



Educating American Modernists
The Origins of the New Haven School

Rían Derrig

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 16 September 2019

European University Institute
Department of Law

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SUMMARY

This thesis reconstructs an intellectual history of the ‘New Haven School’. It employs archival material previously unused by researchers, in some cases completely unseen since recording or storage, to explore what for Lasswell and McDougal were the origins of the ideas that would become identified in the field of international law as this school. A widespread contemporary understanding of the New Haven School considers it a post-war response to international relations realism, a positivist-empiricist theory of international law in an epoch of American empire. The history recovered in this thesis emphasises the significance of three of strands of ideas not centrally addressed by this narrative. First, it places Lasswell and McDougal’s ideas in the cultural context of 1920s and 1930s modernism. Second, the political commitments of policy-oriented jurisprudence are traced to New Deal redistributionism and European socialism. Third, two bodies of thought are identified that for Lasswell and McDougal represented the intellectual origins of New Haven School theory – psychoanalysis and philosophical pragmatism. The thesis explores this history and these ideas in the following way. In Chapter 1, the 1968 moment when the New Haven School was named by former students of Lasswell and McDougal is reconstructed. The thesis then begins to seek the origins of the ideas that prompted this naming by working backwards through time – in Chapter 2, to Lasswell and McDougal’s initial 1943 statement of their legal theory, and in Chapters 3 and 4 to the earlier lives of Lasswell and McDougal respectively. In Chapter 5, the thesis concludes by returning to the post-war period in which the New Haven School was named, exploring the seminars through which Lasswell and McDougal inspired a group of students to identify as the New Haven School.

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Prologue

There is something that is identified in the field of international law as the ‘New Haven School’. This thesis takes this something as an object of inquiry, understanding it to mean and be a number of things. The New Haven School designates a group of scholars of international law who after 1968 identified their employment of a common methodology by naming this school, and themselves as members. The New Haven School also designates the two people who had taught them this methodology when they were students in the city of New Haven attending Yale Law School – Harold Lasswell and Myres McDougal. And it designates the ideas about law, social order, value and personality that Lasswell and McDougal taught as this methodology. This thesis uses methods of intellectual history to reconstruct these ideas and to identify what for Lasswell and McDougal were their origins.

I have written this history for a number of reasons found in the present. These reasons could all be understood as answers to the question, Why is the New Haven School still with us? The school rested on ideas Lasswell and McDougal developed between the World Wars. By the time it was named in 1968 they had systematised these ideas as a framework of legal and social theory at least a decade before, taught this to successive cohorts of students, and their collaboration was nearing its end. Lasswell would die in 1978. It might be imagined that today these ideas must seem thoroughly dated, too deeply characterised by the interwar anxieties or post-war exigencies they addressed to be of interest as anything other than disciplinary curiosities. Yet while few scholars identify as New Haven School adherents in the way Lasswell and McDougal’s students did in 1968, the school is still discussed by international lawyers. It is cited in new journal articles, book sections are devoted to the author’s view of what it was, and it is discussed not infrequently in classes, workshops and conferences. Why

is the New Haven School still with the field in this way? Is there some way in which we cannot, or have not moved on?

A first set of answers to this question might be grouped together as methodologically or theoretically themed. Lasswell and McDougal's legal theory explicitly and vigorously committed to methodological and theoretical premises about law that were genuinely new to the fields of legal theory and international law. They were new in 1943 when Lasswell and McDougal first collaborated on an article outlining their approach, and for many they remained so in 1968 and later. Some of the methodology and vocabulary Lasswell and McDougal introduced has now become so commonplace that to attribute it to them rather than to a whole temper of thought and cultural moment would seem absurd. Compiling a list of the *Yale Law Journal's* most-cited articles, Fred Shapiro placed their 1943 article 'Legal Education and Public Policy: Professional Training in the Public Interest' at rank twenty-two and noted: "The terms 'decision-making' and 'content analysis' occur in Lasswell and McDougal's *Legal Education and Public Policy* prior to the earliest examples recorded by the *Oxford English Dictionary*, and much of the modern connotation of the word 'policy' stems from that article and other writings by these two authors."¹ These are examples of theoretical and methodological commitments vigorously made by Lasswell and McDougal, which proved to be the 'right' ones given the vocabulary and methods that were increasingly taken as authoritative by much American and European legal and social scientific scholarship in the second half of the twentieth century. To some, these commitments can make their work seem attractive today, and if not always substantively employable, often a useful reference point.

Lasswell and McDougal made other theoretical and methodological commitments that were new, but the 'wrong' ones from the point of view of many contemporary lawyers and social scientists. Their 1943 article and subsequent theoretical work was centrally concerned with ideas about the relationship between legal order and the personalities and character of people that would become unfashionable in the post-war period, falling out of step with a dominant understanding of what could constitute 'scientific' inquiry into social phenomena. The same can be said of Lasswell and McDougal's conception of legal and social science as deeply concerned with the realisation of social value. Sometimes these 'wrong' commitments are

¹ Fred R Shapiro, 'The Most-Cited Articles from The Yale Law Journal' (1991) 100 *The Yale Law Journal* 1449 pp. 1452. Shapiro dates the OED's earliest citations for 'decision-making' and 'content analysis' to 1953.

ignored. Sometimes they are amplified so they become what the New Haven School ‘stood for’. By saying the school ‘was about’ the idea that international legal debates were debates over values, scholars can invoke a foil helpful to their own introspections about value and law.

While obviously interrelated with methodological and theoretical commitments, a second set of explanations for the school’s lasting presence in the contemporary field of international law might be grouped together as politically themed. It is hardly surprising that scholars might want something from the New Haven School that would help them accomplish their own projects in the present. This is one way of understanding an interpretation of Lasswell and McDougal’s legal theory that has become widespread among scholars of international law today. Cast bluntly, this interpretation proceeds as follows. In the 1940s American power rises. Shrugging the tired positivism of international law, Hans Morgenthau, George F. Kennan and great power politics take the top table as advisors worthy of the moment. Myres McDougal senses the zeitgeist the realists have captured and leads a ‘legal’ response. Positivist social science is instrumentally refashioned as ‘policy-science’, the lawyer policy-scientist pitched as the anti-communist power behind the throne.

From here this narrative tends to proceed in pursuit of two quite different arguments, both of which take stakes in our present. For some critics, this ends as a story of Cold Warrior lawyers hawking a method skewed to imperial American policy. In this telling it is a cautionary tale of lawyers losing sight of legality, the autonomy of law, in a clash between ‘realism’ and ‘legalism’.² A useful lesson is drawn from this critical story – we are prompted to imagine lawyers bought out of their vocation by hegemony and neoliberalism. In an alternative narrative, some interpreters distance themselves from McDougal’s most nationalistic moments, but emphasise that the New Haven School bequeathed the field of international law a legacy

² See for example: Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge University Press 2001) pp. 476 and more generally Chapter 6; Martti Koskenniemi, ‘Law, Teleology and International Relations: An Essay in Counterdisciplinarity’ (2012) 26 *International Relations* 3 pp. 14; Anne Peters, ‘There Is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law’ (2001) 44 *German Yearbook of International Law* 25 pp. 31-32; Mónica García-Salmones Rovira, ‘Sources in the Anti-Formalist Tradition: A Prelude to Institutional Discourses in International Law’, *The Oxford Handbook of the Sources of International Law* (Oxford University Press 2017) pp. 203-223; BS Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd ed., Cambridge University Press 2017) pp. 107-109; Friedrich V Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (Cambridge University Press 1989) pp. 195-200; and the sceptical reflections in: Antonio Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E Jimenez de Arechaga, R Jennings, L Henkin and O Schachter* (Hart Publishing 2011) esp. Louis Henkin at pp. 200-202.

of useful empirical methods and the admirable figure of the lawyer policy-maker. Many narrators of this second version claim the New Haven School as an intellectual ancestor of an American, post-1990s centre-left foreign policy establishment.³

Though they end in different morals, both of these narratives start from a common interpretation of the New Haven School. The intellectual history recovered in this thesis emphasises the importance of strands of ideas not centrally addressed by this common interpretation. The emphases developed in the thesis can be summarised in three points. First, rather than a post-war reaction to international relations realism, I place Lasswell and McDougal's ideas in the cultural context of 1920s and 1930s modernism. Re-periodising their policy-oriented jurisprudence demonstrates the complexity of the project. It was motivated not by post-war American confidence and hegemony, but by interwar anxieties as international institutions lost support, imperialisms and reactionary parochialisms burgeoned, fascisms challenged entrenched orders, and old orders of value seemed to need new foundational myths. Within the twentieth century, this thesis emphasises continuity over an often-told story of rupture. My sources emphasise that what was post-war was built from the interwar as well as the wartime.

Second, while McDougal's foreign policy interventions from the 1950s onwards can seem to exemplify Cold War American neoconservatism, the politics of the New Haven School are more complex. We will follow the political arc of policy-oriented jurisprudence to its origins in New Deal redistributionism and European socialism. Third, this thesis explores two bodies of thought that for Lasswell and McDougal represented the intellectual origins of New Haven School theory – psychoanalysis and philosophical pragmatism. This challenges the positivist-empiricism and methodological objectivity associated with the school in many contemporary interpretations. Lasswell and McDougal sought to scientifically build social order by controlling politics and ideology through law. Their ideas about how to do this were based on strong conceptions of the irrational, unconscious and emotional bases of social life.

³ For example: Anne-Marie Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda' (1993) 87 *The American Journal of International Law* 205 pp. 209-213; Harold Hongju Koh, 'Is There a "New" New Haven School of International Law?' (2007) 32 *Yale Journal of International Law* 559 pp. 562; Oona A Hathaway, 'The Continuing Influence of the New Haven School' (2007) 32 *Yale Journal of International Law* 553 pp. 555; Gregory Shaffer and Tom Ginsburg, 'The Empirical Turn in International Legal Scholarship' (2012) 106 *The American Journal of International Law* 1 pp. 2; Jeffrey L Dunoff and Mark A Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013) Chapter 1.

As a consequence of the way this thesis re-positions the New Haven School, I hope new questions about its contemporary relevance might seem askable. At a moment when commentators in many parts of the world discuss the ‘return’ of irrationality and emotion to politics, or frequently suggest that voters chose to leave a supranational legal order for predominantly existential reasons, Lasswell and McDougal’s efforts to understand relationships between legal and political order, and the inner lives of people, can surely be of interest.⁴

We might also find tools to interrogate what some are beginning to understand as an epochal shift in the way America relates to the international legal order, a shift either thought to be enacted by the presidential administration of Donald Trump, or of which this administration is a symptom. Lasswell and McDougal wrote for a moment that was in some ways similar. In both the interwar and early post-war periods, they perceived America to be engaged in a process of understanding itself, and its place in the world. McDougal negotiated this process through a neoconservative movement from the interwar left to the post-war right, carrying the same beliefs about law and social order with him. Perhaps it is telling that on questions of foreign policy, the shift associated with the Trump administration has prompted neoconservatives with whom McDougal would have found common cause during the Cold War, to share more and more ground with post-1990s centre-left liberal internationalists.⁵ Seen in the light of these developments, the way McDougal employed the theory he developed with Lasswell can be read as a story of the continuity across much of the left and right in American politics of an understanding of the post-1945 international legal order as something with which America engages as a hierarchical superior, seeking the freest exercise of its possibilities for intervention.

But our analysis will move backwards from these contemporary questions, tracing earlier and earlier iterations of the set of ideas about law, social order, values and personality that seem to have contributed to these parts of our present. In this thesis, I have sought to understand the New Haven School as a cluster of ideas in a time and context, while at the same time beginning

⁴ An influential recent example of this trend: William Davies, *Nervous States: How Feeling Took Over the World* (Vintage Publishing 2018).

⁵ Making this observation: Stephen Wertheim, ‘Return of the Neocons’ *New York Review of Books* (2 January 2019); Matt Taibbi, ‘Return of the Neocons!’ *Rolling Stone* (14 January 2019).

to re-understand that time and context through the New Haven School. In adopting this approach, I draw methods from Carlo Ginzburg's work in what has been described as an Italian school of 'microhistory'.⁶ In his 1976 *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller*, Ginzburg reconstructs a set of cosmological and philosophical ideas held by Menocchio, a miller from Montereale in Northern Italy, through transcripts of his interrogations before officials of the Catholic Church as part of the Roman Inquisition. While Ginzburg re-understands Menocchio's own ideas, he also uses them to re-understand the cultural context in which Menocchio lived, by which he was shaped and to which he responded. Poorly understood currents of folk belief and dissident networks of critique that challenged Church orthodoxy are suggested and re-captured through the worldview of one person.⁷

Through Menocchio, as in other works, Ginzburg has accessed neglected strata of culture and belief through sources previously unused, and through statements and biographies of individuals first ignored by virtue of being un-articulable in familiar themes.⁸ In a similar way, in this thesis I have sought to explore under-appreciated aspects of the New Haven School through biographical details and ideas often interpreted in the field as details, marginal to narratives set in different registers. I have drawn on archival sources previously unexplored by researchers, and in some cases entirely unseen since their recording or storage. These sources are drawn principally from Lasswell and McDougal's personal papers in New Haven, as well as from collections in Chicago and New York.

Chapter 1 reconstructs the debates among a group of scholars of international law – self-identified New Haven School adherents and critics – prompted by Lasswell and McDougal's employment of these ideas in their collaborative teaching and writing. The chapter reconstructs a period of reception and naming that takes as its centre of gravity the 1968 moment when the ideas Lasswell and McDougal had developed together were explicitly identified as a

⁶ Ginzburg reflects on his first employment of this term in work with colleagues in the late 1970s, and on writings of other historians who employed it independently prior to this in: Carlo Ginzburg, John Tedeschi and Anne C Tedeschi, 'Microhistory: Two or Three Things That I Know about It' (1993) 20 *Critical Inquiry* 10.

⁷ Carlo Ginzburg, *The Cheese and the Worms: The Cosmos of a Sixteenth-Century Miller* (Routledge & Kegan Paul 1981). Ginzburg's work has tended to focus on members of subordinate social classes in order to recapture their worldviews, often exploring disjunctions between these worldviews and the languages and cosmologies of dominant social classes. The present thesis presents an account of the ideas of two white, Protestant American men who became relatively powerful scholars at an elite law school, obviously members of a dominant social class.

⁸ See also: Carlo Ginzburg, *The Night Battles: Witchcraft & Agrarian Cults in the Sixteenth & Seventeenth Centuries* (Johns Hopkins Univ Press 1992).

methodology unifying a group of scholars such that they were named a 'school'. By this time, the ideas about law, social order, values and personality that prompted this naming had already gestated, been thoroughly systematised as a framework of legal and social theory, and taught for at least 10 years.

To understand what for Lasswell and McDougal were the origins of these ideas, the thesis begins to work backwards. In Chapter 2 we examine their work in the context of Washington D.C. in 1943 as they write their first article together, a practical and philosophical critique of American legal education. Lasswell and McDougal would build their theoretical framework upwards from this article, expanding the research agenda it outlined in seminars from the late 1940s onwards, collaboratively taught from a voluminous unpublished theoretical text. We explore their careers in this wartime period, the government posts they held and the work they performed when they wrote this piece.

Chapters 3 and 4 continue to work backwards, reconstructing the earlier careers and intellectual lives of Lasswell and McDougal respectively. We seek to recapture influences Lasswell drew from his childhood in the American Midwest, from the University of Chicago and interwar Europe; and that McDougal found in Mississippi, Oxford, Illinois and New Haven. Chapter 3, on Lasswell, is a particularly long chapter, exploring in some length a large volume of correspondence Lasswell sent to his parents as he travelled and researched in Europe between 1923-1928. These letters are unpublished, and describe interwar Europe and Lasswell's own ideas through an exhaustive and literary narrative. In devoting such space to these unusually rich sources, my ambition has been to follow Ginzburg in perceiving a broad cultural context through a narrowly subjective set sources. In this chapter, my interest is in the diverse contexts Lasswell lucidly reflects as much as in Lasswell himself.

With the benefit of having traced important experiences in Lasswell and McDougal's intellectual lives to childhood, in Chapter 5 we return to the period in which our analysis began. The New Haven School was named by people who had been taught by Lasswell and McDougal. After their 1943 article, little was published outlining the theoretical framework they developed. Instead, Lasswell and McDougal taught this framework from an unpublished manuscript. Despite being largely complete by at least the late 1950s, this manuscript would remain unpublished until 1992. But exposure as students to the ideas it systematised was what

self-declared New Haven School adherents had in common. In this final chapter, we draw on an original, unpublished version of these materials to imagine ourselves among the students taking seminars taught by Lasswell and McDougal, digesting the ideas about law, social order, value and personality foundational to the teaching that built the New Haven School.

Chapter 1.

In 1968 New Haven has a school of international law

1.1 The New Haven School is named by students

From April 1968, former students of Lasswell and McDougal began to state in their publications that they approached international legal studies by reference to a common methodology. They made clear they took that methodology from the teaching of Lasswell and McDougal at Yale Law School, and designated their group first the ‘New Haven Approach’, and later more usually the ‘New Haven School’. In this chapter, we reconstruct this naming moment through the web of people, publications and arguments by which it was enacted. We see that even as it was named, the New Haven School meant many things to many people, and was interpreted by scholars who perceived themselves as outsiders or critics in diverse ways that have lived on, iterated into our present through what are often narrow lines of citation.

This chapter and thesis does not appraise these meanings and interpretations with the aim of establishing and presenting what was, or is the ‘truest’ New Haven School. I do not argue that one or another reading was most faithful to the teachings of Lasswell and McDougal, or that this or that argument ‘was’ the New Haven School. Rather, this chapter seeks to make the modest point that at least after its naming, there were many different New Haven Schools for different people and it served as counterpoint to a plurality of ideas and principles for the field of international law more broadly. I do not purport to settle any of these debates about or within the school. Instead, I am interested in understanding how this teaching and body of ideas

inspired so many different visions of itself. The thesis is an effort to recapture and reconstruct the nature of the intellectual project in which Lasswell and McDougal thought they were engaged. It seeks to find what were for Lasswell and McDougal the origins of the teaching and ideas that inspired the different interpretations of the New Haven School we will encounter in this chapter. The reconstruction I develop is one that is not completely inconsistent with many of these interpretations, or with other more contemporary iterations, but that does add new dimensions and emphases.

Representative of the naming moment that is our point of entry into the New Haven School is a monograph co-authored by McDougal, Lasswell and James C. Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure*. This book need not be considered a canonical text of the school, but it is of interest because it prompted the field of international law to receive the New Haven School as something distinctive. Reviews of this book were the first publications written by former students that named the school. While I do not assert the text necessarily encompassed an identified essence of the New Haven School, it is clear that it created a moment in the field of Anglo-American international law, and to an extent beyond, when that field seemed to collectively perceive the New Haven School as *having* some identifiable essence.

Much of *The Interpretation of Agreements* was devoted to the analysis of doctrine and case law (principally of the International Court of Justice), concerning methods for the interpretation of treaty law. The main claim made in the book however, was a methodological one. McDougal, Lasswell and Miller's argument was for a theory of legal interpretation that conceptualised...

Every type of prescription or agreement, as a communication in which parties seek through signs and deeds to mediate their subjectivities... Signs are materials or energies that are specialized to the task of mediating between the subjective events of two or more persons. The subjective events that are called up by the signs of a system of communication are *symbols*... symbols are often referred to as "interpretations" of signs.⁹

⁹ Myres McDougal, Harold Lasswell and James C Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (Yale University Press 1967) pp. xi-xiii [emphasis original].

Treating legal agreements as moments of communication, *The Interpretation of Agreements* argued that legal interpretation should be an effort to “...discover the shared expectations that the parties to the relevant communication succeeded in creating in each other.”¹⁰ McDougal, Lasswell and Miller (a psychologist with legal training) defined ‘expectations’ as phenomena inhering in the psychological subjectivities of the parties: “Even when states make agreements, the subjectivities which are important to shared commitment, and which a subsequent interpreter must seek, are the subjectivities of individual human beings...”.¹¹ They dismissed the “arbitrary formalism” of arrogating “to one particular set of signs – the text of a document – the role of serving as the exclusive index of the parties’ shared expectations.”¹²

They argued that interpretation should treat all aspects of the context in which an agreement was made as indices of shared expectations. This should include values to which the interpreter themselves subscribed concerning a ‘world community’, the values and objectives the parties might explicitly articulate as reasons for seeking an agreement, as well as “...marginally conscious and unconscious demands, expectations, and identities that affect the statements that are made (or omitted) in international or local affairs.”¹³ In arguing that interpreters should analyse the subjectivities of parties to an agreement, McDougal, Lasswell and Miller noted:

...the subjectivities of one human mind are not open to direct observation by another. Hence we spend our lives becoming adept in varying measure in drawing inferences about the moods and images of others, automatically formulating and testing hypotheses that are based on posture, body movement, gesture, speech, and overt participation in a great range of social situations. Hypotheses can rarely be put to the test of utterly unambiguous confirmation, unless the topic is quite trivial. But the order of confirmation of even profound assumptions about the inner lives of other persons, though of differing magnitude, may be consensually high. One assumes, therefore, that characterizations of subjectivity will be approximations, and that any degree of approximation is to be preferred to undisciplined and arbitrary preclusion of relevant indices of expectation.¹⁴

¹⁰ *ibid.* pp. xvi.

¹¹ *ibid.* pp. 15. Noting Miller’s psychological and legal training: Burns Weston, ‘Review: The Interpretation of Agreements and World Public Order by Myres S. McDougal, Harold D. Lasswell and James C. Miller’ (1969) 117 *University of Pennsylvania Law Review* 647 pp. 647.

¹² McDougal, Lasswell and Miller (n 9) pp. xvii.

¹³ *ibid.* pp. xiv.

¹⁴ *ibid.* pp. xvii-xviii.

They imagined an interpreter *empathising* with the parties to the agreement being interpreted, striving to contextualise a process of agreement so as to gain insight into “...the continuing, never-ending sequence of events that compose the self...” of each party.¹⁵ The theory of legal interpretation McDougal, Lasswell and Miller specified had at its core the figure of an interpreter performing a quasi-therapeutic role, both in relation to the parties to an international agreement and to themselves:

It is now feasible for the decision-maker to supplement the ordinary examination of the self by making use of newer methods of self-observation for the purpose of detecting the presence of factors tending toward interpretations incompatible with the goals of human dignity. The allusion is, for example, to the technique of free fantasy (or free association), and to the systematic scrutinizing of the factors of culture, class, interest, personality, and crisis level that have influenced one’s development.¹⁶

Among its most significant arguments concerning case law, *The Interpretation of Agreements* employed the 1966 *South West Africa* case as a foil for its argument that lawyers need to be more aware of their tasks as interpreters, and of the impulses of their selves. In that case, the ICJ had considered a claim brought by Ethiopia and Liberia concerning the status of the Mandate granting South Africa control over the territory of South West Africa. South Africa had claimed the Mandate had ceased to exist with the dissolution of the League of Nations and asserted the right to annex the territory and impose strict apartheid policies. Ethiopia and Liberia contended the Mandate still existed under UN auspices, limiting South Africa’s control over South West Africa. In 1966 the court had decided by a narrow majority that Liberia and Ethiopia had no legal interest in the subject matter, effectively reversing a 1962 preliminary

¹⁵ Quoted passage and explanation of ‘empathizing’: *ibid.* pp. xix. In explaining what they called the ‘contextual principle’, McDougal, Lasswell and Miller made explicit the importance they believed psychological research had played in permitting access to subjective aspects of what a person experienced as their context: “Awareness of context is the principal characteristic of scientific fields previously occupied with “itemistic” ways of thinking. Among modern innovators – in addition to Freud and psychoanalysts – are Koffka, Köhler, Wertheimer, Lewin, Piaget, Tolman.” *ibid.* pp. 50 n. 11. These figures are all prominent representatives of different schools of psychological theory and practice.

¹⁶ McDougal, Lasswell and Miller (n 9) pp. 77. Free association is a psychoanalytic technique. In a footnote readers were referred to Lasswell and McDougal’s first collaborative statement of policy-oriented jurisprudence: Harold Lasswell and Myres McDougal, ‘Legal Education and Public Policy: Professional Training in the Public Interest’ (1943) 52 *The Yale Law Journal* 203. We will examine this work in Chapter 2.

judgment that had affirmed the applicants did have standing and their claims were admissible.¹⁷ Between the 1962 and 1966 judgments the members of the court had changed. A widespread view was that this allowed the British judge Gerald Fitzmaurice and the Australian president of the court Percy Spender to re-impose the joint dissenting opinion they had delivered in 1962.¹⁸ Spender used the president's prerogative to break a tie by casting a second vote. McDougal, Lasswell and Miller were joining others who criticised the weak formalistic justifications the 1966 judgment had used to deny the applicants a decision on the merits: "The opinion of the Court and several of the separate opinions, both concurring and dissenting, in the recently decided *South West Africa* cases ... offer dramatic documentation of the continuing need both of a more sophisticated understanding of the task of interpretation and of a more comprehensive and viable set of principles of interpretation."¹⁹

We can read the responses to *The Interpretation of Agreements* as a microcosm of those of the field to the New Haven School as a whole. If those responses are imagined populating a scale, that scale had two poles. At one end were scathing critiques delivered by prominent international lawyers defending their own traditionalisms and sometimes their own judicial decisions. At the other, ardent followers of Lasswell and McDougal who argued between themselves over their different visions of New Haven School theory. The distance between was occupied, at least in the American field of international law, by people interested in different kinds of collaboration between law and the social sciences, but often bemused by the apparent exclusivity and cult-like reputation of policy-oriented jurisprudence.²⁰

1.1.1 *The New Haven School attracts critics*

Two representatives of the critical pole were Herbert Briggs, an American member of the International Law Commission, and Gerald Fitzmaurice, a former Special Rapporteur on the law of treaties and judge of the ICJ from 1960-1973. Briggs published a review of *The Interpretation of Agreements* in February 1968. He opened by characterising large parts of

¹⁷ *South West Africa Cases (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment of 21 December 1962: ICJ Report; 1962, pp. 319, and: *South West Africa*, Second Phase, Judgment, ICJ Reports 1966, pp. 6.

¹⁸ See e.g. Ernest A Gross, 'The South West Africa Case: What Happened' (1966) 45 *Foreign Affairs* 36.

¹⁹ McDougal, Lasswell and Miller (n 9) pp. 360-361 n. 1.

²⁰ An example of this view: Gidon Gottlieb, 'The Conceptual World of the Yale School of International Law. Review of: *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure*, by Myres S. McDougal; Harold D. Lasswell; James C. Miller' (1968) 21 *World Politics* 108.

McDougal, Lasswell and Miller's work as "...a linguistic morass in which the authors have chosen to bury their own powers of communication. ... Possibly one hundred pages are squandered on this dogmatic scientism."²¹

Briggs defended the approach to interpretation adopted in the International Law Commission's 1966 Draft Articles on the Law of Treaties, which specified "...that 'the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties' as 'a subjective element distinct from the text.'"²² He took umbrage at the uncompromising character of McDougal, Lasswell and Miller's attack on this approach, disdainfully quoting their vocabulary to demonstrate its patent absurdity.²³ Yet he concluded by agreeing with their emphasis on contextuality and accepting their criticism of the Commission's Draft Articles 27 and 28 on interpretation. When McDougal, Lasswell and Miller articulated their arguments as views about legal doctrine, Briggs agreed with them. He framed his position in the following way:

One arrives, then, at considerable agreement with the authors concerning the goal of interpretation. What is regrettable is that they have dressed up in the guise of modern "communications analysis" a decrepit and often-challenged view that it is the intention of the parties (their 'genuine shared expectations,' 'the subjectivities which are important to shared commitment') which is subject to interpretation, rather than the text of the treaty in which they have objectively expressed their shared intentions, subjectivities, and agreement.²⁴

Taking Briggs at face value, his disagreement was substantial at least insofar as he believed McDougal, Lasswell and Miller over-emphasised the subjectivities of parties to an agreement at the expense of that agreement's text. Yet at the same time, he made clear his own views on interpretation were not rigidly textualist. His genuinely categorical points of disagreement concerned the language, premises and methods *The Interpretation of Agreements* relied upon

²¹ Herbert W Briggs, 'Book Review: The Interpretation of Agreements and World Public Order - Principles of Content and Procedure. Myres S. McDougal, Harold D. Lasswell and James C. Miller. New Haven and London: Yale University Press. 1967. Pp. Xxi, 410. \$9.75' (1968) 53 Cornell Law Review pp. 543.

²² *ibid.* pp. 544. Briggs quotes: Yearbook of the International Law Commission: Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly. Vol. II pp. 223.

²³ Briggs (n 21) pp. 544.

²⁴ *ibid.* pp. 545-546.

– the ‘dogmatic scientism’ of its ‘modern communications analysis’ – to reach doctrinal views apparently close to his own.

Gerald Fitzmaurice had similar issues. In 1971, four years after McDougal, Lasswell and Miller’s book had appeared, Fitzmaurice published a long review article based on a very close reading in *The American Journal of International Law*. Like Briggs, one of his central criticisms was that the book was written in a “highly esoteric private language... which renders large tracts of it virtually incomprehensible to the uninitiated...”²⁵ Fitzmaurice preferred to build his own analysis around quotes from Milton, Wordsworth, Coleridge, Shelley, Shakespeare, Virgil, and citations to R.H. Hill’s *A Dictionary of Difficult Words*.²⁶ Quoting what he thought were particularly abstruse passages from McDougal, Lasswell and Miller, Fitzmaurice said the problem was not their being taken out of context, but “...whether there is any readily discoverable meaning at all.”²⁷ He said such “...attempts to invest the subject [of treaty interpretation] with a pseudo-scientific aura are unrealistic and vain.”²⁸

Like Briggs, on some points Fitzmaurice noted “...there is much of quite acceptable substance...” underlying McDougal, Lasswell and Miller’s positions.²⁹ He also noted the doctrinal respectability of their central argument – for an open-ended conception of interpretation. Fitzmaurice understood this as substantially the same as the position Hersch Lauterpacht had argued in the Institute of International Law in the 1950s.³⁰ However, he did have two substantial disagreements with his reviewees. One was not addressed directly but bubbled throughout the article. Fitzmaurice was seen by many as a central figure in the 1966 *South West Africa* judgment, the foil McDougal, Lasswell and Miller used to castigate what they thought was a reactionary legal culture of rigid textualism.³¹ It might be supposed that this

²⁵ Gerald Fitzmaurice, ‘Vae Victus or Woe to the Negotiators! Your Treaty or Our “Interpretation” of It? (Review Article)’ (1971) 65 *American Journal of International Law* 358 pp. 360.

²⁶ *ibid.* e.g. Wordsworth, Coleridge pp. 358; Shelley pp. 359; Milton pp. 360; R.H. Hill (among many references to dictionaries for the purpose of explaining Fitzmaurice’s own vocabulary) pp. 361 n. 8; Shakespeare pp. 370; Wordsworth pp. 373.

²⁷ *ibid.* pp. 361.

²⁸ *ibid.* pp. 363.

²⁹ *ibid.* pp. 364.

³⁰ *ibid.* pp. 367.

³¹ In an opening paragraph, Fitzmaurice notes the title of McDougal, Lasswell and Miller’s final chapter ‘Past Inadequacies, and Future Promise’. He does not make explicit that this chapter invokes the 1966 *South West Africa* decision as a central example of the ‘past inadequacies’ the book attacks. Instead, Fitzmaurice relies on Percy Bysshe Shelley to sarcastically cast doubt on the ‘future’ promised in that chapter. *ibid.* pp. 359. The only explicit reference Fitzmaurice makes to the *South West Africa* cases is to the 1962 decision. His opinion is that McDougal,

was at least part of the reason he compiled this painstaking review four years after the book was published, and had it appear in *The American Journal of International Law*.³² The other disagreement amounted to Fitzmaurice effectively making the perceptive point that the interpretative approach theorised in *The Interpretation of Agreements* was not a liberal one.

The most striking feature of the authors' system is, however, that it subordinates the interpretation of a treaty ... to the attainment of certain objectives. ... This is defined in general terms as "requiring the rejection of the parties' explicit expectations [sc. if and insofar as they] contradict community policies." In other words the intentions of the parties ... are not to be given effect to if, in the opinion of the "decision-maker," such intentions are inconsistent with "the goals of public order." Since it is thus left to the adjudicator to decide not only whether there is such inconsistency but also what *are* the goals of public order (and of which public order) to be taken into account, it is evident that on this wide-ranging, indeed almost illimitable basis, the parties could never be sure how their treaty would be applied or whether it would be applied at all. The process would, in fact, confer on the "decision-maker" a discretion of a kind altogether exceeding the normal limits of the judicial function, amounting rather to the exercise of an administrative rôle. This is well illustrated by the character of the only "community goal" which, so far as this reviewer can see, the authors themselves actually specify, namely, that of the preservation of "human dignity" which is coupled with what is called "the operation of *examining the self* for predispositions incompatible with the goal of human dignity"...³³

Fitzmaurice had little time for the idea of a judge 'examining the self'. In an opening footnote he had dispensed with the notion: "...if the judge's prejudices are of a subjective character, but are not such that he could be successfully challenged in the given case, the matter must be left to his own conscience, - but simply as part of his normal judicial duty which involves other,

Lasswell and Miller's overcomplicated language makes straightforward questions, which he implies is how he sees the ones raised by this case, seem incomprehensible. See: *ibid.* pp. 362 n. 11.

³² Late in his life, McDougal recalled Fitzmaurice's article as "the nastiest" ever written about *Law, Science and Policy*. He remembered confronting Fitzmaurice about the article at a meeting of the Institute of International Law in Rome. Fitzmaurice maintained he had never read anything McDougal had written, after which McDougal thought they became friends. It is clear from the article that Fitzmaurice at least read *The Interpretation of Agreements* with great care. Interview with Rosalyn Higgins, 'Oral History Discussion' (27 March 1993). See also: Interview with Stephen Schwebel, 'Oral History Discussion' (6 November 1992). Reproduction of these oral history materials was made possible with financial support from the Oscar M. Ruebhausen Fund at Yale Law School.

³³ Fitzmaurice (n 25) pp. 370. The references made by Fitzmaurice are to McDougal, Lasswell and Miller (n 9) pp. 42, 44, 383 [emphasis original].

hardly less important obligations, such as to study the applicable law, inform himself of the precedents, etc.”³⁴ He was more concerned by his sense that ‘human dignity’ was a value broad enough to permit McDougal, Lasswell and Miller’s judge-administrators to engineer an interpretation in any way they saw fit. To Fitzmaurice, this was “not law but sociology”, apparently thinking sociology an illiberal enterprise.³⁵ Accompanied by a suitably ominous extract from Virgil in the Latin, Fitzmaurice’s conclusion concerning *The Interpretation of Agreements*:

Aiming at order and liberality, its concepts, by their very breadth, open the door to anarchy and abuse.³⁶

1.1.2 The New Haven School has members

Occupying the opposite end of the scale to Briggs and Fitzmaurice were former students of Lasswell and McDougal, self-identified adherents of the New Haven School. In April 1968 Richard Falk published a journal article that was in effect a review of *The Interpretation of Agreements*, and in February 1969 Burns Weston followed with a book review. Both had been taught by Lasswell and McDougal at Yale Law School in the 1950s, and were among a number of students whose collaboration McDougal nurtured. It was Falk’s article that first announced, and consequently supported the crystallisation of, the New Haven School. Calling it the ‘New Haven Approach’, Falk wrote:

We refer to the New Haven Approach because there exists a group of scholars that have self-consciously elected to guide their studies by an application of the framework of inquiry as it has been outlined in the principal methodological efforts of Professors McDougal and Lasswell. The coordination of inquiry around a common methodology, if significant, leading to the development of “a school,” an approach to the study or treatment of a subject-matter that is a significant event in the history of the subject. Schools of painting and of philosophy come to mind as principal illustrations of the flowering of an approach at a given time and place. “The Vienna Circle,” “The Cambridge Platonists,” and “The Prague Circle” (of linguistics) are among examples that come to mind. By referring to the work

³⁴ Fitzmaurice (n 25) pp. 358 n. 2.

³⁵ *ibid.* pp. 372.

³⁶ *ibid.* pp. 373.

inspired by McDougal and Lasswell as “The New Haven Approach” I am presuming both to acknowledge and to hasten the acknowledgement of this body of work as distinct and as historically significant in the development of international legal studies.³⁷

He noted that by coincidence Gidon Gottlieb’s October 1968 review of McDougal, Lasswell and Miller’s book would also acknowledge the existence of “The Yale School of International Law”.³⁸ Falk substantiated this inauguration of ‘a school’ by citing publications he thought represented “...the central achievements to date of the New Haven Approach”.³⁹

In this article, Falk’s interest was in the function interpretation played in sustaining domination in human society.⁴⁰ He sought to examine the method explicated by McDougal, Lasswell and Miller through this insight. To do this, he invoked an extract from an influential argument made by Susan Sontag about the reactionary and progressive potentials of interpretation in different cultural contexts. In Sontag’s view:

The modern style of interpretation excavates, and as it excavates, destroys; it digs “behind” the text, to find a sub-text which is the true one. The most celebrated and influential modern doctrines, those of Marx and Freud, actually amount to elaborate systems of hermeneutics, aggressive and impious theories of interpretation. All observable phenomena are bracketed, in Freud's phrase, as *manifest content*. This

³⁷ Richard Falk, ‘On Treaty Interpretation and the New Haven Approach: Achievements and Prospects’ (1968) 8 *Virginia Journal of International Law* 323 pp. 330 n. 11.

³⁸ Gottlieb (n 20).

³⁹ The ‘central achievements’ Falk cited: Douglas Johnston, *The International Law of Fisheries: A Framework for Policy-Oriented Inquiries* (Yale University Press 1965); Harold Lasswell and Abraham Kaplan, *Power and Society: A Framework for Political Inquiry* (Yale University Press 1950); Myres McDougal and Associates, *Studies in World Public Order* (Yale University Press 1960); Myres McDougal and William Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (Yale University Press 1962); Myres McDougal and Florentino Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (Yale University Press 1961); Myres McDougal, Harold Lasswell and Ivan Vlasic, *Law and Public Order in Space* (Yale University Press 1963); BS Murty, *The Ideological Instrument of Coercion and World Public Order* (Yale University Press 1967).

⁴⁰ Falk said: “Self-interested interpretation presented as authoritative or objective interpretation has been an essential ingredient of all patterns of domination, veiling oppressive and exploitative relationships in the guise of that which is “natural” or “true” or “necessary.” Even the most presupposed form of domination – the domination of women by men – is an expression of the male control of the processes of interpretation. ... Two preliminary propositions are implicit: First, that the capacity to disseminate one-sided interpretations as authoritative is likely to warp the collective perception of reality in decisive respects; second, that the quest for order, justice, and truth in human affairs is very much conditioned by the interpretative process – both by the identity of interpreters and by the methods they use. An energetic commitment to the improvement of interpretation is implicit in any effort to achieve a just ordering of human affairs.” Falk, ‘On Treaty Interpretation and the New Haven Approach: Achievements and Prospects’ (n 37) pp. 324-325.

manifest content must be probed and pushed aside to find the true meaning - *the latent content* – beneath. For Marx, social events like revolutions and wars; for Freud, the events of individual lives (like neurotic symptoms and slips of the tongue) as well as texts (like a dream or a work of art) – are all treated as occasions for interpretation. To understand *is* to interpret. And to interpret is to restate the phenomenon, in effect to find an equivalent for it. Thus, interpretation is not (as most people assume) an absolute value, a gesture of mind situated in some timeless realm of capabilities. Interpretation must itself be evaluated, within a historical view of human consciousness. In some cultural contexts, interpretation is a liberating act. It is a means of revising, of transvaluing, of escaping a dead past. In other cultural contexts, it is reactionary, impertinent, cowardly, stifling. Today is such a time, when the project of interpretation is largely reactionary, stifling ... To interpret is to impoverish, to deplete the world – in order to set up a shadow world of “meanings.” It is to turn *the* world into *this* world. (“This world”! As if there were any other.)⁴¹

Sontag’s concern about interpretation being understood as a process of looking beneath social phenomena for the unseen forces and meanings that really animated those phenomena was close to Falk’s. They both sensed that process could be ‘a liberating act’, escape from ‘a dead past’ in one cultural context, but ‘reactionary, impertinent, cowardly, stifling’ in another. Sontag’s original argument had been about the interpretation of art, but in taking a ‘historical view of human consciousness’ she diagnosed a characteristic of hermeneutic systems like those of Marx and Freud, that Falk and others associated with New Haven School legal theory. Though departing from a different set of concerns to Falk, Fitzmaurice had sensed this characteristic in *The Interpretation of Agreements* too, and framed it in the following way: “...a great deal of the book is concerned with this – that the text as written is inherently suspect: only by going behind it can the truth be arrived at.”⁴²

This characteristic amounted to an extremely deep, arguably illimitable conception of contextual interpretation. It pushed the politics underlying legal interpretation firmly into the foreground, and was a principle the wider field of international law began to associate with the New Haven School from these early reviews. Falk was among the first to emphasise this

⁴¹ Susan Sontag, *Against Interpretation and Other Essays* (André Deutsch 1987) pp. 6-7 [emphasis original]. Quoted in: Falk, ‘On Treaty Interpretation and the New Haven Approach: Achievements and Prospects’ (n 37) pp. 327-328.

⁴² Fitzmaurice (n 25) pp. 369.

association. He becomes quite central to any reconstruction of the early reception of New Haven School ideas in the broader field of international law because of his practice of reviewing the many large treatises McDougal published with collaborators, mostly students, throughout the 1960s.⁴³ Most of these books were enormous, rigorously employed the distinctive theoretical vocabulary McDougal had developed with Lasswell, and were structured in a manner that made them difficult for a reader unfamiliar with this vocabulary and method to decipher. Falk was a prominent figure, then on the faculty of Princeton University, and in effect, he translated these works by reviewing them, giving the broader field something to engage with that they could think of as the New Haven School.⁴⁴ Consequently, for those who engaged with the school through him, he also contributed to their ideas about what the school claimed and seemed to represent.

The problematic of deep, or too-deep contextualism facilitating the pursuit of politics and partisanship through purportedly ‘legal’ arguments became one of these things the New Haven School seemed to represent. *The Interpretation of Agreements* outlined a methodological argument that cast this problematic into particularly sharp relief. It recommended that in every instance of legal interpretation, the international lawyer should engage in an analysis of the subjective intentions of parties to an agreement that was as wide-ranging as possible, untrammelled by the text or ideas about the autonomy of law. Reflecting on the contextual principles outlined in *The Interpretation of Agreements*, Michael Reisman, the New Haven School member who would later succeed McDougal as the school’s representative and leader at Yale, has noted his disagreement with the extent to which the book pursued this argument. He edited the manuscript but thought it failed to take into account the question of role, the fact

⁴³ E.g. Richard Falk, *Legal Order in a Violent World* (Princeton University Press 1968) Chapter 3 ‘McDougal and Feliciano on Law and Minimum World Public Order’; Richard Falk, ‘Book Review: McDougal, M.S. and Associates. *Studies in World Public Order*. New Haven: Yale University Press, 1960. pp. xx, 1058.’ (1961) 10 *American Journal of Comparative Law* 297; Richard Falk, ‘Review Article: The Reality of International Law. Review of: Morton A. Kaplan and Nicholas de B. Katzenbach, *The Political Foundations of International Law*, New York, John Wiley & Sons, 1961; Julius Stone, *Quest for Survival*, Cambridge, Mass., Harvard University Press, 1961.’ (1962) 14 *World Politics* 353. (Kaplan and Katzenbach were also New Haven School collaborators).

⁴⁴ Higgins notes Falk’s adoption of this role: “Those unfamiliar with the language of the social sciences and with the particular McDougal-Lasswell vocabulary – and they are the majority in Europe, certainly – find their writings difficult, even exasperating. Falk, emphasizing how important was the effort he made to understand McDougal’s ideas, has taken it upon himself to act as interpreter to the outside world.” Rosalyn Higgins, ‘Policy and Impartiality: The Uneasy Relationship in International Law. Review of: *Order in a Violent World*, by Richard A. Falk’ (1969) 23 *International Organization* 914 pp. 921. Michael Reisman has noted that Falk’s reviews contributed to making the New Haven School acceptable in the field of international law, offering some criticism and at the same time a gateway to the legal theory employed by Lasswell, McDougal and other New Haven School members: Conversation between the author and Michael Reisman, Yale Law School, New Haven (7 December 2016).

that in some roles a lawyer might be called on to play demanded a more ‘legalistic’ perspective than others.⁴⁵

Falk’s review of *The Interpretation of Agreements* had addressed the politics of the contextualism recommended by Lasswell and McDougal’s work directly... “In one sense, the essence of the New Haven Approach is to work out explicitly and fully the implications for a given subject-matter of common-sense rationality as understood in mid-twentieth century America.”⁴⁶ Yet he was pleased that...

McDougal and Lasswell here seem to be moving rapidly away from an approach to world order that embodies the contingent time-space outlooks of mid-twentieth century United States foreign policy with its focus on the struggle to contain the spread of Communist influence. Unlike earlier works in their series devoted to world public order, *Interpretation* is not scarred by the distorting imprint of cold war partisanship.⁴⁷

Falk noted a 1963 article in which McDougal had defended the Kennedy administration’s naval blockade of Cuba and a 1955 piece McDougal co-authored with Norbert Schlei to argue for the lawfulness of American testing of a hydrogen bomb over the Pacific Marshall Islands as “...extreme examples of McDougal's perception of problems of world legal order from the perspective of cold war partisanship”.⁴⁸ Late in his life, in conversation with another former student, Frederick Tipson, McDougal said of the reputation the New Haven School garnered as legal theory for Cold Warriors:

Well I think again there was some mistake there, I was partially responsible for that and not Harold, I think that I usually found that international law came out on the side of the State Department of the United States, but I think by and large it did, I don't think I was wrong in those conclusions.⁴⁹

⁴⁵ Conversation between the author and Michael Reisman, Yale Law School, New Haven (28 September 2016).

⁴⁶ Falk, ‘On Treaty Interpretation and the New Haven Approach: Achievements and Prospects’ (n 37) pp. 332.

⁴⁷ *ibid.* pp. 331.

⁴⁸ *ibid.* pp. 331 n. 13. Myres McDougal and Norbert A Schlei, ‘The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security’ (1955) 64 *The Yale Law Journal* 648.; Myres S McDougal, ‘The Soviet-Cuban Quarantine and Self-Defense’ (1963) 57 *The American Journal of International Law* 597.

⁴⁹ Interview with Frederick Tipson, ‘Oral History Discussion (1)’ (11 September 1992).

When Burns Weston's review of *The Interpretation of Agreements* was published almost one year after Falk's, the problematic of how to set boundaries between legal contextualism and politics remained pressing. Weston declared his own "acceptance of the New Haven Approach".⁵⁰ He also cited Gottlieb's acknowledgement of the 'Yale School of International Law', but noted its imprecision because "...the Lasswell-McDougal jurisprudence is not restricted to the international law field".⁵¹ Weston lauded McDougal, Lasswell and Miller's book while distancing himself from Falk's concern about partisanship and bias in 'decentralised' or 'horizontal' decision-making contexts, i.e. legal interpretation performed by representatives of states rather than third-party tribunals. Weston said:

I am not suggesting, as Professor Falk seems to do in his recent and constructive review of the McDougal-Lasswell-Miller study, that "genuine shared expectations" and fundamental community policies can rarely be realized in more-or-less horizontal (or partisan) decisional contexts. ... the observable tendency of national officials (judicial, executive and legislative) – or, for that matter, international officials (judicial, executive and parliamentary) – "to invoke norms [or interpretations] that correspond with the national preference" is not necessarily destructive of world order but merely reflective of the vast process of claim and counterclaim by which that order is by and large established.⁵²

The crux of Weston's perspective could be found in a footnote: "Professor Falk's praiseworthy concern for impartiality is, I think, a bit excessive when addressed to the McDougal-Lasswell-Miller study."⁵³ It was a trend of Falk's to use the contextual premises of policy-oriented

⁵⁰ Weston (n 11) pp. 647 n. 1. To Falk's list of published works "inspired by the New Haven Approach", Weston added: Richard Arens and Harold Lasswell, *In Defense of Public Order: The Emerging Field of Sanction Law* (Columbia University Press 1961); Harold Lasswell and Lung-Chu Chen, *Formosa, China, and the United Nations: Formosa in the World Community* (St Martin's Press 1967); Rosalyn Higgins, *The Development of International Law Through the Political Organs of the United Nations* (Oxford University Press 1963); Myres Smith McDougal and David Haber, *Property, Wealth, Land: Allocation, Planning and Development; Selected Cases and Other Materials on the Law of Real Property, an Introduction* (Michie Casebook Corp 1948); and Myres McDougal, Harold Lasswell and W Michael Reisman, 'The World Constitutive Process of Authoritative Decision' (1967) 19 *Journal of Legal Education* 253.

⁵¹ Weston (n 11) pp. 647 n. 1.

⁵² *ibid.* pp. 657-658.

⁵³ *ibid.* pp. 657 n. 51. Weston had already taken issue with what he thought was Falk's exaggerated concern for impartiality when he criticised Falk's support for the Supreme Court's 1964 judgment in *Banco Nacional de Cuba v Sabbatino* 376 US 398 (1964) (United States Supreme Court). In that case, the majority had held that the Cuban government's expropriation of sugar owned by a private company was not contrary to international law. See: Burns Weston, 'Special Book Review: L'affaire Sabbatino: A Wistful Review' (1967) 55 *Kentucky Law Journal*. At pp. 854 n. 49 Weston notes the majority in the *Sabbatino* case "relied heavily" on Falk's arguments in a 1964 book: Richard A Falk, *The Role of Domestic Courts in the International Legal Order* (Syracuse University Press

jurisprudence to argue for restrictive legal interpretations on issues of international law that concerned the scope of application of American law or the American government's freedom of movement in international affairs.⁵⁴ It was a trend of Weston, McDougal and other New Haven School adherents to use the contextual premises of policy-oriented jurisprudence to do the opposite. Falk's 1966-1967 argument with John Norton Moore (another New Haven School member) over the legality of American intervention in Vietnam was a further example of this dynamic of contextualism being employed to serve different value-orders.⁵⁵

Yet another former student of Lasswell and McDougal, Rosalyn Higgins, sketched the politics of the New Haven School more broadly in a 1969 review article. She added further sediment to the crystallisation of the school, noting its existence and specifying legal scholars occupying different orbits of association.⁵⁶ The review was of one of Falk's books, and Higgins used a dichotomy between Falk and McDougal to position herself. Juxtaposing McDougal's belief in

1964). McDougal was on the other side of this case. With a former student, Cecil Olmstead, he wrote a brief arguing the Supreme Court should hold the expropriation *was* contrary to international law. While the majority held against this view, the single dissent was Justice Byron White, yet another former student of McDougal's. In conversation with McDougal late in his life, Olmstead recalled that their brief subsequently became the basis for an Act of Congress intended to reverse the decision of the Supreme Court (the Second Hickenlooper Amendment, 22 U.S.C. § 2370). The Act specified that courts should not apply the Act of State Doctrine to avoid ruling on the legality of expropriations effected by a foreign sovereign. For McDougal's reflections on this see: Interview with Cecil Olmstead, 'Oral History Discussion' (1 March 1993).

⁵⁴ Falk's address to the 1959 Annual Meeting of the American Society of International Law made this approach relatively explicit. It was titled 'The Relevance of Contending Systems of Public Order to the Delimitation of Legal Competence', and he said: "For international law, in contrast to domestic law, is much like a Victorian lady and so must also depend upon an excess of self-restraint to achieve virtue." See: 'Proceedings of the American Society of International Law at Its Fifty-Third Annual Meeting' [1959] Proceedings of the Annual Meeting (American Society of International Law) pp. 173-181, quotation at pp. 174.

⁵⁵ For this argument see: Richard Falk, 'International Law and the United States Role in the Viet Nam War' (1966) 75 *The Yale Law Journal* 1122; Moore's reply, John Norton Moore, 'International Law and the United States Role in Viet Nam: A Reply' (1967) 76 *The Yale Law Journal* 1051; and Falk's response, Richard Falk, 'International Law and the United States Role in Viet Nam: A Response to Professor Moore' (1967) 76 *The Yale Law Journal*. In May 1968, Moore also published an article arguing for the significance of, and affiliating himself with what he termed the 'McDougal-Lasswell system' of jurisprudence: John Norton Moore, 'Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell' (1968) 54 *Virginia Law Review* 662. At pp. 664 n. 3 and pp. 663 n. 4-5, he listed *The Interpretation of Agreements* as one of the most important examples of this jurisprudence, and specified other works he considered to be representative of Lasswell and McDougal's methodology.

⁵⁶ Higgins, 'Policy and Impartiality: The Uneasy Relationship in International Law. Review of: Order in a Violent World. by Richard A. Falk' (n 44). At pp. 920 n. 24, Higgins added yet further nuance to Falk's and Weston's lists of adherents: "He [Falk] does not indicate who he regards as belonging to this school but in listing certain works identifies at least by implication D. Johnston, W. Burke, F. Feliciano, I. Vlasic, and B. Murty. I believe that a further breakdown is possible: The above together of course with McDougal, Lasswell, and Riesman [sic] themselves are indeed engaged on a coordinated enquiry based on a common methodology. But there is also an "outer circle" of international lawyers who have been greatly influenced by McDougal's thinking either through working at Yale University or through collaboration with him. They may and do have diverse styles and opinions, their use of the methodology is approximate rather than precise, and their conclusions are not necessarily the same; but they share, consciously, common foundations. Richard Falk, Oscar Schachter and Fred Goldie would seem to fall in this category. This reviewer would also perceive herself as in the same position."

the necessity of defending Western liberal democracy from the threat of communist ‘totalitarianism’ against what she saw as Falk’s Marxism and concern for the global south, Higgins said:

...this reviewer remains with McDougal rather than Falk. But it is a very fine line between insisting that decisions be taken in accordance with the policy objectives of a liberal, democratic world community and asserting that *any* action taken by a liberal democracy against a totalitarian nation is lawful. Falk correctly draws attention to this distinction, and I would share his concern that McDougal at times seems to step over the line.⁵⁷

Higgins cited McDougal and Schlei’s 1955 piece on the testing of hydrogen bombs as an example of stepping ‘over the line’, and used footnotes to further specify her positions on a series of controversial issues related to American foreign policy in the 1950s and 1960s.⁵⁸

1.1.3 McDougal speaks about interpretation at the Vienna Conference on the Law of Treaties

These different visions from within the New Haven School of what Lasswell and McDougal’s policy-oriented jurisprudence demanded and signified, with books like *The Interpretation of Agreements*, contributed to a widely-held perception of the school as representative of a contextual approach to law that threatened to subsume law or legality, into politics and values. This perception, and the concern it provoked in many lawyers, was heightened by the positions McDougal publicly adopted on questions of American foreign policy during the Cold War. His frequent legal arguments in support of neoconservative State Department policies lent credence to the idea, still current today, that the New Haven School’s contextualism was a method skewed in favour of the imposition of a hegemon’s will.

We can find one particularly prominent example of McDougal cashing out the theoretical ideas he had developed with Lasswell in a way that created a moment of widespread exposure for New Haven School ideas. By exploring this example of McDougal employing New Haven School ideas, we can understand consequences that followed from his practice of doing this for

⁵⁷ *ibid.* pp. 922. On the McDougal – Falk dichotomy see pp. 921-924.

⁵⁸ McDougal and Schlei (n 48). Higgins presents these positions as a summary list at: Higgins, ‘Policy and Impartiality: The Uneasy Relationship in International Law. Review of: Order in a Violent World, by Richard A. Falk’ (n 44) pp. 927 n. 36.

the school generally, and we can also better understand the context with which McDougal brought these ideas into dialogue. Many of the reviews we have already encountered were prompted by the arguments McDougal advanced on this particular occasion, arguments which were themselves directly extracted from *The Interpretation of Agreements*.

It was the first session of the United Nations Conference on the Law of Treaties. In March, April and May 1968, plenipotentiaries gathered in Vienna. The delegates had assembled to conclude a project initiated by the International Law Commission nineteen years earlier – a codification of the law of treaties. The members of the Commission, first fifteen and later twenty-five, had considered reports on the law of treaties from a succession of Special Rapporteurs, all British – James L. Brierly; Hersch Lauterpacht; Gerald Fitzmaurice; and Humphrey Waldock. By March, 1968 Waldock’s work had culminated in the set of draft articles that were to be put to this conference in Vienna. A convention was to be concluded.

In its 1947 resolution establishing the Commission, the General Assembly had envisaged it “...composed of persons... representing as a whole the chief forms of civilization and the basic legal systems of the world”.⁵⁹ As the delegates of governments found their places in the grand hall of the Hofburg Palace that had been repurposed for the conference, they could well have felt their gathering was one of civilisational significance. In the sedimented imperial grandeur of the Hofburg, these men wore suits with narrow ties and horn-rimmed glasses. They sat in rows of minimalist, functionally modern tables and chairs. Translators murmured through sleek steel headphones, following discussions from glass-fronted cubicles elevated around the dais. Officials of the conference sat at a raised table facing the mass of delegates. On the wall behind was a large rendering of the olive wreath and world map of the UN emblem.⁶⁰

The conference had convened to construct something of ambitious proportions. Article by article, these representatives of a world community were to debate their way through the draft convention. They would vote together on each clause of an agreement about how they would make agreements in the increasingly organised, codified legal community of states many thought was rapidly taking shape. This was a moment of cooperation for this world community,

⁵⁹ Establishment of an International Law Commission, GA Res. 174 (II) 1947.

⁶⁰ Photo Records, Vienna Convention on the Law of Treaties, Vienna, 23 May 1969. United Nations Audiovisual Library of International Law <<http://legal.un.org/avl/ha/vclt/vclt.html>>. (Online archive). ‘Men’ is used advisedly in this description. Photo documentation of the conference and the lists of delegates demonstrate an absence of women delegates.

and it was a moment of ideological contestation. After pleasantries from UN Legal Counsel Constantin Stavropoulos and Austrian President Franz Jonas, the first discussion of the conference was a vigorous confrontation about who was part of the community of international law being agreed upon, and who was not.

Oleg Nikolaevich Khlestov, chair of the delegation from the USSR, immediately took the floor to protest the discrimination his government felt was being practised in the organisation of the conference. Participation had only been open to States Members of the UN, of the specialised UN agencies, and parties to the Statute of the International Court of Justice. Khlestov said: “Under the cover of that formula, certain States, particularly the United States and the United Kingdom, were trying to further their narrow political interests and to infringe the rights of a number of sovereign States, especially of socialist countries.”⁶¹ He said the convention to be considered by the conference was of interest to all countries in the world, yet the People’s Republic of China, the German Democratic Republic, the Democratic Republic of Viet-Nam, and the Democratic People’s Republic of Korea had been excluded.

Representatives of India, the United Arab Republic, Romania, Ceylon, Hungary, the Ukrainian Soviet Socialist Republic, Mongolia, Tanzania, Poland, the Byelorussian Soviet Socialist Republic, Bulgaria, Cuba, Guinea, Yugoslavia, Syria and Congo-Brazzaville rose in quick succession to agree with Khlestov. Czechoslovakia took the view that, “One group of States was excluding another group from codifying general international law because of their economic and social structure.”⁶² Many other states sat the argument out, and between speeches objecting to this exclusion the representative of the Republic of China (the US-supported government in Taipei) intervened to note that it felt fully represented.⁶³ A state could only possess one vote so there was no room for a second China. Francis Vallat spoke for the UK to say “... that the problem raised by the USSR representative was fundamentally political and could not properly be debated at a conference of jurists engaged in preparing a convention on the law of treaties.”⁶⁴ The time for such discussions had been when the resolution convening the conference had been passed in the General Assembly. He noted that “international law was not an exact science”, controversy would no doubt arise, but implored his fellow delegates “to

⁶¹ United Nations Conference on the Law of the Treaties, First Session Vienna, 26 March-24 May 1968, UN Doc. A/CONF.39/11. (1969) pp. 2.

⁶² *ibid.* pp. 5.

⁶³ *ibid.* pp. 5

⁶⁴ *ibid.* pp. 3.

confine their remarks to issues which concerned them as international lawyers”.⁶⁵ Czechoslovakia had the last word, deeply regretting “...that the effects of the cold war had also made their appearance at the Conference, which could justifiably be regarded as one of the most important in the history of the United Nations.”⁶⁶ The conference moved on.

By the afternoon of Friday April 19th, more than three weeks after this opening confrontation, the plenipotentiaries had reached draft Articles 27 and 28, intended to regulate how treaties should be interpreted. Article 27 was titled, ‘General rule of interpretation’; Article 28, ‘Supplementary means of interpretation’.⁶⁷ Taslim Olawale Elias, chair of the Nigerian delegation and of the meeting, introduced the articles for consideration. McDougal immediately took the floor to introduce an amendment on behalf of the United States of America. The American delegation wanted to unify Articles 27 and 28 and eliminate any suggestion of a hierarchy of importance among an open-ended list of materials that could be relevant to the interpretation of a treaty. McDougal said that as it stood the draft and its accompanying commentary:

...establishes a hierarchical distinction between certain primary means of interpretation, described as a “general rule of interpretation,” and certain allegedly “supplementary means of interpretation.” Among the primary means a predominant emphasis is ascribed to the text of the treaty, which is to be interpreted “in accordance with the ordinary meaning to be given to the terms.” The Commentary to Article 27 insists that the reference in the Article to “context” is not to factual circumstances attending the conclusion of the treaty, but to the mere verbal texts, and, similarly, that the reference to “object and purpose” is not to the actual common intent of the parties, explicitly rejected as the goal of interpretation, but rather to mere words about “object and purpose” intrinsic to the text.⁶⁸

McDougal’s point was that the even if the Commission’s draft articles nominally permitted interpreters to resort to the preparatory work and information about the circumstances of

⁶⁵ *ibid.* pp. 3.

⁶⁶ *ibid.* pp. 5.

⁶⁷ When the convention was finalised, these became Articles 31 and 32: Vienna Convention on the Law of Treaties, 1969. (Entered into force 27 January 1980). United Nations, Treaty Series, vol. 1155, p. 331.

⁶⁸ Myres McDougal, ‘Vienna Conference on the Law of Treaties: Statement of Professor Myres McDougal, United States Delegation, to Committee of the Whole, April 19, 1968’ (1968) 62 *American Journal of International Law* 1021 pp. 1021. Official record of this statement appears in: United Nations Conference on the Law of the Treaties, First Session Vienna, 26 March-24 May 1968, UN Doc. A/CONF.39/11’ (n 61) at pp. 167-168.

conclusion of a treaty, it did so only in Article 28 as a ‘supplementary means of interpretation’, having heavily weighted Article 27 to emphasise the text. Article 27 also conceptualised a treaty’s ‘context’ and ‘object and purpose’, as textual phenomena. The commentary to Article 28 made clear that ‘supplementary’ was intended to emphasise that article’s reference to “means to aid an interpretation governed by the principles contained in article 27”, rather than “alternative, autonomous means of interpretation”.⁶⁹

In its commentary the Commission had made clear it was writing against something. It said its approach to interpretation proceeded “...on the basis that the text of the treaty must be presumed to be the authentic expression of the intentions of the parties, and that the elucidation of the meaning of the text rather than an investigation *ab initio* of the supposed intentions of the parties constitutes the object of interpretation.”⁷⁰ The Commission had taken care to note it was in safe company. “The Institute of International Law adopted this – the textual – approach to treaty interpretation.”⁷¹ This was the position Briggs had defended in his review of *The Interpretation of Agreements*, weeks before the Vienna Conference.

McDougal was advocating the view the Commission wrote against. He thought treaty interpretation *should* be an investigation of the “common intent of the parties”.⁷² Reproducing verbatim a point he had made with Lasswell and Miller, he argued the Commission was arbitrarily “...arrogating to a single set of signs – the text of a document as infused by “ordinary” meaning – the task of serving, save in the most exceptional circumstances, as the exclusive index of the common intent of the parties.”⁷³ He explained to his fellow delegates that if they would only turn to “modern communications study”, they would see it was “...generally agreed, in today’s age of sophistication, that there are no fixed or natural meanings of words which the parties to an agreement cannot alter.”⁷⁴

⁶⁹ Yearbook of the International Law Commission: Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly. Vol. II (n 22) (1966) at pp. 223.

⁷⁰ *ibid.* pp. 223.

⁷¹ *ibid.* pp. 220.

⁷² McDougal, ‘Vienna Conference on the Law of Treaties: Statement of Professor Myres McDougal, United States Delegation, to Committee of the Whole, April 19, 1968’ (n 68) pp. 1025.

⁷³ *ibid.* pp. 1025. See: McDougal, Lasswell and Miller (n 9) pp. xvii.

⁷⁴ McDougal, Vienna Conference on the Law of Treaties: Statement of Professor Myres McDougal, United States Delegation, to Committee of the Whole, April 19, 1968 (n 68) pp. 1024.

These views had already been litigated when governments had responded to the Commission's 1966 publication of its draft articles. In October 1967 the US had submitted a *note verbale* to the UN Secretary General commenting on the draft.⁷⁵ It included a portion almost certainly authored by McDougal, and in the same month he had published a less restrained critique in the *American Journal of International Law*.⁷⁶ Aware of the contentious nature of the articles on interpretation, the Commission's commentary had already made an attempt to soothe people of McDougal's disposition, specifying that the draft should not "...be regarded as laying down a legal hierarchy of norms for the interpretation of treaties", and that "...it would be unrealistic and inappropriate to lay down in the draft articles that no recourse whatever may be had to extrinsic means of interpretation, such as *travaux préparatoires*, until after the application of the rules contained in article 27 has disclosed no clear or reasonable meaning."⁷⁷

McDougal read these assurances as a way of saying the formal strictures adopted by the Commission could in practice be treated more flexibly than their critics allowed. In his 1967 AJIL comment he responded:

If it be suggested that the Commission's formulations are so vague and imprecise and so impossible of effective application that a sophisticated decision-maker can easily escape their putative limits, surely it must be answered that not all decision-makers are so sophisticated and that it is not the expected function of the International Law Commission to create myth for cloaking arbitrary decision.⁷⁸

⁷⁵ UN General Assembly: Law of Treaties: Report of the Secretary General: Comments by Governments: UN Doc. A/6827/Add. 2 (1967)

⁷⁶ Myres McDougal, 'The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus' (1967) 61 *American Journal of International Law* 992. McDougal was a member of an American Society of International Law study panel on the law of treaties. Frederic Kirgis notes that this panel became "...the briefing and planning group for the U.S. delegation to the Vienna Conference on the Law of Treaties." The State Department sent copies of the October 1967 AJIL issue on the 'Law of Treaties' to US embassies for presentation to chairs of delegations to the Vienna Conference. See: Frederic L Kirgis, *The American Society of International Law's First Century: 1906-2006* (Martinus Nijhoff 2006) at pp. 343-345. For analysis of the debate over interpretation in relation to successive Commission reports, see: Julian Davis Mortenson, 'The Travaux of Travaux: Is the Vienna Convention Hostile to Drafting History?' (2013) 107 *American Journal of International Law* 780. Mortenson attributes to McDougal the role of *bête noire* in the later stages of this debate. By exaggerating the restrictiveness of the Commission's 1966 draft articles Mortenson believes McDougal contributed to a lasting misapprehension of the extent to which the final version of the Vienna Convention limits recourse to *travaux*.

⁷⁷ Yearbook of the International Law Commission: Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly. Vol. II (n 22) pp. 220, 223.

⁷⁸ McDougal, 'The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus' (n 76) pp. 998.

In his speech in Vienna he again attacked this defence of informal flexibility, which Waldock seemed to have a particular tendency to retreat towards. Referring to a principle attributed to Vattel, ‘...it is not permissible to interpret what has no need of interpretation’, McDougal said:

...in more recent years the hoary maxim from Vattel, about which the hierarchy in Articles 27 and 28 is structured, has become generally recognized as an obscurantist tautology. It is a tautology because the determination of what text does or does not require interpretation is in itself an interpretation; it is obscurantist because the grounds for such determination are not revealed for candid appraisal.⁷⁹

These arguments had the structure of a pragmatist critique of reactionary orthodoxy hiding behind legal form. On this occasion it was explicitly drawn from McDougal’s writing in ‘modern communications study’ with Lasswell and Miller, and it also reflected a style of criticism he had developed even in his first book reviews as a junior teacher of land law in the 1930s. In those 1930s reviews McDougal had associated himself with the left-wing of legal realism.⁸⁰ His caustic charge, that scholars who took a narrow, rigid view of what law was, what it could do and how deeply it was an expression of values were supporting a conservative status quo and undercutting collective action, was a progressive one. Here, advocated in 1968 on behalf of a world power in the Hofburg, the same contextual critique had another inflexion. McDougal also wanted to increase the freedom of movement of American power, and believed the world community was an extension of, or should be made an extension of, his conception of American democratic order.⁸¹ Many interpreted his contextual method as a vehicle for these aims and saw legal form as restraint of American power. After this contextualism was used in

⁷⁹ McDougal, ‘Vienna Conference on the Law of Treaties: Statement of Professor Myres McDougal, United States Delegation, to Committee of the Whole, April 19, 1968’ (n 68) pp. 1023.

⁸⁰ E.g. Myres McDougal, ‘Book Review: The Law and Mr. Smith. By Max Radin. The Bobbs-Merrill Company, Indianapolis, 1938.’ (1939) 87 University of Pennsylvania Law Review 495 pp. 496.

⁸¹ In his earliest work in international law, McDougal was most explicit in explaining what he saw as the relationship between contextual interpretation and the expansive role he hoped America would assume as a kind of world community planner. See for example: Myres McDougal, ‘Intervening’ (1954) 48 Proceedings of the American Society of International Law 113 – “The whole function of international law is to permit such intervention in affairs which would otherwise be regarded as internal. ... The whole purpose of the United Nations and its host of subsidiary international organizations is, again, to permit external elites to intervene in the affairs of nation-states which would otherwise be regarded as internal – to intervene for the purposes of promoting international peace and security, of promoting co-operation with respect to economic well-being and human rights, and of promoting all the other values specified in the organizational charters. It must be recognized that we created these institutions for the very purpose of intervention.” at pp. 120-121. See also: Myres McDougal, ‘The Role of Law in World Politics’ (1949) XX Mississippi Law Journal 253 esp. pp. 282; and Myres McDougal and Gertrude CK Leighton, ‘The Rights of Man in the World Community: Constitutional Illusions Versus Rational Action’ (1949) 59 The Yale Law Journal 60 pp. 106-107.

the way McDougal used it in Vienna, for many international lawyers to be progressive was to be formalist.

As in *The Interpretation of Agreements*, McDougal leaned on the *South West Africa* case, likening the Commission's textualism to this judgement.

The danger of encouraging arbitrariness in decision by overemphasis upon the primacy of textuality in interpretation is perhaps best illustrated by the opinion of the International Court of Justice in the most recent of the *South-West Africa* cases. ... Emphasis upon the primacy of the text and the priority of ordinary meanings certainly opens more doors to uncertainty – even to obscurantist manipulation – than does insistence upon a comprehensive, contextual examination of all factors potentially relevant to common intent.⁸²

Immediately following McDougal's speech, there was some sympathy for his point. The Republic of Viet-Nam (South Vietnam), the Philippines, Pakistan, the Ukrainian Soviet Socialist Republic and Ghana supported, to different extents, his criticism of the Commission's emphasis on text. Australia cautiously mused that textualism was probably the safest option, but reserved the right to return to some of McDougal's ideas at a later stage.⁸³ It was Uruguay that first expressed concern that liberal recourse to preparatory works or a treaty's 'object and purpose' could facilitate "...means of infiltrating extrinsic elements into the text with a view to evading clear obligations", or a "...teleological method that might result in a subjective and self-interested approach."⁸⁴ While McDougal emphasised third-party interpretation of a disputed treaty over interpretive work done in ministries of foreign affairs, states like Uruguay focused more on the latter – interpretations in the service of national interests.

When the meeting reconvened the following day, the reception of the American amendment became increasingly mixed. The USSR intervened to impugn McDougal's motives:

⁸² McDougal, 'Vienna Conference on the Law of Treaties: Statement of Professor Myres McDougal, United States Delegation, to Committee of the Whole, April 19, 1968' (n 68) pp. 1026.

⁸³ United Nations Conference on the Law of the Treaties, First Session Vienna, 26 March-24 May 1968, UN Doc. A/CONF.39/11 (n 61) pp. 168-171.

⁸⁴ *ibid.* pp. 170.

The United States amendment completely upset the system adopted by the International Law Commission. ... The proposal was politically dangerous, in that it would permit an arbitrary [sic] interpretation divorced from the text and capable of altering its meaning, which was only possible if the change was the subject of agreement between the parties. Amendments such as that submitted by the United States departed from the pattern proposed by the International Law Commission by reflecting the special interests of States participating in the Conference. The purpose of the International Law Commission's strict formulation was to avoid unilateral interpretation by States and to bring out their common intention.⁸⁵

The delegates took some space the next day, Sunday, and picked up the discussion again on Monday. Ian Sinclair rose for the UK delegation to begin the afternoon session. He supported the Commission's draft, also invoking the authority of the Institute of International Law, a forum he recalled had already debated the merits of interpretation departing from the common intention of the parties as opposed to the text, to the decisive rejection of the common intent approach.⁸⁶ More states joined in opposition to the American amendment. Sweden "...saw considerable danger in such proposals...".⁸⁷ Kenya thought they "...opened the way for the party with the greatest powers of persuasion to impose its interpretation on the other parties".⁸⁸ The Kenyan delegate chalked the "absurd decision in the *South West Africa* case" not up to textualism but absence of good faith.⁸⁹ Madagascar saw "grave dangers" in the American amendment.⁹⁰ When all had had their say, just before 6 p.m. on Monday the amendment was rejected by the Committee of the Whole, 66 votes to 8 with 10 abstentions.⁹¹ The conference moved on.

In doctrinal terms, McDougal's proposal had not departed from a well-established, if debated, approach to interpretation. It was advocated by American legal scholars and by others. He noted the 1935 Harvard Draft Convention on the Law of Treaties – based on codification efforts of the League of Nations and finalised by the generation of American international lawyers that had preceded him – had specified a conception of interpretation that was extremely close

⁸⁵ *ibid.* pp. 175.

⁸⁶ *ibid.* pp. 177.

⁸⁷ *ibid.* pp. 179.

⁸⁸ *ibid.* pp. 180.

⁸⁹ *ibid.* pp. 181.

⁹⁰ *ibid.* pp. 183.

⁹¹ *ibid.* pp. 185.

to his proposed amendment.⁹² He also found varying degrees of support for much of the substance of his argument in comments made by doyens like Arnold McNair, and even members of the Commission itself – Briggs, Shabtai Rosenne (Israel) and Mustafa Kamil Yasseen (Iraq).⁹³

It was also true, as many delegates charged during the three-day debate in Vienna, that what McDougal was proposing could support the freer exercise of American power. His personal use of a very open contextual approach to interpretation to vigorously advance arguments that seemed untenable to others was a leitmotif of his post-war career. It could be seen for example in the arguments he had made in 1956 as counsel for the Kingdom of Saudi Arabia in an arbitration between Saudi Arabia and the Arabian American Oil Company (ARAMCO).⁹⁴ McDougal's view of that case, in which he used an expansive conception of the "essential purposes" of the concession being interpreted to argue the Saudi Arabian government had not ceded control over the shipping of oil, was that it was closely related to ideas expressed in *The Interpretation of Agreements*.⁹⁵

Essentially the same interpretative move was also the basis for a series of controversial articles that supported State Department policies: his 1963 defence of the naval blockade of Cuba; his 1955 assertion of the legality of hydrogen bomb tests on the Marshall Islands; and his defence of the June 1950 UN Security Council resolution that condemned North Korea for its 'armed attack' on South Korea.⁹⁶ That resolution was adopted due to the absence of the Soviet delegate,

⁹² McDougal, 'The International Law Commission's Draft Articles upon Interpretation: Textuality Redivivus' (n 76) pp. 999; McDougal, 'Vienna Conference on the Law of Treaties: Statement of Professor Myres McDougal, United States Delegation, to Committee of the Whole, April 19, 1968' (n 68) pp. 1022. 'Harvard Draft Convention on the Law of Treaties' (1935) 29 Supplement to the American Journal of International Law 653.

⁹³ McDougal, 'Vienna Conference on the Law of Treaties: Statement of Professor Myres McDougal, United States Delegation, to Committee of the Whole, April 19, 1968' (n 68) pp. 1023-1024

⁹⁴ *Saudi Arabia v Arabian American Oil Co (ARAMCO)* 1958 27 ILR 117.

⁹⁵ This arbitration is discussed in McDougal, Lasswell and Miller (n 9) at pp. 170-171. The authors say: "Candor perhaps requires the notation that one of the authors, McDougal, was of losing counsel in this case. From defeat in advocacy books are sometimes born." pp. 171 n. 179. The centrality of McDougal's employment of a broad contextual interpretation is clear in his final draft of the memorial: 'Final Memorial of the Royal Government of Saudi Arabia in the Arbitration between the Royal Government of Saudi Arabia and the Arabian American Oil Company'. Accession 1995-M-082. Myres Smith McDougal Papers (MS 1636). Manuscripts and Archives, Yale University Library. Box 6 D34-37. (Unpublished, copy on file with author). The background to this arbitration, including the involvement of Aristotle Onassis, who chose to hire McDougal, is described in: Stephen Schwebel, 'The Kingdom of Saudi Arabia and Aramco Arbitrate the Onassis Agreement' (2010) 3 Journal of World Energy Law & Business 245. Schwebel, later a judge of the ICJ, was a former student of McDougal and discussed the arbitration with him late in McDougal's life. See: Interview with Schwebel (n 32). On that occasion McDougal said that in his view *The Interpretation of Agreements* was essentially "a precis of the arguments in that case."

⁹⁶ McDougal, 'The Soviet-Cuban Quarantine and Self-Defense' (n 48); McDougal and Schlei (n 48); Myres McDougal and Richard Gardner, 'The Veto and the Charter: An Interpretation for Survival' (1951) 60 Yale Law

and McDougal called his interpretation of Article 27(3) of the UN Charter – which specified that non-procedural decisions of the Security Council be made “...by an affirmative vote of seven members *including the concurring votes of the permanent members*” – “an interpretation for survival.”⁹⁷ While these arguments were all made by McDougal alone, and in some cases with the collaboration of students, many international lawyers interpreted them as canonical statements of New Haven School theory when they were published, and continue to interpret them as such today.

To the extent McDougal did employ and associate himself with ideas about law in social life drawn from the intellectual project he shared with Lasswell, those ideas did not originally come from debates or problematics of international law. At least to some, they even seemed to exclude McDougal from its inner of inner circles – from membership of the Commission itself for example, and from the bench of the ICJ.⁹⁸ For the most part, Lasswell and McDougal’s project, representations of which we have found in *The Interpretation of Agreements* and among post-1968 New Haven School members, was built on, and responded to, problematics in fields and debates outside international law. It had been conceived and developed as a much wider theory, of law in general as Weston noted, but most importantly of society in general. When this theory was received by the field of international law, and as it was claimed and contested, it was mapped on to the political fault-lines and specific anxieties of international law.

Journal 258. Writing in 1986, McDougal closely related this 1951 article with Gardner to *The Interpretation of Agreements*, see: ‘Introduction to the Reissue’ in McDougal and Associates (n 39) at pp. xv.

⁹⁷ McDougal and Gardner (n 96). Regarding non-procedural Security Council decisions, Article 27(3) states: “Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members *including the concurring votes of the permanent members*; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.” [emphasis added] Charter of the United Nations. (Signed 26 June 1945, entered into force 24 October 1945).

⁹⁸ See for example: Rosalyn Higgins, ‘Obituary: Professor Myres McDougal’ *The Independent* (8 May 1998). Higgins notes: “But he was perhaps viewed as too much wedded to his own approach ever to be appointed to the International Law Commission or the international judiciary.” In 1969, McDougal and Oscar Schachter were proposed as candidates for the ICJ seat Philip Jessup was vacating by an ASIL committee advising the US National Group on the Permanent Court of Arbitration. When the Group nominated their candidate in August 1969 however, the nominee was Hardy Dillard. Kirgis (n 76) recounts this chain of events, but concludes that what happened “within the U.S. National Group is not a matter of record...” at pp. 356-357. In an oral history late in his life, McDougal’s own version of these events was that he had signed a petition calling for the abolition of the Electoral College after Hubert Humphrey lost the 1968 presidential election to Richard Nixon. Humphrey very narrowly lost the popular vote, but was resoundingly defeated by Nixon in the College. This prompted criticism of the system for being obsolete and undemocratic. McDougal said he had signed “...for Harold’s sake... and Nixon simply would not forgive that.” Interview with Olmstead (n 53).

1.2 What is perceivable as the lawyer's context?

A theme has emerged in this chapter, something the New Haven School represented among international lawyers when it first provoked reaction from the field, and which has been carried through to contemporary understandings of the school. That theme has been Lasswell and McDougal's exhortation that the lawyer understand law through all aspects of the context by which it is constituted, and responses aggravated by the apparently illimitable nature of this task and the apparently indissoluble questions it poses. Where does such contextuality take you? What can even be understood as our context? How can we possibly perceive the psychological subjectivities of negotiators as context pertinent to the interpretation of a treaty, as *The Interpretation of Agreements* seemed to suggest?

Lasswell and McDougal drew answers to these questions from many fields of knowledge, answers and fields we will explore as we follow their work and intellectual lives backwards in time from this moment when their school was named. The early debates between members of the New Haven School, as well as between delegates in Vienna, demonstrated that pursuing law's context to the extent Lasswell and McDougal often seemed to demand provoked difficult conversations about politics and about values.⁹⁹ This thesis will re-find and reconstruct the origins of this demand in Lasswell and McDougal's animating desires to bring all of the context of social life within the lawyer's gaze, and to scientifically steady orders of value.

⁹⁹ In a 2018 address to the European Society of International Law, Philip Allott responded to Rosalyn Higgins' comments about her use of New Haven School theory by noting that when it first became prominent (during the period we have explored in this chapter), the New Haven School introduced *values* to international law – "Suddenly that was a relevant discussion." Philip Allott, 'Seven Philosophers in Search of Universal Society (Address followed by a conversation between Philip Allott, Rosalyn Higgins and Iain Scobbie)' (2018). Annual Conference of the European Society of International Law, Manchester.

Chapter 2.

In 1943 the policy-oriented lawyer is to be an epochal figure

2.1 Lasswell and McDougal imagine the American modernist

From its naming in 1968, we can trace the ideas and vocabulary that became associated with the New Haven School backwards in time, through the 1960s and 1950s statements of Lasswell, McDougal and various collaborators, to a yet earlier moment in wartime Washington, 1943. Then, Lasswell and McDougal spent their evenings writing in the Blackstone Hotel, off K Street. In March of that year, their work was published as an article in the *Yale Law Journal*, ‘Legal Education and Public Policy: Professional Training in the Public Interest’.

This article would remain the only publication to specify parts of the system of legal theory Lasswell and McDougal had begun to develop in their seminars at Yale Law School until the publication of *Jurisprudence for a Free Society* in 1992.¹⁰⁰ In 1943, ‘Legal Education’

¹⁰⁰ Harold Lasswell and Myres McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (Kluwer Law International; New Haven Press 1992). McDougal has noted that while they taught, excepting this 1943 article, he and Lasswell published nothing spelling out what they meant in relation to their legal theory: Interview with Quintin Johnstone, ‘Oral History Discussion’ (1 February 1993). Myres Smith McDougal Papers (MS 1636). Manuscripts and Archives, Yale University Library. We will examine the theoretical framework developed in these seminar materials in Chapter 5.

programmatically laid out what amounted to a research agenda Lasswell and McDougal wanted other scholars to pursue, recommending methodologies and possible research questions.

The piece also expressed a vision of a figure. That figure was of the American legal scholar as a person who should assume intellectual and moral leadership at a moment Lasswell and McDougal said was uncertain and full of movement, yet that offered enormous possibilities for social construction. They said:

A recurrent problem for all who are interested in implementing policy, the reform of legal education must become ever more urgent in a revolutionary world of cumulative crises and increasing violence. Despite the fact that for six or seven decades responsibility for training new members of the “public profession” of the law has in this country been an almost exclusive monopoly of a new subsidized intellectual elite, professional teachers of law, and despite much recent ferment and agitation among such teachers, little has actually been achieved in refashioning ancient educational practices to serve insistent contemporary needs.¹⁰¹

A recurrent premise of this article, as of the seminars in which Lasswell and McDougal would develop these ideas, was the idea that social structure, common purposes and cultures emanated from, and continued to exist in relation to, the inner lives people – their personalities and characters. They explained:

Character refers to the degree of integration achieved by individual personalities. The democratic character is distinguished by capacity to respect the self and others. ... Within the last two generations the patient, objective study of development during infancy, childhood and adolescence has enormously extended our knowledge of factors affecting the growth and deformation of human personality. Whatever damages the child's respect for himself gives rise to a chain of adjustments that may result in a character dangerous to the individual and to his neighbors. Such secondary attitudes as the acceptance of democratic doctrine may be incorporated in personalities whose basic structure is incompatible with the ideals of mutual respect. Yet very well-integrated characters may live in societies where caste differentiations are taken for granted and these personalities may express secondary attitudes grossly incompatible with democratic ideals. In short, there is no one-to-

¹⁰¹ Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) pp. 203.

one correspondence between the total structure of personality and expression in any single sector, such as in the sphere of secondary political attitudes. We know, however, that under stress the underlying character formation exercises profound influence over the conduct of the individual.¹⁰²

Noting a study undertaken by Erich Fromm on character formation in pre-Nazi Germany, Lasswell and McDougal drew the lesson:

The study revealed a very large discrepancy between the characters of many who called themselves socialist and the political attitudes that they professed. This was a basic weakness of the parties that sustained the Republic in Germany. In view of these considerations it is only wise foresight for any society that aspires toward democracy to use every means within its power to make sure that the persons who come to adulthood possess characters whose basic structure is compatible with democratic values.¹⁰³

A consequence of this preoccupation with the relationship between personality and culture was that an epoch could be understood to call for the vision of a figure, an ideal of leadership that would instantiate the ‘democratic character’. Lasswell and McDougal understood the legal scholar as potentially such an ideal, a person concerned with realising social value.

We submit this basic proposition: if legal education in the contemporary world is adequately to serve the needs of a free and productive commonwealth, it must be

¹⁰² *ibid.* pp. 231. Hengameh Saberi has also drawn attention to, while expressing some criticism of, the therapeutic characteristics of policy-oriented jurisprudence: “The New Haven School’s international law ... embraced a new existential rationale entrusted to social therapists in international lawyers: edification of minds and unification of ‘personalities’ toward a homogeneous global order. This professional image markedly distinguishes the New Haven Jurisprudence from the teachings of legal realists, but a study of its intellectual pedigree in Lasswell’s thought has so far been absent from the international legal theory literature on the policy-oriented jurisprudence.” This abstract refers to a book chapter in which Saberi relates Lasswell’s psychoanalytic social theory, in particular as theorised in *World Politics and Personal Insecurity*, to his development of policy-oriented jurisprudence with McDougal. See: Hengameh Saberi, ‘Descendants of Realism? Policy-Oriented International Lawyers as Guardians of Democracy’, *Critical International Law: Post-Realism, Post-Colonialism, and Transnationalism* (Oxford University Press 2014) pp. 29-52.

¹⁰³ Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) pp. 231. The study was cited as unpublished: pp. 231 n. 61. Fromm’s seminal *Escape from Freedom* was cited as an important source Lasswell and McDougal drew on to theorise ‘democratic character’: at pp. 225 n. 43. Other work by Fromm was also cited, at pp. 231 n. 58. In his 1935 *World Politics and Personal Insecurity*, Lasswell had said: “On methodological points my views are in many respects parallel to those of Erich Fromm...” Harold Lasswell, *World Politics and Personal Insecurity* (Free Press 1965) pp. 197 n. 20. Fromm’s *Escape from Freedom*, first published in 1941 as he was teaching seminars with Lasswell at the New School in New York, shares much in orientation, method and tone with *World Politics and Personal Insecurity*. Erich Fromm, *Escape from Freedom* (Farrar & Rinehart 1941).

conscious, efficient, and systematic training for policy-making. The proper function of our law schools is, in short, to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity. ... What is needed now is to implement ancient insights by reorienting every phase of law school curricula and skill training toward the achievement of clearly defined democratic values in all the areas of social life where lawyers have or can assert responsibility.¹⁰⁴

They were interested in how lawyer policy-makers should be socialised as democrats and elevated as elites. Lasswell and McDougal's lawyer policy-maker was a figure prompted by the desire to analyse American society's sense of self. Lasswell and McDougal imagined their lawyer policy-maker as a guardian of the American epoch. It was one among many imaginings, of the figure of the American modernist.

In advancing this idea through an argument about legal theory and pedagogy, Lasswell and McDougal said they were attempting to offer a programmatic response to quite old problems, and the Second World War was a moment amenable to the reforms they demanded.

Few would contest that during this pivotal era in our history lawyers have flouted both their opportunities and their obligations. The blind have been leading the blind. It is self-congratulatory falsehood to say that recent catastrophes have come upon us like bolts from the blue, unforeseen by the eye of mortal man; unheeded prophets have foretold for years what was coming unless appropriate moves were made in time. The war period is a propitious moment to retool our system of legal education. America's huge plants for the fabrication of lawyers are practically closed for the duration; yet if the end of the present war in any way resembles the termination of World War I, their doors will swing wide to admit a dammed-up stream of returning soldiers who want legal training. In the rush of conversion from war to peace the archaic conventions and confusions of the past may win out over the vital needs of our civilization and the doors may open to admit the unwary members of an entire generation into a reguiled vacuum. War is the time to retool our educational processes in the hope of making them fit instruments for their future job.¹⁰⁵

¹⁰⁴ Lasswell and McDougal, 'Legal Education and Public Policy' (n 16) pp. 206-207.

¹⁰⁵ *ibid.* pp. 211. Footnotes specified that 'unheeded prophets' had articulated Marxist predictions about the coming crisis of capitalism, in particular Vladimir Ilich Lenin. The German philosopher of history Oswald Spengler and the Russian-American sociologist Pitirim Sorokin were cited for their pessimistic predictions about the future of Western culture.

Lasswell and McDougal believed the ‘future job’ of legal education was to prompt an elite to confront and embrace their commitments to a culturally particular understanding of democratic values. Education could impart social realities weighted with determinacy in future conditions that asked what may be conceivable and what may not, where value lay and where it did not, where concepts ended and where they began, which were experiences of emancipation and which of constraint. The ‘policy-oriented jurisprudence’ Lasswell and McDougal began to specify in this 1943 article was based on a social theory that held that at a mass level these social realities were accessible through primary education, mass media and propaganda; and at an elite level through higher education and techniques of self-scrutiny developed by psychoanalysts, psychologists, ethnologists and other scientists of human behaviour.¹⁰⁶ Starting with law schools and with a theory about law, education for the professions was where American democrats were to be socialised and made known to themselves.

2.2 Policy-oriented jurisprudence was part of a pragmatist tradition

In political terms, Lasswell and McDougal built their jurisprudence on an American vision of social democracy. While less explicit about redistribution of economic wealth than Lasswell’s, and to some extent McDougal’s earlier writing, their 1943 article did call for the training of a legal elite that would plan the distribution of wealth and values in a ‘commonwealth of mutual deference’.¹⁰⁷ This legal elite would instantiate the figure of the lawyer policy-maker. It was the role Lasswell and McDougal felt themselves called on to play as much as to impart to the rising generation. They argued legal education as it stood was beholden to ‘ancient’ educational practices and philosophies, relics of a past era much unlike the volatility that seemed to

¹⁰⁶ *ibid.* describing such methods for example at pp. 214-215; 286-287.

¹⁰⁷ It is helpful to interpret the distinctive vocabulary of policy-oriented jurisprudence through Lasswell’s ideas about the importance of language in different cultural psychologies. For example, a ‘commonwealth of mutual deference’ might be read in the light of the following passage in *World Politics and Personal Insecurity*, a book McDougal credits with containing the seeds of policy-oriented jurisprudence: “Since Americans have the individualistic enterpriser’s psychology, the language which wins loyal support for political demands of a collective nature must be phrased in language which is acceptable to this psychology. So if the radical elements in America had been named something besides “socialism” and if they had been argued in terms of an American “joint-stock” company giving every citizen a “national dividend” and a “guaranteed income to all who work,” substantive American policy might have been rather more collectivist than it is today”. Lasswell, *World Politics and Personal Insecurity* (n 103) pp. 167. For their articulation of redistributionist policies that could be called social democratic, see for example their ideas about income equality, inheritance tax, a universal minimum income for all families, and free public schooling to young adulthood: Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) pp. 227.

characterise modern industrial societies.¹⁰⁸ Lasswell and McDougal set about teaching these elites methods of controlling masses of people to build social change.¹⁰⁹ More than this, value systems needed to be internalised in the characters of people. Post-war social engineers were to themselves *be* this social change.

In terms that would be repeated in their collaborative work many times, Lasswell and McDougal placed value at the centre of inquiry and rejected ‘ancient’ pedagogies unfit for the modern world.

Clarification of values, by relating general propositions to operational principles in representative and specific contexts, must for effective training be distinguished from the traditional, logical, *derivation* of values by philosophers. Such derivation – that is, exercises by which specialists on ethical philosophy and metaphysics take sentences that define moral standards and deduce them from more inclusive propositions or vice versa—is a notorious blind alley. Divorced from operational rules, it quickly becomes a futile quest for a meaningless *why*, perpetually culminating in some inevitably circular and infinitely regressive logical justification for ambiguous preferences. From any relatively specific statements of social goal (necessarily described in a statement of low-level abstraction) can be elaborated an infinite series of normative propositions of ever increasing generality; conversely, normative statements of high-level abstraction can be manipulated to support any specific social goal. Prospective lawyers should be exposed, by way of warning and sophistication, to the work of representative specialists in derivation; relatively little time should be required, however, to teach them how to handle, and how to achieve emotional freedom from, the ancient exercises.¹¹⁰

¹⁰⁸ They cited an example of the inadequacy of legal education to the problems of industrial society: “Its [the general legal curriculum] framework is still largely that designed for the training of small-town practitioners of nearly a century ago. Some changes have, however, been effected. Not long ago a Connecticut judge complained that in the Yale Law School his son had learned how to reorganize a railroad but had not learned how to replevy a dog. Ironically the son's first job was to assist in the reorganization of a railroad. The records do not reveal that he has yet had opportunity to replevy a dog.” Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) pp. 204 n. 4.

¹⁰⁹ See for example on the lawyer’s need of skills of management, public relations, propaganda and communication theory: *ibid.* pp. 205; 280-289.

¹¹⁰ *ibid.* pp. 213. McDougal repeated this argument in extremely similar terms in an address to the American Society of International Law in 1959: ‘Proceedings of the American Society of International Law at Its Fifty-Third Annual Meeting’ (n 54) pp. 112-113. On that occasion he cited as his authority: Harold Lasswell, ‘Clarifying Value Judgment: Principles of Content and Procedure’ (1958) 1 *Inquiry* 87.

This sweeping intolerance for metaphysics and abstract philosophy was characteristic of a tradition of ideas descending from philosophical pragmatism.¹¹¹ Like the classical pragmatists Charles Sanders Peirce, William James and John Dewey, Lasswell and McDougal rejected ‘specialists in derivation’ as the inheritors of a dry orthodoxy of European rationalist philosophy that had reached a pitch of futility. Tangled in the fiction of a rationally-scoured search for ultimate ends and the absolutism of ideas abstracted from experience of life, such specialists had little to offer law students beyond a cautionary tale. In one of his earliest papers, Peirce had expressed the same idea as a warning like Lasswell and McDougal’s: “...as metaphysics is a subject much more curious than useful, the knowledge of which, like that of a sunken reef, serves chiefly to enable us to keep clear of it, I will not trouble the reader with any more Ontology at this moment.”¹¹²

These statements are representative of the pragmatist effort to unify abstract, idealist philosophy, with empiricist notions of absolute fact and rationality, through commitment to truth immanent in function and method. From such a perspective, a truthful conception of some object, such as we may seek it, is no more and no less than our conception of the practical effects that object may have.¹¹³ This move, proposed in nascence by Peirce, popularised by James, and brought to towering influence by Dewey, was a deft one. It was an American effort to sidestep philosophising beholden to metaphysical absolutes, derivations from beyond the self, and debates around ‘subjects’ juxtaposed against ‘objects’, characteristic of eighteenth and nineteenth century European philosophy. It was a deft move conceptually, creating a sense of liberation from stale, analytical clashes. It was also a deft cultural move, animating an ethos of social progressivism associated with anticolonialism, industrialism and the frontier.¹¹⁴

¹¹¹ For an examination of the relationship between Lasswell and McDougal’s published jurisprudential scholarship, in particular their concept of ‘human dignity’, and philosophical pragmatism, see: Hengameh Saberi, ‘Love It or Hate It, but for the Right Reasons: Pragmatism and the New Haven School’s International Law of Human Dignity’ (2012) 35 Boston College International and Comparative Law Review 59. In 1971, Lasswell noted the relationship between his research in ‘policy science’ and the work of John Dewey: “The policy sciences are a contemporary adaption of the general approach to public policy that was recommended by John Dewey and his colleagues in the development of American pragmatism”. Harold Lasswell, *A Pre-View of Policy Sciences* (American Elsevier Pub Co 1971) pp. xiv.

¹¹² How to Make our Ideas Clear’ (1877), in: Charles S Peirce and others, *The Essential Peirce: Selected Philosophical Writings* (Indiana University Press 1998) pp. 140.

¹¹³ *ibid.* pp. 132.

¹¹⁴ Cornell West says of philosophical pragmatism: “Its basic impulse is a plebeian radicalism that fuels an antipatrician rebelliousness for the moral aim of enriching individuals and expanding democracy. This rebelliousness, rooted in the anticolonial heritage of the country, is severely restricted by an ethnocentrism and a patriotism cognizant of the exclusion of peoples of color, certain immigrants, and women yet fearful of the subversive demands these excluded peoples might make and enact”. Cornel West, *The American Evasion of Philosophy: A Genealogy of Pragmatism*. (University of Wisconsin Press 2009) pp. 5.

Cornell West has described this move as the pragmatist ‘evasion of epistemology-centered philosophy’, a sidestepping of metaphysics to bring common life into philosophy. An evasion also enacted by European thinkers like Søren Kierkegaard and Friedrich Nietzsche, West describes its early American instantiation in Ralph Waldo Emerson:

... Emerson's alternative to modern philosophy was neither to replace it with a new philosophical problematic nor to deny it by means of a strict and severe skepticism. Rather he evades modern philosophy; that is, he ingeniously and skillfully refuses: (1) its quest for certainty and its hope for professional, i.e., scientific, respectability; (2) its search for foundations.¹¹⁵

West argues this has resulted in:

... a conception of philosophy as a form of cultural criticism in which the meaning of America is put forward by intellectuals in response to distinct social and cultural crises. In this sense, American pragmatism is less a philosophical tradition putting forward solutions to perennial problems in the Western philosophical conversation initiated by Plato and more a continuous cultural commentary or set of interpretations that attempt to explain America to itself at a particular historical moment. ... This deep intellectual vocation ... impels the major American pragmatists to be organic intellectuals of some sort; that is, participants in the life of the mind who revel in ideas and relate ideas to action by means of creating, constituting, or consolidating constituencies for moral aims and political purposes. It is no accident that the major figures of American pragmatism use the language of crisis ... and exude urgency as they search for strategies and tactics to facilitate their exercise of intellectual and moral leadership for their constituency.¹¹⁶

Lasswell and McDougal’s 1943 article was one such cultural commentary. Its interpretation was of the American modernist. It explicitly attempted to explain a class of Americans to themselves and to use legal education to prepare their constituency for moral and intellectual leadership.

¹¹⁵ *ibid.* pp. 36.

¹¹⁶ *ibid.* pp. 5-6.

The specialists in derivation Lasswell and McDougal challenged were not just artefacts of the academy. For several hundred years they had justified social, legal and political orders. They constructed ideas about what could be good in people and society, and what was bad and threatening. ‘Legal Education’ conveyed the point that rejection of these ideas was an impulse of the feelings of movement, doubt and anxiety that characterised modern industrial societies, and at the same time, that this rejection roiled back into a feeling of emotional subsidence. The response that structured the programme set out in the article – that what must be sought as answer to this subsidence was “emotional freedom” through confrontation and self-awareness, the conviction that passage through prescribed training could achieve this freedom, and, crucially, the hope that we were capable of doing something with this freedom, that it would not cripple us, were distinctly modernist ideas.¹¹⁷

2.2.1 Democracy was a state of mind

At many points Lasswell and McDougal approached the construction of democratic social order from a therapeutic perspective:

A democratic society is most possible where democratic character prevails; that is to say, where personalities develop with a minimum of distortion. From our studies of personality development we know that great reservoirs of inhibited rage distort human beings and diminish the probability of congenial and productive interpersonal relationships.¹¹⁸

Lasswell and McDougal’s theoretical framework was a recommendation to move away from thinking about values through metaphysical philosophy and abstract methods of logical derivation, and towards understanding values through scientific techniques that investigated the way we actually experienced them. They argued modern scientific knowledge would allow people to use this freedom from old orders to believe in democratic ideals and construct anew.

¹¹⁷ Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16). Emphasising the importance of law students achieving “emotional freedom” at: pp. 213.

¹¹⁸ *ibid.* pp. 218. For exploration of the lawyer’s role in ‘managing’ different personality types, both individually and at collective levels through ideology and propaganda techniques, see: pp. 280-285. On this point see also: Saberi (n 102).

People need to be equipped with the knowledge of how democratic doctrines can be justified. They can not be expected to remain loyal to democratic ideals through all the disappointments and disillusionments of life without a deep and enduring factual knowledge of the potentialities of human beings for congenial and productive interpersonal relations. As a means of maintaining a clear and realistic appraisal of human nature, there must be deeply based recognition of the factors governing the formation of human character. No democracy is even approximately genuine until men realize that men can be free; and that the laborious work of modern science has provided a non-sentimental foundation for the intuitive confidence with which the poets and prophets of human brotherhood have regarded mankind. Buttressing the aspirations of these sensitive spirits stands the modern arsenal of facts about the benevolent potentialities of human nature, and a secure knowledge of methods by which distorted personality growth can be prevented or cured.¹¹⁹

For the most part, their article emphasised new scientific methods of observation and measurement above general theory. Taking hold of a complex, swirling modern reality was most important:

In recent decades, and especially with the rapid expansion of the social and psychological sciences, the observing of human conduct has become progressively more technical and exhaustive. It is not too much to say that the great contribution of modern specialists on the human sciences is less in the realm of general theory than in the perfecting of method by which ancient speculations can be confirmed, modified or rejected. From the laboratory of the psychologist, the field expedition of the ethnologist and the clinic of the physician have come illuminating bodies of data; and the procedures of observation invented in these special situations have stimulated the development of ways of studying men and women under normal circumstances in our own civilization. ... Throughout the length and breadth of modern society decisions are modified on the basis of what is revealed by means of intensive or extensive observation of human life, the procedures varying all the way from the prolonged interviews of a psychoanalytic psychiatrist to the brief questions of the maker of an opinion poll. ... The writer who is equipped to examine

¹¹⁹ Lasswell and McDougal, 'Legal Education and Public Policy' (n 16) pp. 225. Addressing the American Society of International Law in 1959, McDougal said: "It is a scientific question, of course, how people actually acquire values. That he [McDougal] might be interested in, for purposes of affecting the future." 'Proceedings of the American Society of International Law at Its Fifty-Third Annual Meeting' (n 54) pp. 136.

personality from the standpoint of modern psychology, psychiatry and sociology is making use of a much more complex method for deciding what details are data than the man who operates within a framework of “commonsense.”¹²⁰

The human sciences were beginning to offer knowledge about the way humans related to each other that could allow scientists of society to influence the future. The very act of studying society in this way was in itself an intervention that would have such influence:

...we need to take account of the degree to which the scientific observer modifies the situation that he undertakes to describe. ... When we look toward the future our aim is not to draw a fatalistic series of trend curves in the direction they have been moving in the past. To extrapolate in this way is necessary, but it is a prelude to the use of creative imagination and of available scientific knowledge in deciding how to influence the future. The very act of taking thought and of acting on the basis of thought are among the factors that determine the future trend of events. In a democratic society a policy-maker must determine which adjustments of human relationships are in fact compatible with the realization of democratic ideals. ... What are the slogans and doctrines – in which contexts of experience – that create acceptance of democratic ideals and inspire effort to put them into practice?¹²¹

This attention to values as something experienced by people in society led Lasswell and McDougal to understand social life as a flow of events.

If we conceive of interpersonal relations as a continuing stream of events through days, weeks, years and generations, we can think of our policy problem as that of maintaining a proper equilibrium among component parts of this perpetual flow.¹²²

They teased these events into the applied form of experimental inquiry. ‘Goal variables’ were listed as parts of the experiences that constituted an abstraction labelled a ‘democratic’ state. Shared power; shared respect; shared knowledge; balanced distribution of community wealth; regularity in the pace of social change; access to information; and the cultivation of ‘democratic characteristics’ in individual personalities, were presented as variables constituting a state of

¹²⁰ Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) pp. 214-215; 279.

¹²¹ *ibid.* pp. 279; 214.

¹²² *ibid.* pp. 218.

affairs where a collectivity of individuals *experience* the social reality of ‘democracy’.¹²³ From this perspective, ‘democracy’ was in significant part a manifestation of a state of mind, a succession of experienced events amongst a community of people, bounded in time and space.¹²⁴

It was not only great events, but habits, experiences of the small moments of mundanity that make up what it is to feel social life, that Lasswell and McDougal’s theory addressed.¹²⁵ The law school would need to thrust upon the lawyer a sense of vocation long after they left the carrels and assumed responsibility.

It should be remembered, furthermore, in computing the sum of the lawyer’s influence, that its true measure is not to be found in the more dramatic occasions, such as constitution-making or legislation-drafting, when such influence is exercised, but rather in the cumulative effect of multiple thousands of routine, day-to-day, presentations of fact and deliverances of opinion. ... the lawyer does bear a peculiar responsibility. The lawyer, it must be recalled, is a member of a learned profession – of a skill group which has the temerity to make a profession of tendering advice to others. It is his responsibility to acquaint himself not only with what the learned have thought, and with the historical trends of his time, but also with the long-term interests of all whom he serves and the appropriate means of securing such interests. For nurturing him in the necessary skills and information society offers him a peculiarly long period of training and incubation; and, if that period is filled with the proper experiences he can – our whole educational system is based on the premise – be trained for responsible leadership. To no one else can clients and members of the public reasonably be expected to look for that enlargement and correction of perspective that critical and inclusive view of reality, that is based on the disciplined exercise of skills which the lay man is not given the opportunity to acquire.¹²⁶

¹²³ *ibid.* pp. 217-232.

¹²⁴ Lasswell theorised this approach more extensively in his earlier, though closely related work. See: Harold Lasswell, *Psychopathology and Politics* (Viking Press 1960) (originally 1930) esp. at pp. 241-242.

¹²⁵ On literary modernism and ideas of habit and mundanity in philosophical pragmatism, see: Lisi Schoenbach, *Pragmatic Modernism* (Oxford University Press, USA 2012).

¹²⁶ Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) pp. 211.

Lasswell and McDougal's call for reform of legal education focused on the lawyer's immersion in calibrated experiences at a formative life-stage. Predispositions, bias and perspective needed to be confronted by future lawyer-leaders, moulded by their education into the law.¹²⁷

To some extent, Lasswell and McDougal recommended asking questions like, 'What would a court do, given X body of data, made subject to listed variables?' They were acutely concerned however, that scientific formalism risked sterility the same as analytical formalism and theological dogmatism. Value-orders demanded more than chaste prediction.

The student who would affect the distribution of values and hence make an influential impact on society must not only bear in mind his policy values, but must try to evaluate and command every control necessary to reach his goal. ... Effective policy-thinking must be manipulative, originative, evocative, creative. It cannot substitute the calculation of an endless fan of possibilities for disciplined and imaginative attention to actualizing the most favored possibility. Unlike logical or scientific thinking, policy-thinking is not primarily contemplative and passive; it is goal-thinking and provides criteria for the selection of arguments as well as for the control of other pertinent factors. It is developmental, unifying preference and probability. ... we must unequivocally reject both the principles of legal technicality and of scientific prediction as criteria for reconstructing a curriculum for training lawyers to put democratic values into policy.¹²⁸

Value-orders demanded a type of thought – 'policy-thinking' – that began inquiry from a reality already made in their image.

... here we take our stand – unless some such values are chosen, carefully defined, explicitly made the organizing focii [sic] of the law school curriculum, and kept so constantly at the student's focus of attention that he automatically applies them to every conceivable practical and theoretical situation, all talk of integrating "law" and "social science," or of making law a more effective instrument of social control, is twaddling futility. Law cannot, like golf or surgery, be taught only as technique; its ends are not

¹²⁷ Concerning the decisions of judges for example, Lasswell and McDougal said: "A judge who must choose between such principles can only offer as justification for his choice a proliferation of other such principles in infinite regress or else arbitrarily take a stand and state his preference; and what he prefers or what he regards as "authoritative" is likely to be a product of his whole biography." *ibid.* pp. 236.

¹²⁸ *ibid.* pp. 243.

so fixed and certain. What law “is,” and hence what should be taught as “law,” depends primarily, as we have seen, upon the ends preferred.¹²⁹

Lasswell and McDougal were saying that values, affective motivations, visions of the self, needed to be consciously engineered. A ‘democratic’ society was an agglomeration of personalities, all socialised into a ‘democratic’ way of interpreting experiences, seeing action and possibility like ‘democrats’ in a million small ways a million moments every day. It was necessary that “all who have an opportunity to participate significantly in the forming of policy” begin to “share certain ways of thinking, observing and managing”.¹³⁰ In a nation relying to “an extraordinary degree upon the advice of professional lawyers”, American modernists would be made through law.¹³¹

2.2 Legal realist critiques of elite manipulation of mass psychology

Reflecting the fresh ground Lasswell and McDougal had covered, and to some extent discomfited by what could be read as illiberal elements of their program, some of the passing generation of legal realists sounded notes of caution. Soon after the article was published, Charles Clark, one of Yale’s prominent legal realists in the 1920s and 1930s and then justice of the Court of Appeal for the Second Circuit, wrote to McDougal in Washington. He was on board with much of the substance of their ‘Legal Education’ article, but was concerned that Lasswell and McDougal were too dismissive of case-based teaching. Immersion in day-to-day casework did “seem to us to actually to present all the ramifications of ideas which men have strenuously fought over”.¹³² The necessity was to “avoid the danger of substituting for what is really quite concrete and effective assistance to judges and lawyers, and what can be well used, a merely nebulous vague aspiration towards good will.”¹³³

Clark’s colleague on the Second Circuit bench and fellow Yale realist, Jerome Frank, also dispatched his impressions by letter to Lasswell. Frank, who had applied psychoanalytic

¹²⁹ *ibid.* pp. 245.

¹³⁰ *ibid.* pp. 291.

¹³¹ *ibid.* pp. 291.

¹³² Charles Edward Clark Papers (MS 1344). Manuscripts and Archives, Yale University Library. Charles Clark to Myres McDougal, 7 October 1943.

¹³³ *ibid.*

insights to the behaviour of judges in his 1930 *Law and the Modern Mind*, may have been expected to be well-disposed towards Lasswell and McDougal's interest in personality and psychological methods.¹³⁴ Like Clark however, he was an experienced practitioner – in private practice and Roosevelt's New Deal administration – and was similarly concerned about what may be lost were social engineering to so completely displace what he saw as the 'art' of lawyering. Having seen off legion litigatory challenges to New Deal legislation, he was sensitive to the necessity that lawyer policy-makers be adept manipulators of court custom and procedure.

For Frank, the appropriate model for the law school was the medical school, where keeping students from the real employment of their craft on patients would seem bizarre. Ever the psychoanalyst, he concluded that Lasswell and McDougal were suffering from what John Dewey called "occupational psychoses" – "You have not been a practicing lawyer, and I suspect that McDougal has not been much in court. Ergo, you don't want lawyers trained in practice to play an important role in law schools". He suggested a law school "in which fellows like you should of course play a large part, but in which most of the teachers are practicing lawyers...".¹³⁵ His letter closed with perhaps his most fundamental reservation:

While I thoroughly agree with you that the scientific spirit and the experimental and operational method are indispensable if our democratic society is to endure, I must say that I think you do that idea an injury by exaggerating the possibility of scientific precision in the social field. The scientific spirit applied to social problems should lead to a recognition of the numerous imponderables, indescribables and inexactitudes inherent in most social matters. By exaggerating the possibility of procuring anything like exactness, you tender an issue to your opponents which makes you extremely vulnerable. Even John Dewey who has been, I think, somewhat more cautious in his utterances on this question than you, has not sufficiently conceded the difficulties.¹³⁶

The wispish epistemological lines Lasswell and McDougal's lawyer policy-maker seemed to tread between scientific method and the pursuit of value gave Frank pause. He continued to

¹³⁴ Jerome Frank, *Law and the Modern Mind* (Stevens & Sons 1949) (originally 1930).

¹³⁵ Jerome New Frank Papers (MS 222). Manuscripts and Archives, Yale University Library. Jerome Frank to Harold Lasswell, 28 May 1943.

¹³⁶ *ibid.*

develop this point in an address delivered four years later, in 1947, and again by letter, this time to McDougal.

Another word which should be taboo is “science” when applied to matters legal (as in the phrases “legal science” or “the science of law”) or to social studies (as in the phrase “the social sciences”). To be sure, “science” can be so defined as to bring within its scope what is done by many lawyers and legal scholars, and also by students of government, economics, history, psychology and anthropology... To most persons today, however, “science” signifies a large measure of exactitude, and methods which yield much reliable prediction; the word evokes, for most men (many lawyers among them), a central image of something like physics, so that, to them, “science,” the “physical sciences,” and “exact science,” are all but synonymous [sic]. But social studies, including studies of matters legal, deal with data which permit little exactitude and thus yield only a dismayingly small quantity of reliable predictions. ... The trouble is that basically all the so-called “social sciences” are but phases of anthropology.¹³⁷

Frank thought the objects of social science were customs, group beliefs, mores and folkways. They did not permit prediction or generalisation due to so many ‘imponderables’ and ‘inexactitudes’, not least the irrational workings of the individual personality.

The art of government, at bottom, is a branch of anthropology... The statesman thus appears as a working anthropologist. If a sagacious statesman, he is a careful student of customs... The political economist who wants to serve the statesman must understand that his work is... anthropological, that he must become an inventor of new acceptable customs.¹³⁸

The conclusion was that one should speak of the “social arts”, perhaps “social studies”. Confusion, and, Frank intimated, epistemological domination, was all that would come of vocabularies of legal or social “engineering”.¹³⁹ The sword-tip of this intimation peeked through footnotes, as Frank defined the terms of his agreement with Lasswell and McDougal’s argument that what they had called ‘democratic’ values should be emphasised in law schools:

¹³⁷ Jerome Frank, ‘A Plea for Lawyer-Schools’ (1947) 56 *The Yale Law Journal* 1303 pp. 1330-1331.

¹³⁸ Jerome Frank, *Save America First: How to Make Our Democracy Work* (Harper & Brothers 1938). Cited in: Frank, ‘A Plea for Lawyer-Schools’ (n 137) at pp. 1332.

¹³⁹ Frank, ‘A Plea for Lawyer-Schools’ (n 137) pp. 1333.

To cherish those values is to repudiate the notion, à la Plato, that university law students are to constitute an élite, versed in methods of “manipulating symbols,” according to their appraisal of contemporary “mass psychology,” for the public good.¹⁴⁰

Manipulation of mass psychology, the danger that psychiatry may be allowed to “become unscientifically authoritarian”, concerned Frank.¹⁴¹ McDougal’s response, articulated in a short letter, emphasised a pragmatist view of truth in context and function over the faux-elevation of scientific predictability charged by Frank. He suspected they had different ideas of what ‘science’ was. He also urged the stakes were too high for “constructive skepticism” alone.

One can not [sic] simply take the basic democratic values of our society for granted, assume that they will be self-defining in all the many situations in which power decisions are made and trust to skeptical criticism about irrational practices and doctrines for the achievement of more rational practices and doctrines.¹⁴²

Frank’s faith in craft and custom gave anxious American modernists little ease. Values needed to be confidently held, and the means were at hand by which their collective realisation could be moulded and planned. Frank, Lasswell and McDougal were all alive to the irrational, personality-driven elements so central to social change. Lasswell and McDougal went further. They felt enjoined to construct.

2.4 ‘The war period is a propitious moment’

In ‘Legal Education’, Lasswell and McDougal approached the war period as “a propitious moment to retool our system of legal education.”¹⁴³ The ideas they expressed in this article predated the Second World War, but their careers in 1943 were very much a product of the war. They had both been drawn to Washington by government service, Lasswell before McDougal. In 1943 Lasswell was a scholar of national fame. He was known for his publications on

¹⁴⁰ *ibid.* pp. 1323 n. 34.

¹⁴¹ Jerome New Frank Papers (MS 222). Manuscripts and Archives, Yale University Library. Jerome Frank to Myres McDougal, 26 November 1947.

¹⁴² Jerome New Frank Papers (MS 222). Manuscripts and Archives, Yale University Library. Myres McDougal to Jerome Frank, 21 November 1947.

¹⁴³ Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) pp. 211.

propaganda, public opinion in a mass media culture, and political psychology.¹⁴⁴ A popularised book titled *Politics: Who Gets What, When, How*, reached a wide non-academic audience.¹⁴⁵ His doctoral research on propaganda during the First World War, published in 1927, was described in *American Mercury* as “a melancholy comment upon human imbecility”. Foster Rhea Dulles, writing in the literary journal *The Bookman* called it “a telling indictment of all war and the hypocrisy and deceit which comes in its train”, concluding that “in its suggestions for the future it is a Machiavellian textbook which should promptly be destroyed”. *The New York Times* noted that “although it is devoted so largely to the technique of propaganda in the World War, the book is well worth the attention of whoever, feeling somewhat bewildered by modern perplexities of life, wants to see through appearances and get at the inner significance of some of them”.¹⁴⁶ Lasswell was a public intellectual recognised as a *bona fide* insider capable of unveiling a modern condition of mass manipulation.

In 1940, after earlier plans to fund Lasswell’s efforts to develop “a disciplined approach to the study of mass communications in present day society” were superseded by war-aims, the Rockefeller Foundation agreed to underwrite research on wartime propaganda.¹⁴⁷ This allowed Lasswell to take up the position of ‘Chief of the Experimental Division for the Study of War-Time Communications’, operating from the Library of Congress.¹⁴⁸ Lasswell managed a small staff and reported to the Librarian of Congress, the poet and writer Archibald MacLeish. His research unit’s task was to produce technical ‘histories’ of propaganda practice during the war; to critically reformulate “basic theory in the field of communication”; and to service the communication needs of government policy-makers.¹⁴⁹

Lasswell subjected newspapers, periodicals and transcriptions of broadcast media to content analysis, a technique he developed and would bequeath to the discipline of political science.

¹⁴⁴ Lasswell, *Psychopathology and Politics* (n 124) (originally 1930); Harold Lasswell, ‘The Triple-Appeal Principle: A Contribution of Psychoanalysis to Political and Social Science’ (1932) 37 *American Journal of Sociology* 523; Harold Dwight Lasswell, *World Politics and Personal Insecurity* (Free Press 1965) (originally 1935); Harold Lasswell, ‘What Psychiatrists and Political Scientists Can Learn From One Another’ (1938) 1 *Psychiatry* 33; Harold Lasswell, ‘The Contribution of Freud’s Insight Interview to the Social Sciences’ (1939) 45 *American Journal of Sociology* 375.

¹⁴⁵ Harold Lasswell, *Politics: Who Gets What, When, How* (Whittlesey House 1936).

¹⁴⁶ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Newspaper Clippings. Harold Lasswell, *Propaganda Technique in the World War* (Peter Smith 1927).

¹⁴⁷ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. Memorandum, ‘Public Opinion and the Emergency’, 1 December 1939.

¹⁴⁸ *ibid.* Memorandum, Harold Lasswell to Archibald MacLeish, 25 August 1941.

¹⁴⁹ *ibid.* Memorandum, Harold Lasswell to Archibald MacLeish, 25 August 1941.

He wanted to build coherent bodies of information that could support policy decisions. Essentially, it was a goal he had pursued for many years – the psychologically-informed mapping of the opinions of different publics. Where possible, such mapping would be followed by techniques of intervention that could push those opinions in chosen directions. Lasswell’s team pursued its brief through a rapidly expanding realm of bureaucratic propaganda. They analysed Axis propaganda and responded with their own, monitored attitudes and biases expressed in American press, composed poster slogans and themes to boost public morale, and generally sought to transmit symbols capable of mass persuasion.¹⁵⁰

Lasswell became what he described as a ‘roving consultant’ from this post.¹⁵¹ His memos shuttled around Washington. Some seemed to fall on barren ground, like his suggestions for the unification of architectural symbolism in government buildings, the idea of an ‘Act for Freedom’ publicity campaign that would declare the fourth day of each month ‘Freedom Day’, and his argument that the term ‘Latin America’ should fall into desuetude to encourage perceptions of a shared hemispheric culture.¹⁵² Other ideas however, were very influential.

A large part of the practice of American propaganda came to be handled by the ‘Office of Facts and Figures’, based in the Library of Congress and headed by MacLeish, and Colonel William Donovan’s ‘Office of the Co-ordinator of Information’ on Pennsylvania Avenue. Donovan’s office was the subject of press speculation dubbing it successor to George Creel’s infamous 1917 World War Committee on Public Information.¹⁵³ MacLeish was mocked as a poet supported by playwrights and essayists at the ‘Office of Fuss and Feathers’.¹⁵⁴ Yet these agencies were the centre of the American response to what were perceived as Nazi practices of propagandist psychological warfare. Both frequently sought Lasswell’s expert knowledge. His memoranda advised techniques of data compilation, analysis and presentation that would become the shared language of modern intelligence communities. He emphasised the importance of cataloguing “trends” in “insecurity indicators”, defined as “a change that is likely to place a great deal of strain on the capacity of people to adjust to new conditions.”¹⁵⁵

¹⁵⁰ *ibid.* Memoranda.

¹⁵¹ *ibid.* Memorandum, Harold Lasswell to Archibald MacLeish, 21 November 1941.

¹⁵² *ibid.* Memoranda, Harold Lasswell to Archibald MacLeish, 15 April 1941; ‘An Architectural Symbol for America’, 24 April 1941; ‘Freedom Day’, 12 January 1942.

¹⁵³ *ibid.* *The Sunday Star*, 3 October 1941.

¹⁵⁴ *ibid.* *The Times-Herald*, 6 April 1942.

¹⁵⁵ *ibid.* Memorandum, Harold Lasswell to Archibald MacLeish, 21 November 1941.

Lasswell's advice was articulated through a mix of content analysis, interview-based sources and psychological theory characteristic of the methods he had strived to push to fruition over the preceding decade.¹⁵⁶ The work of these offices was centrally concerned with what they saw as the war that needed to be waged for the emotions of their own, and where possible, allied and enemy societies. The *Washington Times-Herald* recounted William Donovan's conviction that "an army is only the result of a philosophy, and to fathom one, you have to fathom the other."¹⁵⁷

In 1941 Lasswell reported to his parents that he had been asked to participate in the organization of a "College of Government". He implied this request came from within government.¹⁵⁸ By 1944 this idea had matured into a stylish printed booklet titled 'The Institute of Legal Studies: A Proposal in Legal Education', backed by an expansive memorandum making the case for the establishment of an Institute in Washington.¹⁵⁹ In this Institute, lawyers and social scientists would train students seconded from law schools around the country to be policy-makers. The Institute never came to fruition, but with the 1943 'Legal Education' article, it was one more expression of the need for a new kind of leader, the figure of the lawyer policy-maker.

Throughout the war years Lasswell supplemented government work with a visiting lectureship organised by McDougal at Yale Law School. As McDougal said, "Things turned out exactly right for him."¹⁶⁰ Thurman Arnold, the famous legal realist, left his jurisprudence course to become Assistant Attorney General in charge of anti-trust, and his co-teacher Edward S. Robinson, the prominent psychologist, was killed when he was hit by a bicycle as he left the graduate school one afternoon. This left a course open for Lasswell and McDougal. These first

¹⁵⁶ *ibid.* Memorandum, Harold Lasswell to William Donovan 'Intelligence Reports for the President', 4 August 1941.

¹⁵⁷ *ibid.* *Washington Times-Herald*, 20 September 1941.

¹⁵⁸ *ibid.* Harold Lasswell to Anna and Linden Lasswell, 12 July 1941.

¹⁵⁹ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series II. (Box 133): *The Institute of Legal Studies: A Proposal in Legal Education*. At the 1959 annual meeting of the American Society of International Law, the senator Henry Jackson proposed a strikingly similar 'Academy of National Policy' – "an 'All-American team' of thinkers": 'Proceedings of the American Society of International Law at Its Fifty-Third Annual Meeting' (n 54) pp. 351-352.

¹⁶⁰ Bonnie Collier, 'A Conversation with Myres S. McDougal' [2013] Yale Law School Oral History Series. pp. 12.

seminars in 1939 were the drawing-board sketches of what would become the manifesto set out in 'Legal Education'.¹⁶¹

In 1943 McDougal was a rising power at Yale Law School. He had made his name as a progressive, even radical voice in property law scholarship. His legal realism had the zeal of the reformed, having shed his training in classics and Oxford analytical jurisprudence under pressure from Yale's realists during his doctoral work at the school. To McDougal, the eclecticism of 1930s legal realism felt faithless, value-less, and he wanted a more constructive kind of scholarship. He thought it was necessary to pursue new institutions and social ends. The inequity of poverty during the Depression supported a sense that old structures and rules had proven unsustainable, and many believed scientific social planning held great possibility.¹⁶² Lasswell seemed to offer ideas of just this sort, already at an advanced level of systematisation. Having met in 1935, they had begun to collaborate. Given McDougal's foothold as an ambitious young reformer in property law, Arnold and Robinson's jurisprudence seminar was retitled 'Property in a Crisis Society'. McDougal's interest in public policy and New Deal social planning amicably met Lasswell's psychoanalytic theories of the social condition.

When they composed their 'Legal Education' article together in the Blackstone Hotel, McDougal was, like Lasswell, a member of the burgeoning East Coast policy class. Oscar Cox, a Yale Law School graduate, had been appointed General Counsel to the Office of Lend-Lease Administration in 1941. This office had been tasked with administering the aid and military hardware given by America to Allied countries, mainly in return for lease agreements permitting American military bases in those countries.¹⁶³ Cox had been 'business manager' of the *Yale Law Journal*, and when he made good in the corridors of power he staffed his office with many of the law journal members, McDougal included.

¹⁶¹ Frederick Samson Tipson, 'Consolidating World Public Order: The American Study of International Law and the Work of Harold D. Lasswell and Myres S. McDougal, 1906-1976' (University Microfilms International, 1987). (Unpublished doctoral dissertation, copy on file with author). Clarifying the dates of Lasswell and McDougal's first seminars at pp. 97.

¹⁶² Interview with Tipson (n 49).

¹⁶³ Collier (n 160); Interview with Elias Clark, 'Oral History Discussion' (14 May 1993); Interview with Eugene V Rostow, 'Oral History Discussion' (11 December 1992); Interview with Tipson (n 49); Interview with Richard Gardner, 'Oral History Discussion' (15 February 1993).

Cox worked to direction from Harry Hopkins, one of Franklin Delano Roosevelt's key advisors. If Hopkins wanted a policy pursued in support of the war-effort, a legal means of pursuing it had to be found. A lawyer in Cox's charge that was unable to embrace this attitude would not hold their job. Late in his life, McDougal remembered that one of his first tasks was to establish the legality of armed forces on icebergs, "... and of course we had no trouble establishing the legality of armed forces on icebergs. Anything Cox wanted was legal you see."¹⁶⁴

McDougal remembered the mood in Washington as grim. Gasoline was in short supply and people were afraid they would be bombed. At the same time, for him these were good days. A fight was being waged, it seemed like an honourable one, bringing with it the relevance and moral purpose of such collective moments, and from childhood on a farm in north Mississippi he had reached offices of real power on the East Coast. He acted as Cox's representative on different committees, sitting as envoy bolstered by authority a few steps removed from Roosevelt, through Cox to Hopkins to the President. "The first time I knew I could whip Wall Street lawyers, just a little country boy from Mississippi. I was a little defensive about Wall Street lawyers, but I saw I could take them very easily, though I hadn't taught them."¹⁶⁵

Before the end of the war he moved to the State Department, where he worked for Herbert Lehman, Governor of New York in the 1930s and later Senator, as he set up the United Nations Relief and Rehabilitation Administration (UNRRA). This international agency was charged with administering the distribution of material aid to populations under the control of the United Nations. McDougal left to return to Yale after about a year, but it was during this stint in the State Department that he co-wrote his first publication relating to, if not quite positioned in, the field of international law. The article, titled 'Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy', was written to order for the department. In two parts, it sprawled across more than two hundred and fifty pages of the *Yale Law Journal's* 1945 issues.¹⁶⁶ His collaborator, Asher Lans, had studied political science at Columbia University, was a former Yale Law School student and also worked in the

¹⁶⁴ Collier (n 160) pp. 15; Interview with Rostow (n 163).

¹⁶⁵ Collier (n 160) pp. 16.

¹⁶⁶ Myres McDougal and Asher Lans, 'Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I' (1945) 54 *The Yale Law Journal* 181; Myres McDougal and Asher Lans, 'Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II' (1945) 54 *The Yale Law Journal* 534.

State Department. McDougal later claimed to have completed most of the piece himself, and the writing does reflect ideas he had been developing with Lasswell for some years.

The central contention advanced by McDougal and Lans was one of constitutional law. They said that the President, in consultation and collaboration with Congress, could commit the United States to international legal agreements without using the treaty-making process prescribed in the Constitution, whereby two-thirds of the Senate must approve a new treaty agreement with a foreign state. They argued for the interchangeability of what they dubbed ‘Congressional-Executive agreements’, with agreements ratified by the Senate under the procedure outlined in the Constitution’s treaty-making clause. Their argument strengthened the position of the Executive to make binding commitments in the field of foreign affairs.

McDougal and Lans, prompted by the State Department, wanted to accord scholarly authority to the view that a recalcitrant Senate should not be permitted to veto membership of a world organisation. That had been the fate of American membership of the League of Nations after the Republican Party took control of the Senate and Congress in the 1918 midterm elections. Henry Cabot Lodge faced down Woodrow Wilson and offered a barrage of reservations to the Charter of the League, none of which Wilson accepted. This was precisely the sort of paralysis that McDougal, Lans, and Roosevelt’s administration had come to think must be consigned to a past of genteel ‘isolationism’. They now thought, or hoped, that fascism and war had whetted majority appetite for international law and organisation, and this appetite could be relied upon to support their vision of the centralised management of power by modern American statesmen.

McDougal and Lans pitched their case in counterpoint to what they caricatured as a traditionalist view, handmaiden to an outgrown ‘isolationism’.¹⁶⁷ As representative of this traditionalism, Edwin Borchard, Yale’s resident professor of international law, was ushered onstage. Borchard’s position hewed to a restrictive view of the President’s power to legally bind the state in foreign affairs. He responded by presenting the consensus among an older class of Anglo-American foreign policy doyens. It was a consensus much less cavalier about

¹⁶⁷ Stephen Wertheim has convincingly demonstrated that by 1945 a debate had been won whereby a small group of foreign policy elites cast interwar internationalists like Borchard as ‘isolationists’ to make more amenable their own argument that America needed to be the militarily supreme post-war global power: “... in 1942 and 1943 postwar planners revived world organization less to eliminate war or promote law than to cleanse U.S. power in the eyes of the American public as well as foreign states.” Stephen Wertheim, *Tomorrow, the World: The Birth of U.S. Global Supremacy in World War II* (PhD Dissertation, Columbia University 2015) pp. 24.

the possibility of a freewheeling executive running roughshod over the Senate and its constitutionally granted prerogative in foreign affairs.¹⁶⁸

But something else rankled Borchard about McDougal's attack. McDougal and Lans had vigorously insisted on dragging Borchard's broader opinions on foreign affairs into the discussion. Quoting supporting statements from his various published works, all appearing in notable law journals, they said:

The major policy premise from which Professor Borchard's own legal arguments stem is not difficult to ascertain. He makes it completely articulate. It is a strong conviction that the United States should abjure participation in international political organizations and retire beyond the Jericho-like walls of his own version of the nineteenth century juristic conception of neutrality. ... at least one reason for his opposition to the use of procedures other than the treaty procedure for consummating international agreements is the thought that retention of minority veto control may again produce a condition of stalemate, permitting once more a triumph of the statesmanship of withdrawal.¹⁶⁹

In the opening footnote to his own article, Borchard deigned to respond:

[McDougal and Lans] ... feel it incumbent upon themselves to explain my views on the treaty and the executive agreement by reason of my general views on foreign policy. Apart from the fact that I should prefer to be my own interpreter instead of being represented by disconnected passages quoted or, more generally, paraphrased, out of context by hostile critics, my views on foreign policy have no relation, so far as I know, to my views on the treaty-making power. Nor can conclusions reached after thirty-five years of professional contacts, official and unofficial, with many of the governments of Europe and Latin America be characterized as merely "preconceptions".¹⁷⁰

Borchard wanted to decorously divorce questions of analytics and hermeneutics from statecraft. His satisfied mention of "conclusions reached after thirty-five years of professional contacts" might have belied such decorum, but his avowed position was that debates of constitutional law proceeded from the written text, within accepted interpretive parameters.

¹⁶⁸ Edwin Borchard, 'Treaties and Executive Agreements: A Reply' (1945) 54 *The Yale Law Journal* 616.

¹⁶⁹ McDougal and Lans, 'Treaties and Congressional-Executive or Presidential Agreements' (n 166) pp. 191-192.

¹⁷⁰ Borchard (n 168) pp. 616.

There was no room for open-ended ideas like community ends, political or moral theory. McDougal and Lans would entertain no such reveries.

In making this explicit reference to Professor Borchard's policy preconceptions, it is not our purpose to suggest that interpreters who do not share these preconceptions may not honestly come to the same legal conclusions. The variables that may produce a legal belief or an interpretation of the Constitution are no less numerous and heterogeneous than those that produce policy preconceptions. (See Lasswell and McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest* (1943) 52 Yale L. J. 203, 239.) It is now common knowledge, however, that policy preconceptions are among the most important variables that predispose legal conclusions and that every interpreter (Professor Borchard and the present writers not excluded) responds to the words and practices of the Constitution with his total personality, which includes both his view of world society and his conception of the role of government in that society. It is for this reason that we think it relevant to present a fairly comprehensive summary, and criticism, of Professor Borchard's more general views. This summary and criticism will also serve the purpose of making completely explicit our own policy preconceptions.¹⁷¹

For many lawyers, such loose talk of 'total personality', 'general views', and 'policy preconceptions' was corrosive. It represented a threat to their epistemic authority, and perhaps to their ability to place limits on moral responsibility.

2.5 Interwar, politically progressive preoccupations with personality and culture

As we have explored Lasswell and McDougal's first statement of what would become policy-oriented jurisprudence in 1943, and cast around their careers and intellectual lives in this limited wartime window, we can already note themes that would come to characterise the New Haven School. First, in relation to the way legal circles perceived this new body of legal theory, by 1945 we have already seen McDougal invoking, and associating his arguments with the framework he was developing with Lasswell. In this case his aim was to support a State

¹⁷¹ McDougal and Lans, 'Treaties and Congressional-Executive or Presidential Agreements' (n 166) pp. 192, n. 31.

Department position concerning the Senate's influence over foreign policy, and to challenge a prominent representative of the interwar field of American international law – Edwin Borchard.

Second, on the face of their 1943 'Legal Education' article, Lasswell and McDougal explicitly noted their ideas and proposals were drawn from problems that pre-dated the Second World War. The article was placed in a context of social problems posed by modern industrial life. Third and relatedly, the progressive, modernist politics of which policy-oriented jurisprudence was a product were apparent in 'Legal Education'. Lasswell and McDougal included many proposals that can be described as social democratic, and that signalled intellectual lineage both to the New Deal and strands of European socialism.

Fourth, pragmatist ideas about ontology and epistemology were central components of 'Legal Education', as were concepts and methods taken from different schools of research in social psychology and psychoanalysis.¹⁷² The methodological proximity of Lasswell and McDougal's interest in personality and culture to Erich Fromm's psychoanalytic social theory in particular, was made clear. 'Legal Education' offers a particularly helpful example of the ease with which these two bodies of thought – philosophical pragmatism and psychoanalysis – were able to overlap as the intellectual origins of policy-oriented jurisprudence. They shared much. Both Sigmund Freud and the classical pragmatists had critiqued inherited social orders they determined unsuited to modern life. Both Freud and the pragmatists had sought to do this by trying to relate their ideas about psychological interiority to the modern paradigm of scientific inquiry. They constructed this relation in different ways, but they all believed psychological forces were operating beneath the surface of modern social life. In 1943, Lasswell and McDougal pursued implications of the same point for law and lawyers.

¹⁷² For explicit references to several different strands of social psychology and psychoanalysis, see especially: Lasswell and McDougal, 'Legal Education and Public Policy' (n 16) – concerning new methods at pp. 214-215, 286-287 (esp. n. 131), 291; and character and personality at pp. 231, 279-282.

Chapter 3.

The earlier life of Harold Lasswell

3.1 'The germs' of policy-oriented jurisprudence

For the origins of the ideas about law, social order, value and personality that Lasswell and McDougal expressed in their 1943 call for reform of legal education, and to understand the contexts that made them compelling, we must look further back, to yet earlier moments and works in the intellectual lives of both Lasswell and McDougal. In Lasswell's case, his most comprehensive single statement of his social theory prior to meeting McDougal was a series of lectures and articles from 1932 and 1933. In 1935 it was published as the monograph *World Politics and Personal Insecurity*. Speaking about their collaboration, McDougal later said:

Lasswell was primarily responsible for this [the theoretical framework set out in the 1943 article], my role was to help him give it hands and feet. He had the map from the first day I met him there in the summer of nineteen and thirty-five but he didn't know enough about authority you see. He knew about effective power, he knew about the factors that affect human beings, the complexities of human being's perspectives... This first book on *World Politics and Personal Insecurity* has the germs of everything that I've said to you [describing policy-oriented jurisprudence] and our collaboration

was just a slow process of working out this theory in a way that it could be applied to any subject.¹⁷³

Many of the premises, methods and motivating problematics underlying the 1943 'Legal Education' article can be found more extensively articulated in *World Politics*. More than a self-contained, discrete statement of enquiry followed by analysis, this monograph was similar to 'Legal Education' in that it sought to recommend an entire research program and orientation towards the scientific study of society. Lasswell described this orientation as 'configurative analysis of the world value pyramids'.¹⁷⁴ By configurative, he meant a perspective that was self-consciously oriented towards a 'totality' of social reality, aware of both its contemplative and manipulative capabilities in relation to that social reality. 'Totality' was intended to encompass past, present and futures of the material and symbolic factors that affected social change. Deeply contextual, it was as ontologically catholic a conception of the 'social' as possible. Through it, Lasswell mostly examined two things – elites and politically dominant symbols.

In describing the configurative observer's 'contemplative' and 'manipulative' attitude, Lasswell was saying two things. First, adopting a contemplative attitude, an observer could generalise laws of change. These generalisations were based on explanations of how details observed in society related to "tentatively held conceptions of the elite-symbol changes toward which or away from which events are moving".¹⁷⁵ Ponderously expressed, this was a speculative method. 'Laws' of change were not absolute, positivist inductions. They were generalised speculations about how particular details an observer could plausibly intuit, fit into other speculations about what might happen in the future. Emphasising this speculative flexibility, in a manipulative attitude the observer thought about how to rearrange what they observed, trying to effect elite-driven and symbolic changes in society.

Lasswell's view was that the difference between the two attitudes could not be absolute, but a question of emphasis. Contemplative analysis tried to minimise, but could never exclude, the observer's implication in the 'totality' being studied. It was rather that the generalisations were

¹⁷³ 'Reflections on the New Haven School: An Interview of Professor Myres S. McDougal by Professor W. Michael Reisman' [1982] United Nations Audiovisual Library of International Law.

¹⁷⁴ Lasswell, *World Politics and Personal Insecurity* (n 103) (originally 1935). Title of Chapter 1, in Part I 'Method', pp. 3-22.

¹⁷⁵ *ibid.* pp. 4.

so broad as to make the observer's involvement less important. Manipulative analysis emphasised this involvement, and as a result would tend to be applied to more proximate, "familiar patterns of reality".¹⁷⁶ The analyst of society, the 'participant observer', needed to confront their own involvement in the social realities they took as objects of analysis.

We may be without conscious interest in our "power" position in society, but we cannot escape from the "power" implications themselves. We may be so devoted to a compulsive neurotic ritual of collecting, ordering, condensing, and expelling data that the political implications, aside from modest incomes and great deference from other compulsive personality types, are ignored. We may be oral, impressionistic, agile, and facile, welcoming mainly the approbation of other oral erotics; but the "power" consequences remain none the less. Those who declare that they want truth and are indifferent to control may, indeed, get truth; but they are bound to have some control. The mere fact of persisting in a network of interpersonal relations means that one finds a place in, and partly modifies the shape and composition of the current value pyramid, whether one keeps this in mind or not.¹⁷⁷

In spite of these 'power' consequences, indeed because of their confrontation of them, the observer could state analytical categories and trends of social change, and they could self-consciously influence society. Lasswell's animating vision was the "... gradual creation of a sense of wholeness, and of assurance in the discovery of the interdetail connections within the all-encompassing totality...".¹⁷⁸ Prefiguring what would later become a characteristic of New Haven School legal theory, Lasswell wanted to bring all of social life within the social scientist's gaze.

The 'sense of wholeness' he desired needed to be sought using a method that was itself one of constant movement, of "incessant cross-referencing" between different observational methods (for instance speculating about historical trends, quantitatively measuring material changes, and qualitatively examining individual attitudes and personalities), and between contemplative and manipulative attitudes.¹⁷⁹ An appropriate analogy might be that of the shuttle, shooting back and forth across a loom as it carries its weft thread between the warp thread. Incessantly

¹⁷⁶ *ibid.* pp. 5.

¹⁷⁷ *ibid.* pp. 16.

¹⁷⁸ *ibid.* pp. 12.

¹⁷⁹ *ibid.* pp. 12.

whipping back and forth between method, perspective and attitude, the analyst studies society as a sort of shuttle, dragging their inevitable contribution of weft into the fabric they call the object and outcome of their analysis. Modifying the distribution of power and values as they go, but self-consciously so. Or like the clinical psychoanalyst, who modifies the emotional state of the analysand in the very process of its articulation and observation.

It was on this ontology of constant movement that Lasswell stated categories and ‘laws’ of change, statements that seem to claim some kind of objective status despite the observer’s implication in the object of those claims. Lasswell saw social reality as constant movement, not a collection of static entities to be measured and described from an external standpoint. If social reality *was* movement, constant change in every possible part of what we could say it was constituted by – materials, ideas, communication, emotions – and as long as the social analyst incessantly shot back and forth across these constantly changing conceptual details, constantly revising analytical categories, projections and explanations, the analyst could be in dialogue with social change. What Lasswell called ‘configurative analysis’ was a state of being in conversation with society, much more than it was an exercise in observing and stating anything like deduced facts.

Each specific interpretation is subject to redefinition as the structural potentialities of the future become actualized in the past and present of participant observers. The analyst moves between the contemplation of detail and of configuration, knowing that the soundness of the result is an act of creative orientation rather than of automatic projection. The search for precision in the routines of the past must be constantly chastened and given relevance and direction by reference to the task of self-orientation which is the goal of analysis.¹⁸⁰

The ‘soundness’ of that conversation, the Romanticism of the science, relied on a kernel of ‘creative orientation’ that was a recurring feature of Lasswell’s social theory.

In *World Politics*, Lasswell explained that by developing this framework, he hoped to initiate a shift in perspective “in many respects parallel to the viewpoint introduced by Marx and Engels into modern social theory”.¹⁸¹ Marx and Engels had considered as political aspects of

¹⁸⁰ *ibid.* pp. 13.

¹⁸¹ *ibid.* pp. 17.

society previously treated as depoliticised – the competitive market. In Lasswell's words, they "marked the recovery of the political standpoint". He also intended to recover a standpoint, "the self-orientation which is the goal of analysis".¹⁸² His ambition was to use psychoanalytic techniques for the study of personality and culture to build on Marx and Engels' dialectical explanation of the material factors of social change. Throughout the book, explanations that used Marx's theory of dialectical materialism were central, consistently applied to concrete historical examples.¹⁸³ What Lasswell added was a psychoanalytic attention to unconscious emotional forces as another important force animating social change.

An important part of this contribution rested on the idea of societal 'insecurity' as a way of speaking about the collective dissatisfaction, anxiety, restlessness or fear a community could be said to feel and express. As Lasswell explained it, these feelings could be prompted by a social environment being affected by material, economic deprivations, in particular depressions and modern shifts in the division of labour; by violence, as in fascist Italy and Germany; and by the ways people came into contact with and understood themselves in relation to others. They could also be prompted by symbolic changes like new ideas and propaganda, or challenges to collective 'we' symbols like the 'nation', the 'church', 'class' or 'race'. At the level of world politics, what Lasswell took to be an underlying assumption of the possibility of recourse to violence bore heavily on societal insecurity.

Owing to the assumption of violence in international and interclass relations, collective symbols are presented at the focus of attention under circumstances which are particularly prone to precipitate all manner of anxiety reactions. The meaning of these symbols is a function of the total personalities in which they occur, and they necessarily derive much of their significance from deeper and earlier sources than those connected with the immediate political situation.¹⁸⁴

Put bluntly, people would often project intimate, personal insecurities on to collective symbols (ego symbols). To a certain extent individuals might counter-assert themselves against threats to these collective symbols and in so doing reduce their sense of personal insecurity, but it was

¹⁸² *ibid.* pp. 17-19.

¹⁸³ See for example Lasswell's analysis of the path from the emergence of modern industrialism, to World War One, to fascism and socialism: *ibid.* pp. 124. Lasswell described Marx and Freud as "heroes of the insecure" at pp. 216.

¹⁸⁴ *ibid.* pp. 52.

difficult. It was difficult partly because of the strong possibility of violence that was sustained by collective attention on a small number of powerful, supposedly threatening figures. Vested interests in the press, politics and business arose to whom it was beneficial to emphasise threatening developments in world politics. It was also difficult because while ego symbols at a primary level (for example about siblings, friends, neighbours) could be nuanced by many reflective experiences and intimate knowledge, sentiments about secondary objects like nations and classes were barely, if at all modified by such knowledge. They were ambiguously referred to and could harbour all sorts of residues from early emotional attachments, thus reducing the possibility of 'reality critique'.¹⁸⁵

Indeed one of the principal functions of symbols of remote objects, like nations and classes, is to serve as targets for the relief of many of the tensions which might discharge disastrously in face-to-face relations. The hatred of the physical father may be displaced upon the symbol of the monarch, enabling the person to keep on good terms with the person toward whom the early animosities were mainly directed. ... The elaboration of regressive and fantastic processes in connection with the rudimentary self-symbols of world politics is favoured by the weak superego formations which arise in consequence of the comparative absence of world mores. The assumption that the resort to violence is the ultimate appeal in world politics indicates the weakness of moral imperatives in this sphere of human relations. Impulses are permitted to discharge in elementary form owing to the fragmentary nature of world culture.¹⁸⁶

Assuming the centrality of violence as the appeal of last resort in world politics, Lasswell saw the mores (super-ego formations) of world society as weak and rudimentary. Given the weakness of this value-order, the analyst needed to look behind the conscious expression and explanation of remote ego symbols, to insecurities that they could encourage to discharge towards different objects, and to environmental changes that might create insecurity.¹⁸⁷

¹⁸⁵ *ibid.* pp. 55. For terminological explanation see: pp. 48-51. These ideas are developed in significantly more detail in Lasswell and McDougal's *Law, Science and Policy* seminar materials, which we will explore in Chapter 5.

¹⁸⁶ *ibid.* pp. 55-56.

¹⁸⁷ *ibid.* pp. 7-8.

3.1.1 'Political psychiatrists' should practice the 'politics of prevention'

Lasswell thought that psychoanalytic theory prompted the advent of “political psychiatrists” practicing the “politics of prevention”, a politics of dissipating accumulated anxieties as harmlessly as possible, of “mitigating the consequences of human insecurity in our unstable world”.¹⁸⁸ The modern division of labour included people who were “specialized creators of symbols”, making the management of masses by propaganda “one of the principal cultural characteristics of our epoch”, and a natural method for the political psychiatrist.¹⁸⁹ Political psychiatrists were well placed to push masses towards social outcomes deemed desirable from the perspective of mitigating damage done by human insecurity. A vocation like this could easily slip into the conformist analyst tamping down the analysand’s socially unconventional impulses and adjusting them to social norms, a common characterisation of American clinical analysts from the 1950s onwards. It could also however, be midwife to revolution, shaping social change to cohere with knowledge about the self rather than bringing the self into line with society.

In his 1930s writings, and particularly in *World Politics*, Lasswell presented his employment of psychoanalysis to theorise the politics of prevention as closer to a revolutionary vocation, as a psychoanalytic vision committed to social change. Arguing that modern industrialisation and the attendant spread of the “capitalistic culture complex” were important insecurity-producing environmental changes, he described historical developments in the nineteenth century.¹⁹⁰

Industrial society differentiates the life situation of the community, multiplying the foci of attention and hence laying the basis for differences in loyalty, hope, and policy. ... In the foreground appears the rapid application of modern technology to production, profoundly altering the life situation of many members of the community. Perceiving new possibilities of profit, self-selected enterprisers took the initiative in demanding many modifications in traditional ways of life, clashing with the symbols and practices favourable to the landed group.¹⁹¹

¹⁸⁸ *ibid.* pp. 19-20.

¹⁸⁹ *ibid.* pp. 19.

¹⁹⁰ *ibid.* pp. 8.

¹⁹¹ *ibid.* pp. 11 and pp. 37.

Nationalist identities had risen in Europe through this process, and by the 1930s new elites sought to effect their own world-revolutionary redistribution of values and power.

The calculation of pecuniary advantage is a highly “rational” process; yet the social patterns which permit this rational process to go on must be sustained by an irrational consensus. Hence the tension between the rational and the traditional is particularly high under capitalism, which requires consensus, yet fosters the rational analysis of every symbol and practice. The rationalism of capitalism has rendered it peculiarly dependent for positive values, ethical imperatives and unifying goal symbols upon its legacies from previous cultures. The vestiges from primitive folk culture (*Gemeinschaft*) have been drags upon the completely ruthless application of the principle of calculated pecuniary advantage in The Great Society. The insecurities arising from the changes in the material environment have been augmented by stresses arising from the decline in potency of the older religious symbols and practices. Nationalism and proletarianism are secularized alternatives to the surviving religious patterns, answering to the need of personalities to restabilize themselves in a mobile world.¹⁹²

Lasswell saw the two most probable coming elite world-revolutions in the form of fascist nationalisms and the ‘proletarianism’ of communism and socialism. As he saw it, the stable ascension of either of these orders seemed to depend in large part on the small bourgeoisie. This was the class that most strongly instantiated the contradictions capitalism gave rise to – as it encouraged the functions of the rational, calculating ego one the one hand; it relied for impulsion and stability on the superego’s mores and values, and the id’s desires and impulses on the other. The dissatisfied middle classes had been central to the rise of fascist nationalisms, and ‘proletarian’ strategists needed to win their loyalties. One of the goals of *World Politics* was to examine how to push “the psychological responses of the middle classes to rival symbols of identification.”¹⁹³

Is there any way to disintegrate the middle classes as a whole more readily for the benefit of the proletarian mythology which might unite mankind? Certainly the present practice of insulting and intimidating them has strengthened fascism. Is it worth while to show that the revolutionary state of the socialists is the only one where able

¹⁹² *ibid.* pp. 39.

¹⁹³ *ibid.* pp. 39.

organizers and technicians are given security and scope, the only society in which the road to reward for effort is open, where it cannot be shut off by the erratic malcoordination of the capitalist economy?¹⁹⁴

Using psychoanalytic theory to explain why Marxism was such an attractive social criticism to so many people – due to “certain advantages in its symbolic structure” – Lasswell thought it was “the most pretentious bidder for universal acceptance as the basis for a stable world order”.¹⁹⁵ But it needed to be repackaged for the small bourgeoisie. This was of particular relevance in an American context where older, skilled middle-income workers might be prompted to greater collective self-consciousness. Perhaps they might even come to think of themselves as something like “Americans of Middle Income”.¹⁹⁶

3.1.2 World social order, world social justice

In his final chapter ‘In Quest of a Myth: The Problem of World Unity’, Lasswell outlined this project of repackaging international politics. While he had many ideas about unifying a world society using material strategies (creating financial bonds issued by international agencies, pooling debts of national governments under the auspices of a world authority, having the Bank for International Settlements grant development loans and integrate central banks), he was most interested in the creation and manipulation of emotions supportive of world political unity.¹⁹⁷

The prerequisite of a stable order in the world is a universal body of symbols and practices sustaining an élite which propagates itself by peaceful methods and wields a monopoly of coercion which it is rarely necessary to apply to the uttermost. This means that the consensus on which order is based is necessarily nonrational; the world myth must be taken for granted by most of the population. ... The discovery of the symbols which in point of fact do elicit enough rearrangements of human reaction to inaugurate and conventionalize a stable order is the essence of world legislation. The discovery of the portentous symbol is an act of creative orientation toward an implicit total

¹⁹⁴ *ibid.* pp. 201-202.

¹⁹⁵ *ibid.* pp. 194. For extensive discussion of the strengths of Marxist theory from a psychoanalytic perspective see pp. 98-104.

¹⁹⁶ *ibid.* pp. 203-204.

¹⁹⁷ For his ‘material’ suggestions, see: *ibid.* pp. 182-186.

configuration. ... His [the legislator's] task it to make himself, as it were, the maternity hospital for the delivery of the significant symbol.¹⁹⁸

While 'law' as a vehicle for a binding, cultural myth was quite central to this task of constructing a world society, it referred to a particular kind of legal culture. Lasswell dismissed liberal visions of democratic internationalism for reasons that went well beyond a strategic assessment of the success Marxist 'proletarianism' had already achieved as a political project.

Energy has been expended on fostering loyalty to the League of Nations and to procedures of "Inquiry," "Mediation," or "Arbitration." It is important to remember that no procedure exists apart from an institutional order in which safety, income, and deference are distributed according to certain conventions.¹⁹⁹

Noting that a majority of League states were capitalist states, bound by their self-interest to maintain this order, he continued...

If to strengthen the League is to strengthen capitalism during our historical epoch, and one regards capitalistic individualism as an anachronistic concession to human perversity, support of the League is an act of immorality. The support of procedures always occurs in a specific situation, and the support of procedures tends to preserve or to protect certain pyramids of safety, income, and deference, and to undermine others. The approach to world politics which undertakes to sentimentalize procedures, or various parochial agencies, assumes that human beings ought to accept order rather than justice as a value.²⁰⁰

Lasswell thought people were enchanted by thick visions of 'justice' and repelled by sterile calls to 'order', calls that were always grounded in a social context and as such protected the claims of the dominant without acknowledgment. A myth constitutive of world society needed to promise more than dry order and "pale peace". Proletarian socialism offered more. It offered

¹⁹⁸ *ibid.* pp. 181.

¹⁹⁹ *ibid.* pp. 189.

²⁰⁰ *ibid.* pp. 190. It is worth noting that Lasswell does not explicitly say he does regard capitalistic individualism in this way, rather that if one did, it had the following moral consequences. Many of his strongest statements are parsed in this way, making his writing difficult to interpret. In the present example, the context in which he makes this statement removes any ambiguity about his views of capitalist individualism.

to “annihilate the social order that keeps some men rich and some men poor” and to inaugurate a “class-less society where all men are brothers and peace rules because justice has come”.²⁰¹

The demand for world order rather than justice appeals to the style of thinking which was current in Europe during the rise of the bourgeoisie. Woodrow Wilson was the most significant recent spokesman of the ideal which glorified “Law” instead of glorifying “Justice,” “Equality,” “Socialization,” and “Bread.” Wilson was repeating the language of democratic internationalism which had helped the rising bourgeoisie to abolish inconvenient social formations, and to develop a competitive marketing game from which it profited. Wilson echoed the civilization of the last century; Lenin spoke for substantive justice in a changed world. Wilson was satisfied with formalities; Lenin went to the heart of the problem of establishing a uniform method of recruiting the élite in every country, sensing that without a consensus on symbols of justice, there can be no lasting peace.²⁰²

Disavowing any of the naive Wilsonian liberalism he might have felt when he first came to Europe in 1923, by the 1930s Lasswell’s vision was of political psychiatrists supporting the masses of international politics in their transition to a socialist world society. In managing the symbols around which world unity might be created, law might usefully have an important role, but it could not be conceived as the genteel ‘order’ found in ‘mediation’ or ‘arbitration’, the self-satisfied agreements of bourgeois gentlemen. It needed to reach for thicker conceptions of ‘justice’. The time seemed to frame such justice in socialist terms – planned classlessness, sweeping redistribution, reward for labour proportionate to skill rather than market-value.

Taking at face value McDougal’s recollection that his collaboration with Lasswell started at a time when Lasswell “...knew about effective power, he knew about the factors that affect human beings, the complexities of human being’s perspectives... but he didn’t know enough about authority...”, it is worth noting two aspects of Lasswell’s discussion of law’s role in his envisioned world myth-making project.²⁰³ First, his view of existing ‘world mores’ was stark, deeming violence the ultimate underwriter of world politics. While he had much faith in the importance of constructing a future world society founded on a universal value-order (the best

²⁰¹ *ibid.* pp. 190.

²⁰² *ibid.* pp. 190-191.

²⁰³ ‘Reflections on the New Haven School: An Interview of Professor Myres S. McDougal by Professor W. Michael Reisman’ (n 173).

candidate being proletarian socialism), his observation of world politics had given him no faith in any such order of the past. Between the World Wars there were many advocates of contending, often vibrant visions of different international moral and cultural orders, a great deal of them Americans.²⁰⁴ In Geneva, Lasswell had met many of these advocates. Yet in *World Politics* he dismisses their ideas as relatively monolithic representatives of an outdated, bourgeois class. McDougal would later cast Edwin Borchard in a similar way.²⁰⁵

Second, while keen to discuss the possibilities of law in a world society, Lasswell often described its operation in bluntly strategic, instrumental terms.

We might take advantage of the prestige of terms like “law” and sloganize the “World Legal Community.” Perhaps it is appealing technique to deflate the pretensions of local groups by arguing that the world legal community is prior to and superior to municipal law. Theories of natural law have been useful verbiage historically in advancing a novelty in the name of plausible symbols, and a certain body of literature is already available for authoritative citation.²⁰⁶

While Lasswell’s ideas drew on diverse sources, for the most part he was writing for Americans. He had a detailed view of what he thought of as the American cultural psychology, holding that it understood itself in vocabulary that was “legal, ethical, and theological rather than analytical”.²⁰⁷ This influenced his emphasis on the myth-making value of legal language. In some ways, his view of law was classically elitist-socialist, as a method for social control with sketchily conceived normative value, easily cast as a relic of self-serving bourgeois ‘order’. As McDougal observed, Lasswell’s was a complex understanding of “effective power” and of the “factors that affect human beings”. Yet the justified, genuine “authority” that he believed in and placed at the centre of his vision, was explicitly creative and mythical. Less than a myth itself, *World Politics* was a manifesto outlining how a modern myth should, and needed to be constructed.²⁰⁸

²⁰⁴ On diverse American visions of internationalism in this period, see: Wertheim, *Tomorrow, the World: The Birth of U.S. Global Supremacy in World War II* (n 167).

²⁰⁵ See: Chapter 2: In 1943 the policy-oriented lawyer is to be an epochal figure. *supra.* pp. 58-61.

²⁰⁶ Lasswell, *World Politics and Personal Insecurity* (n 103) pp. 187

²⁰⁷ *ibid.* pp. 164. This analysis of American culture is similar to Eric Voegelin’s work. See: On the Form of the American Mind, Vol. 1 of: Eric Voegelin and others, *The Collected Works of Eric Voegelin* (Louisiana State University Press 2007) (originally 1928). Lasswell will encounter Voegelin later in this chapter.

²⁰⁸ Having analysed the American cultural psyche, Lasswell bullet-points what he thinks would need to be the characteristics of an American treatise of equivalent significance and purpose to *Das Kapital*. The resemblance

As McDougal would later state, Lasswell's 1935 theorisation of the elite-led construction of a socialist world society "contained the germs" of the 1943 article they would write together, which in turn was the basis for their *Law, Science and Policy* seminars at Yale Law School.²⁰⁹ In *World Politics*, we find the distinctly interwar preoccupations by which policy-oriented jurisprudence was animated; Marxist and socialist ideas that would continue to echo through their later collaborative work; and theoretical premises drawn from both philosophical pragmatism and psychoanalysis. Much research and thought prompted by many experiences and places lay behind these ideas. They were a product of Lasswell's research in the 1930s, of extended periods he spent in Europe between 1923 and 1928, of his training at the University of Chicago, and to an extent of the reformist politics amidst which he grew up. We will explore these places and experiences with the microhistorical aim of both re-understanding Lasswell and his ideas in a time and context, and at the same time accessing parts of that time and context through Lasswell.

3.2 Lasswell's childhood and education: Progressive Era Illinois and Chicago

For early twentieth century life in small-town Illinois, the Presbyterian church and manse were community focal points. Birth, death, love, hatred, suffering, gossip, politics all had their appointed and unappointed hours. Many members of these small communities brought their various maladies and maledictions to the pastor's study. The good china and silver would appear with equanimity for occasions of community celebration and of mourning. The son of the pastor to a succession of such towns, in 1902 Lasswell was born into a house where the life of a community was, quite literally, at home. The life of the family, intimately a life of the larger community.

Lasswell's mother, Anna Prather, was a public school teacher in the communities her husband Linden undertook as pastorates – Donnellson, Enfield, Good Hope, Mount Zion, Greenview, Raymond – small towns in rural Illinois. Reflecting on his childhood, Lasswell recalled his

this list shares with common characterisations of the New Haven School is striking. See: Lasswell, *World Politics and Personal Insecurity* (n 103) at pp. 167.

²⁰⁹ 'Reflections on the New Haven School: An Interview of Professor Myres S. McDougal by Professor W. Michael Reisman' (n 173).

mother's ministrations to young couples without a suitable venue for their marriage, throwing open the pastor's manse for their reception; her tactful interventions in standoffs over despoiled flowerbeds or the bruised ego of a local talent overlooked in the church choir; her management of Sunday schools; and her stern eye casting about a congregation as Linden preached.²¹⁰

His father would receive concerns in his study, perhaps attempting to rein in the dominance of minor businessmen, or on one occasion recalled by Lasswell, inveighing against intolerance from the pulpit after a local tailor made overtures on behalf of the Klan. The tailor vented about the damage he was certain the 'kikes', 'Irish', 'Polacks' and 'negroes' did to his business.²¹¹ Linden cultivated a sense of duty to the community and to his role within it that was impressed on Lasswell. He remembered his father climbing from bed, heavy with fever, to deliver a sermon. He would advise his son that he "never wanted any farmer to hitch up his team and drive through the mud to find the doors of the House of God shut and the lights out, when he had reason to expect a welcome, and an occasion of worship."²¹²

Linden was a supporter of the Democratic politician William Jennings Bryan (though not of the Democratic Party generally), believing in Bryan's anti-elitist agenda and hoping he would break the power of the East Coast monopolists and trusts. Concentrations of wealth, and consequently power, among the corporations and industrialists in the east of the country were a concern in the manse. Bryan's speeches on the Chautauqua speaking circuit, cast in a theologically-inclined liberal progressivism, excoriated industrial monopolists and the presence of corporate money in politics. For many years Lasswell family vacations included the public forum at Old Salem Chautauqua. On these muggy summer days, when rural America revelled in fiery rhetoric and tented political theatre, Lasswell met Bryan, Robert La Follette, and other prominent performers of the Progressive Movement. Like Bryan, La Follette was a strident critic of large corporations and the railroad trusts, a hero of these family holidays.²¹³

²¹⁰ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series V. Box 215 Folder 28 D8-11. Undated, partially typed and partially handwritten description of the careers of Linden Downey Lasswell and Anna Prather Lasswell, as well as of Lasswell family life, written by Harold Lasswell.

²¹¹ *ibid.* Box 215 Folder 28 D12-13.

²¹² *ibid.* Box 215 Folder 28 D9.

²¹³ *ibid.* Box 215 Folder 28 D20-21. See also: Harold Lasswell and Dwaine Marvick, *Harold D. Lasswell on Political Sociology* (University of Chicago Press 1977) pp. 16.

On the platform under the great tent, La Follette would toss his great mane, pull off his coat, unloosen his tie, roll up his sleeves, and slay again the railroad dragon in four perspiring hours.²¹⁴

These figures spoke to the provincial, castigating the industrial barons of the day for the ease with which they gathered and held power. It was a time when small-town, Protestant America felt it had something to lose. The great coastal cities heaved with life, seemingly making claims on the nation's wealth and culture. Their elites seemed to increasingly consolidate industrial power, their working classes were populated by immigrants who seemed less and less like the sort of people you would have found on the Mayflower, less Protestant and less Northern European. In the immediate world of Lasswell's youth, Linden was a political insider of a sort, but a provincial one, suspicious of the big city and the supposed subtlety of its politics. He thought many people shook off "the dust of the village and lived to regret it", consumed by the complexity and inhumanity of the metropolis.²¹⁵ His son would build a career as an advisor to power, but long before that Lasswell knew what it was to look from the outside in, to join the press beneath hot canvas in thick, close air, and listen to firebrands rail against the dominant.

Anna encouraged her son's curiosity from a young age, exposing him to a wide range of literature and ensuring the manse was stocked with reading that supported Lasswell's philosophical interests. Wilhelm Windelband's 'History of Philosophy' made an early impression, leaving him well prepared for later close readings of Max Weber in Germany, Weber having been a contemporary and passing disciple of Windelband at the University of Heidelberg.²¹⁶ Aged fourteen and fifteen, Lasswell spent summers with an uncle who was a medical doctor in Indiana. There he came across some writings by an Austrian neurologist. His uncle had hoped the ideas of this experimental Viennese practitioner could have some useful applications for a patient with a medically inexplicable paralysed arm. At the time it seemed to Lasswell that Sigmund Freud's ideas were perceptive and sensible. Later at the University of Chicago it was explained to him that these theories were considered to be controversial.²¹⁷

²¹⁴ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series V. (n 210). Box 215 Folder 28 D21. Handwritten passage.

²¹⁵ *ibid.* Box 215 Folder 28 D19.

²¹⁶ Lasswell and Marvick (n 213). pp. 16. On Weber and Windelband's relationship, see: Paul Honigsheim, *The Unknown Max Weber* (Transaction Publishers 2003) pp. 137-140.

²¹⁷ Lasswell and Marvick (n 213) pp. 17. See also: Leo Rosten, 'Harold Lasswell: A Memoir', in: Arnold A Rogov (ed.), *Politics, Personality, and Social Science in the Twentieth Century: Essays in Honor of Harold D. Lasswell* (University of Chicago Press 1969) pp. 6.

When Lasswell was five, his older foster brother had died, leaving him to grow up as an only child whose intellectual life was placed at the centre of the family's concerns.²¹⁸ During high school years, while Linden maintained his pastorate in a small town, the Lasswells lived close enough to the city of Decatur to avail of urban educational possibilities. Lasswell came into contact with two inspirational high school teachers, Lucy H. Nelson and William Cornell Casey. Nelson taught English, and inhabited what seemed to be a "rather cosmopolitan world", pushing her student towards writers like Havelock Ellis and Karl Marx – exciting, even risqué figures for many in early twentieth century Illinois.²¹⁹ She also orchestrated a meeting and conversation between Lasswell and John Dewey when Dewey visited Decatur.²²⁰

Casey had interdisciplinary interests, nurturing Lasswell's awareness of psychology, semantics, history and economics. He encouraged Lasswell's early participation in competitive debating, from high school and throughout his time at the University of Chicago, where Casey also taught after leaving Decatur. As Lasswell built his own career in the academy his former teacher remained a friend and correspondent.²²¹ Casey later became a professor of sociology at Columbia University, where he crafted a reputation as an eccentric, intellectually untamed Renaissance man with a modernist penchant for speaking about sociology through the vocabulary of mathematics.²²² When remembered for his relationship with Lasswell, Casey is often quoted for his conviction that "the education of one-top level lawyer is more important to society than the education of fifty social scientists".²²³ In 1943, Lasswell and McDougal would make a similar point in 'Legal Education', and Lasswell would devote much of his career to the education of America's legal elite.

²¹⁸ Lasswell and Marvick (n 213) pp. 16.

²¹⁹ *ibid.* pp. 17. Marvick's compilation of biographical material draws on interviews personally conducted with Lasswell before his death. See also: Bruce Lannes Smith, 'The Mystifying Intellectual History of Harold D. Lasswell', in Rogow (ed.) (n 217) pp. 48.

²²⁰ Lasswell and Marvick (n 213) pp. 17.

²²¹ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. Box 56, Folder 780. Letter from Harold Lasswell to Anna and Linden Lasswell, July 1924. Lasswell details plans to meet Casey in London.

²²² Thomas M. Jones, 'William Cornell Casey: Who Teaches Sociology, Is Thoroughly Thrilled By "The Shadow" and Lives Alone In A Spacious, De Luxe Cliff-Top House' *Columbia Spectator* (New York, 8 March 1935). In the preface to *World Politics*, Lasswell said of Casey: "Then there is my obligation to an inimitable friend of the last twenty years, William Cornell Casey, now of Columbia University, whose great acumen and tempered sensitivity are liberating and fructifying respites from an epoch heavy-laden with rancorous sterility." Lasswell, *World Politics and Personal Insecurity* (n 103).

²²³ Lasswell and Marvick (n 213) pp. 18.

Late in his life, McDougal maintained that Lasswell completed a year of law school as a young student, before switching to political science, however this does not seem to have been the case.²²⁴ Lasswell entered the University of Chicago in 1918 on a competitively won history and English scholarship, majored in economics, then moved to doctoral work in political science, although at different stages he did take some legal courses.²²⁵ Reporting to his parents that he had ‘flunked’ one of these courses, he explained what he felt had been the problem:

...I refused either thru [sic] incompetence or obstinacy to apply legal reasoning; and although I am to cover some more law, it will be preparatory for my special problems. I think the real reason was obstinacy, at least I hope so; at any rate the experience was interesting. There is a very great difference between the scientific attitude to a problem and the dialectical one, and the lawyer's attitude is dialectic, like the theologian's. He assumes an intention as expressed or implied in a text or a precedent, and he attempts to solve a given case by establishing its consistency with the intention. The scientist is content with establishing the fact that certain sequences occur under certain specified conditions, and instead of arguing about the effects of an adjustment he tries to work out ways and meaning for testing the results of such an arrangement.²²⁶

Perhaps the pre-eminently central protagonist in the story of this period of great change in American social science is Charles Edward Merriam, Lasswell's doctoral supervisor and mentor. From the 1920s Merriam doggedly pursued the institution-building and consolidation of funding power that would shape American social science through the rest of the twentieth century. At the centre of these efforts lay, as for Lasswell and McDougal, the vision of a figure. Merriam's figure shared much with the lawyer policy-maker.

Mark C. Smith describes Merriam's vision as one of a figure that should straddle the role of the technically skilled, social scientific ‘service intellectual’, and the practicing politician. The dilemma lay in Merriam's belief that while the knowledge possessed by increasingly adept social scientists offered means by which society could manage its way to harmony, eliminating conflict from politics, it did not justify their assumption of power. This right could only inhere

²²⁴ Interview with Tipson (n 49).

²²⁵ Rodney Muth, Mary M Finley and Marcia F Muth, *Harold D. Lasswell: An Annotated Bibliography* (New Haven Press ; Kluwer Academic Publishers 1989) pp. 29.

²²⁶ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 779 D21-22. Letter from Harold Lasswell to Anna and Linden Lasswell, 16 March 1924.

in democratically elected representatives, who in turn lacked specialised social scientific knowledge.²²⁷ Merriam would spend his career attempting to mediate between these poles of knowledge and power, realising his vision in institutional more than intellectual form.

At first, in particular from 1910 to 1919, Merriam seemed to embody the figure of the social scientist politician himself, contesting mayoral elections in Chicago, becoming a significant figure in the Illinois Progressive Party, and serving the American government as a practicing propagandist in Italy during the First World War.²²⁸ His political career enjoyed middling and short-lived success however. Turning to the academy, in his writing from the early 1920s he consistently advocated the systematic development of political science through a focus on practical, empirical work, the use of statistics and of psychology. He pushed this agenda through the American Political Science Association (APSA), which established and made him chair of a 'Committee on the Organization of Political Research.' On the recommendation of this committee, the Social Science Research Council (SSRC) was founded in 1923.²²⁹

As private foundations began to commit greater and greater funds to research in the natural sciences, Merriam saw that in the boardrooms occupied by the wealthy, establishment figures that backed cheques cut by these foundations, scientific objectivity was a claim of currency. Social scientists needed to convincingly make the case that their research employed vogueish scientific methods and hence would produce useful results, but that these results would not be politically committed, partisan ones. If such funding was to be obtained, the necessity to avoid rocking the stately boats of their patrons could not be avoided. This research also often required access to politicians and official fora. To obtain this, the objects of study needed to believe research would be objective.²³⁰ For some of these people, 'objective' could as easily have been replaced with 'uncritical', or at least 'uncontroversial'. The SSRC would use its control of greater and greater financial resources, obtained in no small measure by Merriam's adept cultivation of wealthy backers, to fund research that satisfied its criteria for objective, scientific

²²⁷ Mark C Smith, *Social Science in the Crucible: The American Debate over Objectivity and Purpose, 1918-1941* (Duke University Press 1994) pp. 87-90.

²²⁸ *ibid.* 89-90.

²²⁹ *ibid.* pp. 91, 98.

²³⁰ *ibid.* pp. 95-96.

methods, and explored topics that struck an ever-shifting balance between defensibly dispassionate scientific concern, and political relevance.²³¹

Merriam also genuinely held a conception of science, and of its application to social problems, where objectivity of perspective and method was the means by which conflict between competing interests in society would be transcended. Although he himself did little of the statistical, empirical or psychological research he ardently demanded, in his view what was at stake was a question of skilled management using what he saw as ever more powerful tools. Smith traces this overweening faith in a relatively vague notion of ‘science’ to John Merriam, Charles’ older brother, who was a palaeontologist trained by the famous geologist Joseph Le Conte. Le Conte, and in turn John, were natural scientists of a pronounced theological bent, believing God’s immanence in nature assured the beauty, reason and morality of scientific knowledge. John frequently extolled upon this conviction with support from Wordsworth and Tennyson, a Romantic sensibility not unlike Lasswell and McDougal’s faith in scientific knowledge as the epochal support for humankind’s benevolent potentialities, as expressed by past “poets and prophets of human brotherhood”.²³²

Like Lasswell, the Merriam brothers came from a Presbyterian home in the rural Midwest, had a school-teacher mother, and were brought up amidst active engagement in the politics of the Progressive Era.²³³ All turned from the ministry and law, traditional professions open to their class, and Merriam and Lasswell entered a rising discipline where they were caught in an effort to balance knowledge about governance, ends of political community and their bases of legitimacy, with roles that assumed governance and pursued those ends. For both, conditions of modernity like industrialisation and urbanisation posed the most pressing problems for governance and achievement of good ends, while what were thought of as the possibilities in technical knowledge offered by modernity prompted the most enchanting solutions. One squinted towards good ends themselves through a Puritan sense of the good as attainable, salvageable from a social condition prone, but not necessarily condemned, to strife, subject to

²³¹ Among the most important such backers were the ever-present Rockefeller family. Smith notes that Merriam was on first name terms with the younger generation of the family by the 1930s. *ibid.* pp. 98.

²³² *ibid.* pp. 93. Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) pp. 225. Cited at: Chapter 2: In 1943 the policy-oriented lawyer is to be an epochal figure. (n 205) *supra.* pp. 46.

²³³ Smith (n 227) pp. 85.

commitment to the necessary good works. “What is difficulty? [Merriam asked] A mere notice of the necessity for exertion.”²³⁴

Merriam’s conviction may have been less shakeable than his supervisee’s, possibly because his conception of scientific knowledge as a body of such good works was less philosophically deep, and consequently less ambivalent than Lasswell’s. At the time, it seemed to Merriam that the disorganised, impressionistic state of most social sciences, and in particular political science, justified a relatively straightforward emphasis on the unalloyed benefits of more and more reliance on statistics and the representation of studied social realities through numbers. This had been an open debate in the discipline for some time, and he had shown occasional reservations about rigidly positivistic perspectives. In one notable instance, he opposed the addition of the frequently quoted inscription on the façade of the new Rockefeller-funded Social Science Research Building at the University of Chicago - ‘When you cannot measure, your knowledge is meagre and unsatisfactory’ - a flourish ordered by the sociologist and zealous statistician William Fielding Ogburn.²³⁵ On the whole however, strategically, he felt science as statistics and objective taxonomies needed to be the party line for the time being. The zealots could be simmered down if the time ever came. In the second half of the twentieth century, the overweening dominance of positivist methods in political science, particularly in the American field, has caused the ambivalence, and often outright discomfort, many of the discipline’s prominent figures felt towards such methods in this formative period to be neglected. This has also been a characteristic of contemporary understandings of New Haven School theory.

In these years, Lasswell was a student and junior researcher, and although his interests and career prospects were, and would continue to be, positioned by his supervisor’s vision, his own questions and strategies were more personal.²³⁶ He was one of the young academics who was to take up Merriam’s cry for a new, confidently scientific discipline. This involved answering many of the questions Merriam could leave unanswered. Although his first publications were in psychologically-oriented political economy, and his graduate research was considered to be

²³⁴ *ibid.* pp. 87 – drawn from an autobiographical essay by Merriam.

²³⁵ *ibid.* pp. 28, 92.

²³⁶ On Merriam’s influence on Lasswell’s early career see: Bruce Lannes Smith, ‘The Mystifying Intellectual History of Harold D. Lasswell’, in: Rogow (ed.) (n 217). See also detailed correspondence between Lasswell and Merriam between 1923-1952: Merriam, Charles E. Papers, [Box 34, Folder 4; Box 51 Folders 18-19; Box 64 Folder 22; Box 65 Folder 2] Special Collections Research Center, University of Chicago Library.

in political science, Lasswell turned to Chicago's vibrant sociological circle from an early stage.²³⁷ Sharing office space with graduate students in sociology, he met and was increasingly inspired by the founder of the Department of Sociology at Chicago, Albion Small; by Robert E. Park, a former student of both John Dewey and William James; by William I. Thomas, known for his 'sociopsychological', anthropological perspective; and perhaps most significantly, by George Herbert Mead, the prominent figure of early social psychology.²³⁸ Merriam's interest in the political psychology he championed tended to fixate at the level of group traits and metrics of public opinion, yet Lasswell was also drawn towards psychology, personality and culture at an individual level.²³⁹ From this perspective, the Chicago sociologists were more engaging. Mead's influence in particular, proved crucial.

Mead's sociology blended philosophical pragmatism and social psychology. One of his central concerns was the socially constituted nature of the self, understood in part through the many ways perception, communication and self-reflection were social acts, and the implications of this view for group psychology and social control.²⁴⁰ His course on social psychology was enormously popular among students, and Lasswell thought it prompted the well-known life histories conducted by Chicago sociologists.²⁴¹ Life-histories would be an important part of Lasswell's writing in the 1930s. As a student, Mead studied at Harvard University with William James, tutoring James' children, and later taught at the University of Michigan alongside John Dewey before moving with Dewey to Chicago. Lasswell was occasionally invited to the Mead home, and through Mead continued his early contact with Dewey.

²³⁷ Harold Lasswell and Willard E Atkins, *Labor Attitudes and Problems* (Prentice-Hall 1924).

²³⁸ Lasswell and Marvick (n 213) pp. 21-22; Smith (n 227) pp. 222; Bruce Lannes Smith, 'The Mystifying Intellectual History of Harold D. Lasswell', in Rogow (ed.) (n 217) pp. 49-52. Of particular help in reconstructing this period of Lasswell's intellectual life is a prospectus for an unrealised intellectual biography compiled by William Ascher and Ronald D. Brunner, who collaborated with Lasswell to develop his 'policy-science' framework: William Ascher and Ronald D Brunner, *Prospectus for an Intellectual Biography of Harold D. Lasswell* (Unpublished 1982). Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Acc. 2010-M-039. Box 4 Folder 13 D3-30.

²³⁹ Smith (n 227) pp. 221 for interpretation of Merriam's focus.

²⁴⁰ George Herbert Mead and Filipe Carreira da Silva, *G.H. Mead: A Reader* (Routledge 2011). On the 'Social Self' see pp. 58-62, on the self, social control and the state see pp. 70-88. At pp. 85, Mead comments on the League of Nations and the Dawes Plan in terms close to views Lasswell expresses in letters from Europe. Note also: 'On the Psychological Basis of Internationalism', pp. 283-292.

²⁴¹ Smith (n 227) pp. 222. Materials from this social psychology course were compiled, edited and published as a monograph by Charles Morris, see: George Herbert Mead and others, *Mind, Self, and Society* (The definitive edition, University of Chicago Press 2015).

Mead also introduced Lasswell to the English philosopher and mathematician Alfred North Whitehead, Bertrand Russell's former teacher and with him, co-author of *Principia Mathematica*. Alongside Mead, Whitehead offered ideas that would underpin central insights in Lasswell's own writing and thought. Moving from the field in which he and Russell had been so influential, mathematical logic, to the philosophy of science, and finally to metaphysics in the 1920s, Whitehead developed a brand of 'process philosophy' that offered a metaphysical system that challenged assumptions about the nature of reality and being held by many traditions of Western philosophical thought.

His system departed from a central dichotomy – between the dominant paradigm of *substance-based metaphysics*, which answered questions about the nature of being in terms of discrete units of reality that are static entities at any one point in time, i.e. bits of matter in space; and *process metaphysics*, which answered those same questions in terms of constant process, activity and change. The substance-based snapshot of 'reality', populated by static bits of matter, was discarded. For Whitehead, such a snapshot could only represent a grouping of processes, activities and changes, which were the real 'units' of reality, and the interrelations of these 'units' must "involve transition in their essence. [Hence]... all realization involves implication in the creative advance".²⁴² Whitehead's was a vision of perceptible reality at the most fundamental level as an ontology of constant change, flux, transition. The very nature of all being, organic or inorganic, simply *was* experience of processes of *becoming*, rather than of static *being*.

Like Lasswell, Whitehead was concerned with the apparent degradation of lives lived in pursuit of value effected by the epistemological reign of 'positivist' sciences. Lecturing at the University of Chicago in 1933, he presented tenets of his metaphysics in contrast to the "common-sense notion of the universe" that he felt still held sway in the *everyday* life of mankind, a legacy of sixteenth century European thought.²⁴³ The latest developments of natural science however, in particular the advent of early quantum theory, he felt supported his own process-based ontology and epistemology.

²⁴² Alfred North Whitehead, *Nature and Life* (Greenwood Press 1977) pp. 22. (Lectures delivered by Whitehead at the University of Chicago in October 1933).

²⁴³ *ibid.* pp. 3.

Sketching two legs of the reigning common-sense paradigm, Whitehead referred to David Hume and Isaac Newton. From Hume's observations about our sense-perception of nature, Whitehead drew great scepticism as to the utility of our senses in giving us any access to the real nature of things. "Sense-perception does not provide the data in terms of which we interpret it".²⁴⁴ From Newton's laws of motion, as methodologically and practically useful as they were, he drew the insight that these laws gave no essential reason for their existence. Newton's explanation of stresses in relation to the masses of material bodies had the character of detached, if highly useful, arbitrary facts. *Arbitrary* motion was explained by means of an elegant system of *arbitrary* stresses between material bodies, related to their mass and motion. The concepts of mass and motion offered no inherent reasons for the existence of any stresses at all. For Whitehead, Newton had shown "that a dead Nature can give no reasons. All ultimate reasons are in terms of aim at value. A dead Nature aims at nothing". And yet... "It is the essence of life that it exists for its own sake, as the intrinsic reaping of value".²⁴⁵

Notwithstanding the fact that some fields of natural science had dismantled these classical views, Immanuel Kant, having sought to answer the alliance of Hume and Newton in his three critiques, had bequeathed a dominant common-sense cosmology, and left most modern philosophy in the position of departing from their presuppositions. Given the doubtful, hermetically-sealed character of sense-perception prompted by Hume's work, and Newton's well-structured, but ultimately arbitrary and reasonless nature, in turn synthesised in Kant's layered mental categories of knowable reason, it was "a field of perception devoid of any data for its own interpretation, and a system of interpretation devoid of any reasons for the concurrence of its factors".²⁴⁶ Seeking more tangible articulation of the blind-spots of this modern cosmology, and seemingly stirred by Franklin Delano Roosevelt's rapid enactment of depression-relief policies since his inauguration eight months before the lectures, Whitehead declaimed:

In the recent situations at Washington, D.C., the Hume-Newton modes of thought can only discern a complex transition of *sensa*, and an entangled locomotion of molecules.

While the deepest intuition of the whole world discerns the President of the United

²⁴⁴ *ibid.* pp. 7.

²⁴⁵ *ibid.* pp. 9.

²⁴⁶ *ibid.* pp. 9.

States inaugurating a new chapter in the history of mankind. In such ways the Hume-Newton interpretation omits our intuitive modes of understanding.²⁴⁷

It did not seem so great a leap from disenchantment with a barrenly rational field of philosophical enquiry, to the sense of fluidity and connectivity engendered by recent advances in theoretical physics, to the engaged social solidarity that seemed to demand political visions like the New Deal. In different ways, the philosophical pragmatists, James, Peirce and Dewey, all also built visions from process ontologies in response to what they thought were desiccated European categorical and rationalist philosophical legacies, as George Herbert Mead approached social psychology from process presuppositions. In his 1930s writings, particularly in *World Politics*, Lasswell himself would draw his social theory from the ever-moving flow of experience postulated by process philosophy.

During his undergraduate studies Lasswell also met the Australian academic and practicing clinical psychologist George Elton Mayo, an early proponent of a psychoanalytic approach to social relations in what had become his field of research, industrial organisations and working environments. In 1922 Merriam had been impressed by Mayo's interest in the way social environments related to psychiatry and the personality, and had given him entrée into the powerful Rockefeller funding circle.²⁴⁸ Lasswell was similarly drawn to Mayo's approach, working with him as an assistant at Harvard Business School on several occasions throughout the 1920s.²⁴⁹ Already familiar with psychoanalysis, working with Mayo gave Lasswell the chance to engage in some practical analyses of Harvard students. Notwithstanding the odd scandalised glance from more orthodox quarters, real, practical analysis of voluntary patients was something Lasswell would continue later as a faculty member at Chicago, and throughout his career.

Alongside this clinical focus, Mayo was interested in the way that social and physical environments could be altered so as to influence studied individuals. He tested how lighting,

²⁴⁷ *ibid.* pp. 10.

²⁴⁸ Richard CS Trahair, 'Elton Mayo and the Early Political Psychology of Harold D. Lasswell' [1981] *Political Psychology* 170 pp. 175.

²⁴⁹ Smith (n 227) pp. 225. However, note: Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221) Box 56, Folder 775 D38-40. Letter from Harold Lasswell to Anna and Linden Lasswell, July 1923. Here Lasswell refers to Mayo and teaching, noting that his collaborator on *Labor Problems*, Atkins, had gotten him a job with Mayo so as to allow Lasswell to support himself financially. Contra. Smith's assertion that Lasswell and Mayo first met in 1925: Smith (n 227) at pp. 225.

shop-floor layouts and rest periods in factories influenced a worker's psychological responses.²⁵⁰ In psychoanalytic terms, this idea of adjusting the individual to a largely fixed social structure defanged the original Freudian critique of the self-denial and hypocrisy of the Puritan social order.²⁵¹ It emphasised the management possibilities offered by psychoanalysis rather than its critical strain. Therapeutic adjustment of relations between personalities and social orders would later become a central preoccupation of New Haven School legal theory.

3.3 Researching interwar Europe

In May 1923 Lasswell obtained from Morton D. Hull, a Republican Congressman for Illinois' second district, a loan of \$1,500 at 5% interest for five years, secured on Lasswell's life insurance policy. Primed by Merriam, Hull professed himself keen to foster awareness of international perspectives in American politics, and to eliminate the provincialism that both he and Lasswell thought characterised many American thinkers.²⁵² The loan funded the first of a series of research trips Lasswell would make to Europe. Between June 1923 and July 1924 he travelled from New York to Geneva, to London, to Paris, and to Berlin, before returning to Chicago to take up his new post as an Instructor in political science. He returned to Berlin in the following summer of 1925, and in 1928 he travelled to Berlin and Vienna as a Fellow funded by the SSRC, in pursuit of psychoanalytic training at the foot of the master, Sigmund Freud.

In deeply detailed correspondence with his parents during these very formative trips, which we will now explore, Lasswell reflected on the ideas about people and society he felt pushed towards by the different contexts he encountered. *World Politics* vividly and explicitly reflected the formative impact of his European research. Though they remain unpublished, his parents saved his voluminous letters, and many ideas he developed at length in those letters

²⁵⁰ A well-known example involved testing workers' environments in Western Electric's Hawthorne plant in Chicago. Smith (n 227) pp. 224.

²⁵¹ Smith, emphasising Mayo's Victorian sensibilities, notes the deradicalisation of his use of Freud, as well as its desexualisation. See: *ibid.* pp. 225-226. On Freud and the Puritan social order, see: Eli Zaretsky, *Political Freud* (Columbia University Press 2017) pp. 24-26.

²⁵² Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 775 D 7-10. Letter from Harold Lasswell to Anna and Linden Lasswell, 1923.

appeared in *World Politics*. He cited German, French and Italian language writing he had encountered on these trips, and the scholars he had met.

3.3.1 Geneva, the League of Nations and the opinions of publics

In the Geneva of 1923, Lasswell joined a muddle of expatriate businesspeople scurrying from tax obligations, drifting scions of wealth and nobility mingling with Genevois upper bourgeoisie, and the international class of statespersons, academics, civil servants and journalists who fluttered to the League of Nations and the other private and public international organisations headquartered in the city. For a student with Lasswell's interests, the concentration of objects of study was singular. Geneva hosted the stagecraft of states and empires that were in many ways still fighting battles joined in 1914, if no longer through declared warfare, at least through pointed plays for territorial and industrial power, and through high-stakes propagandist articulations of perceived public opinions, grievances and insecurities.²⁵³ While the hard realities of the normative order mediated and constructed in Geneva during these years were most grievously felt elsewhere in the world, in the colonies and on peripheries far from Geneva, the League of Nations quickly created a distinctively internationalist environment, both facilitating and challenging power plays of national and imperial interest, and propagandist rhetoric.

The claims of nineteenth century statecraft were amplified and pressured by the stage created in the League.²⁵⁴ Rapid communication using the steamship, telegram and expansive

²⁵³ EJ Hobsbawm, *On Empire: America, War, and Global Supremacy* (1st ed., Pantheon Books 2008). Hobsbawm characterises the period from 1914 to 1945 as a single 'thirty years' war'. In relation to actual conflict, he does note a break during the 1920s, incorporating the period discussed in the present text, between the Japanese withdrawal from the Soviet Far East in 1922 and the attack on Manchuria in 1931.

²⁵⁴ Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2015). Pedersen makes the point that, "What was new, rather, was the apparatus and level of international diplomacy, publicity, and 'talk' that the system brought into being. Put bluntly, League oversight could not force the mandatory powers to govern mandated territories differently; instead, it obliged them to *say* they were governing them differently". pp. 4 [emphasis original]. In May 1924 Lasswell makes a similar observation when reflecting on the 1922 'Bondelswarts affair', or 'Bondelswarts Rebellion'. Of the killings of Bondelswart people by South-African mandated authorities in South West Africa, and on the debate prompted in the League and international press, Lasswell said: "When you have overwhelming force at your disposal, you find it inconsistent with your dignity to argue too much. The Bondelzwarts undertook to argue, and the South African authorities considered their dignity. [...] The League did its best to inquire, and seems to have succeeded in making the authorities down there decide to kill the natives privately or only under enormous provocation." Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 780 D2. Letter from Harold Lasswell to Anna and Linden Lasswell, 4 May 1924. For a full account of this context and incident see: Pedersen at pp. 110-130.

international press networks dredged public servants, journalists, politicians, scholars, businesspeople, and representatives of non-governmental organisations from around the world, and at the same time broadcast the performance to ‘publics’ who were increasingly thought to have determinable ‘opinions’.²⁵⁵ In moments, the League was a distinctive site where *Belle Époque* sensibilities and logics, whether of law, politics or diplomacy, met modernist angst, often in discomfiting ways.²⁵⁶

As he began to observe meetings of the Council of the League in July 1923, waiting for the main event of the annual Assembly in September, Lasswell witnessed a pageant of such moments. He quickly accosted Manley Hudson, then a professor of international law at Harvard and advisor to the League’s legal section, later a judge of the Permanent Court of International Justice (PCIJ), who was marshalling the Irish and Abyssinian applications to join the League.²⁵⁷ Less powerful, in some cases quite new states were keen to take their places in the pageant, to be seen to speak and court symbols of dignity and legitimacy. With modern international press coverage, being seen to speak counted not just in the Hôtel National but back home as well, as the Irish Taoiseach, W.T. Cosgrave realised when he opened his speech in Irish on the occasion of Ireland’s formal admission, as did the many small states ever-keen to move expressions of condolence for Japanese earthquake victims, or to praise past judges of the PCIJ.²⁵⁸ Through lectures, meetings and conversations with people like Hudson, William Rappard, the head of the League Mandates section, and Hugo Preuss, the prominent German constitutional lawyer and scholar, Lasswell saw the politics of process upon which a bureaucracy like the League and its organs runs. He saw the multiplication of autonomous bureaucratic aims and competencies, as well as the way state power could course through these processes.

²⁵⁵ On this, see: Stephen Wertheim, ‘Reading the International Mind: International Public Opinion in Early Twentieth Century Anglo-American Thought’, *The Decisionist Imagination: Democracy, Sovereignty, and Social Science in the 20th Century*. Nicolas Guilhot and Daniel Bessner, eds. (Berghahn Books 2018).

²⁵⁶ One such discomfiting moment can be found in the meeting between a nineteenth century, colonial faith in the civilising mission, and the apparently noteworthy, ‘strenuous conditions’ of modernity. Article 22 of the Covenant of the League of Nations stated: “To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are *inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world*, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant”. [Emphasis added.]

²⁵⁷ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 775 D 29-31. Letter from Harold Lasswell to Anna and Linden Lasswell, 11 July 1923.

²⁵⁸ *ibid.* Box 56, Folder 776 D7-9. Letter from Harold Lasswell to Anna and Linden Lasswell, 10 September 1923.

He saw that large powers like Britain, France and Italy could sometimes act almost unilaterally, minting fresh, quasi-legal arguments to support ends of national policy. The League and its attendant press corps offered a forum within which such arguments could be articulated, receiving some degree of legitimacy by virtue of their mere articulation in that context, and from the support or tacit acquiescence of smaller states. Obligated states could be gathered into the orbits of their indebtedness to large powers by circulating members of the Secretariat who might enquire which way the state in question intended to vote on a matter, casually making known French or British intentions.²⁵⁹ At the same time the setting moved and amplified arguments against these actions. These arguments could straightforwardly challenge the legitimacy of violent policies of imperial self-interest, and they could create complex webs of normative language and precedent that in some cases tied, or at least dealt afresh, the hands of the large powers.

Lasswell and his fellow observers were well aware, for instance, of France's unwillingness to oppose Italy's taking of Corfu for fear of parallels being drawn with their occupation of the Ruhr, parallels which would find support in the emphasis both states had placed on the taking of 'pledges'.²⁶⁰ They muttered in the corridors that Italian imperialism could spark fresh controversy over the status of the Free State of Fiume, pulled to and fro between Italian and Yugoslav claims. All knew that as the value of the lira fell Mussolini could move to consolidate his position domestically by taking steps towards Italy's promised position as 'Mistress of the Mediterranean', and yet the inside word was that British public opinion simply would not support British military entanglement. Would France risk its strategic aims in the Ruhr and support British action, or would they use the opportunity to consolidate those aims while

²⁵⁹ *ibid.* Box 56, Folder 776 D9. Letter from Harold Lasswell to Anna and Linden Lasswell, 10 September 1923.

²⁶⁰ *ibid.* Box 56, Folder 776 D7. Letter from Harold Lasswell to Anna and Linden Lasswell, 10 September 1923. The 'Corfu incident' occurred in August 1923. The Greek and Albanian governments had disputed their border. A boundary commission was established under the auspices of the Entente powers represented by the Conference of Ambassadors in Paris. It was composed of British, French and Italian officials and chaired by the Italian general, Enrico Tellini. Tellini, Major Luigi Corti, Lieutenant Mario Bonacini, Thanas Gheziri, an Albanian interpreter, and Remigio Farnetti, the group's driver, were killed in an ambush in Greek territory near the disputed border. The assailants were unidentified. The Greek government blamed Albanians for the killings, the Albanian government blamed Greeks. The Italian government made a series of demands for apology, gestures of respect, and indemnity from Greece. The Greek government countered, rejecting some of the more symbolically onerous Italian demands. The Italian government rejected the Greek counter offer, and Italian warships, airplanes and troops bombarded and seized the Greek island of Corfu, holding the territory in what was described as 'the taking of a pledge', for the assurance of adequate Greek reparations. Greece protested this seizure to the League of Nations. Ultimately, the League was sidestepped as a forum for the dispute, and the Conference of Ambassadors announced terms for the resolution of the dispute that largely supported Benito Mussolini's original demands, to which Greece acceded. For further analysis of the same issue see: *ibid.* Box 56, Folder 776 D22. Letter from Harold Lasswell to Anna and Linden Lasswell, 24 September 1923.

attention was focused on Southern Europe? French public opinion wavered, but if *Le Temps* whipped up talk of Greek ‘barbarism’ on the Greco-Albanian border, the die could be cast for non-intervention.²⁶¹ Geopolitics and personalities conditioned procedural politics and argumentative language in the Council and the Assembly, which conditioned abstractions of public opinion, which in turn conditioned perceived geopolitical possibilities and intimate personal anxieties, and so on amidst a polyvalent din of old and new practitioners of international affairs.²⁶²

As the League Assembly convened on September 3rd, the fifty-one members would raise the tenor of this din. Some would seek to use this distant, genteel forum to position domestic policy aims. The rumour ran that Abyssinia’s Prince Regent (Haile Selassie) was seeking membership to strengthen his hand in pursuit of reform at home. Abyssinia’s practice of slavery however, could raise eyebrows in humanitarian quarters.²⁶³ Germany was considering petitioning for membership, and the question of the equity and sensibility of the burden of reparations placed on Germany at Versailles, vigorously upheld by France, would be raised regardless. If the French view carried, the argument against German membership could in turn harden on the basis that Germany’s payment of reparations constituted an international obligation unfulfilled, and states that do not fulfil international obligations had no claim to the League’s chambers. Past French intransigence, refusing to accept payment in lumber for example, might well be neither here nor there. Yet were the Scandinavian members, Britain, and their allies to force their opposition to occupation of the Ruhr, it had been suggested at some pessimistic tea parties that France could quit the League were she assured of drawing a strong enough bloc of states in flight. Lasswell counselled Anna and Linden, at this point presumably the most well-informed international affairs-watchers in the American Midwest, that this was a problematic view, not to be taken too seriously.²⁶⁴

²⁶¹ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 776 D2-3. Letter from Harold Lasswell to Anna and Linden Lasswell, 3 September 1923. *Le Temps* was an important Parisian daily newspaper, publishing from 1861 to 1942, a paper of record.

²⁶² Pedersen (n 254) pp. 8, noting the noisy, “polyvalent” world of the League and its rapidly growing assortment of “international commissions, organizations, lobbies, and experts”, that made up what commentators called “*l’esprit de Genève*”.

²⁶³ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 775 D64. Letter from Harold Lasswell to Anna and Linden Lasswell, August 1923.

²⁶⁴ *ibid.* Box 56, Folder 775 D65. Letter from Harold Lasswell to Anna and Linden Lasswell, August 1923.

At the same time, some would use the Assembly to try to advance projects of international institution-building in pursuit of ever-more structured and enforceable world order. Robert Cecil and the Disarmaments Commission would seek to push the Assembly towards a proposal that would empower the League not only to declare a state that had violated Article 10 of the Covenant an aggressor, thus focusing stern glares from Geneva, but to place a legal obligation on member states to intervene to block the aggressive action.²⁶⁵ Cecil's proposal would permit a system of special alliances in concession to French pressure. An alliance agreement could trigger prior to a decision of the Council, potentially structurally undermining the League machinery, a point reserved in anticipation by Italy. France sought assurance against future German aggression, and was sceptical that all League members would answer her call were it sounded. Hence special, closer alliances seemed logical, yet the four days procedurally allotted in September for adoption of the Cecil proposal might not allow enough time to build and inscribe such alliances. Many heads were being scratched over the question of how an 'aggressor' would be defined.²⁶⁶ The Canadians meanwhile, had helpfully weighed in, asking 'Is there anything to be said for an interpretive move?' Article 10 could be understood to mean that a Council recommendation could not bind a state without the consent of that state's parliament, bringing Cecil's ardent project in pursuit of enforceable international order round in a reassuring full circle. Nonetheless, Lasswell noted, the mere presentation of a proposal of this character for discussion and criticism was a significant step in itself.²⁶⁷

As the summer closed, alongside the League sister non-governmental projects of international organisation proceeded apace, though not without bruised egos. Just before the opening of an International Convention of Red Cross Societies in Geneva, Lasswell and the press corps were treated to the drama of the delegation from the American Red Cross halting their journey in Paris and sending a sulky telegram protesting impugment of their honour by the International Committee of the Red Cross, a Swiss and Genevois organisation. A report published by the Committee had pointedly noted that all national Red Cross Societies were of equal influence, regardless of financial contribution, and charged the League of Red Cross Societies

²⁶⁵ *ibid.* Box 56, Folder 775 D65. Letter from Harold Lasswell to Anna and Linden Lasswell, August 1923.

²⁶⁶ *ibid.* Box 56, Folder 775 D65. Letter from Harold Lasswell to Anna and Linden Lasswell, August 1923.

²⁶⁷ *ibid.* Box 56, Folder 775 D66. Letter from Harold Lasswell to Anna and Linden Lasswell, August 1923. On the progress of this debate and the relationship between disarmament, binding measures for mutual aid in the event of aggression, and the constant push exerted by figures like Cecil and the representatives of Scandinavian countries towards reliance on binding arbitral capabilities for the PCIJ, see also: *ibid.* Box 56, Folder 776 D13-14. Letter from Harold Lasswell to Anna and Linden Lasswell, 12 September 1923.

(established by national Red Cross organisations during the World War) with paying disproportionate attention to the big spenders, Britain and America.

The Americans stopped in Paris, declaring, 'No further!' in the absence of retraction. The Genevois, feeling that there had never been any need for the upstart League in the first place, were making this point known, and American dignity was caught in the crossfire with implications of bossiness. The League in turn, had pushed for decentralisation of Red Cross bodies, deprioritising Geneva.²⁶⁸ For Lasswell, it was a lesson in the politics of international organisations. Extremely local interests and personal sensitivities rubbed shoulders with the most exalted and abstract of humanitarian, purportedly universal ideals. Special statuses were a delicate matter.

At the root of course is the demand of each group for distinction and privileges, complicated by the complacency of the big and the sensitiveness of the little. One cannot but insist upon the importance of personal element in the situation, for it is possible by geniality and frankness to maintain relations strained by the adjustment of the larger factors. ... And how easy it is for the unrecognized motives of personal aggrandizement to transform worthy people into enemies of growth! They proceed to welcome arguments to prove their case and not to solve the problem in terms of the best results, and their own slant on the thing renders them singularly blind deaf and dumb to the larger considerations.²⁶⁹

Notwithstanding such tantrums, the personal dimension ran both ways. Manley Hudson noted that it did seem that American participation in such organisations, as well as its representation on many committees of the League of Nations, could drag America into closer and closer participation, perhaps even membership.²⁷⁰ The rapidly growing webs of a diffuse international civil service created commitments, personal relationships, and converging views of collective goals, that had real force.

During these weeks in Geneva, Lasswell also wanted to understand the far-flung audiences to which the antics and anxieties of cosmopolitans were being broadcast. He was drawn towards

²⁶⁸ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 775 D69-71. Letter from Harold Lasswell to Anna and Linden Lasswell, 30 August 1923.

²⁶⁹ *ibid.* Box 56, Folder 775 D70-71. Letter from Harold Lasswell to Anna and Linden Lasswell, 30 August 1923.

²⁷⁰ *ibid.* Box 56, Folder 775 D71. Letter from Harold Lasswell to Anna and Linden Lasswell, 30 August 1923.

two abstractions of such audiences. First, the opinions of national publics. Having talked himself into the post of League correspondent for the *Chicago Tribune*, Lasswell was consistently buried amidst the League's contingent of journalists. He saw how officials briefed the press pool, the kinds of documents they could request to see, and heard the rumours, whispers and intrigues that shivered through their ranks. Hudson drafted him to write a profile of German public opinion about the League for the *New York Times*, and he saw the balance journalists struck between their semi-insider status and knowledge, and the stories they could put to print.²⁷¹

His research ambition was the compilation of a survey of the public opinions of the world. Hudson viewed this as a quixotic endeavour, but Lasswell found an ally in Arthur Sweetser, a well-known American journalist, war correspondent and then head of the League Public Information Section. Though sceptical about a survey of the public opinion of the entire world, Sweetser saw the value of a detailed survey of the channels for, and personalities influencing, American perceptions of Europe in the news, a suggestion Lasswell followed. His central interest was in the way communication through the press constructed, nudged, and in turn responded to, abstractions of opinion attributed to large groups of people. Lasswell would make practical application of this interest in his work as a propagandist during the Second World War, and it would be apparent in the 'Legal Education' article he wrote with McDougal in the same period.

Second, the children. Lasswell realised that many of the stereotypes through which international affairs were mediated were picked up long before anyone opened *The Chicago Tribune*, *the Manchester Guardian*, or *Le Temps*. They were inculcated at school, through pedagogical techniques and often through overt government control of the portrayal of nationalities, groups, regions, or internationalist sentiments in textbooks. Switzerland, with its world-renowned reputation for schooling Europe's privileged classes, seemed like an ideal place to explore such practices. He delved into the work of the famous child psychologist and errant Freudian analyst Édouard Claparède, a well-connected member of an old and distinguished Genevois family, whose home Lasswell visited on several occasions.²⁷² He also established acquaintances in the 'Rousseau Institute', an experimental private school

²⁷¹ *ibid.* Box 56, Folder 775 D46-49. Letter from Harold Lasswell to Anna and Linden Lasswell, 2 August 1923.

²⁷² *ibid.* Box 56, Folder 776 D22-24. Letter from Harold Lasswell to Anna and Linden Lasswell, 24 September 1923.

established by Claparède, and a plan formed around distributing questionnaires in different European countries that might appraise children's 'international attitudes'.²⁷³

In late September, as Lasswell prepared to leave Geneva for London, he was granted a bittersweet moment at one of the last meetings of the Council of the League. Ishii Kikujirō of Japan, the Council President, opened with a statement declaring the referral of a series of questions regarding competence, the use of force, and state liability for political crimes to a judicial committee for an opinion. Hjalmar Branting of Sweden, "a grand old Viking who says little except what he means", responded that while he believed the PCIJ was the proper organ for such a task, he acceded to the decision because his colleagues would not permit the Court to adopt the role.²⁷⁴ Cecil shared this view, but felt compelled to argue that good had come of the decision notwithstanding its compromised character. He believed "it at least established the precedent that international incidents are not simply to be regarded as closed, but are to be carefully balanced and weighed for the sake of discovering a proper principle to govern future contingencies of a similar character."²⁷⁵

Many felt the League's failure to restrain or condemn Italy's action on Corfu had been one of the summer's damning indictments. Yet at least Cecil, Branting, and Lasswell saw an incremental, if fitful and compromised, acculturation of norms, process and precedent – of law. At the same time, it seemed to Lasswell that only so much could be expected of this legal machinery. For the League to do more, the Great Powers would have to do more. For the Great Powers to do more, one of the central necessities seemed to be the assuagement of insecurities. He thought that in personal and cultural registers, gnawing tinglings of anxiety could cabin one's vision and empathy. This could happen as easily late on a summer's night in Geneva, tweaking language to be delivered to the Council, as when flicking open *the Daily Mail* on a drizzly evening in Manchester after tea had been had and scant hours of leisure were to be filled. There was a felt-sense that the moment was an anxious one. To be relevant, a science of society had to articulate and engage with these anxieties, to speak them, and where possible, to offer succour.

²⁷³ *ibid.* Box 56, Folder 775 D38-40. Letter from Harold Lasswell to Anna and Linden Lasswell, 13 October 1923.

²⁷⁴ *ibid.* Box 56, Folder 776 D29. Letter from Harold Lasswell to Anna and Linden Lasswell, 1 October 1923.

²⁷⁵ *ibid.* Box 56, Folder 776 D29-30. Letter from Harold Lasswell to Anna and Linden Lasswell, 1 October 1923.

3.3.2 *In London the Fabians live in a psychological age*

In 1883, an informal gathering of communitarian, earnest young people (including Havelock Ellis, later to be recommended to Lasswell by his teacher Lucy Nelson) gathered in a sitting room on Osnaburgh Street, London, and decided that if “the reconstruction of Society in accordance with the highest moral possibilities” were ever to be put in hand, the first thing to do was appoint a secretary, take minutes, and form an association.²⁷⁶ Within three years the members of this association included a young Irish journalist, George Bernard Shaw; two clerks from the British Colonial Office, Sidney Webb and Sydney Olivier; one of the country’s most prominent orators and women’s rights activists, Annie Besant; and the social psychologist Graham Wallas.²⁷⁷

The society established a practice of issuing ‘tracts’, applying socialist principles to current social problems. It developed expansive research capacities and used them to support the work of Britain’s increasingly powerful trade union organisations. In 1895, Beatrice Webb, her husband Sidney (the former Colonial Office clerk), George Bernard Shaw, and Graham Wallas decided to establish the London School of Economics and Political Science using funds from a bequest made to the society by a wealthy, elderly member, Henry Hutchinson.²⁷⁸ Through its articulation of a socialist vision in British politics, through the influence the LSE would build as counterpoint to the establishment, gowned power of Oxbridge academia, and through the individual notoriety, political and cultural activism of many of its members, the Fabian Society became an important force on the British left.

Upon arriving in London at the beginning of October 1923, Lasswell was quickly drawn into the academic, political and social circles of the society. Through visits to the International Labour Office in Geneva, he had made the acquaintance of Stephen Sanders, a former general secretary of the society and later a member of the British parliament, who encouraged Lasswell to use his name as introduction to the prominent Fabians.²⁷⁹ The first week in London saw

²⁷⁶ Margaret Cole, *The Story of Fabian Socialism* (Stanford University Press 1961) pp. 3-4.

²⁷⁷ *ibid.* pp. 7-8.

²⁷⁸ *ibid.* pp. 113.

²⁷⁹ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 776 D25. Letter from Harold Lasswell to Anna and Linden Lasswell, 26 September 1923. On Sanders see also: Cole (n 276). pp. 134 n. 2, pp. 191.

meetings with Harold Laski and Graham Wallas.²⁸⁰ Both lectured at the LSE, which Lasswell made his informal academic base, and would offer advice and frequent discussion for the duration of his stay. Laski, though British, had previously taught modern history and political theory at McGill, Harvard and Yale Universities, had been connected with the New School in New York at its founding, and was well-acquainted with American academics and public figures like the journalist and writer Walter Lippmann, and Supreme Court Justice Oliver Wendell Holmes. When he met Lasswell in 1923 he was one of the Fabian Society's most prominent public figures, turning down the offer of a cabinet position from the British Prime Minister Ramsay MacDonald in that year.

Wallas, not so known as a charismatic, well-connected public figure like Laski, was a prominent advocate of social psychology as balm to the problems of modern society, a view that prompted deep engagement from the twenty-one year old graduate student he adopted as passing mentee. Wallas' famous volume of 1908, *Human Nature in Politics*, had called for inquiry into political life to engage with visions of human nature. Wallas attacked political science's modern drift into specialism, and its reliance on a one-dimensional conception of human reason as the 'enlightened', rational pursuit of self-interest. He argued that non-rational inferences were in large part the stock-in-trade of political life, their creation in others being the art of politics, through debate, propaganda and manipulation. 'Non-rational' predispositions had once been the bread and butter of classical theorists, who articulated visions of *homo politicus* by explicitly building from assumptions about human nature. Wallas thought that modern scientists of society scampered ever further from frank engagement with such all-encompassing visions. At the same time, it seemed to him that non-rational motivating logics, anxieties and desires had only become more pronounced in the modern industrial society. For Wallas, "industrial civilization had given the growing and working generation a certain amount of leisure, and education enough to conceive of a choice in the use of that leisure; but had offered them no guidance in making their choice."²⁸¹

A post-Romantic keen for cultural centres cut adrift in vast, mechanised societies meandered forlornly between the lines of Wallas' writing. Yet he did feel modernity offered answers, in particular through the science of psychology. Noting a large debt of inspiration to William

²⁸⁰ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 776 D33. Letter from Harold Lasswell to Anna and Linden Lasswell, 8 October 1923.

²⁸¹ Graham Wallas, *Human Nature in Politics* (Constable 1927) pp. x-xi.

James' *Principles of Psychology*, Wallas framed his program as a critique of the reliance on arid, means-to-end reasoning in the study of politics. He argued instead for the systematic use of psychological principles in political theory and practice. He felt both criminology and pedagogical theory were fields that had realised the folly of separating structure from agent, institutions from psychology. Theorists in these areas actively sought to move between individual experiences of psychological interiority, and a macroscopic focus on institutional and social structures. Lasswell, fresh from immersion in Genevois experimental pedagogical technique alongside Édouard Claparède, was well-disposed towards this parallel.

He was also well-disposed towards Wallas' narrative of 'the Great Society', developed in the 1914 volume of that title. Building on the social psychological program set out in *Human Nature in Politics*, the Great Society was the community created by industrialisation, where a factory worker's job could be lost because of the decision of a financier in a distant metropolis, a heady discourse of advertising funded by massive corporations eddied and swirled through international press agencies, and sprawling political parties and trade unions vied for the dues and votes of people lost in endless terraces of planned housing, snaking through smoggy, factory-cities. 'Facts', of a scale hitherto never seen, applied to people's lives with crushing intimacy, yet were delivered through misleading discourses that spanned nations and continents. Wallas supposed that the 19th century industrialists had in large part meant well. Whatever the hard banalities of industrial life, it would surely bring a measure of ease, leisure and liberation to millions – so ran the 'progressive' refrain. And yet;

...the deeper anxiety of our time arises from a doubt, more or less clearly realized, whether that development is itself proceeding on right lines. ... not many perhaps are consciously unhappy, but there are strangely few signs of that harmony of the whole being which constitutes happiness. ... When, indeed, one gets behind the mechanical arrangements of railways and telegraphs, or of laws and treaties and elections, what are the real forces on which our hopes of national or international solidarity depend? One remembers afternoons spent in canvassing along the average streets of a modern city, and the words and looks which showed how weak are the feelings which attach the citizen to a society whose power he dimly recognizes, but which he often seems to think of merely with distrust and dislike.²⁸²

²⁸² Graham Wallas, *The Great Society: A Psychological Analysis* (The Macmillan Company 1914) pp. 6, 7, 11.

The scale of social interrelationship had gotten much larger and dramatically more complex, while kinship had not. For some, holistic social harmony and the solidarity that might be drawn from it not only seemed distant in modern industrial societies, it seemed difficult to conceive. The young workers Wallas wrote about may have been liberated in some ways by their modern careers, but that liberation had come at the cost of laying waste to the traditional social structures of value – religion, pastoral and village life – that had given their parents and grandparents meaning. It was unclear what industrial civilisation could offer in these registers of value. Wallas sensed the fretful realisation of this crisis of value in the politics and literature of the twentieth century. It was a realisation which created unease with past faith in the “manifest finger of destiny” and the “tide of progress”, verities of nineteenth century, Victorian sensibilities.

We are afraid of the blind forces to which we used so willingly to surrender ourselves. We feel that we must reconsider the basis of our organised life because, without reconsideration, we have no chance of controlling it. ... Our philosophers are toiling to refashion for the purposes of social life the systems which used so confidently to offer guidance for individual conduct. Our poets and playwrights are revolutionising their art in the attempt to bring the essential facts of the Great Society within its range.²⁸³

Edifices of a vast society had raised wilfully skyward, drawing on lines of credit undersigned by social orders torn apart by the very construction they had enabled. As a result, in the early twentieth century, an intellectual task was at hand. This social change needed to be appraised, understood, and directed. Modernists like Wallas and Lasswell thought ancient civilisations had been flayed and left to ruin by blind forces like the ones they feared, and the stakes of war and famine seemed many times greater in a world of globalised, interdependent markets for commodities, credit, and communication.

Like Merriam, Lasswell and McDougal, Wallas sought ease in part by narrating a vision of a figure. His psychologically-attuned political science was constructed from a functional perspective, to be used by somebody. For Wallas, that was a government minister or official who, “has put back his books on their shelves, has said goodbye to his last expert advisor, and sits with shut eyes at his desk, hoping that if he can maintain long enough the effort of straining

²⁸³ *ibid.* pp. 14.

expectancy some new idea will come into his mind".²⁸⁴ In such moments, it seemed crucial to Wallas that knowledge about the organised conduct of social life orient the decision-maker. As for Lasswell and McDougal in 1943, Wallas' social change was measured in moments. Moments where, with the all the false and indispensable inevitability of reality perceived and felt as all of one piece, the right people started from the right assumptions, feeling a flashing twist of certainty as to where to lay their hand on organised social life.

Struck by Wallas' sensitivity for human suffering, his asking of questions many did not care for, or about, and his inability to give more force to his views thanks to his lacking for Shaw or Laski-like bombast, Lasswell reflected at length on Wallas' vision:

"Human Nature in Politics" came along in 1908, and this book is by all odds the most important contribution to political science which has been put inside two covers in this twentieth century. His viewpoint has been spreading slowly and surely among students and publicists, and is bound to go marching on thru [sic] the coming century. Not that it represents a well-rounded conception of things, not that it is entirely accurate as far as it does go... but that it fits in with the temper of those who are doing the fruitful thinking about human relations. I surmise that he will be known chiefly for his influence in spreading a more objective viewpoint and a descriptive vocabulary (two aspects of the same thing) among the thinkers about social relations. This accomplishes a very subtle revolution because it cuts the heart out of dogmatic half truths and bombastic, conventional analyses. On the side of positive suggestion for the adjustment of affairs, I think he has been deficient. And I do not believe that he is rid of the preconceptions which cling to one whose early thinking was done in a pre-psychological age.²⁸⁵

Tellingly, Lasswell found Wallas wanting when it came to 'positive suggestion for the adjustment of affairs' and in his failure to more thoroughly rid himself of the preconceptions of 'a pre-psychological age'.

Alongside regular scholarly meetings with Laski and Wallas, Lasswell inhabited a social scene animated by London's left-wing people of affairs. These circles left the city's smog to spend

²⁸⁴ *ibid.* pp. 16.

²⁸⁵ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 777 D39. Letter from Harold Lasswell to Anna and Linden Lasswell, 28 November 1923.

their weekends in picturesque country villages. There they would work up the froth of debate, consensus and gossip that lubricated the following week's dinner and tea party circuit, before filtering into the political columns of *the Spectator*, *the Observer*, *the Manchester Guardian*, and *The Times*. Receiving invitations to 'weekend schools' and supporting after-work tea parties affiliated to the Labour Party, Lasswell met people of letters and politics like Crystal Eastman, a famous, charismatic leader of the women's suffrage movement in America and co-founder of the American Civil Liberties Union; Edmund Dene Morel, the pacifist, journalist, and influential anti-slavery advocate; Henry Noel Brailsford, a prominent writer on foreign affairs and world organisation; the LSE economic historian Richard Henry Tawney; a succession of Labour Party members of parliament (MP); speakers from the Worker's Education Association; and members of the Fabian youth wing ('the Nursery').²⁸⁶

Lasswell attended meetings of the Nursery himself, where Shaw frequently presided and lent evenings a theatrical air.²⁸⁷ When Bertrand Russell began to campaign for the general election in December 1923, Lasswell joined the young 'Fabian Lions', cut loose from the Nursery to canvass. They knocked on doors in support of Russell's quixotic race in the wealthy constituency of Chelsea, where virulent class-politics and aristocratic panic at the prospect of 'those socialist dogs' taking power was potent.²⁸⁸ He joined Beatrice and Sidney Webb for tea at their home, where he met Susan Lawrence, a Labour Party MP, prominent Fabian and friend of the Webbs. Lawrence took the young American under her wing and gave him access to sessions of the London County Council. On other occasions, afternoons of hushed conversation with insiders like the Webbs and Laski revealed the dinner-party statesmanship of generals and diplomats. Moments when a handful of backroom brokers, if anyone at all, even aspired to knowing the complete story of what was going on.²⁸⁹ Despite their many differences, in all of these social relations Lasswell was preoccupied with "the multitude of forces inside any one 'institution'", and the non-rational factors motivating individuals within those institutions.

²⁸⁶ *ibid.* Box 56, Folder 776 D33-36. Letter from Harold Lasswell to Anna and Linden Lasswell, 8 October 1923. On Shaw and the Nursery see also: *ibid.* Box 56, Folder 777 D1-4. Letter from Harold Lasswell to Anna and Linden Lasswell, 4 November 1923. On Tawney see: *ibid.* Box 56, Folder 777 D19-20. Letter from Harold Lasswell to Anna and Linden Lasswell, 14 November 1923.

²⁸⁷ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 777 D4. Letter from Harold Lasswell to Anna and Linden Lasswell, 4 November 1923.

²⁸⁸ *ibid.* Box 56, Folder 777 D17, D36; 'socialist dogs' at D46-47. Letters from Harold Lasswell to Anna and Linden Lasswell 14, 25 November & 5 December 1923.

²⁸⁹ *ibid.* Box 56, Folder 776 D54-55. Letter from Harold Lasswell to Anna and Linden Lasswell, 25 October 1923.

To Lasswell, and to many of the people he spent time with in London, old ways of speaking about social ends and old ways of conceptualising one's interventions in organised life seemed too rigid and tight a fit for the complexity animating the modern, urbanised and industrialised society. Global communication, specialisation of labour, specialisation of the disciplines, mass education, mass political participation, the constitution of the idea of 'the masses' in the first place, all fed this sense of fragmented, ever-moving complexity. Social 'forces' that dwarfed individual agency whirled kaleidoscopically from moments of great and suffocating intimacy, to fabulously abstract discourses of global reach. In this maelstrom one's own sense of self, let alone trends of social change, seemed a difficult thing to get one's hands around. It is in these perceptions of movement and complexity that we can find much of the anxiety that would later motivate Lasswell and McDougal's efforts to systematise a body of legal theory capable of bringing all of social life within the lawyer's gaze.

Cultural pessimism was widespread across Europe. Critically-minded Londoners formed orderly queues for lectures with titles like "Is Civilization Decaying?"²⁹⁰ One result of these anxieties, exhibited in a great deal of the art and literature of the period, and which Lasswell felt compelled to express, was that it felt harder and harder to express opinions that were too definitive, and it seemed necessary to be sceptical when others attempted to do so. Even more unsettling, those opinions seemed part of the very constitution of experience as it was lived, bodily and socially. In some way, they were what *made* the social world. People doubted, and contested, and at the same time sensed the very great stakes attached to doubt and contestation.²⁹¹

The spread of intelligence has produced a world of Hamlets, to put it in a smooth statement which is only true as indicating the tendency. This contempt for opinion has always been true of a large body of people who have been well trained, but this contempt has been spread by the newspapers, books, movies, and travellers on a larger scale than ever before. The pressing upon our attention of the relativity of opinions to digestion, Oedipus complexes, and the like – not to mention complex institutional forces – has produced a sense of bafflement which expresses itself in an impatient

²⁹⁰ *ibid.* Box 56, Folder 776 D63. Letter from Harold Lasswell to Anna and Linden Lasswell, 31 October 1923. It might be noted that Lasswell did not stray far from his new circles in observing this phenomenon. This was the title of the Fabian Society's Autumn 1923 lecture series. See: Cole (n 276) pp. 194 n. 3.

²⁹¹ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 776 D37-38. Letter from Harold Lasswell to Anna and Linden Lasswell, 13 October 1923.

rejection of the imperfect handiworks of our minds. The emergence of a Mussolini in a backward country, or in a country sorely pressed, is in one sense a leap in the dark taken by those who find themselves rushed into a new situation, and who make a bolt for home. [...] I don't know of any useful panacea but I think two "morals" may be pointed: (1) intellectuals must continue their analyses until they get hold of a new picture of the world which they have sufficient confidence in to use as a chart; (2) institutions must be so modified as to focalize within a reasonable time limit the facts to be considered and the men best trained to consider them.²⁹²

The moment demanded new languages through which social reality could be explained, new concepts that could be invoked to assuage mass bafflement and argue authoritatively and soothingly against authoritarian 'bolts for home'. Lasswell conceived of *World Politics*, and later of policy-oriented jurisprudence, as efforts to craft precisely such languages and concepts.

3.3.3 *In Paris myth is in vogue*

While queuing with the Fabians to hear lectures about the decay of civilisation had seemed the thing to do in London, when Lasswell arrived in Paris in January 1924, things felt different. The orthodoxies of French philosophy, society, art and culture prompted an engineer of social change to think about the adjustment of society in a context where the dominant idioms were not so receptive to pragmatic idealism. Lasswell saw the philosophical side of this problem quickly and directly upon meeting a friend from the University of Chicago, then in France "to do some missionary work for pragmatism (a school of philosophy)..."²⁹³ Culturally as well as conceptually, this was a tall order.

He complains vehemently of the conservatism of the French thinkers; they regard pragmatism as a bizarritiy from a land of uncouth barbarians, for the most part, and calmly inform you that they are, being Frenchmen, rationalists. They mean by that of course the classical philosophy of the eighteenth century with subsequent emendations, and they pride themselves upon it. Their method is rigorous consistency to an assumed premise, and they call this logic, which it is, of a kind. But they are singularly blind it appears to the business of criticising their premises, and take refuge in a fog of polished verbiage about a rational mind which knows and which lightens the dreary way of the

²⁹² *ibid.* Box 56, Folder 776 D38. Letter from Harold Lasswell to Anna and Linden Lasswell, 13 October 1923.

²⁹³ *ibid.* Box 56, Folder 778 D4. Letter from Harold Lasswell to Anna and Linden Lasswell, 2 January 1924.

imperfect fact. As Locke [the friend from Chicago] says, they don't comprehend the language of the pragmatic movement, and he is faced with a nearly hopeless task in translating it into an intelligible idiom.²⁹⁴

Lasswell was seeing first-hand the reception of the challenge laid down to European rationalism by philosophical pragmatism. It was a dissonance between the progressivist spirit of inevitable intervention and change that pragmatism came to underwrite in America and an Old World attachment to sediment that struck Lasswell as he saw France through the eyes of an American modernist.

Noting a disconnect between the cosmopolitan communities of Paris and a France lived behind closed doors, Lasswell thought he sensed a deep conservatism in Catholic, rural France, "the backbone of the nation".²⁹⁵ The newspapers reported distinctions awarded to a family that had occupied the same farm for eight hundred years, and another whose members could trace descent from Charlemagne at the beginning of the ninth century. Family life was "ingrown, exclusive, sufficient unto itself. Children come and grow, family festivals are observed, quaint customs and stories and traditions cluster about the seasons of the year, the wines, the relations of father and child and man and wife. Mediaeval superstitions survive, and are tolerated because they are believed by the rustics, and because they are venerated as part of the social heritage by the others".²⁹⁶ Far from the relative nomadism and progressivist spirit of Lasswell's Midwestern childhood, he thought the language in which social change might be spoken in conservative and rural France was quite different. And yet, the frugal savings and manpower produced by this 'France', and, he frequently noted, by exploitation in its colonies, paid for fast-moving, avant-gardist intellectualism, wars of acquisition, and empire.

Usually in such a period of quiescence the next upheaval is maturing, and, very much as Marx presumed the new society to thrive in the crust of the old until it grew sufficiently powerful to break thru [sic], we may sit still and suspect the same thing now. The frontiers of investigation these days include archaeology, atomic physics, pathological psychology is assuming its proper place in the perspective of things, it

²⁹⁴ *ibid.* Box 56, Folder 778 D4. Letter from Harold Lasswell to Anna and Linden Lasswell, 2 January 1924.

²⁹⁵ *ibid.* Box 56, Folder 778 D15, D19-20. Letters from Harold Lasswell to Anna and Linden Lasswell, 13, 16 January 1924.

²⁹⁶ *ibid.* Box 56, Folder 778 D19. Letter from Harold Lasswell to Anna and Linden Lasswell, 16 January 1924.

seems, and the philosophical implications of psychology as we know it were formulated before the war by Bergson and his school.²⁹⁷

In contemplating Henri Bergson's effort to oust the "super intellectualism" that was part of France's intellectual heritage, Lasswell was taken by the socially and politically contextual character of such 'vogues' in ideas, art and culture. As French thinkers had invoked and deified "reason as something transcending experience" so as to found claims against the crown and clergy during the Revolution, so Bergson had become "a lion of salons" as part of a modernist move against French rationalism.²⁹⁸ Bergson and William James had a mutually inspirational (if intellectually complicated) relationship, and some of Bergson's ideas would sit comfortably with Alfred North Whitehead's later work.

In order to "give an account of the inner significance of a vogue", Lasswell was following the temper of much progressive thought of the time when he thought both of society itself, and of histories of social change, in relation to the personality and characters of people. The social reality that was 'France' included the ideas of philosophers as much as the customs of rural provinces, tales of past humiliations and prides, and the *orientalisme* projected on the colonies, because these were important affective stimulations that made 'France' and 'Frenchness' – a reality of emotional experience. To understand 'vogues' that capture the collective imagination and often herald social change, Lasswell thought in terms of cultural and social insecurities, needs, anxieties and desires.²⁹⁹ In seeking novel ways of fulfilling such impulses, communities find themselves taken by enthusiasms that seem peculiarly well-fitted to satisfy the impulses of a cultural moment.

Bergson's widely popular 'anti-intellectualist' philosophical ideas might be understood in the context of increasingly urbanised communities looking for excuses to discard rural, traditional codes of conduct. Lasswell recalled that the 'Jazz Age' trend of short, 'bobbed' women's hair had been explained by the French-born psychoanalyst André Tridon in his *Psychoanalysis and Love*, as due to male attraction towards this style cultivated by homosexuality in the military during the war. Albert Einstein's theories of relativity might have engendered popular

²⁹⁷ *ibid.* Box 56, Folder 778 D11. Letter from Harold Lasswell to Anna and Linden Lasswell, 9 January 1924.

²⁹⁸ *ibid.* Box 56, Folder 778 D10-11. Letter from Harold Lasswell to Anna and Linden Lasswell, 9 January 1924.

²⁹⁹ *ibid.* Box 56, Folder 778 D11. Letter from Harold Lasswell to Anna and Linden Lasswell, 9 January 1924.

fascination due to a widespread sense of moral conflicts prompted by war to peace-time social adjustments.³⁰⁰

What are the common denominators of all these samples? The human personality, in its cravings for love and applause, for novelty and life, is always there. These vogues arise in a society sufficiently complicated to reveal to everyone a wide variety of as yet unattained ways of realizing the adjustments which the personality demands, and which may be satisfied in an innumerable variety of exercises. ... The vogue is the promise which the unfulfilled cravings of a generation or a locality cause one to take seriously. If it becomes, before long, part of the accumulated habits of society, a tradition, we forget that it ever was a vogue and accept it as something peculiarly choice... unless it doesn't fit with the new situation, which produces rivals in the form of new vogues. Our fundamental craving for life expresses itself in the vogue which attaches itself to every serious promise, from monkey glands to electrical fertilization. All are deserving, not of scoffs, but of comprehension and serious inquiry.³⁰¹

Lasswell's view of a 'fundamental craving for life' in social change was not far removed from Whitehead's 'creative advance'. Life lived *was* the reaping of value. This view of a felt-condition of social life, the self, and social change, was a distinctly situated one. While it might be possible to speculate about some elements of 'human personality' unchanged over time, reflected by classical thinkers and cultures, 'adjustments' and particularities about the movement of 'vogues' could only be understood deeply embedded in context.

Movements in French modernist art and literature bared their indebtedness to, and constitution of, the context of the cultural moment. Viewing an exhibition of Auguste Rodin's sculpture, Lasswell was struck by his creation of new idioms through which human passion and power, horror and fear, and above all, 'the mystery of the unconscious', could be expressed with gripping brutality.

It would not be difficult to find in Rodin the superlative incarnation of the spirit of the modern epoch, with its sense of mounting power and unsurmounted mysteries, its

³⁰⁰ *ibid.* Box 56, Folder 778 D11. Letter from Harold Lasswell to Anna and Linden Lasswell, 9 January 1924.

³⁰¹ *ibid.* Box 56, Folder 778 D12. Letter from Harold Lasswell to Anna and Linden Lasswell, 9 January 1924.

overcrowding and overspeeding, its repressions, its haunting visions of grandeur, its orgies of barbarity, its pains of uncertainty.³⁰²

In Lasswell's vision of the spirit of the epoch, modernity was a moment that belonged to a rising class who realised that social order and value was their project, as opposed to something handed down as flakes of old culture. This idea, that order and value must be actively made through social effort, would deeply characterise Lasswell's intellectual life. With McDougal and through policy-oriented legal theory, he would seek to use law to direct such effort.

3.3.4 Berlin: war, propaganda and 'masters in every line'

As Lasswell travelled by train from Paris to Berlin in early April 1924, the manifested violence of collective myths rolled past his car window. Through northern France, Belgium and the occupied Ruhr, many parts of what had been the front lines of the First World War remained visible, shell holes and trench marks yawned past. Buses toured the lines regularly. French reconstruction was most advanced, though even there bare tracts of land marked forest razed.³⁰³ Between these gashes of the recent war, Belgian towns glowed orange as steel mills flared late at night. In the French-occupied Ruhr, a massive web of railroads, coal mines and steel mills seemed to stretch from the track in all directions.³⁰⁴

A French soldier sharing Lasswell's compartment described his view of war as a necessary reality every couple of years. German revenge was inevitable, so France might as well place itself in possession of the Ruhr and the left bank of the Rhine for when the time came. It was sad, he agreed, to think of his raising children to kill other people's children, but he saw no alternative as long as people loved their nations, and it seemed unthinkable that people would stop loving their nations. The next generation would see another war, and it wouldn't lead to the end of civilisation or anything of the like. After periodic blood-letting, it seemed to the soldier, civilisation had great recuperative power.³⁰⁵

³⁰² *ibid.* Box 56, Folder 778 D43-44. Letter from Harold Lasswell to Anna and Linden Lasswell, 3 February 1924.

³⁰³ *ibid.* Box 56, Folder 779 D41. Letter from Harold Lasswell to Anna and Linden Lasswell, 3 April 1924.

³⁰⁴ *ibid.* Box 56, Folder 779 D39-42. Letter from Harold Lasswell to Anna and Linden Lasswell, 3 April 1924.

³⁰⁵ *ibid.* Box 56, Folder 779 D40. Letter from Harold Lasswell to Anna and Linden Lasswell, 3 April 1924.

A professional soldier might be expected to be stoic about such affairs, but it was also true that war felt possible and touchable in a way it had not at the turn of the century. It was no longer an abstract spectre, something exported to the colonies and peripheries. Many could see the trench marks in the ground, and could talk reasonably about balancing the costs of military occupation against national economic interests, the threatening birth rates and the irrational dogmatism of one's neighbours. Using his time in Berlin to plumb the narratives that had led to war, and to desensitisation in its wake, Lasswell was jaded by the collection of propaganda held in the Berlin State Library.

...I find it perfectly monotonous, because the same mechanisms were used everywhere. You have analogous atrocities, analogous accusations and indignant denials of war responsibility, analogous trumpeting about national ideals and national culture, analogous appeals to the neutrals, analogous appeals to young men to stand up and be killed - and to the women to help make munitions and to sacrifice their husbands and children to the noble ideals for which they were responsible custodians, analogous invocations of the God of Battles, analogous proclamations of scientific and artistic supremacy, analogous deification of war heroes, analogous defamation of the unwilling fighters, analogous in every respect. Everybody fought a war of defense and thought that the other nation was a pack of hypocritical liars for believing the same thing, everybody died or urged others to die in the sacred name of something they called patriotism and love of country, everybody declared that the future of humanity and culture was bound up with the triumph of their particular cause and the enfeeblement of the other by blood and iron... everybody, in short, believed analogous things.³⁰⁶

Focusing on the communicative, symbolic and psychological phenomena that brought communities to bay for the destruction of others, Lasswell opened his inquiries in childhood. He again picked up the research he had begun in Geneva on the 'international attitudes' of children.³⁰⁷ Notwithstanding elite manipulation, education at an earlier age might make collective opinion less susceptible to war propaganda, or perhaps susceptible to the right kinds of propaganda. Contacts at the German Ministry of Education guided Lasswell's reading of

³⁰⁶ *ibid.* Box 56, Folder 780 D30. Letter from Harold Lasswell to Anna and Linden Lasswell, 26 May 1924.

³⁰⁷ *ibid.* Box 56, Folder 780 D31. Letter from Harold Lasswell to Anna and Linden Lasswell, 26 May 1924.

school textbooks, and when he returned to Berlin once again the following summer, of 1925, he continued to research civic education, ideas about the duties of citizenship and patriotism.³⁰⁸

During these periods in Paris and Berlin, Lasswell also spent time with prominent press figures. In Paris he met with representatives of news agencies like Paul Scott Mowrer, head of the European service of the *Chicago Daily News*; and Elmer Roberts, European chief of the *Associated Press*. He pressed them for information about their methods, and pitched his own ideas.³⁰⁹ He met Dorothy Thompson of the Philadelphia *Public Ledger* through a contact at the Russian embassy in Berlin. Thompson, at that time a prominent advocate for women's suffrage in America and an increasingly well-known European correspondent for the *Ledger*, would become one of the most influential American journalists of the twentieth century. On first meeting, Lasswell, Thompson and their Russian host struck up a long and vigorous late night conversation about the relationship between what they thought was the poor quality of German political leadership and the dearth of women in positions of power.³¹⁰ Lasswell renewed the acquaintance when he returned to Berlin the following summer.³¹¹ As in London, he met some of the period's most prominent women leaders, thinkers and writers. These included Emma Goldman, the famed and controversial anarchist, and Helene Stöcker, the German feminist and pacifist activist.³¹²

Lasswell also drew inspiration from German social science. He told Anna and Linden, "Germany was the inspirer of the Americans who created the higher learning in America in the last fifty years; it was to Germany that they went to learn research methods and to come in contact with masters in every line."³¹³ Although he thought that fifty years prior America had had no outstanding scholars to compare with German figures in political science, economics, history or sociology, and in 1924 the German disciplines remained formidable, the gap was closing. Perhaps due to the growing self-confidence of the American academy, Lasswell noted that apart from people like Albert Einstein in physics, Rudolph Stammler in jurisprudence and Hugo Preuss in political science (who he met many times), few German scholars were referred

³⁰⁸ *ibid.* Box 56, Folder 780 D55-56; and Box 56, Folder 781 D7. Letters from Harold Lasswell to Anna and Linden Lasswell, 16 June 1924; 9 July 1925.

³⁰⁹ *ibid.* Box 56, Folder 778 D50 (meeting Roberts); and Box 56, Folder 779 D31-33 (meeting Mowrer). Letters from Harold Lasswell to Anna and Linden Lasswell, 10 February 1924; 27 March 1924.

³¹⁰ *ibid.* Box 56, Folder 779 D80-81 Letter from Harold Lasswell to Anna and Linden Lasswell, 30 April 1924.

³¹¹ *ibid.* Box 56, Folder 781 D16. Letter from Harold Lasswell to Anna and Linden Lasswell, 25 July 1925.

³¹² *ibid.* Box 56, Folder 780 D68. Letter from Harold Lasswell to Anna and Linden Lasswell, 2 July 1924.

³¹³ *ibid.* Box 56, Folder 779 D45. Letter from Harold Lasswell to Anna and Linden Lasswell, 6 April 1924.

to in current American work.³¹⁴ He read Heinrich Mann, Oswald Spengler, Max Weber, Friedrich Meinecke, and attended the lectures of Werner Sombart.³¹⁵ It seemed to Lasswell that German vocabulary was “subtle and strong for social and psychological relations”, with the study of power being advanced in German sociology.³¹⁶ Despite a rich vein of thought about democracy however, the language did not seem as strong in its expression, or in that of republicanism; “Just as the people here are poor in heroes under the regime of democracy, they are poor in phrases, and it is by phrases that loyalties are fixed and loved.”³¹⁷

What Lasswell thought was a poverty of propagandas, vocabularies and symbols in many people’s post-war lives in Europe was as significant as the material and physical poverty, hardship and cruelty wrought by war and markets.

Ethics based on fear or on narrow calculation of pecuniary profits and losses or on blind adherence to an authoritarian formula are too fragmentary to work. And if one accepts the necessity for human sympathy the practical problem is how to make the social situation which is beyond one’s first hand world vigorously alive to one’s self. Movies, personal accounts, rigid habits of imagining social circumstances: these help.³¹⁸

The ethical problem was one of empathy. Of making the life of the distant social felt as real, and of appreciating a personally inevitable state of intervention, so as to consciously assume the demands of that social.

3.3.5 Vienna and Berlin: psychoanalytic modernism

On the last in this series of European research trips, in September 1928 Lasswell arrived in Vienna. His doctoral dissertation on propaganda during World War One had just been published, and if anything he was even more preoccupied by the same problematic of social change as it could relate to collective psychologies. It seemed clear this problematic assumed different cultural inflexions whether articulated through Anglo-American or Continental

³¹⁴ *ibid.* Box 56, Folder 779 D46. Letter from Harold Lasswell to Anna and Linden Lasswell, 6 April 1924.

³¹⁵ *ibid.* Box 56, Folder 781 D7-19. Letters from Harold Lasswell to Anna and Linden Lasswell, 9, 13, 16, 19, 24, 25, 28 July 1925.

³¹⁶ *ibid.* Box 56, Folder 780 D55-58. Letter from Harold Lasswell to Anna and Linden Lasswell, 16 June 1924.

³¹⁷ *ibid.* Box 56, Folder 780 D57. Letter from Harold Lasswell to Anna and Linden Lasswell, 16 June 1924.

³¹⁸ *ibid.* Box 56, Folder 779 D72. Letter from Harold Lasswell to Anna and Linden Lasswell, 23 April 1924.

European paradigms. On this last European journey, Lasswell travelled to two cities bubbling with hypotheses as to the yearnings undergirding such inflexions – Vienna and Berlin. An aspiring psychoanalyst of society, he joined the small, eclectic sub-group within the medical-psychological circles of both cities that wanted to explicitly link psychoanalytic theory, to politics and society.

Despite making occasional attempts to foster interdisciplinary sub-groups, Viennese psychoanalytic circles orbited large personalities who, by 1928 at least, steadily bickered over their discipline's theory, methods and aims. Lasswell alternated between nightly meetings with Alfred Adler's group in cafes on the city's *Ringstraße*; meetings with Anna Freud, secretary to the Vienna Psychoanalytical Training Institute and gatekeeper for her elderly, reclusive father; attending meetings of the Vienna Psychoanalytic Society as a guest of Paul Federn; and discussing analyses of political personalities with Wilhelm Stekel.³¹⁹ Each of these figures and their attendant disciples pursued their own reformulated versions of Sigmund Freud's earlier work.

Alfred Adler had broken from Freud, and by that time established himself as the leader of the school of 'individual psychology'. As Lasswell explained this to his parents, Adler was preoccupied with the individual's striving towards superiority, Freud towards sexual expression, and they had built their theories around these differing respective insights. Calling by Adler's office in the city and his country house in the hills outside Vienna, Lasswell joined the largely American coterie that would gather to hear Adler lecture.³²⁰ Their private conversations on political psychology ranged from Adler's informal counselling of Béla Kun, the leader of Hungary's communist revolution in 1919; to his acquaintance with Adolphe Joffe, a prominent figure in Russia's Bolshevik Revolution who had claimed to be a disciple of Adler; to writing in which he analysed leaders of the French Revolution.³²¹ Paul Federn offered similar support, and arranged for Lasswell to make a statement to the Psychoanalytic Society explaining his interests.³²²

³¹⁹ *ibid.* Adler: Box 56, Folder 782 D1, D4, D27. Letters from Harold Lasswell to Anna and Linden Lasswell, 5, 9 August, 23 September 1928. Anna Freud: Folder 782 D5. Letter from Harold Lasswell to Anna and Linden Lasswell, 12 August 1928. Federn: Folder 783 D23, D33. Letters from Harold Lasswell to Anna and Linden Lasswell, 8, 25 October 1928. Stekel: Folder 783 D27-28. Letter from Harold Lasswell to Anna and Linden Lasswell, 14 October 1928.

³²⁰ *ibid.* Box 56, Folder 782 D1. Letter from Harold Lasswell to Anna and Linden Lasswell, 5 August 1928.

³²¹ *ibid.* Box 56, Folder 782 D1-2. Letter from Harold Lasswell to Anna and Linden Lasswell, 5 August 1928.

³²² *ibid.* Box 56, Folder 783 D33. Letter from Harold Lasswell to Anna and Linden Lasswell, 25 October 1928.

It was Wilhelm Stekel however (seen, with Freud, Adler, and Carl Jung, as one of the field's 'Big Four'), that reacted with the most enthusiasm and insight to Lasswell's interests, offering frequent consultation, ideas and case summaries.³²³ Noting that Stekel had identified himself with no single theory, like Adler, nor exaggerated the unconscious, like Jung, Lasswell was encouraged by his flexible and imaginative posture. He also travelled to the nearby resort town of Semmering to see Anna Freud, who recommended the work of analysts who had shown an interest in the implications of psychoanalytic theory for the social sciences. Her father saw few people, having chosen five aspiring analysts to train daily and seeing only two or three extremely "difficult and interesting cases".³²⁴

In 1927 Anna Freud had published her first book, 'Introduction to the Technique of Child Analysis', adding to an already significant body of research and practice in Viennese child psychology. With the support of the social-democratic local government, many schools and municipal authorities offered experimental counselling services to children.³²⁵ By getting to know Charlotte Bühler, a child psychologist whose work would become internationally recognised in the 1930s, Lasswell again picked up his long-running interest in pedagogical theory as he explored the psychological experiments Bühler performed on babies and small children in schools and public childcare institutions.³²⁶

The intersection of psychoanalysis and pedagogy aggravated a schism that divided Viennese analysts, a point that bubbled into dispute at the season's first meeting of the Vienna Psychoanalytic Society. Lasswell saw epistemological significance in Wilhelm Reich's attack on a new magazine for psychoanalytic pedagogy. The attack stirred up a long-running controversy. While some members of the society were keen to recommend a "psycho-analytic education" or "psycho-analytic ethic", others wanted to see psychoanalysis as a science that 'analysed', rather than prescribe codes of norms.³²⁷

³²³ *ibid.* Box 56, Folder 783 D27, 29. Letters from Harold Lasswell to Anna and Linden Lasswell, 14, 18 October 1928.

³²⁴ *ibid.* Box 56, Folder 782 D5. Letter from Harold Lasswell to Anna and Linden Lasswell, 12 August 1928.

³²⁵ *ibid.* Box 56, Folder 782 D4. Letter from Harold Lasswell to Anna and Linden Lasswell, 9 August 1928.

³²⁶ *ibid.* Box 56, Folder 782 D11, 17. Letters from Harold Lasswell to Anna and Linden Lasswell, 25 August, 7 September 1928.

³²⁷ *ibid.* Box 56, Folder 783 D28. Letter from Harold Lasswell to Anna and Linden Lasswell, 14 October 1928.

Nothing could illustrate better the difficulty which arises when one tries to keep the category of description and of valuation distinct, for new insights into the consequences of social arrangements for human life almost automatically force the individual to recast his outlook on social practices. Thus the same person speaks on the basis of his scientific experience, but when he expresses valuational judgments he is speaking not as a scientist but as a philosopher-politician. Other philosophers will dissent from some of his views, although they may agree that the state of facts is the same. ... It is not the conflict but the intersection of values which creates confusion. If every issue would obligingly crystallize into a black and a white, decision would be simple. All these movements began as medical sciences, which meant that they were trying to cure people of disease. But disease itself is not an absolute value from one culture to another, especially in the sphere of personality organization.³²⁸

As one navigated the feuds and warring ethics within Viennese psychoanalysis, the fraught character of a 'science' nominally drawn from medical practice and clinical observation, that yet seemed to emphasise the inevitability of its application to ideas of community, value, and social policy, thrust itself into debates. The distance between rival clinical methods and theoretical frameworks, variously represented as 'scientific' or 'analytical', and visions of desired societies and the figures that would inhabit and build them, was not so great - "Adler wants to make people 'useful', and Jung wants to aid the individual to uncover that balance of unconscious tendencies which is 'normal' for him, whether for society or not. He doesn't fear for society though because he has confidence in the sociable qualities of the unconscious". Lasswell concluded, "All these psychological movements are likely to pass over into reforming societies."³²⁹

Clashes in Austrian politics lent urgency to projects of political reform. While conservatives rumbled about the need to protect property lest the socialists seize power nationally, the *Heimwehr* (a conservative paramilitary group) affirmed their preparation for the moment when all decent patriots would march on Vienna and roust the Jews, communists and anarchists.³³⁰ The communists foretold the inevitability of transition from capitalism, and the socialists fervently built new, planned social realities through housing, education and social care.³³¹

³²⁸ *ibid.* Box 56, Folder 783 D28. Letter from Harold Lasswell to Anna and Linden Lasswell, 14 October 1928.

³²⁹ *ibid.* Box 56, Folder 783 D28. Letter from Harold Lasswell to Anna and Linden Lasswell, 14 October 1928.

³³⁰ *ibid.* Box 56, Folder 782 D22. Letter from Harold Lasswell to Anna and Linden Lasswell, 14 September 1928.

³³¹ *ibid.* Box 56, Folder 782 D9 Letter from Harold Lasswell to Anna and Linden Lasswell, 19 August 1928. (Describing a planned housing project on the outskirts of Vienna).

These visions offered different answers to common modernist questions. For many, it was difficult not to sense the enjoinder the cultural moment seemed to place on one to contest, and at the same time the very great stakes attached to that contestation.

Alongside his immersion in psychoanalysis, in Vienna Lasswell spent time with Hans Kelsen, a thinker who had built a jurisprudence in pursuit of the epistemological dualism of description and valuation in 'legal science'.³³² Kelsen was a professor of law and political science at the University of Vienna, sat on the bench of the Austrian Supreme Court and had drafted the country's central constitutional document, the *Bundes-Verfassungsgesetz*. The significance of constructing a theory of law that was then used in a moment of nation-building was not lost on Lasswell. "Kelsen is in the unique position of having developed a profound theory of law, and of having the historical opportunity dropped in his lap to apply it on a national scale."³³³ Finding a small, animated man who was "cordiality itself" rather than the stiffly affected dignity of the clichéd jurist, Lasswell enjoyed a long discussion with Kelsen that moved from the personalities of politicians, to the state of American legal education and jurisprudence.

Our people are so busy with the trade aspect of law that they have cultivated practically no jurisprudence, and Kelsen's books, though translated into practically every other language, have not been turned into English. Although a revolution has begun at Harvard, Yale and Columbia, and the signs of a new orientation are discernible, promises are bigger than the fulfilments.³³⁴

In Kelsen's book-filled study, seven years before he would meet Myres McDougal and begin to join the 'revolution' of legal realism at Yale, Lasswell saw the cultural shift away from formalist doctrine and vocational legal education, towards modernist critique and built futures. Beside Lasswell's early psychoanalytic social theory, as well as later policy-oriented jurisprudence, Kelsen's 'pure theory of law' can itself be understood as a different answer to a very similar sense of the anxieties and demands of the modernist cultural moment. Psychoanalysis is an important intellectual influence, a product of this moment, shared by the

³³² *ibid.* Box 56, Folder 782 D21, 25. Letter from Harold Lasswell to Anna and Linden Lasswell, 14, 19 September 1928.

³³³ *ibid.* Box 56, Folder 782 D21. Letter from Harold Lasswell to Anna and Linden Lasswell, 14 September 1928.

³³⁴ *ibid.* Box 56, Folder 782 D21. Letter from Harold Lasswell to Anna and Linden Lasswell, 14 September 1928.

pure theory as well as policy-oriented jurisprudence.³³⁵ Bespeaking the close relationship between Kelsen and Viennese psychoanalytic circles, if Lasswell had any possibility of being granted an audience with Sigmund Freud, it would be on Kelsen's imprimatur.³³⁶ This audience failed to come off. Kelsen did however assign his assistant, Eric Voegelin, to guide Lasswell through Viennese politics and high society.

Before heading north to Berlin, Lasswell instead travelled south to Budapest to visit the prominent Hungarian analyst Sándor Ferenczi. By 1928 Ferenczi was emphasising his relational, active, empathetic clinical strategy in opposition to Sigmund Freud's more 'neutral' interpretive techniques and passive analytic practice. This ethos of the engaged analyst would likely have resonated with Lasswell's nascent vision of interventionist psychoanalytic social analysis, and he affirmed Ferenczi sympathetic to his project of studying politicians from the analytical point of view.³³⁷ One of Ferenczi's circle, Geza Roheim, broke from his research program of applying psychoanalysis to anthropology to show Lasswell the city's Hungarian National Museum.

On the way to Berlin, Lasswell took the opportunity to stop in Prague and meet with then Minister of Foreign Affairs of Czechoslovakia, later President, Edward Beneš. Asking his advice as to the kind of social scientific research useful from the politician's point of view, the minister seemed concerned with oppression and disorder engendered by nationalism. He approached his own view of a "national psychology" through deep reading of the imaginative literature of a country.³³⁸ In Vienna, Budapest and Prague, the zeitgeist seemed to urge consideration of the relationship between collective psychologies (often hued by national romanticism) and social change. It was hard to find a self-professed intellectual who was not engaged in applying some breed of psychology to an errant discipline in urgent need of its

³³⁵ The influence of psychoanalytic theory on Kelsen's scholarship in law has received little examination. A notable exception to this trend can be found in the work of Étienne Balibar, see for example: Étienne Balibar, *Citoyen Sujet et Autres Essais d'anthropologie Philosophique* (Presses universitaires de France 2015) Chapitre 12, 'L'invention du surmoi Freud et Kelsen 1922'. See also: E Aston, B Reynolds and Paul Cefalu, *The Return of Theory in Early Modern English Studies: Tarrying with the Subjunctive* (Springer 2016) Chapter 5 'Invitation to a Totem Meal: Hans Kelsen, Carl Schmitt, and Political Theology', pp. 121-143; and Anthony Carty, 'Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt' (1994) 16 *Cardozo L. Rev.* 1235. For a brief contextual history: Clemens Jabloner, 'Kelsen and His Circle: The Viennese Years' (1998) 9 *European Journal of International Law* 368 pp. 382-384.

³³⁶ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 782 D5. Letter from Harold Lasswell to Anna and Linden Lasswell, 12 August 1928.

³³⁷ *ibid.* Box 56, Folder 783 D38. Letter from Harold Lasswell to Anna and Linden Lasswell, 10 November 1928.

³³⁸ *ibid.* Box 56, Folder 783 D46. Letter from Harold Lasswell to Anna and Linden Lasswell, 27 November 1928.

means of sublimation. In Vienna, Lasswell even found a Catholic priest lecturing on the relationship between psychoanalysis and the confession.³³⁹

The tempo of the ‘psychological age’ was no less gripping in Berlin, where psychoanalytic theory developed in close collaboration with modernist art, literature, and revolutionary socialist politics. In her cultural and intellectual history of the Berlin Psychoanalytic Institute, Veronica Fuechtner notes; “In Weimar Berlin, psychoanalysis was considered not only a new clinical theory but also a political mission and part of a cultural avant-garde”.³⁴⁰ When Lasswell arrived in Berlin in late November 1928, the Institute housed a hub of former Freudian disciples, many of whom cultivated a critical perspective towards the Viennese ‘orthodox’ analysis of their training.

Wilhelm Reich, perhaps having suffered through one too many stinging arguments like the one over the magazine for psycho-analytic pedagogy, said one could “breathe more freely” in the atmosphere of politically and methodologically progressive analytical thought in Berlin.³⁴¹ The Berlin group of analysts were animated by the application of psychoanalysis to society and politics, law and pedagogy. They were interested in reaching beyond the upper bourgeoisie by hosting free clinics for the poor and communicating psychoanalytic ideas through mass media.³⁴² For some, Berlin was the historical origin of dissent from Freudian analysis, the training ground of analysts who would later shape critical movements in post-war American psychoanalysis.³⁴³

Lasswell took to this spirit soon after immersing himself in the Berlin psychoanalytic scene. “I like the Berlin group of psychoanalysts much better than that anywhere else, and I am actually in process of being analysed by Dr. Reik”.³⁴⁴ In the three and a half months he spent in Berlin before returning to America, Lasswell spent his SSRC funding on the “analytical hour between

³³⁹ *ibid.* Box 56, Folder 783 D34. Letter from Harold Lasswell to Anna and Linden Lasswell, 25 October 1928.

³⁴⁰ Veronika Fuechtner, *Berlin Psychoanalytic: Psychoanalysis and Culture in Weimar Republic Germany and Beyond* (University of California Press 2011) pp. 2.

³⁴¹ *ibid.* pp. 10.

³⁴² *ibid.* pp. 11.

³⁴³ *ibid.* pp. 7, citing an interview with the German analyst and scholar Johannes Cremerius. Noting connections with the early Frankfurt School (Institute for Social Research) through the Frankfurt Psychoanalytic Institute at pp. 10.

³⁴⁴ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series I. (n 221). Box 56, Folder 783 D48. Letter from Harold Lasswell to Anna and Linden Lasswell, 3 December 1928.

three and four” with Theodor Reik.³⁴⁵ Lasswell was forcefully struck by the distinctive research atmosphere that prevailed in Berlin’s medical psychological circles – “...the scientific spirit and mutual sympathy of the men is a pleasant contrast to the proselyting and jangling attitude which so often prevailed at Vienna. Everybody works long hours and there isn't much time nor inclination for the trifling.”³⁴⁶

With less feuding than Vienna, experimental collaboration seemed more viable. Lasswell attended an interdisciplinary gathering at an analyst’s house that sought to form a cooperative committee through which non-analysts would work with analysts. The physical sciences delegation included Richard von Mises, a mathematician at the University of Berlin; and Otto Fritz Meyerhof, a biochemist who had won the Nobel Prize in medicine in 1922. The social sciences “...were represented by those who could be called young and hopeful rather than old and tired”.³⁴⁷ The gathering agreed on nothing formal, but it was an important statement of intent.

As Lasswell was in Berlin, consolidating ideas and research possibilities at the end of this visit to two cities considered among the most vibrant ‘laboratories of modernity’, and after several years of regular research visits to interwar Europe, correspondence from Merriam emphasised his unflagging efforts to marshal money from wealthy patrons that would support more psychological research on politics.³⁴⁸

3.4 Collaboration with the Frankfurt School; Stack Sullivan and Sapir

The research projects Lasswell pursued in the 1930s demonstrated the formative significance of the modernist strands of ideas in psychoanalysis, social psychology and social science that he had found so vibrant in 1920s Europe. In 1930, Lasswell published *Psychopathology and Politics*, a book that used psychological case-histories to theorise the relationship between

³⁴⁵ *ibid.* Box 56, Folder 783 D55. Letter from Harold Lasswell to Anna and Linden Lasswell, 14 December 1928.

³⁴⁶ *ibid.* Box 56, Folder 783 D50. Letter from Harold Lasswell to Anna and Linden Lasswell, 6 December 1928.

³⁴⁷ *ibid.* Box 56, Folder 784 D22. Letter from Harold Lasswell to Anna and Linden Lasswell, 13 February 1929.

³⁴⁸ *ibid.* Box 56, Folder 784 D13. Letter from Harold Lasswell to Anna and Linden Lasswell, 29 January 1929. See also: Merriam, Charles E. Papers, [Box 34, Folder 4; Box 51 Folders 18-19; Box 64 Folder 22; Box 65 Folder 2] (n 236).

political power and personality ‘types’.³⁴⁹ In 1935, this would be followed by his most significant work prior to meeting McDougal, *World Politics and Personal Insecurity*.

In this period, these research interests brought Lasswell into close contact with members of the Institute for Social Research – the early Frankfurt School. Using correspondence between Lasswell (and to a lesser extent Charles Merriam), and the Frankfurt School theorists Max Horkheimer and Franz Neumann, Nick Dorzweiler has reconstructed this period of Lasswell’s career.³⁵⁰ In so doing, Dorzweiler has challenged common narratives about Lasswell’s scholarship, and about the field of American political science more generally. Since the 1940s these narratives have portrayed the field as increasingly polarised between the critiques of ‘scientism’ made by critical theorists like Horkheimer, Neumann and Fromm; and proponents of the scientific study of politics like Lasswell and Merriam, who are usually cast as crude positivists.³⁵¹ Dorzweiler reconstructs correspondence and collaboration between these scholars, demonstrating that, “Horkheimer, Neumann, and Lasswell all considered themselves to be on common ground in treating culture as a body of symbols and practices used by elites to maintain their social and political authority.”³⁵²

Beginning with Fromm and Lasswell’s first meeting in 1933, when Fromm was exploring the possibility of moving the Institute for Social Research to Chicago, Lasswell maintained close contact with him and other members of the Institute.³⁵³ In 1935, the Institute’s journal published an article in cultural anthropology written by Lasswell. Dorzweiler cites correspondence between Horkheimer and Lasswell, in which they speak of future collaboration and make clear that Lasswell was invited to submit the piece, a rare honour reserved for non-Institute contributors deemed evidently sympathetic to the group’s methods and aims.³⁵⁴ By 1937, Lasswell and Merriam’s names were added to the Institute’s American ‘Advisory

³⁴⁹ Lasswell, *Psychopathology and Politics* (n 124) (originally 1930).

³⁵⁰ Nick Dorzweiler, ‘Frankfurt Meets Chicago: Collaborations between the Institute for Social Research and Harold Lasswell, 1933-1941’ (2015) 47 *Polity* 352.

³⁵¹ Dorzweiler joins a growing body of literature challenging this binary view. Also recapturing commonalities between pre-1940s European ‘social theorists’ and American ‘social scientists’: John G Gunnell, ‘The Founding of the American Political Science Association: Discipline, Profession, Political Theory, and Politics’ (2006) 100 *American Political Science Review* 479; and Ira Katznelson, *Desolation and Enlightenment: Political Knowledge After Total War, Totalitarianism, and the Holocaust* (University Presses of California, Columbia and Princeton 2004).

³⁵² Dorzweiler (n 350) pp. 356-357.

³⁵³ *ibid.* pp. 362-371. See also correspondence between Fromm and Lasswell in: Erich Fromm Papers, The New York Public Library Manuscripts and Archives Division. Series I. Correspondence dated 1936-1942.

³⁵⁴ Harold Lasswell, ‘Collective Autism as a Consequence of Culture Contact: Notes on Religious Training and the Peyote Cult at Taos’ (1935) 4 *Zeitschrift für Sozialforschung* 232.

Committee', and they supported Horkheimer and Neumann's applications on behalf of the Institute for grants from American philanthropic organisations.³⁵⁵ In 1941 another of Lasswell's articles appeared in the Institute's journal, and Neumann asked him to chair a section of a planned Institute project on the politics of German culture.³⁵⁶ The section, titled 'Ideological Permeation of Labor and the New Middle Classes', fit well with Lasswell's writing in *World Politics*, though the project later petered due to lack of funds.

In the 1930s and early 1940s Lasswell also developed close collaboration and personal friendships with the psychoanalyst Harry Stack Sullivan, and the cultural anthropologist Edward Sapir. Finding his position at the University of Chicago less and less tenable, due it seems to the presidency of Robert Maynard Hutchins, who began to look askance at the empirical and psychological direction Merriam's department had taken, Lasswell had looked to the east coast.³⁵⁷ He had developed close acquaintances in Harry Stack Sullivan, an unorthodox and experimental figure in his own discipline of psychiatry, and Edward Sapir, a cultural anthropologist and linguist who had been at Chicago with Lasswell in the 1920s, before moving to Yale. All three men were intrigued by research possibilities that might be explored at an intersection of their respective expertise.

In his memoir on Lasswell, Gabriel Almond describes their dream "of a research institute that would combine the study of culture, society, and personality and contribute to a better and happier world".³⁵⁸ In early 1938, it looked as though this might well materialise. The William Alanson White Foundation in Washington D.C. was moving funds into place to support a full-time core research faculty in psychiatry and the social sciences, and Lasswell, Sapir and Sullivan were set to constitute this core.³⁵⁹ The expected funding evaporated however, Lasswell

³⁵⁵ Dorzweiler (n 350) pp. 368-369.

³⁵⁶ Harold Lasswell, 'Radio as an Instrument of Reducing Personal Insecurity' (1941) 9 *Zeitschrift für Sozialforschung* 49. Dorzweiler (n 350) pp. 370.

³⁵⁷ Gabriel Abraham Almond, *Harold Dwight Lasswell, 1902-1978: A Biographical Memoir* (National Academy Press 1987) pp. 260. Hutchins had been at Yale Law School prior to taking up the presidency at Chicago and was considered to have 'betrayed' legal realism. In 1996, McDougal remained sympathetic to Lasswell's side of the story: "Oh, Hutchins was just a fool. He was a dim-witted sort of fellow. He was a favourite of one of the Yale presidents." See: Collier (n 160) pp. 12.

³⁵⁸ Almond (n 357) pp. 261.

³⁵⁹ *ibid.* pp. 254-261. Dr. William Alanson White was the director of St. Elizabeth's psychiatric hospital in Washington D.C. in the 1920s, when Lasswell conducted research into patient records for *Psychopathology and Politics*. Lasswell struck up a collaborative relationship with White, who was also interested in interdisciplinary work between psychiatry and the social sciences.

and Sullivan's relationship grew problematic and to some extent fell apart, and Sapir died in 1939.³⁶⁰

In 1939, Lasswell began to lecture at the New School for Social Research in New York. His courses on 'Propaganda and the Measurement of Public Opinion,' and a 'Case Seminar on the Structure of Personality and Culture' were open to the fee-paying public.³⁶¹ Founded in 1919 in response to censorship of academic criticism of American involvement in the First World War, by 1939 the New School had been invigorated by its sponsorship of European academics fleeing fascism, becoming a hub of progressive European social theory. Lasswell taught his courses collaboratively, alongside figures like George H. Gallup, creator of the 'Gallup poll'; the political and legal philosopher Max Ascoli; the sociologist and propaganda expert Hans Speier, later the first director of the social science division of the RAND Corporation; prominent psychoanalyst and feminist theorist Karen Horney; psychoanalyst Ernst Kris; and Erich Fromm. Lasswell's psychoanalytic research on culture, identity, and mass communication fitted comfortably into the New School curriculum alongside the work of scholars drawing on bodies of political and social theory that he himself had studied on his European trips.

³⁶⁰ *ibid.* pp. 261. On this period of Lasswell's career, see also: Smith (n 227) pp. 243-244.

³⁶¹ New School Archives: Digital Collections: Bulletin listings 1939-1946. It is likely this connection with the New School came about through Merriam's relationship with Horace Kallen, one of the founders of the New School. Correspondence supporting, though not categorically confirming this supposition, can be found in: Papers of Horace Meyer Kallen; RG 317; YIVO Institute for Jewish Research, Center for Jewish History, New York. Box 42 Folder 752; Box 44 Folder 790; and Box 53 Folder 965, containing correspondence between Kallen and Merriam from 1922, and between Lasswell and Kallen 1942-1949.

Chapter 4.

The earlier life of Myres McDougal

4.1 McDougal has a problem with values

We have joined Lasswell in Illinois, at the University of Chicago and in interwar Europe as he collected ideas that he would build into a psychoanalytic theory of social life in the 1930s. To understand how this theory became the basis for seminars at Yale Law School from 1939 onwards, an argument about reforming American legal education in 1943, and shaped a body of ideas about international law that was named the New Haven School in 1968, we must also look to earlier moments, experiences and places in McDougal's life. One important moment that allows us microhistorical access to McDougal's ideas about law at a formative stage of his early career, as well as to a context by which these ideas were shaped and to which he wished to respond, places us in the Stevens Hotel on South Michigan Avenue, Chicago at 10.30 a.m. CST on Thursday 28 December 1933. There, the Association of American Law Schools had called the opening session of its annual meeting to order.

The meeting performed all the prosaics demanded by such an organisation, a melee of committees, subcommittees, delegations and reports. Alongside and through these minuted prosaics, the sense that the present was a moment of change seemed to lift and whip the words of professors, teachers, judges and lawyers.³⁶² Given the context, this was unsurprising. The

³⁶² Details in this section drawn from: 'Minutes of the Thirty-First Annual Meeting' (1933) 1933 Association of American Law Schools. Proceedings of the Annual Meeting 5.

teachers of law assembled amidst what had been Jazz Age opulence. In 1927 the Stevens had opened as one of the world's great hotels. James W. Stevens, with his sons Ernest and Raymond, had raised the twenty-eight storey, three-thousand room building with credit drawn on Chicago's 1920s booming economic confidence. The lavishly appointed, Beaux-Arts structure sprawled across an entire city block. Newspapers talked of a Versailles in the Midwest that hosted presidents and movie stars.

Six years later, when the Stevens was a venue for discussions on the future of American legal education, scores of Chicagoan banks had folded in the Great Depression and companies connected to the Stevens family had been forced into receivership. In the months preceding the law teacher's meeting in December 1933, James and Ernest were snared in a tightened noose of loans made to the failing hotel and indicted by a grand jury, armed men looted Ernest's townhouse, and Raymond shot himself in the library of his Highland Park estate.³⁶³ The Stevens family and their grand hotel was one among many stories of businesspeople, financiers and industrialists, who as the century turned had commanded vast holdings and corporations that bestrode America's burgeoning metropolises.³⁶⁴ From 1929, the economic depression quickly tore the elaborate networks of debt and credit from beneath many of these individuals, sometimes tumbling them into courtrooms or self-assumed exile, always leaving their employees and investors with impoverishing losses and no jobs.

The delegates who addressed the Association of American Law Schools (AALS) during its three-day meeting did not respond uniformly to the economic and social context of the Great Depression, but they did respond, and they were all animated by it. Addressing the association as its president, Yale Law School's Dean Charles Clark structured his remarks around the question 'Law Professor, What Now?'. He drew extensive analogies with Hans Fallada's popular novel 'Little Man, What Now?', a story of a young German couple worn into indignity

³⁶³ For details, see: Charles Lane, 'Heartbreak Hotel' [2007] *Chicago Magazine*. The indictments of James and Ernest were hastened by a suspicion that Ernest might be planning to flee the country, following the example of Samuel Insull. The collapse of Insull's Midwestern utilities empire and the hardship this caused for many investors who were not particularly wealthy became representative of the idea that the common worker bore the brunt of the Depression. Addressing the AALS, Jerome Frank references Insull to evoke this sentiment, see: 'Minutes of the Thirty-First Annual Meeting' (n 362) at pp. 107.

³⁶⁴ On this period see: Alan Trachtenberg, *The Incorporation of America* (Farrar, Straus and Giroux 2007).

and subordination by inequalities and poverty of the late Weimar Republic.³⁶⁵ He asked the gathering:

What is the connection of such a story of frustration with the modern successful, possibly too successful, law professor? ... The financial leaders of this generation are being blamed for many things which include most pointedly greed combined with lack of foresight – a drifting along ways made attractive by self-interest. Yet at their right hands as counsellors and advisors stand the ablest of the men we have instructed and we ourselves are not too far away. We may tell ourselves that we have well taught professional proficiency. Have we taught civic responsibility? In fact, do we know, can we know what it means for our profession? Revaluation of ultimate aims and of intermediate means is now urgently required of all our social organisms.³⁶⁶

In this way Clark opened a three-day conversation that in large part comprised a railing critique of a greed-driven, speculative economy that had subordinated, or completely disregarded, collective welfare and social aims. Most speakers saw the law and lawyers as in different ways complicit in this social order, and were concerned as to whether “law fulfills its social functions in modern society”.³⁶⁷ Most speakers also groped towards a core insecurity they felt when they spoke of law’s social aims and functions – doubt about what those aims and functions should be, doubt about the value-order they should be pursuing. They invoked orders of social value through formulae like “ultimate aims”, “decent citizenship”, “social statesmanship”, “the customary tradition of the relevant life and times”, “social needs and ends”, “the rational sciences of Ethics and Politics”, “emotive experience or psychological make-up”, “folkways”, “results in human lives”, “the needs of the moment”.³⁶⁸

With this insecurity, they also expressed an angered confidence. Anger most immediately engendered in America by the spectacular human damage wrought by the collapse of what was increasingly perceived as an asocial economic order, confidence in the very assumption of the

³⁶⁵ Hans Fallada, *Little Man, What Now?* (Simon and Schuster 1933) (originally published in German in 1932). The book became a popular American movie in 1934: Frank Borzage, *Little Man, What Now?* (Universal Pictures 1934).

³⁶⁶ ‘Minutes of the Thirty-First Annual Meeting’ (n 362) pp. 15.

³⁶⁷ *ibid.* Charles Clark’s words at pp. 15, echoed by many other speakers.

³⁶⁸ *ibid.* at pp. 15 (Charles Clark), 20 (Clark citing J.C. Bonbright), 45 (Beardsley Rumml), 46 (Rumml), 56 (Leon Green), 91 (Robert Maynard Hutchins), 95 (Roscoe Pound), 102 (Jerome Frank), 105 (Frank), 118 (Karl Llewelyn).

task of doubtfully grasping for new orders of value through law, and confidence in progressive possibilities the modern sciences seemed to promise, even enjoin. Even in December 1933, as disgraced titans of nineteenth-century liberal capitalism like the Stevens family fell and dragged whole cities into poverty, the law teachers had only to cross Michigan Avenue to visit the Chicago World's Fair. There they could lose themselves in the scientific innovation, technological futurism and modern architecture that would build what the fair preached was to be a 'Century of Progress'.³⁶⁹

On Saturday afternoon, as the teachers of law prepared to conclude the last session of their meeting, a twenty-seven year old professor from the University of Illinois at Urbana spoke from the floor.

There have been some large words and vague phrases bandied about here this afternoon, and I am not sure that I understand them. From one speaker I have heard the phrase "administration of justice by law." From another I have heard the phrase "the needs of the moment." Last night I heard of the "rational science of ethics" and of "the rational science of politics." It seems to me that all of those phrases evade the real problem before us – a problem of "values." I think we all admit today that the law is instrumental, that it is just one form of social regulation that we are driving towards some social goal, that concepts are malleable and that principles are variable. What I should like to know is where are we going from there? What is to be our test of what is justice? How do we determine the needs of the moment? Where do these principles of the rational science of ethics and of the rational science of politics come from? Whose "justice" are we working for? I should like to get some expression of opinion. I think we will all admit that most of what Mr. Frank said is true. Most of what passes for realistic jurisprudence is, of course, true. But where do we go from there?³⁷⁰

Myres McDougal was asking what you were supposed to do when old concepts and orders were felt to have been dismantled. How do you advocate ideas of social change, he asked the

³⁶⁹ On the fair and the significance its architecture in relation to American modern architecture see: Lisa Schrenk, *Building a Century of Progress: The Architecture of Chicago's 1933–34 World's Fair* (University of Minnesota Press 2007).

³⁷⁰ 'Minutes of the Thirty-First Annual Meeting' (n 362) pp. 120.

room of legal realists, to an audience for whom scepticism has become mainstream, faithlessness orthodox?

4.2 Trained by legal realists but in search of a ‘clear purpose’

Above any other theme, McDougal’s earliest writings were preoccupied with the faithlessness he saw in his realist mentors and peers. He thought ‘legal realism’ was a movement. He thought it had energy, and he thought most of its advocates were of the cultural moment in a way that charged them with progressive potential, that put them on the right side of history. What he lamented was an absence of commitment to avowed social goals. Anxious about value-orders himself, he spent the first decade of his academic career working this through in book reviews bristling with criticism of the unwillingness of others to acknowledge value, politics or collective goals in law. In 1935, halfway through that decade, McDougal formulated what might be one of his best expressions of this anxiety by drawing on the Spanish-American philosopher George Santayana. Of a handbook on mortgages, he said:

The mortgage problems and decisions undoubtedly partake of what Santayana has called the “profound absurdity of things” and are probably just as little amenable to any “ought” as the bewildering economy that brought them forth. Yet – eternal verities aside – he who sets himself up as a reformer might well be required to offer some ideal more appealing than that of consistency with the fundamental nature of phantom concepts.³⁷¹

The reference was to Santayana’s idea that, “Romance is evidently a potent ingredient in the ethos of the modern world...”³⁷² This ingredient was “...a certain sense of homelessness in a chaotic world, and at the same time a sense of meaning and beauty there. ...men are not deeply respectful to custom or reason, but feel the magic of strangeness and distance, and the profound absurdity of things.”³⁷³ McDougal identified with Santayana’s sense of a chaotic modern condition, brought about not least by the ‘bewildering economy’ of industrial capitalism. He also identified with Santayana’s value-doubt. Compulsion through ‘custom or reason’ was

³⁷¹ Myres McDougal, ‘Book Review: A Treatise on Mortgages. By William F. Walsh. Chicago: Callaghan. 1934 Pp. Xlv, 376.’ (1934) 44 Yale Law Journal 1278 pp. 1282.

³⁷² George Santayana, *The Genteel Tradition: Nine Essays* (University of Nebraska Press 1998) pp. 162.

³⁷³ *ibid.* pp. 161-162.

inaccessible at a time unamenable to ‘any ought’. Yet such doubt and anxiety sat alongside a feeling that it was because moderns had this knowledge, could see with disenchanting clarity, that they could construct. As Santayana described this feeling later in the text quoted by McDougal:

Something wistful, a consciousness of imperfection, the thought of all the other beauties destroyed or renounced in achieving anything, seems inseparable from breadth in sympathy and knowledge; and such breadth is the essence of modern enlightenment. But is not this intelligent humility itself a good? ... Why not frankly rejoice in the benefits, so new and extraordinary, which our state of society affords? ... haven't we Einstein and Freud, Proust and Paul Valéry, Lenin and Mussolini? For my part, though a lover of antiquity, I should certainly congratulate myself on living among the moderns, if the moderns were only modern enough, and dared to face nature with an unprejudiced mind and a clear purpose.³⁷⁴

Beginning with his unpublished 1931 doctoral dissertation, a realist critique of the concept of ‘Collateral Mistake in Contractual Relations’, McDougal’s writing had been just such a search for ‘an unprejudiced mind and a clear purpose’ – ‘some ideal more appealing than that of consistency with the fundamental nature of phantom concepts’.³⁷⁵

From Oliver Wendell Holmes (and some of his realist mentors), McDougal took a tendency to lead with the idea of doing legal scholarship for the sake of ‘prediction’. But McDougal pushed beyond the disinterested prediction of what courts would do. With each new book review he moved closer to unabashed advocacy of particular social goals. Supposed concern only with the ‘prediction’ of legal outcomes, from which the scholar stood well removed, was a conservative trope inaugurated by Holmes. It was probably palatable to a wide legal audience. In reviews with most potential for controversy (critiques of the American Law Institute’s Restatements of the Law for example), McDougal stayed closer to this position. He sometimes parsed criticism as a methodological call for the redescription of legal process, paid token deference to doyens in footnotes and advocated concrete social goals cautiously.

³⁷⁴ *ibid.* pp. 162-163.

³⁷⁵ Myres McDougal, ‘Collateral Mistake in Contractual Relations’ (Yale University, School of Law 1931). (Unpublished thesis, copy on file with author).

On other occasions he might begin in the language of ‘prediction’ before unravelling an understanding of what this meant that was anything but disinterested. Though largely undeveloped in these early writings, this could be summarised as the idea that whether they acknowledged it or not, legal scholars were implicated in the social phenomena they wrote about. They influenced those phenomena, and calling for ‘prediction’ was really a way of trying to acknowledge and consciously direct that influence. In later reflections on his formative years as a realist McDougal illustrated this understanding of ‘prediction’:

They [the legal realists] were concerned with the future but some of them regarded efforts to predict as completely impossible. Jerome Frank for example, took the position that there’s nothing consequential you can say about the future. You’re lucky if you can describe the present or something about the past. They had no comprehensive set of policies, no comprehensive set of intellectual procedures. I can remember that Underhill Moore used to say to Dession and me, and ah... Fortas, the group of us, he’d have us out to dinner, he said, “I’ll meet you young squirts at the barricades”, he says, “I’m not interested in what ought to be, the only thing I’m interested in is what is and the factors that affect the is. The policy consequences are for the birds, nobody knows what the policy consequences of a decision are”. Ah... this, for many of us, this was a destructive approach, as I said, there wasn’t enough in it to maintain our loyalties, to keep people interested. After World War Two it was clear to many people that ah... law, authoritative decision, had a great deal to do with the disastrous consequences that led up to World War Two, and ah, many people had a vision of a better world after World War Two. They wanted to get rid of this kind of destruction...³⁷⁶

McDougal criticised Frank and Moore for denying you could predict outcomes of a social policy, but this was the least important part of his criticism. The real problem, of which disavowal of prediction was only a symptom, was that they refused to imagine futures. They refused to believe it was possible to consciously direct the construction of futures through law. After World War Two, McDougal thought law had contributed to the breakdown of the interwar international order, and in the 1930s he had thought it contributed to the inequity and

³⁷⁶ ‘Reflections on the New Haven School: An Interview of Professor Myres S. McDougal by Professor W. Michael Reisman’ (n 173). George Dession established a number of policy-oriented projects with Lasswell and McDougal in the 1940s. Abe Fortas would later become an Associate Justice of the US Supreme Court and a member of the American delegations to the 1945 and 1946 meetings of the United Nations in San Francisco and London.

suffering of the Depression. He had, or wanted to find faith that law could be used to consciously engineer progressive social change. He felt that while the realists had captured something powerful by dissolving law's purported autonomy from its historical and political context, unmasking its service to status quo interests and calling for its use in pursuit of avowed social goals, their ideas about those goals were too often reluctantly specified and coy, or simply nihilistic. McDougal remembered his first realist teacher, Wesley Sturges, saying, "If law is like this I don't intend to waste my energies on it except to make a living."³⁷⁷ Walter Wheeler Cook's reflections made an even bigger impression:

He [Cook] told me that he regretted that he had wasted his whole life, that he had spent it simply destroying other people, and made no effort to construct. It was a very, sort of humbling experience to hear Cook talk.³⁷⁸

Alongside this preoccupation with consciously using law to pursue social goals, McDougal's writing castigated others for concealing their own goals behind 'absolutist' thought and 'metaphysics'. In a 1931 review of a casebook on the 'law of municipal corporations' he deplored the author's "... search for fundamental principles. ... Modern scepticism about the existence or utility of legal principles has left Professor Tooke untouched. ... Is he suggesting that there are certain permanent principles of the law of municipal corporations? If so, what are they? Who made them principles? Principles for whom? For what?"³⁷⁹

Another book was firmly "in the absolutist tradition".³⁸⁰ In McDougal's view, the author's ideal:

...is that of "logical consistency" and he obtains initial premises by the usual formula. From all the forked doctrine that abounds in the cases and older texts, he picks out certain symbols which, for reasons unexplained, he labels "fundamental." Symbols pointing in opposite directions he attacks with invective or relegates to

³⁷⁷ Interview with Clark (n 163).

³⁷⁸ *ibid.*

³⁷⁹ Myres McDougal, 'Book Review: Cases on the Law of Municipal Corporations. By Charles W. Tooke. 1931 Edition. Chicago: Commerce Clearing House, Inc., 1931. Pp. Xiii, 896.' (1932) 27 *University of Illinois Law Review* 469 pp. 469-470.

³⁸⁰ McDougal, 'Book Review: A Treatise on Mortgages. By William F. Walsh. Chicago: Callaghan. 1934 Pp. Xlv, 376.' (n 371) pp. 1279.

footnotes as perversions. ... Courts are castigated in strong language for having yielded to conflicting economic interests and contradictory social ideals.³⁸¹

Such representatives of absolutism were juxtaposed against legal realism:

Many legal scholars today do not believe that the application of old principles to new facts is quite so simple a process as that of pouring new wine into old bottles. They prefer accurate observation of immediate social phenomena to a quest for the eternal. Legal concepts they recognize as mere devices for the attainment of social ends. Hence, their emphasis in organization, when they edit casebooks, is on problems. They do not offer concatenations of rules, principles, and concepts which are to be taught as if entities existing for the sake of pure being. Such hot pursuit of the Holy Grail no longer interests them. They group their materials about troublesome situations which arise in actual life.³⁸²

McDougal's approach to law was anti-metaphysical and anti-absolutist, committed to value found in experiences of 'actual life'. This was a philosophical and methodological position, but it was also a political one. His 1930s writing placed McDougal on what he described as the "left-wing" of the realist movement. Reviewing a new book written by fellow realist Max Radin, who made points like, a court "is not properly supposed to have as its purpose the task of reforming our social life", McDougal laboured to distance himself.³⁸³ While he acknowledged that "right-wing" realists would approve of Radin's "philosophy of acceptance"...

Left-wing members will tend to think his benedictions indiscriminate. He could have defended our democratic governmental framework... He could have assigned a much greater creative, reforming, function to judges. His definition of "law" as prophecy, as doctrine, is insight from a very limited perspective only. From a broader perspective any differentiation of "law" from morals, manners, economics and so forth is illusory. Indeed the greatest present concern of the layman is with

³⁸¹ *ibid.* pp. 1279.

³⁸² McDougal, 'Book Review: Cases on the Law of Municipal Corporations. By Charles W. Tooke. 1931 Edition. Chicago: Commerce Clearing House, Inc., 1931. pp. xiii, 896.' (n 379) pp. 470.

³⁸³ McDougal, 'Book Review: The Law and Mr. Smith. By Max Radin. The Bobbs-Merrill Company, Indianapolis, 1938.' (n 80) pp. 496.

that growing edge of social change where “law” and “economics” are hopelessly intermingled.³⁸⁴

Concealing their own politics behind reified absolutes and metaphysical entities, McDougal’s interlocutors refused to discuss the values that should whet this ‘growing edge of social change’.

The “logical derivation” of values from assumed postulates of theology, metaphysics, and ethics, very specialized parts of our culture, they [legal realists] regard not as the highest form of intellectual achievement but as a waste of time and energy. Such specious rationalism interests them only as any “case” material interests a psychiatrist or an anthropologist or when it is used to oppose, or detract attention from, specific values in which they are interested. The conservative or even reactionary social implications of a rarified “ethics,” wholly apart from its sad misdirection of human energies, is indeed a theme which might bear development.³⁸⁵

McDougal’s own politics, and his ideas about the politics of legal realism, were of the New Deal – “...civil liberties, social security, more goods to more people, healthful housing, conservation and full utilization of resources, collective bargaining, farm security, socialized medicine, protection of consumers, protection of investors, cheaper and better administration of justice...”³⁸⁶ He wanted redistribution of wealth and the construction of expansive government agencies capable of ambitious social planning:

Today our accepted social goals include something more than peace. Public opinion is mobilizing behind maximum utilization for the benefit of all classes. Our governments – federal, state, and municipal – are committed to a program of reconstructing our cities and rehousing at least a third of the nation. Humanitarian sentiment, in the guise inter alia of land-purchase programs, has even begun to extend to the pitifully insecure one-half of our farm population. City planning, rural rehabilitation, metropolitan communities, and garden cities; public subsidies,

³⁸⁴ *ibid.* pp. 496.

³⁸⁵ Myres McDougal, ‘Fuller vs. the American Legal Realists: An Intervention. Review of *The Law in Quest of Itself*. By Lon L. Fuller, Professor of Law, Harvard Law School’ (1941) 50 *Yale Law Journal* 827 pp. 835- 836 n. 28.

³⁸⁶ *ibid.* pp. 836.

government financing, graded-tax plans, zoning, and eminent domain – all these are in the headlines and in the air.³⁸⁷

These politics were class-based, collectivist and anti-patrician. McDougal spoke approvingly of the expansion in England and America of what he called “socialistic liberalism”.³⁸⁸ Like others on the left of realism, he wrote against nineteenth century liberal capitalism and the English common law; the aristocracy of industrial barons and Anglo-American gentry these orders benefitted. To the established scholars he challenged, McDougal must have seemed a strident voice of an American middle class. In the 1930s, anti-communist and anti-socialist hysteria was far less pronounced than it would later become, but McDougal still felt the need to couch his writing against the charge of un-Americanism. His rejoinder – “Un-Americanism has been said to be the last refuge of a conservative...”³⁸⁹

In a 1937 review of a book written by Illinois State Senator Thomas Vernor Smith, McDougal noted his (and Smith’s) intellectual borrowings from Lasswell.³⁹⁰ In later publications McDougal used more and more of Lasswell’s characteristic vocabulary and cited his 1930s *Politics: Who Gets What, When, How*; and *World Politics and Personal Insecurity*.³⁹¹ Occasional lines from these reviews would later appear in the 1943 article on legal education. In a 1939 review of Jerome Hall’s *Readings in Jurisprudence* McDougal even performed a content analysis of sections of the book.³⁹²

In May 1942, the *Harvard Law Review* published his review of the third volume of the American Law Institute’s *Restatement of the Law of Property*. Here McDougal’s writing came closest to the 1943 article he would publish with Lasswell one year later. In what would become the policy-oriented style, he listed variables the Restatement should have structured its

³⁸⁷ Myres McDougal and John W Brabner-Smith, ‘Land Title Transfer: A Regression’ (1939) 48 *Yale Law Journal* 1125. pp. 1125-1126. See also: Myres McDougal and Charles Runyon, ‘Book Review: Restatement of the Law of Torts, Volume IV, Division 10, As Adopted by the American Law Institute. St. Paul: American Law Institute, Publishers. 1939.’ (1940) 49 *Yale Law Journal* 1500 at pp. 1505-1506.

³⁸⁸ Myres McDougal, ‘Book Review: The Promise of American Politics. By T. V. Smith. Chicago: University of Chicago Press, 1936. Pp. Xix, 308, \$2.50’ (1937) 46 *Yale Law Journal* 1269 pp. 1272.

³⁸⁹ McDougal and Brabner-Smith (n 387) pp. 1151.

³⁹⁰ McDougal, ‘Book Review: The Promise of American Politics. By T. V. Smith. Chicago: University of Chicago Press, 1936. Pp. Xix, 308, \$2.50’ (n 388) pp. 1269 n. 2.

³⁹¹ McDougal, ‘Fuller vs. the American Legal Realists: An Intervention. Review of The Law in Quest of Itself. By Lon L. Fuller, Professor of Law, Harvard Law School’ (n 385) pp. 838 n. 35.

³⁹² Myres McDougal, ‘Book Review: Readings in Jurisprudence, Selected, Edited, and Arranged by Jerome Hall. Indianapolis: The Bobbs-Merrill Company. 1938. Pp. 1183. \$7.50.’ (1939) 34 *Illinois Law Review of Northwestern University* 109 pp. 110.

inquiries around, defined claims presented to a court as questions of “Who wants what from whom and why?”, and wondered why the Institute failed to engage in “some *preventive* social engineering”.³⁹³ Among the references McDougal cited in support of his application of a scientific method to legal problems were Lasswell’s *World Politics* and Elton Mayo’s *The Human Problems of an Industrial Civilization*.³⁹⁴ McDougal used this method to direct his value-angst towards the Institute’s invocation of legal concepts:

Though supplementary comments contain much useful discussion of what the Institute means by the various quoted phrases, such comments stop short either of an adequate factual breakdown of type problems or of statements of policy susceptible of testing for their compatibility with major democratic social goals. The discussion is in general too much tempered by complacency.³⁹⁵

In this 1942 piece, McDougal criticised the value-complacency of conservative legal scholarship represented by the Restatements. At the same time, in calling for ‘statements of policy susceptible of testing for their compatibility with major democratic social goals’, he took distance from the reluctance of the most sceptical legal realists to state their commitment to social ends. Around this position, he wrapped the beginnings of a method drawn from Lasswell’s 1930s social theory. It was a preface to the call for policy-oriented legal education he and Lasswell would soon compose in the Blackstone Hotel, the closest he had come to finding the ‘unprejudiced mind and clear purpose’ he, Santayana and many other observers of modern society took as their ambition.

4.3 McDougal’s childhood and education, the unreconstructed South

Burnsville and Booneville are small towns in Prentiss County, north Mississippi. Twenty miles apart, they sit on a high ridge that runs north to south from the Tennessee line to the Gulf of Mexico. Born in 1906 in Burton, a village lower on that same ridge, Myres McDougal’s

³⁹³ Myres McDougal, ‘Book Review: Future Interests Restated: Tradition Versus Clarification and Reform. A Review of: Restatement of the Law of Property. Volume III. St. Paul: American Law Institute Publishers. 1940.’ (1942) *LV Harvard Law Review* 1078 pp. 1080-1084, ‘preventive social engineering’ is explained at pp. 1085 n. 11 [emphasis original].

³⁹⁴ *ibid.* pp. 1080 n. 7.

³⁹⁵ *ibid.* pp. 1088 n. 18.

pressing early memories were of childhood in Burnsville and school years in Booneville.³⁹⁶ The area had once been rich in cotton production, wealth built upon slavery. After the Civil War and Reconstruction, the inability of some such regions to continue to profit through a slave-based economy meant white farmers and the plantation class were less prosperous. When McDougal grew up he remembered the area's communities being in economic decline. Cotton production was no longer lucrative and there was little money in the main alternative, corn. Previous generations of McDougal's family had seen prosperity, owning the racetrack in Burnsville and a farm a few miles south that later became the site of the village of Tishomingo. Yet he knew many aunts, uncles and cousins who moved to Oklahoma, Texas and New Mexico. Lacking opportunities and living simple lives in rural Mississippi, they drifted towards the West Coast in search of money. McDougal recalled life in Prentiss County:

Most of the travel was by horse and buggy, surreys, or by wagon. The roads ran north and south with the waterways, toward the Gulf, and only later did the area get organised in terms of railroads that ran east and west. ... You would regard it as just about as primitive as life could be. You lived on vegetables, and you grew your own meat. Everybody knew everybody else. It's ah... it's hard to... the life was so different. I remember I took my wife back there to a fish fry in later years, after we were married. I was, I think twenty-seven at the time. And I saw my wife's eyes getting big as saucers, and I asked her what was the matter with her. ... She says nobody had shoes. It had dawned on me for the first time that they were all barefooted.³⁹⁷

Both sides of McDougal's family had lived in north Mississippi for several generations. His mother's family, Smiths, came from a "primitive Baptist community" called New Hope, while the McDougals on his father's side lived a few miles away and were Presbyterians and Methodists.³⁹⁸ McDougal's immediate family had some status. His father, Luther Love McDougal was a doctor, Booneville's general practitioner, and what Myres McDougal described as a "political boss in one corner of the state".³⁹⁹ To be a country doctor was to be somebody, to hold a position of authority. McDougal watched his mother, Lula Bell Smith,

³⁹⁶ Interview with Andrew Willard, 'Oral History Discussion' (11 September 1992). In one of the many oral histories McDougal gave late in his life, he noted of these memories: "... through the benefit of psychoanalysis, I can recall some of the things and events very clearly." Collier (n 160) pp. 1.

³⁹⁷ Interview with Willard (n 396).

³⁹⁸ *ibid.*

³⁹⁹ Interview with Tipson (n 49).

manage farm work and phone enquiries while locals currying favour came and went from his father's office. Like Linden Lasswell, Luther Love was a political insider, but a provincial one, skilled in a clannish, horse-trading country politics of long-standing loyalties and intimately personalised political ends.⁴⁰⁰

Relative to the generally declining rural community, there was some money and land in the family. Luther owned the second motor car in the county and Luther's father owned large farms, sawmills and gristmills.⁴⁰¹ McDougal thought he had become wealthy by pioneering steam cotton gins.⁴⁰² McDougal was closest to Lula Bell's parents, spending much of his childhood on their farm in New Hope. Late in life he would remember many aspects of his life as a young child in bucolic terms, but as the oldest of three brothers he also remembered formative years of obligation to labour on the land and with animals, to the family's subsistence. Christmas was a big event, a time of rest and giving, but few holidays broke the rest of the year. People worked too hard and there was always a labour that could lay claim to leisure. When McDougal first began to move away by studying at the University of Mississippi, his grandfather, who had taught him to plough and farm, said "Myres was a good boy 'til he went off to Ole Miss and now he isn't worth killing."⁴⁰³ McDougal recalled, "... he was pretty rough on me but he was one I was fondest of and one I modelled most after."⁴⁰⁴

McDougal's father was a somewhat literary man, quoting Milton and Pope to his son, as was one of his uncles, a gold miner in Alaska who lived in a book-filled cabin in the Matanuska Valley. As a child, McDougal would receive books from him. He recalled the impression made by *Little Journeys to the Homes of the Great*, an anthology of biographies of significant historical figures written by the anarchist-socialist political critic Elbert Hubbard.⁴⁰⁵ His maternal grandmother also encouraged him to explore the world beyond Prentiss County: "She was the one who encouraged me to work and get out and do something."⁴⁰⁶ But it was hard to let Mississippi go. McDougal's father hoped he would aspire to represent the state as a senator, and McDougal himself seemed to nurse the idea that someday he would return.⁴⁰⁷ He owned

⁴⁰⁰ See: Chapter 3: The earlier life of Harold Lasswell. *supra*. pp. 77.

⁴⁰¹ Collier (n 160) pp. 1.

⁴⁰² Interview with Willard (n 396).

⁴⁰³ *ibid.* 'Ole Miss' was, and is, the colloquial name for the University of Mississippi.

⁴⁰⁴ *ibid.*

⁴⁰⁵ *ibid.*

⁴⁰⁶ Collier (n 160) pp. 1.

⁴⁰⁷ Interview with Rostow (n 163).

three hundred acres of land near New Hope and was preoccupied with the inheritance of his grandparent's farm, where he had learned to farm and hunt, late into his retirement.⁴⁰⁸ Asked of his regrets by Eugene Rostow in 1992, McDougal said:

I sometimes regret not going back to Mississippi. I don't know whether you were dean or not but I was offered the chancellorship of the University of Mississippi when I was 34 years of age. And my father... wanted me to be senator for Mississippi... he brought me up to be senator. And I would have taken that I think...⁴⁰⁹

Skipping several years of high school because the school was short of classroom space, McDougal entered university in 1921, when he was fifteen years old.⁴¹⁰ Already having some ability in Latin from high school, he was well prepared for the subject at Ole Miss and also studied Greek. Strategic thinking on Luther Love's part lay behind his son's focus on classical languages. "The Latin teacher at the University of Mississippi was chairman of the Rhodes Scholarship Selection Committee and my father made certain that I took Latin."⁴¹¹ The Latin professor was chair of the first, local selection committee. McDougal duly reached the state level selection committee for the scholarship, where he learned the politics of academia.

The chair of the state selection committee was Alfred Hume, a professor of mathematics and Chancellor of the University of Mississippi. Amidst controversy generated by the 'Scopes Trial' of 1925, in which a Tennessee school teacher was accused of violating state legislation prohibiting the teaching of evolutionary theory in state-funded schools, Hume was criticised for allowing the university's biology department to teach evolution. Some powerful critics wanted him removed from the post of chancellor.⁴¹² McDougal, then editor of the university's student newspaper *The Daily Mississippian*, wrote an editorial supporting Hume and threatening to mobilise student protests if Hume's critics would not allow him to remain as chancellor. McDougal took copies of the newspaper to the Mississippi state legislature in

⁴⁰⁸ Collier (n 160) pp. 2.

⁴⁰⁹ Interview with Rostow (n 163).

⁴¹⁰ Collier (n 160) pp. 2.

⁴¹¹ 'A Charmed Life, Excerpts from a Conversation with Judge Ronald St. J. Macdonald, European Court of Human Rights, 7 August 1995', *Myres Smith McDougal: Appreciations of an Extraordinary Man* (Yale Law School 1999) at pp. 60. See also: Interview with Tipson (n 49).

⁴¹² Westley F Busbee Jr, *Mississippi: A History* (John Wiley & Sons 2014). Noting at pp. 201 that in 1926 a measure prohibiting the teaching of the theory of evolution was approved by Governor Henry L. Whitfield, despite opposition from Alfred Hume and other educators.

Jackson and distributed them to legislators.⁴¹³ Whatever the role played by McDougal's intervention, Hume overcame his critics and remained chancellor.

Later, when McDougal was considered for the Rhodes Scholarship by the state selection committee, his main competitor was John Satterfield. Satterfield would become president of the American Bar Association in the 1960s and one of the country's most prominent and virulent opponents of desegregation. Two committee members who taught at the Methodist college where Satterfield had studied voted for him, while the two remaining members voted for McDougal. As chair, Hume broke the tie in McDougal's favour, making possible postgraduate studies in England at Oxford University. He later told McDougal: "Mr. McDougal, you were my friend when I needed a friend, and I figured you needed a friend."⁴¹⁴

McDougal relished this politics of horse-trading, favours and loyalty. He had learned it from his father at a young age in Booneville, and he was good at it. When he was editor-in-chief of *The Daily Mississippian*, James Eastland was business manager. "We had a political machine that put us both in."⁴¹⁵ Eastland would later become one of the state's longest serving senators, a powerful chair of the Senate Judiciary Committee and another forthright opponent of desegregation in the 1950s and 1960s. McDougal and Eastland were, and remained close friends. McDougal would recall that when Eastland was a senator, their relationship allowed him to appear in Eastland's office to ask him for something, and Eastland would dictate and sign the necessary letter with few questions.⁴¹⁶ "That incidentally, was a position of power with my colleagues here [at Yale Law School]. When they wanted anything out of the Senate they could get it through Eastland."⁴¹⁷

Much later, in 1962, these ties to his state, to the University of Mississippi and to Southern power-brokers like Eastland and Satterfield would place McDougal between the white, Southern elites inciting violent opposition to desegregation, and a Kennedy administration staffed in large part by East Coast 'liberals' who were products of McDougal's teaching. In September 1962, President John F. Kennedy and his Attorney General Robert F. Kennedy

⁴¹³ Interview with Tipson (n 49).

⁴¹⁴ *ibid.* See also: 'A Charmed Life, Excerpts from a Conversation with Judge Ronald St. J. Macdonald, European Court of Human Rights, 7 August 1995' (n 411). pp. 61.

⁴¹⁵ Interview with Tipson (n 49).

⁴¹⁶ *ibid.*

⁴¹⁷ Interview with Clark (n 163).

faced down Mississippi Governor Ross Barnett's refusal to permit James Meredith, an African American, to register as a student of the University of Mississippi. Nicholas Katzenbach, Deputy Attorney General and a former student of McDougal's, visited the university and law school to explain that a court order to allow Meredith to enrol would be enforced.⁴¹⁸ On the day of, and night following Meredith's registration, a violent stand-off and riot developed on the campus between large mobs of segregationist white students, and several thousand federal marshals and soldiers.

Discussing these events with Katzenbach in 1992, McDougal remembered being called by Burke Marshall, who was Assistant Attorney General in charge of the Justice Department's Civil Rights Division. Marshall asked McDougal to intervene on behalf of the administration by speaking to his former rival, John Satterfield. News broke the following morning that Satterfield had been retained as counsel to Governor Barnett, foreclosing this backchannel.⁴¹⁹ McDougal was perceived as an East Coast Democratic Party insider, who at the same time could wield clout with Dixiecrats like Eastland, Barnett and Satterfield. Eastland has said of McDougal: "Mr. McDougal was a schoolmate of mine. He is a very distinguished professor at Yale University, and I think a very misguided liberal."⁴²⁰

When reflecting on these intersections of cultures, identities and loyalties, McDougal could seem to relish the unsettled reaction his avowed Southernness provoked among colleagues at Yale. When Elias Clark (who knew very well where McDougal had grown up) asked him whether he signed a petition to abolish the house un-American activities committee that had circulated among law school faculty, McDougal's almost wry response was: "No I don't think so. That would not be my nature. ...I would have approved of the un-American activities committee... probably. See I'm a Southerner, I'm from Mississippi."⁴²¹

⁴¹⁸ Interview with Nicholas Deb Katzenbach, 'Oral History Discussion' (3 October 1992). Katzenbach was also central to the 'Stand in the Schoolhouse Door' incident. Alabama governor George Wallace blocked the doorway of an auditorium at the University of Alabama, in a purported attempt to prevent the desegregation of the university with the enrolment of two African-American students, Vivian Malone and James Hood. Katzenbach, with federal marshals and members of the Alabama National Guard, confronted and moved Wallace.

⁴¹⁹ *ibid.*

⁴²⁰ Interview with Frederick Tipson, 'Oral History Discussion (2)' (11 September 1992). Also cited in: Rosalyn Higgins, 'Obituary: Professor Myres McDougal' *The Independent* (1998). Rosalyn Higgins.

⁴²¹ Interview with Clark (n 163).

As he lived it, McDougal's relationship with McCarthy era communist-hunting was more complex, perhaps at least in part due to Lasswell's subjection to FBI investigation of his alleged communist affiliations. In 1951, Lasswell was denied clearance to view classified materials held at the RAND Corporation in California. The Army-Navy-Air Force Personnel Security Board informed him by letter:

Based on information now available to it, the Board has tentatively decided that consent for your employment on classified Army, Navy, or Air Force contracts must be denied. This information indicates that for many years you have been a Communist Party member and have closely and sympathetically associated with Communist party members. You have also openly and actively expressed sympathy with many Communist doctrines and ideologies.⁴²²

Perhaps the members of the Board had studied Lasswell's ideas about a socialist world society in *World Politics and Personality Insecurity*.⁴²³ It might be more likely however, that they became aware of an accident outside Chicago in October 1938. When a truck veered off Torrence Avenue and crashed outside the village of Lansing, it littered the road with pamphlets and printed material on Marxism and communism. Local authorities quickly traced the materials to Lasswell, who had been moving from Chicago to Washington D.C. On that occasion the investigation was dropped. A Chicago newspaper noted Lasswell was an 'anti-red' examining the material for research purposes.⁴²⁴

Lasswell challenged the Board's decision, submitting in response a large body of documents including an autobiographical sketch, a student-written essay explaining the democratic principles espoused in his published work, and forty-six sworn affidavits from people familiar with his career and ideas who all affirmed his opposition to, or at least their unawareness of him ever ascribing to, communist ideologies. Many of the affidavits, particularly those authored by scholars, noted Lasswell's research into communism and in some cases his association with left-wing figures, but emphasised that he undertook these activities as a scientist, always impressing them with his rigorous objectivity and interest only in the technical

⁴²² Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series V. (n 210). Box 213 Folder 14 D1. Letter from Army-Navy-Air Force Personnel Security Board to Harold Lasswell, 19 August 1951.

⁴²³ Lasswell, *World Politics and Personal Insecurity* (n 103). (originally published 1935).

⁴²⁴ 'Solved Red Angle in Crash Death; Papers Traced' *Chicago Tribune* (24 October 1938).

aspects of communist propaganda.⁴²⁵ McDougal's statement to the Board formulated this point in colourful terms:

He has studied Communists and their activities, as a physical scientist might study snakes, to increase our understanding and ability to control them...⁴²⁶

The claim to 'objectivity' and the status of 'science' was a valuable one in such circumstances. Lasswell engaged Leon Lipson, who was then in legal practice but would later join the Yale Law School faculty, to coach and represent him with McDougal as he challenged the Board's decision.⁴²⁷ Together they convinced the board to grant Lasswell the clearance he wanted. Nonetheless, every year thereafter McDougal received visits from agents of the FBI who questioned him about Lasswell's ideas and loyalty.⁴²⁸

In her 1998 obituary of McDougal, Rosalyn Higgins noted that he "thought of himself as an unreconstructed Southerner".⁴²⁹ In many ways McDougal did grapple personally and intellectually with the cultural tensions associated with that label – between lifestyles and knowledge-paradigms of modern industrial society (in the post-civil war Southern states, associated with the North), and the agrarian culture of the South many perceived to be under threat during Reconstruction and in the early twentieth century. Through marriage, he had connections to the pre-Civil War planter class. McDougal had met Francis during his doctorate at Yale, and they married two years later.⁴³⁰ Francis was a Lee, of the Virginian Lees, one of the richest and most powerful aristocratic families in the pre-Civil War South.⁴³¹ The family was made famous by Robert E. Lee, commander of the Confederate States Army.

Parts of McDougal's biography can be read as representative of a perceived confrontation between the lifestyles of small, white Southern farming communities, and diverse urban

⁴²⁵ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series V. (n 210). Box 213 Folder 14 D33; D38; D41; D43; D77. The statements made by William T. R. Fox; Joseph M. Goldsen; Harold Gosnell; Albert Lepawsky; and Charles Merriam are examples of this approach.

⁴²⁶ *ibid.* Box 213 Folder 14 D76. Letter from Myres McDougal to the Army-Navy-Air Force Personnel Security Board dated 11 September 1951.

⁴²⁷ Interview with Bonnie Collier, 'Yale Law School Oral History Series: A Conversation with Leon Lipson' (6 June 1996). McDougal later wrote an article with Lipson: Myres McDougal and Leon Lipson, 'Perspectives for a Law of Outer Space' (1958) 52 *American Journal of International Law*.

⁴²⁸ Interview with Rostow (n 163).

⁴²⁹ Higgins, 'Obituary' (n 420).

⁴³⁰ Interview with Willard (n 396).

⁴³¹ Collier (n 160) pp. 8, 11-12.

progressivisms. In the 1920s and 1930s, as McDougal was moving from the agrarian South to Yale Law School – then a hub of ideas about progressive, planned urban life – a briefly prominent current of cultural critique articulated this confrontation. A group of Southern writers styled the ‘Southern Agrarians’ advanced the merits of an aristocratic, rural society against modern urban industrialism.⁴³² Their movement had two strands. One was straightforwardly and rankly racist, defending slavery and segregation as a ‘natural’ order that had been respected in the pre-Civil War South. Another strand criticised the dehumanising consequences of homogeneity and automation in industrial life by juxtaposing against it the supposed virtues of life lived close to the land. Advocates of this strand tried to avoid confronting the fact that the agrarian society they extolled had been built upon slavery and the violent subjugation of African Americans. Their writing was characterised by narratives of Southern culture rent by jagged silences where black and female voices had been excluded.⁴³³ Such silences can seem to yawn through the environments McDougal recalls from his early years. He remembered having black childhood friends in Booneville, but also the separateness of the white and black communities, his family home being on the street that ended where the black neighbourhood began.⁴³⁴

4.4 The University of Oxford and Roman law

In October 1927, McDougal took up his Rhodes Scholarship and sailed for England on the flagship of United States Lines – ‘Leviathan’.⁴³⁵ He would spend three years completing a postgraduate degree in law at the University of Oxford. He was tutored by William Holdsworth, a famous historian of English law who significantly influenced McDougal’s career and early ideas about law. Much of Holdsworth’s writing typified an English tradition of legal history.

⁴³² Their controversial 1930 manifesto essay collection: Susan V Donaldson (ed), *I’ll Take My Stand: The South and the Agrarian Tradition* (75th anniversary ed., Louisiana State University Press 2006).

⁴³³ *ibid.* In her introduction to the 2006 edition of *I’ll Take My Stand*, Susan Donaldson notes the Southern Agrarians sought to maintain ‘whiteness’ “... in part by figuring regional agrarian tradition as white and male at every possible opportunity in essay after essay and in part by reducing African Americans to near-invisibility and near-silence.” pp. xvi.

⁴³⁴ ‘A Charmed Life, Excerpts from a Conversation with Judge Ronald St. J. Macdonald, European Court of Human Rights, 7 August 1995’ (n 411) at pp. 60.

⁴³⁵ Myres Smith McDougal Papers (MS 1636). Manuscripts and Archives, Yale University Library. Accession 1995-M-002. Passenger ticket dated 1 October 1927.

His seventeen-volume history of English law carefully picked dignified passage through the antics of kingdoms and monarchs from the early medieval period to 1875.⁴³⁶

In its way, Holdsworth's legal scholarship was quite flexible. In 1927 he delivered lectures at Yale Law School, subsequently published under the title *Charles Dickens as a Legal Historian*, that used Dickens' *Bleak House* to reconstruct the workings of the Court of Chancery. In other works he explored legal developments through biographies of prominent figures.⁴³⁷ McDougal would later emphasise this flexibility, what he called Holdsworth's approach to law on "policy terms", preferring this to the rigidity of Austinian analytical jurisprudence.⁴³⁸ "He [Holdsworth] had the notion that all law was policy believe it or not, this old conservative professor of history. And ah, I didn't like C.K. Allen, C.K. Allen was a very arch-conservative teaching jurisprudence. But I really learned my jurisprudence from Holdsworth."⁴³⁹ What the American legal realists, and later policy-oriented jurisprudence called the 'decision-process' that was law, McDougal attributed to Holdsworth:

Old Holdsworth thought of law as a decision process. ... And you see, in major part... this goes back to Roman law. Ah, there were two schools of Roman law, the Sabinians and the Proculians. And the relative emphasis on decisions and the relative emphasis on rules was what characterised those two schools of Roman law. And the ideas of the American legal realists were not new ideas, there were just new in this country, or new emphases in American legal education.⁴⁴⁰

The Sabinians (seeking precisely defined rules and logically derived categorisations) and their Proculian critics (prizing flexibility and proximity to experience over logical derivation) do seem analogous to the relationship between nineteenth century legal 'formalism' and American legal realism. In some descriptions the Proculians can seem to share even more with Lasswell and McDougal's vision of their own reforms:

The former [the Proculians] was founded by Labeo and the latter [the Sabinians] by Capito and they "first made, as it were, two sects: for Ateius Capito held fast to what

⁴³⁶ William Holdsworth, *A History of English Law*. (Seventh edition, Sweet & Maxwell 1972). Originally published between 1903 and 1966.

⁴³⁷ William Holdsworth, *Some Makers of English Law* (The University Press 1938).

⁴³⁸ Interview with Tipson (n 420).

⁴³⁹ Interview with Katzenbach (n 418). Speaking of Carleton Kemp Allen.

⁴⁴⁰ Interview with Tipson (n 420).

had been handed down to him, whereas Labeo, a genius, with confidence in his own scholarship, who had studied several other branches of knowledge, set out to make many innovations”.⁴⁴¹

Holdsworth closely mentored McDougal, hosting him at his picturesque riverside home on Sunday afternoons along with prominent figures in English law and academia.⁴⁴² Holdsworth was instrumental to McDougal’s progression to New Haven, advising him to become a law teacher and using his relationship with Charles Clark, dean of Yale Law School at the time, to ensure the school admitted and funded McDougal.⁴⁴³ McDougal also studied under James L. Brierly, attending lectures in which he transcribed the first edition of Brierly’s *The Law of Nations*.⁴⁴⁴ Brierly took interest in this young American too, inviting him to his home and intolerantly winnowing the Greek and Latin vocabulary from his tutorial papers.⁴⁴⁵

4.5 Legal realists are intellectual children of philosophical pragmatism

Notwithstanding what he thought of as the policy premises of his training under Holdsworth, when McDougal began his doctorate at Yale Law School in 1930, he was jarred by the ascendant culture of American legal realism. Reflecting on this experience with Elias Clark, he said:

⁴⁴¹ Peter Stein, ‘Interpretation and Legal Reasoning in Roman Law’ (1995) 70 *Chicago-Kent Law Review* 1539. Quoting the Roman jurist Sextus Pomponius at pp. 1545. Concluding at pp. 1556, Stein links Oliver Wendell Holmes’ legal realism to these schools of Roman law through Holmes’ reading of Rudolph von Jhering’s *Der Geist des römischen Rechts* (The Spirit of Roman Law).

⁴⁴² One of the people McDougal met was Arthur Goodhart, a barrister and later professor of jurisprudence at Oxford University. Goodhart was cited by Roscoe Pound at the 1933 meeting of the AALS for a paper in which Goodhart cast haughty scepticism on the prominence of psychological ideas in legal realism. Goodhart had satirically invoked Alfred Adler to himself ‘psychoanalyse’ legal realism as a whole. See: Arthur Lehman Goodhart, ‘Some American Interpretations of Law’, *Modern Theories of Law* (Oxford University Press 1933), pp. 15-17. Cited by Pound at: ‘Minutes of the Thirty-First Annual Meeting’ (n 362) pp. 99.

⁴⁴³ ‘A Charmed Life, Excerpts from a Conversation with Judge Ronald St. J. Macdonald, European Court of Human Rights, 7 August 1995’ (n 411) at pp. 63. The letter informing McDougal he would receive a Sterling Fellowship to fund graduate study at Yale Law School noted that although his legal studies in America had been at a school not recognised by Yale, and normally English legal education was not considered equivalent to American, “... your recommendations were so unusual that we felt we should award you the fellowship.” Myres Smith McDougal Papers (MS 1636). Manuscripts and Archives, Yale University Library. Accession 1995-M-002. (n 435). Box 30 Folder 30 D34. Letter from the Office of the Dean to Myres McDougal, 14 February 1930.

⁴⁴⁴ Andrew Willard, ‘Myres Smith McDougal: A Life of and about Human Dignity’ (1999) 108 *The Yale Law Journal* 927 pp. 929. See also: Interview with Schwebel (n 32).

⁴⁴⁵ ‘A Charmed Life, Excerpts from a Conversation with Judge Ronald St. J. Macdonald, European Court of Human Rights, 7 August 1995’ (n 411) at pp. 62.

I came through here [New Haven] in the summer of nineteen and thirty ... and went in to meet your father [Charles Clark], and he was very busy as dean and didn't have too much time to fool with me, but he said what are you interested in, what would you like to teach? And I told him jurisprudence. He said we don't even teach it here. We don't believe in it. And I almost went through the floor, I thought I'd come among illiterates or barbarians... or something... this was about all they taught at Oxford. And ah, after a few weeks here of course, in the fall, I found out that everybody taught jurisprudence, that this was just the beginning of American legal realism.⁴⁴⁶

McDougal had arrived at Yale just as what he called a “middle generation” of legal realists held currency. Charles Clark, Wesley Sturges, Arthur Corbin and Ernest Lorenzen mediated his introduction to the body of American scholarship in law that had come to be denoted ‘realist’. As teachers and scholars, these figures tended to share a view of what law was, what it was for, and how you should go about doing it. To draw together what was a frequently nuanced body of scholarship; they thought law was a social and cultural construction, deeply beholden to its context. They thought law was for pursuing collective goals. They thought you should go about doing it with those goals at the forefront of your mind and in a sceptical mood, critical of dogma of any kind.

Perhaps since Karl Llewelyn’s 1931 attempt to authoritatively list ‘realist’ legal scholars, copious energies have been committed to discussion of who was a legal realist, who was a ‘proto-realist’, who was neither, who opposed them as a ‘Langdellian formalist’ but who was a ‘Bealist’, what all of these labels mean, and whether we should be talking about a group of ‘legal realists’ at all.⁴⁴⁷ Reading Llewelyn’s 1931 *Harvard Law Review* article, a bombastic, peculiarly statistical rejoinder to Roscoe Pound’s relatively tame and sympathetic appraisal of the new ‘realistic jurisprudence’, it is easy to discern that these disputes about the character and membership of an enthusiastically labelled ‘movement’ were prompted at least in part by

⁴⁴⁶ Interview with Clark (n 163).

⁴⁴⁷ Karl N Llewellyn, ‘Some Realism about Realism: Responding to Dean Pound’ (1931) 44 *Harvard Law Review* 1222. ‘Bealism’, a term used by Jerome Frank and others, referred to the scholarship of Joseph H. Beale, a prominent member Harvard’s law faculty, see: Frank, *Law and the Modern Mind* (n 134). Considering the utility of the term ‘legal realism’ and finding in its favour, see: Neil Duxbury, *Patterns of American Jurisprudence* (Oxford University Press 1995) at pp. 65-71. See also: William Twining, *Karl Llewellyn and the Realist Movement* (Second edition, Cambridge University Press 2014); and: Laura Kalman, *Legal Realism at Yale, 1927-1960* (Univ Of North Carolina Press 2011).

oversized personalities and institutional politics.⁴⁴⁸ These labels can also simply seem unconvincing when taken at face value as indications of substantive intellectual differences. Notwithstanding much deeply detailed research distinguishing proto-realists from realists, realism proper from Pound's sociological jurisprudence and Christopher Langdell's case-based teaching, and realists from other realists, these scholars can also be read as sharing an enormous amount of common ground.

The 1933 meeting of the Association of American Law School affords a good illustration of this. Clark summed the mood as one of flux and plurality: "Destruction of ancient dogmas has been done with a devastating completeness; but erection of a sound or accepted legal science is little advanced, while the winds of all sorts of doctrines rage."⁴⁴⁹ Yet if a lawyer not versed in the very particular folkways of early twentieth century New England and Southern conservatism, along with elite Northern progressivism, were to have stumbled upon these animated white Protestant men in the gilded function room of the Stevens Hotel, the similarity of their ideas about law would have been what was most striking.

All were seized as to law's embeddedness in a thick social context, and its subordination to social goals. That social context was the modern American industrial society. Those social goals were articulated from the perspective of a reality in which the law teachers thought truth was known in experience, in particular the experience of the common person, the 'Little Man'. All believed (with differing levels of radicalism) that by veiling conservative reaction behind absolutist reasoning, law had supported liberal capitalism's destructively inequalitarian social order. They all thought law needed to be conceived as an actively administered method of social control, openly committed to value-orders. All were also convinced their vision of law's 'social function' must be realised not through cloistered philosophising, but through experience-oriented education.⁴⁵⁰ Put differently, they were all the intellectual children of philosophical pragmatism.

⁴⁴⁸ Roscoe Pound, 'The Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697.

⁴⁴⁹ 'Minutes of the Thirty-First Annual Meeting' (n 362) pp. 17.

⁴⁵⁰ In interwar America, debates about the nature, methods and purpose of legal education were hotly contested. In many ways these debates were a way of talking about questions existential to a new 'profession' of university-based law teachers. For an overview of these debates: William W Fisher, Morton J Horwitz and Thomas Reed, *American Legal Realism* (Oxford University Press 1993) pp. 270-273.

McDougal's earliest contact with realist ideas, upon meeting Charles Clark in 1930, conveyed as much. Clark's peremptory dismissal of jurisprudence, "...we don't even teach it here. We don't believe in it", was not a careless comment. It was precisely what it purported to be – a statement of belief, a foundational one. In a legal idiom, Clark was restating philosophical pragmatism's rejection of the epistemology-centred problematic of modern European philosophy, what the pragmatists saw as an obsessive preoccupation with metaphysical questions about the nature of knowledge, to the exclusion of the 'empirical'. While by the 1930s 'legal realists' had come to be understood, and frequently to understand themselves, as challenging 'Langdellian formalism', 'Bealism', or Pound's sociological jurisprudence, these foils are best understood as proxies. At its core, the challenge the realists had inherited was a challenge to the sedimented, reactionary jurisprudence of the English common law.

Through the 1930s, McDougal's writing fell between two traditions of thought that descended from philosophical pragmatism and shaped the intellectual terrain of legal realism. He believed that values had social reality, that lawyers should talk about them, and wanted to associate himself with those he saw as the more radical realists. This connected him to a version of philosophical pragmatism that emphasised social critique. At the same time, he was repelled by the corrosive scepticism that seemed to haunt realists like Jerome Frank, Underhill Moore, Wesley Sturges and Walter Wheeler Cook. This discomfort with the possibility of nihilism pushed McDougal towards a conservative approach to philosophical pragmatism, one more concerned with description and prediction than social change. We can better understand the nature of McDougal's commitments to legal realism by understanding these two pragmatist traditions.

In his intellectual history of philosophical pragmatism, Louis Menand has reconstructed the earliest discussions in which Charles Sanders Peirce and William James, the founders of pragmatism, developed their ideas. They took place in a discussion group formed in Boston in January 1872, which Peirce later remembered being ironically named 'The Metaphysical Club'. The group included at least two lawyers, who would later become representatives of the two traditions of pragmatism between which McDougal fell. They were Nicholas St. John Green and Oliver Wendell Holmes.⁴⁵¹

⁴⁵¹ Louis Menand, *The Metaphysical Club* (Farrar, Straus & Giroux, 2001) pp. 201-203.

As we have seen, Peirce, James and later John Dewey thought the subject/object dichotomy a pernicious fallacy, and that answering these questions one way or the other made no difference whatsoever to the experience of living. While they developed the idea in different ways, they thought the only test of something we could call ‘truth’ had to relate to the practical effects different ways of thinking had in our lives. A loose way to describe their views could be to say they did not believe thinkers who refused to structure inquiry around these practical effects were doing philosophy, or that the monopoly of such thinkers over the legitimate subject matter of philosophy should be rejected. Charles Clarke meant much the same thing when he said that at Yale Law School they didn’t believe in jurisprudence.

Like Peirce and James, Nicholas St. John Green and Oliver Wendell Holmes were also seized by the conviction that it was necessary to reject ways of thinking that purported to find truth in idealised disengagement from experiences of living. They historicised such ways of thinking, dissolving their purported disengagement from society and culture. Starting from a belief in truth as a function of experience, and nursing a caustic intolerance of abstract reasoning that had practical effects only in ways it could not acknowledge, Green and Holmes took as their targets the theological premises and rationalist legal maxims of English jurists like Thomas de Littleton, Edward Coke, Francis Bacon, Matthew Hale and William Blackstone.⁴⁵² In broad terms, Green and Holmes did to the English common law what Peirce, James and John Dewey did to Cartesian ‘rationalism’.⁴⁵³

From the works of Green and Holmes, we can trace our two traditions of pragmatism into legal realism. Green, a trenchant critic of the hypocrisy, bigotry and sexism he saw rationalised in the legal doctrines of 1860s Boston, opened a tradition of social critique with a plebeian democratic ethos.⁴⁵⁴ From Holmes came a similarly contextual, historicist way of challenging abstract ideas, but no preoccupation with injustice veiled by that abstraction.⁴⁵⁵ While Dewey, James, Green and Peirce expected philosophy based on their conception of ‘experience’ to

⁴⁵² A judge addressing the AALS in 1933 invoked this tradition quite explicitly: “That arch common lawyer, Lord Coke, that foe of equity, put it this way...”. ‘Minutes of the Thirty-First Annual Meeting’ (n 362). pp. 78.

⁴⁵³ See: ‘How to make our ideas clear’, in: Peirce and others (n 112) pp. 124-141.

⁴⁵⁴ Critiquing ideas about causality in scientific inquiry from Aristotle, through Scholastic philosophy and into the ideas of Bacon and Descartes, see: Nicholas St John Green, ‘Proximate and Remote Cause’ (1870) 4 American Law Review 201. Attacking evangelical Christian sexism: Nicholas St John Green, ‘Book Review: Commentaries on the Law of Married Women under the Statutes of the Several States and at Common Law and in Equity. By Joel Prentiss Bishop. Vol. I. Philadelphia: Kay and Brother. 1871’ (1871) 6 American Law Review 57.

⁴⁵⁵ His classic formulation: “The life of the law has not been logic: it has been experience.” Oliver Wendell Holmes, *The Common Law* (Macmillan & Co 1882) pp. 1.

engender social change, Holmes' faith in the "able and experienced men" of law, "who know too much to sacrifice good sense to a syllogism", left him quite satisfied with the social order as it was.⁴⁵⁶ The change his 'general theory' proposed was in the description of how law's *form* came to be the way it was. He was much more complacent about law's *substance*. "The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient..."⁴⁵⁷ He and Green both thought legal principles should be understood by reference to what had practical effects in our lives, what was 'convenient'. Unlike Green, Holmes thought that in substance, that was what happened anyway. He did not feel several hundred years of disingenuously articulated abstract reasoning had consequences in the way Green or the other classical pragmatists did. The differing traditions of Green and Holmes turned on their respective radical and conservative understandings of the political import of the pragmatist project of re-description.

As a consequence of his circumscribed view of re-description, Holmes' pragmatism, which was his legal realism, took 'prediction' rather than social change as its end. "The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts."⁴⁵⁸ Placing him in a context of 'pragmatic modernists', Lisi Schoenbach has examined Holmes' emphasis on prediction by juxtaposing 'The Path of the Law' with Henry James' (William's brother) novel *The Wings of the Dove*.

Holmes's use of prediction in "The Path of the Law" to streamline and simplify law's relationship to time is undermined repeatedly by the essay's multiple and often contradictory rhetorics. In Henry James's late novel, *The Wings of the Dove* (1902), by comparison, James makes a powerful case against prediction on ethical and aesthetic grounds, while also helping us to see how it is an understandable response to the pressures of modern life. James's novel suggests an entirely different relationship to the future from that represented in Holmes's essay, one that emphasizes contingency and freedom rather than management and control. ... What emerges from an extended analysis of prediction in these two texts is thus another characteristically pragmatist dialectic, one that attempts to balance calculation and contingency, management and freedom, insurance and risk.⁴⁵⁹

⁴⁵⁶ *ibid.* pp. 35-36.

⁴⁵⁷ *ibid.* pp. 1-2.

⁴⁵⁸ Oliver Wendell Holmes, 'Path of the Law' (1896) 10 *Harvard Law Review* 457 pp. 457.

⁴⁵⁹ Schoenbach (n 125) pp. 85-86.

Here, Henry James takes Green's place as counterpoint to Holmes, illustrating what Schoenbach identifies as a 'characteristically pragmatist dialectic' between 'management and freedom'. Considering the centrality to modern epistemology of prediction, statistics and probability, Schoenbach notes that it was as old orders of determinism were eroded that modern ideas of 'control' like Holmes' came to seem so important. "In other words, the characteristically modern experience of becoming unmoored from established systems of belief, institutions, and social structures is met by an obsessive commitment to control, to a quasi-religious belief in the power of statistics and the laws of probability."⁴⁶⁰

This dialectic between management and freedom, conservatism and radicalism, Holmes and Green, shaped the work of many legal realists by the 1920s and 1930s. Some followed Holmes and oriented their deformed conception of law around the prediction of 'outcomes'. Others used the same premises of deformalisation to pursue political aims, with Roosevelt and the New Deal offering relevance, purpose and employment.⁴⁶¹ Yet for some, value-scepticism and nihilism also attended this latter pole of the dialectic. McDougal's early legal realism can be understood as an effort to occupy a middle ground between these two poles of a pragmatist dialectic.

4.6 McDougal teaches in the Midwest, settles on the East Coast, and chooses a collaborator

As McDougal mingled with other law teachers in the Stevens Hotel in December 1933, he was preoccupied by concerns more practical than the value-angst expressed in his minuted intervention from the floor. Reflecting on the period late in his life, McDougal recalled that

⁴⁶⁰ *ibid.* pp. 88-89. In 'The Path of the Law' Holmes famously says: "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics". at pp. 469.

⁴⁶¹ At the AALS in 1933, Jerome Frank speaks for realists of this persuasion. The proximity of his ideas to philosophical pragmatism is apparent: "For the New Deal, as I see it, means that we have taken to the open road. We are moving in a new direction. We are to be primarily interested in seeking the welfare of the great majority of our people and not in merely preserving, unmodified, certain traditions and folkways, regardless of their effect on human beings. That important shift in emphasis is the vital difference between the New Deal and the Old Deal philosophy. . . . *Principles are what principles do. And if the old principles, which the high priests of the Old Deal worshipped, dictated the unhappiness that we call a depression, then . . . those principles are not divine but Satanic, barbarous and cruel. We must find new principles, new guides for action, which will tend to produce happiness and security in the place of anguish and confusion.*" 'Minutes of the Thirty-First Annual Meeting' (n 362) pp. 102-103 [emphasis original].

after his doctorate at Yale Law School he had been ‘farmed out’ to teach at the University of Illinois at Urbana. Sturges, his doctoral supervisor and mentor in realism, used his connections to get McDougal hired at Illinois, promising to offer him a post at Yale later.⁴⁶² Charles Clark was dean of Yale Law School, and agreed to the arrangement. McDougal recalled Clark’s promise: “If you’re really an American legal realist we’ll bring you back in three years.”⁴⁶³ McDougal was sent to Illinois because many saw it as a ‘Yale school’, a faculty on which teachers would be trained before being ‘called’ back to New Haven. When he was hired in 1931, the majority of the law faculty were graduates of Yale.⁴⁶⁴ McDougal taught courses in credit transactions and personal property, and quickly became associate dean. He was close to the dean, Albert J. Harno, who was also a Yale graduate. He remembered life in the Midwest as a happy time.⁴⁶⁵

Nonetheless, not quite three years after Clark made his promise, McDougal used the AALS meeting to avow his realism.

So at one meeting of the Law School Association in Chicago, I deliberately attacked a Harvard man called Joey Beale and cut him up pretty badly. Beale was a very famous man and I cut him up on purpose, just for Clark to hear it and Clark told me that day, he said, “We’ll bring you back. I think you’ve grown up,”...⁴⁶⁶

The ‘call’ came when McDougal was in Michigan fishing with friends from Urbana. Restocking on food in a grocery store, he collected a two-week old telegram from New Haven inviting him back to Yale Law School. He brought the telegram back to Urbana and went to see Harno.

... I told the dean I did not think I wanted to go back to Yale anymore; I had grown to like the Midwest and wanted to live there. The dean said nothing for quite a long time; he kept looking at the telegram, turning it over and over and over again, very

⁴⁶² Myres Smith McDougal Papers (MS 1636). Manuscripts and Archives, Yale University Library. Accession 1995-M-002. (n 435). Box 30 D11, 12, 146. Telegrams from Albert J. Harno to Myres McDougal dated 25 March and 24 April 1931. Letter from Albert J. Harno to Myres McDougal dated 24 April 1931.

⁴⁶³ Collier (n 160) pp. 6.

⁴⁶⁴ Interview with Clark (n 163). McDougal recalled that The University of Ohio was another ‘Yale school’, while the University of Michigan served the same purpose for Harvard: Interview with Johnstone (n 100).

⁴⁶⁵ ‘A Charmed Life, Excerpts from a Conversation with Judge Ronald St. J. Macdonald, European Court of Human Rights, 7 August 1995’ (n 411) at pp. 65.

⁴⁶⁶ Collier (n 160) pp. 6. Interview with Clark (n 163).

slowly; finally, he looked up at me and said, “Mac, I waited forty years for this but it never came. I would advise you to go.”⁴⁶⁷

McDougal accepted the job, returning to New Haven in 1934. He was intended to teach a course on ‘business units’ alongside William Douglas, but when Abe Fortas unexpectedly became available Douglas preferred to teach with him, pushing McDougal into property law alongside Charles Clark. McDougal was relieved. He saw himself as a country boy who had grown up on the land and knew the land, while he knew nothing about business and Wall Street.⁴⁶⁸ In this way he opened a career in property law, becoming a popular teacher. As his published writings from the period attest, McDougal’s realist approach to the field was strident. He had been hired as a young scholar who would teach and write about law in this way. It was the intellectual orthodoxy of Yale Law School: “... a fellow would have to leave if he wasn’t a realist.”⁴⁶⁹ At the same time, he was looking for an intellectual apparatus he did not have. He did not have a scientific explanation for his belief in social values, for their character and relation to law. He found this intellectual apparatus when he met Harold Lasswell.

In the summer of 1935, McDougal taught at the University of Chicago as a visiting professor. Late in his life he would consistently recall the same details of the morning he met Lasswell. Over breakfast he read a newspaper review of *World Politics*. The reviewer concluded that they could not understand it, but it was evidently a great book and there must people who could. Before beginning his class that morning, McDougal noticed Lasswell’s name on the door opposite his own.

When I finished my own class noises were still coming out of this room and I thought I'd go over and see if I could understand the great man. I went in and sat down in the back of the room, and he was applying psychoanalytical techniques to the biography of H.G. Wells, which was the book of the month club selection for that month and I was about half through reading the book. I sat and listened to Lasswell for an hour applying psychoanalytical techniques to Wells and never finished the book.⁴⁷⁰

⁴⁶⁷ ‘A Charmed Life, Excerpts from a Conversation with Judge Ronald St. J. Macdonald, European Court of Human Rights, 7 August 1995’ (n 411) pp. 65.

⁴⁶⁸ Interview with Tipson (n 49).

⁴⁶⁹ Collier (n 160) pp. 29.

⁴⁷⁰ Interview with Tipson (n 49). The original analysis, with the handwritten heading ‘Law, Policy and Science study materials’, indicating this analysis was used in Lasswell and McDougal’s seminars, can be found in: Harold

McDougal introduced himself and a long lunch followed.

I was completely fascinated with the man. He was just exactly what I was looking for. I was looking for something that was constructive to add to what we called American legal realism at Yale. ... And ah, I went back to the law school and told them what a wonderful man I had just met, and they just guffawed with laughter, said "He's crazy! We were going to do a study together, he wanted to know whether the courthouse was wired with direct or alternating current." Then they'd laugh with great glee, and this set me back a little. But I asked my wife to give a dinner party, to which I invited all of his critics and invited him. In about 15 minutes I knew who was crazy. Lasswell could run circles around them without their even knowing what he was doing to them.⁴⁷¹

Lasswell seemed to have something to say about how to build from scepticism in legal realism, how to explain and pursue social values and goals.

This was the thing that struck me about Harold from the beginning, it was the emphasis upon the goals of law that caught my eye.... This was the emphasis even when he was analysing H.G. Wells, what does this man want you see? What was he trying to do?⁴⁷²

McDougal saw the implications these psychoanalytic theories of human motivation could have for law. On many occasions he said of their collaboration:

I made it clear to the students then and I make it clear to them now that the basic ideas of the law, science and policy stuff all came from Lasswell. I didn't create those ideas but I was able to understand them and use them. That was the contribution I thought I made.⁴⁷³

Dwight Lasswell Papers (MS1043) Manuscripts and Archives, Yale University Library. Accession 2010-M-039. Box 3 Folder 11. D1-51. 'An Analysis of H.G. Wells'.

⁴⁷¹ Interview with Tipson (n 49).

⁴⁷² Interview with Tipson (n 420).

⁴⁷³ 'A Charmed Life, Excerpts from a Conversation with Judge Ronald St. J. Macdonald, European Court of Human Rights, 7 August 1995' (n 411) pp. 67.

Yet soon after he and Lasswell had taken over Thurman Arnold and Edward Robinson's jurisprudence course, McDougal considered a different intellectual partner – the Polish anthropologist Bronislaw Malinowski. Malinowski's 1922 *Argonauts of the Western Pacific*, based on ethnographic work he conducted while living on the Tobriand Islands in Melanesia, had been enormously influential and garnered him a reputation as a methodological innovator in anthropology. When World War Two began he had moved from England to America, taking a post at Yale. He cultivated McDougal as a possible collaborator. McDougal attended Malinowski's seminars and helped revise his draft writings. McDougal felt he had to choose. Once again, McDougal's wife was called on to deliver a dinner party.

... I decided that I had to decide which one I wanted to work with. I couldn't work with both of them, they seemed to me to have completely compatible systems but very different words. So my wife gave a dinner party, we lived out at the end of Livingston Street, in one of those big red houses, she gave a dinner party. I had both Lasswell and Malinowski there ... they got in a fight and they just pawed up that living room from about six until midnight, but Lasswell could whip him, I saw that if I was going to work with one that Lasswell was the one I wanted because his words were more like my words and he was more adept with them, and ah... Malinowski was a little more like the English training I had had you see, he had been trained in England himself, or he had trained the English. I had just about decided that I was going to go with Lasswell but Malinowski asked me to teach a course on international law with him. He said, "Your predecessor, Borchar, he doesn't know a thing about international law," and "Let's teach a course and teach it the way it ought to be taught," he says "It's just like primitive law, it's like the law in the Melanesian islands."⁴⁷⁴

McDougal agreed with this view of international law and committed to teach it with Malinowski, but circumstances changed.

We were gonna give this seminar in the fall, this was just before World War Two, and ah, Malinowski went to raise money... he was a very loyal Pole... to raise money for the Poles at a fundraising event down in New York. He got so excited he died of a heart attack during the ceremony. And we never got to give the seminar, though

⁴⁷⁴ Interview with Tipson (n 420).

we'd talked it over and I knew exactly what he was going to do. But I was forced back on Harold then, I didn't have any choice between Malinowski and Harold after his death.⁴⁷⁵

McDougal was drawn to Lasswell, as to Malinowski and later to many students, because he saw people who could help him construct. Late in life he said he collaborated with people...

...I liked and I thought had ideas that I didn't have, people who were creative. A question of not only liking them but they were people who were creative who could help me create the things I wanted to create you see. ... I owe most of my books and articles to some cooperating student. There's no question. I like to work with other people and I work more easily. Maybe it's a lack of confidence or maybe it's the fact that I enjoy working with people I like, I don't quite know why... I prefer collaboration, but I do.⁴⁷⁶

In this same period immediately before the Second World War, McDougal's predisposition towards collaboration prompted the beginning of another long and formative relationship. Though short-lived in terms of published works, it is notable for its similarity to his partnership with Lasswell. Maurice Rotival was a French urban planner who took a professorship at Yale's School of Architecture in 1939. He came to New Haven from Caracas, where he had been a central contributor to a new master plan for the city.

In the late 1930s Venezuela was a nation ascendant on the strength of oil dollars. Financial and technical arrangements with America came with those dollars, followed during the war by concern about the influence of fascism and communism, and in turn by a propaganda campaign waged by Nelson Rockefeller as 'Coordinator of Inter-American Affairs'. This was the third branch of the US propaganda mill, the first two being MacLeish's 'Office of Facts and Figures' and Donovan's 'Office of the Coordinator of Information'. The Latin American branch spoke doggedly of the hemispheric unity that Lasswell was writing memos about in Washington, also, notably, on Rockefeller largesse. Rotival was a prominent representative of modernist French urban planning, associated with the famous *Société Française des Urbanistes*, as well as internationally renowned architects like Le Corbusier and Wallace Harrison - a close friend

⁴⁷⁵ *ibid.*

⁴⁷⁶ Interview with Tipson (n 49).

and advisor to Rockefeller. The urban concept for the Caracas plan was completed in 1939, but the outbreak of war stalled its realization and Rotival came to New Haven, assuming the professorship in planning that he had obtained with the help of the well-connected Harrison.⁴⁷⁷

In later years McDougal remembered his serendipitous first meeting with Rotival. One afternoon he happened on a lecture the new professor was delivering in New Haven, following a sign on the street. He watched as students scrambled for the beautiful sketches Rotival would draw and let fall to the floor as he spoke. He later recalled, "Rotival was like Lasswell, close to a genius."⁴⁷⁸ McDougal had been appointed chair of a committee on regional planning by Charles Seymour, the university president, and through this committee began to work with Rotival.

Many people who thought themselves progressive believed social planning necessitated management not alone of the psychic realms of law and institutions, but also of built environments. The Tennessee Valley Authority (TVA) was a federal agency created under Roosevelt to plan and manage power, waterways and economic development in a rural area much impoverished during the Depression. It was extremely controversial, yet by the late 1930s its practical success was clear to many and it was cited as the flagship example of New Deal regional planning. Legislation passed in 1937 channelled federal money to local bodies charged with planning the improvement of housing for low-income families.⁴⁷⁹ This prompted and supported more expansive projects in urban development, university chairs like Rotival's, and the work of committees like McDougal's.

Rotival joined McDougal as a second chair of this committee, the rumour around the law school being that they were developing a TVA for New England. Many alumni and members of the powerful governing board, the Yale Corporation, already suspected the law faculty a seedbed of radicals. McDougal's insistent notions of government intervention, not to mention a Frenchman with monumental European visions, were never going to sit well. On one occasion Rotival had a napkin thrown in his face by an enraged alum.⁴⁸⁰ Nonetheless, Seymour stood

⁴⁷⁷ Carola Hein, 'Maurice Rotival: French Planning on a World-Scale (Part I)' (2002) 17 *Planning Perspectives* 247. pp. 258. See also: Carola Hein, 'Maurice Rotival: French Planning on a World-Scale (Part II)' (2002) 17 *Planning Perspectives* 325.

⁴⁷⁸ Interview with Tipson (n 49); Interview with Clark (n 163).

⁴⁷⁹ Hein, 'Maurice Rotival' (n 477) pp. 258.

⁴⁸⁰ Interview with Clark (n 163).

firm as McDougal's patron, and in 1947 the committee's study was published, *The Case for Regional Planning with Special Reference to New England*.⁴⁸¹

Comprising a text largely written by McDougal, this study was an important statement of Rotival's conception of urban planning and the role of the planner.⁴⁸² The figure of the urban planner was cut to the same measure as the lawyer policy-maker. The ends of the science of planning and the ethic of the call were almost identical to the principles Lasswell and McDougal applied to legal education. Rotival, reflecting attitudes in French modernist urban planning of the time, saw the planner as much more than a designer concerned with the materiality of lived-space. The urbanist was an engineer of social harmony concurrent with, and contingent on, built harmony. They were policy-makers close to power, charged with managing social equilibrium through the physical environment.

Influenced from an early age by the mentorship of the famous French architect and planner Eugène Hénard, Rotival followed him in understanding the city as an organism. The planner's role was a therapeutic one, like a surgeon. Rotival sketched alternate *universes* for decision-makers – the past and possible future lineaments of a region's broad economic, geopolitical and historical context – alongside *keys*, a spectrum of interventions that could adjust development towards different future *universes*.⁴⁸³ Examining Rotival's theoretical development in New Haven, Carola Hein notes that he “considered planning an apolitical science, a means to promote democracy and a protection against communism.”⁴⁸⁴

A year after the publication of his study with Rotival, McDougal provoked further controversy with a casebook compiled in collaboration with a student, David Haber, elaborating land law as a planned affair.⁴⁸⁵ *Property, Wealth, Land; Allocation, Planning and Development* pushed concerned legislators in Texas and Washington State to prohibition, threatening the withdrawal of funding from law schools that used the text.⁴⁸⁶ As well as its planning orientation, the book

⁴⁸¹ Myres McDougal, *The Case for Regional Planning with Special Reference to New England* (Yale University Press 1947).

⁴⁸² *ibid.*, pp. 5.

⁴⁸³ Hein, ‘Maurice Rotival’ (n 477) pp. 255.

⁴⁸⁴ *ibid.*, pp. 253. See also: Paul Rabinow, *French Modern Norms and Forms of the Social Environment* (University of Chicago Press 2014) pp. 358.

⁴⁸⁵ Myres McDougal and David Haber (eds), *Property, Wealth, Land; Allocation Planning and Development: Selected Cases and Other Materials on the Law of Real Property* (Michie 1948).

⁴⁸⁶ Interview with Tipson (n 49).

included an article on Russian property law by Harold Berman. This was too much in Texas, where the book was never taught. In Washington State some pushback from the academy ensured it saw light on reading lists.

4.7 Building a 'school'; a problem with values

If “the basic ideas of the law, science and policy stuff” were drawn from Lasswell’s interwar social theory, it is also true that other characteristics of the body of ideas about law that became known as the New Haven School reflected McDougal’s career and intellectual life in the 1920s and 1930s. The very existence of a body of collaborators that desired to identify themselves as a ‘school’ can be understood as in part a consequence of McDougal’s consistent interest in nurturing warm relationships with students. His charismatic, personable style of offering very substantial support to students he liked is often remarked upon, and was not far removed from the interpersonal skills required of a Southern country politician.⁴⁸⁷

On a theoretical level, we can see McDougal’s problem with values, a legacy of philosophical pragmatism also shared by Lasswell, carried through moments like the 1943 legal education article; a prominent 1959 presentation McDougal delivered to the American Society of International Law based on an article he co-wrote with Lasswell; and his 1968 speech in Vienna.⁴⁸⁸ Early in their collaboration on policy-oriented jurisprudence, McDougal’s

⁴⁸⁷ A colleague of McDougal’s, Eugene Rostow develops this theme in: Eugene V Rostow, ‘Myres S. McDougal’ (1975) 84 *The Yale Law Journal* 704. Describing ‘three McDougals,’ the senator, the teacher and the scholar, Eugene Rostow paints the first as “a consummate Mississippi politician of the old school: worldly, perceptive, and persuasive – principled, to be sure, but above all an artist in power.” at pp. 704. It is also sometimes noted that McDougal adopted a very welcoming posture towards students from abroad at a time when other faculty of Yale Law School were less welcoming. McDougal reflects on this in oral histories late in his life. His view was that some of his colleagues were second generation immigrants themselves, and as a result did not like to have so many foreigners in the law school. Interview with Johnstone (n 100). See also: Interview with Florentino P Feliciano, ‘Oral History Discussion’ (7 January 1993).

⁴⁸⁸ At the 1959 Annual Meeting of the American Society of International Law, McDougal was the outgoing president and had themed the three-day conference around an article he had written with Lasswell: Myres McDougal and Harold Lasswell, ‘The Identification and Appraisal of Diverse Systems of Public Order’ (1959) 53 *The American Journal of International Law* 1. In the discussion following McDougal’s combative, Cold War themed presentation to the society, all questions were addressed to his evidently pragmatist conception of what could be perceived as value. Near the end of an extended discussion, he was pushed as to whether his belief was that the ‘law of human dignity’ he and Lasswell advocated was not itself an ethical idea. McDougal responded that he “...was not interested in logical derivations employing infinite regress in justification of values. It is a scientific question, of course, how people actually acquire values. That he might be interested in, for purposes of affecting the future. By logic, one can invent or use any given ethical system in justification, but such exercises simply annoy and divide people. When one talks about ethics and ideologies and systems of morality, without the detailed specification of concrete values and the factors affecting their acceptance, one is very quickly off into a

preoccupation with values prompted him to insist that Lasswell further specify their role in his theoretical framework.⁴⁸⁹ Hence, from three indicative value categories in *World Politics*; five were specified in the 1943 article (power, respect, knowledge, income, safety); and in the *Law, Science and Policy* seminars this became the list of eight that would be widely associated with the New Haven School – power, enlightenment, wealth, respect, well-being, skill, affection, rectitude.⁴⁹⁰

never-never land, which is not very fruitful. Common values and shared science, but not common ideologies or common derivations, are necessary.” Abdul Abbass, an Iraqi diplomat and scholar, said he “... was really confused on this issue of values. First of all, he really did not know how we derive them, how we judge them, and his confusion increased when one used the terms ‘short-range, mid-range and long-range’ values. What are these?” McDougal replied, “...they are simply preferences that we living human beings now have. They are the secular, empirical values that most of us cherish, and you may derive them any way that makes you happy.” ‘Proceedings of the American Society of International Law at Its Fifty-Third Annual Meeting’ (n 54) pp. 135-136. Even in 1993, when discussing the limits of textual interpretation with Rosalyn Higgins, McDougal felt distaste for lawyers who maintained the philosophical premises he had spent much of his career criticising: “We [policy-oriented lawyers] think people that think law is something autonomous and distinct from policy are deluding themselves, that they can't make a rational decision, can't make a rational assessment of the means if they're employing a false notion of law. ... they're absolutists you see, and I don't care for absolutists. ... I think the treaty amendments and revisions mean very little. Because the larger context is what's important. ... Fundamentally I'd make this a struggle between people who believe in logical derivation and people who don't...”. Interview with Higgins (n 32).

⁴⁸⁹ McDougal notes his insistence on this point in: Interview with Johnstone (n 100).

⁴⁹⁰ Harold Lasswell and Myres McDougal, ‘Law, Science and Policy’ (1958) (Unpublished working papers; copy on file with author). Part II Ch I D2 pp. 31. Speaking in Manchester in 2018, it was in relation to the possibility of such a list that Philip Allott stated his divergence from the ideas of the New Haven School: Allott (n 99).

Chapter 5.

Democratic character is a social inheritance

5.1 A 'free society' is a society of self-insight

From the naming of a 'school' in 1968, we have followed a set of ideas about the relationships between law, social order, value and personality backwards in time, through significant moments of Lasswell and McDougal's lives in 1930s and 1940s Washington and New Haven, and before that in Europe, Illinois and Mississippi in the 1930s, 1920s and 1910s. That set of ideas, which drew so much attention to McDougal in Vienna, and prompted Falk, Weston, Higgins and others to identify themselves as members of the New Haven School, was what Lasswell and McDougal taught together at Yale Law School. Having been students of Lasswell and McDougal was what Falk, Higgins, Reisman, Weston and other New Haven School members had in common. Apart from the 1943 'Legal Education' article, it was only in their teaching that Lasswell and McDougal thoroughly explained their framework of legal and social theory.⁴⁹¹ That framework, as will become evident in this chapter, was not intended to apply only, or even particularly, to international legal studies. Lasswell and McDougal's ambition was broader – to teach a theory of how social order between humans came about, and could be maintained.

⁴⁹¹ McDougal makes this explicit in: Interview with Johnstone (n 100).

They began to teach together in 1939 but it was the late 1940s before policy-oriented jurisprudence was systematically stated and taught as such.⁴⁹² The jurisprudence was taught in seminars called *Law, Science and Policy*, with the aid of several hundred pages of typed materials, an unpublished book manuscript. The first line of the first chapter of this manuscript declared its audience to be those “concerned with jurisprudence for a free society”.⁴⁹³ It is easy to read statements like this alongside McDougal’s post-war neoconservative foreign policy interventions and conclude the jurisprudence is best understood as the sabre-rattling of Cold Warriors.⁴⁹⁴ In these seminars at least, that was not what was meant.

We can understand what was meant by yet again microhistorically pursuing an earlier moment. Had you tuned your radio to a station on the National Broadcasting Company (NBC) network

⁴⁹² The Yale Law School curriculum announcement for Fall Term 1947 listed *Law, Science and Policy* alongside the following description: “Law and science as instruments of public and private policy, with reference to selected problems of property and politics. The seminar is designed to test and to apply an analysis of the legal process outlined in publications by the directors of the seminar. New problems are selected each term in order to avoid duplication. In the fall term emphasis will be on legal semantics. The distinctive language of the lawyer will be studied in the perspective of what is now known about language as a whole and an effort will be made to relate this distinctive language to the other variables that affect official behavior. Methods of forecasting appellate court decisions and opinions will be evaluated. Basic literature includes the work done and inspired by I. A. Richards, Rudolf Carnap, Edward Sapir, Charles W. Morris, Alfred Korzybski, and others. In the spring term emphasis will be on the interrelations of the decision-making process and the structure of personality and culture. The effect on official response of education, experience, temperament, and character will be explored. Basic literature includes the work done and inspired by Max Weber, Marx, Pareto, Malinowski, Freud, Hull, Warner, Dollard, Fromm, and others.” Reproduced in: Myres McDougal, ‘The Law School of the Future: From Legal Realism to Policy Science in the World Community’ (1947) 56 *The Yale Law Journal* 1345 pp. 1353.

⁴⁹³ Lasswell and McDougal, ‘Law, Science and Policy’ (n 490). (Lillian Goldman Law Library, Yale Law School) Part I Chapter I (page numbering irregular). Later references to these materials are to this original unpublished version, dated 1956-1958. However, a published edition that includes additions and edits made by Myres McDougal and Andrew Willard after Lasswell’s death has been available since 1992: Lasswell and McDougal, *Jurisprudence for a Free Society* (n 100). Of this book, McDougal has said: “Well that book is simply the summation of everything that I have done and a partial summation of what Harold did and it’s the book that we both wanted to remember by... and we had a little difference, Harold wanted to publish it immediately, without any improvements and I simply couldn’t publish until I had it the way it was satisfactory to me, and Harold eventually conceded that, and revised this book shortly before his death. He went over and revised the whole book and ah... he did not put in the footnotes and all but Andy [Willard] has been able to find the footnotes and he and I have made the present text completely compatible with what Harold and I stood for all over the years.” Interview with Tipson (n 49). On the same topic see also: Interview with Johnstone (n 100). There, McDougal noted that before publication of *Jurisprudence for a Free Society*, the ideas developed in the seminar materials he taught from with Lasswell only appeared in a small number of publications of Lasswell’s. It is likely he was referring to publications like Lasswell’s 1951 ‘Democratic Character’, which we will examine below. On yet another occasion, McDougal said: “In a seminar on “Law, Science, and Policy,” designed largely for prospective teachers and offered for several decades in the Yale Law School, Lasswell and I sought to build upon and develop the themes announced in the [1943] article. In collaboration with our students and other associates, we made application of the recommended theories and procedures in many books and articles, most notably in international law, property law, and criminal law. A book to be published in 1991 – Lasswell & McDougal, *Jurisprudence for a Free Society: Studies in Law, Science, and Policy* – will contain the lectures and other materials, somewhat revised and updated, prepared by Lasswell and me to conduct the seminar.” Shapiro (n 1) pp. 1507.

⁴⁹⁴ On the construction of the concept of the ‘free world’ in American public discourse and foreign policy, see: Peter Slezkine, *Free World: The Creation of a U.S. Global Order (Forthcoming)* (PhD Dissertation, Columbia University 2020).

at 7.45 p.m. EST on Wednesday 17th May 1939, perhaps WEAJ in New York or WMC in Memphis, you would have heard Harold Lasswell deliver this introduction:

The first time I inspected a hospital for the care of the mentally ill, I thought of a strange and interesting possibility. Imagine that you could take all the mental fragments that you saw around you and put them together. You could build one giant mind. You would take every mood – the weeping, melancholy mood; the angry, raging mood; the expansive, assertive mood – and all the rest. You would take every idea and fit it with the other: the idea of superiority, the idea of weakness and so on. You might assemble a giant mind very much as you build a giant airship out of separate parts. As it is, a mental hospital seems to be a heap of mental pieces, like a jig saw puzzle, scattered all around.⁴⁹⁵

Lasswell was introducing a series of broadcasts scripted by him and titled *Human Nature in Action*. The series ran on a weekly basis over much of the rest of 1939 and 1940. Had you remained with Lasswell, his NBC co-presenters and growing cast of actors until the final broadcast in December 1940, you would have understood that he thought collections of humans and collections of nations looked a lot like that heap of mental pieces he first perceived in a hospital. Individual human beings were driven by deep psychological impulses. The collectivities they created and called communities, societies or nations were creatures of themselves, vehicles for innumerable such impulses.

People could be seen as constantly shifting, adjusting mental fragments, coalescing into larger mental fragments that in turn shifted and adjusted to constantly changing circumstances. They were fragments because at a snapshot in time they could be characterised as more or less driven by particular impulses: anger and assertion, seeking respect; condescended upon and fearful, seeking security; feeling superior, feeling weak. These impulses were common to humans and Lasswell thought they could and should counterbalance each other. If they were counterbalanced within each human mind, you might have that ‘giant mind’. Nations and international society might be a ‘giant airship’, each of its separate parts an individual mind organised such that its impulses balanced and integrated with material circumstances of life in the least destructive ways possible.

⁴⁹⁵ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series 2. Box 109 Folder 12 D3. NBC, ‘Human Nature in Action’ (17 May 1939).

The unifying theme of this series of broadcasts is that the enemy of man is his own destructiveness – his destructive impulses and his destructive practices. As a means of genuine freedom, we need freedom from destructiveness.⁴⁹⁶

Freedom was to be free of our selves, free of personality structures that moved at the behest of motivations of which we were unconscious, in most cases causing at least some, and often crippling damage to our relationships with other people. Freedom required us “to be candid about ourselves to ourselves”, in this way dissolving the potentially violent grip of the unconscious self and achieving more control over how we touched others.⁴⁹⁷

This was a political project in “the golden age of self-discovery”.⁴⁹⁸ ‘Freedom’ was not an empty symbol for Lasswell. Like Freud, Peirce, Green, James and Dewey, Lasswell believed that if a person could attain genuinely candid insight into their experience of reality, the important questions of how to live a good life in that reality would be answered in the re-description forced by such insight. Questions such as what ‘freedom’ logically permitted or demanded in this or that circumstance, or how it could support derivation of moral codes, were elaborate ways of avoiding insight. If a person achieved ‘freedom’ in the way Lasswell meant it, they already had their good life, and as a consequence would contribute to the collective good life. If you genuinely achieved insight into the impulses of your self, it was not hard to understand the needs of other people, to empathise with vulnerabilities of others as your own, to appreciate the necessity of your contribution to collective projects that tried to build worlds that might make the self secure. To achieve political and social change, enough people needed to understand themselves. Otherwise collective projects would be harried and undermined by the insecurities of the personalities that constituted them, the destructive impulses and practices born of those insecurities. “The world of the future will only be a better place to live in, if the men and women in it are different.”⁴⁹⁹

⁴⁹⁶ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series 2. Box 109 Folder 12 D80. NBC, ‘Human Nature in Action’ (12 July 1939).

⁴⁹⁷ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series 2. Box 109 Folder 12 D95. NBC, ‘Human Nature in Action’ (19 July 1939).

⁴⁹⁸ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series 2. Box 109 Folder 12 D63. NBC, ‘Human Nature in Action’ (28 June 1939).

⁴⁹⁹ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series 2. Box 109A Folder 17 D130. ‘Human Nature in Action’, *The Man of the Future* (17 December 1940).

This basic point, that insight into the self was a condition of social change, was not only the unifying theme of these broadcasts. It was arguably the unifying theme of Lasswell's life as an intellectual, and it was certainly the unifying theme of the policy-oriented jurisprudence he taught with McDougal in the *Law, Science and Policy* seminars. In those seminars, 'jurisprudence for a free society' meant the kind of 'freedom' Lasswell had explained on NBC. The 'free society' envisaged in policy-oriented jurisprudence was a society of self-insight.

5.2 The policy-oriented understanding of law

5.2.1 The self-consciousness of authority

To be a student in Lasswell and McDougal's *Law Science and Policy* seminars was to aspire to be a student of all human society. It was to assume a task that was communicated as an ethic – to continually relate every detail taken as the centre of one's attention to past, present and possible futures of "the social process as a whole".⁵⁰⁰ This demanded genuinely multi-disciplinary competences, duly imparted in almost six hundred pages of dense materials. If you had joined Lasswell and McDougal's 1950s seminars you would quickly have realised that the course was not going to foreground 'law' as such. A definition of 'law' was offered, its place and operation in different social situations periodically examined, but it took its meaning from a much larger theory of social life. Like Lasswell's *Human Nature* broadcasts, that theory built a world outwards, from the human psyche to collectivities of people, to institutions, law and culture. Accordingly, by far the densest and largest portion of the seminar materials developed a detailed theory of psychological interiority – what the self was, how it was constituted by relationships with other people, and how such relationships formed patterns of practises that constituted collective life.⁵⁰¹

⁵⁰⁰ Lasswell and McDougal, 'Law, Science and Policy' (n 490) Part II Chapter I.

⁵⁰¹ See references examined in detail below, and in particular: *ibid.* – Part II Chapter I 'The Social Process as a Whole' (can be compared to pp. 335-372 in Lasswell and McDougal, *Jurisprudence for a Free Society* (n 100)); Part II Chapter II 'Specific Value-Institution Processes' (pp. 375-587 *Jurisprudence*); Part II Chapter III 'The Dynamics of Personality' (pp. 591-631 *Jurisprudence*); Part II Chapter IV 'Political Personality' (pp. 631-669 *Jurisprudence*); Part II Chapter V 'Political Culture' (pp. 683-709 *Jurisprudence*); and Part III Chapter 5 'The Projection of Future Developments' (compare esp. pp. 995-1002 *Jurisprudence*).

As McDougal frequently noted, policy-oriented jurisprudence drew heavily on Lasswell's *World Politics*. The psychoanalytic theory of social life explored in that book was significantly deepened in the *Law Science and Policy* seminars. Its implications for the conceptualisation of ideas like 'authority', 'order', 'violence' and 'control' were given much more attention than they had received in *World Politics*. Building out these implications as Lasswell and McDougal did, from core premises about the self, resulted in an approach to law that in disciplinary terms is best captured by calling it anthropological. Some of Sigmund Freud's own work demonstrated that when psychoanalysis was given a social twist, it prompted methods and topics of inquiry that shared most with the work of cultural anthropologists.⁵⁰²

Several hundred pages into the seminar materials, a student would have found a "drastic" hypothesis about the origin of law elaborated, though not endorsed by Lasswell and McDougal. The hypothesis was that;

... "law" was first invented in a city, and thereafter copied. For this purpose law is defined as rules consciously made for the regulation of conduct. Before the city, it is held to be inconceivable that rule-making would occur. If rules are challenged in small folk cultures, the challengers are disposed of, or adjustments are made by methods that deny deliberate rule making. Cities on the other hand pose the problem of adjusting the continuing relations of people, many of whom possess the same basic conceptions, but are confronted by new behavior problems. Authority becomes detached, manipulative, and conscious.⁵⁰³

He was not cited, but on other occasions Lasswell and McDougal associated this hypothesis with the work of Gordon Childe, a prominent Australian archaeologist known for applying Marxist social theory to archaeology.⁵⁰⁴ Its significance can be understood as an allegorical evocation of an idea about the early twentieth century context in which it was written rather than a factual claim about the prehistory of law. That idea, that as people related to each other in intense, specialised and imbricated ways in urban industrial societies, authority could no

⁵⁰² The seminal examples: Sigmund Freud, *Civilization and Its Discontents* (David McLintock tr, Penguin Books 2002); Sigmund Freud, *Totem and Taboo: Some Points of Agreement between the Mental Lives of Savages and Neurotics* (James Strachey tr., Routledge Classics 2004).

⁵⁰³ Lasswell and McDougal, 'Law, Science and Policy' (n 490) Part III Chapter 4 'The Scientific Examination of Conditions'. D4 pp. 94.

⁵⁰⁴ The same hypothesis appears in: Myres McDougal and Harold Lasswell, 'Jurisprudence in Policy-Oriented Perspective' (1967) 19 University of Florida Law Review 486 pp. 488; and: McDougal and Feliciano (n 39) pp. xxxv (Introduction, by Lasswell).

longer take for granted ‘adjustments’ prompted by shared ‘basic conceptions’, animated McDougal’s legal realism, Lasswell’s social theory, and in turn policy-oriented jurisprudence. In the modern world authority had become detached, whether from theology, metaphysics or ‘folk’ culture. If it became sufficiently detached, it could only be related to as manipulative. Most significantly of all, like moderns themselves, it had become self-conscious. The *Law, Science and Policy* seminars laboured to inculcate in a captive elite an answer to the quintessential problem of the modernist jurist – the self-consciousness of authority.

5.2.2 *When order is law*

Lasswell and McDougal tried to use what they thought of as the detachment of authority distinctive to the modern era to contextualise its past lives in cosmologies of theology, metaphysics or ‘folk’ cultures. Detailed exercises in such historical contextualisation took up large portions of their materials. They drew on legal customs recounted in anthropological research like Bronislaw Malinowski’s study of the Tobriand islanders, Robert Lowie’s writing on the state in ‘primitive society’, Karl Llewellyn and Edward Hoebel’s study of the Cheyenne Indians, and Meyer Fortas and E. E. Evans-Pritchard’s *African Political Systems*.⁵⁰⁵ They also developed detailed contextual sketches of the “history of some of the most important theological and metaphysical systems of mankind”, considering social, political and economic aspects of the history of Confucianism, Buddhism, Roman Catholicism, Calvinism, German Idealism and Marxism.⁵⁰⁶ Each portrait of a social structure that had borne authority was treated allegorically, to reveal something about the self’s constitutive relationship with authority. These allegories supplied the interpretative material from which a complex system of carefully defined terms was extrapolated.

A cluster of key terms was central to Lasswell and McDougal’s understanding of law.

⁵⁰⁵ Lasswell and McDougal, ‘Law, Science and Policy’ (n 490) Part II Chapter II ‘Specific Value-Institution Processes’ D2 pp. 66-67, 73-74, citing: Bronislaw Malinowski, *Argonauts of the Western Pacific: An Account of Native Enterprise and Adventure in the Archipelagoes of Melanesian New Guinea* (George Routledge & Sons, Ltd 1932); Robert H Lowie, *The Origin of the State* (Harcourt, Brace & Co 1927); Karl N Llewellyn and E Adamson Hoebel, *The Cheyenne Way. Conflict and Case Law in Primitive Jurisprudence*. (University of Oklahoma Press 1941); and Meyer Fortes and EE Evans-Pritchard, *African Political Systems* (Published for the International African Institute by Oxford UP 1970).

⁵⁰⁶ Lasswell and McDougal, ‘Law, Science and Policy’ (n 490) D3 pp. 150-164.

If we ask an expert to tell us about the “legal philosophy” of a given civilization, we expect him to reply by quoting the most important doctrines that are an articulate part of the civilization in question. These propositions are meanings, in the present sense of the term, since they purport to designate patterns in which subjective outlook (indicated by words) is important. By contrast, if we ask how a spear is thrown or how a pottery wheel is used, the reply deals for the most part with the physical operations involved in the manipulation of material objects. The fact is that all human interactions involve meanings in varying degree; hence the distinction we are making is a slope and not a chasm. We are using the term “perspective” to designate the inner life of those who participate in an interaction, and the term “operation” to refer to the visible behavior. A pattern of perspectives and operations that recurs in a social process is called a “practice”, and a pattern of practices which are specialized to a value constitutes an “institution”. We use the term “myth” to designate all the perspectives current in an institutional complex, and “technique” to refer to all the operations.⁵⁰⁷

Building outwards from the psyche, law was a pattern of meanings in the inner lives of people. The important term ‘perspective’ referred to those inner lives. Coupled with physical ‘operations’, perspectives became ‘practises’, which in turn focused on the pursuit of particular values and became ‘institutions’. All the perspectives that animated a constellation of many related institutions were a ‘myth’, all the operations ‘technique’. These concepts, from the collective level of myth and technique inwards to the individual’s perspective and operations, were a way of breaking down the idea of culture or civilisation. A point made above and emphasised throughout the seminars was that this vocabulary sought to deny the existence of an ontological dichotomy between the material and the immaterial. Lasswell and McDougal’s conception of law was at the same time *both* patterns of inner meaning *and* embodied actions in material contexts, at individual and collective levels.

Nonetheless, law was most importantly a type of inner meaning collectivised.

The categories which have been developed with the structure of personality in mind are applicable to all perspectives that prevail in a given community considered as a whole. The term myth has been introduced as a means of designating all group

⁵⁰⁷ *ibid.* Part II Chapter I ‘The Social Process as a Whole’. D2 p. 38.

perspectives, and hence applies to collective identifications, expectations and demands. Investigation shows that these patterns are grouped in more complex structures which may be distinguished from one another as follows: myth = doctrine + formula + miranda.⁵⁰⁸

‘Doctrinal’ components of any myth were those at the highest level of abstraction that affirmed group perspectives. “Such propositions make use of the basic symbols of identification, together with the formulation of fundamental goal values and beliefs concerning the past, the present, and the future.”⁵⁰⁹ Seminar students received a list of examples from the American Declaration of Independence and the Virginia Bill of Rights. The ‘formula’ of a myth was made up of prescriptions considered binding on members of the community – most of what would generally be called ‘law’. Students were referred to the Constitution for the main examples of formula drawn from the American myth. Finally, the ‘miranda’ were “... the popular legends, anecdotes, poems, and other folk elements embellishing the basic themes of the myth.”⁵¹⁰ In this schema, law was found within myth as formula and possibly doctrine.

Different parts of any particular myth could be more or less accepted by members of different social classes, which brought students to the important “... distinction between the parts of the myth which prevail among the upper classes and elsewhere in society.”⁵¹¹ A myth could be characterised as ‘ideology’ and ‘counter-ideology’. Lasswell and McDougal advised speaking “... of a myth as counter-ideology when an established ideology is explicitly rejected in the name of an alternative system.”⁵¹² They suggested that communities could exist where there were no ideological differences between classes, but in others the differences may be significant. Given law’s place in any collective myth, this allowed for analysis of law’s relationship to different social classes. In a situation where discontent had been systematised, law might be found in a counter-ideological myth. Echoing class-based, Marxist analysis in Lasswell’s previous work, especially *World Politics*, policy-oriented jurisprudence reminded its 1950s adherents:

⁵⁰⁸ *ibid.* D2 pp. 44. These concepts are also explained in Harold Lasswell and Abraham Kaplan, *Power and Society: A Framework for Political Inquiry* (Yale Univ Press, 1950), see esp. pp. 116-133. Lasswell and Kaplan note that they take them, with some adaptations, from Italian elite theory, in particular the writing of Gaetano Mosca: Gaetano Mosca, *Ruling Class* (McGraw-Hill 1939).

⁵⁰⁹ Lasswell and McDougal, ‘Law, Science and Policy’ (n 490) Part II Chapter I ‘The Social Process as a Whole’. D2 pp. 44.

⁵¹⁰ *ibid.* Part II Chapter I ‘The Social Process as a Whole’. D2 pp. 45.

⁵¹¹ *ibid.* Part II Chapter I ‘The Social Process as a Whole’. D2 pp. 45-46.

⁵¹² *ibid.* Part II Chapter I ‘The Social Process as a Whole’. D2 pp. 46.

The class system of the community is the principal outcome of past activities. It provides a frame for future effort.⁵¹³

‘Law’ characterised several possible parts of a collective myth. A myth itself was a manifestation of social order. To interrogate the meaning of social order, Lasswell and McDougal described what they conceived as the self-regulating devices by which cultures preserved themselves. Some deviations from the mores of a culture were met with sanctions, individuals were deprived of values. Other actions were expected to occur under normal circumstances despite being deviations, and were called ‘counter-mores’. ‘Built in’ sanctions that responded to counter-mores and to the violation of mores could be formal and legal, or informal. “The crucial point is that such a pattern must be expected to be restorative or protective of the culture.”⁵¹⁴ The fundamental framework of social order comprised a culture’s mores and counter-mores.

The seminar materials quickly ushered students to the realisation that this framework of social order could be mapped on to the structure of individual personality.

It is useful to analyze the patterns of personality from a standpoint comparable with culture. Some tendencies to act (whether completed or not) arouse defences within the personality system, ranging from instantaneous inhibition to many forms of self-attack. ... In general the conscience (or the superego, in psychoanalytic terms) is the structure within the personality that automatically applies sanctions. On examination it appears that every person possesses deep impulses which are in more or less direct conflict with the modes of behaviour that have been acquired and built into the conscience. Hence at least part of the impulse life (the id) is nonconformist.⁵¹⁵

⁵¹³ *ibid.* D2 pp. 147. Class-analysis social structure based on these concepts was developed in greater detail in Lasswell and Kaplan (n 508), e.g. pp. 62-69; 206-208. This source is frequently identified as indicative of the general policy-oriented framework in New Haven School writings in the 1960s. E.g. Falk, ‘On Treaty Interpretation and the New Haven Approach: Achievements and Prospects’ (n 37) pp. 330 n. 11; Weston (n 11) pp. 647 n. 1; and Moore, ‘Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell’ (n 55) pp. 664 n. 3, 665 n. 5. In the *Law, Science and Policy* materials, Lasswell and Kaplan are also cited as illustrative of the ‘general frame of reference’ concerning power and governmental institutions that is extended in policy-oriented jurisprudence: Lasswell and McDougal, ‘Law, Science and Policy’ (n 490) at ‘Reading List’ D1 pp. 6.

⁵¹⁴ Lasswell and McDougal, ‘Law, Science and Policy’ (n 490) Part II Chapter I ‘The Social Process as a Whole’. D2 pp. 47.

⁵¹⁵ *ibid.* Part II Chapter I ‘The Social Process as a Whole’ [emphasis original]. D2 pp. 48-49.

In the same way the impulse life of society prompted counter-mores and violation of mores, the individual id prompted tendencies sanctioned by the super-ego according to standards ‘built in’ to the self.

The super ego includes part of the ego ideal, or the relatively permanent perspectives incorporating the principal demands upon the self by the self, and the closely interrelated expectations. The super ego and the ego ideal, taken together, are the character, comprising the requirements adopted by the self and enforceable by the self. It is clear that unless the social order is sustained by most of the personalities in the community that the continuity of the order is vulnerable. The fate of the ideology and the social structure depends in large part upon their success in knitting themselves into the inner lives of the persons who carry the culture from one time to the next.⁵¹⁶

Lasswell and McDougal taught that continuity of social order was a matter of character. Cultures were carried by people. The defensive, protective function of collective sanctions – largely realised as law – depended on the extent to which a group’s ideology and mores were coextensive with the masses of super-egos and ego ideals of which it was composed. Law was a collective manifestation of internalised defences against impulses of human inwardness.

Policy-oriented jurisprudence was not concerned with offering a fixed, “one and only” definition of law.⁵¹⁷ It was concerned however, with explaining when ‘order’ became ‘law’. This explanation rested on the parallel drawn above between the individual’s internalisation of limitations upon the self through the super-ego, and a culture’s imposition of sanctions based on mores. Lasswell and McDougal defined law as a type of relationship. It was a relationship of power, which took the form of decisions that were both authoritative and controlling.⁵¹⁸ They differentiated authority and control using sample statements:

“The mayor of this town is Joe Doaks, but the boss is Tom Brown”; “The King reigns but he does not govern”; “The country has a written constitution on the American model, but is run by a succession of military dictators”; “Nominally the

⁵¹⁶ *ibid.* Part II Chapter I ‘The Social Process as a Whole’. D2 pp. 49.

⁵¹⁷ *ibid.* Part II Chapter II ‘Specific Value-Institution Processes’. D2 pp. 69.

⁵¹⁸ *ibid.* Part II Chapter II ‘Specific Value-Institution Processes’. D2 pp. 60.

Soviet Union is a socialist state run for the benefit of all; actually it is a garrison-police state run for the benefit of a few”; “Parliamentary democracy is a facade for the exploitation of the proletariat by the plutocracy”.⁵¹⁹

Malinowski’s fieldwork bolstered these examples. The ethnographer’s carefully recorded formal legal codes often misrepresented the reality of sanctions in a group. Authority was not constituted by written legal codes, it was constituted by the expectations of members of a group. It was these perspectives that might invest some corpus, process or ceremony with authoritative meaning. Control was difficult to ascertain, but in policy-oriented jurisprudence it meant attempting to understand sanctions as they were lived in a group and touched a person’s life – what Malinowski called the ‘cultural-context’.⁵²⁰ In so far as it related to the existence of law, the type of social organisation was not important. Lasswell and McDougal saw law in what social anthropologists of the time called unorganised and ‘primitive’ cultures. Meyer and Pritchard’s study of indigenous political systems in Africa claimed to have found examples of cultures without ‘government’, the system in Eskimo communities of sanction for murder being personally administered by a relative of the victim was also cited.⁵²¹ The policy-oriented view was that in these examples, expectations about authoritative sanctions were widely held and group members experienced a compelling demand to act accordingly, which meant there was law.

Seminar students were encouraged to distinguish this definition of law from prevailing schools of jurisprudence and philosophy.

Note that this is not a “positivist” definition, if by the traditional word “positivism” is meant a conception of law as purely descriptive of what “is” of [sic] “has been”. We can speak of law as it “ought” to be if we lay down our goal values, and search for institutions capable of bringing our goals to life. Note further that this is not a “metaphysical” definition, if by that expression is meant the use of a term to refer to phenomena which are assumed to belong to a realm beyond description. By law we designate actual or potential features of the social process, including subjective as well as non-subjective events. (The subjective perspectives can be observed

⁵¹⁹ *ibid.* Part II Chapter II ‘Specific Value-Institution Processes’. D2 pp. 62.

⁵²⁰ *ibid.* Part II Chapter II ‘Specific Value-Institution Processes’. D2 pp. 64.

⁵²¹ *ibid.* Part II Chapter II ‘Specific Value-Institution Processes’. D2 pp. 66-67. Fortes and Evans-Pritchard (n 505).

directly by introspection, or indirectly by interviewing and other appropriate procedures.)⁵²²

But not all authoritative and controlling relationships could be law. A yet more profound requirement needed to be fulfilled.

We think of law as in some sense restrictive of arbitrariness. “Self-limitations” upon utter capriciousness are the minimum degree of order that begins to cover the nakedness of control with some cloak of authority. This is the essential point in the interpretation of law as “order”, which is a recurring theme of practice and jurisprudence. The kernel of the notion of order is that there is some stability of expectation (some absence of capriciousness) about what is demanded by decision makers, and how it is demanded.⁵²³

Social order was law when limitation was placed upon the capriciousness of the collective by the collective. Policy-oriented jurisprudence taught its students to see law as a special and potentially desirable relationship of order, as more than a constraining rule serving a dominant myth and perhaps class, because it could be the part of the collective psyche that internalised limitations on its own capriciousness. The significance of this emphasis is perhaps best understood by following the idea from the collective level back to its origins in a theory of psychological interiority.

5.2.3 Law should minimise anxiety

The idea was built on Freud’s theory that in modern civilisation, the individual experienced inner drives to satisfy urges (the id) that were incompatible with their civilised environment. These drives were aggressions against civilised life. Unable to satisfy them, the personality was compelled to redirect the drives inward, against the self (the ego). A part of the ego became the conscience (the super-ego), charged with imposing the aggressive drives on the rest of the ego that had originally been directed outward from the self. Freud argued: “In this way civilization overcomes the dangerous aggressivity of the individual, by weakening him,

⁵²² Lasswell and McDougal, ‘Law, Science and Policy’ (n 490) Part II Chapter II ‘Specific Value-Institution Processes’. D2 pp. 69.

⁵²³ *ibid.* Part II Chapter II ‘Specific Value-Institution Processes’ [emphasis original]. D2 pp. 72.

disarming him and setting up an internal authority to watch over him, like a garrison in a conquered town.”⁵²⁴ Freud was particularly preoccupied with the individual’s sense of ever-present guilt, created by the tension between the super-ego and ego. He traced this feeling to “... a fear of loss of love, a ‘social anxiety’. In a small child it can never be anything else, but for many adults too the only change is that the place once occupied by the father, or by both parents, has been taken over by the wider human community.”⁵²⁵ The intuition that the relationship of a mature personality to authority was formed in important ways by the child’s relationship to a parent, and to a certain extent was analogous to that relationship, was a core premise of much psychoanalytic social thought.

The seminar materials shifted some of Freud’s original emphases. Rather than Freud’s epochal, civilizational experience of ‘guilt’, policy-oriented jurisprudence focused on ‘anxiety’ and the sense of enduring insecurity it created in the individual. In 1951, around the time Lasswell was preparing the *Law, Science and Policy* seminars with McDougal, he explored the meaning of anxiety in his own closely related writing. Drawing on Harry Stack Sullivan, he said:

[Sullivan] ... described sudden severe anxiety in these terms: “(It) ... is undergone in later life as what I call *uncanny emotion*, chilly crawling sensations, and the like, often meant by the words ‘awe,’ ‘dread,’ ‘loathing,’ and ‘horror.’” According to Sullivan’s theory the starting point of anxiety reactions can be discovered in infancy when the person who mothers the infant “*is anxious, angry, or otherwise disquieted.*” “This *interpersonal induction* of anxiety, and the exclusively interpersonal origin of every instance of its manifestations, is the unique characteristic of anxiety and of the congeries of more complex tensions in later life to which it contributes”.⁵²⁶

Lasswell saw anxiety and the insecurity it created as the great threat to the modern ego. Because it could cripple individual personalities, it could cripple the collective projects that were the interpersonal manifestations of those personalities. Anxiety was personally and consequently socially destructive. As anxiety in the child was traced to the parent, in society it was traced to

⁵²⁴ Freud, *Civilization and Its Discontents* (n 502) pp. 61.

⁵²⁵ *ibid.* pp. 62.

⁵²⁶ Harold Lasswell, ‘Democratic Character’, *The Political Writings of Harold D. Lasswell* (The Free Press 1951) pp. 509. Citing: Harry Stack Sullivan, ‘The Meaning of Anxiety in Psychiatry and in Life’ (1948) 11 *Psychiatry* 1 pp. 5 [emphasis original].

authority and to law. Policy-oriented jurisprudence was an effort to plumb this connection, to fashion relationships of law that minimised anxiety. Lasswell and McDougal taught that the presence of ‘self-limitations upon utter capriciousness’ indicated when order was law, because analytic case-histories of anxious children tended to reveal parents who subjected their children to capricious demands. These demands came from the parent's own unconscious impulses, unexamined through introspection and so not placed within limitations by their own self-insight. Speaking on *Human Nature*, Lasswell described one such case-history;

The father who is unaccountably severe one day, and mushily sentimental the next, is a source of anxiety to the child. The environment is not serene or even consistent. It is capricious and unsettling.⁵²⁷

In this example, by attaining insight into his self to reveal the unconscious impulses affecting his behaviour towards his child, the father was able to change the way he related to the child. Revealed and confronted, the unconscious drives lost their power and could be subjected to self-control. Thereafter, in the father the child found an authority less prone to expression of unexamined destructive impulses, and a more well-organised reference point for the child's own process of internalising limitations on the self.

Policy-oriented jurisprudence took the same view of the collective expression of unconscious impulses. It could be said that from the policy-oriented perspective, order was law to the extent it mediated the dysfunctional father. This was a perspective concerned by the spectre of authority giving vent to capriciousness – unconscious – drives. Authority of this type created insecurity in the individual, distorting characters. It was therefore not conducive to the continuity of a social order. The individual personality was forced to organise its parts, internalising the demands of collective life through the super-ego to redirect unconscious drives. It followed that the inner life of a society had to be similarly organised. Self-insight needed to be attained to reveal unconscious impulses expressed at the level of a human group. To reveal a previously unexamined collective impulse was to deprivilege the position of that impulse and to reduce its destructive potential by subjecting it to a cultural super-ego. Law

⁵²⁷ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series 2. Box 109 Folder 12 D60. NBC, ‘Human Nature in Action’ (n 498).

should be an expression of that super-ego, internalised restraint by a cultural self of the cultural self.

On another occasion in the same period, Lasswell expressed this idea in a manner that emphasised its implications for international law. In the introduction to a book McDougal co-wrote with Florentino Feliciano on the international law of the use of force, Lasswell cited the Austrian born Israeli Jewish philosopher Martin Buber's statement "The antithesis of constraint is not freedom but unitedness". Building on this statement, Lasswell said:

From your perspective or mine the creative opportunity is to achieve a self-system larger than the primary ego; larger than the ego components of family, friends, profession, or nation; and inclusive of mankind. A self-system of this kind does not abolish the primary ego nor deny loyalty to intermediate groupings. Rather, it provides a frame of survival and fulfilment for articulating demands and expectations appropriate to any component of human society. In our terminology voluntary self-commitment is an act of freedom; in this sense Buber should read: 'The antithesis of coercion is unitedness voluntarily attained.'⁵²⁸

5.3 The policy-oriented understanding of character and constitutional order

5.3.1 The state within us

Trimmed bare, the conception of law that Lasswell and McDougal's seminars sought to impart was of authority that had internalised limits on its potential for capricious expression, the outcome of analysis of a collective unconscious. While this was the basic policy-oriented understanding of law, it was not the conceptual starting point of the jurisprudence. It is more accurate to call it an ending, an extrapolation to law of the psychoanalytic theory of personality and culture Lasswell had developed in *World Politics*. Building from that base theory, by the 1950s *Law, Science and Policy* included something *World Politics* had not, an idea that added a distinctly jurisprudential core. That idea was that constitutional order depended on the

⁵²⁸ 'Introduction: Universality versus Parochialism' in: McDougal and Feliciano (n 39) pp. xxxviii.

personal character of citizens, and that it was possible to describe, and cultivate, a ‘democratic character’.

The first thorough exposition of the connection between the constitution of a body politic and the character of the individual citizen was made by Plato in the *Republic*. In paragraphs that still astound the reader for their depth and ingenuity Plato anticipated the theories of Freud and outlined a comprehensive account of the interdependence of the policy making institutions of society and the institutions by which individual character is given its special stamp. The essential insight can be formulated in the hypothesis that the stability of the constitution depends upon the moulding of the appropriate form of character (or personality). It was recognized that these factors were part of a larger equilibrium which involves many other elements. But the specific point is that personality is a significant feature of constitutional stability. To some extent the stabilizing of public order fosters the appearance of uniform types of personality that harmonize with the regime; and conversely the emergence of a new form of personality facilitates the eventual modification of the system of public authority and control.⁵²⁹

Reading Plato alongside Freud in this way, *Law, Science and Policy* pursued the conviction that had been the centrepiece of Lasswell and McDougal’s 1943 article – the task of legal education was to cultivate a rising American elite. That elite needed to be a democratic elite. Policy-oriented jurisprudence brought this idea much further, theorising the internal organisation of a personality that was ‘democratic’ and examining formative ideological and material influences in childhood and education that moulded such a personality. The bare conception of law as internalised limitation based on self-insight was the distilled concentrate of this thick description of democratic character. If law was the mediation of the dysfunctional father, democratic character was what would result from a particular process of mediation, a process the *Law Science and Policy* seminars aspired to describe and have a hand in enacting.

Lasswell and McDougal asked how transmission of mores from one generation to another – an order perpetuating itself through the education of its young – breaks down.

⁵²⁹ Lasswell and McDougal, ‘Law, Science and Policy’ (n 490) Part II Chapter V ‘Political Culture’ [emphasis original]. D3 pp. 76.

Plato's answer is: disturbances occur in the relation between fathers and sons. More generally, the disequilibrating influence is alleged to be a breakdown in the relations between the elder generation and the successor generation. By the "father" (the elder generation) is meant all individuals who have authority (and control) in society, whether the person is the actual father or the surrogate of the father (like the teacher).⁵³⁰

Plato fitted comfortably alongside Freud, similarly concerned by the dysfunctional figure of authority. Plato's famous formulation of dysfunction was as the father's exaggeration of the constitutional ideal. In Plato's hypothesis the timocratic, honour-loving father pursued self-effacement to an extent the son thought extreme, prompting the rise of an ambitious generation. Exaggerated ambition in turn begot children who pursued wealth as reaction against the unselfish ideals of their parents. The children of wealth pursued a wider conception of self-satisfaction, becoming what Plato thought of as self-indulgent democrats, while the children of democrats strayed towards illicit self-satisfactions and became tyrannical.⁵³¹ The process of cultural change Plato described was not an even sequence of constitutional orders succeeding each other in time. It was a social inheritance driven by impulses internal to generational personalities. The father did not rearticulate the constitutional order, he exaggerated it to satisfy inner drives, parts of what Plato called "the individual soul-state".⁵³² As Lasswell and McDougal put this; "... the elder generation deviates from the established order by changing the relationships that prevail between the ideal and the actual (between the symbolic pattern of conduct and the overt pattern)."⁵³³ Emphasising this disjunction between the symbols of an established order and the actions of the bearers of that order again evoked the figure of the capricious father. If an authority enacted impulses that could not be understood by referring to the acknowledged ideals, that authority would be experienced as capricious.

The connection Plato drew between the inner drives of the 'soul-state' and a particular constitutional order, policy-oriented jurisprudence approached through the concept of 'character'. Character could be divided into the 'self-system' and the 'energy-system'. The self-system was the constellation of values we embraced to make us who we were. It was

⁵³⁰ *ibid.* Part II Chapter V 'Political Culture'. D3 pp. 77.

⁵³¹ *ibid.* Part II Chapter V 'Political Culture'. D3 pp. 78-79; Plato, *Plato: The Republic* (GRF Ferrari ed., Tom Griffith tr., Cambridge University Press 2000).

⁵³² Lasswell and McDougal, 'Law, Science and Policy' (n 490) Part II Chapter V 'Political Culture'. D3 pp. 79.

⁵³³ *ibid.* Part II Chapter V 'Political Culture'. D3 pp. 78.

composed of perspectives – our conscious demands, expectations and identifications.⁵³⁴ Some self-systems were dominated by one value – power or respect for example – others pursued a more diverse set of values. The energy-system incorporated unconscious drives that might conflict with the self-system.⁵³⁵ Serious cases of inner conflict between the self-system and energy-system could be found in psychiatric hospitals, the disorganised ‘mental fragments’ Lasswell had recalled on *Human Nature*. A constitutional order could be understood as a product of successful organisation between many self-systems and many energy systems at a moment in time – many personalities sufficiently organised to commit energy to their ideas about collective good. If this was so, a constitution’s integrity and longevity depended on a similar state of organisation within each new generation.

In a 1951 piece, *Democratic Character*, which explicitly noted its close relationship to the *Law, Science and Policy* working materials, Lasswell focused on this relationship between constitutions and character.⁵³⁶ A ‘democratic character’ had particular characteristics:

Let us take as the outstanding characteristic of democratic character ... *the maintenance of an open as against a closed ego*. By this expression our intention is convey the idea that the democratic attitude toward other human beings is warm rather than frigid, inclusive and expanding rather than exclusive and constricting. We are speaking of an underlying personality structure which is capable of “friendship,” as Aristotle put it, and which is unalienated from humanity. Such a person transcends most of the cultural categories that divide human beings from one another, and senses the common humanity across class and even caste lines within the culture, and in the world beyond the local culture.⁵³⁷

⁵³⁴ *ibid.* Part II Chapter III ‘The Dynamics of Personality’. D3 pp. 3. In: Lasswell, ‘Democratic Character’ (n 526), at pp. 481, the concept of the ‘self-system’ was attributed to the work of Sullivan, and of ‘identifications, expectations and demands’ to George Herbert Mead.

⁵³⁵ Lasswell and McDougal, ‘Law, Science and Policy’ (n 490) Part II Chapter III ‘The Dynamics of Personality’. D3 pp. 6.

⁵³⁶ Lasswell, ‘Democratic Character’ (n 526). Noting the inclusion of large extracts taken from the *Law, Science and Policy* materials at pp. 476 n. 22. The seminar materials in turn contained sections that developed the points made in the article, using many of the same sources and quotations. For application of some of these ideas in the work of McDougal in this period see: McDougal, ‘The Law School of the Future: From Legal Realism to Policy Science in the World Community’ (n 492) pp. 1346, 1349; and McDougal, ‘The Role of Law in World Politics’ (n 81) pp. 254-257, 260-263, and 276.

⁵³⁷ Lasswell, ‘Democratic Character’ (n 526) pp. 495-496 [emphasis original]. Earlier descriptions of the ‘democratic character’ can be found in: Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) esp. pp. 218, 231.

In the seminar materials, this ideal of openness and unalienated empathy was frequently described as sensitivity to many egos moving in relation to each other. Students would have been taught that social responsibility was a demand by the self upon the self and on others "... to consider more than the value position of one ego, and to take several values into account."⁵³⁸

Two further specifications were that a democratic character could not be pathologically driven by the pursuit of a single value (power or respect for example), and would have confidence in the "benevolent potentialities of man".⁵³⁹ The absence of such confidence was generally traced to absence of affection or to abuse. The final characteristic was most significant, determining the ability of a personality to realise any others.

*The ideal conception of democratic character includes the specification that the self-system shall have at its disposal the energies of the unconscious parts of the personality.*⁵⁴⁰

In this reframing of Plato's theory of social change, the controlled unconscious was taken as the lynchpin of all benevolent social action. Pursuing this idea meant examining the formation of the self-system in childhood, adolescence and through education, and attempting to understand how the conscious and unconscious drives of a personality might be organised so as to bring energy and self into alignment.

The seminar materials explained that from the point of view of constitutional order, it was particularly important that childhood impulses of aggression towards authority be successfully redirected and the energies of the self be channelled into internalising features of that authority.

Unless the child is able to cope fully with the anxieties generated in reference to authority figures, the structure of the emerging personality may be warped. To cope fully means to repress destructive impulses directed toward inhibiting figures, and to devote the energies of the personality to the task of incorporating the leading features of these persons.⁵⁴¹

⁵³⁸ Lasswell and McDougal, 'Law, Science and Policy' (n 490) Part II Chapter II 'Specific Value-Institution Processes'. D2 pp. 178.

⁵³⁹ Lasswell, 'Democratic Character' (n 526) pp. 502.

⁵⁴⁰ *ibid.* pp. 503 [emphasis original].

⁵⁴¹ Lasswell and McDougal, 'Law, Science and Policy' (n 490) Part II Chapter V 'Political Culture'. D3 pp. 81.

This was not an argument for the internalisation of a dominant social order and the repression of desire to question that order. Like the Freudian analysis of civilisation on which it was built, it is more accurately described as an argument about how human beings were socialised into being capable of living and acting together as any kind of collective, and how that socialisation could go wrong. To go wrong was generally understood as denial or qualification in the giving of love to a person, whether on the part of an actual parent or the wider social environment, which in turn distorted what could be loving, open and caring in that human personality. The self could be pushed into defending itself against insecurity through extremes of either destruction or withdrawal – defending itself against rather than with the other self.⁵⁴² In their 1943 article on legal education, Lasswell and McDougal had argued that democracy was in part a state of mind. Their 1950s teaching significantly deepened this view. Constitutional order was the state within us as much as without.⁵⁴³

5.3.2 *The mid-century figure of the authoritarian character*

While the democratic character was the ideal, one possible outcome of interpersonal dynamics damaged by poorly organised destructive impulses was the authoritarian character. Lasswell had modelled a society based on his conception of the psychology of authoritarianism as early as 1937 – ‘the garrison state’.⁵⁴⁴ This construct, recurrent in the *Law, Science and Policy* materials, was a speculative description of a future society “... in which the specialists on violence are the most powerful group in society. From this point of view the trend of our time is away from the dominance of the specialist on bargaining, who is the businessman, and toward the supremacy of the soldier.”⁵⁴⁵ The garrison state was Lasswell’s way of using Freud’s theory that civilisation demanded the personality disarm and be made subject to the

⁵⁴² *ibid.* Examined in more detail at: Part II Chapter V ‘Political Culture’. D3 pp. 80-81.

⁵⁴³ “It would be an exaggeration [sic] to say that for well over two thousand years Western man made no advances in the study of politics beyond Plato and Aristotle. But it is not exaggerating to say that no one went beyond Plato’s insight into the dynamics of the human soul until Freud penetrated one again into the lurid depths of the unconscious, and brought to the surface once more ‘the state within us,’ and revealed again the niagara of love and destruction within every living person.” Lasswell, ‘Democratic Character’ (n 526) pp. 468-469.

⁵⁴⁴ Harold Lasswell, ‘Sino-Japanese Crisis: The Garrison State versus the Civilian State’ (1937) XI *China Quarterly* 643. More fully developed in: Harold Lasswell, ‘The Garrison State’ (1941) 46 *American Journal of Sociology* 455.

⁵⁴⁵ Lasswell, ‘The Garrison State’ (n 544) pp. 455.

super-ego as “... an internal authority ... like a garrison in a conquered town”, to explore the social consequences of failed personality development.⁵⁴⁶

The garrison state was a society built atop authoritarian super-egos – a fascistic dystopia where bureaucratic civilian managers assumed the skills of violence traditionally confined to the soldier. Lasswell argued that modern technology and material conditions of life in industrial society had brought all people within the effective reach of war, controlling violence and propagandistic manipulation. He speculated that as a sense of crisis pushed societies to militarise, the skill sets of soldiers and civilian managers would merge. Manager-leaders of garrisoned states would socialise violence through their administration of society as “one unified technical enterprise”.⁵⁴⁷ This argument did not presume the garrison state would emerge based on psychological factors alone, but did hold they could undermine a pre-existing constitutional order and would contribute to shaping the social order to come.⁵⁴⁸

At the individual level, the authoritarian was one of the personalities ‘warped’ by failure to cope with anxiety. Because law was a relationship characterised by power, policy-oriented jurisprudence was particularly concerned with personalities that pursued power as a value. As the ideal conception made clear, a personality pathologically obsessed with power alone could not be a democratic character, yet it seemed demonstrable that people drawn to politics, law or positions of authority were often more driven by the pursuit of power than others. In policy-oriented jurisprudence, the ideal-type *homo politicus* was completely driven by the value of power. This “political personality” was distorted, destructive to itself and to society.⁵⁴⁹ Lasswell and McDougal noted the ‘political personality’ of policy-oriented jurisprudence corresponded to the ‘authoritarian personality’ developed by Theodor Adorno, Elsie Frenkel-Brunswick, Daniel Levinson and Nevitt Sanford in their 1950 book of that name.

Law, Science and Policy directed close attention to the way a child organised their relationship to authority in the family as they matured, transitioning from the parent-child relation to the adult’s broader relationship to authority in a society. This transitional ‘Oedipal stage’

⁵⁴⁶ Freud, *Civilization and Its Discontents* (n 502) pp. 61.

⁵⁴⁷ Lasswell, ‘The Garrison State’ (n 544) pp. 459.

⁵⁴⁸ Lasswell and McDougal, ‘Law, Science and Policy’ (n 490) Part II Chapter V ‘Political Culture’. D3 pp. 87.

⁵⁴⁹ See: *ibid.* Part II Chapter IV ‘Political Personality’. D3 pp. 32.

represented a conflict in the inner life of a child – between the desire to expand beyond the relationship with a parent-figure and to remain.

When this conflict is successfully resolved by the child a new set of goals is adopted in place of the demands for immediate body contact and for continual protection and supervision; and also in place of the destructive demand to annihilate the rival. The new goals implicate a wider context of human beings, and in general many more objects in time and space. Specifically, they include the copying of adult patterns of conduct and the sharing with playmates of the sub-culture of children that stays in touch with though remaining distinct from the world of adults. Directing energy towards progressive goals of this kind the child is able to hold his destructive tendencies in check and to forestall acute internal crises of anxiety in which guilt and fear predominate. Once the Oedipal phase has been successfully surmounted the personality has achieved a major consolidation, and is able to acquire the culture of his community at an accelerated rate.⁵⁵⁰

This was the re-direction of aggression and internalisation of mores on which a democratic character depended. According to this theory, when the Oedipal conflict was poorly navigated, in a sense the child failed to take possession of authority by reshaping it and making it a state of their own mind. Ambivalent treatment as a child – experience of the capricious parent who subjected the child to expressions of both love and hate – was identified as a particularly frequent source of such problems, and of the techniques for coping with anxiety that characterised an authoritarian personality.

There is evidence that politically centered characters have early received very ambivalent treatment and that the combination of abrupt deprivation and great indulgence generated an image of the self ... which pre-figures the power opportunities of later years. The individual has sharply contradictory conceptions of the self, some traits being positive and others negative. At one level he may think of himself as excelling in all values; at another level the ego is self-derided as unlovable, contemptible, guilty, dependent, stupid, clumsy, impoverished, and weak. Strong demands may be made upon the self, either to overcome the adverse features, or to take the consequences in terms of extreme self-deprivation, such as suicide. At the same time the principal demand upon others is to submit to one's

⁵⁵⁰ *ibid.* Part II Chapter IV 'Political Personality'. D3 pp. 38.

purposes, through coercion if necessary. Human relations are conceived in terms of struggle and conflict, and coercion is accepted as the state of nature and society.⁵⁵¹

Such internal contradictions created deep insecurity and anxiety. They had the potential to manifest in many ways extremely destructive to the self and society. Lasswell and McDougal illustrated by quoting from *The Authoritarian Character*:

... a basically hierarchical, authoritarian, exploitative parent-child relationship is apt to carry over into a power-oriented, exploitatively dependent attitude toward one's sex partner and one's God and may well culminate in a political philosophy and social outlook which has no room for anything but a desperate clinging to what appears to be strong and a disdainful rejection of whatever is relegated to the bottom. The inherent dramatization likewise extends from the parent-child dichotomy to the dichotomous conception of sex roles and of moral values, as well as to a dichotomous handling of social relations as manifested especially in the formation of stereotypes and of ingroup-outgroup cleavages. Conventionality, rigidity, repressive denial, and the ensuing break-through of one's weakness, fear and dependency are but other aspects of the same fundamental personality pattern, and they can be observed in personal life as well as in attitudes toward religion and social issues.⁵⁵²

This sketch of the authoritarian captures a spectre that animated a great deal of mid-twentieth century thought about personality and social order. In the interwar period, members of the Frankfurt School, like Lasswell in *World Politics*, often juxtaposed ideas of authoritarianism, totalitarianism or fascism against revolution and the revolutionary. In 1950s America, adherents to this tradition of ideas more commonly emphasised a movement between the authoritarian and the democrat. The aims and methods of policy-oriented jurisprudence place it in this tradition, and its progression from seed-form in *World Politics* to maturity in the *Law, Science and Policy* seminars is similar in many respects. Lasswell's 1940s collaboration with members of the Frankfurt School demonstrates as much. He was involved in preliminary

⁵⁵¹ *ibid.* Part III Chapter 5 'The Projection of Future Developments'. D4 pp. 137.

⁵⁵² *ibid.* Part II Chapter IV 'Political Personality'. D3p40. Quoting: Theodor W Adorno and others, *The Authoritarian Personality* (Norton 1969).

research for the project on anti-Semitism of which *The Authoritarian Personality* was an outcome, and was considered as a possible co-director by Franz Neumann.⁵⁵³

The point policy-oriented jurisprudence made by evoking this spectre was the point Lasswell had developed on *Human Nature*. A free society was one where the destruction made possible by the inner life of humans was tempered by insight into that inner life. Freedom was insight into the unconscious, emancipation from collective irrationality. Adopting this perspective in 1950s America or Europe, recent experience of fascisms and totalitarian authority made it easy to feel close to real instantiations of destructive collective irrationality. Speaking on *Human Nature* in August 1939, as such totalitarianisms moved towards war, Lasswell had concluded a case-study of ‘Jones’, a “reactionary” of “bitter conservatism” who displayed many characteristics of the authoritarian personality, with the following argument:

Jones has a passionate hatred of change. Everything that seems to call for frank cooperation with other people is unendurable to him. He wants to dictate in the family, in the business – and in every circle he moves into. Jones has a bitter hatred of democracy because he doesn’t respect human personality. He doesn’t respect human personality ... because he doesn’t respect his own personality. Jones can’t live in a world of mutual respect because he hasn’t anything to respect, not even himself. It’s a failure of education for democratic cooperation to permit a personality to grow up like Jones. The existence of a man like Jones is a symptom of dangerous and destructive processes in our own society. We need to correct them. And we need to correct our understanding of human nature, and especially of human nature in ourselves. When we look candidly at our own human nature, we will not be taken in by anxiety types like Jones. We will see him for what he is, a distorted human personality, menacing to himself and therefore to the rest of us.⁵⁵⁴

Lasswell and McDougal frequently said their most basic value-commitment, of which the entirety of *Law, Science and Policy* was an articulation, was a respect for ‘human dignity’. The less frequent but more complete expression of this conviction was as a respect for the ‘dignity of human personality’, the conviction society had denied Jones. Policy-oriented jurisprudence

⁵⁵³ Nick Dorzweiler, ‘Frankfurt Meets Chicago: Collaborations between the Institute for Social Research and Harold Lasswell, 1933–1941’ (2015) 47 *Polity* 352. pp. 371. See: Chapter 3: The earlier life of Harold Lasswell (n 400). *supra*. pp. 118.

⁵⁵⁴ Harold Dwight Lasswell Papers (MS 1043). Manuscripts and Archives, Yale University Library. Series 2. Box 109 Folder 12 D126. NBC, ‘Human Nature in Action: The Reactionary’ (9 August 1939).

rested on the premise that to exist and survive, democratic constitutional order needed to be an interpersonal manifestation of this respect. As Lasswell and McDougal had expressed this point when they first began to articulate the jurisprudence in 1943:

People ... can not be expected to remain loyal to democratic ideals through all the disappointments and disillusionments of life without a deep and enduring factual knowledge of the potentialities of human beings for congenial and productive interpersonal relations. As a means of maintaining a clear and realistic appraisal of human nature, there must be deeply based recognition of the factors governing the formation of human character. No democracy is even approximately genuine until men realize that men can be free; and that the laborious work of modern science has provided a non-sentimental foundation for the intuitive confidence with which the poets and prophets of human brotherhood have regarded mankind. Buttressing the aspirations of these sensitive spirits stands the modern arsenal of facts about the benevolent potentialities of human nature, and a secure knowledge of methods by which distorted personality growth can be prevented or cured. Through the further application of methods that have already achieved partial success, we can provide instruments capable of putting into practice admonitions of the moralists and visions of the dreamers.⁵⁵⁵

The set of ideas atop which Lasswell and McDougal built the New Haven School had at their core this conviction. That knowledge about human character made possible by modern science demonstrated that just as distorted personalities could be ‘prevented and cured’, so too could distorted social orders be made democratic, so too could people be made free.

⁵⁵⁵ Lasswell and McDougal, ‘Legal Education and Public Policy’ (n 16) pp. 225. Cited at: Chapter 2: In 1943 the policy-oriented lawyer is to be an epochal figure (n 205). *supra*. pp. 46.

Epilogue

Who can say nowadays that his anger is really his own anger when so many people talk about it and claim to know more about it than he does? A world of qualities without a man has arisen, of experiences without the person who experiences them, and it almost looks as though ideally private experience is a thing of the past, and that the friendly burden of personal responsibility is to dissolve into a system of formulas of possible meanings.

- Robert Musil, 1930⁵⁵⁶

To the extent that to be a ‘school’ of thought is to be named and enacted as such, this history begins and ends in the moment when Lasswell and McDougal’s ideas about law, social order, value and personality began their life as a school. To their experiences of Lasswell and McDougal’s teaching, students added their own aims and politics, and through debates like the ones we followed in Chapter 1, named, invoked and contested an abstract identity determined in relation to a unifying methodology. This thesis has identified and analysed a thread of ideas that we can understand as a continuity in time that unified the New Haven School, but that predated its crystallisation as a disciplinary identity.

McDougal exercised significant control over Yale Law School’s graduate program from the 1930s to the late 1960s, increasingly entwining his approach to legal method with an effort to push the law school to train people who intended to teach, and to become an ever more international institution.⁵⁵⁷ McDougal recalled this effort being met with increasing resistance from other members of the faculty, who believed the graduate program was becoming

⁵⁵⁶ Robert Musil, *The Man Without Qualities* (Vintage Books 1996) (first published in Berlin, 1930) pp. 158.

⁵⁵⁷ Reflecting on this period in: Interview with Johnstone (n 100).

disproportionately large, but it did have the consequence of disseminating New Haven School ideas quite widely around the world. In the 1970s and 1980s it was not unusual to find the dean of a law school in India, a barrister in London, an official of the Department of Foreign Affairs in the Philippines, or a judge in Japan who had studied at Yale and claimed affiliation to the New Haven School.

In these circles, Michael Reisman was and is acknowledged as the intended inheritor of the New Haven School legacy, the designated successor to McDougal. Reisman has maintained the identity that was associated with the New Haven School in the sense that students to whom he teaches international law are made aware there is something distinctive about the way they are being taught to see law, a distinctiveness that descends from ideas that were Lasswell and McDougal's. At the same time, in his own work he has built upon these ideas and developed his own vision of New Haven School theory.

A sister tributary to the 'legal' New Haven School, almost a disciplinary alter-ego, can be found in the 'policy-science' community. Lasswell established a non-profit foundation called the 'Policy Sciences Center' in New York in 1948 and spent the last years of his life based there. Through this foundation, today a research network is maintained by people who were Lasswell's students or collaborators. It includes people working in political science, in substantive policy-areas like forestry or the environment, and in scholarship on, and clinical practice in psychology and psychoanalysis. Through this network, conferences are organised, the *Policy Sciences* journal is published, and Lasswell's writings are made available.

Given the strands of ideas emphasised as part of the New Haven School story in this thesis, the theoretical and methodological commitments of participants in this network are notable. Generalising across a group of individuals working in different fields, a number of themes are apparent. One is a deeply reflexive view of the scientific study of social life as an intervention whereby the object of inquiry is inevitably constituted and modified by that inquiry. A second is a strongly-held view that the social scientist is engaged in a process of creating social value and must acknowledge this to be the case. A third is an emphasis on psychological interiority as the starting point from which we must orient ourselves in our social reality. A fourth, related

theme is a classically pragmatist conception of the empirical, often explicitly related to the work of John Dewey.⁵⁵⁸

For these collaborators of Lasswell, as well as to McDougal, the ‘legal’ New Haven School and the policy-sciences were parts of the same project. Meetings of the policy-science network included New Haven School lawyers, a collaboration McDougal encouraged until his death in 1998. *Jurisprudence for a Free Society* is among the ‘classic works’ made available on the website of the Policy Sciences Center. McDougal finalised this two-volume book for publication after Lasswell’s death with help of Andrew Willard, the current president of the center and an editor of the *Policy Sciences* journal, whose work spans anthropology and international law.

The lawyers, policy-scientists, political scientists, anthropologists, psychologists and psychoanalysts who identify with an intellectual lineage they understand to have descended from the scholarship of Lasswell and McDougal are different in many ways. They have different politics, theoretical interests and obviously speak to different audiences. But viewed from the perspective of someone outside these circles – the position from which I have written this history – they have a characteristic in common beyond their identification with this intellectual lineage. In the broader fields of both political science and international law, where Lasswell and McDougal were most well-known, these intellectual descendants share the experience of claiming a legacy that has never been exclusively theirs. In political science, Lasswell is today widely understood as a mascot for the behavioural revolution and positivist-empirical social science. This narrative generally baffles, and is challenged by, his policy-science collaborators. Similarly, this thesis departed from contemporary invocations of the New Haven School in the field of international law that seem to cast afresh a legacy so as to variously claim or wield it. Likely there is some inevitability about these politics of legacy. People have projects for which they want support, people need banners behind which they might march.

The more important point, recalling the microhistorical perspective this thesis has adopted, may simply be that we can re-engage with the ideas and preoccupations that get read out of the

⁵⁵⁸ I am grateful to members of this network who took time to speak to me about Lasswell’s life and work: William Ascher; Garry Brewer; Steven Brown; Ronald Brunner; and Stanley Renshon.

past as such legacies are fashioned. We have traced the origins of the intellectual project in which Lasswell and McDougal felt they were engaged to a set of ideas about law, social order, value and personality. In Chapter 5, we explored Lasswell and McDougal's theorisation of a relationship between different experiences of psychological interiority, and different manifestations of social order – authoritarian and democratic. As that chapter demonstrated, these ideas about law were not intended to apply only to international law, and as a consequence this thesis has not been concerned solely with questions of international law. Yet the New Haven School *is* widely-known as a school of international legal theory, and there are ways in which I hope the ideas and preoccupations this thesis has re-accessed can allow us to ask new questions about the New Haven School as a school of international law.

One such question might prompt us to explore the connections Lasswell and McDougal theorised for their 1950s and 1960s *Law, Science and Policy* students between ordered (democratic) personalities; different visions of social order; and arguments based on conceptions of world order familiar to readers of New Haven School work in the field of international law. Something denoted as 'world public order' appeared frequently in the post-war writings of New Haven School adherents. By tracing the conceptual starting point for such an order to Lasswell and McDougal's theory of psychological interiority, by appreciating the extent to which this theory viewed the construction of world order as a psychological project, we re-access in a new way the New Haven School, and with it the early twentieth century context by which it was prompted.

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