITICS AND PERSONAL INSECURITY* (1935).

24. See HAROLD D. LASSWELL, *PROPAGANDA TECHNIQUE IN THE WORLD WAR* (1927); Harold D. Lasswell, *The World Revolution of Our Time*, in *WORLD REVOLUTIONARY ELITES* 29 (Harold D. Lasswell & Daniel Lerner eds., 1965) [hereinafter Lasswell, *World Revolution*].

25. Lasswell first developed this line of thought in his early writings. See HAROLD D. LASSWELL, *THE ANALYSIS OF POLITICAL BEHAVIOR: AN EMPIRICAL APPROACH* 224-34 (1948). He argued that survey research was essential to understanding governmental operations and encouraging the development of democratic and responsible governments. He was also aware, however, of the danger posed by the development of "communications professionals." See HAROLD D. LASSWELL, *ON POLITICAL SOCIOLOGY* 267-78 (1977).

26. 1 *JURISPRUDENCE*, *supra* note 1, at xxx.

focusing on these values, decision makers are able to promote and develop in practice a "jurisprudence for a free society" (that is, a framework expressing an underlying commitment to "the basic values of human dignity").<sup>27</sup> McDougal also emphasizes Lasswell's insistence on applying a multidisciplinary array of perspectives, thereby aggregating knowledge being accumulated by specialists in all fields that appear constitutive of the behavioral domains subject to legal constraint and guidance.<sup>28</sup>

This stress on the collaborative nexus seems warranted, reflecting its comparative rarity as well as the importance attached to its exposition by McDougal and Lasswell in their quite revealing cross-portraits of one another. It also bears on a paradoxical aspect of the resultant jurisprudence, and its distinctive web of influence. On one side is the penchant for Lasswellian taxonomies, long lists of complex items to be included in the comprehensive mapping of what a policy adviser or policymaker should consider and do.<sup>29</sup> On the other is the intensely personal McDougalian approach, with the sensitivity of a local politician to the way the world works.<sup>30</sup>

In one crucial respect, the McDougal and Lasswell orientation is richer and more challenging than what appears in published form. Lasswell was very much an amateur, yet highly skilled, psychoanalyst, alert above all to what was concealed from conventional understanding in unconscious motivations and instinctual drives; McDougal learned from this, and built upon his own past in a rural northern Mississippi county where his father, a country doctor, allegedly could routinely deliver 50,000 votes on election day. It was McDougal's love of people and of helping his students gain access to power and vocational success that brought him the greatest visible satisfaction, and exhibited his "other" sense that power was mainly about human relations, wheeling and dealing, the reciprocal sense of getting things done for others and thereby engendering feelings of gratitude and loyalty.

## II. CASTING THE SPELL: PROPAGATING THE IDEAS OF THE NEW HAVEN SCHOOL

Conjectures about the wider web of influence and impact may seem remote from a Book Review, but arguably not in relation to the McDougal and

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27. See 2 *id.* at 737-41.

28. McDougal writes in his prefatory note on Lasswell:

A distinctive emphasis in Lasswell's orientation to problem-solving is grounded in the wisdom that every discipline can provide methods and insights which may be of use to those who can use and/or understand them. Hence, his injunction to become multidisciplinary, and no one heeded this advice better than Lasswell himself.

1 *id.* at xxxii.

29. See, e.g., 2 *id.* at 741-58 (providing clarification of values); 2 *id.* at 960-72 (offering recommended approach to study of judicial decisions).

30. McDougal does not express this highly emotional, personalized style in his written work, but it is a staple of his vivid oral performances and of his working style.

Lasswell jurisprudence. Their jurisprudence, its potency and its limitations, owe as much to personal style as to intellectual attributes. McDougal and Lasswell's jurisprudential publication—produced over a period of decades—was paralleled by a pedagogical process that sent forth influential students from the Yale Law School to all corners of the country and the world forever imprinted with the law, science, and policy approach.

Indeed, the McDougal and Lasswell framework has had more influence in Third World countries than any other American jurisprudential perspective—a surprising result given the founders' penchant for applying their theory in justification of U.S. foreign policy.<sup>31</sup> This truth illustrates the power of the framework to structure decisions whatever the observational stance of the user. It is also a tribute to McDougal's extraordinary missionary gift as an engaged teacher. The scholars and practitioners influenced by the approach invariably are former students. I remember being dazzled as a student by Mac's seemingly limitless patience with foreign graduate students whose English intonation made their speech incomprehensible to me. Somehow, Mac listened carefully enough to create bonds that endured over great distances and for decades, giving individuals who were then anonymous students that experience of dignity in concrete personal encounter that the jurisprudence promised at the level of social and political intercourse.<sup>32</sup>

What is more, unless one was actually in residence as a student or visiting scholar, the spell was not cast. The weight of impact depended on the existential experience of teacher, text, and pupil in the Yale Law School milieu. My view is that *A Jurisprudence for a Free Society* will not be widely read or relied upon, except by those who were directly exposed to the pedagogic spell cast by McDougal and Lasswell's special variant of enchantment. Why? The text on its own is too idiosyncratic and demanding to engage general readers, and requires excessive effort to achieve the practical purpose of promoting a useful and ethically attractive approach to the place of law in the policy process.

Can the disciples sustain the vision of the founders? It remains to be seen, but I doubt it. There is to be sure an Institute for the Policy Sciences based in New Haven, which brings the faithful together annually at their own expense for several days of stimulating discussion within the ambit of the McDougal and Lasswell jurisprudence, and is administratively directed by a gifted

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31. Perhaps the most impressive scholarly assessment of McDougal and Lasswell's contribution by a Third World author is that of B.S. Chimni in a long discussion that mixes appreciation and criticism. B.S. CHIMNI, *INTERNATIONAL LAW AND WORLD ORDER: A CRITIQUE OF CONTEMPORARY APPROACHES* 73–145 (1993). Chimni's book is one of the few that tries to assess the utility of alternative approaches for the study of international law and world order.

32. I omit reference to Lasswell here because he did not share this side of the teaching impact, to the best of my understanding.

interpreter, Andrew Willard, a scholar of independent importance.<sup>33</sup> As well, the Yale law faculty includes McDougal's semi-anointed successor, Michael Reisman, himself a remarkably dedicated, wide-ranging, and talented adherent, whose own scholarly achievement has achieved worldwide recognition and whose teaching commitment has built a loyal following.<sup>34</sup> Whether Willard and Reisman can do for the words of McDougal and Lasswell what Peter and Paul did for the message of Jesus is, of course, a tall order, and not one that appears to be their single-minded scholarly purpose.

Yet all is not lost even if the primary line of influence cannot perpetuate itself beyond the successor generation. The jurisprudence's astonishing range of scholarly applications is likely to provide the most resounding vindication of the heroic efforts made by McDougal and Lasswell throughout their long, productive careers.<sup>35</sup> On this secondary level of influence, writers on almost any topic of significance in international law can benefit from and are likely to keep consulting the McDougal treatment of broad subject-matter sectors. Scholars will find reference to the configurative approach useful both because it provides a rich appreciation of the nature of international law in relation to any substantive concern, and because a comprehensive exploration of the multi-dimensionality of contested behavior in light of expectations about the application of legal authority is likely to be useful in evaluating alternatives. Even here there are problems. The massiveness of the tomes on specific topics makes their revision a daunting task, and yet unless the unfolding world and its law enterprise is incorporated, the scholarly work, despite its theoretical merits, will soon appear superseded by time. Here, I think a conscious effort to stimulate, and if necessary subsidize, the processes of revision would be both intrinsically rewarding and the most promising way to keep the McDougal and Lasswell jurisprudential torch burning in the decades ahead.

What I have written in the prior paragraph could be read as implying that the configurative jurisprudence is superfluous, or worse, a kind of gigantic failure. Not at all. The jurisprudence is the culmination and keystone of many

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33. See INTERNATIONAL INCIDENTS (W. Michael Reisman & Andrew R. Willard eds., 1988); Andrew R. Willard, *Incidents: An Essay in Method*, in INTERNATIONAL INCIDENTS, *supra*, at 25; see also W. Michael Reisman & Andrew R. Willard, *The World Community*, 21 U.C. DAVIS L. REV. 807 (1988).

34. Professor Reisman has been a prolific scholar, exerting influence on a wide range of topics relevant to international law. In addition to the work cited in the previous note, and to his collaborative work with McDougal, among Reisman's most significant contributions are W. MICHAEL REISMAN, NULLITY AND REVISION: THE REVIEW AND ENFORCEMENT OF INTERNATIONAL JUDGMENTS AND AWARDS (1971) and W. MICHAEL REISMAN & JAMES E. BAKER, REGULATING COVERT ACTION (1992). In many respects, since Lasswell's death Reisman has been McDougal's most significant collaborator, especially on matters relating to the constitutive process of governance in international political life. The most important of this writing is collected in MYRES S. MCDUGAL & W. MICHAEL REISMAN, INTERNATIONAL LAW ESSAYS (1981).

35. See 1 JURISPRUDENCE, *supra* note 1, at xxiv-xxvi nn. 1-5 (listing of principal works); see also Frederick S. Tipson, *Bibliography of Works by and Relating to Myres S. McDougal*, in TOWARD WORLD ORDER AND HUMAN DIGNITY: ESSAYS IN HONOR OF MYRES S. MCDUGAL 579 (W. Michael Reisman & Burns H. Weston eds., 1976) [hereinafter TOWARD WORLD ORDER AND HUMAN DIGNITY].

disparate scholarly extensions and applications. Without it there would be something missing of a fundamental character, a cohering overall framework for analysis and prescription. Again, my conclusion is paradoxical. The jurisprudence is an extraordinary part of the overall achievement, yet it will not work by itself without the living presence of its two larger-than-life architects and charismatic disseminators.

### III. A CRITIQUE OF THE JURISPRUDENCE<sup>36</sup>

The great contribution of the McDougal and Lasswell jurisprudence is that it provides an orientation toward law in any context, a coherent way of thinking that is more systematic than alternatives, an approach that if followed, or even approximated, assures a comprehensive and intellectually responsible treatment of any complex problem or issue area. The impressive corpus of scholarship by McDougal and his many collaborators on specific topics confirms this claim, as well as its cautionary corollary: Don't expect to overcome discretion, bias, or interpretative perspective by adopting this (or any other) approach.<sup>37</sup> In fairness, McDougal and Lasswell acknowledge this limitation on their approach, at least in the abstract. They claim only that one must be as self-conscious as possible about one's observational perspective, and as systematic and complete in assessing policy choices as the current state of available knowledge allows.<sup>38</sup> On the matter of observational clarity, greater concreteness would have made their position both more insightful about the deformations of knowledge produced by the biases of power elites and more persuasive, by taking into account differences of gender, race, class, sexual orientation, and culture. There is in this vast work no discussion of feminist, gay and lesbian, indigenous peoples', or black "readings" of international law. This is a serious omission given the powerful critiques of hegemonic discourses of various sorts that emerged in the 1980's and 1990's.<sup>39</sup>

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36. Prior assessments of McDougal and Lasswell's jurisprudence include CHIMNI, *supra* note 31, at 73-145; JULIUS STONE, VISIONS OF WORLD ORDER 20-32 (1984); Oran R. Young, *International Law and Social Science: The Contributions of Myres S. McDougal*, 66 AM. J. INT'L L. 60 (1972); Gerald Fitzmaurice, *Vae Victis or, Woe to the Negotiators!: Your Treaty or Our "Interpretation" of It?*, 65 AM. J. INT'L L. 358 (1971) (reviewing MYRES S. MCDUGAL ET AL., THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER (1967)). For my own earlier responses to McDougal and Lasswell, see RICHARD A. FALK, LEGAL ORDER IN A VIOLENT WORLD 80-96 (1968); Richard A. Falk, Book Review, 10 AM. J. COMP. L. 297 (1961).

37. What can be expected from a scholar or decision maker is to clarify her or his "observational framework." See 1 JURISPRUDENCE, *supra* note 1, at 17-19. It is a matter of acknowledgment of perspective, not its transcendence, although an appropriate "scientific" view of knowledge reduces to a minimum such distorting impacts. Impressively, McDougal and Lasswell assert the relevance of psychoanalysis to probe the domain of unconscious bias and manipulation. See 2 *id.* at 911-41.

38. See 1 *id.* at 23.

39. See, e.g., SPIKE PETERSON & ANNE S. RUNYAN, GLOBAL GENDER ISSUES (1993); J. ANN TICKNER, GENDER IN INTERNATIONAL RELATIONS (1992); Howard R. Berman, *Perspectives on American Indian Sovereignty and International Law, 1600 to 1776*, in EXILED IN THE LAND OF THE FREE 125-88 (Oran Lyons et al. eds., 1992); Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J.

Moreover, it is not clear exactly what McDougal and Lasswell claim for their jurisprudential stance, whether the essential claim is one of sensitizing scholars and decision makers to the performance of their roles in a more efficient manner, or something more. This second, stronger claim would be that the jurisprudence could effect a series of outcomes or decisions that were more persuasively aligned with the realization of the values of human dignity than outcomes and decisions made impressionistically or on the basis of rival jurisprudential stances.<sup>40</sup> The weak goal of sensitizing students and policymakers seems attainable, provided the effort entailed is not so overwhelmingly complex as to render the process impracticable. It is not surprising that the larger goal, the adoption of the jurisprudential orientation as method as well as perspective, has been limited to the scholarly community (although arguably decision makers exposed to the approach might in practice apply law more responsively to the value demands at stake). Even among scholars, as noted earlier, the orbit of influence has been restricted to those who have directly assimilated the approach through a period of dedicated study within the charismatic pedagogical reach of McDougal.

The strength of the McDougal and Lasswell framework as a guide to thought therefore needs to be separated from the more problematic claim that with such a supposedly scientific purchase on knowledge it will be possible to march in time while advancing toward the posited goal of "a free society" embodying ever more fully the values of human dignity. The jurisprudence as set forth by McDougal and Lasswell is explicitly designed to help academic advisers and policymakers use law as a specialized instrument in a wide variety of social and political arenas for pursuing these normative goals.<sup>41</sup> In my view, this part of the enterprise fails, and is doomed to failure by its inherent nature. This failure is expressed by the inability of honest, intelligent, morally sensitive, and politically moderate individuals steeped in the New Haven approach to agree in the domain of policy application. Reliance on the McDougal and Lasswell orientation tends, if anything, to accentuate policy divergences as opposed viewpoints each claim "scientific" grounding for their

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INT'L L. 613 (1991); Lurence R. Helfer, *Lesbian and Gay Rights as Human Rights*, 32 VA. J. INT'L L. 157 (1991); Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42 (1993); *See also* HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES chs. 8-14 (Abdullahi Ahmed An-Na'im ed., 1992).

40. It is integral to McDougal and Lasswell's project to promote a world order based on the values of human dignity and to avoid the challenges associated with either totalitarianism or with what they label "a Garrison-Prison World." *See* 2 JURISPRUDENCE, *supra* note 1, at 986-87. They express these wider ambitions most forcefully in Chapter 4. *See* 2 *id.* at 973-79. McDougal and Lasswell also express a conviction that a policymaker with authority can facilitate these ends by improving the intellectual foundations of the decision-making process along the lines they propose. *See, e.g.*, 2 *id.* at 1131-33.

41. *See, e.g.*, 1 *id.* at 203-326 (analyzing functions of legal policymakers); 1 *id.* at 1131-1262 (clarifying intellectual tasks to be performed by legal academics and policymakers).

positions.<sup>42</sup> As the Chinese proverb goes, “Two persons in the same bed have different dreams.”

Indeed, in other writing and speaking—especially that of McDougal—devoted to discussion of controversial policy issues (how to interpret the U.N. Charter in light of Soviet obstructionism; how to appraise the legality of hydrogen bomb tests in the Pacific; how to evaluate contested Cold War interventions in Vietnam or Nicaragua), the results, although elaborated in alleged relation to the jurisprudential frame, had an uncomfortable tendency to coincide with the outlook of the U.S. government and to seem more polemically driven than scientifically demonstrated.<sup>43</sup>

Finding myself over the years in the odd position of adhering generally to the McDougal jurisprudential outlook, yet consistently in sharp disagreement on policy applications,<sup>44</sup> I tried on several occasions to convince my erstwhile mentor that he misunderstood, and hence misapplied, his own theory. Of course, such a tack involved hubris on my part, but Mac, with his exemplary loyalty to former students and his unfailing offstage humor, seemed, or at least so I imagined (perhaps vainly), almost to accept this effort to deny any claims of policy “truth” deriving from his framework of inquiry. In any event, whatever McDougal did or didn’t believe, the effort to resolve policy controversy by scientific inquiry has not succeeded. Opposing lines of interpretation by individuals of comparable intelligence and virtue can reach utterly opposed policy conclusions on controversial matters even as they acknowledge their indebtedness to the McDougal and Lasswell jurisprudence.<sup>45</sup>

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42. Consider, for example, the debates on the Vietnam War by two “followers,” John Norton Moore and myself, which appeared initially in the pages of *The Yale Law Journal*. See discussion and sources cited *infra* note 44.

43. Some of the most important early work along these lines was collected in MCDUGAL ET AL., *STUDIES*, *supra* note 17.

44. These disagreements often surfaced in oral encounters at professional occasions or in private conversation, and reached their peak of intensity during the decade of debate about the legality of U.S. participation in the Vietnam War. McDougal’s views were never, as far as I know, developed systematically, although he generally affirmed the position supporting U.S. government claims developed by his student, John Norton Moore. See Myres S. McDougal, *Foreword* to JOHN NORTON MOORE, *LAW AND THE INDO-CHINA WAR* at vii, xi (1972); see also Myres S. McDougal, *Foreword* to ROGER H. HULL & JOHN C. NOVOGROD, *LAW AND VIETNAM* at vii–ix (1968). My own orientation was highly critical of U.S. official claims. See, e.g., 1 *THE VIETNAM WAR AND INTERNATIONAL LAW* 397–400 (Richard Falk ed., 1968).

The main issues in controversy between Professor Moore and myself were debated in a series of articles published in the pages of *The Yale Law Journal*. See Richard A. Falk, *International Law and the United States Role in the Viet Nam War*, 75 *YALE L.J.* 1122 (1966); John Norton Moore, *International Law and the United States Role in Viet Nam: A Reply*, 76 *YALE L.J.* 1051 (1967); Richard A. Falk, *International Law and the United States Role in Viet Nam: A Response to Professor Moore*, 76 *YALE L.J.* 1095 (1967).

Another example of sharp policy disagreement concerned the U.S. Government’s insistence on testing nuclear weapons on the high seas and in the atmosphere. See Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective*, 64 *YALE L.J.* 648 (1955), reprinted in MCDUGAL ET AL., *STUDIES*, *supra* note 17, at 770–72.

45. For instance, the published work of two prominent McDougal protégés, Michael Reisman and Burns Weston, diverges on many crucial issues of policy controversy. Compare W. Michael Reisman,

The jurisprudential enterprise embodies an Enlightenment confidence that science produces over time a stream of advances in knowledge, and the further conviction that if knowledge is properly put to the task of the realization of values, the results will lead inevitably to human betterment.<sup>46</sup> This unconditional confidence in the *normative* benefits of knowledge does give the McDougal and Lasswell jurisprudence a slightly old-fashioned tone. In this heady “postmodern” era there is widespread skepticism abroad about the generalizability of knowledge relevant to social issues, and a far greater degree of deference to a range of different readings. To posit a comprehensive framework of the McDougal and Lasswell variety is to suppress difference, and to suppose that rational value categories can achieve objective knowledge. True, McDougal and Lasswell recommend self-scrutiny in relation to observational standpoint, but they do so to minimize the intrusion of bias, whereas the postmodern position is that there is no way to transcend the particularities of perspective, and hence, what is called “bias.”

In cultural terms, the McDougal and Lasswell effort is thus situated in the modernist attempt to retain human access to unconditional truth by supplanting religion with science, in this instance social science.<sup>47</sup> Of course, McDougal and Lasswell (and their many followers) invoke science for the sake of “values,” as derived from the experience of constitutional democracies in the non-socialist West.<sup>48</sup> To some extent, McDougal and Lasswell anticipate the end-of-history line taken by Francis Fukuyama through their insistence that there is one and only one general path that has the capacity to achieve a free society.<sup>49</sup>

McDougal and Lasswell had an early and historically prophetic grasp on the fundamental ideological struggle of the last half-century, and they resolved

*Deterrence and International Law*, 4 N.Y.L. SCH. J. INT’L. & COMP. L. 339 (1983) (arguing that both expectations of politically relevant actors and control intention—evidenced by proliferation of nuclear weapons in decentralized system—indicate effective legality of nuclear armaments) with Burns H. Weston, *Nuclear Weapons and International Law: Prolegomenon to General Illegality*, 4 N.Y.L. SCH. J. INT’L & COMP. L. 227 (1983) (arguing that nuclear weapons are incompatible with fundamental precepts of international law); see also TOWARD WORLD ORDER AND HUMAN DIGNITY, *supra* note 35 (illustrating wide range of views associated with McDougal and Lasswell’s approach).

46. This epistemological confidence in the fruits of scientific inquiry is a pervasive attribute of McDougal and Lasswell’s enterprise, briefly specified in the Preface. See 1 JURISPRUDENCE, *supra* note 1, at xxii–xxiii.

47. For an analysis of the complex transition to modernism, see generally STEPHEN TOULMIN, COSMOPOLIS: THE HIDDEN AGENDA OF MODERNITY (1990).

48. See 2 JURISPRUDENCE, *supra* note 1, at 725–41, 1017–31, 1131–54; see also MCDUGAL & REISMAN, *supra* note 34; MYRES S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER (1980); LUNG-CHU CHEN, AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW 3–22 (1989).

49. See FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN at xi (1992). In fairness, McDougal and Lasswell give an isolated acknowledgment that it is at least theoretically possible for a socialist schema to be consistent with the values of human dignity, even if the empirical record fails to posit a single supportive instance. In the course of the chapters attributed primarily to Lasswell, they suggest that “[i]t is speculatively conceivable that socialist economies in advanced industrial societies and in big states can learn how to maintain high levels of economic progress by strategies other than maintaining high levels of terror.” 2 JURISPRUDENCE, *supra* note 1, at 1147.

it in favor of the West in a manner that has been abundantly validated but that was by no means self-evident when initially articulated.<sup>50</sup> There is an element of *mea culpa* involved here; I tended to regard the ideological struggle as far less clear-cut while it was unfolding, seeing serious flaws in the value commitments of both systems.<sup>51</sup> As well, my fear that the Cold War would generate a catastrophic World War III made me receptive to the project of constructing a world order based on coexistence that transcended the ideological divide while respecting a diversity of views within the antagonistic blocs.<sup>52</sup> In retrospect, given the oppressiveness and ineptitude of the Soviet system, ruining everything and everyone it touched, I now regard the ideological partisanship of McDougal and Lasswell as far preferable to my posture of nonpartisan criticism and emphasis on war avoidance.<sup>53</sup> This clarity of commitment informs their jurisprudence at every stage, giving it both a historical relevance and rootedness, and an ahistorical validation of great significance—for the process of democratizing, realizing the values of a free society, is without end. Admitting this, which I gladly do, is not, however, an acquiescence in their claim that values and policy can be put on a scientific foundation in the sense of objective knowledge generative of “correct” policy choices.<sup>54</sup> There are two interrelated problems here. If scientific means objective, then it cannot be achieved in policy domains. If scientific is more adequately and contemporaneously understood as encompassing varying degrees of chaos, uncertainty, irreducible complexity, and indeterminacy, then McDougal and Lasswell’s invocation of science is misleading—for science in this sense does not generate determinate answers to policy problems.<sup>55</sup>

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50. See McDougal & Lasswell, *supra* note 17, at 1–6. Note especially their criticisms of false universalism of the sort posited in C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* (1958). McDougal & Lasswell, *supra* note 17, at 1 n.1, 2.

51. See, e.g., RICHARD FALK, *THE END OF WORLD ORDER* 3–23, 35–69, 89–101 (1983); RICHARD FALK, *THE PROMISE OF WORLD ORDER* 1–4 (1987).

52. See RICHARD A. FALK, *A STUDY OF FUTURE WORLDS* 150–59 (1975); RICHARD A. FALK, *THIS ENDANGERED PLANET* 309–12 (1971). Although this anxiety has not been validated, it is a matter of unresolved (and, likely, unresolvable) conjecture as to how great risks of general war were at various points of crisis in the Cold War; the “lessons” of the past are always overdrawn, as occurrences that might have happened, or almost happened, are essentially neglected in favor of what did happen.

53. Arguably, the excesses of both positions were avoided by the encounter between them, producing a desirable mutual muting that kept the focus on the stakes of struggle, but also on its risks.

54. McDougal, while right on the fundamental split between public order systems, may still be irresponsible with respect to the advocacy of given interventions in foreign societies; what would it mean to be irresponsible? In his jurisprudential terms, it would mean not clarifying the bias of the observer, failing to grasp the antecedent grounds of the conflict, inadequately assessing the prospects for success, or refusing to think through the implications of alternative lines of policy. The best example is probably McDougal’s support for the U.S. role in the Vietnam War. See *supra* note 44. Beyond this, the complexity of reality makes the resolution of choice opaque from the perspective of the rational, inquiring mind; otherwise, every split judicial decision would be an expression of mental incompetence or corruption.

55. The traditional image of scientific rationality is based on the discovery of “laws” that explain causation in a manner that excludes indeterminacy. The more recent image, while acknowledging the traditional emphasis on predictability, seeks to grasp the social and cognitive importance of degrees of unpredictability arising from unfathomable patterns of complexity and causation. For useful introductory accounts, see JAMES GLEICK, *CHAOS* (1987); STEPHEN H. KELLERT, *IN THE WAKE OF CHAOS* (1993); M.

The collaboration itself also introduced tensions into the jurisprudence. Lasswell's garrison-state hypothesis was one of his most famous conceptualizations: that world political trends were inducing a pervasive militarization of the governing process everywhere, including in the countries of the liberal West.<sup>56</sup> An outgrowth of Lasswell's work prior to his collaboration with McDougal, the garrison-state hypothesis is somewhat unconvincingly incorporated into the jurisprudence late in the second volume. This hypothesis is not easily reconciled with the ideological bipolarity of a world order that pits totalitarian versus free societies as the essential struggle of our time, a view that anchors the McDougal and Lasswell jurisprudence in the history of the Cold War era. This tension is obliquely addressed deep in the entrails of the McDougal and Lasswell opus, as one of two "constructs" presenting contrasting "images of a terminal state of man."<sup>57</sup> The other construct, labeled "Construct B. Toward a Universal Public Order of Human Dignity," is a scenario not present in Lasswell's earlier independent work that envisions cumulative progress being achieved in relation to the eight public order values.<sup>58</sup> While informing readers that they did not "intend to obtrude our estimates of the outcome into the presentation," McDougal and Lasswell went on to say that "we are not sanguine," while regarding neither result as "inevitable."<sup>59</sup>

This fear of pervasive militarization was quite plausible given the persistence of Cold War tensions that imposed a readiness in the nuclear age to wage all-out strategic war at a moment's notice. Lasswell also believed that the techniques of manipulation and coercion available to the modern state would allow total control over territorial space, and that leaders, even in democratic societies, were being driven toward a garrison-prison ethos.<sup>60</sup> Of course, it is a great relief that this "construct" has not come to pass, although it is also the case that Construct B has not materialized, despite the spread of human rights and democratic values.

Two observations are relevant here. First, the garrison-state hypothesis is more systemic than is the other view of a rivalry between contending public

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MITCHELL WALDROP, *COMPLEXITY: THE EMERGING SCIENCE AT THE EDGE OF ORDER AND CHAOS* (1992). For Ilya Prigogine's seminal reimagining of science, see ILYA PRIGOGINE & ISABELLE STENGERS, *ORDER OUT OF CHAOS* (1984). For a useful effort to adapt the understanding of international relations to these perspectives, see JAMES N. ROSENAU, *TURBULENCE IN WORLD POLITICS* 47-66 (1990).

56. See Lasswell, *World Revolution*, *supra* note 24, at 73-77.

57. See 2 *JURISPRUDENCE*, *supra* note 1, at 986. The garrison-state construct is labeled "Toward a Garrison-Prison World." 2 *id.* at 986-1017. Note that the use of the word "man" in this formulation is very anachronistic in relation to normative sensitivities of the 1990's. And this matter of semantic choice cannot be reduced to an issue of "political correctness." There has occurred, despite the "Reagan revolution" and now the "Contract with America," a societal shift in attitude toward gender that affects acceptable language use at this time. I stress this point partly for substantive reasons, but also to reinforce the contention that the jurisprudence as published has a dated quality attributable to its long period of gestation and refinement.

58. See 2 *id.* at 1017-31.

59. 2 *id.* at 986.

60. See 2 *id.* at 991-95.

order systems, but has turned out to be a false alarm. There is not now evident any trend toward an increase in state power vis-à-vis the citizenry. Second, the stress on the coercive capabilities of the state fails to take into account the impact of global market forces on the role and character of the state in the evolving world order. McDougal and Lasswell fail, along with most other work on global trends, to appreciate the vital restructuring impact of economic globalization and regionalization on the nature of the state, including its function in upholding territorial security.

McDougal and Lasswell are sensitive to the significance of power (effective control) considerations in determining legal outcomes, perhaps overly so.<sup>61</sup> Every specialist in international law is confronted by the challenge of irrelevance, namely, that foreign policy is inherently discretionary, that law is either manipulated to rationalize policy or ignored by reference to national interests, and that the failure to realize this has been detrimental to the protection of national interests.<sup>62</sup> One can read the enormous jurisprudential enterprise generated by the New Haven approach as a gigantic exercise of reassurance, an insistence that if properly understood international law is similar in its essence to other types of law and can guide decision by courts, government officials, and advisers in a manner that is beneficial (in preserving power and furthering values) both for those in authority and for members of the broader community. As expressed by McDougal in the preface, “[t]he jurisprudence for which we searched was one relevant, in its theories and intellectual procedures, for any community, including the global or earth-space community and all its component communities. A jurisprudence which stopped short with a single nation-state could scarcely be adequate in or for an interdependent world.”<sup>63</sup>

I would register two responses, while taking note of the grandiosity implicit in their transcultural claim to provide a jurisprudence that will fit equally well everywhere. Such an attempt has grown more difficult over time, as formerly colonial nations seek economic, cultural, and social autonomy, in

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61. McDougal and Lasswell express this sensitivity both by associating law in its essence with effective control—that is, the capacity to translate claims of authority into behavior—and by classifying power as the first of their eight values that together constitute the basis of human dignity and provide the guidelines for the realization of a free democratic society. See 1 *id.* at 147–50, 399–404; 2 *id.* at 941–48; see also Myres S. McDougal, *Law and Power*, 46 *AM. J. INT’L L.* 102, 109–12 (1952).

62. For a classic statement of this claim, see GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900–1950*, at 95–100 (rev. ed. 1984). This challenge is often suppressed in more legalistic approaches to international law, but it is always lurking in the background, haunting the claim that governments should defer to international law in the implementation of foreign policy. I have discussed this theme in several settings. See RICHARD A. FALK, *A GLOBAL APPROACH TO NATIONAL POLICY* 29–40 (1975); Richard A. Falk, *Law, Lawyers, and the Conduct of American Foreign Relations*, 78 *YALE L.J.* 919 (1969). See generally LOUIS HENKIN, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 31–83 (1968); *THE RELEVANCE OF INTERNATIONAL LAW* (Karl W. Deutsch & Stanley Hoffmann eds., 1968); Dean Acheson, *The Arrogance of International Lawyers*, Remarks Before the Section of International and Comparative Law of the American Bar Association (Mar. 24, 1968), in 2 *INT’L LAW*. 591 (1968).

63. 1 *JURISPRUDENCE*, *supra* note 1, at xxii.

addition to political independence. We are only now beginning to realize the postcolonial assertiveness of non-Western societies, as well as the radical unevenness of perception and memory across space and through time that renders suspect all universalist thinking originating in the West.<sup>64</sup> First of all, the McDougal and Lasswell attempt to provide a universal jurisprudence is the most impressive effort ever made to achieve this result, although its impact outside of international law has been decidedly modest, and this despite Lasswell's eminence as a social scientist.<sup>65</sup> Second, the jurisprudence's universalist claims are irrelevant to its real achievements as a tool and framework for analysis, and are oblivious to the most serious shortcomings of its orientation for the purpose of assessing and enhancing policy choice with respect to the domain of international law.<sup>66</sup>

By seeking to establish the political credentials of international law as helpful to governments dedicated to the promotion of human dignity, a goal that in practical application has meant defending the contested international initiatives of the U.S. government,<sup>67</sup> the McDougal and Lasswell approach has often been accused of conflating law with apology for state power.<sup>68</sup> Perhaps worse is their appeal to existing authority structures and power-wielders as if they were receptive to the promotion of the values of human dignity, ignoring the distorting effects of structures of exploitation, privilege,

64. One dimension of this assertiveness is the rise of inter-civilizational tensions, especially between Islam and the West. In this regard, see Samuel P. Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22; see also OLIVIER ROY, THE FAILURE OF POLITICAL ISLAM (1994); Thomas Kamm, *Rise of Islam in France Rattles the Populace and Stirs a Backlash*, WALL ST. J., Jan. 5, 1995, at A1, A6. On the less lethal challenge to Western-guided universalism, see Yoichi Funabashi, *The Asianization of Asia*, FOREIGN AFF., Nov.-Dec. 1993, at 75; Fareed Zakaria, *Culture Is Destiny: A Conversation with Lee Kuan Yew*, FOREIGN AFF., Mar.-Apr. 1994, at 109. The McDougal and Lasswell approach to cultural identity is, in contrast to that of the writers cited, to stress the potential for harmonization, provided only that public order systems are liberal democratic in character. See, e.g., 2 JURISPRUDENCE, *supra* note 1, at 787-803.

65. On the jurisprudence's modest impact outside of international law, see Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 85-88 (1991). On Lasswell's eminence as a social scientist, see McDougal's prefatory note "McDougal On Lasswell," and the references cited there. 1 JURISPRUDENCE, *supra* note 1, at xxix-xxxvii.

66. Rosalyn Higgins' adaptation is suggestive of one line of jurisprudential evolution that derives from the New Haven approach. See ROSALYN HIGGINS, PROBLEMS AND PROCESS (1994). Her formulation at the end of this fine book imparts its quasi-McDougalian orientation:

International law is a process, a system of authoritative decision-making. It is not just the neutral application of rules. . . . The problem exactly is that various, quite plausible, alternative prescriptions can be and have been argued for. The role of international law is to assist in choice between these various alternatives. . . . International law is a process for resolving problems. And it is a great and exciting adventure.

*Id.* at 267. At the same time, her substantive discussions are fairly conventional doctrinal expositions without any particular elaboration of the global setting or the policymaking framework.

67. This convergence is evident in the setting of policy application, perhaps most pronouncedly in relation to interventionary diplomacy during the Cold War era, but also on such matters as nuclear weapons tests on the high seas and the interpretation of the U.N. Charter to minimize the role of the Soviet veto. See sources cited *supra* note 44.

68. For critical analysis, see MARTTI KOSKENNIE, FROM APOLOGY TO UTOPIA 173-78 (1989); Purvis, *supra* note 65, at 83-87; see also Philip Trimble, *International Law, World Order, and Critical Legal Studies*, 42 STAN. L. REV. 811, 815-20 (1990).

and unevenness—although the policymakers and decision-making elites are beneficiaries of such structures, and are generally unaware of such disguised biases. The invocation of human dignity as the foundational criterion of legality covers up the failure to engage in social criticism of a more concrete variety, that brings into view factors of race, class, and gender. Somehow, the workings of the legal system are never tested by critical reflection upon ongoing struggles against a variety of oppressive circumstances and on behalf of those most vulnerable. The McDougal and Lasswell enterprise, for all its vastness, devotes no space to the cartography of suffering and victimization that occurs *within* the sort of public order system, based on the principles of liberal democracy, of which they approve.

#### IV. SUMMING UP

There is no doubt in my mind that immersion in the McDougal and Lasswell jurisprudence is beneficial from many standpoints: student, scholar, policymaker, and judge. It softens predispositional bias and fills in many of the gaps found in conventional wisdom. As such, it provides an invaluable pedagogic tool that has proven useful, even formative, for several generations of students who have attended the Yale Law School, and then moved on to a variety of careers.

Further, it is a prodigious intellectual achievement. The sheer magnitude of the scholarly endeavor is quite overwhelming. Only a seasoned weightlifter could carry the McDougal and Lasswell corpus. More deeply, the integrity of seeing the world clearly from a single vantage point provides a kind of moral certification of lifelong dedication to the pursuit of “truth.” Their sustained commitment, especially given the subject matter, stands in contrast to academic work that follows trends or headlines and adds up to nothing in the end. Whatever else, McDougal and Lasswell have established a clearly contoured presence in writings about law, especially international law.

Will the McDougal and Lasswell orientation provide the basis for future endeavors to construct a jurisprudence for free societies? I think here its role will be restricted. Their enterprise too fully embodies the modernist legacy of the Enlightenment, with its particular turn toward universal science and reason, a meta-narrative of society and humanity that implicitly and operationally situates the West at the center.<sup>69</sup> In this regard, the absence of critical

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69. For varying strands of this postmodern critique of rationality and the ordered worldview of modernity, see DAVID HARVEY, *THE CONDITION OF POSTMODERNITY: AN ENQUIRY INTO THE ORIGINS OF CULTURAL CHANGE* 10–38 (1989); JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION* at xxiii–xxv (1984); JOHN MCGOWAN, *POSTMODERNISM AND ITS CRITICS* 14–16, 19–21 (1991); *see also* TOULMIN, *supra* note 47, at 192–98, 206–09 (arguing new phase of modernity will witness shift in importance from nation-state to sub-, trans-, and multinational levels); R.B.J. WALKER, *ONE WORLD/MANY WORLDS* 57–63 (1988) (postmodern approach to world order; arguing “critical social movements” must emerge to establish connections across time and space); CAROLYN MERCHANT, *THE DEATH OF NATURE* at xvi–xviii (1980)

perspectives reflecting the interests of excluded constituencies (women, non-Westerners, the poor, indigenous peoples) is a fatal flaw. A free society is most likely to emerge from the interplay of difference and sameness, a dialectic of sorts.<sup>70</sup> McDougal and Lasswell, despite their fabled openness to a diversity of perspectives and participants, cannot accommodate such radical questionings of the established order. Also, they do not help us achieve an identity as political actors or citizens based on the possibilities of the future (community, time), rather than the necessities of the present (territory, space).<sup>71</sup> A jurisprudence of human dignity would have to include the training needed to reconceptualize citizenship, moving it by stages to encompass an imagined future (that is, a time dimension) as well as to infuse traditional territorial affiliations of citizenship (that is, a space dimension) with world order values.<sup>72</sup>

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(feminist and ecological critique of mythos and practice of rationalist science).

70. For a challenging formulation of difference as constitutive, see TRINH T. MINH-HA, *WOMAN, NATIVE, OTHER: WRITING POSTCOLONIALITY AND FEMINISM* (1989).

71. For some discussion along these lines, see generally RICHARD FALK, *EXPLORATIONS AT THE EDGE OF TIME: THE PROSPECTS FOR WORLD ORDER* (1992).

72. I have elaborated on this assertion in two recent published discussions. See Richard Falk, *Democratizing, Internationalizing, and Globalizing*, in *GLOBAL TRANSFORMATION* 475–502 (Yoshikazu Sakamoto ed., 1994); Richard Falk, *The Making of Global Citizenship*, in *THE CONDITION OF CITIZENSHIP* 127, 139–40 (Bart van Steenberg ed., 1994). Also relevant are various claims that to counter the detrimental impacts of global market forces it is necessary to protect territorial or social interests by adopting new tactics and strategies. Robert Reich has written in this vein, encouraging what he calls “positive economic nationalism” as a constructive reaction to the gravitational pulls of economic globalism. See ROBERT B. REICH, *THE WORK OF NATIONS* 301–15 (1991).