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## Educating American Lawyers: The New Haven School's Jurisprudence of Personal Character

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## **Educating American Lawyers: The New Haven School's Jurisprudence of Personal Character**

**Rían Derrig\***

### **Abstract**

Using previously unexploited archival sources and unpublished teaching materials, this article rereads Harold Lasswell and Myres McDougal's earliest 1943 statement of policy-oriented jurisprudence – what would become known as the 'New Haven School' – and examines their wartime careers in government and academia. It breaks with widely held current understandings of the New Haven School. First, Lasswell and McDougal's work is re-periodized. Instead of a reactionary answer lawyers offered to international relations realists in the 1940s, I argue that policy-oriented jurisprudence was a product of interwar insecurities and the rising culture of American modernism from the 1920s. Second, notwithstanding frequent associations of the jurisprudence with interventionist, anti-communist American foreign policy during the Cold War, the article emphasizes Lasswell and McDougal's engagement with progressive politics of the early 20th century – New Deal social planning and redistribution; psychoanalytically inspired social critique; Marxism and socialism. Third, I argue that the school's primary intellectual origins are to be found not in American legal realism or positivist social science, but in philosophical pragmatism and psychoanalysis.

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### **1 Introduction**

This article is extracted from a doctoral thesis that uses new empirical evidence to explore underappreciated aspects of the intellectual history of Harold Lasswell and Myres McDougal's policy-oriented jurisprudence, better known as the 'New Haven

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School'.<sup>1</sup> Using material from archives in New Haven, Chicago and New York, which includes previously unseen sources, as well as the unpublished seminar materials from which Lasswell and McDougal taught their jurisprudence, the article argues that by exploring Lasswell and McDougal's early careers and scholarship, we can identify previously underexamined ideas in their later, more widely known Cold War international law texts and interventions. I argue that a historically aware reading of Lasswell and McDougal's 1930s and 1940s scholarship allows us to better understand the later international law treatises and arguments that most international lawyers associate with the New Haven School today. By reading these later texts and arguments in light of the animating preoccupations and historical contexts that shaped Lasswell and McDougal's earliest articulations of policy-oriented jurisprudence, we understand their performance as interventions from a new vantage point, and perceive a distinguishable centre of gravity that was meaningful to a later generation of international law practitioners and scholars who consciously identified as a 'school' of international legal studies.

From the early 1950s onwards, McDougal and many collaborators, mainly former students, applied the legal and social theory he had developed with Lasswell to fields as diverse as the law of the sea; the law of war and the use of force; space law; treaty law; the law of international organizations; international human rights law; and other topics.<sup>2</sup> Today it is usually these voluminous texts, with the interventionist, anti-communist positions McDougal adopted in support of Cold War foreign policy positions of the US State Department, that the New Haven School is understood to have represented in the post-war field of international law. The theoretical complexity of New Haven School publications (often read as turgid prolixity) tends to be understood as a product of combining the American legal realism of McDougal's early career with positivist empirical methods recommended by Lasswell, comprising an effort to theoretically justify a legalist response to international relations realism.

Based on this understanding, some critics today consider the New Haven School a story of Cold Warriors justifying imperial American policy. Lawyers losing sight of legality, the autonomy of law, in a clash between realism and legalism.<sup>3</sup> This critical

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<sup>1</sup> The thesis examines Lasswell's social theory, McDougal's legal scholarship and their respective careers in depth, using personal correspondence, previously inaccessible oral history sources and unpublished memoranda and writings: R. Derrig, 'Educating American Modernists: The Origins of the New Haven School' (2019) (PhD thesis on file at the European University Institute, Florence).

<sup>2</sup> See, e.g., McDougal and Schlei, 'The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security', 64 *Yale Law Journal* (Yale L.J.) (1955) 648; McDougal, 'The Soviet-Cuban Quarantine and Self-Defense', 57 *American Journal of International Law* (AJIL) (1963) 597; M. McDougal and F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961); M. McDougal, H. Lasswell and I. Vlasic, *Law and Public Order in Space* (1963); M. McDougal, H. Lasswell and J. C. Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (1967); McDougal and Gardner, 'The Veto and the Charter: An Interpretation for Survival', 60 *Yale L.J.* (1951) 258; McDougal and Bebr, 'Human Rights in the United Nations', 58 *AJIL* (1964) 604; M. S. McDougal and L. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity* (2nd ed., 2019).

<sup>3</sup> See, e.g., M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001), at 476, and more generally ch. 6; Koskeniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity', 26 *International Relations* (2012) 3, at 14; Peters, 'There Is Nothing More Practical than a Good Theory: An Overview of Contemporary Approaches to International Law',

story prompts us to imagine international lawyers as agents of American hegemony and neoliberalism. In an alternative narrative, other interpreters emphasize that the New Haven School should be remembered for a legacy of positivist empirical methods, and for the admirable figure of the lawyer policy-maker. Many narrators of this second version claim the New Haven School as an intellectual ancestor of an American, post-1990s centre-left foreign policy establishment, which was eager to promote positivist empirical research methods and a conception of international legal scholarship close to policy-making.<sup>4</sup>

They end in different morals, but both of these narratives start from a common interpretation of the New Haven School. This article challenges this interpretation in three ways. First, policy-oriented jurisprudence is re-periodized. Far from a reactionary answer that lawyers offered to international relations realists in the 1940s, I argue that Lasswell and McDougal's work was a product of the rising culture of American modernism from the 1920s. Rather than a confident post-war project, Lasswell and McDougal related their jurisprudence to interwar anxieties prompted by the failure of the international order of the League of Nations, the rise of fascism and social problems posed by what they saw as the unprecedented complexity and speed of modern industrial society.

Second, I emphasize the relationship between Lasswell and McDougal's development of policy-oriented jurisprudence and progressive politics. When they began to collaborate in 1935, such politics challenged the inequalities and plutocratic orders many people thought capitalist industrial society had created by the early 20th century. McDougal's work before developing the jurisprudence with Lasswell was concerned with New Deal social planning and redistribution. In the 1920s, Lasswell was strongly influenced by graduate research that immersed him in Europe's most prominent circles of socialist and social democratic thinkers. He comprehensively stated his pre-jurisprudential social theory in *World Politics and Personal Insecurity*, a 1935

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44 *German Yearbook of International Law* (2001) 25, at 31–32; Rovira, 'Sources in the Anti-Formalist Tradition: A Prelude to Institutional Discourses in International Law', in J. d'Aspremont and S. Besson (eds), *The Oxford Handbook of the Sources of International Law* (2017), at 203–223; B. S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd ed., 2017), at 107–109; F. V. Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (1989), at 195–200; and the sceptical reflections in A. Cassese, *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jimenez de Arechaga, R. Jennings, L. Henkin and O. Schachter* (2011), esp. 'Interview with Louis Henkin: February 1995' at 200–202.

<sup>4</sup> See, e.g., Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205, at 209–213; Koh, 'Is There a "New" New Haven School of International Law?', 32 *Yale Journal of International Law* (*Yale J. Int'l L.*) (2007) 559, at 562; Hathaway, 'The Continuing Influence of the New Haven School', 32 *Yale J. Int'l L.* (2007) 553, at 555; Shaffer and Ginsburg, 'The Empirical Turn in International Legal Scholarship', 106 *AJIL* (2012) 1, at 2; J. L. Dunoff and M. A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (2013), ch. 1. The work of legal scholars who were students of McDougal and/or Lasswell should be treated separately from the more widespread representations challenged here. Scholars like Richard Falk, Rosalyn Higgins, Michael Reisman and Andrew Willard have developed and employed policy-oriented jurisprudence in ways that are methodologically and politically diverse.

monograph that envisaged a socialist world-state.<sup>5</sup> The larger thesis from which this article is extracted reconstructs these experiences and ideas in detail. Although largely confined to Lasswell and McDougal's wartime writing and careers, this article emphasizes their connections to these progressive politics of the early 20th century.

Third, I argue that policy-oriented jurisprudence is not best understood as an iteration of American legal realism complemented by positivist empirical methods, but has intellectual origins in philosophical pragmatism and psychoanalytic social theory. My archival sources emphasize the centrality of premises found in a conception of the 'empirical' drawn from philosophical pragmatism; and in psychoanalytic theories of law and democratic order. The psychoanalytic premises of policy-oriented jurisprudence closely linked law and democracy to the characters and personalities of people. Lasswell and McDougal argued that if the lawyer policy-maker understood the relation between character and democracy, they could confront their involvement in the maintenance of democratic order, and engineer American society towards an idealized future. Lasswell and McDougal's aim was the construction of a legal theory that would be of its time in a way many modernist American writers and thinkers also took as their task. In the writing of Ralph Waldo Emerson and the philosophical pragmatists, and in the work of legal realists like Jerome Frank, a tradition of ideas can be found that attempts to explain America to itself at particular moments. I argue the New Haven School was part of this pragmatist tradition of examining the American sense of self.<sup>6</sup>

This article is structured as follows. Section 2 examines the policy-oriented jurisprudence Lasswell and McDougal began to outline in their first collaborative publication in 1943, seeking to demonstrate its interwar character; connections to progressive politics; and origins in philosophical pragmatism and psychoanalytic social theory. The section rereads this publication by drawing on unpublished teaching materials from Lasswell and McDougal's 'Law, Science and Policy' seminars in the late 1940s and 1950s, in which they further developed the ideas first presented in 1943, and on personal correspondence from archives in New Haven. Section 3 contextualizes this first articulation of policy-oriented jurisprudence by exploring Lasswell and McDougal's careers in government and academia during and immediately before the Second World War. This section employs personal correspondence and unpublished documents from archives in New Haven, New York and Chicago, as well as previously unseen oral history sources. Section 4 concludes by connecting the rereading and contextual narrative developed in Sections 2 and 3 to the three ways this article takes issue with the above-noted contemporary interpretation of the New Haven School.

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<sup>5</sup> H. Lasswell, *World Politics and Personal Insecurity* (1935, repr. 1965). Lasswell asked: 'Is it worth while to show that the revolutionary state of the socialists is the only one where able organizers and technicians are given security and scope, the only society in which the road to reward for effort is open, where it cannot be shut off by the erratic malcoordination of the capitalist economy?' (*ibid.*, at 201–202).

<sup>6</sup> Richard Falk has noted: 'In one sense, the essence of the New Haven Approach is to work out explicitly and fully the implications for a given subject-matter of common-sense rationality as understood in mid-twentieth century America.' See Falk, 'On Treaty Interpretation and the New Haven Approach: Achievements and Prospects', 8 *Virginia Journal of International Law* (1968) 323, at 332.

## 2 Educating for Democratic Character

In April 1968, Richard Falk first named the ‘New Haven Approach’ a ‘school’ of international legal studies.<sup>7</sup> This naming was almost immediately picked up by fellow self-identified members Burns Weston and Rosalyn Higgins, and later many more former students of Lasswell and McDougal’s 1950s ‘Law, Science and Policy’ seminars.<sup>8</sup> From this naming of a school in 1968, the ideas and vocabulary that became associated with the New Haven School can be traced backwards in time, through the 1960s and 1950s statements and writings of Lasswell, McDougal and collaborators, to wartime Washington in 1943. Then, Lasswell and McDougal spent their evenings writing in the Blackstone Hotel off K Street. In March of that year their work was published as an article in the *Yale Law Journal*, ‘Legal Education and Public Policy: Professional Training in the Public Interest’. With few exceptions, this article would remain the only publication to specify the framework of legal theory Lasswell and McDougal had begun to develop in their collaboratively taught seminars at Yale Law School until the teaching materials used in those seminars were published as the two-volume *Jurisprudence for a Free Society*, in 1992.<sup>9</sup> By rereading ‘Legal Education’ alongside an original, unpublished version of those seminar materials, and in the context of their careers during and immediately prior to the Second World War, I argue that the New Haven School’s character as an interwar body of legal theory, animated by progressive politics and founded on premises of philosophical pragmatism and psychoanalytic social theory, becomes evident.

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<sup>7</sup> *Ibid.*, at 330 n.11.

<sup>8</sup> Weston, ‘Review: The Interpretation of Agreements and World Public Order by Myres S. McDougal, Harold D. Lasswell, and James C. Miller’, 117 *University of Pennsylvania Law Review* (1969) 647, at 647 n.1; Higgins, ‘Policy and Impartiality: The Uneasy Relationship in International Law. Review of: Order in a Violent World. by Richard A. Falk’, 23 *International Organization* (1969) 914, at 920 n.24.

<sup>9</sup> H. Lasswell and M. McDougal, ‘Law, Science and Policy’ (1958) (Unpublished manuscript of teaching materials on file at Lillian Goldman Law Library, Yale Law School). Unless otherwise specified, later references in this article are to this unpublished edition. However, in 1992, long after Lasswell’s death in 1978, these seminar materials were revised by McDougal and Andrew Willard and published in two volumes: H. Lasswell and M. McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy*, 2 Vols (1992). On many occasions, McDougal has said that while they taught, excepting the 1943 ‘Legal Education’ article, he and Lasswell published nothing specifying (as opposed to applying) their legal theory.

*In a seminar on ‘Law, Science, and Policy’, designed largely for prospective teachers and offered for several decades in the Yale Law School, Lasswell and I sought to build upon and develop the themes announced in the [1943] article. In collaboration with our students and other associates, we made application of the recommended theories and procedures in many books and articles, most notably in international law, property law and criminal law. A book to be published in 1991 – Lasswell & McDougal, Jurisprudence for a Free Society: Studies in Law, Science, and Policy – will contain the lectures and other materials, somewhat revised and updated, prepared by Lasswell and me to conduct the seminar.*

See Shapiro, ‘The Most-Cited Articles from The Yale Law Journal’, 100 *Yale L.J.* (1991) 1449, at 1507. Limited portions of these seminar materials were incorporated by Lasswell into publications he produced after 1943. See, e.g., Lasswell, ‘Democratic Character’, in H.D. Lasswell, *The Political Writings of Harold D. Lasswell* (1951) 465, at 476 n.22 (noting his use of the seminar materials).

In 1943, 'Legal Education' laid out a research agenda that Lasswell and McDougal wanted other scholars to pursue, recommending a methodology and questions. The article also expressed a vision of a figure. That figure was of the American legal scholar as a person who should assume intellectual and moral leadership at a moment Lasswell and McDougal said was uncertain and full of movement, yet that offered enormous possibilities for social construction: '[T]he reform of legal education must become ever more urgent in a revolutionary world of cumulative crises and increasing violence. ... [L]ittle has actually been achieved in refashioning ancient educational practices to serve insistent contemporary needs.'<sup>10</sup>

A recurrent premise of this article was the idea that democratic order emanated from, and continued to exist in relation to, the inner lives of people – their personalities and characters. Lasswell and McDougal explained:

*Character refers to the degree of integration achieved by individual personalities. The democratic character is distinguished by capacity to respect the self and others. ... Within the last two generations the patient, objective study of development during infancy, childhood and adolescence has enormously extended our knowledge of factors affecting the growth and deformation of human personality.<sup>11</sup>*

They drew on a study undertaken by Erich Fromm on character formation in pre-Nazi Germany, which 'revealed a very large discrepancy between the characters of many who called themselves socialist and the political attitudes that they professed. This was a basic weakness of the parties that sustained the Republic in Germany'.<sup>12</sup> They concluded: 'it is only wise foresight for any society that aspires toward democracy to use every means within its power to make sure that the persons who come to adulthood possess characters whose basic structure is compatible with democratic values.'<sup>13</sup>

Preoccupied with this relationship between personality and democracy, Lasswell and McDougal understood the epoch to call for an ideal of leadership that would instantiate the 'democratic character'. In the 'Law, Science and Policy' seminar materials and in published writings that Lasswell explicitly linked to those materials, relations between the democratic character and constitutional order were a central preoccupation. These relations were expansively systematized, a central component of which was a reading of Plato's *Republic* alongside Sigmund Freud's critique of the inhibiting effects of modern 'civilized' life:

*The first thorough exposition of the connection between the constitution of a body politic and the character of the individual citizen was made by Plato in the Republic. In paragraphs that still astound the reader for their depth and ingenuity Plato anticipated the theories of Freud*

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<sup>10</sup> Lasswell and McDougal, 'Legal Education and Public Policy: Professional Training in the Public Interest', 52 *Yale L.J.* (1943) 203, at 203.

<sup>11</sup> *Ibid.*, at 231.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.* The study was cited as unpublished, *ibid.*, at 231 n.61. Fromm's seminal 1941 *Escape from Freedom* was cited as an important source on which Lasswell and McDougal drew to theorize the 'democratic character', *ibid.*, at 225 n.43. Another work by Fromm was also cited, *ibid.*, at 231 n.58. Lasswell had previously said: 'On methodological points my views are in many respects parallel to those of Erich Fromm.' See Lasswell, *supra* note 5, at 197 n.20.

*and outlined a comprehensive account of the interdependence of the policy making institutions of society and the institutions by which individual character is given its special stamp. The essential insight can be formulated in the hypothesis that the stability of the constitution depends upon the moulding of the appropriate form of character (or personality). ... [P]ersonality is a significant feature of constitutional stability. To some extent the stabilizing of public order fosters the appearance of uniform types of personality that harmonize with the regime; and conversely the emergence of a new form of personality facilitates the eventual modification of the system of public authority and control.*<sup>14</sup>

Lasswell and McDougal's attention to this insight – that the stability of a legal order depended on corresponding personality types being actively moulded – focused their writing and teaching on how lawyer policy-makers could be socialized as democrats.<sup>15</sup> They believed legal education should prompt students to confront their commitments to a culturally particular understanding of democratic values. The policy-oriented jurisprudence they began to specify in 1943 was based on a social theory that held that at a mass level these commitments were accessible through primary education, mass media and propaganda; and at an elite level through higher education and techniques of self-scrutiny developed by psychoanalysts, psychologists, ethnologists and other scientists of human behaviour.<sup>16</sup> The lawyer policy-maker was a figure prompted by the desire to analyse American society's sense of self, to establish secure relations between the inner life of American polity and its legal order. 'The proper function of our law schools is . . . to contribute to the training of policy-makers for the ever more complete achievement of the democratic values that constitute the professed ends of American polity.'<sup>17</sup>

### **A Policy-Oriented Jurisprudence was Part of a Pragmatist Tradition**

In political terms, Lasswell and McDougal built their jurisprudence on an American vision of social democracy. While less explicit about redistribution of economic wealth than Lasswell's and to some extent McDougal's earlier writing, their 1943 article did

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<sup>14</sup> Lasswell and McDougal, Part II Chapter V 'Political Culture', in H. Lasswell and M. McDougal, 'Law, Science and Policy' (1958), at p. D3 76 (page numbering irregular) (emphasis in the original). See also, closely related, Lasswell, 'Democratic Character', in H.D. Lasswell, *The Political Writings of Harold D. Lasswell* (1951) 465, at 476 n.22, (specifying that parts of this publication were taken from the seminar materials).

<sup>15</sup> Hengameh Saberi has also emphasized this aspect of policy-oriented jurisprudence, connecting a nuanced reading of Lasswell's psychoanalytic social theory to his development of the jurisprudence with McDougal. See Saberi, 'Descendants of Realism? Policy-Oriented International Lawyers as Guardians of Democracy', in P. Singh and B. Mayer (eds), *Critical International Law: Post-Realism, Post-Colonialism, and Transnationalism* (2014) 30. She notes that 'the therapeutic responsibility of international law scholars in the free world remains as significant as the function of policy scientists of democracy' (*ibid.*, at 42). Of the demands made on the discipline of international law by policy-oriented jurisprudence, Saberi concludes: 'Edification of minds and unification of "personalities" toward a homogenous global order were the novel goals international law was asked to embrace . . . ' (*ibid.*, at 52). She notes further: 'This professional image markedly distinguished the New Haven Jurisprudence from the teachings of the [legal] realists, but discussion of its intellectual pedigree in Lasswell's thought has been absent from the literature on the New Haven Jurisprudence' (*ibid.*, at 52).

<sup>16</sup> Lasswell and McDougal, *supra* note 10, e.g. at 214–215, 286–287 (describing methods drawn from current research in the psychological and social sciences).

<sup>17</sup> *Ibid.*, at 206–207.



call for the training of a legal elite that would plan the distribution of wealth and values in a 'commonwealth of mutual deference'.<sup>18</sup> This legal elite would instantiate the figure of the lawyer policy-maker, employing methods to control masses of people to build social change.<sup>19</sup> In philosophical terms, they argued that legal education as it stood was beholden to philosophies of a past era with little to say about the volatility and problems that seemed to characterize modern industrial societies.<sup>20</sup> In terms that would be repeated in their collaborative work many times, Lasswell and McDougal placed value at the centre of inquiry and rejected 'ancient' pedagogies unfit for the modern world:

*Clarification of values, by relating general propositions to operational principles in representative and specific contexts, must for effective training be distinguished from the traditional, logical, derivation of values by philosophers. Such derivation – that is, exercises by which specialists on ethical philosophy and metaphysics take sentences that define moral standards and deduce them from more inclusive propositions or vice versa – is a notorious blind alley. Divorced from operational rules, it quickly becomes a futile quest for a meaningless why, perpetually culminating in some inevitably circular and infinitely regressive logical justification for ambiguous preferences. ... Prospective lawyers should be exposed, by way of warning and sophistication, to the work of representative specialists in derivation; relatively little time should be required, however, to teach them how to handle, and how to achieve emotional freedom from, the ancient exercises.<sup>21</sup>*

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<sup>18</sup> It is helpful to interpret the vocabulary of policy-oriented jurisprudence through Lasswell's ideas about language and cultural psychologies. For example, a 'commonwealth of mutual deference' might be read in the light of the following passage in *World Politics*, a book McDougal credits with containing the seeds of policy-oriented jurisprudence:

*Since Americans have the individualistic enterpriser's psychology, the language which wins loyal support for political demands of a collective nature must be phrased in language which is acceptable to this psychology. So if the radical elements in America had been named something besides 'socialism' and if they had been argued in terms of an American 'joint-stock' company giving every citizen a 'national dividend' and a 'guaranteed income to all who work,' substantive American policy might have been rather more collectivist than it is today.*

See Lasswell, *supra* note 5, at 167. For redistributionist policies that could be called social democratic, see their ideas about income equality, inheritance tax, a universal minimum income for all families and free public schooling to young adulthood: see Lasswell and McDougal, *supra* note 10, at 227. In the 1930s, McDougal had welcomed the advent of what he called 'socialistic liberalism': see McDougal, Book Review of T.V. Smith, *The Promise of American Politics* (1936), 46 *Yale L.J.* (1937) 1269, at 1272.

<sup>19</sup> On the lawyer's required skills in management, public relations, propaganda and communication theory, see Lasswell and McDougal, *supra* note 10, at 205, 280–289.

<sup>20</sup> They cited an example of the inadequacy of legal education to the problems of industrial society:

*Its [the general legal curriculum's] framework is still largely that designed for the training of small-town practitioners of nearly a century ago. Some changes have, however, been effected. Not long ago a Connecticut judge complained that in the Yale Law School his son had learned how to reorganize a railroad but had not learned how to replevy a dog. Ironically the son's first job was to assist in the reorganization of a railroad. The records do not reveal that he has yet had opportunity to replevy a dog.*

See Lasswell and McDougal, *supra* note 10, at 204 n.4.

<sup>21</sup> *Ibid.*, at 213. In 1959, McDougal repeated this argument in an address to the American Society of International Law: see 'Proceedings of the American Society of International Law at Its Fifty-Third Annual Meeting', in *Proceedings of the Annual Meeting (American Society of International Law)* (1959), at 112–113. Then, he cited as his authority Lasswell, 'Clarifying Value Judgment: Principles of Content and Procedure', 1 *Inquiry* (1958) 87.

This intolerance of metaphysics and abstract philosophy was characteristic of a tradition of ideas descending from philosophical pragmatism.<sup>22</sup> Like the classical pragmatists Charles Sanders Peirce, William James and John Dewey, Lasswell and McDougal rejected ‘specialists in derivation’ as the inheritors of a dry orthodoxy of European rationalist philosophy that had reached a pitch of futility. Tangled in the fiction of a rationally scoured search for ultimate ends and the absolutism of ideas abstracted from experience of life, such specialists had little to offer law students beyond a cautionary tale. In one of his earliest papers, Peirce had expressed the same idea as a warning like Lasswell and McDougal’s: ‘as metaphysics is a subject much more curious than useful, the knowledge of which, like that of a sunken reef, serves chiefly to enable us to keep clear of it, I will not trouble the reader with any more Ontology at this moment.’<sup>23</sup>

These statements are representative of the pragmatist effort to unify abstract, idealist philosophy with empiricist notions of absolute fact and rationality, through commitment to truth immanent in function and method. From such a perspective, a truthful conception of some object, such as we may seek it, is no more and no less than our conception of the practical effects that object may have.<sup>24</sup> This move, proposed in nascence by Peirce, popularized by James and brought to towering influence by Dewey, was a deft one. It was an American effort to sidestep philosophizing beholden to metaphysical absolutes, derivations from beyond the self and debates around ‘subjects’ juxtaposed against ‘objects’ characteristic of 18th- and 19th-century European philosophy. It was a deft move conceptually, creating a sense of liberation from stale, analytical clashes. It was also a deft cultural move, animating an ethos of social progressivism associated with anticolonialism, industrialism and the frontier. Examining its early American instantiation in Ralph Waldo Emerson, Cornell West has described this as the pragmatist ‘evasion of epistemology-centered philosophy’, a sidestepping of metaphysics to bring common life into philosophy.<sup>25</sup>

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<sup>22</sup> For an examination of the relationship between Lasswell and McDougal’s published scholarship, in particular their concept of ‘human dignity’, and philosophical pragmatism, see Saberi, ‘Love It or Hate It, but for the Right Reasons: Pragmatism and the New Haven School’s International Law of Human Dignity’, 35 *Boston College International and Comparative Law Review* (2012) 59. Also placing policy-oriented jurisprudence within a pragmatist tradition, see F. Tipson, ‘Consolidating World Public Order: The American Study of International Law and the Work of Harold D. Lasswell and Myres S. McDougal, 1906–1976’ (1987) (PhD thesis on file at the University of Virginia, Charlottesville, VA). In 1971, Lasswell noted the relationship between his ‘policy science’ and the work of John Dewey: ‘The policy sciences are a contemporary adaption of the general approach to public policy that was recommended by John Dewey and his colleagues in the development of American pragmatism.’ See H. Lasswell, *A Pre-View of Policy Sciences* (1971), at xiv.

<sup>23</sup> Peirce, ‘How to Make Our Ideas Clear’ [1877], in C. S. Peirce, *The Essential Peirce: Selected Philosophical Writings: Volume 1: (1867–1893)*, ed. N. Houser and C. Kloesel (1998), at 140.

<sup>24</sup> *Ibid.*, at 132.

<sup>25</sup> C. West, *The American Evasion of Philosophy: A Genealogy of Pragmatism* (2009), at 36. West says further of philosophical pragmatism:

*Its basic impulse is a plebeian radicalism that fuels an antipatrician rebelliousness for the moral aim of enriching individuals and expanding democracy. This rebelliousness, rooted in the anticolonial heritage of the country, is severely restricted by an ethnocentrism and a patriotism cognizant of the exclusion of peoples of color, certain immigrants, and women yet fearful of the subversive demands these excluded peoples might make and enact.*

*Ibid.*, at 5.

The specialists in derivation that Lasswell and McDougal challenged were not just artefacts of the academy. For several hundred years they had justified legal and political orders. They constructed ideas about what could be good in people and society, and what was bad and threatening. ‘Legal Education’ conveyed the point that rejection of these ideas was an impulse of the feelings of speed, doubt and anxiety that characterized modern industrial societies, and at the same time that this rejection roiled back into a feeling of emotional subsidence. The response that structured the article – that what must be sought as answer to this subsidence was ‘emotional freedom’ through confrontation and self-awareness, the conviction that passage through prescribed training could achieve this freedom and, crucially, the hope that we were capable of doing something with this freedom, that it would not cripple us – drew on psychoanalytic as well as pragmatist premises.<sup>26</sup>

## **B Therapy for Democracy**

At many points in ‘Legal Education’, Lasswell and McDougal approached democracy from a therapeutic perspective: ‘A democratic society is most possible where democratic character prevails; that is to say, where personalities develop with a minimum of distortion. From our studies of personality development we know that great reservoirs of inhibited rage distort human beings and diminish the probability of congenial and productive interpersonal relationships.’<sup>27</sup> This approach would become even more pronounced in their ‘Law, Science and Policy’ seminar materials, where they drew heavily on theories of personality development taken from Freudian psychoanalysis and, among other sources, from *The Authoritarian Personality*, the influential 1950 study by Theodor Adorno, Elsie Frenkel-Brunswick, Daniel Levinson and Nevitt Sanford.<sup>28</sup>

The basis for this therapeutic approach to democracy was a theory whereby cultures employed self-regulating devices to preserve themselves. According to Lasswell and McDougal’s ‘Law, Science and Policy’ materials, some deviations from the mores of a

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<sup>26</sup> Lasswell and McDougal, *supra* note 10, at 213.

<sup>27</sup> *Ibid.*, at 218. On this point, see also Saberi, *supra* note 15.

<sup>28</sup> Lasswell and McDougal, Part II Chapter IV ‘Political Personality’, in H. Lasswell and M. McDougal, ‘Law, Science and Policy’ (1958), at p. D3 40, (quoting T. W. Adorno et al., *The Authoritarian Personality* (1969)). Lasswell’s former collaborator, the psychoanalyst Harry Stack Sullivan, was a further important source, as was made explicit in ‘Legal Education’: Lasswell and McDougal, *supra* note 10, at 225 n.43. For references to several different strands of social psychology and psychoanalysis in ‘Legal Education’, see especially: Lasswell and McDougal, *supra* note 10, at 214–215, 286–287 (esp. n.131), 291 (on new methods), 231, 279–282 (on character and personality). For further explanation of the role played by psychoanalytic theories of personality and culture (largely taken from Sigmund Freud’s work) see, in particular, Lasswell and McDougal, Part II Chapter I ‘The Social Process as a Whole’, at p. D2 47; Part II Chapter III ‘The Dynamics of Personality’, at p. D3 1; Part II Chapter IV ‘Political Personality’, at p. D3 40; and Part II Chapter V ‘Political Culture’, at p. D3 76, in H. Lasswell and M. McDougal, ‘Law, Science and Policy’ (1958). These sections reappear almost verbatim in Lasswell and McDougal, *Jurisprudence for a Free Society*, *supra* note 9 at, respectively, pp. 335–372; pp. 591–631; pp. 631–669; and pp. 683–709.

culture were met with sanctions, and individuals were deprived of values. Other actions were expected to occur under normal circumstances despite being deviations, and were called 'counter-mores'. 'Built in' sanctions that responded to counter-mores and to the violation of mores could be formal and legal, or informal. 'The crucial point is that such a pattern must be expected to be restorative or protective of the culture.'<sup>29</sup> In this view, the fundamental framework of social order comprised a culture's mores and counter-mores. In the seminar materials, Lasswell and McDougal held that this framework of social order could be mapped on to the structure of individual personality:

*It is useful to analyze the patterns of personality from a standpoint comparable with culture. Some tendencies to act (whether completed or not) arouse defences within the personality system, ranging from instantaneous inhibition to many forms of self-attack. ... In general the conscience (or the superego, in psychoanalytic terms) is the structure within the personality that automatically applies sanctions. On examination it appears that every person possesses deep impulses which are in more or less direct conflict with the modes of behaviour that have been acquired and built into the conscience. Hence at least part of the impulse life (the id) is nonconformist.<sup>30</sup>*

Lasswell and McDougal taught their students that in the same way the impulse life of society prompted counter-mores and violation of mores, the individual id prompted tendencies sanctioned by the superego according to standards 'built in' to the self:

*The super ego includes part of the ego ideal, or the relatively permanent perspectives incorporating the principal demands upon the self by the self, and the closely interrelated expectations. The super ego and the ego ideal, taken together, are the character, comprising the requirements adopted by the self and enforceable by the self. It is clear that unless the social order is sustained by most of the personalities in the community that the continuity of the order is vulnerable. The fate of the ideology and the social structure depends in large part upon their success in knitting themselves into the inner lives of the persons who carry the culture from one time to the next.<sup>31</sup>*

From this perspective, continuity of social order was a matter of character. Cultures were carried by people. The defensive, protective function of collective sanctions – largely realized as law – depended on the extent to which a group's ideology and mores were coextensive with the masses of superegos and ego ideals of which it was composed. In the 'Law, Science and Policy' seminars, law was understood as a collective manifestation of internalized defences against impulses of human inwardness.

Character could be divided into the super ego and the ego ideal, or, in less Freudian terminology that Lasswell and McDougal also employed, the 'self-system' and the 'energy-system'. The self-system was the constellation of values we embraced to make us who we were. It was composed of perspectives – our conscious demands,

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<sup>29</sup> Lasswell and McDougal, Part II Chapter I 'The Social Process as a Whole', in H. Lasswell and M. McDougal, 'Law, Science and Policy' (1958), at p. D2 47.

<sup>30</sup> Lasswell and McDougal, Part II Chapter I 'The Social Process as a Whole', in H. Lasswell and M. McDougal, 'Law, Science and Policy' (1958), at pp. D2 48–49.

<sup>31</sup> Lasswell and McDougal, Part II Chapter I 'The Social Process as a Whole', in H. Lasswell and M. McDougal, 'Law, Science and Policy' (1958), at p. D2 49.

expectations and identifications.<sup>32</sup> Some self-systems were dominated by one value – power or respect, for example – others pursued a more diverse set of values. The energy-system incorporated unconscious drives that might conflict with the self-system.<sup>33</sup> Serious cases of inner conflict between the self-system and energy-system could be found in psychiatric hospitals. Lasswell and McDougal held that a constitutional order could be understood as a product of successful organization between many self-systems and many energy systems at a moment in time – many personalities sufficiently organized to commit energy to their ideas about collective good. If this was so, and as they noted Plato had anticipated, a constitution's integrity and longevity depended on a similar state of organization within each new generation.

While in 1943, 'Legal Education' did not include this extensive systematization of the connection between character and constitutional order, it did emphasize the significance of that connection, as well as Lasswell and McDougal's conviction that new knowledge in the human sciences would support the systematization they themselves were undertaking in their seminars:

*[W]ith the rapid expansion of the social and psychological sciences, the observing of human conduct has become progressively more technical and exhaustive. ... [T]he procedures varying all the way from the prolonged interviews of a psychoanalytic psychiatrist to the brief questions of the maker of an opinion poll.<sup>34</sup>*

To some extent, in 'Legal Education' Lasswell and McDougal recommended asking questions like, 'What would a court do, given X body of data, made subject to listed variables?'. They were acutely concerned, however, that scientific formalism risked sterility as much as analytical formalism or theological dogmatism did. Democracy demanded more than prediction:

*Effective policy-thinking must be manipulative, originative, evocative, creative. It cannot substitute the calculation of an endless fan of possibilities for disciplined and imaginative attention to actualizing the most favored possibility. Unlike logical or scientific thinking, policy-thinking is not primarily contemplative and passive; it is goal-thinking and provides criteria for the selection of arguments as well as for the control of other pertinent factors. ... [W]e must unequivocally reject both the principles of legal technicality and of scientific prediction as criteria for reconstructing a curriculum for training lawyers to put democratic values into policy.<sup>35</sup>*

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

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<sup>32</sup> Lasswell and McDougal, Part II Chapter III 'The Dynamics of Personality', in H. Lasswell and M. McDougal, 'Law, Science and Policy' (1958), at p. D3 3. In Lasswell, *supra* note 9, at 481, the concept of the 'self-system' was attributed to the work of Harry Stack Sullivan, and that of 'identifications, expectations and demands' to George Herbert Mead.

<sup>33</sup> Lasswell and McDougal, Part II Chapter III 'The Dynamics of Personality', in H. Lasswell and M. McDougal, 'Law, Science and Policy' (1958), at p. D3 6.

<sup>34</sup> Lasswell and McDougal, *supra* note 10, at 214–215, 279.

<sup>35</sup> *Ibid.*, at 243.

*[H]ere we take our stand – unless some such values are chosen, carefully defined, explicitly made the organizing foci [sic] of the law school curriculum, and kept so constantly at the student's focus of attention that he automatically applies them to every conceivable practical and theoretical situation, all talk of integrating 'law' and 'social science,' or of making law a more effective instrument of social control, is twaddling futility. Law cannot, like golf or surgery, be taught only as technique; its ends are not so fixed and certain. What law 'is,' and hence what should be taught as 'law,' depends primarily, as we have seen, upon the ends preferred.<sup>36</sup>*

Lasswell and McDougal were saying that values, visions of the self, democracy all needed to be consciously engineered. A democratic society was an agglomeration of personalities, all socialized into a democratic way of interpreting experiences, seeing action and possibility like democrats in a thousand small ways in a thousand moments every day. It was necessary that 'all who have an opportunity to participate significantly in the forming of policy' begin to 'share certain ways of thinking, observing and managing'.<sup>37</sup> In a nation relying to 'an extraordinary degree upon the advice of professional lawyers', American democracy would in some measure rest on the personal character of those lawyers.<sup>38</sup>

### **C Legal Realist Critiques of Elite Manipulation of Mass Psychology**

Discomfited by what could be read as illiberal elements of Lasswell and McDougal's programme, some of the passing generation of legal realists sounded notes of caution. Soon after 'Legal Education' was published, Charles Clark, one of Yale's prominent legal realists in the 1920s and 1930s and then justice of the Court of Appeal for the Second Circuit, wrote to McDougal in Washington. He agreed with much of the substance of the article, but was concerned that Lasswell and McDougal were too dismissive of case-based teaching. Immersion in day-to-day casework did 'seem to us to actually to present all the ramifications of ideas which men have strenuously fought over'.<sup>39</sup> The necessity was to 'avoid the danger of substituting for what is really quite concrete and effective assistance to judges and lawyers, and what can be well used, a merely nebulous vague aspiration towards good will'.<sup>40</sup>

Clark's colleague on the Second Circuit bench and fellow Yale realist, Jerome Frank, also dispatched his impressions by letter to Lasswell. Frank, who had applied psychoanalysis to the behaviour of judges in his 1930 *Law and the Modern Mind*, could have been expected to be well disposed towards Lasswell and McDougal's interest in character and law.<sup>41</sup> Like Clark, however, he was an experienced practitioner – in private practice and Roosevelt's New Deal administration – and was similarly concerned about what could be lost were social engineering to so completely displace what he saw as the 'art' of lawyering. Having seen off legion litigatory challenges to New Deal

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<sup>36</sup> *Ibid.*, at 245.

<sup>37</sup> *Ibid.*, at 291.

<sup>38</sup> *Ibid.*, at 291.

<sup>39</sup> Charles Clark to Myres McDougal, 7 October 1943, Charles Edward Clark Papers (MS 1344), Manuscripts and Archives, Yale University Library.

<sup>40</sup> *Ibid.*

<sup>41</sup> J. Frank, *Law and the Modern Mind* (1949) (1930).

legislation, he was sensitive to the necessity that lawyer policy-makers be adept manipulators of court custom and procedure.

For Frank, the appropriate model for the law school was the medical school, where keeping students from the real employment of their craft on patients would seem bizarre. Ever the psychoanalyst, he concluded that Lasswell and McDougal were suffering from what John Dewey called ‘occupational psychoses’ – ‘You have not been a practicing lawyer, and I suspect that McDougal has not been much in court. Ergo, you don’t want lawyers trained in practice to play an important role in law schools.’ He suggested a law school ‘in which fellows like you should of course play a large part, but in which most of the teachers are practicing lawyers’.<sup>42</sup> His letter closed with perhaps his most fundamental reservation:

*While I thoroughly agree with you that the scientific spirit and the experimental and operational method are indispensable if our democratic society is to endure, I must say that I think you do that idea an injury by exaggerating the possibility of scientific precision in the social field. The scientific spirit applied to social problems should lead to a recognition of the numerous imponderables, indescribables and inexactitudes inherent in most social matters. By exaggerating the possibility of procuring anything like exactness, you tender an issue to your opponents which makes you extremely vulnerable. Even John Dewey who has been, I think, somewhat more cautious in his utterances on this question than you, has not sufficiently conceded the difficulties.*<sup>43</sup>

The epistemological lines Lasswell and McDougal’s lawyer policy-maker seemed to tread between scientific method and the pursuit of value gave Frank pause. He continued to develop this point in an address delivered four years later, in 1947, and again by letter, this time to McDougal:

*Another word which should be taboo is ‘science’ when applied to matters legal (as in the phrases ‘legal science’ or ‘the science of law’) or to social studies (as in the phrase ‘the social sciences’). To be sure, ‘science’ can be so defined as to bring within its scope what is done by many lawyers and legal scholars, and also by students of government, economics, history, psychology and anthropology. ... To most persons today, however, ‘science’ signifies a large measure of exactitude, and methods which yield much reliable prediction; the word evokes, for most men (many lawyers among them), a central image of something like physics, so that, to them, ‘science,’ the ‘physical sciences,’ and ‘exact science,’ are all but synonymous [sic]. But social studies, including studies of matters legal, deal with data which permit little exactitude and thus yield only a dismayingly small quantity of reliable predictions. ... The trouble is that basically all the so-called ‘social sciences’ are but phases of anthropology.*<sup>44</sup>

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

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<sup>42</sup> Jerome Frank to Harold Lasswell, 28 May 1943, Jerome New Frank Papers (MS 222). Manuscripts and Archives, Yale University Library.

<sup>43</sup> *Ibid.*

<sup>44</sup> Frank, ‘A Plea for Lawyer-Schools’, 56 *Yale L.J.* (1947) 1303, at 1330–1331.

*The art of government, at bottom, is a branch of anthropology . ... The statesman thus appears as a working anthropologist. If a sagacious statesman, he is a careful student of customs . ... The political economist who wants to serve the statesman must understand that his work is . . . anthropological, that he must become an inventor of new acceptable customs.*<sup>45</sup>

Frank's conclusion was that one should speak of the 'social arts', perhaps 'social studies'. Confusion and, he intimated, domination were all that would come of vocabularies of legal or social 'engineering'.<sup>46</sup> The sword-tip of this intimation peeked through footnotes, as Frank defined the terms of his agreement with Lasswell and McDougal's argument that democratic values should be moulded by lawyers and in law schools: 'To cherish those values is to repudiate the notion, à la Plato, that university law students are to constitute an élite, versed in methods of "manipulating symbols," according to their appraisal of contemporary "mass psychology," for the public good.'<sup>47</sup> Elite manipulation of mass psychology, the danger that psychological theory might 'become unscientifically authoritarian', concerned Frank.<sup>48</sup>

McDougal's response, articulated in a short letter, emphasized a pragmatist view of truth in context and function over the faux-elevation of scientific predictability charged by Frank. He suspected they had different ideas of what 'science' was. He also urged that the stakes were too high for 'constructive skepticism' alone.

*One can not [sic] simply take the basic democratic values of our society for granted, assume that they will be self-defining in all the many situations in which power decisions are made and trust to skeptical criticism about irrational practices and doctrines for the achievement of more rational practices and doctrines.*<sup>49</sup>

McDougal thought American lawyers needed to be filled with the values of American society, and that methods were at hand by which those values could be shaped and inculcated.

### **3 An East Coast Policy Class, at War**

In 'Legal Education', Lasswell and McDougal approached the war period as 'a propitious moment to retool our system of legal education'.<sup>50</sup> The ideas they expressed in that article pre-dated the Second World War, but their careers in 1943 were very much a product of the war. Examining their respective careers in and around this wartime window, we can see them apply ideas developed through interwar scholarly work to the policy-making in which they were involved, and in turn draw on those policy-making experiences as they began to articulate policy-oriented jurisprudence

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<sup>45</sup> *Ibid.*, at 1332, citing J. Frank, *Save America First: How to Make Our Democracy Work* (1938).

<sup>46</sup> *Ibid.*, at 1333.

<sup>47</sup> *Ibid.*, at 1323 n.34.

<sup>48</sup> Jerome Frank to Myres McDougal, 26 November 1947, Jerome New Frank Papers (MS 222). Manuscripts and Archives, Yale University Library.

<sup>49</sup> Myres McDougal to Jerome Frank, 21 November 1947, Jerome New Frank Papers (MS 222). Manuscripts and Archives, Yale University Library.

<sup>50</sup> Lasswell and McDougal, *supra* note 10, at 211.



in 'Legal Education'. As contextual examination of Lasswell and McDougal's careers makes clear, these ideas were strongly characterized by links to progressive politics of the early 20th century, as well as pragmatist and psychoanalytic premises.

## **A The Wartime Career of Harold Lasswell**

### **1 Practicing Propagandist**

In 1943, Lasswell was known for his publications on propaganda, public opinion in a mass media culture and political psychology.<sup>51</sup> In 1936, a popularized book, *Politics: Who Gets What, When, How*, reached a wide non-academic audience.<sup>52</sup> His doctoral research on propaganda during the First World War, published in 1927, was described in *American Mercury* as 'a melancholy comment upon human imbecility'. Foster Rhea Dulles, writing in the literary journal *The Bookman*, called it 'a telling indictment of all war and the hypocrisy and deceit which comes in its train', concluding that 'in its suggestions for the future it is a Machiavellian textbook which should promptly be destroyed'. *The New York Times* noted that 'although it is devoted so largely to the technique of propaganda in the World War, the book is well worth the attention of whoever, feeling somewhat bewildered by modern perplexities of life, wants to see through appearances and get at the inner significance of some of them'.<sup>53</sup> Lasswell was a public intellectual examining a modern condition of mass manipulation.

In 1940, after earlier plans to fund his efforts to develop 'a disciplined approach to the study of mass communications in present day society' were superseded by war-aims, the Rockefeller Foundation agreed to underwrite research on wartime propaganda.<sup>54</sup> This allowed Lasswell to take up the position of 'Chief of the Experimental Division for the Study of War-Time Communications', operating from the Library of Congress.<sup>55</sup> He managed a small staff and reported to the Librarian of Congress, the poet and writer Archibald MacLeish. His research unit's task was to produce technical 'histories' of propaganda practice during the war; to critically reformulate 'basic theory in the field of communication'; and to service the communication needs of government policy-makers.<sup>56</sup>

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<sup>51</sup> H. Lasswell, *Psychopathology and Politics* (1960) (1930); Lasswell, 'The Triple-Appeal Principle: A Contribution of Psychoanalysis to Political and Social Science', 37 *American Journal of Sociology* (*Am. J. Soc.*) (1932) 523; Lasswell, *supra* note 5; Lasswell, 'What Psychiatrists and Political Scientists Can Learn From One Another', 1 *Psychiatry* (1938) 33; Lasswell, 'The Contribution of Freud's Insight Interview to the Social Sciences', 45 *Am. J. Soc.* (1939) 375.

<sup>52</sup> H. Lasswell, *Politics: Who Gets What, When, How* (1936).

<sup>53</sup> Newspaper Clippings. H. Lasswell, *Propaganda Technique in the World War* (1927), Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

<sup>54</sup> Memorandum, 'Public Opinion and the Emergency', 1 December 1939, Series I, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

<sup>55</sup> Memorandum, Harold Lasswell to Archibald MacLeish, 25 August 1941, Series I, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

<sup>56</sup> *Ibid.*

Lasswell subjected newspapers, periodicals and transcriptions of broadcast media to content analysis, a technique he developed. He wanted to build coherent bodies of information that could support policy decisions. It was a goal he had pursued for many years – the psychologically informed mapping of the opinions of different publics. Where possible, such mapping would be followed by techniques of intervention that could push those opinions in chosen directions. Lasswell's team pursued its brief through a rapidly expanding realm of bureaucratic propaganda. They analysed Axis propaganda and responded with their own, monitored attitudes and biases expressed in the American press, composed poster slogans and themes to boost public morale and generally sought to transmit symbols capable of mass persuasion.<sup>57</sup> Lasswell became what he described as a 'roving consultant' from this post.<sup>58</sup> His memos shuttled around Washington. Some seemed to fall on barren ground, like his suggestions for the unification of architectural symbolism in government buildings, the idea of an 'Act for Freedom' publicity campaign that would declare the fourth day of each month 'Freedom Day' and his argument that the term 'Latin America' should fall into desuetude to encourage perceptions of a shared hemispheric culture.<sup>59</sup> Other ideas, however, were very influential.

A large part of the practice of American propaganda came to be handled by the 'Office of Facts and Figures', based in the Library of Congress and headed by MacLeish, and Colonel William Donovan's 'Office of the Co-ordinator of Information' on Pennsylvania Avenue. Donovan's office was the subject of press speculation dubbing it successor to George Creel's infamous 1917 World War Committee on Public Information.<sup>60</sup> MacLeish was mocked as a poet supported by playwrights and essayists at the 'Office of Fuss and Feathers'.<sup>61</sup> Yet these agencies were the centre of the American response to what were perceived as Nazi practices of propagandist psychological warfare. Both frequently sought Lasswell's expert knowledge. His memoranda advised techniques of data compilation, analysis and presentation that would become the shared language of modern intelligence communities. He emphasized the importance of cataloguing 'trends' in 'insecurity indicators', defined as 'a change that is likely to place a great deal of strain on the capacity of people to adjust to new conditions'.<sup>62</sup>

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<sup>57</sup> *Ibid.*

<sup>58</sup> Memorandum, Harold Lasswell to Archibald MacLeish, 21 November 1941, Series I, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

<sup>59</sup> Memoranda, Harold Lasswell to Archibald MacLeish, 15 April 1941; 'An Architectural Symbol for America', 24 April 1941; 'Freedom Day', 12 January 1942, Series I, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library. Lasswell's interest in relations between architectural symbolism and political power found expression in the posthumously published: see H. Lasswell and M. B. Fox, *The Signature of Power: Buildings, Communication, and Policy* (1979). I thank an anonymous reviewer for this reference.

<sup>60</sup> *The Sunday Star* (3 October 1941). Series I, Box 62 Folder 843, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

<sup>61</sup> John O'Donnell, 'Capitol Stuff', *The Times-Herald* (6 April 1942). Series I, Box 62 Folder 843, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

<sup>62</sup> Memorandum, Harold Lasswell to Archibald MacLeish, 21 November 1941. Series I, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

Lasswell's advice was articulated through a mix of content analysis, interview-based sources and psychological theory characteristic of the methods he had developed over the preceding decade.<sup>63</sup> The work of these offices was centrally concerned with what they saw as the war that needed to be waged for the emotions of their own and, where possible, allied and enemy societies. The *Washington Times-Herald* recounted William Donovan's conviction that 'an army is only the result of a philosophy, and to fathom one, you have to fathom the other'.<sup>64</sup>

In 1941, Lasswell reported to his parents that he had been asked to participate in the organization of a 'College of Government'. He implied that this request came from within government.<sup>65</sup> By 1944, this idea had matured into a stylish printed booklet entitled *The Institute of Legal Studies: A Proposal in Legal Education*, backed by an expansive memorandum making the case for the establishment of an Institute in Washington.<sup>66</sup> In this Institute, lawyers and social scientists would train students seconded from law schools around the country to be policy-makers. The Institute never came to fruition, but with the 1943 'Legal Education' article, it was one more expression of the idea that it was necessary to consciously mould a new kind of American leader – the lawyer policy-maker.

## 2 Psychoanalytic Social Theorist

The research projects that Lasswell had pursued in the 1930s demonstrated the formative significance of the modernist strands of ideas in psychoanalysis, social psychology, sociology and political science he had found so vibrant while conducting extended research trips in Geneva, London, Paris, Berlin and Vienna in the 1920s.<sup>67</sup> In 1930, he published *Psychopathology and Politics*, a book that used psychoanalytic case-histories to theorize the relationship between political power and personality types.<sup>68</sup> In 1935, this was followed by his most significant work prior to meeting McDougal – *World Politics*.<sup>69</sup> In this book, Lasswell combined Marxist dialectical materialism with a

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<sup>63</sup> Memorandum, Harold Lasswell to William Donovan 'Intelligence Reports for the President', 4 August 1941. Series I, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

<sup>64</sup> *Washington Times-Herald* (20 September 1941). Series I, Box 62 Folder 843, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

<sup>65</sup> Harold Lasswell to Anna and Linden Lasswell, 12 July 1941. Series I, Box 56 Folder 787, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library.

<sup>66</sup> *The Institute of Legal Studies: A Proposal in Legal Education*, Series II Box 133, Harold Dwight Lasswell Papers (MS 1043), Manuscripts and Archives, Yale University Library. At the 1959 annual meeting of the American Society of International Law (organized under McDougal's presidency of the society), Senator Henry Jackson proposed a strikingly similar 'Academy of National Policy' – 'an "All-American team" of thinkers': 'Proceedings of the American Society of International Law' (1959), *supra* note 21, at 351–352.

<sup>67</sup> These formative research trips receive extensive examination in the doctoral thesis from which this article is extracted. The thesis employs voluminous unpublished correspondence that Lasswell maintained with his parents as he travelled: see Derrig, *supra* note 1.

<sup>68</sup> Lasswell, *supra* note 51.

<sup>69</sup> Lasswell, *supra* note 5.

psychoanalytic understanding of emotional forces animating social change, with the aim of theorizing the emergence of a socialist world-state.

From the early 1930s, these research interests brought Lasswell into close contact with members of the Institute for Social Research – the early Frankfurt School. Using correspondence between Lasswell, his doctoral supervisor and mentor Charles Merriam and the Frankfurt School theorists Max Horkheimer and Franz Neumann, Nick Dorzweiler has reconstructed this period of Lasswell's career.<sup>70</sup> Dorzweiler has challenged common narratives about Lasswell's scholarship, and about American political science more generally. Since the 1940s, these narratives have portrayed the field as increasingly polarized between the critiques of 'scientism' made by critical theorists like Horkheimer, Neumann and Fromm; and the views of proponents of the scientific study of politics like Lasswell and Merriam, usually cast as crude positivists.<sup>71</sup> Dorzweiler reconstructs correspondence and collaboration between these scholars, demonstrating that, 'Horkheimer, Neumann, and Lasswell all considered themselves to be on common ground in treating culture as a body of symbols and practices used by elites to maintain their social and political authority'.<sup>72</sup>

Beginning with Fromm and Lasswell's first meeting in 1933, when Fromm was exploring the possibility of moving the Institute for Social Research to Chicago, Lasswell maintained close contact with him and other members of the Institute.<sup>73</sup> In 1935, the Institute's journal published an article in cultural anthropology written by Lasswell. Dorzweiler cites correspondence between Horkheimer and Lasswell in which they speak of future collaboration and make clear that Lasswell was invited to submit the piece, an honour reserved for non-Institute contributors deemed evidently sympathetic to the group's methods and aims.<sup>74</sup> By 1937, Lasswell and Merriam's names were added to the Institute's American 'Advisory Committee', and they supported Horkheimer and Neumann's applications on behalf of the Institute for grants from American philanthropic organizations.<sup>75</sup> In 1941, another of Lasswell's articles appeared in the Institute's journal, and Neumann asked him to chair a section of a planned Institute project on the politics of German culture.<sup>76</sup> The section, titled

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<sup>70</sup> Dorzweiler, 'Frankfurt Meets Chicago: Collaborations between the Institute for Social Research and Harold Lasswell, 1933–1941', 47 *Polity* (2015) 352.

<sup>71</sup> Dorzweiler joins a growing body of literature challenging this binary view. Also recapturing commonalities between pre-1940s European 'social theorists' and American 'social scientists', see Gunnell, 'The Founding of the American Political Science Association: Discipline, Profession, Political Theory, and Politics', 100 *American Political Science Review* (2006) 479; and I. Katznelson, *Desolation and Enlightenment: Political Knowledge After Total War, Totalitarianism, and the Holocaust* (2004).

<sup>72</sup> Dorzweiler, *supra* note 70, at 356–357.

<sup>73</sup> *Ibid.*, at 362–371. See also correspondence between Fromm and Lasswell in Series I, Correspondence dated 1936–1942, Erich Fromm Papers, The New York Public Library Manuscripts and Archives Division.

<sup>74</sup> Lasswell, 'Collective Autism as a Consequence of Culture Contact: Notes on Religious Training and the Peyote Cult at Taos', 4 *Zeitschrift für Sozialforschung* (1935) 232.

<sup>75</sup> Dorzweiler, *supra* note 70, at 368–369.

<sup>76</sup> Lasswell, 'Radio as an Instrument of Reducing Personal Insecurity', 9 *Zeitschrift für Sozialforschung* (1941) 49; Dorzweiler, *supra* note 70, at 370.

‘Ideological Permeation of Labor and the New Middle Classes’, fit well with Lasswell’s *World Politics*, although the project petered out due to lack of funds. Neumann also considered, but did not choose, Lasswell as a possible co-director of the project on anti-Semitism that culminated in the *Studies in Prejudice* collection, within which *The Authoritarian Personality* was published as a volume.<sup>77</sup>

In the 1930s and early 1940s, Lasswell also developed close collaboration and personal friendships with the psychoanalyst Harry Stack Sullivan and the cultural anthropologist Edward Sapir. Finding his position at the University of Chicago less tenable due to the presidency of Robert Maynard Hutchins, who began to doubt the empirical and psychological direction Merriam’s department had taken, Lasswell had looked to the East Coast.<sup>78</sup> He developed close acquaintances in Sullivan and Sapir, who had been at Chicago with Lasswell in the 1920s before moving to Yale. All three were intrigued by research possibilities at the intersection of their respective expertise. In his memoir on Lasswell, Gabriel Almond describes their dream ‘of a research institute that would combine the study of culture, society, and personality and contribute to a better and happier world’.<sup>79</sup> In early 1938, it looked as though this might materialize. The William Alanson White Foundation in Washington, DC was moving funds into place to support a full-time research faculty in psychiatry and the social sciences, to be constituted by Lasswell, Sapir and Sullivan.<sup>80</sup> However, the expected funding evaporated, Lasswell and Sullivan’s relationship grew problematic and to some extent fell apart and Sapir died in 1939.<sup>81</sup>

In 1939, Lasswell began to lecture at the New School for Social Research in New York. His courses on ‘Propaganda and the Measurement of Public Opinion’ and a ‘Case Seminar on the Structure of Personality and Culture’ were open to the fee-paying public.<sup>82</sup> Founded in 1919 in response to censorship of academic criticism of American

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<sup>77</sup> Dorzweiler, *supra* note 70, at 371.

<sup>78</sup> G. A. Almond, *Harold Dwight Lasswell, 1902–1978: A Biographical Memoir* (1987), at 260.

<sup>79</sup> *Ibid.*, at 261.

<sup>80</sup> *Ibid.*, at 254–261.

<sup>81</sup> *Ibid.*, at 261. On this period of Lasswell’s career, see also M. C. Smith, *Social Science in the Crucible: The American Debate over Objectivity and Purpose, 1918–1941* (1994), at 243–244. William Alanson White was director of St Elizabeth’s psychiatric hospital in Washington, DC, in the 1920s, when Lasswell conducted research into patient records for *Psychopathology and Politics*. Lasswell struck up a collaborative relationship with White, who was also interested in interdisciplinary work between psychiatry and the social sciences. The William Alanson White Institute was ultimately founded in 1943 by Sullivan, Erich Fromm, the prominent analyst Clara Thompson, Freida Fromm-Reichmann, Janet Rioch and David Rioch, as an effort to incorporate social activism into psychoanalysis and break from strictures of the mainstream of the discipline in America.

<sup>82</sup> Bulletins 1939–1946, Course Catalogue Collection, Digital Collections, The New School Archives. It is likely this connection with the New School came about through Merriam’s relationship with Horace Kallen, one of the founders of the New School. Correspondence supporting, though not categorically confirming, this supposition can be found in: Correspondence between Kallen and Merriam, 1922, RG 317, Papers of Horace Meyer Kallen; Correspondence between Lasswell and Kallen 1942–1949, Box 53 Folder 965, Box 44 Folder 790, Box 42 Folder 752, YIVO Institute for Jewish Research, Center for Jewish History, New York. Merriam’s influence on Lasswell’s career is evident in Correspondence between Lasswell and Merriam 1923–1952, Box 34 Folder 4, Box 51 Folders 18–19, Box 64 Folder 22, Box 65 Folder 2, Merriam, Charles E. Papers, Special Collections Research Center, University of Chicago Library.

involvement in the First World War, by 1939 the New School had been invigorated by its sponsorship of European academics fleeing fascism, becoming a hub of progressive European social theory. Lasswell taught his courses collaboratively, alongside figures like George H. Gallup, creator of the 'Gallup poll'; the political and legal philosopher Max Ascoli; the sociologist and propaganda expert Hans Speier, later the first director of the social science division of the RAND Corporation; prominent psychoanalyst and feminist theorist Karen Horney; psychoanalyst Ernst Kris; and Erich Fromm. Lasswell's psychoanalytic research on culture, identity and mass communication fitted comfortably into the New School curriculum alongside scholars drawing on bodies of political and social theory that he himself had studied in the 1920s.

Throughout the war years, Lasswell undertook a visiting lectureship organized by McDougal at Yale Law School. As McDougal said, 'Things turned out exactly right for him'.<sup>83</sup> Thurman Arnold, the famous legal realist, left his jurisprudence course to become Assistant Attorney General in charge of anti-trust, and his co-teacher Edward S. Robinson, the prominent psychologist, was killed when he was hit by a bicycle as he left the graduate school one afternoon. This left a course open for Lasswell and McDougal. These first seminars in 1940 and 1941 were the drawing-board sketches of 'Legal Education'.<sup>84</sup>

## **B The Wartime Career of Myres McDougal**

### **1 Lawyer for the Government**

In 1943, McDougal had made his name as a progressive voice in property law scholarship. His legal realism had the zeal of the reformed, having shed his training in classics and Oxford analytical jurisprudence under pressure from Yale's realists during doctoral work. To McDougal, the eclecticism of 1930s legal realism felt faithless and value-less, and he wanted a more constructive kind of scholarship. He thought it necessary to pursue new institutions and social ends. The inequity of poverty during the Depression supported a sense that old structures and rules had proven unsustainable, and many believed that scientific social planning held great possibility.<sup>85</sup> Lasswell seemed to offer ideas of just this sort, already at an advanced level of systematization. After meeting in 1935, they had begun to collaborate. Given McDougal's foothold as a young reformer in property law, Arnold and Robinson's jurisprudence seminar was retitled 'Property in a Crisis Society'. McDougal's interest in New Deal social planning amicably met Lasswell's psychoanalytic theories of the social condition.

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<sup>83</sup> Collier, 'A Conversation with Myres S. McDougal', *Yale Law School Oral History Series* (2013), at 12.

<sup>84</sup> *Bulletin of the Yale Law School* (1940–1941) (Class bulletin on file at Yale Law School). I am grateful to John Nann and his colleagues at the Lillian Goldman Law Library for their help in establishing the dates of these first seminars.

<sup>85</sup> Frederick Tipson, 'Oral History Interview with Myres McDougal (1)', Yale Law School, (11 September 1992). Reproduction of these oral history materials, making them accessible for research, was made possible with financial support from the Oscar M. Ruebhausen Fund at Yale Law School.

When they composed 'Legal Education' in the Blackstone Hotel, McDougal was, like Lasswell, a member of the burgeoning East Coast policy class. In 1941, Oscar Cox, a Yale Law School graduate, had been appointed General Counsel to the Office of Lend-Lease Administration. This office had been tasked with administering aid and military hardware given by America to Allied countries, mainly in return for lease agreements permitting American military bases in those countries.<sup>86</sup> Cox had been 'business manager' of the *Yale Law Journal* and he staffed his office with former journal members, McDougal included. Cox worked to direction from Harry Hopkins, one of Franklin Delano Roosevelt's key advisors. If Hopkins wanted a policy pursued in support of the war effort, a legal means of pursuing it had to be found. Late in his life, McDougal remembered that one of his first tasks was to establish the legality of armed forces on icebergs, 'and of course we had no trouble establishing the legality of armed forces on icebergs. Anything Cox wanted was legal you see'.<sup>87</sup>

McDougal remembered the mood in Washington as grim. Gasoline was in short supply and people were afraid they would be bombed. At the same time, for him these were good days. A fight was being waged, which seemed like an honourable one, bringing with it the relevance and moral purpose of such collective moments, and from childhood on a farm in north Mississippi he had reached offices of real power on the East Coast. He acted as Cox's representative on committees, sitting as envoy bolstered by authority a few steps removed from Roosevelt, through Cox to Hopkins to the President. 'The first time I knew I could whip Wall Street lawyers, just a little country boy from Mississippi. I was a little defensive about Wall Street lawyers, but I saw I could take them very easily, though I hadn't taught them.'<sup>88</sup>

Before the end of the war he moved to the State Department, where he worked for Herbert Lehman, Governor of New York in the 1930s and later Senator, as he set up the United Nations Relief and Rehabilitation Administration (UNRRA). This agency was charged with administering the distribution of material aid to populations under the control of the United Nations. McDougal left to return to Yale after about a year, but it was during this stint in the State Department that he co-wrote his first publication relating to international law. The article, titled 'Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy', was written to order for the department. In two parts, it sprawled across more than 250 pages of the *Yale Law Journal's* 1945 issues.<sup>89</sup> His collaborator, Asher Lans, had studied political science at Columbia University, was a former Yale Law School

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<sup>86</sup> Collier, *supra* note 83; Elias Clark, 'Oral History Interview with Myres McDougal', Yale Law School (14 May 1993); Eugene Rostow, 'Oral History Interview with Myres McDougal', Yale Law School (11 December 1992); Tipson, *supra* note 85; Richard Gardner, 'Oral History Interview with Myres McDougal', Yale Law School, (15 February 1993).

<sup>87</sup> Collier, *supra* note 83, at 15; Rostow, *supra* note 86.

<sup>88</sup> Collier, *supra* note 83, at 16.

<sup>89</sup> McDougal and Lans, 'Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: I', 54 *Yale L.J.* (1945) 181; McDougal and Lans, 'Treaties and Congressional-Executive or Presidential Agreements: Interchangeable Instruments of National Policy: II', 54 *Yale L.J.* (1945) 534.

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

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

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

McDougal and Lans pitched their case in counterpoint to what they caricatured as a traditionalist view, handmaiden to an outgrown isolationism.<sup>90</sup> As representative of this traditionalism, Edwin Borchard, a prominent international lawyer and professor at Yale Law School, was ushered onstage. Borchard's position hewed to a restrictive view of the President's power to legally bind the state in foreign affairs. He responded by presenting the consensus between an older class of foreign policy doyens. It was a consensus much less cavalier about the possibility of a strong executive displacing the Senate's constitutional prerogative in foreign affairs.<sup>91</sup>

But more irritating to Borchard was McDougal and Lans' insistence on drawing his opinions on foreign affairs into the discussion.

*The major policy premise from which Professor Borchard's own legal arguments stem is not difficult to ascertain. ... It is a strong conviction that the United States should abjure participation in international political organizations and retire beyond the Jericho-like walls of his own version of the nineteenth century juristic conception of neutrality.*<sup>92</sup>

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<sup>90</sup> Stephen Wertheim has demonstrated that by 1945 a debate had been won whereby a small group of foreign policy elites cast interwar internationalists like Borchard as 'isolationists' to make more amenable their own argument that America needed to be the militarily supreme post-war global power: 'in 1942 and 1943 postwar planners revived world organization less to eliminate war or promote law than to cleanse U.S. power in the eyes of the American public as well as foreign states.' See S. Wertheim, 'Tomorrow, the World: The Birth of U.S. Global Supremacy in World War II' (2015) (PhD thesis on file at Columbia University Library, New York), at 24.

<sup>91</sup> Borchard, 'Treaties and Executive Agreements: A Reply', 54 *Yale L.J.* (1945) 616.

<sup>92</sup> McDougal and Lans, *supra* note 89, at 191–192.



In the opening footnote to his own article, Borchard responded: ‘my views on foreign policy have no relation, so far as I know, to my views on the treaty-making power. Nor can conclusions reached after thirty-five years of professional contacts, official and unofficial, with many of the governments of Europe and Latin America be characterized as merely “preconceptions.”’<sup>93</sup>

Borchard wanted to divorce hermeneutics from statecraft. His invocation of ‘conclusions reached after thirty-five years of professional contacts’ might have belied this view, but his avowed position was that debates of constitutional law proceeded from the written text, within accepted interpretive parameters. There was no room for open-ended ‘policy premises’. Citing the recent publication of ‘Legal Education’, McDougal and Lans maintained:

*The variables that may produce a legal belief or an interpretation of the Constitution are no less numerous and heterogeneous than those that produce policy preconceptions. ... It is now common knowledge, however, that policy preconceptions are among the most important variables that predispose legal conclusions and that every interpreter (Professor Borchard and the present writers not excluded) responds to the words and practices of the Constitution with his total personality, which includes both his view of world society and his conception of the role of government in that society.*<sup>94</sup>

For many lawyers, responding to a constitution based on one’s ‘total personality’, ‘view of world society’ and ‘conception of the role of government’ seemed corrosive. It represented a threat to their epistemic authority, and perhaps to their ability to place limits on moral responsibility. It was one of the first times, but would not be the last, that McDougal would deploy premises about personality and law taken from his work with Lasswell to advance arguments about legal doctrine with political stakes.

## **2 New Deal Urban Planner**

During these war years McDougal’s property law expertise prompted yet another collaboration. Though short-lived in terms of published work, it was the beginning of a long relationship that McDougal would compare to his friendship with Lasswell. Maurice Rotival was a French urban planner who took a professorship at Yale’s School of Architecture in 1939. He came to New Haven from Caracas, where he had been a central contributor to a new master plan for the city. In the late 1930s, Venezuela was a nation ascendant on the strength of oil dollars. Financial and technical arrangements with America came with those dollars, followed during the war by concern about the influence of fascism and communism, and in turn by a propaganda campaign waged by Nelson Rockefeller as ‘Coordinator of Inter-American Affairs’. This was the third branch of the US propaganda mill, the first two being MacLeish’s ‘Office of Facts and Figures’ and Donovan’s ‘Office of the Coordinator of Information’. The Latin American branch spoke doggedly of the hemispheric unity that Lasswell was writing memos about in Washington, also, notably, on Rockefeller largesse.

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<sup>93</sup> Borchard, *supra* note 91, at 616.

<sup>94</sup> McDougal and Lans, *supra* note 89, at 192 n.31.

Rotival was a prominent representative of modernist French urban planning, associated with the famous *Société Française des Urbanistes*, as well as internationally renowned architects like Le Corbusier and Wallace Harrison – a close friend and advisor to Rockefeller. The urban concept for the Caracas plan was completed in 1939, but the outbreak of war stalled its realization and Rotival came to New Haven, assuming the professorship in planning that he had obtained with the help of the well-connected Harrison.<sup>95</sup> In later years, McDougal recalled his first meeting with Rotival. One afternoon, he happened on a lecture that the new professor was delivering in New Haven, following a sign on the street. He watched as students scrambled for the beautiful sketches Rotival would draw and let fall to the floor as he spoke. McDougal was drawn to people who might help him create: 'Rotival was like Lasswell, close to a genius.'<sup>96</sup> McDougal had been appointed chair of a committee on regional planning by Charles Seymour, the university president, and through this committee began to work with Rotival.

Many people who wanted to pursue progressive political aims believed social planning necessitated management not only of law and institutions, but also of built environments. The Tennessee Valley Authority (TVA) was a federal agency created under Roosevelt to plan and manage power, waterways and economic development in a rural area impoverished during the Depression. It was extremely controversial, but by the late 1930s its practical success was clear to many and it was cited as the flagship example of New Deal regional planning. Legislation passed in 1937 channelled federal money to local bodies charged with planning the improvement of housing for low-income families.<sup>97</sup> This prompted and supported more expansive projects in urban development, university chairs like Rotival's and the work of committees like McDougal's. Rotival joined McDougal as a second chair of this committee, the rumour around the law school being that they were developing a TVA for New England. Many alumni and members of the powerful governing board, the Yale Corporation, already suspected the law faculty to be a seedbed of radicals. They were aggravated by McDougal's insistent notions of government intervention, not to mention a Frenchman with monumental European visions. On one occasion, Rotival had a napkin thrown in his face by an enraged alum.<sup>98</sup> Nonetheless, Seymour held as McDougal's patron, and in 1947 the committee's study was published, *The Case for Regional Planning with Special Reference to New England*.<sup>99</sup>

A text largely written by McDougal, complemented by futuristic illustrations of geometric patterns intersecting with outlines of the human body and world maps, this study was an important statement of Rotival's conception of urban planning and the role of the planner.<sup>100</sup> The figure of the urban planner shared methods and politics

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<sup>95</sup> Hein, 'Maurice Rotival: French Planning on a World-Scale (Part I)', 17(3) *Planning Perspectives* (1 January 2002) 247, at 258.

<sup>96</sup> Tipson, *supra* note 85; Clark, *supra* note 86.

<sup>97</sup> Hein, *supra* note 95, at 258.

<sup>98</sup> Clark, *supra* note 86.

<sup>99</sup> M. McDougal, *The Case for Regional Planning with Special Reference to New England* (1947).

<sup>100</sup> *Ibid.*, at 5.

with the lawyer policy-maker. The ends of the science of planning, the concepts and vocabularies used were almost identical to those Lasswell and McDougal applied to legal education. Rotival, reflecting attitudes in modernist French urban planning of the time, saw the planner as more than a designer concerned with the materiality of lived space. The urbanist was an engineer of social harmony concurrent with, and contingent on, built harmony. They were policy-makers close to power, managing social equilibrium through the physical environment. Influenced from an early age by mentorship from the famous French architect and planner Eugène Hénard, Rotival followed him in understanding the city as an organism. The planner's role was a therapeutic one, like that of a surgeon. Rotival sketched alternative *universes* for decision-makers – the past and possible future lineaments of a region's broad economic, geopolitical and historical context – alongside *keys*, a spectrum of interventions that could adjust development towards different future *universes*.<sup>101</sup>

Examining Rotival's theoretical development in New Haven, Carola Hein notes that he 'considered planning an apolitical science, a means to promote democracy and a protection against communism'.<sup>102</sup> A year after the publication of his study with Rotival, McDougal provoked further controversy with a casebook compiled in collaboration with a student, David Haber, that elaborated land law as planning.<sup>103</sup> *Property, Wealth, Land; Allocation, Planning and Development* pushed concerned legislators in Texas and Washington State to prohibition, threatening the withdrawal of funding from law schools that used the text.<sup>104</sup> As well as its planning orientation, the book included an article on Russian property law by Harold Berman. This was too much in Texas, where the book was never taught. In Washington State, some pushback ensured it saw reading lists.

Alongside their study on New England, McDougal worked with Rotival on a plan for New Haven. They spent afternoons sketching maps that overlaid the city's nine-square plan, worked out by English Puritans, with skyscrapers, elevated walkways and highway connectors feeding on to helicopter fields.<sup>105</sup> The first proposal, presented in 1941, was criticized for the monumentality of its design, Rotival's adherence to French modernist principles. In later iterations, Rotival omitted these elements while retaining a functionalism that dovetailed comfortably with American pragmatic progressivism. These versions met with much more approval, his suggestions for highway access to the city, prioritization of a commercial centre and the demolition of areas deemed 'slums' being adopted in 1942 as principles of New Haven's official master plan, implemented over the following two decades.<sup>106</sup>

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<sup>101</sup> Hein, *supra* note 95, at 255.

<sup>102</sup> *Ibid.*, at 253.

<sup>103</sup> D. Haber and M. McDougal (eds), *Property, Wealth, Land; Allocation Planning and Development: Selected Cases and Other Materials on the Law of Real Property* (1948).

<sup>104</sup> Tipson, *supra* note 85.

<sup>105</sup> Myres McDougal to Maurice Rotival, 23 June 1976; 9 August 1972, Box 5 Folder 28, D34, D46, Acc. 1994-M-059, Myres Smith McDougal Papers (MS 1636), Manuscripts and Archives, Yale University Library.

<sup>106</sup> Hein, *supra* note 95.

## 4 Conclusion

As this article has reread 'Legal Education' – Lasswell and McDougal's earliest articulation of what would become policy-oriented jurisprudence – alongside the unpublished seminar materials in which they continued to develop the jurisprudence, and as we have explored their careers in this wartime window, we can note three characteristics of the New Haven School widely underappreciated in contemporary interpretations, and which are highlighted by this early history. First, on the face of their 'Legal Education' article, Lasswell and McDougal explicitly noted that their ideas and proposals were drawn from problems that pre-dated the Second World War. The article was placed in a context of social problems posed by modern industrial life. Second and relatedly, the progressive politics of which policy-oriented jurisprudence was a product were apparent in 'Legal Education'. Lasswell and McDougal explicitly included many proposals that can be described as social democratic, and that signalled intellectual lineage both to the New Deal and to strands of European socialism. Lasswell's academic career prior to their collaboration demonstrates his interest in Marxist and socialist theory, especially psychoanalytically inspired bodies of social critique like that of Erich Fromm and other Frankfurt School theorists with whom he collaborated. McDougal's academic and policy-making career in the same period demonstrates his extensive engagement with New Deal social planning.

Third, pragmatist ideas about ontology and epistemology were central components of 'Legal Education', as were concepts and methods taken from different schools of research in psychoanalysis and social psychology. The 'Law, Science and Policy' seminar materials, key sections of which we have examined, indicate in more detail Lasswell and McDougal's reliance on Freudian psychoanalytic theory, as well as the work of Lasswell's former collaborator Harry Stack Sullivan. In 'Legal Education', the methodological proximity of Lasswell and McDougal's ideas about personality and culture to Erich Fromm's work was made explicit. In both of these sources – 'Legal Education' and the 'Law, Science and Policy' materials – we can note the ease with which philosophical pragmatism and psychoanalysis were able to overlap as the intellectual origins of policy-oriented jurisprudence. They shared much. Both Sigmund Freud and the classical pragmatists had critiqued inherited social orders they determined unsuited to their respective diagnoses of modern European and North American cultural life. Both Freud and the pragmatists had sought to do this by trying to relate their ideas about psychological interiority to the modern paradigm of scientific inquiry. They constructed this relation in different ways, but they all believed psychological forces were operating beneath the surface of modern life. From 1943, Lasswell and McDougal pursued implications of the same point for American lawyers and American democracy.