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MCDUGAL-LASSWELL POLICY SCIENCE: DEATH AND TRANSFIGURATION

Jack Van Doren & Christopher J. Roederer***

“[No system of]. . . intellectual strategies. . . can enable an applier to dispense with a final creative choice in the relation of human rights prescriptions, any more than any other prescription, to particular instances of human interaction.”⁺

INTRODUCTION

This article discusses the death and transfiguration of the legal paradigm referred to as McDougal-Lasswell Policy Science. This paradigm asserts those who make legal decisions should decide on articulated policy grounds rather than attempting to make decisions based merely on rules or principles. The theme centers on the paradox to which jurists have given different degrees of acceptance. In the United States domestic scene, it is virtually dead, and in the international law arena where it is transfigured, it is alive and well.¹

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⁺ Myres S. McDougal, *Human Rights and World Public Order: Principles of Content and Procedures for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387, 405 (1974).

¹ See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 190, 196, 202 (1995) (discussing policy science met with rejection on the domestic United States level, but it currently occupies a place in international law) [hereinafter DUXBURY]. For a book designed for jurisprudence teachers of policy science, see W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW (1987) [hereinafter REISMAN & SCHREIBER]. For a transposition of policy science to international law, see W. MICHAEL REISMAN ET AL., INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE (2d ed. 2004) [hereinafter REISMAN ET AL., CONTEMPORARY PERSPECTIVE]. Note that although policy science is relatively alive and well in international law, it is not at the height it was during the cold war. The international law journal at Yale, which was dedicated to New Haven Policy Science

After further describing the theme and evolution of Policy Science, Part II provides a general critique of the McDougal-Lasswell approach. A treatment of how Policy Science was extended from domestic law to international law follows in Part III. Part IV discusses the present status of Policy Science on the domestic front and explores the multitude of factors that have led to its death in this arena. We also explore why the same factors have not led to its death on the international front. Part V looks to the transfiguration of domestic Policy Science at the New Haven School of International Law, which, although alive and well, has a number of serious shortcomings. The point is not to put nails in the coffin of Policy Science domestically, nor to undermine the New Haven School of International Law. Rather, we embrace the Policy Science view that legal positivism is overblown in the domestic and international legal arenas, that the law is a process, and that those who make legal decisions cannot escape policy choices. We remain skeptical, however, that the high level abstractions that Policy Science advocates offer—such as attempting to maximize human dignity by maximizing a host of other values such as power, respect, affection, well-being, skill, rectitude, wealth, and enlightenment—offer anything more than the illusion of certainty.

I. THEME AND EVOLUTION OF POLICY SCIENCE

Prominent Legal Realists, including Professors Thurman Arnold and Edward Robinson, introduced a Policy Science course at Yale Law School in 1932, which was a major step in the genesis of policy science.² In 1937, due to the unexpected death of Professor Robinson and Arnold's move to the New Deal Administration in Washington, D.C., Myres McDougal was drafted to teach the course.³ Law students regarded the course with suspicion, labeling it the "cave of the winds," which was not a compliment.⁴

Professor McDougal became a card-carrying Legal Realist in the early 1930's. At about the same time, conservative legalists introduced the Restatement Movement. The rationale behind the Restate-

scholarship, *Yale Studies in World Public Order* (1974-80), renamed the *Yale Journal of World Public Order* (1980-83), was replaced by the *Yale Journal of International Law* in 1983. The editor's note on the homepage states: "[o]ver time, the journal broadened its focus and began to publish articles from a variety of methodological approaches and jurisprudential perspectives, a tendency formalized by the decision of later editors to change the name of the journal." YALE J. OF INT'L L., <http://www.yjil.org/about/yale-journal-of-international-law> (last visited Jan.17, 2012).

² DUXBURY, *supra* note 1, at 165.

³ *Id.*

⁴ *Id.* (citing a letter from McDougal).

ments was to codify areas of the law such as property and contracts.⁵ The conservative response sought to introduce order into a proliferating body of law which Realists and non-Realists alike had found to be chaotic.⁶ Displaying his Realist mindset, McDougal attacked the Harvard Law School-dominated Restatement Movement of the 1930s, describing it as “fantastic,” meaning not only that the legalists attempting it would fail, but also that the project was a fantasy.⁷ The conservative legalists counterattacked Legal Realists for focusing too much on the “is” in single cases, instead of looking at a uniform course of behavior.⁸ This emphasis, they argued, neglected the degree of certainty achieved through rule and form.⁹ The rational element was more important than the Realists thought.¹⁰ Other critics of Realism found it lacking because it too strongly separated “the is” and “the ought,” thereby neglecting the ethical dimensions of law.¹¹

Later in the 1930’s, McDougal began to take aspects of the critiques on Realism more seriously. Although McDougal remained impatient with the Legal Positivism underlying the Restatement Movement,¹² he thought Realism lacked a positive program. Thus, McDougal teamed up with sociology Professor Harold Lasswell to create a social science-based policy science.¹³ The program they developed was significantly different from the Positivist Restatement Movement. Rather than attempting to “restate” the law, their pro-

⁵ Jack Van Doren, *A Restatement of Jurisprudence: Why Not?*, 44 GONZ. L. REV. 159, 160-62 (2008-2009).

⁶ *Id.* at 162-64.

⁷ *Id.* at 163.

⁸ See Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 707-98 (1931) (attacking the Realist position); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1222-56 (1931) (defending Realism).

⁹ Llewellyn, *supra* note 8, at 1231 (stating that Pound believes that the quest for certainty produces general security).

¹⁰ *Id.* at 1230.

¹¹ See generally LON L. FULLER, *THE LAW IN QUEST OF ITSELF* 13, 60, 61 (The Lawbook Exchange, Ltd. 2009) (1940) (discussing the aspirational character of law and the unhappiness with Legal Realism).

¹² DUXBURY, *supra* note 1, at 194 (stating that McDougal rejects the Positivist model in the international sphere).

¹³ *Id.* at 167-70 (discussing both Lasswell and McDougal’s interest in collaboration). It is unnecessary here to go through the details of the McDougal-Lasswell liaison in their creation of policy science. Note that Lasswell was a member of the Chicago School of Sociology, but he was also the president of the American Political Science Association and he taught and wrote on psychology. He did important work in communications as well as political psychology.

gram sought to shape the law based on what today might be called “data driven” policy choices.¹⁴

Realists, rejecting the idea that law was determinant, turned to social sciences to fill in the blanks. Lasswell and McDougal thought Realists had only a vague, undeveloped idea of what they were after, and in any event, failed to adumbrate constructive guidance.¹⁵ To

¹⁴ See *id.* at 169-70.

¹⁵ *Id.* at 171 (stating Realists looked to social science, but were unaware of what they were looking for, and misunderstood social science as a complement to law). In *Jurisprudence for a Free Society: Studies in Law, Science, and Policy*, Lasswell and McDougal praise the realists for their insight that law is about authoritative choices and for the fruitful use of anthropology, psychoanalysis, learning theory, sociology, social psychology, economics, etc. HAROLD D. LASSWELL & MYRES S. MCDUGAL, *JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY* 14 (New Haven Press 1992) [hereinafter LASSWELL & MCDUGAL]. Their criticisms are largely that they were too local, too negative and that they did not appropriately use science and law as tools to serve social/community values. *Id.* at 15-16. They did not carry the project further to create a comprehensive guiding theory. They go on to state: “[t]he many important contributions of the American legal realists cannot, thus, be said to be much more than preliminary to the affirmative problems of jurisprudence.” *Id.* at 15. While applauding their assault on slot machine conceptions of legal process, they state

there is a limit beyond which the laborious demonstration of equivalencies in the language of the courts cannot go: eventually the critic must offer constructive guidance as to what and how courts and other decision makers should decide upon the whole range of problems importantly affecting public order. Similarly, some realists have done little service to ‘science’ and scarcely more to ‘law’ by merely proclaiming the virtues of scientific modes of thought and investigation.

Id. Lasswell and McDougal identified the challenge for legal scholars as creating a jurisprudence that is “relevant to establishing and maintaining demanded public order.” *Id.* at 16. By this they mean a public order that secures “demanded values in all their communities.” *Id.* As Richard Falk notes,

[t]hey perceive American legal realism as an antecedent to their work, admirable for its critical focus on the interplay between rules and social process in the enunciation of law in authoritative form, especially through the operations of appellate courts. Indeed, the McDougal and Lasswell undertaking can be regarded as converting the core insight of legal realism into a comprehensive framework of inquiry, including the provision of a normative rudder—the eight constituent values of a free society dedicated to the promotion of human dignity—by which to assess the relative merits of opposing lines of argument and analyses of factual circumstances.

Richard A. Falk, *Casting the Spell: The New Haven School of International Law*, 104 YALE L.J. 991, 991-92 (1995) (reviewing HAROLD LASSWELL & MYRES MC-

remedy this defect, McDougal and Lasswell created a superstructure of social processes leading to the choice of policy outcomes they postulated.¹⁶ Policy Science advocates deluged observers with the claimed necessity for information gathering procedural processes before a legal decision is made.¹⁷ As explained hereafter, this deluge was a major reason for the virtual rejection of Policy Science on the domestic United States level.¹⁸

The first prerequisite of this superstructure is to adopt the "observational standpoint"¹⁹ where the observer focuses on a community of a concern.²⁰ The observer looks at the process she wants to influence.²¹ The observer needs to concentrate on the "actual techniques for making a decision."²² The observer also needs to detach herself from the sector being examined,²³ and exam her own emotion, parochial tendencies, and distortions that result from intense training in a given discipline such as law.²⁴ We wish the "observers" a lot of luck with this task in particular. Reisman argued that this detachment may be necessary because problems may transcend boundaries of both geography and a given discipline.²⁵

Upon achieving an appropriate perspective, the observer applies the intellectual tasks of decision: goal clarification, past trend analysis, factor analysis, predictions, and consideration of policy alternatives.²⁶ Goal clarification means what it says: consideration and

DOUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE, AND POLICY (1992)).

¹⁶ See REISMAN ET AL., CONTEMPORARY PERSPECTIVE, *supra* note 1, at 28-33.

¹⁷ REISMAN & SCHREIBER, *supra* note 1, at 14-16, 516-17.

¹⁸ See *infra* note 46 and accompanying text (referring to some of the policy science descriptions of the procedural processes as "ponderous and perhaps impenetrable"). For example, it is very difficult to see how all these procedures would apply to, say, a judge deciding a case. They make some sense if what you are doing is drafting legislation or rules and regulations, or forming a national security policy, or an environmental strategy, but can they guide adjudication? Can a judge be expected to go through this process when deciding a case?

¹⁹ REISMAN & SCHREIBER, *supra* note 1, at 12.

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* at 12-13.

²⁴ *Id.* at 13.

²⁵ *Id.*

²⁶ *Id.* at 16-20; see also LASSWELL & MCDUGAL, *supra* note 15, at 35 (stating that where the performance of intellectual tasks are stated as, "clarification of goals, the description of past trends in decision, the analysis of conditions affecting decision, the projection of future trends in decision, and the invention and evaluation of policy alternatives."); *id.* at 35-38 (describing these tasks).

choice of what policy you want to achieve.²⁷ Looking to former trends may include how decision-makers have handled the problem in the past. Factor analysis goes beyond looking at past trends as a way of predicting future trends and asks what factors may change and what impact those multiple factors may have on the future.²⁸ Consideration of policy alternatives means evaluating alternative means for securing the claimed policy objectives.²⁹

The performance of these tasks and other tasks mentioned in this paragraph will not be easy. First is the prediction or educated guesses about what the future holds, suggesting the conditioning of the decision³⁰ carries a perilous problem, namely the crystal ball problem. Secondly, while comprehensiveness of inquiry is desirable, it is to be balanced by selectivity—time is not infinite.³¹ Perhaps this choice holds a troublesome contradiction, a judge or other decision maker will have difficulty finding the time to administer these tasks. Thirdly, the observer needs a theory about law, a jurisprudence that is appropriate.³² Fourth, the observer should envision that, at times, people say one thing and do another.³³ At a higher level of abstraction, the jurisprudential theory should take note of the authority and control dichotomy: authority is the identification of the expectation of who will make decisions, and expectations of what will be done, while control is the effectiveness of the decisions actually made, whether authorized or not.³⁴ This work's final focus is the public/private distinction.³⁵

²⁷ REISMAN & SCHREIBER, *supra* note 1, at 16-20 (offering a comprehensive survey supporting this paragraph).

²⁸ See LASSWELL & MCDUGAL, *supra* note 15, at 20, 37.

²⁹ REISMAN & SCHREIBER, *supra* note 1, at 17.

³⁰ See *id.* at 17.

³¹ *Id.* at 13.

³² *Id.* There are plenty of these to choose from! See Van Doren, *supra* note 5, at 160-65 (enumerating nineteen or more jurisprudential theories in a playful "Restatement").

³³ See LASSWELL & MCDUGAL, *supra* note 15, at 18, 22-24 (clarifying that the observational standpoint of the practitioner is different from that of the academic). The former is often concerned with power, while the latter is more concerned with enlightenment or knowledge. An appropriate jurisprudence from their perspective, would address both observational standpoints. For difficulties here, see *supra* note 43.

³⁴ See MALCOLM N. SHAW, INTERNATIONAL LAW 59, 202 (6th ed. 2008) (asserting that authority is the expectation concerning the identity and competence of the decision maker, and control is the effectiveness of a decision whether authorized or not).

³⁵ REISMAN ET AL., CONTEMPORARY PERSPECTIVE, *supra* note 1, at 14 (stating that some proscribed activities produce strong state sanctions for public wrongs and others produce only individual sanctions for private transgressions).

According to policy science, law professors should use the teaching of these processes to train elite decision makers to clarify and implement goals desired by persons.³⁶ Policy science advocates postulate eight goals or objectives people want and need to sustain their human dignity—namely power, respect, affection, well-being, skill, rectitude, wealth, and enlightenment.³⁷ At least as applied to the international arena, these eight goals are shorthand for a long list of corollary values.³⁸ This aspiration was to be achieved by shaping and sharing the eight objects of human desire to promote the maximum distribution of valued things, such as education, wealth, and so on, consistent with individual effort expended.³⁹ They argue that human dignity is fostered by the fulfillment of the eight policy goals of the McDougal-Lasswell system.⁴⁰ According to the advocates of policy science, properly understood and applied, these goals do not conflict and

³⁶ See REISMAN & SCHREIBER, *supra* note 1, at 19; Duxbury, *supra* note 1 at 168-169, 180-181, 185 (stating that potential elite decision makers at Yale strongly resisted Policy Science)

³⁷ See REISMAN & SCHREIBER, *supra* note 1, at 14-15. This goal-value framework was highlighted in McDougal's property casebook. See MYRES SMITH MCDUGAL & DAVID HABER, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 1 (1948) [hereinafter MCDUGAL & HABER] (enumerating values). See generally LASSWELL & MCDUGAL, *supra* note 15, at 335-591, 399-452, 453-72, 473-507, 509-23, 525-38, 539-55, 557-73, 575-90 (covering in deeper specificity the individual topics of Power, Enlightenment, Wealth, Well-being, Skill, Affection, Respect, and Rectitude).

³⁸ See generally LASSWELL & MCDUGAL, *supra* note 15, at 1423-36, 1439-88, 1548-64 & Appendix IV (providing exhaustive outlines of subcomponents of the eight goal choices). Some of these subcomponents are not clear from the terms they qualify. This saturation of aims and goals is laden with contradiction potential.

³⁹ See LUTHER L. MCDUGAL & MYRES S. MCDUGAL, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING, AND DEVELOPMENT, at vi (2d ed. 1981) (finding the widest sharing possible consistent with capabilities and actual contributions to society); see also Harold D. Lasswell & Myres S. McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L. J. 203, 290 (1943). McDougal and Lasswell originally designed policy science for the domestic United States legal context, as set out in their manifesto published in the Yale Law Journal in 1943. This "contributions to society" criterion is what the fight is about these days, workers vs. capital investors, should the rich pay more tax, and so on.

⁴⁰ Julien Cantegreil, *Legal Formalism Meets Policy-Oriented Jurisprudence: A More European Approach to Frame the War on Terror*, 60 MAINE L. REV. 98, 122, 125 (2008) (providing that human dignity is the goal of the New Haven School of International Law using the eight goals or values); Myres S. McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 VA. J. INT'L L. 387, 406 (1974) (maintaining that universal public order of human dignity is the overriding goal).

can solve concrete cases.⁴¹ McDougal and Lasswell taught that a major function of legal education was to train elite decision makers to perform the intellectual task of clarifying and implementing these goals.⁴²

II. GENERAL CRITIQUE OF POLICY SCIENCE

The McDougal-Lasswell system attracted a host of critique. Some of that critique carries over to the international arena where policy science has a foothold. The major reason given for the failure of domestic arena application of policy science, according to a leading commentator, was skepticism over whether the welter of procedural inquiries would actually produce a better substantive decision.⁴³ Put another way, the best analytical methods of information gathering may not produce the best problem or case solution.⁴⁴ Suppose the deci-

⁴¹ See DUXBURY, *supra* note 1, at 188 (representing that those understanding the system were promised to never be at a loss for certainty). See generally *infra* notes 32, 43, 47, & 54 and accompanying text for doubts about whether these goals solve concrete cases.

⁴² See DUXBURY, *supra* note 1, at 185 (asserting that legal education should train the elite decision makers in Policy Science); see also *supra* note 36; REISMAN ET AL., CONTEMPORARY PERSPECTIVE, *supra* note 1, at 16. Reisman has a summary that is helpful to understand what the properly informed decision-maker should do. The shorthand of decision planning is fostering knowledge of participants, perspectives, situations, bases, strategies and outcomes. Thus, the decision maker reflection includes: who is making the decisions (“participants” in McDougal-Lasswell jargon), what are their perspectives, e.g., biases, where do they interact, what resources are brought to bear, is coercion or persuasion being used, at what group is the “pitch” being made, elite or broad audiences, and what outcomes are being obtained.

⁴³ See DUXBURY, *supra* note 1, at 202; see also *id.* at 184, 188 (stating that Policy Science does not reveal criteria for deciding between conflicting values or value tradeoffs). Policy scientists partially address this issue by distinguishing between the different roles of academic and practitioner. The former is looking more for enlightenment or knowledge while the later is looking to make effective decisions. But ultimately both perspectives are riddled with subjectivity.

⁴⁴ See Rebecca M. Bratspies, *Rethinking Decisionmaking in International Environmental Law: A Process-Oriented Inquiry into Sustainable Development*, 32 YALE J. INT’L L. 363, 377 (2007). This is reminiscent of the old problem for utilitarianism; if people always tried to do the utilitarian calculus to figure out what to do, they would not likely be maximizing utility or happiness. Figuring out how to maximize these values will not necessarily lead to maximizing them. One response is to maximize utility through rule utilitarianism rather than act utilitarianism or rule of thumb utilitarianism or through the idea of tacking while sailing. In other words, you do not get to the end that you desire by a straight line, but by tacking back and forth with an eye to the end.

sion maker has the time and resources to gather data and weigh the factors—who knows if the decision will be better?⁴⁵

Secondly, policy science would require major retooling of law professorial skills and orientation. Law professors would need to reorient from doctrinal analysis and the usual mix of lawyering skills to social science and policy analysis. Policy science would also defeat student expectations regarding their legal training. For many professors and students alike, the terminology and jargon of Policy Science would be difficult, ponderous, and perhaps impenetrable.⁴⁶ Students have enough difficulty mastering the legal language of judicial decisions, but this would be compounded if they were also required to grapple with Policy Science.

Thirdly, high-level abstractions—like human dignity, wealth shaping and sharing consistent with effort, “wealth,” and the other seven goals—may not solve concrete cases.⁴⁷ This is a weak link in the chain. Policy choice does not rest on science or neutral assessment, but rather on maximizing a certain set of values designed ultimately to maximize dignity.⁴⁸ Unlike utilitarians, who are content to leave the ends/values open to whatever makes people happy or increases welfare, Policy Science includes wellbeing and wealth along with six other values that appear to overlap in some cases and compete in others. The values do not form a coherent whole, like pieces of a single pie, but

⁴⁵ A related problem is that some policy science advocates may not be fully acquainted with the ebbs and flows of all the social sciences. The hybrid products of policy science could be without sufficient training in either law or the social sciences at least from the students' perspectives.

⁴⁶ See DUXBURY, *supra* note 1, at 188, 202 (describing Policy Science texts as dense, idiosyncratic, verbose, and conceptually outlandish, which made their proposals seem ridiculous). Many of the terms, tasks and projections have explanations that further complicate the outline presented above. Compare, for example, law and economics, which, whatever its other faults, stresses one central value—wealth maximization—and does not have the decision-related baggage of policy science. See *infra* text accompanying note 103.

⁴⁷ See DUXBURY, *supra* note 1, at 184, 188 (arguing that policy science does not reveal criteria for deciding between value conflicts or tradeoffs). Reisman is an acolyte and not a critic, but he still raises the question of conflict of goals. See REISMAN & SCHREIBER, *supra* note 1, at 590 (questioning whether policy goals may clash and not be subject to quantification). The decision maker who focuses on “human dignity” will inject a subjective value factor into a supposedly objective process. See SHAW, *supra* note 34, at 61.

⁴⁸ In this respect, critics saw policy science suffering from the same problems as Natural Law. Cf. REISMAN & SCHREIBER, *supra* note 1, at 590 (questioning if Policy Science is subject to the same criticism as Natural Law regarding the lack of empirical proof for the values asserted). The Natural Law label, which held sway for so long in jurisprudential history, is tantamount to an albatross today. Law professors and students alike could be expected to balk at this project.

are a grab bag of values correlating to the overlapping fields of social scientific disciplines.⁴⁹

Other detractors noted that policy science stressed a Western ideology that the post-Cold War United States' foreign policy used for propaganda and ideological military aggression.⁵⁰ Critics found this extremely problematic in view of failures in Vietnam, the United States' response to 9/11, and the unilateral war of aggression in Iraq.⁵¹ Key adherents, such as Oscar Schachter of Columbia and Richard Falk of Princeton, broke off from the school during the Vietnam War.⁵² Harold Koh notes adherents believed McDougal and others applied, "their theory in a highly selective manner to override the constraints of law in favor of the 'higher ends' sought by present U.S. policy."⁵³ As Richard Falk put it:

Indeed, in other writing and speaking-especially that of McDougal-devoted to discussion of controversial policy issues (how to interpret the U.N. Charter in light of Soviet obstructionism; how to appraise the legality of hydrogen bomb tests in the Pacific; how to evaluate contested Cold War interventions in Vietnam or Nicaragua), the results, although elaborated in alleged relation to the jurisprudential frame, had an uncomfortable tendency to coincide with the outlook of the U.S. government and to seem more polemically driven than scientifically demonstrated.⁵⁴

The New Haven School of International Law presupposes an ability to engage in dialogue and communication between global international law participants.⁵⁵ But actors in international relations have many parochial views that hinder dialogue and communication.⁵⁶ Further, the "normative friction" is not as bipolar as it was during the

⁴⁹ See LASSWELL & McDOUGAL, *supra* note 15, at 377-79 (discussing well-being outcomes from a Policy Science perspective).

⁵⁰ See DUXBURY, *supra* note 1, at 197-98.

⁵¹ See Gary Minda, *Narratives of International Law and Literature after 9/11*, 11 ILSA J. INT'L & COMP. LAW 435, 436-42 (2005).

⁵² Harold Hongju Koh, *Is There a "New" New Haven School of International Law?*, 32 YALE J. INT'L L. 559, 563 (2007).

⁵³ *Id.* (quoting remarks by Oscar Schachter, Symposium, McDougal's Jurisprudence: Utility, Influence, Controversy, Address Before the Am. Soc'y of Int'l Law Annual Meeting (Apr. 26, 1985) in 79 AM. SOC'Y INT'L L. 266, 272-73 (1985)).

⁵⁴ Falk, *supra* note 15, at 2001.

⁵⁵ See Christopher Borgen, *Whose Public, Whose Order? Imperium, Region, and Normative Friction*, 32 YALE J. INT'L L. 331, 362 (2007) (sharing values and cross-cultural exchange is antithetical to the world view of major international participants).

⁵⁶ See *id.*

Cold War.⁵⁷ The friction is multifaceted and has expanded post 9/11 with the Afghan and Iraqi wars.⁵⁸ The New Haven School has not adjusted their program to adequately consider how meaningful dialogue can occur under the existing situation of competitive world views that seemingly have little common ground or shared assumptions.⁵⁹

While many of these criticisms are directed to, or carry over into, the international law arena, the next section attempts to distinguish the domestic area. The following discussion suggests why Policy Science is virtually dead domestically, but has been transfigured to make its proponents active players in the international law area.

A. *Policy Science Extended to International Law*

First, we review the turn of Policy Science to international law. During the 1943 manifesto, McDougal was a teacher and a prominent player in the property arena.⁶⁰ During World War II, McDougal travelled to Washington D.C., where this work exposed him to international law.⁶¹ His interest triggered, McDougal returned to Yale and taught international law, extending his policy science jurisprudence to that arena.⁶²

Influenced by World War II, McDougal began seeing international relations as a basic tension between democratic and autocratic regimes. McDougal thought this conflict should be brought into light to effectuate democratic values. He thought Legal Positivism should be abandoned, because at best, it masked this fundamental conflict.⁶³ Positivism did not provide good tools for critiquing autocratic or totalitarian regimes like Nazi Germany or Soviet Stalinism.⁶⁴ If, in the pos-

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *See* MCDUGAL & HABER, *supra* note 37; Myres S. McDougal, *Future Interests Restated: Tradition versus Clarification and Reform*, 55 HARV. L. REV. 1077, 1077 (1942) (criticizing the Restatement of Property); *see also supra* note 39 (providing for the manifesto).

⁶¹ *See* DUXBURY, *supra* note 1, at 192-93 (describing McDougal's move to Washington DC and his appointment as General Counsel to the Relief and Rehabilitation Agency).

⁶² *See id.* at 194-96 (explaining how McDougal and Lasswell transform their own post-realism jurisprudence to international law). *See generally supra* note 1 and accompanying text (giving historical background information on Policy Science).

⁶³ DUXBURY, *supra* note 1, at 193-94 (referencing the Policy Science creator McDougal's rejection of Legal Positivism in international law).

⁶⁴ *See* the famous debates between H.L.A. Hart and L. Lon Fuller over "Nazi law" and the need for the severability of law and morals. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 593-629 (1958); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L.

itivist view, laws are rules or commands that are backed by the force of the state (i.e. rules that are regularly enforced), then there is little to distinguish the “laws” of Nazi Germany from U.S. law. For McDougal, the Legal Positivists in international law he knew at Oxford had little to offer.⁶⁵ They often failed to appreciate that rules and principles travel in pairs of opposites, such as *pacta sunt servanda* (treaties must be respected) and *rebus sic stantibus* (changed conditions may warrant revision).⁶⁶ McDougal argued that either principle could be chosen to achieve a result the decision-maker favors.⁶⁷ Thus, law is far from being a set of neutral rules but rather is a matter of choice.

McDougal then retained certain approaches from domestic policy science. He thought Positivism led to confusion and masked policy choices that instead should be created and articulated.⁶⁸ Conflicts in international law’s rules and principles could be rendered unimportant by resolutions with articulated policy choices. Thus, McDougal and Lasswell borrowed the frames they adumbrated in the formulation of domestic policy science and applied them to international law.⁶⁹

III. PRESENT STATUS OF POLICY SCIENCE

A. *Domestic United States Law: Death of Policy Science*

The McDougal-Lasswell Policy Science model is virtually dead in the United States domestic law arena.⁷⁰ No doubt this demise is

REV. 630, 630-672 (1958); see also H.L.A. HART, *THE CONCEPT OF LAW* 198-207 (1961); L. LON FULLER, *THE MORALITY OF LAW* 95-151 (1964); H.L.A. Hart, *Book Review: The Morality of Law*, 78 HARV. L. REV. 1281 (1965) (reviewing L. LON FULLER, *THE MORALITY OF LAW* (1964)) (continuing the debate).

⁶⁵ DUXBURY, *supra* note 1, at 193.

⁶⁶ *Id.* at 194.

⁶⁷ *Id.* at 195.

⁶⁸ *Id.* at 200.

⁶⁹ See Lasswell & McDougal, *supra* note 39, at 219-32.

⁷⁰ See *supra* note 1 and accompanying text. *But see* DUXBURY, *supra* note 1, at 5 (asserting that American jurisprudence should not be seen as movements dying and being replaced). A survey of contemporary textbooks, general treatises, and study aids on jurisprudence turns up very few references to Policy Science. Policy Science did not make it into DAVID KENNEDY & WILLIAM W. FISHER, *THE CANNON OF AMERICAN LEGAL THOUGHT* (2006), where the authors claim that the work contains “the twenty most important works of American legal thought” in preface. Brian Leiter argues that “scholars at Yale (notably Harold Lasswell and Myers McDougal) propounded a watered-down version of Realism under the slogan ‘policy science[.]’” and he continues that “[p]olicy science’ is now, happily, defunct, since it had far more to do with rationalizing American imperialism than it did with science.” Brian Leiter, *Legacy of Legal Realism II: Legal Theory*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF THE LAW AND LEGAL THEORY* 61 (Martin P. Golding & William A. Edmundson eds., 2005). Brian Bix’s article in *THE OX-*

due in significant part to the criticisms previously enumerated.⁷¹ It is true that McDougal, Lasswell and their successor, Professor Michael Reisman, have engaged in training many law professors and jurists, foreign and domestic. These scholars and jurists could be carrying on the tradition in law schools and other forums, but no articles have been written on policy science in mainstream domestic law reviews in the last decade.⁷²

FORD HANDBOOK OF LEGAL STUDIES contains a very short treatment of Policy Science, where he argues that “[B]oth [Policy Science and the process school] faltered because they assumed a neutrality in the social sciences and an ability of the social sciences to answer substantive questions of governance, assumptions that turned out to be untenable.” Brian Bix, *Law as an Autonomous Discipline*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 975, 981 (Peter Cane & Mark Tushnet, 2003). M.D.A. FREEMAN, LLOYD’S INTRODUCTION TO JURISPRUDENCE 262, 856-57, 1001, 1032, 1034 (8th ed. 2008) does not have a section on Policy Science, although the works of McDougal and Lasswell are discussed briefly in a few places. The following jurisprudence textbooks and general treatises make no mention of Policy Science, Lasswell, McDougal, Reisman, or the New Haven School: BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT (5th ed. 2009); GEORGE C. CHRISTIE & PATRICK H. MARTIN, JURISPRUDENCE: TEXT AND READINGS ON THE PHILOSOPHY OF THE LAW (3d ed. 2008); PHILOSOPHY OF THE LAW (Joel Feinberg & Jules Coleman eds., 7th ed. 2004); MARK TEBBIT, PHILOSOPHY OF LAW: AN INTRODUCTION (2000). Nonetheless, Anthony Kronman, in THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION (1993), argues that even though “the specialized terminology they invented has for the most part been forgotten,” those who conclude their recommended approach is obsolete are mistaken. *Id.* at 201. Rather he argues “though the details of their approach and their idiosyncratic vocabulary have indeed disappeared from the mainstream of American legal theory, the general position that Lasswell and McDougal defend describes the unspoken common ground on which both the law-and-economics and the critical legal studies movements rest.” *Id.* at 201-02. Kronman, in fact, sees the “law and. . .” movement as being the latest heirs of Policy Science. *Id.* at 355, 356. One could just as easily and accurately say that American Legal Realism actually forms that common base for policy science, CLS, law and economics and the “law and. . .” movement. While Kronman does not think the heirs of Policy Science can provide the cure for the lost lawyer, he does set them up as the main rival to the view of the lawyer as statesman that he supports. *Id.* at 353-81. Kronman’s book was written one year after *Jurisprudence for a Free Society*. It is somewhat odd and sad that most of those influenced by Policy Science had moved on before Lasswell and McDougal’s opus was published.

⁷¹ See *supra* Section II.

⁷² But see Policy Science at Yale website and their in-house Law Journal. The journal *Policy Sciences* is a publication of the Society for Policy Science. A review of the articles published in the journal since 2000 reveals that out of over 200 published articles only around 50 of those articles are clearly law related. There are only a handful of those articles that are written on first year law curriculum subjects (with a few more written on property topics than on other first year course topics) and with the bulk of articles being written in the areas of environmental

It is suggested that the following critiques are important to the domestic failure of policy science, but are relatively insignificant in international affairs. Decision makers in the international area, such as high ranking government officials, who are clearly involved in creating law through treaties and the United Nations, sometimes have more time and resources to devote to the procedural processes outlined by policy science.

Some reasons for the domestic rejection are relatively inapplicable to the international arena. A major reason for domestic rejection is that asking United States law professors to retool into the cumbersome policy science terminology has been, and will be, met with resistance.⁷³ Moreover, law students have and would offer strong resistance. Students at the majority of “non-elite” law schools throughout the country are apt to complain when any course veers too far afield of bar and practice relevant materials.⁷⁴ There also has been a push since the MacCrate Report in 1992 to infuse more practical skills into our courses.⁷⁵ Thus, someone who wishes to teach a course from a policy or theoretical perspective is going to run into resistance from students who want to see a “payoff.” The same would not be true of students who volunteer to take an elective in international law, jurisprudence, or even environmental law. This is true, not only because

law, international environmental law and other international law subjects. POL’Y SCI. CENTER, <http://www.policysciences.org/pubs.cfm> (last visited Jan. 17, 2012).

⁷³ See DUXBURY, *supra* note 1, at 190-91 (arguing that policy science is too idiosyncratic, elitist, and costly, which caused a strong resistance). Students may be resistant because in order to fully buy into the approach one would have to be comfortable with the methodology and values—one would probably want to have a PhD or to have completed advanced studies in sociology, social science methodology, philosophy and law. Once one has expended time and resources on these disciplines, one would probably chart her own path or follow in the path of any of a number of other interesting schools of thought. If one is trying to foist it on law students, there will not be enough time to justify the approach or its policy objectives.

⁷⁴ The ABA standards support this view. “A law school shall maintain an educational program that prepares its students for admission to the bar, and effective and responsible participation in the legal profession.” ABA STANDARDS AND RULES OF PROCEDURE FOR APPROVAL OF LAW SCH. § 301(a) (2011-2012), http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2011_2012_standards_and_rules_for_web.authcheckdam.pdf [hereinafter ABA STANDARDS].

⁷⁵ See *Legal Education and Professional Development: An Educational Continuum*, 1992 A.B.A. SEC. LEGAL EDUC. AND ADMISSIONS TO THE BAR, http://www.americanbar.org/groups/legal_education/publications/maccrate.html [hereinafter THE MACCRATE REPORT]; WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 8* (2007) [hereinafter CARNEGIE REPORT]; see also ABA STANDARDS, *supra* note 74.

the courses would be few, but also because these courses are not tested on the bar, and practice in some of these areas is seen as involving more general advocacy and less litigation. Environmental law includes many norms that are not legally binding, but are explicitly political or policy based guidelines or standards (referred to as soft law).⁷⁶

Moreover, trashing Legal Positivism in favor of a policy analysis would create a firestorm. Teaching of law today occurs in law schools where the aura is one of Legal Positivism. Law students would have a short fuse for extensive policy analysis—if any law professors were capable of it. The atmosphere in the law schools when McDougal and Lasswell taught also was not conducive to policy analysis.⁷⁷ Almost all of our law professors taught as though they were legal positivists. When we have attended the classes of our colleagues in various law schools, domestic and foreign, with few exceptions, the tenor of the presentation is positivist. Policy Science at Yale, according to McDougal himself, was subject to the pejorative student epithet, “cave of the winds.”⁷⁸ Nothing has changed in this regard. The aura of the law schools remains one of Legal Positivism.⁷⁹

One explanation for the different reception on the domestic front than on the international front is a difference in baselines in the two arenas, with a general presumption of positive law in the domestic arena⁸⁰ and a presumption of power politics and lawlessness in the

⁷⁶ For instance, the Rio Declaration on the Environment and Development states in the preamble that it is “[w]orking towards international agreements which respect the interests of all and protects the integrity of the global environmental and developmental system.” United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3-14, 1992, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), pmb., available at <http://www.unep.org/Documents.Multilingual/Default.asp?documentid=78&articleid=1163>.

⁷⁷ Yale was a hostile environment. Imagine third or fourth tier schools where students are trying to pass the bar and get a garden variety job as a lawyer (as opposed to a job in the State Department).

⁷⁸ See *supra* note 4.

⁷⁹ But see John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 VA. L. REV. 662 (1968) (summarizing the McDougal-Lasswell meta-language, hoping to cure what he sees as the Legal Realist (not Legal Positivist) legacy of malaise in law schools).

⁸⁰ If you think about it, no one questions if domestic law is law. The presumption is there is at least some “there” there. It may be that it is indeterminate, that rules do not self-interpret, and that politics, psychology, social forces, etc. all impact decisions. Few, however, think that the body of stuff we call law (the statutes and prior cases, etc.) do not work at all. It may be that a good lawyer only relies on “doctrine” as a starting point for discussion. Nonetheless, being able to marshal doctrinal legal sources is a necessary starting point for practice.

international arena. It is almost as if the latter is still in Hobbes's state of nature with no sovereign and no "rule of law." Meanwhile, in U.S. domestic law, the presumption (however deluded) is that we generally live under the rule of law with a system of laws.

Thus, one major reason for the success of the New Haven School, as opposed to domestic Policy Science, is that the political realist critique of international law, and thereby the realist approach to international law, has been more durable than the American legal realist critique of domestic law. In a sense political realism with regard to international law has been something of a baseline. People (at least in the U.S.) tend to start with the idea that international law is largely political and in fact largely about power politics. International realists tend to be more reductionist than the domestic American legal realists, in that they reduce law to mere power politics; American legal realists were open to a whole host of factors that could go into law creation, application, and adjudication.⁸¹

There is almost a presumption of lawlessness that needs to be rebutted when it comes to international law. In part, this is because in the positivist view of international law, law is created through the consent of states, through treaties and customs. These are not always clearly enforceable, leaving large gaps in the international law landscape. In this view, international law is like extreme laissez-faire contracts.⁸² If extreme laissez-faire contracts dominated our domestic law, then power would sit more clearly on the surface like it does in treaty negotiations.⁸³

Is there a domestic analogue to this? Perhaps there is in contracts,⁸⁴ with choice of law provisions, boiler plate provisions, and ar-

⁸¹ As Lasswell and McDougal note, "In their more constructive efforts the American realists have seized with great gusto upon anthropology, psychoanalysis, learning theory, sociology, social psychology, economics and related disciplines and exploited the findings in these several fields in their particular studies; they have flung the doors wide to any reporter of new discoveries in the expanding science of man." See LASSWELL & MCDUGAL, *supra* note 15, at 14.

⁸² Note that under public international law, the general rule is no tribunal has jurisdiction over a dispute unless the parties consent. See *generally* United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397.

⁸³ For instance, look at the United States' history regarding the International Criminal Court, of negotiating, signing, repudiating and entering into side treaties to undermine the Court, and then allowing Security Council cases to be referred there. See Kurt R. Willems, *U.S. National Security and the International Criminal Court: Should the Obama Administration Consider Reengagement?*, 16 U.C. DAVIS J. INT'L L. & POL'Y 213, 222-25 (2009).

⁸⁴ Even classical contract doctrine was arguably not as laissez-faire as contemporary international law. Even under classic contract doctrine contracts could be void for violating public policy, and consideration needed to be legal consideration.

bitration clauses. Big companies, like powerful countries, get to dictate most of this to the rest of us. Nonetheless, the focus in domestic law doctrinal courses, including in contracts, is not so much on the politics, processes, and policies of law, or norm creation, but on adjudication. Adjudication is often considered less political than other forms of law creation and other forms of conflict resolution.

Although the typical U.S. textbook on international law is overly focused on adjudicated cases, this emphasis is limited in two very important respects that are somewhat unique to international law. First, it is generally acknowledged from the beginning that peaceful means of resolving disputes through adjudication is merely one mechanism among many others for dispute resolution (which include self help countermeasures, the use of force, negotiation, concilia-

More importantly, there were clearly binding mechanisms for resolving contract disputes. Modern contract law is not nearly as *laissez-faire* as either. Note, however, that the *laissez-faire* rule articulated in the *Lotus Case* (France v. Turkey, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7)) (that States are free to do what they wish in the absence of consenting to do otherwise) has been undermined with the growth of non-consensual sources of international law. The development of *jus cogens* norms (norms from which no derogation is allowed) and the development of general principles of law recognized by so called “civilized nations” more and more come in to fill in gaps or lacuna in the law. An interesting example of this can be found in the *Furundžija* case before the International Criminal Tribunal for Former Yugoslavia. Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 183, (Int’l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998), <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf> (addressing the issue as to whether forced oral penetration could be charged as rape). Neither treaty law nor customary international law was specific enough to answer the question. Thus the courts surveyed the laws of various countries to see if there was a general principle found in the practices of the states surveyed that could answer the question. *Id.* at ¶ 180. Here again, countries appeared to have been divided in how to categorize such a case, with some counting it as sexual assault but not rape. *Id.* at ¶ 182. Nonetheless, the trial chamber went on to find that given that such an act was an outrage against human dignity (dignity being “the very *raison d’être* of international humanitarian law and human rights law”) it would not be inappropriate to include forced oral penetration in the definition of rape. *Id.* at ¶ 183. As a result, it concluded that the objective elements of rape included:

- (i) the sexual penetration, however slight:
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person. *Id.* at ¶ 185.

It is an understatement to say that this would not count as a legal decision under a positivist consent approach to international law.

tion, mediation, etc.), and it is rarely the preferred mechanism.⁸⁵ Adjudication is, in fact, relatively rare in the arena of public international law; the International Court of Justice (“ICJ”) typically decides a few cases a year.⁸⁶ Secondly, judicial decisions are not considered a binding source of law in international law. In other words, international law does not have a doctrine of *stare decisis* or binding precedent.⁸⁷ Although the decisions of the ICJ are binding on the parties before the court,⁸⁸ the court is also limited in its ability to enforce compliance with its decisions.⁸⁹

⁸⁵ Note most domestic legal disputes are addressed through mechanisms other than adjudication (even in the litigious U.S.). See THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, JUDICIAL CASELOAD INDICATORS 2010 (2010), <http://www.uscourts.gov/Statistics.aspx> (last visited Jan. 17, 2012).

⁸⁶ The ICJ, since its inception in 1947, has had 124 contentious cases and 26 Advisory Proceedings. See *Cases: List of Cases Referred to the Court Since 1946 by Date of Introduction*, INT’L COURT OF JUSTICE <http://www3.icj-cij.org/docket/index.php?p1=3&p2=2> (last visited Jan. 17, 2012).

⁸⁷ See, e.g., IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 19-22 (7th ed. 2008).

⁸⁸ Article 59 of the *Statute of the International Court of Justice* reads, “The decision of the Court has no binding force except as between the parties and in respect of that particular case.” United Nations, *Statute of International Court of Justice* art. 59 (June 26, 1945).

⁸⁹ The U.N. Charter art. 94(1) imposes an obligation on U.N. Member-States to undertake to comply with decisions of the International Court of Justice and art. 94(2) authorizes recourse to the U.N. Security Council in the event of non-compliance. U.N. Charter art. 94. The U.S. Supreme Court in *Medellin v. Texas* held that because article 94 provides an exclusively political remedy, I.C.J. decisions were not directly binding on U.S. Courts. *Medellin v. Texas*, 552 U.S. 491, 509, 511-12 (2008). Unfortunately, the Security Council has never enforced a decision of the Court under its Article 94(2) powers. See CONSTANZE SCHULTE, COMPLIANCE WITH DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE 39 (2004). Both jurists and jurisdictions are conflicted over the extent to which I.C.J. decisions are directly binding on public officials within states that were parties before the Court. See also SHABTAI ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 1920-1996 249-52 (1997); c.f. A. Mark Weisburd, *International Courts and American Courts*, 21 MICH. J. INT’L L. 877, 883 (2000) (arguing that Article 94 of the U.N. Charter does not impose obligations on the U.S. judiciary to comply with ICJ judgments). See generally Jesse Townsend, Note, *Medellin Stands Alone: Common Law Nations Do Not Show a Shared Postratification Understanding of the I.C.J.*, 34 YALE J. INT’L L. 463, 463-65 (2009) (arguing that contrary to the U.S. Supreme Court decision in *Medellin*, other nations do consider I.C.J. decisions as being binding on public officials). In spite of these shortcomings, at least one commentator has argued that “. . .almost all of the Court’s decisions have achieved substantial, albeit imperfect, compliance.” See Aloysius P. Llamzon, *Jurisdiction and Compliance in Recent Decisions of the International Court of Justice*, 18 EUR. J. INT’L L. 815 (2007).

This fits nicely with the New Haven emphasis on the entire process of authoritative decision-making. The fact that international realism forms the baseline for discussions about international law, rather than positivism, makes it easier for the New Haven School to appear relevant in this domain. The New Haven School, which could be viewed as a continuation of the domestic Legal Realist project, can continue to have a fruitful antagonist/protagonist relationship with realism in international law in a way that it really cannot on the domestic sphere, where positivism dominates. In the domestic arena legal realists had already successfully argued that law was more than mere power politics.⁹⁰ By the time Lasswell and McDougal's published their opus in 1992, *Jurisprudence for a Free Society*, they were out of touch with domestic developments in jurisprudence.⁹¹ Nonetheless, Richard Falk, an international law theorist who is otherwise critical of the New Haven School, did not find it all that problematic that Lasswell and McDougal failed to address virtually any literature from the twenty-five years preceding the publication of *Jurisprudence for a Free Society*.⁹² Thus, when the New Haven international jurists say it is not just about power politics, but also about authority, dignity, and maxi-

⁹⁰ See, e.g., *supra* note 81 and accompanying text. Realists are very diverse in their views, but they drew on the whole range of social sciences in their quests to empirically test the law in action, be it psychology, anthropology, economics, sociology, history or politics. See Shannon Hctor, *Legal Realism*, in JURISPRUDENCE 158, 163 (Christopher J. Roederer & Darrel Moellendorf eds., 2004).

⁹¹ In Chapter 1: *Criteria for a Theory About Law*, Lasswell and McDougal canvass natural law (pp 6-7), historical jurisprudence (pp 7-8), positivism (pp 8-11), sociological jurisprudence, including Marxist jurisprudence (pp 11-13) and then they end by addressing what they call a "relatively recent frame of reference known as 'American Legal Realism' (pp 13-16). In other words, they never really engage developments in legal theory from the 1950s onwards, including the Process School, Critical Legal Studies, Critical Race, Feminism, Law and Economics, etc., all of which were flourishing in the '80s and '90s. They do address what they call "contemporary perspectives" on pages 257-66 where they run through much of this list, which they critique as fragmented frames (Incrementalism, Process, Law and Economics, Critical Legal Studies) and where they give a nod to recent trends in the use of social science for helping make rational authoritative decisions. Even in this section, most of the works cited are from the '70s and early '80s. LASSWELL & MCDUGAL, *supra* note 15, at 3-16, 257-67.

⁹² See Falk, *supra* note 15, at 1993-94. After noting that the authors' had failed "to refer in the text or footnotes to the major scholarly work or historical developments of the last twenty-five years" he continues to state that "[u]pdating would have added, at most, little more than an aura of contemporaneity." He does later note that, "[t]here is in this vast work no discussion of feminist, gay and lesbian, indigenous peoples', or black's 'readings' of international law. This is a serious omission given the powerful critiques of hegemonic discourses of various sorts that emerged in the 1980's and 1990's." *Id.* at 1999.

mizing all other ends or values, it fits within and expands upon the language of the dominant paradigm.

The New Haven Policy Science idea that “. . . law is most realistically observed, not as a mere rigid set of rules but as the whole process of authoritative decision in which patterns of authority and patterns of control are appropriately conjoined,”⁹³ can be addressed more fully in an international law course than in a first year doctrinal course. For various reasons, it is easier to look at the whole process of decision-making when talking about various treaty regimes, or the development of various international regimes like human rights, humanitarian law, the law of the sea, international criminal law, and the like, than it is when looking at torts, contracts, criminal law, and other foundational law topics. In part because of time, we generally do not address the legislative history of a statute or the filing of a case that was eventually adjudicated. The process is too complicated and messy. It is easier to make a few occasional observations about how some of these processes work and then focus on the products of those processes (the statutes and cases, etc.). Simply, there is not enough time to cover the doctrine sufficiently while doing the research mentioned, even if that is the seat of the action.

It is also true, however, that McDougal and his associates at Yale Law School inspired numerous acolytes in his LL.M. program. These LL.M. graduates often became law professors and teachers of domestic law subjects as well as international law. McDougal often personally placed these graduate students in teaching jobs at law schools throughout the country.⁹⁴ A group of such acolytes gather periodically. But this influence has not been enough to sustain the domestic policy science.

True, the occasional article cites McDougal-Lasswell Policy Science and indicates it is using or advocates the use of a policy analysis in the domestic arena.⁹⁵ In law school, Professor Van Doren’s profes-

⁹³ Eisuke Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUD. WORLD PUB. ORD. 1, 30 (1974).

⁹⁴ As Richard Falk notes, “McDougal and Lasswell’s jurisprudential publication – produced over a period of decades – was paralleled by a pedagogical process that sent forth influential students from the Yale Law School to all corners of the country and the world forever imprinted with the law, science, and policy approach. Indeed, the McDougal and Lasswell framework has had more influence in Third World countries than any other American jurisprudential perspective — a surprising result given the founders’ penchant for applying their theory in justification of U.S. foreign policy.” Falk, *supra* note 15, at 1997.

⁹⁵ See John Warren Kindt, *The Failure to Regulate the Gambling Industry Effectively: Incentives for Perpetual Non-Compliance*, 27 S. ILL. U. L.J. 219, 222 (2003) (stating the writer is using McDougal-Lasswell Policy Science, but without providing any convincing detail of how); John Warren Kindt & Stephen W. Joy, *Internet*

sor used the McDougal Haber casebook for Property.⁹⁶ The fact that there are only a few casebooks in the policy science mode on domestic law indicates that policy science is dead for the purpose of studying the domestic law of the United States. A property casebook written by Professor Luther McDougal, in conjunction with Professor Myres McDougal, constituted a valiant effort to infuse life into the McDougal-Lasswell system, but that casebook has gone out of print.⁹⁷

Another reason for the rejection of policy science on the domestic level in the United States is that elite legalists cannot admit that it is a myth that the law is a set of rules, and support the notion that policy determines, and should determine, outcomes. After all, “policy” is a polite word for politics.⁹⁸ Powerful elites fear that they will lose prestige, power, and what goes with it, if law is thought to be mere policy, or even worse, politics. Whatever these elites may think in their heart, they cannot admit publicly their status is partly based on a myth. The typical or atypical judge will deny strenuously she or he is guided by policy choices.

Gambling and the Destabilization of National and International Economies: Time for A Comprehensive Ban on Gambling Over the World Wide Web, 80 DENV. U. L. REV. 111, 112 n.5 (2002) (making several references to Lasswell and McDougal, but makes little attempt to relate authors' conclusions to methodology or substantive goals of Policy Science); Moore, *supra* note 79, at 662-63 (arguing that the law schools are permeated with legal realist malaise and have taken only an ill-defined policy approach and includes a very helpful introduction to Policy Science terminology).

⁹⁶ See generally MCDUGAL & HABER, *supra* note 37.

⁹⁷ Professor Luther L. McDougal teamed up with Professor Myres McDougal to produce a second edition, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT (2d ed. 1981). There are no further editions of this book. Professor Van Doren used this book in Property I, which the students used to refer to as the “red book.” The cover was red in color, but the students were making an ideological point. At least the book was not referred to as “pink.” Within Constitutional Law, the book that comes closest to adopting some of the insights of Policy Science would be PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (5th ed. 2006), which was first written by Paul Brest in 1975 in reaction to the subject by subject and Supreme Court decision focused approach to Constitutional Law that prevailed at the time of the first edition and continues to prevail to this day. Preface at xxxi. Rather, their approach addresses the process of constitutional decision making by multiple actors within historical periods up to the modern era (post 1937) and then address the materials topically and functionally. *Id.* at xxxii. Although inspired by the process school, the authors of this book may be postmodernists who are “skeptical[al] about the legitimating power of process divorced from larger substantive political values.” *Id.* at xxxvi.

⁹⁸ See DUXBURY, *supra* note 1, at 4 (asking why policy science conflating law and politics should be troublesome and that McDougal and Lasswell approved the political nature if their politics was utilized).

Further, if the law is not to be found in the traditional places that lawyers have been trained to look for it, but rather in policy choices that could be better made by trained social scientists and philosophers,⁹⁹ then is not the entire profession a myth or sham? In this view, lawyers and judges who are untrained in Policy Science are not professionals, but complete amateurs as to what really matters; namely making choices that are informed by Policy Science. One who is trained in a course or two on policy science surely could not count himself as a professional in the area. The methods of Policy Science cannot be mastered in a course or two. McDougal himself appeared to need a lifelong academic companion and co-author from the social sciences to develop the approach. Those who work in this area often have Ph.D.'s in the social sciences.¹⁰⁰ If, in this view, the social scientists are the real experts (and this may be the case), then there is little incentive for the academic, judge, law student, or practitioner to buy in (unless they already have a Ph.D.). Even if one has a Ph.D., the social sciences, in contrast to the natural sciences, tend to reward innovation

⁹⁹ When addressing the values in the value-institution process, Lasswell and McDougal list the types of specialist scholars who would be concerned with the study of these values and processes. See LASSWELL & MCDUGAL, *supra* note 15, at 377-79. They include, in addition to jurists: political scientists; students of international relations, communication and civic education; economists, medical professionals, social biologists, sociologists, anthropologists, social psychologists, and historians. *Id.* Note that philosophers are not included even though this set of values and the ultimate end of dignity are as contested and indeterminate as the legal rules and natural law principles that policy scientists wish to eschew.

¹⁰⁰ There has been a strong trend of law faculties hiring Ph.D.'s. Brent E. Newton documents the increase in Ph.D.s over the last 30 years in *Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy*, 62 S.C. L. REV. 105, 130-31 (2010) [hereinafter Newton, *Legal Academy*] ("In the late 1980s, 5% of full-time law professors had Ph.D.'s in areas other than law." (citing Robert J. Borthwick & Jordan R. Schau, Note, *Gatekeepers of the Profession: An Empirical Profile of the Nation's Law Professors*, 25 U. MICH. J.L. REFORM 191, 213 (1991)); ("By the end of the twentieth century, 10.4% of new tenure-track hires had Ph.D.'s (13.2% at schools ranked in the top twenty-five)") (citing Richard E. Redding, "Where Did You Go to Law School?" *Gatekeeping for the Professoriate and Its Implications for Legal Education*, 53 J. LEGAL EDUC. 594, 600 tbl.1 (2003)). "Just a decade later, by 2010, that percentage had grown significantly, particularly at the highly ranked schools. My own study of a representative sample of entry-level, tenure-track professors hired between 2000 and 2009 (excluding clinicians, LRW professors, and other "practical" faculty) revealed that 18.9% possessed Ph.D.'s in addition to or in lieu of a law degree. Professors with Ph.D.'s constituted 35.5% of such tenure-track faculty members hired since 2000 by the first ten schools in tier one of the USNWR rankings." *Id.*

and charting new research paths over working within and through existing paradigms like Policy Science.¹⁰¹

In *The Lost Lawyer*, Anthony Kronman argues that “the general proposition Lasswell and McDougal defend describes the unspoken common ground upon which both the law-and-economics and the critical legal studies movements rest.”¹⁰² It is true that law-and-economics has achieved a high degree of acceptance on the United States domestic legal front. Law-and-economic advocates argue that wealth maximization is the central policy value and if it is not, it should be.¹⁰³ Interestingly, Reisman argues that this emphasis, though part of the eight policy science goals, is not acceptable because the achievement of many other goals is necessary to maximize human dignity.¹⁰⁴ Law and economics advocates do not relegate legal rules and principles to limbo, as do policy science advocates.

When searching for signs of life of Policy Science in domestic law, we came across a promising book by Paul Brest, former Dean of Stanford, and Linda Hamilton Krieger, Former Professor of Law at Boalt Hall. The book, *Problem Solving, Decision Making, and Professional Judgment: A Guide for Lawyers and Policy Makers*,¹⁰⁵ is an in-

¹⁰¹ See generally PAUL A. ROTH, MEANING AND METHOD IN THE SOCIAL SCIENCES: A CASE FOR METHODOLOGICAL PLURALISM (1987).

¹⁰² KRONMAN, *supra* note 70, at 202-03 (arguing common ground appears to be that choice plays a determinative role in adjudication). Note, however, that Kronman also states this was a reiteration of Jerome Frank’s main point in attacking Langdellian formalism (the view that law is a closed system of legal rules and principles). *Id.*

¹⁰³ Law-and-economics, as a general method, pales in comparison to policy science in terms of its complexity. Its basic premises of rationality and wealth maximization are relatively simple and straightforward and can be easily applied to a myriad of social and legal problems. If its advocates could convince legislators, judges and practitioners to follow its normative vision, then no doubt its descriptive and predictive power would be quite strong. Fortunately, human beings tend to resist being reduced to rational wealth maximizers and so this otherwise successful academic exercise will not likely be all that successful in practice as a single tool of analysis, persuasion or decision. While Lasswell and McDougal employ what they call the maximizing postulate, namely that “people will try to chose the course of conduct that leaves them better off than the alternatives that they reject,” they do not reduce the whole range of values to merely wealth maximization, but to the maximization of each value they list. LASSWELL & MCDUGAL, *supra* note 15, at 369.

¹⁰⁴ See REISMAN & SHREIBER, *supra* note 1, at 560 (questioning law-and-economics advocates’ focus on wealth alone, ignoring enlightenment, well-being, power and so on).

¹⁰⁵ PAUL BREST & LINDA HAMILTON KRIEGER, PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICY MAKERS (2010).

terdisciplinary book designed for courses on decision making by lawyers and policy makers. The back cover includes an endorsement by the Dean of New York University, Richard L. Revesz, which would have made Lasswell and McDougal envious. It states:

Their book is likely to transform the curricula of law schools and public policy schools by providing an excellent text for courses that systematically analyze the crucially important, but hitherto largely neglected, process by which lawyers and policymakers exercise their judgment. Their multidisciplinary approach is ambitious and rigorous yet clear and accessible.¹⁰⁶

Yet, not a single reference to Policy Science exists, McDougal or Lasswell, in this textbook. Rather, as Paul Brest put it, “[o]ur project is, for want of a better word, much more “technocratic” than Lasswell’s and McDougal’s.”¹⁰⁷ He further states:

[i]ts essential premise is that it’s the counselor’s job to help a client maximize his or her utility, and its goal is to teach students problem-solving skills through a mixture of decision theory (light), social psychology and JDM [judgment and decision making], and behavioral economics. So, for better or worse, it is orthogonal to Lasswell and McDougal and also to CLS and law & economics.¹⁰⁸

B. Transfiguration: From Policy Science to the New Haven School of International Law

McDougal-Lasswell Policy Science is alive and well in the international law arena, where it is referred to as the New Haven School of International Law, or the New Haven School.¹⁰⁹ Although some prominent commentators tout policy science in the international bailiwick, it is still not the leading theory.

Many, if not most, international legalists dismiss policy science.¹¹⁰ Thus, although the democratic values policy science seeks to promote are desirable and important, an accepting world is not just around the corner, and to posit otherwise makes international law seem utopian and out of touch.¹¹¹ Moreover, some international legal-

¹⁰⁶ *Id.* at back cover (proving Revesz’ endorsement).

¹⁰⁷ Email from Paul Brest to Christopher Roederer (July 13, 2011) (on file with author).

¹⁰⁸ *Id.*

¹⁰⁹ See DUXBURY, *supra* note 1, at 199; Cantegreil, *supra* note 40, at 98; Koh, *supra* note 52, at 562-63.

¹¹⁰ Borgen, *supra* note 55, at 331, 362.

¹¹¹ See Borgen, *supra* note 55, at 359 (arguing that policy science historically related to U.S. foreign policy); Minda, *supra* note 51, at 436-37 (stating Vietnam War

ists are partial to the positivist model, which is at odds with policy analysis.¹¹²

Policy science has undergone a transfiguration in its acceptance in the area of international law. The proponents of the New Haven School carry on McDougal's aversion to Legal Positivism to this day. They refer to Legal Positivism as myth.¹¹³ New Haven advocates stress policy and claim that even the decision to rely on positive law is a policy decision, sometimes a decision to favor the status quo.¹¹⁴

1. Some Reasons for Failure of the New Haven School to Achieve Greater Acceptance

Perhaps some arguments against policy science applied to international law have curtailed acceptance in the international law arena. Policy science applied to international law has not escaped criticism. Policy science has traditionally incorporated a formal attribute of the observational perspective, and other uses of the word "science," which seems to import objectivity.¹¹⁵ Recent commentators have criticized this feature in the McDougal-Lasswell system.¹¹⁶ One commen-

aftermath showed the projection of force of Western democratic values was a failure); *see also* DUXBURY, *supra* note 1, at 199 (arguing that many, if not most, international lawyers reject policy science because the world is not ready to be made over in the liberal values posited).

¹¹² *See* Cantegreil, *supra* note 40; *see also* SHAW, *supra* note 34, at 61 (asserting that critics argue that policy science underrates the positivist legal content of international law and the practice that most states abide by it).

¹¹³ *See* Cantegreil, *supra* note 40, at 122 (asserting that New Haven School scholars may find European reliance on rules of international law as an unfortunate reliance on a myth).

¹¹⁴ *See generally* Bratspies, *supra* note 44, at 377 (stressing the international reach of environmental problems together with the importance of law as policy of McDougal-Lasswell system and separating law from policy is an implicit policy to favor the status quo).

¹¹⁵ *See* REISMAN & SCHREIBER, *supra* note 1, at 577; Bratspies, *supra* note 44, at 377 (asserting that objective neutral decision making impossible for Policy science); *see also* Falk, *supra* note 15, at 1999 (criticizing Policy Science).

¹¹⁶ *See* Van Doren, *supra* note 5, at 163-64; Falk, *supra* note 15, at 1999-2001 (arguing their enterprise fails "to help academic advisers and policymakers use law as a specialized instrument in a wide variety of social and political arenas for pursuing these normative goals." As he further argues, "[i]n my view, this part of the enterprise fails, and is doomed to failure by its inherent nature. This failure is expressed by the inability of honest, intelligent, morally sensitive, and politically moderate individuals steeped in the New Haven approach to agree in the domain of policy application. Reliance on the McDougal and Lasswell orientation tends, if anything, to accentuate policy divergences as opposed viewpoints each claim 'scientific' grounding for their position. As the Chinese proverb goes, '[t]wo persons in the same bed have different dreams,'" further stating, "the effort to resolve policy

tator found that the inherited policy science would not be able to offer a perspective in any important court decision that would achieve an objectively correct result.¹¹⁷ Another commentator found that the existence of the faith in objective methodology in policy science was a mistake.¹¹⁸ Other commentators note a contradiction between the hankering for objectivity and the admitted realities of the policy science frame.¹¹⁹

The eight desired outcomes referred to previously are carried over into the New Haven School's program. These goals or preferred outcomes are predominantly Western democratic values and the contemporary policy scientist is to affirm those values. As in the domestic sphere, however, those values may conflict. For example, even a sympathetic critic of the New Haven School notes that the broad goals of the International Community such as public order, liberty and human dignity may conflict. In recent international law cases concerning electronic surveillance, interception of telecommunications and storing data, this conclusion is difficult to avoid.¹²⁰ These cases have stressed "order" and downplayed human dignity.¹²¹

controversy by scientific inquiry has not succeeded. Opposing lines of interpretation by individuals of comparable intelligence and virtue can reach utterly opposed policy conclusions on controversial matters even as they acknowledge their indebtedness to the McDougal and Lasswell jurisprudence.").

¹¹⁷ Bratspies, *supra* note 44, at 379.

¹¹⁸ *See id.*; *see also* DUXBURY, *supra* note 1, at 172-76 (quoting Professor Lawrence Tribe, "the attempt to use an objectivist viewpoint will superimpose a distortion on the process."). Somewhat contradictorily, McDougal and Lasswell distance themselves from the possibility of the scholar applying an objective approach to values. *Id.* at 173-74. Indeed, for them such a separation would be impossible and even undesirable. *Id.* at 173-75. Seemingly continuing the contradiction, while the mechanics of the legal process must be observed dispassionately, the choices of policy are "unashamedly" value laden. *Id.*

¹¹⁹ DUXBURY, *supra* note 1, at 175-76.

¹²⁰ *See* Cantegreil, *supra* note 40, at 123-24 (citing conflicting standards in international law).

¹²¹ However, a recent commentator sympathetic to the New Haven School notes positivism also can be used to transform international law. The commentator opined that perhaps international lawyers, at least in the context of the War on Terror, should consider an integration of the international law-oriented Legal Positivism and the New Haven School. *See id.* at 126-27. But it is unclear if the "integration" would be acceptable to either side. Juristic opinions do not ordinarily articulate their policy goals. And the New Haven School advocates cannot disregard the doctrine customarily used in international law. For example, it certainly would be a good thing if the limits on the power of the Security Council under Chapter VII of the United Nations Charter were clearly defined. *Id.* at 125-26 (encouraging New Haven School scholars to find limitation on Security Council discretionary power and identify for courts reviewing such actions the appropriate

2. *Attempted Explanation of Paradox of “Death and Transfiguration”*

Our attempt to explain the rejection of Policy Science in the domestic arena, and the acceptance in the international area is as follows. First, to transport policy science to the international law area, it is not necessary to transform the basic teaching of law. The practically oriented law students need not be assaulted with policy analysis and the policy science jargon. The basic legal positivism of the United States law schools, however defective and misleading, need not be touched. International Law is often only one course.

Secondly, the United States domestic legal system is held together in part by this important Legal Positivist myth. The first branch of the myth is that a Constitution drafted for an agricultural society in the 18th century dictates the answers to important legal and policy matters in the technological, industrial twenty-first century society.¹²² The second branch of this myth is the claim of Legal Positivism—that there is really something called law out there to be true or faithful to.¹²³ So, juristic elites will deny the claim that in the domestic arena, law is nothing but politics.¹²⁴ Michael Reisman once wrote “McDougal’s image evolved from *enfant terrible* and destroyer of the

standard of review). The commentator further encourages new wave New Haven School scholars to clarify the relation between complying with international norms, unifying the international legal order, and diversifying values. *Id.* at 126. Good luck on this one under any system. Thus, some commentators project a move to “diversity values.” Diverse values are fine so long as they do not collide in deciding a particular case. The commentator above suggests that the European idea of personal liberty equates with the United States goal of personal privacy. But these concepts are producing different results in War on Terror cases. *Id.* at 123-24.

¹²² See REISMAN & SCHREIBER, *supra* note 1, at 306 (asserting that a constitution drafted centuries before in different context is quite different from decisions of current courts creating law); Karl Llewellyn, *The Constitution as an Institution*, 34 COLUM. L. REV. 1, 3 (1934) (doubting that a Constitution made for a small agricultural society now informs a large industrial nation). For a current attempt to perpetuate this myth, see the recent reading of the Constitution on the floor of the House of Representatives, January 6, 2011. Lucy Madison, *Constitution (As Edited) Read on House Floor*, CBSNEWS (Jan. 6, 2011, 01:12 PM), http://www.cbsnews.com/8301-503544_162-20027598-503544.html (reporting that the reading left out certain parts of the original Constitution such as slavery and was designed to reflect the myth that the Constitution is operative intact).

¹²³ See Van Doren, *supra* note 5, at 163-64 (citing Realists for the view that Restatements of the law assume a fact not in evidence. Namely, there is law out there that is stated and thus capable of restatement).

¹²⁴ See, e.g., Jack W. Van Doren, *Exploring Contradictions*, 4 FLA. B.J. Apr. 1985, at 21, 23 (referencing Critical Legal Studies’ belief that law is politics).

law to elder statesman and prophet of human dignity.”¹²⁵ This evolution, we would argue, came with a shift in focus in his work from the domestic sphere (where he was considered a destroyer of the law) to the international sphere (where he was considered an elder statesman and prophet of human dignity). This is in large part because of the contrast between domestic faith in a positivist vision with skepticism toward the existence of law in the international domain.¹²⁶ Though some, perhaps many, recent commentators write as though there is some “there” there, (some law in international law) others claim that there is not any “there” there (no law in international law).¹²⁷

Indeed, the preeminent legal positivist of the mid-twentieth century, Professor H.L.A. Hart found international law norms so troublesome, that international law could not be admitted to the law club. Hart, therefore, denies that what is called international law is, in fact, law. No sovereign and no secondary rule of recognition exists.¹²⁸ Jerome Frank, one of the fathers of American Legal Realism, argued against having the National Lawyers Guild address controversial issues of international law, because he considered such issues to be matters of pure national interest, and not matters of law at all.¹²⁹

¹²⁵ W. Michael Reisman, *Theory About Law: Jurisprudence for a Free Society*, 108 YALE L.J. 935, 939 (1999).

¹²⁶ On the international front McDougal and Lasswell were arguing legal rules and authority mattered. See Oona A. Hathaway, *The Continuing Influence of the New Haven School*, 32 YALE J. INT’L L. 553, 556 (2007). They critiqued political realism for overestimating the role of power and underestimating the importance of rules and legal processes. See Myres S. McDougal, *International Law, Power and Policy: A Contemporary Conception*, 82 RECUEIL DES COURS 137, 157-60 (1953).

¹²⁷ See DUXBURY, *supra* note 1, at 192 (citing Philip Marshall Brown, who stated international law was derisively ignored and brazenly repudiated); Minda, *supra* note 51, at 440 (referring to Gertrude Stein’s famous quote). See generally Joshua Kleinfeld, *Skeptical Internationalism: A Study of Whether International Law is Law*, 78 FORDHAM L. REV. 2451 (2010) (arguing for a skeptical view of the ability of courts and other institutions to interpret the content of international law and carry out its project in a manner that is consistent with minimal principles of legality).

¹²⁸ See H.L.A. HART, *THE CONCEPT OF LAW* 214 (2d ed. 1994). The secondary rule of recognition is a source deemed authoritative by officials in a system that contains rules and principles by and large determinant of controversies. *Id.* at 94, 95. It is doubtful that we really have a single secondary rule of recognition in domestic law either. *Id.* at 214. Rather, we have various modes of argument that are more or less acceptable to different legal actors.

¹²⁹ The dispute, according to Dan Ernst in the Legal History Blog, was over whether the National Lawyers Guild (to which Frank and Felix Cohen influential Legal Realists, were members) should get involved in arguments regarding an embargo against the belligerents in the Spanish Civil War. Felix Cohen, as chairman

of the Guild's National Committee on International Law, wanted to publish a report arguing that the embargo was invalid under existing law. Frank responded by arguing

that the lifting of the arms embargo was 'basically, not a legal question,' he protested to Cohen. 'The principles of international law are peculiarly uncertain,' he elaborated. 'Historically, and by their very nature, they are par excellence rationalizations of ad hoc attitudes. Essentially they are weapons employed for diplomatic purposes. Every country uses those particular alleged principles of international law which at any given moment suit its convenience.' He continued: 'For purposes of casuistry the invocation of some alleged principles of [international law] may be expedient. And if in a spirit of deliberate partisanship you were thus to evoke such alleged principles, on the basis that a desirable end justifies the use of any means, and that the only test of the propriety of such 'reasoning' is one's getting away with it, then I could understand you. But I do not understand your high moral indignation when someone, blowing away the gossamer of legalism, scrutinizes and criticizes the non-legal postulate which bottoms your discussion. The real test of the views you express in your letter to Morris Ernst is this: Would you be in favor of applying the same alleged principles of international law regardless of the consequences to the people of the United States? Frankly (the world being what it is today) I must say that I would not. Cohen promptly replied. 'What you say about the haziness of international law may be true in many fields, but on the main point of the report we were dealing not with theory but with the historical practice of the United States and other nations respecting foreign insurrections. We were dealing with brute facts and showing how habits developed in one situation were thrown over in another situation, to the great gratification of Mr. Franco, who publicly expressed his appreciation of the embargo.' Frank held his ground. 'My fundamental point is not that there is what you call 'haziness' in international law,' he wrote. My basic point is that the so-called principles of international law are applied, or not applied, in particular instances, in accordance with what a particular country considers, at the particular moment, to be for the welfare of its citizens. Consequently, any given so-called principle of international law is often applied by any given country to one set of facts in one part of the world and not applied to what might seem to be a similar set of facts in another part of the world. Not to recognize that such is the manner in which so-called international law is always applied is to ignore the facts of life.

Dan Ernst, *Legal Realism and International Law, 1938*, LEGAL HISTORY BLOG, (June 22, 2008, 01:00AM), <http://legalhistoryblog.blogspot.com/2008/06/legal-realism-and-international-law.html>.

Another reason policy science may be more conducive to international law is the much greater focus in the study of international law on norm or law creation than in most of domestic law courses. Norm creation in international law takes place within and among United Nations bodies and agencies, regional organizations, in the works of special rapporteurs, nongovernmental organizations, and states. The formation of these norms in custom and treaties includes consideration of what states and these other bodies do, and why they do it. This is much more congenial to a policy science approach of looking at the behavior of decision makers and policymaking.¹³⁰

Professor McDougal taught that the international law making process is ongoing and evolving.¹³¹ For McDougal, however, international law is a study separate from politics and includes a variety of components and actors that can be gleaned from how it actually operates, affects decisions, and creates norms. McDougal asserted that the view that international law was nothing but politics was dangerous because it could lead to the assertion that mere exercise of power could hammer out international law.¹³² Dangerous or not, since World War

¹³⁰ But if our focus in domestic law courses was on how criminal laws are made, how and why people enter into contracts, how and why we structure our tort system the way it is, and so on, policy science would make more sense there too. For instance, we imagine it would work well in a course on the legislative process. However, the policy science approach is more difficult and controversial to implement during adjudication and in courses that focus on the outcomes of adjudication. Although, one cannot deny the insights of the realists that what judges do in cases is not merely a matter of following doctrine and legal rules, most recognize a difference between the rule creation stage when laws are passed and contracts are negotiated, and the adjudication stage, when those “laws” are “applied.” While there is still plenty of room for policy choice and law making during adjudication, most jurists would view their choices, or at least the sources and modes of argument that they use to justify their choices, as being more constrained in the adjudicatory context. The modes of argument and justifications are at the very least different. Policy science modes of argument would not be as at home in a judicial decision as they would be in a discussion about how best to design a criminal code or to protect endangered species, etc. A full blown Policy Science approach to a given case would not only be too difficult, it would also not look like a legitimate judicial decision to the bulk of the legal community. Note also that even states may not engage in the inclusive decision procedure specified by the McDougal-Lasswell Policy Science. See SHAW, *supra* note 34, at 61 (stating states seldom engage in extensive behavioral analysis).

¹³¹ See SHAW, *supra* note 34, at 59 (arguing that international law for McDougal-Lasswell Policy Science is a constantly evolving process of decision making).

¹³² See Janet Koven Levit, *Bottom-Up International Law Making: Reflections on the New Haven School of International Law*, 32 YALE J. INT’L L. 393, 394, 396-98 (2007) (citing JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that international law does not constrain and is there-

II, there has also been a substantial presence of this realist school, which sees states acting in their interest defined as power unconstrained by law.¹³³ Neo-conservatives may contend that international law not only is, but should be, nothing but a ramification of political power,¹³⁴ but New Haven School adherents reject this view. For them,¹³⁵ international law has a broad interactive political component. Thus, international law is composed of many sources, action and reactions, but is much more than nation states acting in their self interests.¹³⁶

IV. SUMMARY AND CONCLUSION

It is interesting that the domestic critique of policy science has not led to its rejection in the International Law arena. Here are some distinguishing characteristics of the domestic arena, as compared to the international arena, that may explain this paradox. The transposition of policy science to International Law need not have the goal of eliminating the cost effective large class in which the legal positivist approach is taught. The bulk of the required curriculum can be taught in this efficient rule based way, leaving the few International Law courses to be taught as small seminars that can delve into policy science. Nor need student expectations that there is law out there to be taught be defeated for the same reason; International Law is not a required course. A deeply ingrained mythology exists that there is law in the domestic arena. International Law may lack this agreed-upon base. Furthermore, International Law experts have no firm basis or agreed-upon vantage point to reject New Haven School theory. The shifting sands of international law do not challenge the legitimacy of International Law elites. In the United States domestic sphere, how-

fore a mere tool of a strong state); Minda, *supra* note 51, at 435-36 (arguing that international law is seen by policy science advocates as a means to transform the world into liberal democracies).

¹³³ See Paul Schiff Berman, *A Pluralist Approach to International Law*, 32 *YALE J. INT'L L.* 301, 301 (2007) (asserting that positivism and realism have been dominant since World War II in international law).

¹³⁴ See Levit, *supra* note 132, at 394 (stating, "[i]nternational law is now besieged by a neo-conservative, nationalist ideology, an ideology hauntingly similar to the Cold War realism of the 1950s and 1960s, that gives little (if any) independent normative weight to international law and instead conceives of it as a mere tool in furtherance of the 'national interest' and power politics.").

¹³⁵ See Bratspies, *supra* note 44, at 389 (arguing that the global community is composed of numerous sources contributing to international law).

¹³⁶ See Suzuki, *supra* note 93, at 30.

ever, if law is politics, narrowly conceived, judges may have no more legitimacy than politicians.¹³⁷

Neither liberals nor conservatives in the United States want law and politics to be inextricably linked in the domestic judicial process. Law training and judicial experience must count for something.¹³⁸ Hence, the Legal Positivist mythology that courts find domestic law from sources such as constitutions, cases and statutes, largely exclusive of policy, has carried the day and contributed to the demise of policy science in the domestic United States. McDougal and Lasswell assumed that Legal Positivist myth and obfuscation could be defeated by policy clarification. To accomplish a significant move in that direction, positivism on the domestic level must be jettisoned and a cumbersome reorientation of current legal education must be adopted. Maybe someday people can be told that McDougal and Lasswell were correct: decision-makers often make their decisions on a policy basis. But positing high-level abstractions as a means of resolving these policy issues is a process about which we reserve an overarching skepticism.

V. EPILOGUE

Our purpose has not been to denigrate the New Haven School. We affirm that law predominantly involves a choice of policy and that positivism is a smokescreen to cover up that policy choice. The New Haven School, which takes a global perspective, is applauded particularly in international law. We also favor the expansion of the focus of international law to include actors other than states. The New Haven School's view of law as a process, rather than a snapshot of a set of rules and principles, is also desirable. Where we part company is the New Haven School's focus on a multitude of goals as supplemented by an exhaustive list of policies that does little to aid the indeterminacy problem.¹³⁹

We also fear that emphasis on liberal values, while laudable, calls for much more thinking about how, if at all, communication can

¹³⁷ The trust of the people in their federal and state government officials is, unfortunately, quite low. A 2010 Gallup poll found that only thirty-six percent of American have a great deal or fair amount of trust and confidence in the legislative branch of government. The executive branch scored slightly better with forty-nine percent and the Judiciary fared the best with sixty-six percent. Frank Newport, *Trust in Legislative Branch Falls to Record-Low 36%*, GALLUP (Sept. 24, 2010), <http://www.gallup.com/poll/143225/trust-legislative-branch-falls-record-low.aspx>.

¹³⁸ For example, Legal Realist Karl Llewellyn stressed "craft" in judging, which presumably elevates the judicial process above mere politics. See KARL N. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 363-68 (1962).

¹³⁹ Falk, *supra* note 15, at 2000-01.

resolve conflict and diametrically opposed premises, which do not even include dialogue to some. We wish the New Haven School good luck, but remain deeply skeptical of the methodologies chosen so far.